

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Cherokee County

Honorable G. Thomas Cooper, Circuit Court Judge

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MARCELLOUS R. CLARK,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000078

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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The PCR court erred in failing to find plea counsel ineffective for not adequately investigating Petitioner Clark’s case because plea counsel did not talk with the police investigator who, according to Clark, promised to help obtain a lesser charge for Clark which failure was prejudicial to Petitioner Clark because there was a reasonable probability that his sentence would have been less. .... 5

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**ISSUE PRESENTED**

Did the PCR court err in failing to find plea counsel ineffective for not adequately investigating Petitioner Clark's case because plea counsel did not talk with the police investigator who, according to Clark, promised to help obtain a lesser charge for Clark which failure was prejudicial to Petitioner Clark because there was a reasonable probability that his sentence would have been less?

## STATEMENT

Between January 17-18, 2016, Misty Collins, who lived in an apartment in Cherokee County returned home and discovered several items missing. The police came at her request, but no suspects developed. A few days later, on January 23, 2016, about six o'clock in the morning, Ms. Collins saw Petitioner Clark carrying a television from her neighbor's home. Ms. Collins knew that her neighbor was not at home. App. 17, ll. 2 – App. 18, ll. 5. Ms. Collins knew Petitioner Clark because he visited his girlfriend who lived in a neighboring apartment, and she had seen him. App. 18, ll. 23 – App. 19, ll. 5.

Petitioner Clark was then interviewed by the police at the police station. When he was checked by the police, he had a ring in his pocket that belonged to Ms. Douglas who lived in another nearby apartment that had also been robbed. App. 19, ll. 8 – 23.

When he was taken to the detention center, Petitioner Clark confessed to having committed both the burglaries of Ms. Douglas' home and Ms. Collins' home. App. 20, ll. 25 – App. 21, ll. 11.

On April 7, 2016, the Cherokee County Grand Jury indicted Petitioner Clark on two counts of burglary first degree. App. 72 – App. 73. On October 11, 2016, Petitioner Clark appeared before the Honorable Roger L. Couch and entered guilty pleas to the two burglary first degree charges. App. 4, ll. 1 – 18. Clark was represented by Don Thompson, and the state was represented by Kimberly Leskanic. App. 1. On the January 18, 2016 burglary of Ms. Collins, Clark entered a plea *nolo contendere* pursuant to North Carolina v. Alford, 400 U.S.25 (1970). On the January 23, 2016 burglary of Ms. Douglas, Clark entered a straight-up guilty plea. App. 4, ll. 19 – 24; App. 72-73; App. 76- App. 77. The judge sentenced Clark to twenty years on the straight-up plea, and to twenty-five years on the Alford plea suspended to the service of twenty

years and five years probation. The sentences were to run concurrent. App. 30, ll. 1 – App. 31, ll. 18.

Petitioner Clark did not appeal his convictions nor sentences. App. 64; App. 51, ll. 20.

On February 13, 2017, Clark filed an application for post-conviction relief (PCR). The state filed a return on August 15, 2017. An evidentiary hearing was held on November 13, 2017 before the Honorable G. Thomas Cooper, Jr. Petitioner Clark was represented by Rodney W. Richey, and the state was represented by Valerie Giovanoli. App. 49.

At the PCR hearing, Petitioner Clark testified that his plea counsel did not effectively represent him. The advice his counsel gave him was not “proper.” App. 52, ll. 1 – 24. Clark explained that his plea counsel did not investigate his case. Clark maintained that one of the detectives that arrested him told him that if he complied with them then he could plead to a lesser charge. If his counsel had investigated his case, then the outcome would have been different. App. 53, ll. 1 – 24.

On examination by the court, Clark said that counsel did not investigate because he did not talk to the detective about Clark being able to plead to a lesser charge by “cooperating with the department.” App. 54, ll. 2 – 10. Clark did not know if he had a defense because counsel never talked about it. App. 55, ll. 1 – 17.

