

**ORIGINAL**

**RECEIVED**

NOV - 5 2015

**S.C. Supreme Court**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Darlington County

R. Ferrell Cothran, Jr., Circuit Court Judge  
\_\_\_\_\_

DERRICK JAVARD GEORGE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002429  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
PURSUANT TO AUSTIN V. STATE  
\_\_\_\_\_

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

INDEX

INDEX..... 1

ISSUE PRESENTED .....2

STATEMENT .....3

ARGUMENT .....5

CONCLUSION .....9

PETITION TO BE RELIEVED AS COUNSEL.....10

ISSUE PRESENTED

Did the PCR court err in failing to find counsel ineffective for not insuring that petitioner's guilty plea was entered freely, voluntarily and knowingly?

## STATEMENT

In March 2011, the Florence County Grand Jury indicted Derrick George on the charge of armed robbery (AR). In May 2011, the Darlington County Grand Jury indicted Derrick George on two counts of armed robbery and carrying a concealed weapon by an inmate. On August 29, 2011, Petitioner George appeared before the Honorable Howard P. King and entered a guilty plea to three counts of AR and carrying a concealed weapon by an inmate which included both the Florence and Darlington County charges. App. 3, ll. 1 – 25; App. 12, ll. 1 – 16. Petitioner George was represented by John M. Ervin, III, and the state was represented by John Charles Jepertinger and John W. Holt. App. 1. Judge King accepted the recommendation by the state for thirteen years on the three armed robberies and ten years on the weapon charge with all sentences to run concurrently. App. 20, ll. 25 – App. 21, ll. 25. Petitioner George attempted to file an appeal from his guilty plea. The Court of Appeals issued an order requiring George to file an identification of the issues pursuant to Rule 203 (d) (1) (B) (iv), SCACR. George's plea attorney had asserted that there were no issues raised during the guilty plea or sentence for appeal. App. 74.

On August 29, 2012, George filed his first PCR application. (2012-CP-16-0735). The state filed a return on January 17, 2013. An evidentiary hearing was held on July 17, 2013 before the Honorable R. Ferrell Cothran, Jr. George was represented by Parker E. Howle, and the state was represented by Karen C. Ratigan. App. 36. On August 27, 2013, Judge Cothran issued an order denying George's PCR application and dismissing it with prejudice. App. 57 – App. 63. George filed a notice of appeal from Judge Cothran's order which the Supreme Court dismissed as untimely on October 22, 2013. App. 89.

On November 26, 2013, George filed a second PCR application, (2013-CP-16-93). The state filed a return on June 2, 2014. A hearing was held on July 21, 2014 before the Honorable Thomas

A. Russo. George was represented by Tristan M. Shaffer, and the state was represented by Joshua L. Thomas. App. 95. On August 29, 2014, Judge Russo issued an order granting George a belated appeal of his first post-conviction relief action pursuant to Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395 (1991). App. 102-App. 103. George's PCR attorney filed a notice of appeal. This petition follows. A petition for a writ of certiorari is filed simultaneously with this petition.

## ARGUMENT

The PCR court erred in failing to find counsel ineffective for not insuring that petitioner's guilty plea was entered freely, voluntarily and knowingly.

Petitioner George pled guilty on August 29, 2011 to three counts of armed robbery and carrying a concealed weapon by an inmate. He was sentenced to a total of thirteen years. App. 1 – App. 22. The three armed robberies were from three different incidents. The first incident occurred September 22, 2010 in Florence when George and a co-defendant were charged with robbing the Panther's Convenience Store with a handgun. App. 6, ll.15 – 25.

The second incident occurred September 24, 2010, when George was charged with robbing the B.P. Station in Darlington of \$800 while armed with a handgun. App. 9, ll. 11 – 23. The third incident occurred in Darlington where he was charged with robbing the SavWay store with a handgun on November 13, 2010. He took \$45. On that same date, while he was incarcerated, two small razor blades were found on his person. George said that the blades were issued at the jail, and he forgot to return them. He still pled guilty to carrying a concealed weapon by an inmate. App. 7, ll. 21 – App. 9, ll. 10.

George had waived venue in Florence County and agreed to plead guilty to the charges from both counties in Darlington. App. 3, ll. 1 – 25. The Florence solicitor offered a negotiated sentence of thirteen for the AR in Florence to run concurrent with the Darlington sentences. A strong armed robbery charge was dismissed. App. 3, ll. 4 – 25. The Darlington solicitor recommended a sentence of thirteen years. App. 12, ll 1 – App. 13, ll. 9. The judge sentenced George to a total of thirteen years. App. 20, ll. 25 – App. 21, ll. 22.

