

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Feb 12 2024**

S.C. SUPREME COURT

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Certiorari to Dorchester County

Honorable Heath P. Taylor, Circuit Court Judge  
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JUSTEN L. WILKES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000509  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
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**ISSUE PRESENTED**

Did the PCR court err in finding Petitioner's guilty plea was knowingly and voluntarily entered where the testimony at the PCR hearing revealed that Petitioner's mental health and cognitive issues impaired his ability to understand the plea proceedings?

## STATEMENT OF THE CASE

Between midnight and five in the morning on October 20, 2016, the apartment of Danyell Criswell and Dave Wise was broken into by an unknown individual. The point of entry appeared to be the sliding-glass-door of the apartment's second-story balcony. Approximately \$150 in cash and the keys to a 2010 black Ford Fusion were taken during the burglary. It was later determined that the Ford Fusion had also been stolen from the apartment complex parking lot. At the scene officers located a grey backpack on the ground beneath the second-floor balcony of the apartment that contained a uniform traffic ticket citing Justen Wilkes, Petitioner, for driving under the influence on October 11, 2016. App. 14, l. 1-App. 15, l. 5.

That same morning at approximately 3:41 a.m., officers with the Summerville Police Department responded to a call of an over-turned abandoned vehicle at Garbon Road and Gahagen Road. The vehicle was confirmed to be the stolen 2010 Ford Fusion. During a search of the vehicle police recovered a wallet that contained Petitioner's driver's license and \$86. App. 15, ll. 6-19. At approximately 4:19 a.m. the home security camera of Edward Taylor recorded an unknown individual attempting to break into the house through a sliding-glass door. The individual ultimately gained access to the home through a kitchen window. The security cameras captured the individual in the Taylor home for approximately forty-five to fifty minutes before he took the keys to Taylor's 2010 Ford F-250 pickup truck. At 5:12 a.m. the surveillance camera recorded the F-250 pickup truck backing out of the Taylor's driveway. Throughout the incident Taylor, his wife, and their twins were asleep upstairs in the home. App. 16, l. 10-App. 17, l. 23.

At 5:31 a.m. Deputy Mooney with the Dorchester County Sheriff's Office was performing routine traffic patrol when he encountered a pickup truck driving towards him going

66 miles per hour in a 45 mile per hour zone. Deputy Mooney initiated his lights and siren as he completed a turn to get behind the truck. The driver accelerated away from him at a high rate of speed and Deputy Mooney terminated his pursuit of the truck. Moments later Deputy Mooney came upon a four-car accident involving the truck. The truck, identified as the stolen F-250, had crossed over the median striking a GMC pickup truck driven by Mrs. Taryn Sigman, a Volvo SUV driven by Mr. Alton Langley, and a Porsche SUV driven by Mr. William Sigman. Tragically, Mr. Sigman was pronounced dead at the scene of the accident. App. 18, l. 3-App. 20, l. 23.

The driver of the F-250 fled the accident scene on foot. During this time officers responded to the Taylor home and reviewed the surveillance video. The individual in the surveillance video matched the driver's license of Petitioner. Approximately two hours after the accident officers located Petitioner, took him in to custody and transported him back to the accident scene. Petitioner admitted to stealing the F-250, driving it at the time of the accident, and fleeing the scene. App. 20, ll. 18-21; App. 21, ll. 3-24.

Petitioner initially admitted to taking two Xanax bars the day of the burglaries and car accident. Toxicology revealed the presence of methamphetamine, metabolites of methamphetamine, and Xanax in his system. The toxicologist opined that the levels in Petitioner's blood would have been impairing. Over the course of subsequent interviews with law enforcement Petitioner admitted to stealing the Ford Fusion and smoking meth and taking Xanax throughout the day prior to the burglaries and accident. App. 22, l. 5-App. 23, l. 7.

