

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

 ORIGINAL

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Certiorari to Cherokee County

Honorable Robin B. Stilwell, Circuit Court Judge

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LEE EDWARD TATE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001304

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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) 734-1330

ATTORNEY FOR PETITIONER

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The PCR court erred in denying Petitioner Tate a belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E. 2d 35 (1974) because Petitioner stated that he did not knowingly and intelligently waive his right to an appeal and the Court failed to find plea counsel ineffective for not filing an appeal for Petitioner. ....5

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**ISSUE PRESENTED**

Did the PCR court err in denying Petitioner Tate a belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E. 2d 35 (1974) because Petitioner testified that he did not knowingly and intelligently waive his right to an appeal and the Court failed to find plea counsel ineffective for not filing an appeal for Petitioner?

## STATEMENT

On October 22, 2012 about 8:30 in the evening, Petitioner Tate and Co-defendant Guyton entered a local convenience store in Cherokee County and demanded money. Petitioner Tate was armed with an AR-15 assault rifle. The co-defendant grabbed the money from the register and the men ran. The shop keeper was able to access his gun and fired shots at the two men as they ran. Petitioner Tate was hit by one of the shots. App. 8, ll. 1 – 13.

Petitioner Tate was transported to the hospital. He provided a full confession regarding his involvement and the incident. He indicated that he had just been released from jail on another charge and needed money to pay the people who paid his bond. The solicitor stated that the charge for which he was incarcerated was threatening a law enforcement officer who was a family member. App. 8, ll. 14 – App. 9, ll. 13.

In January 2013, the Cherokee County Grand Jury indicted Petitioner Tate for armed robbery (AR). App. 62 – App. 63. On August 11, 2014, Tate appeared before the Honorable Frank Addy and entered a guilty plea to AR. Tate was represented by Michael Berry, and the state was represented by Matt Kendall. App. 1. The state had offered a negotiated sentence of twenty-two years suspended to the service of seventeen years and five years probation. The charge for threatening a law enforcement officer was dismissed. App. 4, ll. 2 – 8; App. 9, ll. 7 – 13.

The plea judge accepted the negotiated sentence and sentenced Petitioner Tate to the negotiated sentence of twenty-two years. App. 23, ll 15 – App. 24, ll. 25. Petitioner Tate did not appeal the guilty plea nor sentence. App. 58.

On November 30, 2015, Petitioner Tate filed an application for post-conviction relief (PCR). App. 27. The state filed a return on September 28, 2016. App. 34 – App. 41. An

evidentiary hearing was held on March 21, 2017 before the Honorable Robin B. Stilwell. Petitioner Tate was represented by Rodney W. Richey, and the state was represented by Alicia A. Olive. App. 42. At the hearing, the state told the court that part of the return the state filed was a partial motion to dismiss because Petitioner Tate had failed to file his PCR application within the one year period of the statute of limitations. Therefore, the state moved to dismiss all of Tate's allegations except the allegation that he was denied his right to a direct appeal. App. 44, ll. 1 -21.

PCR counsel agreed that Tate's PCR application was filed two months late because he was in lockdown at the prison. PCR counsel said they would provide "brief" testimony on Tate's appeal. Counsel stated: "And that's what we will give." App. 44, ll. 25 – App. 45, ll. 12.

Petitioner Tate testified he filed his PCR application because he was on lockdown and could not get the materials he needed to file the appeal from his guilty plea. He said he discussed an appeal with his attorney and Tate's understanding was that he could appeal and come back for "a resentencing" and get less time. He claimed that he did ask his attorney to file an appeal. App. 46, ll. 1 - App. 47, ll. 25.

The only reason he took the seventeen years was because he thought he would be able to come back and get resentenced. App. 48, ll. 21 – App. 49, ll. 21. His issue on appeal would have been for less time on his sentence. App. 1 – 6.

