

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

MAY 22 2013

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Certiorari to Saluda County  
Clifton Newman, Circuit Court Judge  
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**S.C. Supreme Court**

DEVIN GANTT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212811  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

LANELLE CANTEY DURANT  
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ATTORNEY FOR PETITIONER

# INDEX

INDEX.....	1
ISSUE PRESENTED .....	2
STATEMENT .....	3
ARGUMENT .....	4
CONCLUSION .....	9
PETITION TO BE RELIEVED AS COUNSEL.....	10

ISSUE PRESENTED

Did the PCR court err in failing to find plea counsel ineffective for not insuring that petitioner's guilty plea was entered freely, voluntarily and knowingly ?

## STATEMENT

In March 2009, the Saluda County Grand Jury indicted Devin S. Gantt on the charge of armed robbery (AR). On October 21, 2009, Gantt appeared before the Honorable Robin B. Stillwell and entered a guilty plea as indicted. Gantt was represented by James Snell, and the state was represented by Ervin J. Maye. Judge Stillwell accepted the negotiated sentence and sentenced Gantt to seventeen years. App. 20, ll. 1 – 11. Gantt did not appeal his conviction or sentence.

On September 7, 2010, Gantt filed an application for post-conviction relief (PCR). The state filed a return on December 9, 2010. An evidentiary hearing was held on April 26, 2012 before the Honorable Clifton Newman. Gantt was represented by Willie F. Bradley and Emily B. Howard. The state was represented by Kaelon E. May. On July 9, 2012, Judge Newman issued an order denying Gantt's PCR application and dismissing it with prejudice. App. 386 – 399. Gantt's attorney filed a notice of appeal. This petition follows.

## ARGUMENT

The PCR court erred in failing to find plea counsel ineffective for not insuring that petitioner's guilty plea was entered freely, voluntarily and knowingly.

Gantt and two co-defendants, Cedric Smith and Stanley Shamble, were charged with the robbery and beating of eighty-one year old Hubert Bryant, who owned a small service station and store in Saluda, on April 14, 2006. App. 12, ll. 1 – 25. Cedric Smith was developed as a suspect. He confessed and identified the other two. Gantt confessed but maintained that he was the driver of the car and did not enter the residence. However, the solicitor said they were prosecuted under the “hand of one is the hand of all.” Therefore it did not matter whether Gantt was the driver or not. App. 13, ll. 1 – 25.

The judge accepted the negotiated plea offer and sentenced Gantt to the seventeen years. App. 20, ll. 1 – 22.

At his PCR hearing, Gantt's attorney told the court that one of the claims of ineffective assistance of counsel raised by Gantt was the plea attorney's failure to investigate. App. 44, ll. 13 – App. 51, ll. 22. Gantt testified that he told his attorney that he participated in the robbery but that he was the driver of the car. He did not go inside the store and had nothing to do with the beating of Mr. Bryant. App. 53, ll. 18 – App. 54, ll. 17.

However, one of his co-defendants, Cedric Smith, said that Gantt went inside the store, and that Smith was the driver. Shamble said that Gantt was the driver. App. 64, ll. 17 – App. 65, ll. 22. Smith received a sentence of twenty-two years which included some other charges, and Smith received two years because he pled guilty to the lesser offense of strong armed robbery. They were sentenced after Gantt's plea. App. 177, ll. 8 – App. 179, ll. 25; App. 201, ll. 3 – 25.

Gantt also testified that his attorney presented him with a plea offer of eighteen years , but he told his attorney that he did not want that offer and wanted to go to trial. His attorney told him he should take the plea because there was no need to go to trial since he had confessed. App. 67, ll. 1 – 25. His attorney recommended that he take the plea offer. App. 68, ll. 1 – 10.

Gantt wanted to have his attorney relieved, but the solicitor told him that he would ask to have his bond revoked if he did as Gantt was out on bond. The offer was reduced to seventeen years but Gantt still wanted a trial. App. 80, ll. 1 – App. 83, ll. 23; App. 86, ll. 1 - 23. He, and his attorney and the solicitor told this before the judge. When Gantt said he still wanted a trial, the judge said the trial would be the next day. App. 87, ll. 22 – App. 88, ll. 14.

His attorney never told him of any investigation he had done. App. 88, ll. 15 – 23. Gantt changed his mind when he realized his chances of winning at trial were “slim to none.” He then accepted the plea offer. App. 88, ll. 24 – App. 89, ll. 18.

Stanley Shamble testified at the PCR hearing that his discovery contained a statement by the victim describing the person who beat him. App. 106, ll. 17 – 21; App. 110, ll. 1 – App. 111, ll. 23. The state objected that no one knew who wrote this statement as it was not signed. PCR attorney said it may have been written by law enforcement. Shamble confirmed that in the statement, the victim gave a physical description of his attacker. App. 113, ll. 22 – App. 115, ll. 4. s

Shamble testified that in his statement he said he and Smith went into the store and Gantt stayed in the car. Shamble took a polygraph which indicated that he was truthful that he did not hit the victim. App. 120, ll. 15 – App. 122, ll. 10.

