

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenwood County

Thomas A. Russo, Circuit Court Judge **S.C. Supreme Court**  
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LAKENDRICK K. LEVERETTE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212506  
\_\_\_\_\_

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  
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not objecting to the trial judge charging the jury on the lesser included charge of strong armed robbery because this gave the jury an option to armed robbery although there was insufficient evidence for strong armed robbery?

## STATEMENT

In August 2006, the Greenwood County Grand Jury indicted Lakendrick Kentrell Leverette on the charges of armed robbery (AR), kidnapping, and possession of a firearm during the commission of a violent crime. On April 7, 2008, Leverette proceeded to trial before the Honorable J. Ernest Kinard, Jr. and a jury. Petitioner was represented by Chad Bettis, and the state was represented by Demetrios G. Andrews. The jury found Leverette not guilty of kidnapping and possession of a weapon during a crime of violence. The jury did find him guilty of the lesser included charge of strong armed robbery (SAR). Judge Kinard sentenced Leverette to fifteen years incarceration. App. 176, ll. 1 – 23. Leverette filed a notice of appeal, and an appeal was perfected through the filing of a brief pursuant to Anders v. California, 386 U.S. 738, (1967) by the Office of Appellate Defense. On February 23, 2010, the South Carolina Court of Appeals dismissed the appeal. State v. Leverette, Op. No. 2010-UP-143 (Ct. App. Filed February 23, 2010). Supp. App.15 – 16.

On January 24, 2010, Leverette filed an application for post-conviction relief (PCR). The state filed a return on January 27, 2011. Leverette filed an amended PCR application on September 16, 2011. On June 5, 2012, an evidentiary hearing was held before the Honorable Thomas A. Russo. Petitioner was represented by Robert W. Cone, and the state was represented by J. Rutledge Johnson. On June 28, 2012, Judge Russo issued an order denying Petitioner's PCR application and dismissing it with prejudice. App. 293 – 301. Leverette's attorney filed a notice of appeal. This petition follows.

## ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not objecting to the trial judge charging the jury on the lesser included charge of strong armed robbery because this gave the jury an option to armed robbery although there was insufficient evidence for strong armed robbery.

On June 9, 2006, Bobby Caton was drinking with his friends at the Getaway Bar in Greenwood. Petitioner and his co-defendant, Zavius Jones, were also at the Getaway. The three of them went outside for a smoke. Allegedly, Caton was forced into the back of a car by Petitioner and Jones and driven to a field. There, Petitioner Leverette and Jones allegedly took Caton's money, cell phone, and clothes. The three of them returned to the Getaway for Caton to get more money. App. 22, ll. 17 – App. 23, ll. 25.

However, as they entered the bar, Caton began telling people he was being robbed and to call the police which they did. The police arrived and arrested Leverette. They find a gun on him which turned out to be a BB gun. Blood on the muzzle of the gun matched Bobby Caton when the gun was put into his mouth. Leverette was charged with AR, kidnapping, and possession of a firearm during a crime of violence. App. 24, ll. 1 – 18.

The trial judge charged the jury on AR. App. 156, ll. 21 – App. 159, ll. 6. The judge also charged the jury on the lesser included charge of SAR. App. 159, ll. 7 – App. 160, ll. 6. The judge then charged the jury on kidnapping and possession of a weapon during a crime of violence. App. 160, ll. 7 – App. 162, ll. 13. There was no objection to the jury charges from defense counsel or the state. App. 162, ll. 14 – App. 164, ll. 10.

The jury returned verdicts of guilty of the lesser included charge of SAR; not guilty of kidnapping; and not guilty of the possession of a firearm during a crime of violence. App. 171, ll. 12 – App. 172, ll. 7. The judge then sentenced Leverette to fifteen years. App. 176, ll. 1 – 23.

At his PCR hearing, Petitioner Leverette testified that his trial counsel was ineffective because he did not object to the judge charging the jury on a lesser included charge of SAR. Leverette argued that the outcome of the trial would have been different if the judge had not offered that lesser included. Leverette stated there was no evidence to support a SAR charge and the jury found him innocent of the AR charge. App. 228, ll. 8 – 16; App. 244, ll.16 – App. 245, ll. 17. Leverette explained that SAR was the taking of something, and AR was taking at gunpoint. He said the testimony at trial focused on a gun, and the police found a gun on him. Therefore, there were no grounds for a SAR charge. App. 245, ll. 18 – App. 246, ll. 17.

