

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to York County

Honorable J. Mark Hayes, Circuit Court Judge  
\_\_\_\_\_

DOMINIQUE AGURS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001001  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
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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 request a curative instruction and adequately argue Petitioner suffered unfair prejudice in support of his motion for a mistrial when the lead investigator testified he "had dealt with" Petitioner "before" during his prior employment with the "Street Crimes Unit" of the Rock Hill Police Department, which implied Petitioner had a criminal record, and where Petitioner was prejudiced by counsel's deficient performance since if counsel had properly argued the motion, there is a reasonable probability the trial judge would have granted a mistrial or at a minimum given a curative instruction?

## STATEMENT OF THE CASE

On March 5, 2013, at the direction of law enforcement, Michael Tumblin, contacted an individual he knew only as “D.J.” to purchase a gram of crack cocaine. App. 21, ll. 4-23. Tumblin, an admitted drug user with a lengthy criminal record, had agreed to work as a confidential informant in order to receive “credit” towards, and assistance with paying fines for, several outstanding traffic violations. App. 87, l. 1 – 90, l. 14; App. 154, l. 17 – 155, l. 20. To purchase the drugs, Tumblin was provided with eighty dollars of documented funds. App. 97, ll. 11-12; App. 153, ll. 19-20; App. 158, ll. 16-18. Prior to the buy, Sergeant Jim Lubben searched Tumblin at the Rock Hill Police Department. App. 73, l. 3 – 74, l. 11. Tumblin was equipped with a concealed, chest mounted camera and microphone to record the transaction. App. 98, l. 19 – 99, l. 24. An undercover officer then drove Tumblin, who had a suspended license, to the parking lot at the Dollar General, which was across the street from the Burger King where the controlled buy allegedly took place. App. 97, l. 13 – 98, l. 4; App. 102, ll. 5-15; App. 130, l. 18 – 131, l. 25.

On his walk from the undercover police car to the Burger King, Tumblin walked near several people and parked cars. He claimed he was not handed anything from anyone while he walked. App. 114, l. 4 – 116, l. 5. Tumblin ultimately entered the “target” vehicle and left a few seconds later. The driver never got out of the car and the undercover officers surveilling the area could not see who was in the vehicle or observe what happened inside the car. App. 168, l. 18 – 169, l. 21. Moreover, the recorded video footage did not show a hand to hand transaction or an exchange of money.

Tumblin left the vehicle and headed back toward the undercover car. During his return, he briefly walked behind an adjacent building, later claiming to be looking for the police car.

App. 119, l. 23 – 120, l. 25. Once back at the Rock Hill Police Department, Tumblin handed over crack cocaine he claimed to have bought from “D.J.” while in the vehicle. App. 170, ll. 22-25; App. 172, ll. 9-24. The substance Tumblin produced was determined to be 0.53 grams of crack cocaine. App. 244, ll. 18-25.

After the controlled buy, Tumblin identified Petitioner as the individual he knew as D.J. in a photographic lineup created by Investigator Leland Harrelson. App. 105, l. 25 – 108, l. 15; App. 112, l. 16 – 113, l. 25; App. 195, l. 9 – 201, l. 1. The lineup included two individuals with significantly lighter complexions than Petitioner. App. 221, ll. 2-25. Tumblin wrote the wrong date on the lineup, indicating his identification took place on March 5, 2012 instead of March 5, 2013. App. 199, ll. 4-10. Moreover, the time stamp on the video footage indicated the controlled buy took place on January 16, 2007, several years before the date of the investigation. App. 116, ll. 14-23; App. 183, ll. 12-23; App. 214, l. 8 – 215, l. 22.

Petitioner was ultimately arrested on March 21, 2013. App. 201, ll. 12-21. None of the documented funds were recovered.

A York County Grand Jury indicted Petitioner on December 12, 2013 for distribution of crack cocaine. App. 471-472. His case was called to trial on April 21, 2014 before the Honorable John C. Hayes, III, and a jury. App. 1. Assistant Solicitor Matthew Shelton represented the state, and Michael Matthews represented Petitioner. App. 1. On April 22, 2014, the jury found Petitioner guilty as indicted. App. 302, ll. 1-5. He was sentenced to life without parole pursuant to S.C. Code Ann. § 17-25-45. App. 308, l. 25.