Gantt’s plea counsel testified at the PCR hearing that Gantt always maintained that he did not enter the victim’s store. App. 133, ll. 1 – 13; App. 140, ll. 6 – 8. He did not receive a copy of the victim’s statement until after Gantt’s guilty plea. He admitted that the statement provided that the

victim said the attacker was about the same size as the victim who was six feet tall and weighed 165. The incident report said Gantt was five feet seven inches and weighed 269. Smith was six feet tall and weighed 170. Shamble was six feet three inches and weighed 230. App. 142, ll. 22 – App. 145, ll. 24.

Plea counsel admitted that the two co-defendants had conflicting stories but he never talked to anyone to get to the heart of the issue. He did talk to Smith once. App. 152, ll. 7 – App. 153, ll. 25.

The solicitor testified at the PCR hearing that he gave all the discovery he had to Gantt's attorney. He said the victim never gave a statement, and that the solicitor had not seen the alleged victim's statement until the PCR hearing. Maybe the statement was written by a law enforcement officer or someone else. App. 177, ll. 1 – 23; App. 183, ll. 25.

PCR counsel argued to the PCR court that Gantt's plea was not voluntarily made because Gantt had to make a rush decision in a short period of time. Gantt did not have full knowledge of all the information. He may have done something different. App. 210, ll. 19 – App. 211, ll. 12.

The PCR judge ruled that he found Gantt's testimony to not be credible while finding plea counsel's testimony credible. App. 390. The judge wrote that Gantt offered no evidence at the PCR hearing that counsel could have found that would have been likely to have a more favorable outcome for Gantt. Therefore, the judge found that Gantt failed to show that counsel's performance was deficient and failed to show any prejudice to Gantt. App. 391.

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, 466 U.S. 668, 104 S.Ct. 2052 (1984).

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. 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). Judges are required to give the defendant an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975).

In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the Supreme Court held that for purposes of a 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.

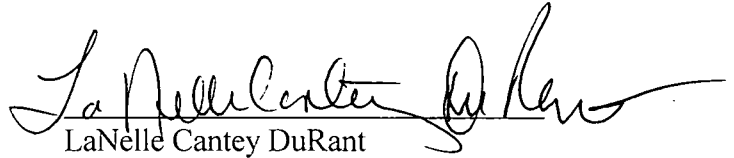
The failure to investigate possible defenses constitutes ineffective assistance of counsel. Cobbs v. State, 305 S.C. 299, 408 S.E.2d 223 (1991). Trial counsel is ineffective if his failure to present evidence alters the outcome of the trial. Hicks v. State, 314 S.C. 280, 443 S.E.2d 907 (1994).

Both plea attorneys were ineffective for not thoroughly investigating Gantt's case. They should have investigated to determine which co-defendant was more truthful. They should have talked to the victim to determine if he could identify his attacker. It was prejudicial to Gantt to plead guilty without more information and more time to decide.

CONCLUSION

Based on the above, certiorari should be granted, and the conviction and sentence reversed, and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant", written over a horizontal line.

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 22<sup>nd</sup> day of May, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO SALUDA COUNTY  
CLIFTON NEWMAN, CIRCUIT COURT JUDGE

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DEVIN GANTT,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2012-212811

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PETITION TO BE RELIEVED AS COUNSEL

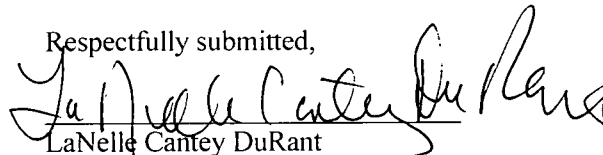
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Counsel for Devin Gantt states:

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 records and transcript of petitioner's post-conviction relief hearing which was held on April 25, 2012. 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 the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Devin Gantt.

Respectfully submitted,



LaNelle Cantey DuRant  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 22<sup>nd</sup> day of May, 2013

STATE OF SOUTH CAROLINA  
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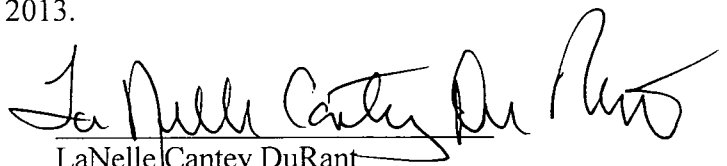
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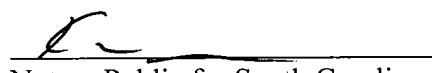
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CERTIFICATE OF SERVICE  
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Devin Gantt, #337539, at Lee Correctional Institution this 22<sup>nd</sup> day of May, 2013.

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22<sup>nd</sup> day  
of May, 2013.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 2, 2013 .