

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Pickens County  
Robin B. Stilwell, Circuit Court Judge  
\_\_\_\_\_

RECEIVED  
SEP 15 2014  
S.C. Supreme Court

KENT R. CLAYTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000179  
\_\_\_\_\_

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

LANELLE CANTEY DURANT  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not advising Petitioner to testify when Petitioner's testimony could have supported trial counsel's request for the judge to charge the jury on the lesser include offense of assault and battery of a high and aggravated nature (ABHAN)?

## STATEMENT

In March 2008 the Pickens County Grand Jury indicted Kent Clayton on the charge of assault with intent to commit criminal sexual conduct (CSC). App. 455. On October 21-23, 2008, Clayton proceeded to trial before the Honorable G. Edward Welmaker and a jury. Clayton was represented by John Dejong and Dallas Ball, and the state was represented by Peter Them. App. 1. The jury returned a verdict of guilty as indicted. App. 409. Judge Welmaker sentenced Clayton to twenty-three years. App. 416, ll. 6 – 25. Clayton's attorney filed a notice of appeal. The appeal was perfected by the Office of Appellate Defense. The Court of Appeals affirmed Clayton's conviction and sentence on January 20, 2011. State v. Clayton, Op. No. 2-11-UP-003 (Ct. App. filed January 20, 2011). App. 456; App. 466-App. 476.

On January 4, 2012, Clayton filed an application for post-conviction relief (PCR). The state filed a return on July 31, 2012. An evidentiary hearing was held on August 26, 2013 before the Honorable Robin B. Stilwell. Clayton was represented by R. Mills Arial, and the state was represented by Karen C. Ratigan. App. 434. On October 22, 2013, Judge Stilwell issued an order denying Clayton's PCR application and dismissing it with prejudice. App. 455 – App. 460. Clayton's attorney filed a notice of appeal. This petition follows.

## ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not advising Petitioner to testify when Petitioner's testimony could have supported trial counsel's request for the judge to charge the jury on the lesser include offense of assault and battery of an high and aggravated nature (ABHAN).

On August 31, 2007, the victim was walking around the Upstate Fair between Easley and Greenville late in the evening. She stood by the front gate briefly and then started to leave. App. 143, ll. 10 – 25. A man offered to walk her across the park. As they proceeded, he allegedly pulled a knife, wrestled her to the ground, and attempted to rape her. She fought so hard that the man voluntarily let her go. App. 144, ll. 1 – 11.

The woman did not report the incident to Sheriff's Office until the next day. However, before she reported it, a man had called the Sheriff's Office to tell that Clayton told him to cover for him and say Clayton was with him the entire time. App. 144, ll. 12 – 25. The police took victim to the fairgrounds to walk around and see if she could identify her attacker. On the second or third walk-around she picked out a person. She told the police she was only fifty percent sure he was her attacker. She was not real positive. This person turned out to be appellant. App. 145, ll. 1 – 25.

At his PCR hearing, Clayton's attorney told the court that Clayton wanted a new trial. App. 436, ll. 1 – 25. Clayton testified that trial counsel was ineffective because Clayton wanted to testify. The judge had denied trial counsel's request to charge the jury on ABHAN finding there was no evidence to support that charge. Trial counsel never discussed with Clayton what elements were needed to get the charge on ABHAN. Clayton did not realize he could get that lesser charge. App. 437, ll. 2 – 12; App. 440, ll. 2 – App. 442, ll. 25. If Clayton had testified, he could show that his intent changed because he looked into her eyes and realized what he was doing. He became

remorseful and let her go. He did not have a knife but a file he used to file his dog's nails. App. 442, ll. 8 – App. 444, ll. 5. The woman tried to solicit him for crack in exchange for Lortab pills but he did not have crack. App. 444, ll. 6 – App. 445, ll. 25.

Trial counsel testified that there was no plea offer from the state. There was a CD of the meeting between a snitch, who was wearing a wire for the police, and Clayton who basically confessed. App. 446, ll. 9 - App. 447, ll. 15.

Trial counsel Dejong discussed with Clayton trying to get ABHAN as a lesser included offense. This trial counsel always discussed with his clients the right to testify but it was always the client's decision. However, he admitted that he usually told clients that he had seen a lot of clients convict themselves by their testimony when the state may not have proved the case. Counsel also admitted that Clayton's testimony probably would not have changed anything except it may have helped with the lesser included of ABHAN. But he did not discuss that in terms of Clayton's right to testify. App. 448, ll. 1 – App. 449, ll. 24.

The PCR judge ruled that Clayton failed to meet his burden of proving that trial counsel should have advised him or allowed him to testify. The trial judge also advised Clayton of his right to testify. App. 458; App. 331. Clayton did not present any credible evidence that trial counsel pressured him not to testify. Clayton was not prejudiced because trial counsel argued for the ABHAN charge. The PCR court found that it was unlikely that Clayton's testimony would have changed the trial judge's decision not to give the jury charge on ABHAN. App. 355-359; App. 458.

The PCR judge found that Clayton did not prove trial counsel failed to render reasonably effective assistance. App. 459.

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 United States Supreme Court held that counsel for the accused need not defer to his client’s wishes regarding incidental matters of trial strategy, but the defendant has the authority to make certain fundamental decisions about his case after thorough advisement with counsel. These fundamental decisions include whether to plead guilty, to waive the right to a jury trial, to testify on one’s own behalf, or to take an appeal. See also Strickland v. Washington, 466 U.S. 668 (1984).

Clayton should have been allowed to make his own decision to testify or not. Trial counsel needed to consult with Clayton sufficiently to insure that Clayton understood all of the facts and ramifications of testifying.

CONCLUSION

Based on the above, certiorari should be granted, and the order of the PCR court should be reversed, and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in cursive script that reads "LaNelle Cantey DuRant". The signature is written in black ink and is positioned above the printed name and title.

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of September, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO PICKENS COUNTY  
ROBIN B. STILWELL, CIRCUIT COURT JUDGE

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KENT R. CLAYTON,

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STATE OF SOUTH CAROLINA,

RESPONDENT

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PETITION TO BE RELIEVED AS COUNSEL

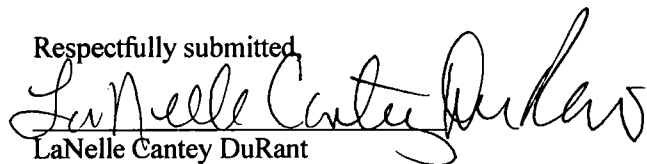
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Counsel for Kent R. Clayton states:

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 August 26, 2013. 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 Kent R. Clayton.

Respectfully submitted,



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of September, 2014

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IN THE SUPREME COURT

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Certiorari to Pickens County  
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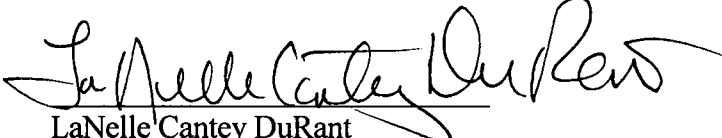
RESPONDENT

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CERTIFICATE OF SERVICE

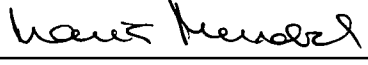
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Kent R. Clayton, #331402, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 15th day of September, 2014.

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day  
of September, 2014.

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