

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County  
Edward W. Miller, Circuit Court Judge  
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**RECEIVED**

JAN 31 2013

**S.C. Supreme Court**

KEVIN KING,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212084  
\_\_\_\_\_

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) 734-1343

ATTORNEY FOR PETITIONER

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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 May 2009, the Greenville County Grand Jury indicted Kevin Lindsey King on the charges of first-degree burglary, safecracking, and petit larceny. On May 14, 2009, King appeared before the Honorable G. Edward Welmaker and entered a guilty plea to the indicted charges. He also pled guilty to criminal sexual conduct (CSC) with a minor second degree and petit larceny for which he waived presentment to the grand jury. King was represented by Randall Chambers, and the state was represented by Barbara Tiffin. The judge sentenced King to twenty years on the burglary first charge, fifteen years on the CSC, thirty years on the safecracking suspended to the service of five years and five years probation, thirty days on the petit larceny charges. App. 18, ll. 2 – 23. King did not appeal his convictions or sentences.

On September 2, 2009, King filed an application for post-conviction relief (PCR). The state filed a return on November 24, 2009. An evidentiary hearing was held before the Honorable Edward W. Miller on April 3, 2012. King was represented by Rodney Richey, and the state was represented by Karen Ratigan. On April 30, 2012, Judge Miller issued an order denying King's PCR application, and dismissing it with prejudice. King's attorney filed a notice of appeal. This petition follows.

## 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.

Kevin King was charged with burglary first degree and safecracking where he allegedly broke into a residence in Greenville County on November 14, 2008, and stole two safes, jewelry, and other items. App. 8, ll. 11 – 25. On November 19, 2008, King allegedly entered another residence where he took items valued at \$624. He was charged with petty larceny. King gave statements to law enforcement in both incidents confessing to the crimes. App. 9, ll. 1 – 15. King also admitted to another petty larceny where he took items from Pack Mountain Produce in Taylors. App. 9, ll. 16 – 25.

King was also charged with criminal sexual conduct with a minor second degree where he engaged in consensual sex with his fifteen year old niece. She became pregnant, and gave birth to a child of whom King's parents took custody. App. 10, ll. 1 – 8, App. 70, ll. 12 – App. 73, ll. 5.

The state recommended a sentence of fifteen years on all charges to run concurrently with the sentence he was currently serving. App. 11, ll. 19 – App. 12, ll. 23. King appeared before Judge Pyle on May 15, 2009 for a probation revocation hearing where Judge Pyle revoked ten years which King was serving at the time of his guilty plea. App. 15, ll. 13 – 20.

Judge Welmaker then sentenced King to an incarceration of twenty years to run concurrently with the ten year probation revocation sentence. App. 18, ll. 2 – 22.

At his PCR hearing, King testified that his plea counsel did not effectively represent him, and he wanted a new trial. App. 48, ll. 1 – App. 49, ll. 10. King's complaint was that he was supposed to get fifteen years as his counsel promised him that. His counsel also told him that he could withdraw his plea if the judge did not go along with the state's recommendation. That did not

happen. King said if he did not get fifteen years, then he wanted to have a trial on the burglary, CSC, and safecracking. App. 49, ll. 16 – App. 51, ll. 5.

King's plea counsel testified at the PCR hearing that he probably told King that he would be able to withdraw his plea if Judge Welmaker did not go with the recommendation. Counsel's experience with Judge Welmaker was that the judge would allow a withdrawal. However, judge Welmaker did not give him an opportunity to do that during the plea. Plea counsel also said even after the plea, he thought the judge had given King fifteen years and he told King that. He learned later that King actually got twenty years. App. 62, ll. 6 – App. 65, ll. 11.

The PCR judge ruled that king did not meet his burden of proof in proving that plea counsel was ineffective. The judge ruled that he found King's testimony to be not credible while he found plea counsel's testimony to be credible. App. 87. The PCR judge wrote that the plea transcript indicated that the plea judge told King that the judge did not have to go along with the recommendation, and that King said he understood. App. 88.

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 a probability sufficient to undermine confidence in the outcome of the trial. 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. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985).

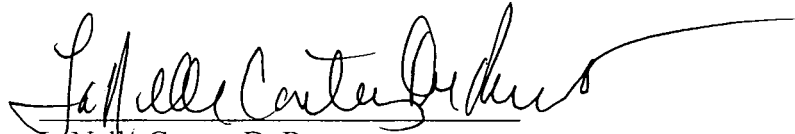
Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (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).

King's plea attorney was ineffective for not insuring that King's guilty plea was voluntarily and knowingly made. King was prejudiced because he wanted to withdraw his guilty plea as his attorney told him he would be able to do. King was denied a trial due to due to counsel's ineffectiveness.

CONCLUSION

Based on the above, certiorari should be granted, the convictions and sentences reversed,  
and the case remanded.

Respectfully submitted,

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is written in a cursive style and is positioned above a horizontal line.

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of January, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO GREENVILLE COUNTY  
EDWARD W. MILLER, CIRCUIT COURT JUDGE

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KEVIN KING,

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STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212084

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PETITION TO BE RELIEVED AS COUNSEL

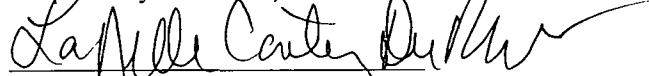
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Counsel for Kevin King states:

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 April 3, 2012. 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 Kevin King.

Respectfully submitted,



LaNelle Cantey DuRant  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 31st day of January, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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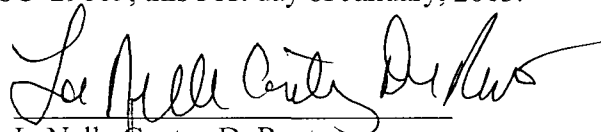
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RESPONDENT

APPELLATE CASE NO. 2012-212084

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CERTIFICATE OF SERVICE  
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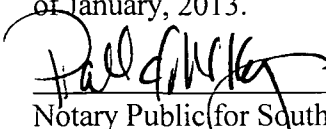
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Kevin King, #251185, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 31st day of January, 2013.



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LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 31st day  
of January, 2013.

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

My Commission Expires: July 24, 2022.