The Court of Appeals affirmed Petitioner’s conviction and sentence. State v. Agurs, 2015-UP-562 (S.C. Ct. App. filed December 23, 2015). App. 363-366. Appellate Defender John Storm represented Petitioner on appeal.

On January 6, 2017, Petitioner filed an application for post-conviction relief (PCR) raising the claim argued in this petition. App. 368-380. The state filed a return to this application dated May 18, 2017. App. 381-387. With the assistance of counsel, Petitioner filed an amended application dated January 19, 2018. App. 388-389. An evidentiary hearing was convened on January 29, 2018 before the Honorable J. Mark Hayes, II. App. 390. Assistant Attorney General Justin Hunter represented the state, and Ashley McMahan represented Petitioner. App. 390.

During the evidentiary hearing, Petitioner testified trial counsel was ineffective for failing to properly object when Investigator Leland Harrelson testified at trial about Petitioner's prior record. App. 402, l. 21 – 403, l. 24. During his direct examination at trial, the assistant solicitor asked Investigator Harrelson if he was able to identify the driver of the "target" vehicle after viewing the video footage captured by the body camera Tumblin wore during the controlled buy. App. 190, ll. 1-3. Harrelson answered, "**Yes. I *had dealt with him before when I was on the Street Crimes Unit with the City of Rock Hill.***" App. 190, ll. 4-6 (emphasis added). While trial counsel objected and moved for a mistrial on the basis that Harrelson brought into issue Petitioner's past criminal record before Petitioner had decided whether or not to testify, he failed to adequately convey to the judge the unfair prejudice to Petitioner. See App. 190, l. 7 – 191, l. 5. The trial judge declined to grant a mistrial stating, "I don't believe there is any manifest necessity based on that one interjection." App. 192, ll. 2-10. Although counsel did not request a curative instruction, the trial judge expressed skepticism that a curative instruction would cure the prejudice to Petitioner, and instead warned Harrelson not to make such references again. App. 192, ll. 11-16; App. 193, ll. 11-22. Harrelson then testified that he knew Petitioner prior to

the controlled buy and that he identified Petitioner based on the video footage. App. 194, ll. 9-21.

During his PCR hearing, Petitioner testified trial counsel was ineffective for failing to insist on a curative instruction and for failing to more thoroughly argue the unfair prejudice to Petitioner given that the jury would have inferred from Harrelson's testimony that Petitioner had a prior record, which was improper character evidence. Petitioner asserted that if counsel had presented a stronger argument, the trial judge would have granted a mistrial. App. 402, l. 21 – 403, l. 24.

Michael Matthews, Petitioner's trial counsel, testified at the hearing that he challenged the trial judge's decision not to grant a mistrial arguing the jury would infer from Harrelson's testimony that Petitioner had a prior record or had been previously arrested and therefore a manifest necessity existed. However, the trial judge indicated Matthews "took the inference too far, that the contact with the street crimes unit did not necessarily mean he was arrested" and ultimately denied the motion for a mistrial. App. 422, l. 21 – 424, l. 2.

By order filed May 17, 2018, the PCR judge denied Petitioner relief. App. 452-470. The judge concluded trial counsel was not ineffective because counsel properly moved for a mistrial, adequately argued a curative instruction would merely call attention to the improper comment, and then again moved for a mistrial. App. 457-458. The judge stated, "Although this Court may have ruled differently on the mistrial motion, this does not give rise to an error by Counsel, as he appropriately objected and moved for a mistrial." App. 458.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to request a curative instruction and adequately argue Petitioner suffered unfair prejudice in support of his motion for a mistrial when

Investigator Harrelson commented on his prior knowledge of Petitioner through his employment with the street crimes unit, 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 request a curative instruction and adequately argue Petitioner suffered unfair prejudice in support of his motion for a mistrial when the lead investigator testified he "had dealt with" Petitioner "before" during his prior employment with the "Street Crimes Unit" of the Rock Hill Police Department, which implied Petitioner had a criminal record, and where Petitioner was prejudiced by counsel's deficient performance since if counsel had properly argued the motion, there is a reasonable probability the trial judge would have granted a mistrial or at a minimum given a curative instruction.

