

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

ORIGINAL

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Certiorari to Sumter County

Honorable Jocelyn J. Newman, Circuit Court Judge

RECEIVED

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DAVID ABRAHAM DUREN, JR.,

JAN 18 2018

PETITIONER SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-000605

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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Lara M. Caudy  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
P.O. Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

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### **ISSUE PRESENTED**

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to investigate the constitutionality of Petitioner's prior convictions, which were used by the state to seek a sentence of life without parole pursuant to S.C. Code Ann. § 17-25-45, where these convictions were obtained in violation of Petitioner's Sixth Amendment right to counsel since Petitioner pled guilty with counsel who was appointed immediately before his plea merely as a formality to stand by Petitioner during the proceeding?

## STATEMENT OF THE CASE

The state alleged at trial that Petitioner entered Thomas & Howard Company on South Harvin Street in Sumter during the early morning hours of June 9, 2011 and stole numerous cartons of cigarettes. App. 105, l. 12 – 106, l. 17. The physical evidence suggested that the perpetrator entered through the rear wall of the building. The store manager discovered a hole in the wall immediately behind a large refrigerator. This was determined to be the point of entry. App. 106, ll. 3-19. Petitioner's blood was allegedly found smeared on top of this large refrigerator. This was the only evidence implicating Petitioner in the burglary. App. 302, l. 19 – 303, l. 20.

A Sumter County Grand Jury indicted Petitioner on May 7, 2015 for second degree burglary. App. 546-547. His case was called to trial on May 18, 2015 before the Honorable George C. James, Jr., and a jury. App. 1. Assistant Solicitor Bronwyn McElveen represented the state. App. 1. Petitioner waived his right to counsel and proceeded *pro se*. App. 1. On May 20, 2015, the jury found Petitioner guilty as indicted. App. 424, l. 20 – 425, l. 1. Judge James sentenced Petitioner to life without parole pursuant to S.C. Code Ann. § 17-25-45. App. 451, ll. 20-24. Petitioner did not appeal his conviction or sentence.

In June 2014, eleven months before trial, the Third Circuit Public Defender Office was appointed to represent Petitioner. App. 321, ll. 10-16. Jacob Smith of the public defender office was ultimately assigned to the case. App. 321, ll. 13-16. App. 495, l. 22 – 496, l. 7. Before Petitioner's motion to relieve counsel was granted in January 2015, Mr. Smith represented Petitioner at the July 31, 2014 hearing in which the state served Petitioner with notice of its

intent to seek a sentence of life without parole pursuant to S.C. Code Ann. 17-25-45 based on his prior convictions for second degree burglary.<sup>1</sup> App. 499, l. 18 – 500, l. 25.

Smith later admitted at the evidentiary hearing that he failed to conduct any investigation into Petitioner's prior convictions or whether the state could use those prior convictions to enhance Petitioner's sentence under the recidivism statute. App. 499, l. 24 – 500, l. 25. Smith simply reviewed the "SLED records" to verify that Petitioner did in fact have prior convictions that would entitle the state to seek a sentence of life without parole. He did not review the indictments related to those prior convictions or confirm the constitutionality of those convictions. App. 499, l. 24 – 500, l. 25.

On September 14, 2015, after Petitioner was convicted by a jury and sentenced to life, Petitioner filed an application for post-conviction relief. App. 454-458. The state filed a return to this application on December 7, 2015. App. 459-467. An evidentiary hearing was convened on July 26, 2016 before the Honorable Jocelyn Newman. App. 468. Assistant Attorney General Julie Coleman represented the state. App. 468. At the beginning of the hearing, Judge Newman granted Petitioner's motion to relieve counsel.<sup>2</sup> Consequently, Petitioner proceeded *pro se*. App. 468.

Petitioner argued at the evidentiary hearing that trial counsel, Jacob Smith, was ineffective for failing to investigate the constitutionality of his prior convictions which were used by the state to seek a sentence of life without parole pursuant to S.C. Code Ann. § 17-25-45.

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<sup>1</sup> On April 4, 2002, Petitioner pled guilty before the Honorable Clifton Newman to two counts of second degree burglary (violent). Petitioner was allegedly represented Jack Howle. App. 479, ll. 2-7. These are the two prior convictions used by the state to enhance Petitioner's sentence.

<sup>2</sup> Timothy L. Griffith was originally appointed to represent Petitioner.

Petitioner asserted that Jack Howle was appointed to represent him on the same day he pled guilty merely as a formality to stand by Petitioner during the proceeding. Citing to United States v. McQueen, 445 F.3d 757 (4th Cir. 2006), Petitioner argued a defendant “may collaterally challenge the use of prior sentencing if the conviction was obtained in violation of his right to counsel.” App. 487, ll. 20-24. Petitioner maintained that because his 2002 convictions for second degree burglary, which were used to enhance his sentence under the recidivism statute, were obtained in violation of his Sixth Amendment right to counsel, they could not be used by the state to seek a sentence of life without parole. Ultimately, Petitioner asserted that his counsel, before he was relieved, was ineffective for failing to challenge the state’s use of these prior convictions at the July 31, 2014 hearing when the state served Petitioner and his counsel with notice of its intent to seek a life sentence. App. 486, l. 10 – 492, l. 10.

