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S.C. Supreme Cou

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County

Stephanie P. McDonald, Circuit Court Judge

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AARON SMALLS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000217

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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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 April 2009, the Charleston County Grand Jury indicted Aaron O. Smalls on the charges of possession with intent to distribute (PWID) cocaine base third offense (2009-GS-10-3226); PWID within one-half mile of a school (2009-GS-10-3227); and manufacturing cocaine base third offense (2009-GS-10-3225). On October 5, 2011, Smalls appeared before the Honorable Deadra L. Jefferson and entered a guilty plea to PWID within one-half mile of a school first offense and manufacturing cocaine base second offense. The remaining PWID cocaine base was *nolle prossed*. App. 7, ll. 6 – 24. Smalls was represented by Edward M. Brown, and the state was represented by Gregory K. Voight. App. 1. Judge Jefferson accepted the negotiated plea and sentenced Smalls to eight years. App. 84, ll. 23 – App. 85, ll. 6. Smalls did not appeal his convictions nor sentences.

On December 29, 2011, Smalls filed an application for post-conviction relief (PCR). Smalls filed an amended PCR application on November 21, 2013. The state filed a return on June 20, 2012. A motions hearing was held on November 21, 2013 before the Honorable Stephanie McDonald. For the purpose of relieving PCR counsel and allowing Smalls to proceed *pro se*. App. 130, ll. 15 – 24. Smalls was represented by Tommy A. Thomas, and the state was represented by Ashleigh R. Wilson. App. 128. An evidentiary hearing was held on January 10, 2014 before the Honorable Stephanie McDonald. Smalls represented himself (*pro se*), and the state was represented by Ashleigh Wilson. App. 143. On March 4, 2014, Judge McDonald issued an order denying Smalls' PCR application and dismissing it with prejudice. App. 220 – App. 234. Smalls 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 January 22, 2009, the North Charleston Narcotics unit executed a search warrant on a residence and detached garage where Aaron Smalls lived. His girlfriend lived in the residence. The search warrant was based on a drug buy by a confidential informant (CI), who wore a wire, that occurred at the detached garage. The CI purchased a small quantity of cocaine. Documents were found at both places which indicated that Smalls was in both locations. App. 22, ll. 17 – App. 23, ll. 5; App. 199, ll. 1 – 19. A small quantity of cocaine was found under some mulch in the curtilage of the house. In the detached garage, which had been converted to an apartment, a metal pan and whisk which had a strong odor of cocaine were seized. App. 23, ll. 10- App. 24, ll. 8; App. 199, ll. 20, ll. 20 – App. 201, ll. 20.

At his guilty plea, Smalls' attorney told the court immediately that Smalls wanted a trial. App. 3, ll. 1 -7. The state reviewed Smalls' previous convictions for drugs and the current charges. The state explained that the current drug charges would be a third drug offense. The state then reviewed the negotiated plea offer which would provide a shorter sentence of only eight years. Smalls indicated that he understood. App. 4, ll. 1 – App. 8, ll. 25.

Smalls stated that he had to defend himself in a situation where he had no choice. App. 31, ll. 2 – 5. Smalls told the plea court that he was not satisfied with his attorney because they had problems from day one. His attorney did not provide adequate information to him as Smalls was just learning some of it at court that day. App. 37, ll. 25 – App. 40, ll. 1.

Plea counsel told the court that he was prepared to go to trial, but Smalls had made allegations against counsel that counsel was incompetent. Counsel did not know if Smalls would get counsel's best. App.56, ll. 17 – App. 57, ll.5.

After lengthy coercive explanations from the judge, Smalls agreed to plead guilty but maintained he still was not satisfied with his attorney. The judge agreed to relieve plea counsel and told Smalls that all offers were withdrawn, and he should get another lawyer. After more lengthy explanation from the judge, Smalls told the court that he was satisfied with his plea counsel. He then proceeded to plead guilty. The judge accepted the negotiated plea offer and sentenced Smalls to eight years. App. 71, ll. 1 – App. 86, ll. 10.

At his first PCR hearing on November 21, 2013, Smalls' PCR counsel told the court that this was a motions hearing as Smalls wanted to have counsel relieved, and counsel had consented. App. 130, ll. 1 – 24. Smalls had been released from prison but was on parole until 2019. App. 131, ll. 1 – 4; App. 140, ll. 1 – 25. Counsel explained that they had a disagreement on how to present the case. However, Smalls wanted to continue pro se at a later date. App. 131, ll. 1 – 6. After a lengthy evaluation of Smalls, the PCR judge relieved PCR counsel and allowed Smalls to represent himself at his PCR hearing. App. 136, ll. 1 – 20.