Petitioner was charged in Dorchester County with burglary first degree and felony driving under the influence, death resulting. App. 45-46; App. 48-49. He was also charged with burglary first degree in Charleston County. App. 51-52. Petitioner appeared before the

Honorable Thomas W. Cooper on March 19, 2018, to enter a guilty plea to the three charges.<sup>1</sup> The State was represented by Donald Sorenson. Petitioner was represented by Timothy Kulp. App. 1. At the start of the hearing the court confirmed that Petitioner had been evaluated by Dr. Geoffrey McKee and had been found both competent to stand trial and criminally responsible for his actions. App. 5, l. 2-App. 6, l. 14; App. 44. At the conclusion of the hearing Petitioner was sentenced to an aggregate term of forty years<sup>2</sup> imprisonment. App. 41, l. 8-App. 42, l. 3.

Petitioner did not appeal his guilty pleas or sentences. On January 11, 2019, Petitioner filed applications for post-conviction relief in both Dorchester County and Charleston County. In the applications Petitioner alleged his guilty plea was not knowingly and voluntarily entered. App. 54-App. 63; App. 80-89. The State initially filed a return to the Charleston application on March 14, 2019. App. 90-95. On December 4, 2020, the State filed a return and motion to merge the applications in both Dorchester and Charleston Counties. App. 64-75; App. 96-106. Petitioner filed an amended PCR application in Dorchester County on January 11, 2021. App. 76-79. The motion to merge the applications was granted by written order on January 19, 2021. App. 107-111.

On January 25, 2023, the parties convened before the Honorable Heath P. Taylor for an evidentiary hearing. The State was represented by Carolina O'Kelly. Petitioner was represented by William Yarborough, III. App. 112. Counsel Kulp, Petitioner, and Petitioner's stepfather, Robert Turner, testified at the hearing. App. 113.

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<sup>1</sup> At the hearing Petitioner waived presentment to the grand jury on the Charleston County burglary first charge. Petitioner additionally waived any challenge to venue and agreed to have the Charleston County charge disposed of during a Dorchester County term of General Sessions. App. 9, l. 14-App. 11, l. 14.

<sup>2</sup> Petitioner received a sentence of twenty-five years on the felony DUI to be served consecutively to a fifteen-year sentence on one of the burglary first charges. Petitioner received a concurrent fifteen-year sentence on the other burglary first charge. App. 47; App.50; App. 53.

Counsel Kulp testified that he met with Petitioner seven or eight times at the jail. He observed that Petitioner had some mental health and cognition issues that gave him “a reason to think that he would benefit by an assessment.” App. 118, ll. 10-24. However, when Counsel Kulp explained the law, elements of the charges, and the discovery to Petitioner, Petitioner seemed to be able to follow him. App. 119, ll. 5-9. Counsel Kulp testified that Petitioner was adamant about not wanting to go to trial and stated at every instance that he did not want to go to trial. App. 120, l. 14-App. 121, l. 5. Because Petitioner did not want to proceed to trial, Counsel Kulp’s primary concern was to avoid him being sentenced to life without parole. App. 123, ll. 2-4.

Counsel Kulp confirmed that he explained all aspects of the plea, all aspects of what a trial would entail, and all possible outcomes to Petitioner. App. 128, ll. 3-6. He recalled Petitioner stating he would be happy with a sentence of 10-15 years’ incarceration however, Counsel Kulp made sure Petitioner understood the only agreement to the plea was that a life sentence would not be imposed. There was no agreement about the number of years that Petitioner could be sentenced to or about whether the sentences would run concurrently or consecutively. App. 128, ll. 7-15.

Counsel Kulp did not think that Petitioner was one of the more mentally challenged people he had represented. App. 132, ll. 14-21. He testified that he did not tell Petitioner what kind of sentence he thought the judge would give him because he had no way of determining what the judge would do. He also explained to Petitioner’s parents that he could not tell them what sentence Petitioner would receive. App. 133, ll. 4-22. Counsel Kulp testified that he never discussed a youthful offender sentence with Petitioner. App. 134, l. 23-App. 135, l. 1.

