

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

ORIGINAL

Certiorari to Lexington County

Honorable J. Cordell Maddox, Circuit Court Judge

RECEIVED

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DAVID LORANCE ADAMS,

S.C. SUPREME COURT  
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000781

JOHNSON PETITION FOR WRIT OF CERTIORARI

LaNelle Cantey DuRant  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Did the PCR court err in failing to find plea counsel ineffective for not insuring that Petitioner Adam's guilty plea was entered voluntarily and knowingly because plea counsel failed to adequately investigate possible defenses.

## STATEMENT

On January 5, 2014, Petitioner David Adams was arrested and charged with criminal sexual conduct (CSC) with a minor second degree. App. 19, ll. 1 – 22; App. 59, ll. 19 – 22. Adams was accused of having sex with his fourteen year old relative between January through May 2012. The girl became pregnant, and gave birth to a baby in October 2012. The DNA tests revealed that Adams was the father of the baby. App. 132; App. 23, ll. 1 – 25.

The Lexington county Grand Jury indicted Adams on the charge of CSC with a minor second degree in June 2014. App. 132. Adams was scheduled for trial on May 14, 2015 but decided to plead guilty just prior to jury selection. App. 25, ll. 5 – 25. He pled guilty as indicted on May 14, 2015 and was sentenced to eighteen years incarceration. App. 19, ll. 9 – 22.

Adams filed a notice of appeal. The Court of Appeals dismissed the appeal for failure to provide a sufficient reason of explanation as required by the Appellate Court Rules. App. 19, ll. 18 – 22.

On September 15, 2015, Adams filed an application for post-conviction relief (PCR). The state filed a return on December 22, 2016. App. 15. An evidentiary hearing was held on December 11, 2017 before the Honorable J. Cordell Maddox, Jr. Petitioner Adams was represented by David K. Allen, and the state was represented by Sherrie Butterbaugh. App. 16.

At the beginning of the PCR hearing, the state informed the judge that the court needed to do a plea reconstruction as there was no transcript from Petitioner Adams' guilty plea. The state explained that the court reporter for the plea reported that her car had been broken into and her equipment and tapes were stolen. Adams' guilty plea was one of the stolen tapes. App. 19, ll. 23 – App. 20, ll. 6.

The state told the judge that the solicitor who handled the guilty plea and Adams' plea counsel were going to testify as to their recollections. The judge agreed. App. 20, ll. 7 – 23. The solicitor, Suzanne Mayes, testified that she remembered this plea because she was expecting to start the trial that day. Nevertheless, she reported that it was an ordinary plea. App. 21, ll. 16 – App. 23, ll. 7. She testified that the judge reviewed all “aspects of Adams' rights” and his waiver of those rights. App. 23, ll. 7 – App. 25, ll. 25.

Plea counsel, Robert Madsen, testified that he was prepared for trial and he was expecting a trial. When he saw Petitioner Adams on the morning trial was scheduled, Adams told him that he wanted to plead guilty as he did not want to “put everyone through this.” Plea counsel said it was “basically a standard plea.” The judge reviewed all of Adams' rights that he was waiving. It was a straight up plea. Counsel said Adams had wanted an Alford plea but counsel told him that was not possible because he could not do a straight up plea unless the state was offering something. App. 38, ll. 1 - App. 43, ll. 25.

The judge made a finding that the guilty plea hearing had been reconstructed sufficiently enough for him as the PCR judge to “determine whether or not any of the allegations of the PCR are correct.” App. 57, ll. 11 – 13.

At the close of the PCR hearing, all parties stipulated that the testimony of the guilty plea reconstruction would be included with the PCR. App. 106, ll. 18 – App. 107, ll. 1.

At the beginning of the PCR hearing, Petitioner Adams testified that his plea counsel was ineffective because counsel told Adams that he was going to do an investigation and talk to witnesses and whatever else needed to be done. App. 59, ll. 1 – App. 61, ll. 25. When counsel did not follow through with these things, Adams filed a motion to have counsel relieved as his attorney. A hearing was held in October 2014 but the judge denied Adams' motion. Adams then

filed a complaint to the Disciplinary Counsel of the Supreme Court against his plea counsel. Nothing was done so when Adams realized that he was “stuck” with his counsel and had no way to have counsel relieved, Adams decided to plead guilty on the morning of the trial. Adams had always wanted a trial until then. App. 62, ll. 1 – App. 65, ll. 25.