Plea counsel testified at the hearing that he talked with the solicitor about reducing the charge in Clark’s case because the solicitor was the person with control over the case. The officer did not have that control. Counsel said that he told the solicitor what the officer said to Clark about helping Clark if he confessed. App. 56, ll. 1 – 25.

On cross-examination, counsel admitted that he advised Clark to plead guilty to both charges for a “global resolution.” Counsel did this because the state had threatened to try Clark

first on the burglary where he pled guilty straight up. Then the state would serve him notice of life without parole (LWOP) and try him on the second burglary first. Counsel believed there was a strong likelihood that Clark would be convicted on both charges. App. 58, ll. 1 – App.;59, ll. 25.

On January 5, 2018, the PCR judge filed an order denying Clark’s PCR application and dismissing it with prejudice. App. 63 – App. 68. The judge found that Clark failed to present any evidence supporting this allegation of failing to investigate. The order provided that Clark “failed to show how further investigation by counsel would have benefitted him.” Clark failed to present evidence to show what counsel could have discovered had he more fully investigated.” The judge found that Clark failed to prove any deficiencies on the part of counsel and failed to prove that he was prejudiced by counsel’s representation. App. 66 – App. 68.

## ARGUMENT

The PCR court erred in failing to find plea counsel ineffective for not adequately investigating Petitioner Clark's case because plea counsel did not talk with the police investigator who, according to Clark, promised to help obtain a lesser charge for Clark which failure was prejudicial to Petitioner Clark because there was a reasonable probability that his sentence would have been less.

A criminal defendant is entitled to effective representation at trial and on direct appeal. Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) the deficient performance must have prejudiced the applicant's case. Id., Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992).

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).

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 applicant must show that there is a reasonable probability that but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985).

Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). The record must show with certainty that the plea is "an intentional relinquishment or abandonment of a known right or privilege." State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982).

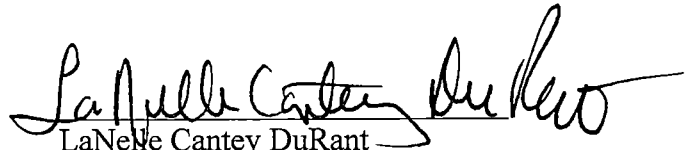
In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the Supreme Court held that for purposes of the claim of ineffective assistance of counsel, while the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make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

In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), the Supreme Court reversed the PCR court and remanded Lounds' case because his defense counsel was ineffective for failing to adequately prepare for trial so as to be able to call key witnesses. Counsel failed to make an independent investigation of the facts and circumstances.

The PCR court erred in not finding plea counsel ineffective. Counsel should have investigated Clark's case at least to the point of talking with the police officer to determine if the officer did promise to help Clark. If he had, there was a reasonable probability that Clark's sentence would have been less.

**CONCLUSION**

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

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of July, 2018.

STATE OF SOUTH CAROLINA

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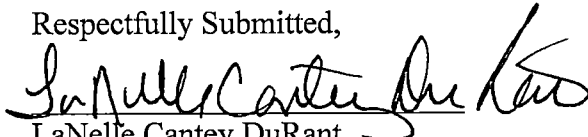
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Marcellous R. Clark 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 post-conviction relief hearing before Judge G. Thomas Cooper, which was held on November 13, 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 Marcellous R Clark.

Respectfully Submitted,



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of July, 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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ATTORNEY FOR PETITIONER

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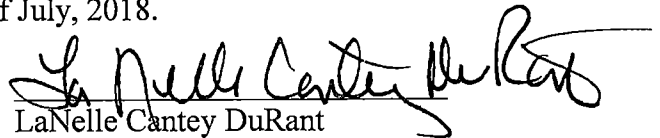
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RESPONDENT

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CERTIFICATE OF SERVICE  
\_\_\_\_\_

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 Jordan Cox, 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 Marcellous R. Clark, #356227, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 27th day of July, 2018.

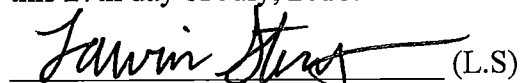


LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 27th day of July, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: July 5, 2027.

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