

CONFIDENTIAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**S.C. Supreme Court**

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Certiorari to Williamsburg County

R. Ferrell Cothran, Jr., Circuit Court Judge

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WILLIAM DAVID YARBOROUGH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

\_\_\_\_\_  
APPELLATE CASE NO. 2014-000229

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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  
Division of Appellate Defense  
PO Box 11589  
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 plea counsel ineffective for not insuring that petitioner's guilty plea was entered freely, voluntarily and knowingly?

## STATEMENT

In October 2008, the Williamsburg County Grand Jury indicted William Yarborough on two sets of charges arising from two incidents. The first indictment (2008-GS-45-219) charged Yarborough with criminal sexual conduct (CSC) first degree and burglary first degree that occurred June 13, 2002. The second indictment (2008-GS-45-220) charged Yarborough with criminal sexual conduct first degree and burglary first degree that occurred January 24-25, 2007. On May 18, 2009, Yarborough appeared before the Honorable Howard P. King and entered a guilty plea to each charge as indicted. Yarborough was represented on the 2002 charges by Steve McKenzie, and by LeGrand Carraway on the 2007 charges. App. 3, ll. 1 – 16. The state was represented by Kimberly Barr. App. 1. Judge King sentenced Yarborough to twenty-two years on each charge as recommended by the state. All sentences ran concurrent. App. 13, ll. 24 – App. 15, ll. 13; App. 30, ll. 1 – App. 31, ll. 14. Yarborough did not appeal his convictions or sentences. App. 139.

On May 17, 2010, Yarborough filed an application for post-conviction relief (PCR). He filed an amended PCR application on October 29, 2013. The state filed a return on November 15, 2013. An evidentiary hearing was held on December 16, 2013 before the Honorable R. Ferrell Cothran, Jr. Yarborough was represented by Charles Brooks, and the state was represented by Daniel Gourley. App. 59. On January 14, 2014, Judge Cothran issued an order denying Yarborough's PCR application and dismissing it with prejudice. App. 138-App. 149. Yarborough'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.

On June 13, 2002, in Williamsburg County, a twenty-three year old woman was asleep in her bedroom while her young child slept nearby. Around 5:42 in the early morning, she awoke to find an unknown white male in her bedroom who put his hand over her mouth and threatened to harm the baby if she screamed. The man then proceeded to engage in sexual intercourse with her. The baby woke up crying and the man left. A rape kit was performed on the woman, but the crime went unsolved for six years. App. 18, ll. 19 – App. 19, ll. 20; Ap. 21, ll. 24- 25.

On January 24, 2007, again in Williamsburg County, a seventeen year old girl reported that she awoke about 10:00 in the morning to find Yarborough, who worked for her father, in her bedroom. He had something in his hand that the girl thought was a gun. He forced her to engage in sexual activities with him while her mother and brother were sleeping in the house. He had entered the home through a kitchen window. The girl recognized his voice. App. 19, ll. 21 – App. 20, ll. 18.

After Yarborough was identified in the 2007 case, he voluntarily submitted DNA samples for SLED testing for the case. The results showed a positive finding and match with the seventeen year old girl. The DNA results were also a match with the DNA of the 2002 rape victim. App. 21, ll. 11 – App. 22, ll. 14.

During mitigation, Attorney McKenzie told the court that one month after the July 2002 incident, Yarborough had entered the Marines and distinguished himself by winning the good conduct medal, and other medals for combat. He served in Afghanistan. He was also treated while in the Marines for alcohol addiction. When he drank, he frequently did not remember what happened. Yarborough was also diagnosed with post traumatic stress syndrome (PTSD), and

received a 50% disability rating from the VA. Yarborough apologized to the court and to the victims for any pain he may have caused. App. 23, ll. 1 – 29, ll. 15.

The judge sentenced him to the twenty-two years. App. 30, ll. 1 – 25.

At the PCR hearing, Yarborough's PCR attorney told the court that the crux of the case was whether Yarborough's plea was voluntarily given . App. 135, ll. 23 -25. Yarborough testified that Attorney McKenzie was his only lawyer as he never saw Attorney Legrand Carraway prior to signing his plea agreement. Attorney McKenzie did not represent him to his fullest. Yarborough pled guilty only because his lawyer told him he would get a life sentence if he went to trial. Yarborough felt he was forced into pleading guilty. App. 65, ll. 1 – App. 67, ll. 1.