Trial counsel testified at the PCR hearing that he thought the state had sufficient evidence to get a conviction on all of Leverette's charges. App. 264, ll. 1 – 17; App. 267, ll. 20 – 24. His trial strategy was to show that the victim had many inconsistencies in his testimony and that the primary culprit was the co-defendant, Zavius Jones. App. 268, ll. 1 – 24.

Trial counsel testified that he did not object to the SAR charge because he wanted to give the jury another option since there was "considerable evidence" being presented against Leverette. Leverette was there with Jones through the entire incident so the jury still could have convicted Leverette of all the charges. He said this was not an "all or nothing" case. App. 276, ll. 8 – App. 278, ll. 15.

The PCR judge ruled that he found Leverette's testimony to not be credible while finding trial counsel's testimony credible. App. 298. The judge wrote that where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. App. 298. The judge wrote that although Leverette argued that since the jury found him not guilty of the AR charge, then they would not have found him guilty of anything if the judge had not charged SAR, that was not true. The jury could easily have found him guilty of AR. The PCR

judge stated that the SAR charge was a benefit to Leverette because it gave the jury another option besides AR. App. 299.

The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391 (2001); State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). A trial court's decision regarding jury charges will not be reversed, where the charges as a whole properly charged the law to be applied. State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007).

In State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011), the Supreme Court held that in reviewing jury charges for error, the Supreme Court must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.

The Supreme Court held in State v. Day, 341 S.C. 439, 452, 529 S.E.2d 431 (2000), that the failure to tailor jury instructions to adequately reflect the facts and theories presented by the defendant constituted reversible error.

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).

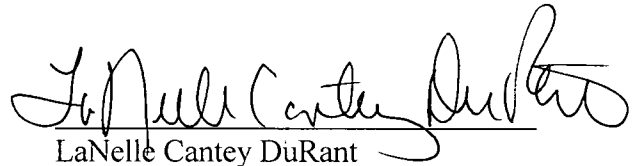
Trial counsel was ineffective in failing to object to the jury charge on strong armed robbery. Because the jury found Leverette not guilty of the armed robbery and the possession of a weapon during a crime of violence, and kidnapping, there was a reasonable probability Leverette would have walked out of court as an innocent person but for the charge on strong armed robbery.

Leverette maintained his innocence at his PCR hearing. App. 228, ll.1 – 10.

CONCLUSION

Based on the above, certiorari should be granted, the conviction and sentence reversed, and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant". The signature is written in a cursive style with a horizontal line underneath the name.

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of February, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO GREENWOOD COUNTY  
THOMAS A. RUSSO, CIRCUIT COURT JUDGE

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LAKENDRICK K. LEVERETTE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212506

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PETITION TO BE RELIEVED AS COUNSEL

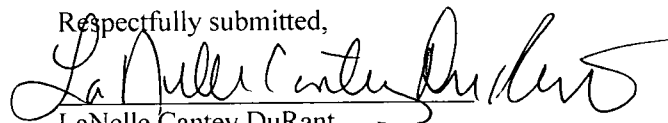
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Counsel for Lakendrick K. Leverette states:

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 June 5, 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 Lakendrick K. Leverette.

Respectfully submitted,



LaNelle Cantey DuRant  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 28th day of February, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenwood County  
Thomas A. Russo, Circuit Court Judge

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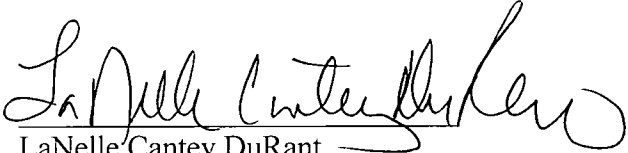
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CERTIFICATE OF SERVICE

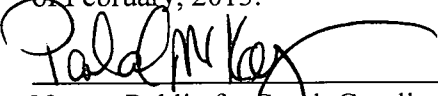
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I certify that a true copy of the Johnson petition for writ of certiorari, a copy of the appendix, and a copy of the supplemental appendix in this case have been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Lakendrick K. Leverette, #276349, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 28th day of February, 2013.

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day  
of February, 2013.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022.