

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

**Nov 25 2024**

S.C. SUPREME COURT

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Certiorari to Greenville County

Honorable J. Derham Cole, Circuit Court Judge  
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JAKOBE GERMAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-001469  
\_\_\_\_\_

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

GARY H JOHNSON  
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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**ISSUE PRESENTED**

Did the PCR court err in finding plea counsel had no obligation to explain and advise petitioner on the impact of a guilty plea on appellate review of the transfer of a minor from Family Court to General Sessions under S.C. Code Ann. § 63-19-1210 (2008 as amended)?

## STATEMENT

At the time of the offenses giving rise to petitioner's guilty plea, he was fifteen years old and considered a child under S.C. Code Ann. § 20-7-6605 (2008).<sup>1</sup> As a child, a transfer hearing was held in Family Court for Greenville County on the state's motion to transfer the criminal charges to the Circuit Court of General Sessions. App. 12, ll. 2 - 5. Petitioner was represented at the transfer hearing by Alex Kornfeld [hereinafter plea counsel] with Ashley Case appearing on behalf of the state. App. 1; 89, ll. 7 - 11. The parties acknowledge the transfer hearing was contested and lasted for a full day, with Judge Usha Bridges ordering petitioner transferred to General Sessions at the conclusion of the hearing.<sup>2</sup> App. 116 - 117.

Following transfer to General Sessions, petitioner pled guilty under the incomplete advice of plea counsel before the Honorable D. Garrison Hill on August 22, 2016, with plea counsel appearing on behalf of petitioner and Katryna Salisbury representing the state. App. 1. Notably, plea counsel admitted never disclosing to petitioner, who was 17 years old at the time of the plea hearing, that petitioner was forever waiving review of the Family Court's decision to transfer him from juvenile proceedings to General Sessions. App. 3, l. 16 - 4, l. 1; 79, l. 16 - 80, l. 2. Judge Hill sentenced petitioner for burglary first (2015-GS-23-6106A) to 17 years; for a second burglary first (2015-GS-23-6111A) to 17 years; for armed robbery (2015-GS-23-6101A) to 10 years; and for a second armed robbery (2015-GS-23-6107A) to 10 years, each concurrent with credit for time served. App. 16, l. 23 - 17, l. 3; 19 - 25.

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<sup>1</sup> "Child" means a person less than seventeen years of age. "Child" does not mean a person sixteen years of age or older who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more. However, a person sixteen years of age who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor.

<sup>2</sup> A transcript of the Family Court hearing was sought in connection with the current PCR application but was unavailable and unable to be transcribed. App. 107. However, the nature of the transfer hearing is partially reflected by the testimony of petitioner's counsel and the solicitor provided during the PCR evidentiary hearing. App. 107.

Petitioner filed for post-conviction relief on August 15, 2017, asserting errors in the Family Court's decision to transfer petitioner to General Sessions. App. 31 - 38. An amended application was filed on petitioner's behalf on November 3, 2021, asserting, among other grounds, that plea counsel was ineffective in failing to advise petitioner on the impact a guilty plea would have on review of the Family Court's decision to transfer petitioner to General Sessions to be tried as an adult. App. 39-40. The state filed its return on August 17, 2021, almost four years after the initial filing for PCR noting errors associated with the transfer, and noted in the return that the transfer hearing in Family Court could not be transcribed since the waiver hearing was:

held in the Family Court before Judge Bridges on June 18, 2015, but the transcript of that hearing is not available to Respondent and is not attached to this return. *Respondent attempted to order the transcript from Court Administration on June 22, 2020*, but the undersigned was told by a staff member of Court Administration by phone on a later date that the transcript was unavailable and that transcripts are shredded five years after the date of the corresponding hearing.

App. 43 fn. 1 (emphasis added).

This petition for certiorari follows.

## ARGUMENT

The PCR court erred in finding plea counsel had no obligation to explain and advise petitioner on the impact of a guilty plea on appellate review of the transfer of a minor from Family Court to General Sessions under S.C. Code Ann. § 63-19-1210 (2008 as amended).

### A. How the matter was raised at PCR.

In the amended application for PCR, petitioner asserted that “[p]lea counsel nor the court inform Applicant that his right to appeal the family court waiver would not be preserved if Applicant pled guilty.” App. 40. Plea counsel acknowledged he failed to discuss the impact of the guilty plea on the ability to appeal the juvenile waiver decision.

Q. Okay. Now during your -- during your negotiations with Mr. German, when you were discussing with him the possibility that he would take the plea, did you talk with him about the consequences if he pled as to whether or not he could raise the issue of the propriety of the waiver hearing on appeal?

A. I don't think I did at that time, no.

Q. Okay. And did you do any research about that, that issue?

A. No.

Q. Okay. And to your -- to your recollection and, unfortunately,

A. Well, can I -- let me say this.

Q. Yes.

A. This is what I know. So I didn't do any additional research to whether or not he could do that, but this is what I do know. In South Carolina we don't have conditional pleas like some other states have where you can say, hey, we're to plead guilty, but we want to preserve this and let this go to a higher court or an

appellate court for review. That I've known that for a long time.  
And I knew that at that time.

App. 71, l. 11 – 72, l. 6.

Despite his claimed knowledge of the fact that the guilty plea would waive any review of the juvenile transfer decision by the Family Court, plea counsel admitted this was never disclosed to or discussed with petitioner:

Q. Okay. So even though you may have not talked specifically about an appeal, you did discuss the possibility of challenging that  
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A. Yes.

