

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Sumter County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

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WILBERT FRANKLIN, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000845

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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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ATTORNEY FOR PETITIONER

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DEC 19 2018

S.C. SUPREME COURT

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The PCR court erred in not finding trial counsel ineffective for not objecting to the trial court making Petitioner Franklin’s fifteen year sentence consecutive to the eight year sentence Petitioner was currently serving which was prejudicial to Petitioner because the jury found him not guilty of the armed robbery but only strong armed robbery which would be a shorter period of incarceration. ....5

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**ISSUE PRESENTED**

Did the PCR court err in not finding trial counsel ineffective for not objecting to the trial court making Petitioner Franklin's fifteen year sentence consecutive to the eight year sentence Petitioner was currently serving which was prejudicial to Petitioner because the jury found him not guilty of the armed robbery but only strong armed robbery which would be a shorter period of incarceration?

## STATEMENT

On August 16, 2014, Chaunise Carter, who was the assistant manager of the Kangaroo Station at the corner of Liberty and Guignard in Sumter, South Carolina, was working the afternoon shift. Around 2:45, a man entered the store whom Ms. Carter described as an “average customer.” The man went to Ms. Carter’s desk and told her to give him the money from the register. App. 64, ll. 21 – App. 66, ll. 22; App. 71, ll. 19 - App. 72, ll. 24.

The man had his hand inside a white bag. Ms. Carter believed the man had his hand on a gun inside the white bag. App. 73, ll. 1 – app. 74, ll. 25. Ms. Carter gave the man the money which was under one hundred dollars. The man ran from the store, and Ms. Carter called 911. App. 75, ll. 1 – App. 76, ll. 25.

Walter Robertson was the director of Sumter United Ministries Emergency Shelter which was formerly known as the Samaritan House. App. 111, ll. 19 - 25. On the night of August 14, 2014, Petitioner Franklin entered the shelter and Mr. Robertson checked him in. Mr. Robertson washed Franklin’s clothes at Franklin’s request. App. 112, ll. 1 – App. 114, ll. 5.

In an effort to find the man who robbed the Kangaroo, law enforcement put part of the surveillance video from the Kangaroo Store on the television news. App. 81, ll. 17 – App. 82, ll. 20. On August 16, 2014, Walter Robertson was watching the news, and saw Petitioner Franklin in the store video as shown on the news. Mr. Robertson recognized the clothes he had washed and the Petitioner’s mannerisms. Mr. Robertson called the police. App. 115, ll. 11 – App. 117, ll. 11.

On July 9, 2015, the Sumter County Grand Jury indicted Petitioner Franklin on the charge of armed robbery (AR). On November 9, 10, and 12, 2015, Franklin proceeded to trial

before the Honorable Maite' Murphy. Franklin was represented by Stephen Story, and the state was represented by John Meadors. App. 1.

Petitioner Franklin testified at the trial about the robbery. His life had taken a bad turn after years of some success. His wife was getting a divorce and he was hopeless at the bottom. He described how he robbed the Kangaroo, but stated that he never had a gun. He had a bag to try and hide his face. He gave a statement to the police where he admitted what he had done. Again, he told them he did not have a gun. App. 141, ll 1-25; App. 148, ll. 17 – 25; App. 150, ll. 18 – App. 153, ll. 25; App. 154, ll. 21 – App. 155, ll. 18; App. 157, ll. 1 – App. 159, ll. 14.

In his opening statement, defense counsel told the jury that Franklin robbed the Kangaroo but was not armed with a weapon. App. 60, ll. 5 – 16.

The jury found Petitioner Franklin not guilty of armed robbery, but did find him guilty of strong armed robbery. App. 240, ll. 1 – 17. The trial judge sentenced Petitioner to fifteen years to run consecutive to the seven year sentence Petitioner Franklin was already serving for attempted armed robbery. App. 249, ll. 9 – 1; App. 243, ll. 1 – 6.

Petitioner Franklin filed a notice of appeal. The appeal was perfected by the Division of Appellate Defense in the Commission on Indigent Defense with the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals dismissed Petitioner's appeal on May 24, 2017. State v. Franklin, Op. No. 2017-UP-218 ( Ct App. filed May 24, 2017). App. 310.

