

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Roger E. Henderson, Circuit Court Judge  
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**RECEIVED**

APR 18 2016

**SC SUPREME COURT**

TOMMY MONTGOMERY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002163  
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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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LANELLE CANTEY DURANT  
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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 Montgomery's guilty plea was entered freely, voluntarily, and knowingly because counsel did not fully investigate Petitioner's case by not evaluating the DNA the second time it was collected and for not investigating potential witnesses?

## STATEMENT

On June 23, 2006, Pamela Fyalls was found murdered in Charleston where she died from blunt sharp trauma to her neck, head, chest, and from strangulation. The murder weapon was deemed to be a bottle found next to her body. The solicitor said there was a “sexual undertone to the scene.” The case went cold after the police investigation produced no significant leads. App. 17, 22-App. 18, ll. 10.

In December 2009, Petitioner Montgomery pled guilty but mentally ill (GBMI) to killing his roommate, Brandon Jenkins, by stabbing him almost one hundred times. Again, the solicitor told the plea court there was a “sexual undertone or allegation of the incident.” Petitioner Montgomery received a thirty year sentence. His DNA was collected when he went to prison. His DNA was found to match the semen found in the mouth of Pamela Fyalls and to skin cells found under her nails. Montgomery’s fingerprints were found on the bottle as well as the deceased’s DNA which made the bottle the likeliest murder weapon. When he was arrested, the solicitor said that Montgomery admitted having sex with Pamela Fyalls but denied killing her. App. 18, ll. 15 – App. 20, ll. 3.

On December 12, 2011, the Charleston County Grand Jury indicted Petitioner Montgomery on the charge of murder. App. 106; App. 94. On June 26, 2013, Montgomery appeared before the Honorable R. Markley Dennis and entered a guilty plea to murder as indicted. App. 107; App. 95; App. 3, ll. 1 – 22. Montgomery was represented by Meghan Erhlick, and the state was represented by Burns Wetmore. App. 1.

At the guilty plea, the solicitor told the judge that this was a negotiated sentence for forty years to which all parties agreed. App. 3, ll. 1 – 22; App. 7, ll. 9 – 22. Montgomery agreed when the judge stated that one benefit of the negotiated sentence was that Montgomery was avoiding a

life sentence. App. 10, ll. 3 – 23. Montgomery pled guilty pursuant to North Carolina v. Alford.<sup>1</sup> App. 8, ll. 23 – 25.

At the plea, defense counsel told the court that Montgomery had a “horrific childhood.” He had flashbacks that are “so intense” for him. Counsel said he was getting mental health treatment at Leiber Prison and was doing well. Counsel agreed that the forty year sentence was “appropriate.” App. 23, ll. 10 – App. 24, ll. 24.

The plea judge accepted the negotiated sentence and sentenced Montgomery to forty years in prison. App. 25, ll. 4 – App. 26, ll. 18.

Petitioner Montgomery did not appeal his conviction nor sentence. App. 95. On July 11, 2013, Montgomery filed an application for post-conviction relief (PCR). The state filed a return and motion to dismiss on December 3, 2013. App. 35 – 37. A conditional order of dismissal was issued by the Honorable Roger M. Young, Sr. on December 12, 2013 granting Montgomery twenty days to respond as to why the order should not become final. App. 39 – App. 41. On January 3, 2014, Montgomery’s PCR counsel filed an amended application for post-conviction relief. App. 42- App. 43. On January 22, 2014, Judge Roger Young filed an order granting a full PCR evidentiary hearing to Montgomery. App. 44.

An evidentiary hearing was held on July 21 and July 31, 2015 before the Honorable Roger E. Henderson. Montgomery was represented by Rodney D. Davis, and the state was represented by J. Rutledge Johnson. App. 45.

At his PCR hearing, Montgomery told the court that he wanted a new trial so “he could be able to his fair chance.” App. 48, ll. 24 – App. 49, ll. 3. The judge explained that if he granted

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<sup>1</sup> North Carolina v. Alford, 400 U.S. 25 (1970).

Montgomery's PCR application, that Montgomery could receive a life sentence due to his prior murder conviction. App. 49, ll. 4 – 24.

Montgomery told the PCR judge that he had mental health problems and was on medication. His diagnoses were bi-polar and PTSD. App. 50, ll. 21 – App. 52, ll. 17.

