

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Horry County

Honorable Michael G. Nettles, Circuit Court Judge

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JAMES ANDERSON,

 ORIGINAL

RECEIVED

MAR 08 2018

S.C. SUPREME COURT  
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001195

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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LaNelle Cantey DuRant  
Appellate Defender

South Carolina Commission on Indigent Defense  
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The PCR court erred by not finding trial counsel ineffective for failing to conduct a sufficient investigation into Petitioner Anderson’s case by not interviewing the main witness, Joe E., a minor who testified at the trial and identified Petitioner as the burglar when the witness had told the state before trial that he could not identify the burglar but trial counsel never talked to this witness.....7

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**ISSUE PRESENTED**

Did the PCR court err by not finding trial counsel ineffective for failing to conduct a sufficient investigation into Petitioner Anderson's case by not interviewing the main witness, Joe E., a minor who testified at the trial and identified Petitioner as the burglar when the witness had told the state before trial that he could not identify the burglar but trial counsel never talked to this witness?

## STATEMENT

During the week of July 4, 2009, a family was vacationing in Myrtle Beach and were staying in a hotel room. On the night of July 8, 2009, Christian Vickery and her boyfriend were staying in the front bedroom. Christian awoke during the night to find the door and window open which she had remembered closing. Her boyfriend's pants and wallet were missing. She sees a man leaving the hotel room. App. 43, ll. 14 – App. 44, ll. 18.

Joe E., a fourteen-year-old boy, was sleeping on the couch in the living area. At the time of the burglary, he was texting friends. His phone went off and startled the burglar who ran. App. 44, ll. 19 – 25. Joe E. told the solicitor before trial that he would not be able to identify the burglar. All he could say was that the burglar was a dark skinned black male. App. 322, ll. 16 – App. 323, ll. 8.

A fingerprint found on the inside of the window ledge of one of the bedrooms was identified as belonging to Petitioner Anderson. App. 320, ll. 19 – App. 321, ll. 6; App. 269, ll. 7 – 25.

On July 29, 2010, the Horry County Grand Jury indicted Anderson for the charge burglary first degree. App. 365-App. 366. On March 12 -14, 2012, Anderson proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. Petitioner Anderson was represented by Edward Chrisco, and the state was represented by Lauree Richardson. App. 1.

At trial, Joe E. testified for the state. He was seventeen at the time of trial. App. 49, ll. 1 – His testimony was that he was on the couch texting friends. He saw an “average dark male” walk through the kitchen archway. Joe got up from the couch and the man ran from the room. Joe testified that the man was “darker skinned, African-American with dark hair.” When the man left, Joe went to check on his parents. App. 50, l. 1 – App. 53, ll. 9.

On cross-examination, defense counsel asked Joe:

**C:** Is that the person that was in your room?

**J:** Looks about the same height and the ----

**C:** Is that the same person that was in the room?

**J:** Yes, sir.

**C:** No doubt in your mind?

**J:** No doubt.

**C:** No doubt whatsoever.

**J:** No doubt, sir.

App. 53, ll. 10 – 19.

Later in the trial, Petitioner Anderson told the trial judge that he “wanted to inform the court that he had lost complete confidence in his attorney.” He said that he just wanted to bring that to the court’s attention. App. 135, ll. 8-25.

The jury returned a verdict of guilty as indicted for burglary first degree. App. 214, ll. 3 – 18. The judge sentenced Petitioner Anderson to twenty-five years incarceration. App. 217, ll. 20 – 25. Trial attorney filed a notice of appeal. The South Carolina Court of Appeals affirmed Anderson’s conviction and sentence on February 12, 2014. State v. Anderson, 407 S.C. 278, 754 S.E.2d 905 (Ct. App. 2014); cert denied (Nov. 10, 2014).

On March 3, 2015, Petitioner Anderson filed an application for post-conviction relief (PCR). The state filed a return on August 3, 2015. An evidentiary hearing was held on February 7, 2017 before the Honorable Michael G. Nettles. Petitioner Anderson was represented by Steven W. Fowler, and the state was represented by Valerie Giovanoli. App. 239.

Petitioner Anderson testified at the PCR hearing his trial attorney “had poor performance” during his trial. Anderson believed that if his attorney had done his job, Anderson would not have been found guilty. App. 279, ll. 16 – App. 280, ll. 2. Anderson said that he filed his PCR because of the ineffective assistance of his trial counsel. App. 244, ll. 9 – 25. Anderson explained that the solicitor had sent a letter to his trial counsel a week before trial telling him of three witnesses, one of which was Joe E., the fourteen-year-old boy who was in the room during the incident. The solicitor’s letter said that Joe E. could not identify the defendant as the burglar and probably would not be testifying. However, if he did testify, he would only be able to say that the burglar was a black male shorter than Joe E. App. 249, ll. 1 – App. 250, ll. 1; App. 371.

When Joe E. testified at trial, he said that Anderson was the burglar. App. 253, ll. 18 – 25. His trial attorney had not investigated the witness Joe E. when he received the solicitor’s letter. If he had, he would have known what Joe E. was going to say on the stand. App. 251, ll. 14 – App. 254, ll. 9.

Trial counsel testified at the PCR hearing that the state had Anderson’s fingerprint at the crime scene and if they could not “get past that” there was at least an 80% chance the jury would find Anderson guilty. App. 302, ll. 18 – App. 303, ll. 9.

Concerning the witness Joe E., counsel received that information a week in advance of trial. According to the information he received, counsel believed that Joe E. was only going to say the burglar was just a black male average height. However, on the witness stand, Joe E. did not say Anderson was the burglar in his direct testimony. Then counsel admitted that he asked a stupid question. He asked Joe E. if that person was in the court room hoping that Joe E. would not be able to identify Anderson. However, Joe E. said yes, the person was and identified Anderson. App. 303, ll. 10 – App. 304, ll. 25.