Adams testified that counsel had not done the investigation as he did not talk to the witnesses Adams had given him. And he did not get a DNA expert. App. 66, ll. 1 – App. 67, ll. 24. Adams thought he was doing an Alford plea and going home with probation. App. 72, ll. 1 – 23. Adams wanted to win his PCR and go back to the position he was in before he pled guilty. App. 75, ll. 1 – 9.

On cross examination, Adams explained that the DNA results had someone else’s name so the results were not accurate. App. 76, ll. 3 – 24. His defense at trial was that the girl was going to babysit Adams’ son while Adams slept because he was working the third shift. When he woke up, the girl was on top of him. H had originally told the police that he never touched the girl. App. 78, ll. 5 – App. 80, ll. 24.

Adams said that he pled guilty because he wanted to go home to his kids as he was their sole provider. However, the main reason he pled guilty was the deficient performance of his plea counsel. Therefore, he said that his decision to plead guilty was not really voluntary. App. 84, ll. 1 – App. 88, ll. 20.

Plea counsel , Mr. Madsen, testified that Adams did give him a number of names to contact. Counsel used an internal paralegal investigator and then hired a private investigator. The problem was that they had trouble getting the witnesses to return their calls. That was when he hired the private investigator. However, some of them were just not helpful. App. 90, ll. 1 – 93, ll. 7.

Counsel also hired a DNA expert to review the DNA evidence after Adams decided that he did not want to have independent DNA testing since they have to share the results with the solicitor. The DNA expert found no errors with the DNA testing so he would not have been helpful at trial. The issue with the wrong name on the DNA report was that the front of the report had the names of the people who submitted samples but the back of the report had David Johnson instead of David Adams. Counsel thought this would be considered a scrivener's error. App. 93, ll. 8 – App. 94, ll. 25.

In describing trial defenses, counsel testified that third party guilt was one defense as there were allegations during the investigation that other family members had had sex with the girl. There also were allegations that the girl's mother was living with a sex offender. Then when Adams told him that he woke up with the girl on top of him and he had been ejaculating, counsel then had to change defenses. App. 95, ll. 1 – App. 97, ll. 25. Counsel admitted that he did not have a good defense going into trial. App. 103, ll. 22 – 24.

The PCR judge issued an order on March 30, 2018 denying Adams' PCR application and dismissing it with prejudice. App. 123 - App. 131. The PCR judge found plea counsel's testimony to be credible but found Adams' testimony to lack credibility. App. 125. The judge wrote that Adams failed to meet his burden of showing that his plea "was anything other than valid and entered into freely and voluntarily." App. 126.

The judge also found Adams' claim that plea counsel failed to sufficiently investigate his case to be "meritless." The judge found that plea counsel was "thoroughly prepared to take Adams' case to trial." Adams failed to produce any evidence at the PCR hearing that showed what counsel should have but did not investigate. App. 130.

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

## ARGUMENT

The PCR court erred in failing to find plea counsel ineffective for not insuring that Petitioner Adam's guilty plea was entered voluntarily and knowingly because plea counsel failed to adequately investigate possible defenses.

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.

Plea counsel was ineffective for not investigating sufficiently Adams' case. Adams was prejudiced by this lack of investigation because the witnesses may have provided more information for a third party guilt defense. The fact that a different name was on one part of the DNA report should have been a red flag to counsel to investigate the DNA results and procedure at the SLED laboratory more thoroughly to rule out a mistake.

**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 5th day of November, 2018.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Honorable J. Cordell Maddox, Circuit Court Judge

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DAVID LORANCE ADAMS,

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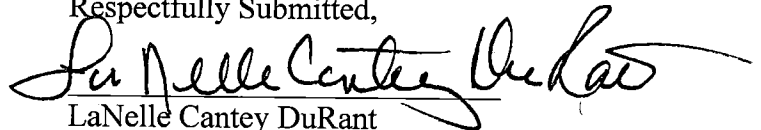
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for David Lorance Adams 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 J. Cordell Maddox, which was held on December 11, 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 David Lorance Adams.

Respectfully Submitted,



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of November, 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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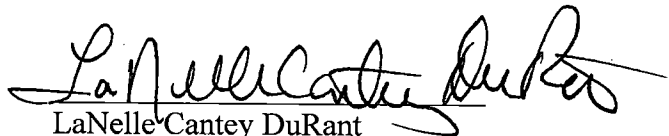
RESPONDENT

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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 Kelly Oppenheimer, 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 David Lorraine Adams, #271989, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 25th day of October, 2018.



LaNelle Cantey DuRant  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 5th day of November, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: September 27, 2028