Petitioner testified that he did not meet with Counsel Kulp “too many times” and that he never went over discovery with him. Petitioner stated that he “can’t read good” and while he would not say he was stupid he had been in special education classes his entire life. Petitioner alleged that Counsel Kulp told him he would receive a YOA sentence, then a sentence of ten years or less, then a sentence of 15 years or less. He testified that had he known he was going to get a 40-year sentence that he would have gone to trial. App. 142, l. 13-App. 144, l. 22. Petitioner testified that everyone he meets tells him that “all they’ve got to do is talk to you and they’re going to know you’re not right” so he did not understand how an insanity defense would not work. He stated he hears voices but that it has gotten better since his arrest because he is on medicine and in a drug free program. App. 145, l. 16-App.146, l. 15.

Petitioner maintained that Counsel Kulp did not tell him he had any defenses to his charges and that he would have gone to trial if he had known he had a defense. He testified he pled guilty because Counsel Kulp told him he was not going to get life but only fifteen years, and that he could not read most of the sentencing sheet that he signed. App. 148, l. 11-App. 149, l. 25. Petitioner stated he did not really remember the plea and that he only understood what was being asked by the judge to an extent because he did not understand some of the “big words.” App. 151, l. 20-App. 153, l. 2.

Petitioner’s stepfather testified that Petitioner had mental health problems, that he was always in trouble, and he could not get him to go to school. App. 155, ll. 9-18. He stated that he could tell that Petitioner did not fully understand everything and that Petitioner had said he heard voices. He testified that Counsel Kulp told the family for a year that Petitioner would get a sentence of 15 years. App. 156, l. 21-App. 157, l. 19. He testified that if he had known

Petitioner was going to receive a 40-year sentence that he would have told him to take the charges to trial. App. 158, ll. 21-24.

A written order of dismissal was filed on March 27, 2023. App. 164-179. The PCR court ruled that Petitioner's testimony at the evidentiary hearing along with the plea transcript and Counsel Kulp's testimony from the evidentiary hearing reflected that Petitioner's plea was knowingly and voluntarily entered. App. 177-178. Regarding the PCR testimony the court wrote,

Applicant's testimony at the evidentiary hearing supports the Plea Court's finding that he knowingly entered his plea. Applicant testified that he had spoken to Counsel about his option to plea, the likelihood of success at trial being very low, and the possible sentences. Counsel further testified to the voluntariness of this plea in that Applicant's focus in his decision to enter a guilty plea was to prevent life in prison without the possibility of parole. Counsel stated that he carefully explained that there was no agreement as to what sentence the judge would impose other than no life without parole sentence, and the judge would not commit to any sentences being concurrent. Counsel stated that Applicant understood this.

App. 177.

## ARGUMENT

The PCR court erred in finding Petitioner's guilty plea was knowingly and voluntarily entered where the testimony at the PCR hearing revealed that Petitioner's mental health and cognitive issues impaired his ability to understand the plea proceedings.

A trial judge should not accept a guilty plea without an affirmative showing that it was intelligent and voluntary. Boykin v. Alabama, 395 U.S. 238 (1969). Additionally, before a plea can be accepted a defendant must be aware of the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000).

“An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense.” Wiggins v. Smith, 539 U.S. 510, 521 (2003) (citation omitted). “To establish deficient performance, a petitioner must demonstrate that counsel's representation ‘fell below an objective standard of reasonableness.’” Id. (quoting Strickland v. Washington, 466 U.S. 668, (1984)). “[T]o establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Id. at 534 (quotations and citation omitted).

A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing (1) that counsel's representation fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 56-57 (1985). “[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone but is

determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing.” Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984).

