

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable Michael G. Nettles, Circuit Court Judge

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KASHAUN BANKS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000232

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

LaNelle Cantey DuRant  
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ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

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**ISSUE PRESENTED**

Did the PCR court err in not finding trial counsel ineffective for failing to object to the trial judge's instruction to the jury in the court's opening charge that this trial was a search for the truth which was prejudicial to Petitioner Banks because those remarks shifted the burden of proof to Petitioner?

## STATEMENT

On October 15, 2011, Keisha Holmes and Tenille Wilson went to their jobs at the Exxon gas station and convenience store on the corner of Rivers Avenue and McMillan Avenue in North Charleston. Later that day, a man with his face covered, entered the store with a gun, and began screaming at the clerks to give him the money. App. 220, ll. 24 – App. 221, ll. 9; App. 230, ll. 7 – App. 231, ll. 8; App. 234, ll. 24 – App. ll. 4.

After they gave the man the money, he fled the store. The clerks immediately called 911. The police arrived and began the search for the robber. App. 221, ll. 10 – App. 222, ll. 14; App. 235, ll. 8 – 16. Officer McAlhaney responded to the call but other officers had already arrived. He then began searching the area. When he drove his car into the nearby church driveway, he saw Petitioner Banks coming from the back of the church. When they see each other, Petitioner ran. Officer McAlhaney followed him and finally confronted Petitioner Banks. Banks was wearing a black, nylon backpack. Because the report said a weapon was involved, the officer conducted a pat down. In the backpack, the officer found a pellet gun which felt like a pistol. He also found gloves, and money in Banks' pants' pockets. App. 255, ll. 1 – App. 267, ll. 3.

On December 12, 2011, the Charleston County Grand Jury indicted Petitioner Banks on the charge of armed robbery (AR). App. 660 – App. 662. On April 22-25, 2013, Petitioner Banks proceeded to trial before the Honorable Kristi Lea Harrington and a jury. App. 1. Petitioner Banks was represented by Andrew D. Grimes and Megan S. Ehrlich. The state was represented by E. Culver Kidd and Elizabeth Riddle. App. 2.

At the beginning of the trial, the trial judge in his opening remarks told the jury:

While all of these things may be true at times, please remember this trial is not for entertainment. **It is a fundamental part of our democracy. It is a**

**search for the truth in an effort to make sure that justice is done between the parties before you here today. [emphasis added]**

App. 213, ll. 11 – App. 241, ll. 3.

In the very next sentence, the judge said:

Please remember **searching for the truth [emphasis added]** and making sure that justice is done is often slow, deliberate and repetitive...

App. 214, ll. 4 – 6.

There was no objection by trial counsel. App. 213, l. 11 – App. 214, ll. 24.

At the beginning of the state's opening remarks to the jury, the solicitor told the jury they had taken an oath to render a **true** verdict. [emphasis added].

The state had the surveillance video, which showed the robbery taking place, from the Exxon station admitted into evidence. App. 231, ll. 9 – App. 232, ll. 20. The jury returned a verdict of guilty. App. 528, ll. 4 – 22.<sup>1</sup> The judge sentenced Banks to twelve years incarceration. App. 546, ll. 4 – 23. Banks' attorney filed a notice of appeal. The appeal was perfected by Blakely Lynn Molitor. The Court of Appeals affirmed Banks' conviction and sentence. State v. Banks, 2014-UP-479 (Ct. App. filed December 23, 2014). App. 649.

On July 10, 2015, Banks filed an application for post-conviction relief (PCR). The state filed a return on February 23, 2016. An evidentiary hearing was held on December 7, 2017 before the Honorable Michael Nettles. Banks was represented by James K. Falk, and the state was represented by Megan Jameson. App. 583.

Petitioner Banks' PCR counsel told the court at the beginning of the hearing that one of the issues he was raising was that trial counsel should have objected to the trial judge's opening

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<sup>1</sup> Petitioner Banks had a jury trial before the Honorable Stephanie P. McDonald on July 18, 2012 which ended in a mistrial.

charge where the judge told the jury that the trial was a search for the truth. The judge said: “We will address that issue certainly.” App. 589, ll. 22 – App. 590, ll. 17.

When Banks testified at the hearing, PCR counsel noted that Banks’ physical condition had changed since the trial as Banks was in a wheelchair. Banks said that he no longer had the use of his legs and had developed a stutter condition. However, Banks did not know the condition nor cause. PCR counsel noted that Banks had been in special education classes. App. 624, ll. 20 – App. 625, ll. 18.

Banks testified that his trial lawyer, Andrew Grimes, sent Banks a letter about Grimes’ health problems at Banks request. Banks thought Grimes was ineffective due to his health problems. App. 632, ll. 1 – 7.

Megan Ehrlich testified as she was second chair to Andrew Grimes during Banks’ trial.<sup>2</sup> Ms. Ehrlich testified that the trial attorneys did not object to the judge’s opening remark to the jury that a trial was a search for the truth. She said she did not remember any discussion about that issue as being burden shifting. However, she testified that they “would normally object to that.” App. 591, ll. 1 – App. 592, ll. 4.

The PCR judge ruled on the record at the PCR hearing. The judge found regarding the opening remarks by the judge to the jury that a trial was a search for the truth had been in the jury charge for years, and many people had been found not guilty with that charge included. The judge believed that the charge had “little effect” and did not adversely affect the results of Banks’ trial. App. 644, ll. 3 – App. 645, ll. 12.

The judge found that the South Carolina Supreme Court in State v. Beatty, 423 S.C. 26, 813 S.E.2d 502 (2018) ruled that the charge was burden shifting and told courts that it “was

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<sup>2</sup> Andrew Grimes was lead counsel but passed away in September 2014 before the PCR hearing.

probably not a good idea to use it.” However, he said that the Supreme Court found that it was not prejudicial. App. 644, ll. 3 – 25.