Trial counsel failed to request a curative instruction and adequate argue Petitioner suffered unfair prejudice when Investigator Harrelson asserted he "had dealt with [Petitioner] before" when he was employed with the "Street Crimes Unit" of the Rock Hill Police Department. This constitutes deficient performance. Harrelson's improper comment implied Petitioner had a criminal record, or at a minimum had been previously arrested for a "street crime." Petitioner was prejudiced by counsel's deficient performance because if counsel had properly requested a curative instruction and later adequately argued Petitioner was entitled to a mistrial, there is a reasonable probability the trial judge would have granted a mistrial, particularly where the judge had expressed his concern with the comment. See App. 191, l. 6-12.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper

measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner 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. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

“A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial.” State v. Wilson, 389 S.C. 579, 585-586, 698 S.E.2d 862, 865 (Ct. App. 2010) (quoting State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009)) (internal quotation marks omitted). “Insubstantial errors that do not impact the result of the case do not warrant a mistrial when guilt is conclusively proven by competent evidence.” Id. at 586, 698 S.E.2d at 865 (quoting State v. White, 371 S.C. 439, 447-448, 639 S.E.2d 160, 164 (Ct. App. 2006)) (internal quotation marks omitted). “The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case.” Id. at 586, 698 S.E.2d at 865-866 (quoting White, 371 S.C. at 447, 639 S.E.2d at 164) (internal quotation marks omitted). “Generally, a curative instruction to disregard the testimony is deemed to have cured any alleged error.” State v. Ferguson, 376 S.C. 615, 618-619, 658 S.E.2d 101, 103 (Ct. App. 2008) (citing State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007)).

Trial counsel was ineffective for first failing to request a curative instruction, and later for failing to adequately argue Petitioner suffered unfair prejudice when Investigator Harrelson asserted he “had dealt with [Petitioner] before” when he was employed with the “Street Crimes Unit” of the Rock Hill Police Department. While counsel moved for a mistrial, he never requested a curative instruction and failed to persuade the trial judge to properly grant a mistrial given the extremely prejudicial character evidence Investigator Harrelson introduced to the jury. This inadmissible evidence suggested to the jury that Petitioner had been previously arrested for a “street crime,” clearly implying narcotics, and therefore had the propensity to commit the offense for which he was on trial, distribution of crack cocaine. See State v. Gore, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984) (when the previous alleged bad act is similar to the one for which the defendant is being tried, the danger of prejudice is enhanced).

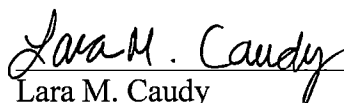
Petitioner was prejudiced by counsel’s deficient performance because if counsel had adequately argued Petitioner was entitled to a mistrial and emphasized the unfair prejudice caused by the admission of this improper character evidence, there is a reasonable probability the trial judge would have granted a mistrial.

Given trial counsel’s deficient performance and the resulting prejudice, Petitioner respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

**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 6th day of December, 2018.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Honorable J. Mark Hayes, Circuit Court Judge

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DOMINIQUE AGURS,

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PETITION TO BE RELIEVED AS COUNSEL

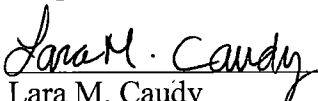
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Counsel for Dominique J. Agurs states:

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 record of Petitioner's post-conviction relief hearing, which was held on January 29, 2018 before the Honorable J. Mark Hayes, II, 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 Dominique J. Agurs.

Respectfully Submitted,

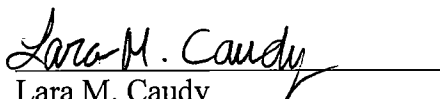
  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of December, 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."

  
Lara M. Caudy  
Appellate Defender

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Defense  
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ATTORNEY FOR PETITIONER

This 6th day of December, 2018.

STATE OF SOUTH CAROLINA  
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DOMINIQUE AGURS,

PETITIONER

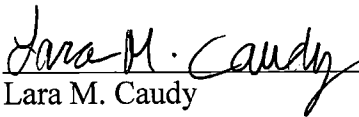
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

—————  
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 Janell Gregory, 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 Dominique J. Agurs, #313102, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 6th day of December, 2018.

  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 6th day of December, 2018.

  
(L.S)

Notary Public for South Carolina

My Commission Expires: September 27, 2028.