

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County

S.C. Supreme Court

Edward W. Miller, Circuit Court Judge  
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FARDARREL L. HUDGENS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000392  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
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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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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 because he had a mental illness and had not been evaluated since 2008?

## STATEMENT

In December 2010, the Greenville County Grand Jury indicted Fardarrel L. Hudgens on the charges of possession with intent to distribute cocaine base (PWID) and possession with intent to distribute marijuana. On March 8, 2011, Petitioner Hudgens appeared before the Honorable D. Garrison Hill and entered a guilty plea to both charges. He was represented by Dorothy A. Manigault, and the state was represented by Jenny L. Barwick. Judge Hill sentenced Hudgens to the minimum sentence of ten years on each charge to run concurrently. App. 14, ll. 1 – 9. Hudgens did not appeal his convictions or sentences.

On April 14, 2011, Hudgens filed an application for post-conviction relief (PCR). The state filed a return on June 27, 2011. An evidentiary hearing was held on December 19, 2012 before the Honorable Edward W. Miller. Hudgens was represented by Scarlett B. Moore, and the state was represented by Karen C. Ratigan. Judge Miller issued an order on January 10, 2013 denying Hudgens' PCR application and dismissing it with prejudice. App. 114 – 121. Hudgens 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 because he had a mental illness and had not been evaluated since 2008.

On January 5, 2010, Hudgens was driving down Laurens Road in Greenville when he was stopped by Officer Johnson for not having the normal paper tag on his car. Hudgens did not have a driver's license nor proof of insurance nor the bill of sale for the car. App. 9, ll. 12 – 25. When the officer conducted a search incident to arrest, he found seven baggies of marijuana or 13.87 grams, and eight rocks of crack or .72 grams. Hudgens was arrested and charged with possession with intent to distribute crack and marijuana. App. 10, ll. 1 – 25.

At his guilty plea, Hudgens told the plea judge that he had a mental condition, and his attorney told the judge that Hudgens had taken medication that morning. However, his attorney told the court that she had no question about his competency. App. 4, ll. 1 – 8.

During mitigation, his attorney told the court that Hudgens had been diagnosed by Dr. Karl Bodtorf in 2008 with a psychotic disorder of schizophrenia as well as poly substance abuse and schizoid affective disorder. He had been under medical care and mental counseling since then. He was also on disability. App. 12, ll. 8 – 22. The judge gave him a sentence of ten years. App. 14, ll. 1 – 9.

At his PCR, Hudgens testified that his plea counsel was ineffective because she did not inquire into his mental competency to enter a guilty plea. App. 48, ll. 1 – 23. He said he did not remember entering the guilty plea. App. 58, ll. 1 – 10. He gave his attorney documents from the South Carolina Mental Health Department showing he had a mental condition. He gave her a copy

of the psychological evaluation from 2008. App. 53, ll. 5 – App. 54, ll. 25. On the day of the guilty plea, he had taken the medication Seroquel for his mental condition. App. 59, ll. 1 – 19.

His plea counsel testified at the PCR hearing that she did receive information about his mental condition from Hudgens. This included the evaluation by Dr. Bodtorf which was done for him to receive disability. She admitted that she did not follow up with Dr. Bodtorf nor any other mental health providers regarding Hudgens' mental condition or the medication Seroquel. App. 64, ll. 20 – App. 66, ll. 25.

The PCR judge ruled that he found Hudgens' testimony to not be credible while he found plea counsel's testimony to be credible. App. 118. He ruled that Hudgens failed to meet his burden of proof that plea counsel should have investigated Hudgens' mental health history more thoroughly. App. 119. Hudgens did not produce an expert at his PCR hearing to testify about his mental health. The judge held that Hudgens failed to prove that plea counsel failed to render reasonably effective assistance, and failed to prove that he suffered any prejudice. App. 120.

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).

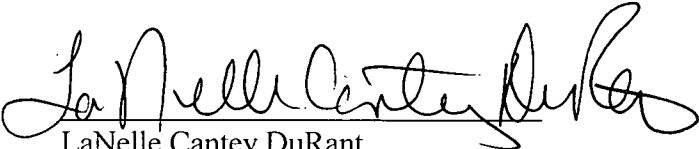
Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (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 Hudgens' plea was voluntary. Plea counsel did not obtain a more recent mental health evaluation as the one by Dr. Bodtorf on which counsel relied was done in 2008 which was three years before the guilty plea in 2011. Counsel did not follow up with the mental health professionals to determine the effect of Seroquel on Hudgens and his ability to plea guilty. This was prejudicial to Hudgens.

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 "D".

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 10<sup>th</sup> day of September, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO GREENVILLE COUNTY  
EDWARD W. MILLER, CIRCUIT COURT JUDGE

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FARDARREL L. HUDGENS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

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PETITION TO BE RELIEVED AS COUNSEL

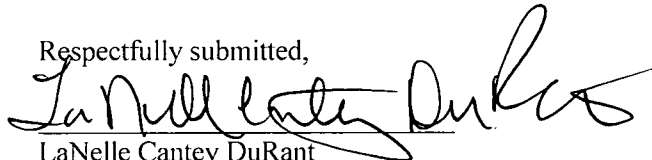
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Counsel for Fardarrel L. Hudgens states:

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 19, 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 Fardarrel L. Hudgens.

Respectfully submitted,



LaNelle Cantey DuRant  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 10<sup>th</sup> day of September, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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FARDARREL L. HUDGENS,

PETITIONER,

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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 Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Fardarrel L. Hudgens, #250464, at Walden Correctional Institution, 4340 Broad River Road, Columbia, SC 29210, this 10<sup>th</sup> day of September, 2013.



LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 10<sup>th</sup> day  
of September, 2013.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023.