STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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AUG 01 2017

S.C. SUPREME COURT

Certiorari to Florence County

Honorable D. Craig Brown, Circuit Court Judge

BOBBY LEE PARNELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-000224

JOHNSON PETITION FOR WRIT OF CERTIORARI

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South Carolina Commission on Indigent Defense
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ISSUE PRESENTED

Did the PCR court err in not finding plea counsel ineffective for not conveying to Petitioner a plea offer of zero to ten years on the assault and battery (A&B) first degree charge which was prejudicial to Petitioner because it made his guilty plea unknowingly and involuntarily entered?

STATEMENT

On June 29, 2013, Petitioner Parnell was at Mary's Place in Lake City when he attacked another man, Tyrone Cooper, during an alleged robbery. The man had to go to the hospital due to the extent of his injuries. There were multiple eyewitnesses to the incident. App. 5, ll. 3 – 14.

On July 2, 2013, the Lake City Police received a call of an assault occurring at an abandoned residence. When the police arrived, they found Petitioner Parnell, the woman Ms. Morris, and other witnesses. It was learned that Parnell had begun assaulting the woman at another location, and then had taken her to the second location of the abandoned house. The woman had extensive and severe injuries which included broken facial bones, broken nose, and teeth knocked out. App. 5, ll. 15 – App. 6, ll. 23.

Parnell was arrested and charged with assault and battery of a high and aggravated nature (ABHAN) and kidnapping from the second incident on July 2, 2013, and with strong arm robbery and assault and battery first degree in the first incident on June 29, 2013. App. 79 – App. 83. On April 17, 2014, Petitioner Parnell appeared before the Honorable Michael G. Nettles, and entered a guilty plea to assault and battery first degree from the June 29, 2013 incident, and to ABHAN from the July 2, 2013 incident. Parnell was represented by Emily Crayton, and the state was represented by Matthew R. Ozment. App. 1.

At the plea, Ms. Morris' aunt told the plea court that the woman and Parnell had been living together. However, he was abusive and Ms. Morris had moved out. He found her and kidnapped her. App. 7, ll. 1 – 24. Other people saw Parnell beating her but no one tried to stop him. App. 14, ll. 1 – App. 15, ll. 25.

During the plea, the judge asked if the only plea negotiations were for the sentences to run concurrent. Plea counsel and the solicitor responded that it was. Parnell agreed that that was his understanding as well. App. 10, ll. 1 – 15.

The judge sentenced Parnell to 289 days which was time served on the assault and battery first degree. The judge then sentenced Parnell to twelve years on the ABHAN. App. 20, ll. 10 – 20. Parnell did not appeal his convictions nor sentences. App. 71.

On June 12, 2014, Petitioner Parnell filed an application for post-conviction relief (PCR). The state filed a return on November 10, 2014. An evidentiary hearing was held on November 7, 2016 before the Honorable D. Craig Brown. Parnell was represented by Tristan Shaffer, and the state was represented by Lindsey McAllister. App. 44.

At the PCR hearing, Parnell's plea counsel, Emily Crayton, testified that she never received a plea offer of zero to ten years. However, when the solicitor allowed Parnell to plead to assault and battery first instead of the strong arm robbery, the amount of time he could receive on that charge was reduced by five years since the assault and battery sentence was zero to ten years. She said:

> "So I guess if you want to look at it like that way on that charge, he was given a zero to ten offer."

App. 48, ll. 11 – App. 49, ll. 24; App. 51, ll. 1 – App. 52, ll. 5.

Parnell did not receive any offers that were lower than the sentence he received. App. 53, ll. 20 – App. 54, ll. 2.

Counsel testified that she and Parnell never discussed a trial as the evidence against him was "pretty overwhelming." App. 54, ll. 23 – App. 55, ll. 25.

Petitioner Parnell testified that he met his plea counsel for the first time the day before his guilty plea. He understood form her that the state was willing to drop the kidnapping and strong arm robbery charges and let him plead guilty to the assault and battery first degree and ABHAN.