On February 1, 2018, the PCR judge filed an order denying Banks’ PCR application and dismissing it with prejudice. App. 648 – App. 659. The judge found Banks’ allegation that trial counsel should have objected to the judge’s opening charge was without merit. The judge wrote that at the time of Banks’ trial in 2013, the jury charge used by the trial court -to seek the truth- was widely used by judges and was similar to the approved charges provided by the Supreme Court for judges. Therefore, because at the time of Banks’ trial the charge was proper, trial counsel was not ineffective for failing to object. The judge also said that there was not a final ruling in Beaty at the time of the judge’s order following rehearing. App. 656 – App. 659.

PCR counsel filed a notice of appeal. This petition follows.

## ARGUMENT

The PCR court erred in not finding trial counsel ineffective for failing to object to the trial judge's instruction to the jury in the court's opening charge that this trial was a search for the truth which was prejudicial to Petitioner Banks because those remarks shifted the burden of proof to Petitioner.

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).

In Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018), the Supreme Court held that to satisfy the prejudice prong of an ineffective assistance of counsel claim, an applicant must demonstrate there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. The court also held that the PCR court should also consider the

strength of the state's case in light of all of the evidence presented as well as considering the impact of trial counsel's error.

The Supreme Court then found in Smalls that for the evidence to be overwhelming such that it precludes a finding or prejudice with regard to an ineffective assistance of counsel claim, the evidence must include something conclusive such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the Strickland standard of a "reasonable probability the factfinder would have had a reasonable doubt" cannot possibly be met.

In State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018), the Supreme Court held that it was error for the trial court to inform the jury that its role was to search for the truth. Although the court said it was error, the Court found that Appellant had not shown prejudice. Therefore reversal was not warranted. The Court in the conclusion stated;

We instruct trial judges to omit any language, whether in remarks to the jury or in an instruction, which might have the effect of lessening the state's burden of proof in a criminal case. Such language includes, but is not limited to any language suggesting to the jury that its task is to "search for the truth" or to find "true facts", or that the jury should render a "just verdict."

State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018).

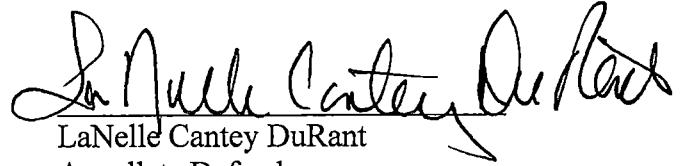
The PCR court erred in not finding trial counsel ineffective for not objecting to the judge's opening remarks to the jury. The Supreme Court specifically ruled that they "instructed" trial courts not to use that prejudicial language. Although Banks' trial was prior to the ruling in Beaty, the standard is "whether an attorney provide representation within the range of competence required in criminal cases." There was a reasonable probability that this issue of the language "to seek the truth" as the role of the jury, had been discussed in the criminal defense bar for a period of time before the Supreme Court ruled in Beaty. The question in PCR

allegations was whether trial counsel's actions were "reasonable under professional norms." Trial counsel in Banks' case was a seasoned criminal defense attorney. He knew how to push an issue to obtain correct action. Therefore, he was ineffective for not objecting and instilling this concept into the minds of judges.

The judge's remarks in Banks' case were prejudicial particularly since they were provided at the beginning of the trial. The remarks gave the jurors the mindset from the beginning that they were there to obtain the truth. The role of the jury was to determine if the state proved beyond a reasonable doubt that Banks was guilty.

**CONCLUSION**

Based on the above, certiorari should be granted, and Petitioner's convictions and sentences reversed, and the case remanded for a new trial.

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant". The signature is written in a cursive style with a large, sweeping flourish at the end.

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of August, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable Michael G. Nettles, Circuit Court Judge

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KASHAUN BANKS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

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PETITION TO BE RELIEVED AS COUNSEL

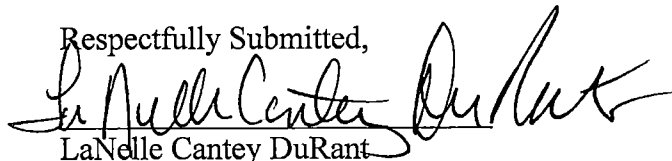
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Counsel for Kashaun Banks states:

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 post-conviction relief hearing before Judge Michael G. Nettles, which was held on December 7, 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 Kashaun Banks.

Respectfully Submitted,



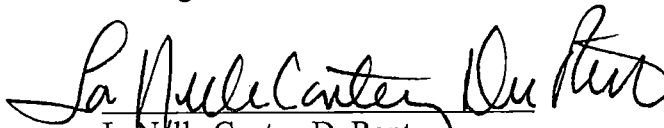
LaNelle Cantey DuRant  
Appellate Defender

This 8th day of August, 2018.

ATTORNEY FOR PETITIONER

**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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ATTORNEY FOR PETITIONER

This 8th day of August, 2018.

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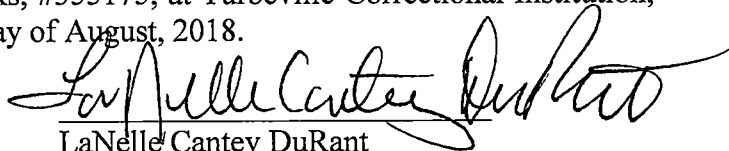
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

—————  
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 Megan Harrigan Jameson, 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 Kashaun Banks, #355175, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 8th day of August, 2018.

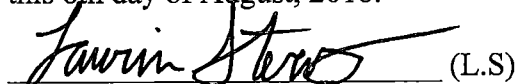


LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 8th day of August, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: July 5, 2027.