There were two DNA reports: one which Yarborough paid for and one that SLED performed. He did not even see the SLED report until after he pled guilty. App. 67, ll. 1 – 23. The DNA testing showed third party guilt because there were two male DNAs in the first victim. Yarborough did not receive this SLED DNA information until after he pled guilty. App. 69, ll. 13 – App. 70, ll. 11. If he had known then what he knew after his plea, he would have gone to trial. He wanted a new trial. App.71, ll. 2 – App. 72, ll. 11. He had a relationship with the seventeen year old in 2007 and her father did not like it. Her father fired him. The girl told him to come to her house, and he was accused of rape. App. 79, ll. 1 – 24.

Yarborough's mother, Pam Gowdy, testified at the PCR hearing that she paid for an independent DNA test for her son. If the DNA results showed rape, then he should plead guilty. Although Yarborough's DNA matched that of the woman from the 2002 incident, she had never been given any proof of an actual rape. App. 92, ll. 21 – App. 98, ll. 25.

Attorney McKenzie testified that although Attorney Carraway technically represented Yarborough on the 2007 case, Attorney McKenzie actually represented Yarborough on all of these

charges. App. 114, ll. 3 – App. 116, ll. 4. Plea counsel admitted that he told Yarborough that if he went to trial, he would probably get a life sentence. App. 111, ll. 3 – 24. The strongest evidence in the case was the DNA. App. 100, ll. 1 – App. 103, ll. 25. Although there was DNA from two males found in the 2002 woman, there was only a trace amount of DNA from the second male. The majority of the DNA belonged to Yarborough. App. 104, ll. 1 – App. 106, ll. 25. SLED reported that the second sample was so small that they could not identify DNA in it but they could tell that it was not Yarborough's DNA. App. 118, ll. 1 – App. 119, ll. 25.

Counsel knew that Yarborough knew about the second male's DNA before his guilty plea because he had the separate test his mother had paid for. There was one sample with two contributors. One contributor could be identified but the second one could not be identified. App. 120, ll. 1 – App. 125, ll. 25.

The PCR judge ruled that he found counsel's testimony to be very credible but Yarborough's testimony was less credible. App. 143. The judge held that Yarborough's guilty plea was entered freely and voluntarily. This allegation was without merit because Yarborough had a full understanding of the consequences of his plea and was fully aware of what was going on. App. 146-App. 147. Yarborough failed to present compelling evidence that plea counsel committed errors or omissions in his representation of Yarborough. Yarborough failed to prove the second prong that he suffered any prejudice by plea counsel's performance. App. 148.

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). 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).

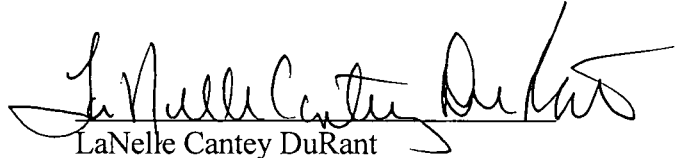
Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709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

The PCR judge erred in not finding trial counsel ineffective for not keeping Yarborough informed of all of the evidence against him. Counsel was ineffective for not insuring that Yarborough wanted to plead guilty and that he understood all of the consequences of pleading guilty.

CONCLUSION

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

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 12th day of November, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO WILLIAMSBURG COUNTY  
R. FERRELL COTHRAN, JR., CIRCUIT COURT JUDGE

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WILLIAM DAVID YARBOROUGH,

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PETITION TO BE RELIEVED AS COUNSEL

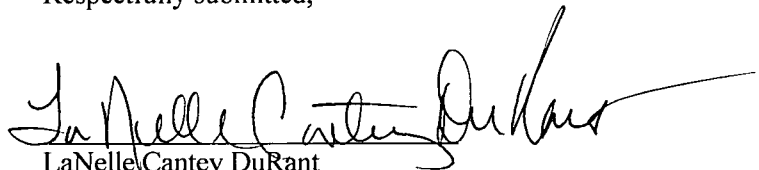
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Counsel for William Yarborough states:

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 16, 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 William Yarborough.

Respectfully submitted,



LaNelle Cantey DuRant  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 12th day of November, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Williamsburg County

R. Ferrell Cothran, Jr., Circuit Court Judge

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WILLIAM DAVID YARBOROUGH,

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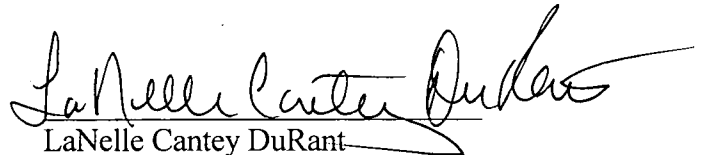
RESPONDENT

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CERTIFICATE OF SERVICE

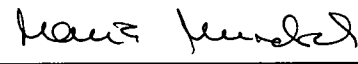
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. William Yarborough, #334712, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 12th day of November, 2014.

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day  
of November, 2014.

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