On October 26, 2017, Petitioner Franklin filed an application for post-conviction relief (PCR). The state filed a return and motion to dismiss on January 31, 2018. App. 309. An evidentiary hearing was held on March 27, 2018 before the Honorable Deandrea G. Benjamin.

Petitioner Franklin was represented by Lance S. Boozer, and the state was represented by Julie Coleman. App. 270.

Petitioner Franklin included in his PCR application and then testified at the PCR hearing that he received an unconstitutional sentence because the judge ran his sentence for strong armed robbery consecutive to the sentence he was already serving. He claimed that his trial counsel was ineffective for not objecting to the consecutive sentence nor filing a motion to object. His attorney did not tell Franklin that he could get a consecutive sentence. App. 276, ll. 17 – 24; App. 283, ll. 14 – 25; App. 311; App. 310.

Trial counsel testified at the PCR hearing that he had discussed with Petitioner Franklin that he could receive a sentence consecutive to the sentence he was already serving. App. 299, ll. 25 – App. 300, ll. 3. Counsel said that Franklin gave a statement to the police confessing to having committed the robbery. App. 290, ll. 4 – 25.

The PCR judge issued an order on April 12, 2018 denying Petitioner Franklin's PCR and dismissing it with prejudice. App. 309 – App. 322. The judge found Petitioner Franklin's testimony to be not credible, but found trial counsel's testimony to be credible and persuasive. App. 315.

The judge also found that Petitioner's allegation that trial counsel was ineffective for not objecting to the consecutive sentence to be "meritless." The judge wrote that the decision to run a sentence concurrent or consecutive to be "left to the sound discretion of the trial judge." App. 315.

Petitioner Franklin's PCR counsel filed a notice of appeal. This petition follows.

## ARGUMENT

The PCR court erred in not finding trial counsel ineffective for not objecting to the trial court making Petitioner Franklin's fifteen year sentence consecutive to the eight year sentence Petitioner was currently serving which was prejudicial to Petitioner because the jury found him not guilty of the armed robbery but only strong armed robbery which would be a shorter period of incarceration.

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).

Trial counsel was ineffective for not objecting to the trial judge running Franklin's sentence for SAR consecutive to the sentence he was already serving. The jury found Franklin not guilty of AR but only SAR. However, by making the sentence consecutive, the judge basically sentenced

Franklin as though he had been found guilty of the AR. This was prejudicial to Franklin. Franklin technically received no benefit from the jury finding him guilty of the lesser charge of SAR. The jury believed him that he did not have a weapon.

**CONCLUSION**

Based on the above, certiorari should be granted, and Petitioner's convictions and sentences vacated, 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 horizontal line underneath the name.

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of December, 2018.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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WILBERT FRANKLIN, JR.

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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PETITION TO BE RELIEVED AS COUNSEL

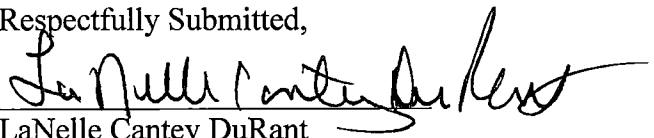
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Counsel for Wilbert Johnson Franklin states:

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 DeAndrea G. Benjamin, which was held on March 27, 2018, 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 Wilbert Johnson Franklin.

Respectfully Submitted,



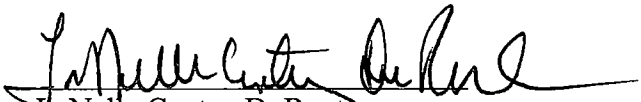
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th 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."

  
LaNelle Cantey DuRant  
Appellate Defender

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

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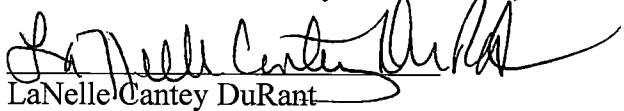
RESPONDENT

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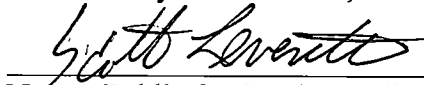
CERTIFICATE OF SERVICE

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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 Megan Harrigan Jameson, 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 Wilbert Johnson Franklin, #229450, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 6th day of December, 2018.

  
LaNelle Cantey DuRant  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 19th day of December, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: September 27, 2028.