The state was going to ask for ten years at 85%. Parnell said no because he wanted to go home. Counsel went and talked to the solicitor again. When she returned, she told Parnell that the state was willing to give him the offer of zero to ten years. Again he said no because he did not want to stay in jail. He testified that he was "not denying that he was guilty." He also thought he was pleading to a nonviolent charge. App. 57, ll. 17 – App. 60, ll. 23. According to Parnell, if he had known it was a violent crime, he would not have pled guilty. App. 61, ll. 1 – 15.

When the judge told him that he would have to serve 85 percent, Parnell though that was just a formality. App. 61, ll. 16 – 25. Although he told the judge that he understood there were no plea negotiations other than concurrent sentences, he really did not because he had signed the plea agreement the day before for zero to ten. App. 63, ll. 1 – App. 64, ll. 9. Parnell said the plea agreement was the sentencing sheet. App. 60, ll. 9 – 23.

The PCR judge denied Parnell's PCR application and dismissed it with prejudice. App. 78. The judge found Parnell's testimony to be not credible while he found plea counsel's testimony to be credible. App. 75. The order provided that Parnell's guilty plea was entered "freely, voluntarily, knowingly, and intelligently." App. 75. The only issue at the PCR hearing was that plea counsel was ineffective for not conveying a plea offer of zero to ten years on the assault and battery first degree. App. 71; App. 73. Although Parnell said he believed that the plea offer was zero to ten on both charges, the order provided that plea counsel said she never received a plea offer for a sentence less than the sentence Parnell received of twelve years and

289 days. App. 75. The judge wrote that Parnell failed to prove either prong under the Strickland test that plea counsel was ineffective.

This appeal follows.

ARGUMENT

The PCR court erred in not finding plea counsel ineffective for not conveying to Petitioner a plea offer of zero to ten years on the assault and battery (A&B) first degree charge which was prejudicial to Petitioner because it made his guilty plea unknowingly and involuntarily entered.

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).

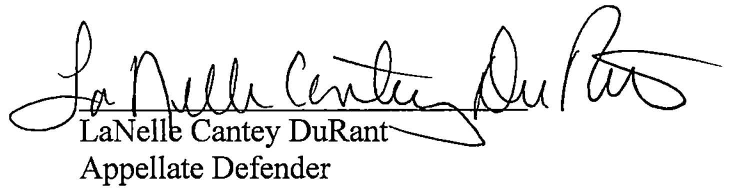
Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the

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).

The PCR court erred in not finding plea counsel ineffective for failing to insure that Petitioner Parnell understood the charges and sentences and plea offers. PCR counsel argued that Parnell was confused about "what exactly was going on." Although Parnell told the judge he understood, counsel argued that might not necessarily be true. Because of his confusion, Parnell's plea was entered not knowingly nor intelligently. App. 66.

CONCLUSION

Based on the above, certiorari should be granted, petitioner's conviction and sentence reversed, and the case remanded.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of August, 2017.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Bobby Lee Parnell states:

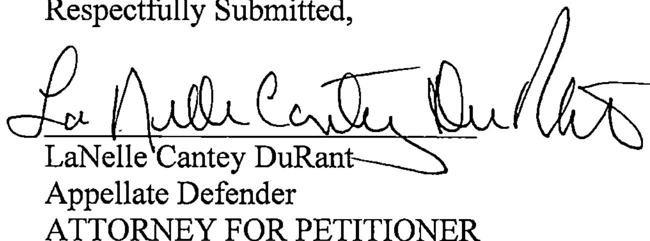
1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. She has reviewed the record of petitioner's trial before Judge D. Craig Brown, which was held on November 7, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Bobby Lee Parnell.

Respectfully Submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 1st day of August, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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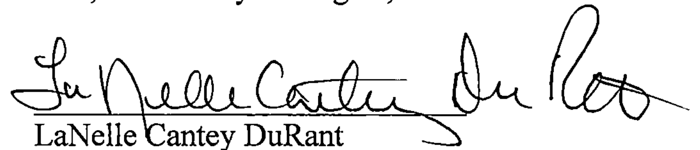
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Bobby Lee Parnell, #287367, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 1st day of August, 2017.



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 1st day of August, 2017.

_________________ (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.