At his PCR hearing, Smalls testified that he felt ambushed when he entered his plea as he felt he had no choice. He told the plea court several times that he was not happy with his attorney. He wanted to go to trial. His attorney had told him there were 37 grams of additional drugs that the state had not tested. If he went to trial, the state would charge him with trafficking. His attorney told him it was not in his best interest to go to trial. App. 152, ll. 1 – App.153, ll. 23. His attorney should have withdrawn the guilty plea because his plea was not voluntary nor knowingly made. App. 166, ll. 6 – 19.

Sharonda Wright testified at the PCR hearing that she was Smalls' girlfriend and had three children with him. She knew that Smalls wanted to go to trial and that plea counsel kept trying to talk him out of it. Counsel also tried to get her to talk Smalls out of going to trial, but she did not. She said that Judge Jefferson just wanted Smalls to take the guilty plea. App. 176, ll 1 – 25.

Plea counsel testified that he filed a motion to suppress as Smalls wanted him to do. He did not think that Smalls had any viable defenses. Counsel listened to the audio tape of the drug transaction and heard nothing exculpatory on it. He did advise Smalls that it was in his best interest to take the plea offer. He understood that all of the drugs were tested at SLED. App. 180, ll. 1- 194, ll. 25.

Greg Voigt was the solicitor who prosecuted Smalls' case. He testified at the PCR hearing that there were two sets of SLED drug reports. The drugs found under the mulch were sent to SLED for testing very quickly. The metal pan and whisk had not been tested when he began preparing for trial. He conveyed to plea counsel that they were sent and he received the report from SLED in August or September just prior to the guilty plea. He did not need this for the plea as he already had cocaine but he wanted it for trial. So when Smalls indicated he was not pleading, Voigt sent these items for testing. There was a small quantity of cocaine on the pan and whisk. He gave everything to counsel. App. 199, ll. 1 – 204, ll. 21.

Plea counsel testified on recall that he presented all the information he received from Solicitor Voigt to Smalls. App. 206, ll. 1 – 11.

The PCR judge ruled that she found the testimony of plea counsel and the solicitor to be credible but found the testimony of Smalls to not be credible. App. 228. The judge ruled that Smalls did not meet his burden of proof that plea counsel was ineffective. The PCR court held that

plea counsel demonstrated the normal degree of skill, knowledge and professional judgment expected of an attorney who practices criminal law in South Carolina. App. 229.

The PCR judge found that Smalls' did not meet his burden of proof that his guilty plea was not freely and voluntarily entered. Smalls was fully advised of the consequences of pleading guilty. App.231 – App. 232. The judge denied Smalls PCR application. App. 233.

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 plea counsel ineffective for not insuring that Smalls wanted to plead guilty and was satisfied that he knew all of the evidence against him. Counsel did not insure that Smalls was fully advised of the consequences of his plea.

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", with a long horizontal flourish extending to the right.

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 2<sup>nd</sup> day of Januray, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO CHARLESTON COUNTY  
STEPHANIE P. MCDONALD, CIRCUIT COURT JUDGE

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AARON SMALLS,

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PETITION TO BE RELIEVED AS COUNSEL

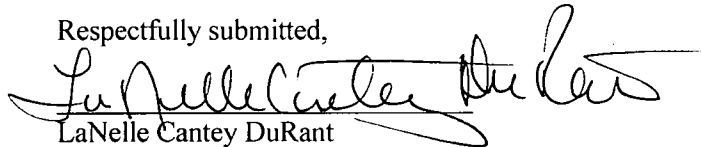
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Counsel for Aaron Smalls states:

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 January 10, 2014. 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 Aaron Smalls.

Respectfully submitted,



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 2<sup>nd</sup> day of January, 2015

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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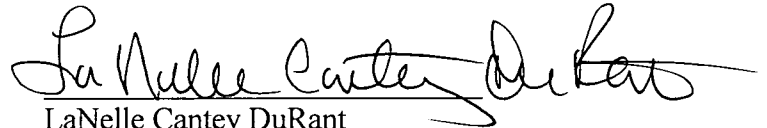
RESPONDENT

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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 Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Aaron Smalls, at 1640 Marietta Street, Charleston, SC 29406-3723, this 2<sup>nd</sup> day of January, 2015.



LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2<sup>nd</sup> day  
of January, 2015.

 (L.S.)

Notary Public for South Carolina  
My Commission Expires: July 3, 2023.