Montgomery testified that his plea counsel was ineffective because she did not investigate his case adequately. He explained that he and his plea counsel did not receive some of the discovery related to the fingerprint evidence on the murder weapon and DNA evidence until six days before his guilty plea. App. 56, ll. 22 – App. 57, ll. 22. Detective Goldstein had to do a second buccal swap because of a problem with the first one. The second results were not received until just before the guilty plea. App. 64, ll. 1 – 19. According to Montgomery, the forensic evidence which consisted of the DNA and fingerprints, was the evidence that linked him to this crime. App. 63, ll. 16 – 23.

Then Montgomery told the PCR court that he felt he had no option but to plead guilty. He explained that because of his previous charge and the evidence “stacked against him “in this case, he felt if he went to trial he would get a life sentence. He said the reason he took the guilty plea was to avoid a life sentence. App. 59, ll. 3 – 20; App. 68, ll.25 – App. 69, ll. 12.

Plea counsel testified at the PCR hearing that she had the fingerprint and palm prints on the bottle which was believed to be the murder weapon independently analyzed. She also had the first DNA evidence analyzed but not the second tests. She explained that she received the first DNA tests results and had those independently analyzed. SLED discovered there was a problem with the search warrant for those tests. Therefore, a second search warrant was obtained for s second DNA test. Those results were received by counsel shortly before the plea so there was not time to have

that DNA test analyzed. App. 73, ll. 15 – App. 74, ll. 25. Counsel testified that the police tested the DNA of other people but no explanation was given as to the reason. App. 75, ll. 2 – 20.

Counsel said that she represented Montgomery on his first murder charge and had him mentally evaluated “multiple times” as he had “significant mental health problems.” App. 77, ll. 1 – 22. She had an investigator “look into everything that they knew about his case.” She felt they did all they could as far as an investigation of the case. App. 79, ll. 2 – 24. Counsel testified that Montgomery told her that the reason he was taking the guilty plea was to “be able to have hope of being released to his family at some point.” App. 83, ll. 23 – App. 84, ll. 1.

The PCR judge issued an order on September 12, 2015 denying Montgomery’s PCR application and dismissing it with prejudice. App. 94 – App. 104. The judge held that he found Montgomery’s testimony not credible and found plea counsel’s testimony credible. App. 100. The PCR judge wrote that he found plea counsel provided effective assistance of counsel. The order provided that Montgomery made the decision to plead guilty “freely and voluntarily,” and that counsel effectively represented Montgomery regarding the DNA and fingerprint and palm print evidence. App. 100 – App. 101. The PCR judge held that Montgomery failed to meet his burden of proof that plea counsel’s performance was deficient or that he was prejudiced. App. 102.

Montgomery’s PCR 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 Montgomery's guilty plea was entered freely, voluntarily, and knowingly because counsel did not fully investigate Petitioner's case by not evaluating the DNA the second time it was collected and for not investigating potential witnesses.

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*.

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,

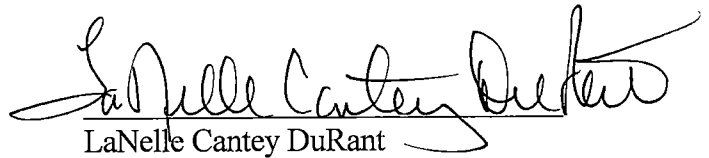
and the right to trial by jury. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). The record must show with certain certainty that the plea is “an intentional relinquishment or abandonment of a known right or privilege”. State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982). Judges are required 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).

Plea counsel was ineffective for not having the second DNA independently analyzed even if she had to ask for a continuance because the forensic evidence was the evidence linking Montgomery to this crime. Counsel should have investigated more thoroughly the other suspects whose DNA the police checked. Without this information on the DNA and the other potential suspects, Montgomery’s guilty plea was not knowingly and intelligently and freely entered.

CONCLUSION

Based on the above, certiorari should be granted, 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 18th day of April, 2016.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO CHARLESTON COUNTY  
ROGER E. HENDERSON, CIRCUIT COURT JUDGE

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TOMMY MONTGOMERY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002163

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Tommy Montgomery 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 23, 2015. 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 Tommy Montgomery.

Respectfully submitted,

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

LaNelle Cantey DuRant  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 18th day of April, 2016

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County

Roger E. Henderson, Circuit Court Judge

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TOMMY MONTGOMERY,

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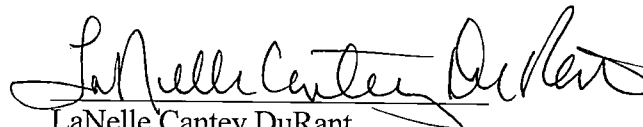
APPELLATE CASE NO. 2015-002163

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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 J. Rutledge Johnson, Esquire, and Tommy Montgomery, #346324, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 18th day of April, 2016.

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day  
of April, 2016.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: March 1, 2026.