Trial counsel admitted that he did not investigate Joe E. although he could have, but he did not think what Joe E. was going to say was harmful to Anderson. Counsel said: “It seemed like he was more of a help to me.” Joe E.’s testimony was a surprise to trial counsel. App. 309, ll. 10 – App. 312, ll. 25.

The solicitor who prosecuted Anderson’s case, Lauree Richardson Ortiz, testified at the PCR hearing that Joe E. had told her before trial that he would not be able to identify Anderson. His testimony was a surprise to the solicitor. App. 321, ll. 18 – App. 323, ll. 19. On cross examination, Ms. Ortiz said that she had sent a letter to the trial attorney telling him of Joe E. and that Joe E. would not be able to identify the burglar. App. 326, ll. 15 – App. 328, ll. 9; App. 371.

According to the solicitor, the main evidence against Anderson was the fingerprint found inside a window ledge of one of the bedrooms that belonged to Anderson. App. 320, ll. 15 – App. 321, ll. 6.

The PCR judge ruled at the PCR hearing that trial counsel’s performance did not fall below the Strickland standard. The judge thought it was appropriate trial strategy for defense counsel to “specifically elicit from this witness based on the information he had that the witness could not make a positive identification.” The judge thought it was proper for trial counsel to ask the question whether the witness could identify him or not. App. 340, ll. 15 – App. 341, ll. 19.

As far as a proper investigation, the judge said: “I’m not real sure how you can properly prepare a minor witness who can sort of act like a chameleon at times; they can change from time to time.” App. 341, ll. 20 – 25.

On May 1, 2017, the PCR judge issued an order denying Petitioner Anderson’s PCR application and dismissing it with prejudice. App. 345 – App. 355. The judge found as a matter of general impression, the testimony of trial counsel and the prosecutor to be credible while he

found the testimony of Anderson to not be credible. App. 350. The judge also found that Petitioner Anderson failed to meet his burden of proving that trial counsel was ineffective for failing to investigate the circumstances surrounding the witness, Joe E. App. 351. The judge found that based on the discovery trial counsel was provided, it was reasonable for him to “view Joe E.’s statement as favorable to his defense.”

PCR counsel filed a notice of appeal. This petition follows.

## ARGUMENT

The PCR court erred by not finding trial counsel ineffective for failing to conduct a sufficient investigation into Petitioner Anderson's case by not interviewing the main witness, Joe E., a minor who testified at the trial and identified Petitioner as the burglar when the witness had told the state before trial that he could not identify the burglar but trial counsel never talked to this witness.

Failure to investigate possible defenses constitutes ineffective assistance of counsel. Cobbs v. State, 305 S.C. 299, 408 S.E.2d 223 (1991). Counsel representing a criminal defendant has a duty to conduct a reasonable investigation, which encompasses the defendant's right to interview potential witnesses against him. State v. Sanders, 341 S.C. 386, 534 S.E.2d 696 (2000).

In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the Supreme Court held that for purposes of the claim of ineffective assistance of counsel, while the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra*.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable

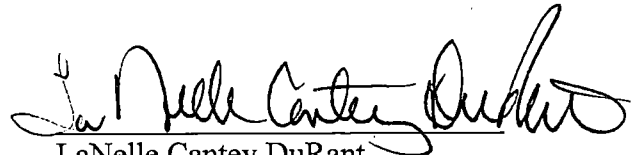
professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

The PCR court erred in not finding trial counsel ineffective for not fully investigating Anderson's case. Trial counsel was the one to find information by investigating the evidence provided by the state even if it was six days before trial. Trial counsel was experienced enough to know that witnesses change their stories. It was counsel's duty to talk with the witness Joe E., especially since he was a minor, to determine if counsel believed the witness to be credible and reliable.

**CONCLUSION**

Based on the above, certiorari should be granted; Petitioner Anderson's convictions and sentences reversed and the case remanded for a new trial.

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant". The signature is written in a cursive style with a large initial "L" and "D".

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of March, 2018.

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PETITION TO BE RELIEVED AS COUNSEL

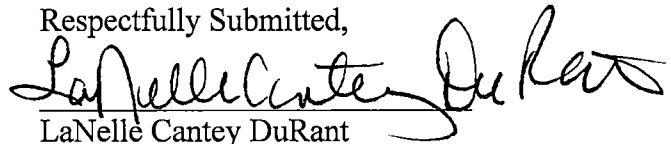
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Counsel for James Anderson states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's trial before Judge Michael G. Nettles, which was held on February 7, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
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 James Anderson.

Respectfully Submitted,



LaNelle Cantey DuRant

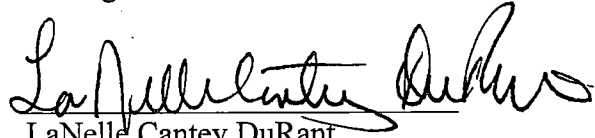
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of March, 2018.

**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."



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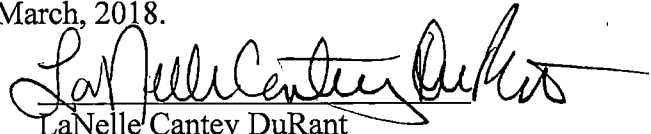
RESPONDENT

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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 has been served upon Johnny Ellis James, Jr., 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 on James Anderson, #260010, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 8th day of March, 2018.

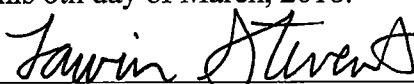


LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 8th day of March, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: July 5, 2027.