Plea counsel testified that it was his practice to inform his client about his right to file an appeal within ten days of the sentence—even on simple possession charges. Counsel claimed that Tate never asked him to file an appeal. Plea counsel testified: "With a negotiated sentence, I would never have advised him that we would have had any option to come back." App. 50, ll. 19 – App. 52, ll. 25.

The PCR judge issued an order on May 24, 2017 denying Petitioner Tate's PCR application and dismissing it with prejudice. App. 57 – App. 61. The judge found that Tate failed to prove by a preponderance of the evidence that he was not advised of his right to appeal. The judge found: "Further, there is no indication in the record that Applicant had any basis to appeal from his guilty plea." App. 59. At the PCR hearing, the judge stated: "in a negotiated plea there really aren't any appellate issues." App. 54, ll. 13 – App. 55, ll. 3.

The judge found that Tate's remaining allegations had to be procedurally dismissed as "barred by the applicable statute of limitations set forth in the Uniform Post-Conviction Procedure Act." The judge cited the Act which provides that PCR applications must be filed within one year after the entry of a conviction or one year after the sending of the remittitur or the final decision upon an appeal. App. 60.

Tate's PCR counsel filed a notice of appeal. This petition follows.

## ARGUMENT

The PCR court erred in denying Petitioner Tate a belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E. 2d 35 (1974) because Petitioner stated that he did not knowingly and intelligently waive his right to an appeal and the Court failed to find plea counsel ineffective for not filing an appeal for Petitioner.

In Roe v. Flores-Ortega, 528 U.S. 470 (2000), the United States Supreme Court held that the better practice was for counsel routinely to consult with defendant regarding the possibility of an appeal.

In Jones v. State, 382 S.C. 589, 677 S.E.2d 20 (2009), the Supreme Court held that counsel must advise a defendant of the right to appeal from a guilty plea when the defendant inquires about an appeal.

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).

Plea counsel was ineffective for not ensuring that Petitioner Tate understood the legal aspects of an appeal which included that an appeal did not mean he would get a sentence reduction. Plea counsel was not sure that he discussed an appeal with Tate. Tate claimed that he asked his attorney to file an appeal because he wanted a sentence reduction. The PCR court erred in not granting a belated appeal to Tate and for not finding plea counsel ineffective for not filing an appeal for Tate.

**CONCLUSION**

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

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a long horizontal flourish extending to the right.

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of January, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Cherokee County

Honorable Robin B. Stilwell, Circuit Court Judge

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LEE EDWARD TATE,

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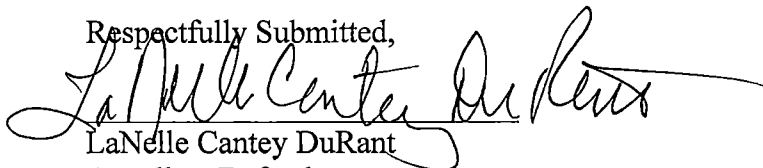
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Lee Edward Tate states:

1. She is 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 Robin B. Stilwell, which was held on March 21, 2017, 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 Lee Edward Tate.

Respectfully Submitted,



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of January, 2018.

**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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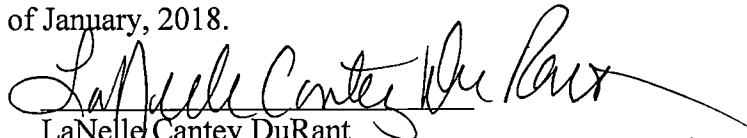
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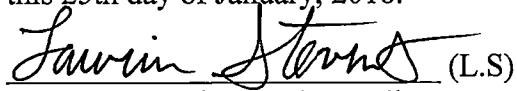
RESPONDENT

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CERTIFICATE OF SERVICE  
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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 Valerie Garcia Giovanoli, 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 Lee Edward Tate, #328637, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 25th day of January, 2018.

  
LaNelle Cantey DuRant  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 25th day of January, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027.