By order filed February 28, 2017, Judge Newman denied Petitioner relief. App. 538-545. Judge Newman found Petitioner failed to meet his burden of proving counsel was ineffective, or that any alleged ineffectiveness prejudiced him. App. 541. During the evidentiary hearing, Judge Newman maintained that if Petitioner wished to challenge his 2002 convictions because they were obtained in violation of his Sixth Amendment right to counsel then he should have filed an application for post-conviction relief within one year of his guilty plea. Consequently, the judge concluded that Petitioner’s claim was procedurally barred because it was not timely raised. App. 486, l. 6 – 487, l. 10; App. 488, l. 19 – 489, l. 13; App. 490, ll. 11-23. Specifically, Judge Newman stated, “What I’m telling you is that the law requires that if you feel you were denied your right to counsel, there is a time frame in which you must appeal to the court or file an application to have that matter heard for the court to make that determination. You failed to do that in this case.” App. 492, ll. 4-10.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to investigate the constitutionality of Petitioner's prior convictions, which were used by the state to seek a sentence of life without parole, this petition for writ of certiorari follows.

## ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to investigate the constitutionality of Petitioner's prior convictions, which were used by the state to seek a sentence of life without parole pursuant to S.C. Code Ann. § 17-25-45, where these convictions were obtained in violation of Petitioner's Sixth Amendment right to counsel since Petitioner pled guilty with counsel who was appointed immediately before his plea merely as a formality to stand by Petitioner during the proceeding.

“The Sixth Amendment provides in part, ‘In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.’” Childress v. Johnson, 103 F.3d 1221, 1226 (5th Cir. 1997). “The Sixth Amendment right to defense counsel in felony prosecutions is a fundamental right, binding on the states through the Fourteenth Amendment.” Childress, 103 F.2d at 1226 (citing Gideon v. Wainwright, 372 U.S. 335 (1963)). The right to counsel is not limited to the trial itself. Id. at 1227. “A defendant has the constitutional right to the assistance of counsel at every ‘critical stage’ of the proceedings against him.” Id. at 1227 (citing Mempa v. Rhay, 389 U.S. 128, 134 (1967)). The United States Supreme Court has held that a plea hearing is a critical stage of the prosecution, at which the right to counsel is constitutionally guaranteed. See Hamilton v. Alabama, 368 U.S. 52, 54 (1961) and White v. Maryland, 373 U.S. 59, 60 (1963).

Importantly, the “Constitution’s guarantee of assistance of counsel cannot be satisfied by mere formal appointment.” Avery v. Alabama, 308 U.S. 444, 446 (1940). In Strickland v. Washington, 466 U.S. 668, 685 (1984), the Supreme Court asserted, “That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it

envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results.” The Court further asserted in United States v. Cronin, “[A]lthough counsel is present, the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided.” United States v. Cronin, 466 U.S. 648, 654 n. 11 (1984).

“A defendant thus is constitutionally entitled to the active assistance of counsel at a plea hearing in a state felony prosecution. If that right is denied, the ensuing conviction may not be used to enhance his sentence in a subsequent prosecution.” Childress, 103 F.3d at 1227 (citing Burgett v. Texas, 389 U.S. 109 (1967)). Consequently, a “defendant may collaterally challenge the use of a prior conviction in sentencing if that conviction was obtained in violation of his right to counsel.” United States v. McQueen, 445 F.3d 757, 760 (4th Cir. 2006) (citing Custis v. United States, 511 U.S. 485, 496 (1994)).

In Childress, the defendant challenged the severity of his twenty five year sentence for leaving the scene of an accident and failure to stop and render aid, arguing that his sentence was unconstitutionally enhanced based on his two prior burglary convictions secured in the late 1940s in violation of his Sixth Amendment right to counsel. 103 F.3d at 1222. Childress pled guilty to burglary in 1946 and 1948 as the result of uncounseled plea negotiations with the prosecutor. Id. at 1223. On both occasions, a court appointed lawyer was assigned to represent Childress immediately prior to each hearing to execute a waiver of his right to a jury trial, which was then required by Texas state law. Id. Childress argued on appeal that he was constructively denied the right to counsel during his 1946 and 1948 guilty pleas and, consequently, these convictions could not be used decades later to enhance his punishment for his subsequent conviction for failure to stop and render aid.

Noting that prejudice is presumed in cases of actual or constructive denial of counsel, the Fifth Circuit Court of Appeals held the state could not use Childress' prior burglary convictions obtained in violation of his right to counsel to enhance his sentence. Id. at 1231. The court emphasized that a defense lawyer who fails to actively assist the defendant during a critical stage of the prosecution is not the counsel whose assistance is contemplated by the Sixth Amendment. Id. at 1232.

