

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County

J. Ernest Kinard, Jr., Circuit Court Judge

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**S.C. Supreme Court**

JUSTIN A. AUSTIN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-00094

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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Appellate Defender

South Carolina Commission on Indigent Defense  
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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's guilty plea was entered freely, voluntarily and knowingly?

## STATEMENT

In June 2010, the Richland County Grand Jury indicted Justin A. Austin on the charge of murder. On January 5, 2012, Austin appeared before the Honorable DeAndrea Gist Benjamin, and entered a guilty plea to the lesser included charge of voluntary manslaughter pursuant to a negotiated plea with the state. Austin was represented by Renee Lipson, and the state was represented by Dolly Garfield. Judge Benjamin accepted the negotiated plea and sentenced Austin to eighteen years. App. 24 – App. 25. Austin did not appeal his conviction or sentence.

On March 2, 2012, Austin filed an application for post-conviction relief (PCR). The state filed a return on June 11, 2012. An evidentiary hearing was held on December 2, 2012 before the Honorable J. Ernest Kinard, Jr. Austin was represented by Patrick Killen, and the state was represented by Robert Corney. On December 31, 2012, Judge Kinard issued an order denying Austin's PCR application and dismissing it with prejudice. App. 70 – 78. Austin'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.

Petitioner Austin was charged with the murder of another young man, Tavaris Tucker, at the Dora Randall Apartments on November 24, 2009. Austin was with two other men when Tucker came into the apartment complex driving what appeared to be an old police car. Austin and his friends thought Tucker was pretending to be undercover, and it was hurting drug sales in the neighborhood. App. 8, ll. 1-25.

Tucker left and returned later. When he did, tucker began to argue with one of Austin's friends. Austin then shot Tucker six times in the back. Law enforcement found two guns on the person of the victim, Tucker. App. 9, ll. 1 - App. 10, ll. 25.

At his PCR hearing, Austin testified that his plea counsel was ineffective because she did not fully explain the consequences of his plea. App. 40, ll.20 – App. 41, ll. 24. He wanted to go to trial because he did not think the state had substantial evidence against him. He felt he was pushed into pleading guilty. His attorney was in the process of changing jobs, and she was not prepared for trial. App. 47, ll. 4 – App. 48, ll. 25.

Austin said he learned slower than others because he had the mental illness of ADHD. He did not understand the plea offer his attorney brought, so he called his mother to explain it. App. 46, ll. 7 – 25. He was also taking the medication Zoloft at the time of the guilty plea so he was confused because the Zoloft affected his ability to analyze the situation. App 49, ll. 1 – App. 52, ll. 16. He would not have pled guilty if he had known then what he knows now. He wants a new trial. App. 50, ll. 16 – App. 51, ll. 6.

Austin's plea counsel testified at the PCR hearing that she realized that Austin had some mental health issues or mental retardation issues. She had him mentally evaluated which showed that he was competent. App. 56, ll. 14 – App. 58, ll. 23. She admitted that she did not know he was on the medication Zoloft at the time of his guilty plea. App. 61, ll. 5 – 15.

Plea counsel said Austin never talked of a trial. It was always a plea. App. 59, ll. 1 - 25.

The PCR judge ruled that he found plea counsel's testimony to be credible while he found Austin's testimony to not be credible. App. 75. The judge ruled that Austin did not meet his burden of proving that plea counsel was ineffective. App. 75. The judge ruled that the guilty plea was intelligent and voluntary. App. 76. At the PCR hearing, the judge stated that it was probably in Austin's best interest to deny his PCR application. App. 68, ll. 10 – 14.

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).

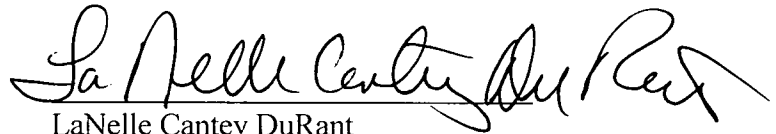
Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (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).

The PCR judge erred in not finding trial counsel ineffective for not insuring Austin's plea was voluntary. He was ADHD; was on medication at the time of his plea; and plea counsel was not prepared for trial. The totality of these circumstances made the guilty plea involuntary.

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, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a large initial "L" and a long, sweeping tail.

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of September, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO RICHLAND COUNTY  
J. ERNEST KINARD, JR., CIRCUIT COURT JUDGE

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JUSTIN A. AUSTIN,

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Justin A. Austin 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 December 3, 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 Justin A. Austin.

Respectfully submitted,



LaNelle Cantey DuRant  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 3rd day of September, 2013

STATE OF SOUTH CAROLINA

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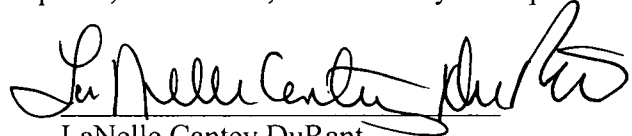
RESPONDENT

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CERTIFICATE OF SERVICE

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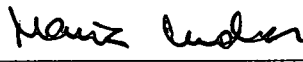
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Justin A. Austin, #286474, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 3rd day of September, 2013.



LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day  
of September, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.