At his PCR hearing on July 17, 2013, Petitioner George testified that his plea attorney was ineffective because he allowed George to plead guilty when George had a mental illness and did not

understand the charges. George said he did not remember committing the crimes. His diagnosis was psychosis and antisocial personality. He was taking medication at that time and told his attorney he did not want to go forward. The medications were Seroquel, Cylexin, and Visceral. App. 39, ll. 1 – App. 43, ll. 6. George voluntarily admitted himself to the Department of Mental Health (DMH) in June 2010. He was evaluated June 7, 2010, and presented a copy of that evaluation to the PCR judge. George told his plea counsel about this admission and evaluation at DMH but his attorney did nothing about it. He felt his attorney pressured him to plead guilty as his attorney told him he would get life in prison if he did not take the plea. App. 41, ll. 1 – App. 43, ll. 25.

George's plea counsel did not tell the plea judge about George's history of mental illness. George felt he did not enter his plea voluntarily as he felt pressured to plead guilty. App. 43, ll. 23 – App. 44, ll. 23.

George's plea attorney testified at the PCR hearing that he did not remember George telling him of any mental illness. Plea counsel saw no signs of mental illness and felt George was competent and understood what he was doing. App. 48, ll. 11 – App. 49, ll. 25. Counsel felt that George would have been found guilty at trial as the evidence in Darlington was overwhelming. The thirteen year sentence was in George's best interest. App. 50, ll. 1 – App. 51, ll. 12.

At the PCR hearing, the plea judge asked PCR counsel if he were going to make the mental health evaluation a part of the record. PCR counsel said no. The judge then read that the evaluation reported that George was malingering and did not diagnose any mental health issues. The report held that George was faking his mental illness. App. 55, ll. 1 – 24.

The PCR judge, Judge Ferrell Cothran, dismissed George's PCR application by finding that George's guilty plea was voluntary and knowing. The judge found that George did not meet his burden of proof that plea counsel failed to render reasonably effective assistance under prevailing

professional norms. App. 57 – App. 63. The judge found George’s testimony to not be credible. However, he found plea counsel’s testimony to be credible. App. 60 – App. 62.

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 one 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. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006); 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 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

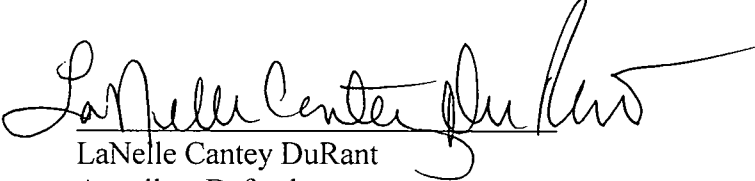
or privilege”. State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982). Judges are required to give the defendant an explanation of the defendant’s waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975).

George’s plea counsel was ineffective for not insuring that George wanted to plead guilty. Counsel was ineffective for not having George evaluated by DMH for competency and the ability to distinguish right from wrong.

CONCLUSION

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

Respectfully submitted,

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of November, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

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

---

DERRICK JAVARD GEORGE,                      PETITIONER,

V.

STATE OF SOUTH CAROLINA,                      RESPONDENT

APPELLATE CASE NO. 2014-002429

---

PETITION TO BE RELIEVED AS COUNSEL

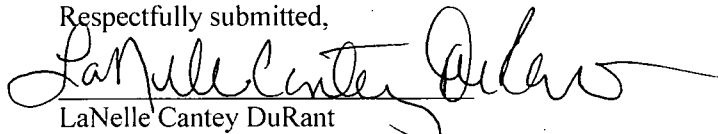
---

Counsel for Derrick J. George 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 July 21, 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 Derrick J. George.

Respectfully submitted,



LaNelle Cantey DuRant  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 5th day of November, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Darlington County

R. Ferrell Cothran Jr., Circuit Court Judge

---

DERRICK JAVARD GEORGE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT


APPELLATE CASE NO. 2014-002429

---

CERTIFICATE OF SERVICE


---

I certify that a true copy of the Johnson petition for writ of certiorari pursuant to Austin v. State and a copy of the appendix in this case have been served on Jessica Kinard, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Derrick J. George, #241851, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 5th day of November, 2015.

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day  
of November, 2015.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina

My Commission Expires: October 30, 2022.