Here, Petitioner was constructively denied the right to counsel during his guilty plea on April 4, 2002 since counsel was appointed immediately before the hearing as a mere formality. Petitioner asserted at the evidentiary hearing that Jack Howle was appointed by Judge Clifton Newman on the same day as the hearing to stand by Petitioner while he pled guilty. Specifically, Petitioner said Howle was "inserted the day [he] pled guilty back in 2002 just as standby to take the guilty plea." He argued, "That's not counsel." App. 488, ll. 3-8.

Petitioner's assertions at the evidentiary hearing are corroborated by his statements years earlier to the trial judge immediately before he was sentenced to life without parole. Petitioner told Judge James that he pled guilty to burglary in 2002 "without a lawyer." When Judge James corrected Petitioner and stated, "Well, no, you had a lawyer. You had Mr. Jack Howell. That's whose signature . . . is on [the sentence sheet]," Petitioner clarified that Howle was appointed the same day he pled guilty. App. 447, l. 18 – 448, l. 5.

It is obvious, based on the evidence presented at the evidentiary hearing, and corroborated by Petitioner's statements immediately before sentencing, that he was constructively denied his Sixth Amendment right to counsel when he pled guilty to two counts of second degree burglary in April 2002 with counsel that was appointed immediately before the hearing to merely stand by Petitioner as a formality. Because Petitioner's burglary convictions were obtained in violation of

his right to counsel, they could not be used by the state to enhance his subsequent sentence for second degree burglary in 2015 pursuant to the recidivism statute.

Petitioner's counsel, Jacob Smith, who represented Petitioner at the July 31, 2014 hearing where the state served Petitioner with notice of its intent to seek a sentence of life without parole pursuant to S.C. Code Ann. § 17-25-45, was ineffective because he failed to conduct any investigation into Petitioner's prior record and whether the convictions relied on by the state were properly obtained. If counsel would have done a proper investigation, he would have learned Petitioner's prior burglary convictions from 2002 were obtained in violation of his Sixth Amendment right to counsel and, consequently, could not be used by the state to enhance his sentence.

"The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel." Bailey v. State, 392 S.C. 422, 432, 709 S.E.2d 671, 676 (2011) (citing U.S. Const. amend. VI and Strickland v. Washington, 466 U.S. 668 (1984)). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. A PCR applicant must show that (1) counsel's performance was deficient, and that (2) the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under the second prong, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

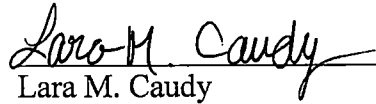
Here, trial counsel was ineffective because he failed to investigate the constitutionality of Petitioner's prior convictions which were used by the state to enhance his sentence. If counsel had conducted a proper investigation, he would have learned that Petitioner's prior burglary convictions were obtained in violation of his right to counsel and, consequently, could not be used by the state to enhance Petitioner's sentence. Counsel's deficient performance was highly prejudicial to Petitioner because he was sentenced to life without parole by Judge James, a much greater sentence than he would have received but for counsel's ineffectiveness. Because of the recidivism statute, Judge James had no discretion in sentencing and was forced to sentence Petitioner to life. If trial counsel had challenged the constitutionality of Petitioner's prior convictions and ultimately the applicability of the statute, Petitioner would have received a lesser sentence.

Petitioner respectfully requests this Court hold the PCR judge erred by finding Petitioner failed to prove trial counsel was ineffective, reverse his sentence, and remand for resentencing.

**CONCLUSION**

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,

  
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Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of January, 2018.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Sumter County  
Honorable Jocelyn J. Newman, Circuit Court Judge

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DAVID ABRAHAM DUREN, JR.,

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V.

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PETITION TO BE RELIEVED AS COUNSEL

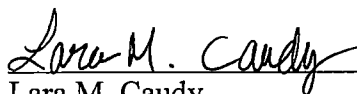
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Counsel for David Abraham Duren states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.
2. She has reviewed the records and transcript of Petitioner's post-conviction relief hearing, which was held on July 26, 2016 before the Honorable Jocelyn J. Newman, and, in her opinion, seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for David Abraham Duren.

Respectfully Submitted,

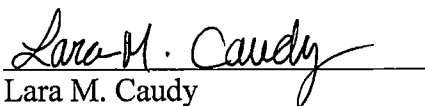
  
\_\_\_\_\_  
Lara M. Caudy  
Appellate Defender

This 18th day of January, 2018.

ATTORNEY FOR PETITIONER

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



Lara M. Caudy  
Appellate Defender

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Defense  
Division of Appellate Defense  
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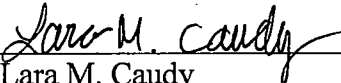
RESPONDENT

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CERTIFICATE OF SERVICE

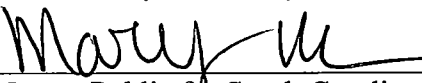
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case have been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served upon David Abraham Duren, #181965, at Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472, this 18th day of January, 2018.

  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 18th day of January, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: May 12, 2027.