The PCR court’s order of dismissal was based on incorrect facts. The order asserted that Petitioner testified that he had spoken to Counsel Kulp about the plea, the likelihood of success at trial being low, and the possible sentences. The order further stated that Petitioner’s focus was on avoiding a life sentence. However, the record reflects that the testimony relied on by the PCR court was actually testimony by Counsel Kulp, not Petitioner. Petitioner’s testimony was that Counsel Kulp did not discuss the case or discovery with him, that he did not understand everything that was going on during the plea, and that he could not read well or understand big words.

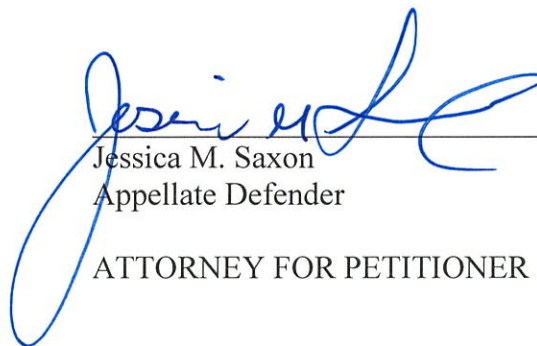
The testimony of Petitioner and his stepfather highlighted that Petitioner had mental health and cognitive issues that impaired his ability to understand the nature and crucial elements of the charges against him, the consequences of his plea, and the constitutional rights he waived in making the plea. The inability of Petitioner to understand what was occurring rendered his plea unknowing and involuntary. Counsel was ineffective in that he failed to ensure that Petitioner not only was informed of, but also understood, his rights, the charges, the potential sentences, and the consequences of his plea. Further, both Petitioner and his stepfather testified that Counsel Kulp told them Petitioner would receive a sentence of fifteen years and that was one of the things that induced Petitioner to plea. Both testified that had they known that Petitioner was going to receive such a large sentence that Petitioner would not have pled guilty and would have gone to trial.

Petitioner’s PCR testimony revealed that he did not fully understand the plea proceedings, the charges against him, his constitutional rights, or the possible outcomes of the

plea. He believed he would be getting a fifteen-year sentence and therefore did not question matters during the plea colloquy. Counsel Kulp failed to ensure that Petitioner fully understood his rights and his options, which rendered Petitioner's plea unknowing and involuntary.

**CONCLUSION**

Based on the foregoing argument, Petitioner respectfully requests that this Court grant the petition for writ of certiorari to allow full briefing of this issue.



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Jessica M. Saxon  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 12th day of February, 2024.

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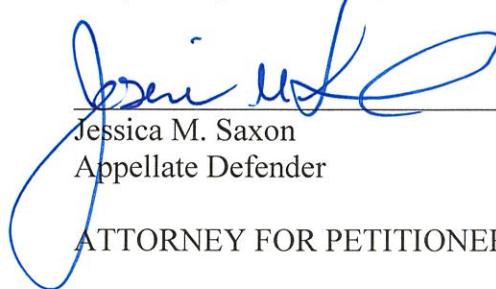
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PETITION TO BE RELIEVED AS COUNSEL  
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Counsel for Justen L. Wilkes states:

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 Heath P. Taylor, which was held on Jan. 25, 2023, 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 Justen L. Wilkes.

Respectfully Submitted,

  
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Jessica M. Saxon  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 12th day of February, 2024.

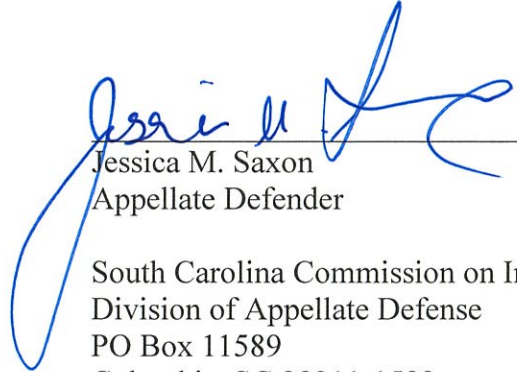
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**CERTIFICATE OF COUNSEL**

**S.C. SUPREME COURT**

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 12th day of February, 2024.