Q. Okay.

A. But -- yes. And I -- when we went to plea later on when he gave up those rights, I didn't say -- *we didn't talk about the waiver hearing at the time of the plea.*

Q. Okay.

A. I mean, this was quite a long period of time from juvenile up to here. *But we did not talk about the waiver hearing on the day of his plea.*

App. 79, l. 16 – 80, l. 2 (emphasis added).

As noted by petitioner's counsel during the PCR evidentiary hearing: "I do think it's significant that we had a 15 and a half year old with a waiver hearing. I do think that he should have been advised of his -- the fact that he was giving up his challenge to that on appeal by pleading guilty." App. 103, l. 22 – 104, l. 1.

B. How the PCR court ruled.

While noting plea counsel's failure to inform petitioner that a guilty plea would waive any objections with his transfer from Family Court to General Sessions, the PCR court focused

on whether “counsel was ineffective in failing to advise of the right to appeal following the guilty plea” rather than the failure to properly advise petitioner regarding the impact of his guilty plea on the validity of his waiver to general sessions. App. 112. In a lengthy footnote, the PCR court addressed plea counsel’s failure to discuss and advise petitioner regarding the impact of the guilty plea on the juvenile waiver determination by the Family Court as quoted in full here.<sup>3</sup> As to petitioner’s claim that plea counsel was ineffective in failing to advise him on the impact of pleading guilty serving to waive any review of the Family Court’s decision to transfer petitioner as a juvenile to General Sessions to be tried as an adult, the PCR court found that petitioner understood that his plea was final and there was no reliance on an incorrect understanding that he could appeal the family court waiver. App. 114.

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<sup>3</sup> The PCR court’s footnote in full: While Applicant's claims do not directly attack the voluntariness of the plea based on counsel's advice on any issue regarding the waiver process and viability of an appeal on same, even so, the record convinces this Court that counsel did not give incorrect advice; thus, to the extent Applicant would challenge the voluntariness of the plea on this point, such a claim would be wholly without merit.” See generally *Smith v. State*, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (“In the context of a guilty plea, the court must determine whether 1) counsel's advice was within the range of competence demanded of attorneys in criminal cases-i.e. was counsel's performance deficient, and 2) if there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty.” (citing *Hill v. Lockhart*, 474 U.S. 52, 56-58 (1985)).

Regarding Applicant's understanding or expectation, this Court credits Applicant's testimony that he understood that his plea was final. There was no reliance on an incorrect understanding that he could appeal the family court waiver. Further, that understanding of finality was precisely the point of the extensive and detailed colloquy with Judge Hill. (See generally Plea Tr. 6, [Applicant affirmatively represented the understanding that he was waiving defenses, if any, by entering plea]). Clearly, Applicant had no expectation of any other result. See generally *State v. Patterson*, 278 S.C. 319, 322, 295 S.E.2d 264, 265 ( 1982) (“A plea of guilty is more than an admission of conduct; it is a conviction which leaves only the punishment to be determined.”). (cont.)

Lastly, to the extent Applicant testified that if he had known he could appeal he “probably would have never even took a plea arrangement,” (PCR Tr. at 28), that testimony is patently speculative and insufficient to carry his burden of showing he would not have pled guilty. In fact, the totality of his PCR testimony appears to demonstrate his desire to have another opportunity to argue his “side in court.” (PCR Tr. at 31-32). That does not bear on the decision to plead at the time under the circumstances in question. See *Stalk v. State*, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009) (finding that “Hill makes clear that this prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial”). See also *Lee v. United States*, 582 U.S. 357, 367 (2017) (“A defendant without any viable defense will be highly likely to lose at trial. And a defendant facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial.”). Applicant's testimony demonstrates a misunderstanding of the relief available, but, critically, it does not support any incorrect advice by counsel or by the plea court that mislead him to his detriment. Again, Applicant fails to carry his burden of proof. App. 114, Order of Dismissal, fn. 7.

C. How the PCR court erred.

As this Court has noted, a fundamental aspect of the protections afforded a juvenile in a waiver proceeding is that a “juvenile who objects to the adjudication procedure or ruling has several avenues of recourse as he or she may file an appeal, an application for post-conviction relief, or a petition for a writ of habeas corpus.” In re Kevin R., 409 S.C. 297, 307, 762 S.E.2d 387, 392 (2014). However, this Court has also determined that the appellate review of a transfer order by Family Court is waived upon entering a guilty plea, despite “how unfair it would be to require this juvenile to proceed to trial and forgo the favorable plea offer to preserve his right to challenge the transfer from family court to the court of general sessions.” State v. Rice, 401 S.C. 330, 333, 737 S.E.2d 485, 486 (2013). Thus, a juvenile is faced with a critical decision in agreeing to a plea offer in General Sessions following a transfer from Family Court: accept the plea offer or risk trial in order to preserve appellate review of the Family Court transfer order. The question this petition presents is whether or not a minor, in the face of making that critical decision, is entitled to be informed by plea counsel of the legal impact of accepting the plea offer on appellate review of the transfer order.

This Court has also noted the special treatment a minor is entitled to when being tried and sentenced as an adult offender in General Sessions:

However, we are mindful that juveniles are entitled to careful sentencing under the Eighth Amendment, and we direct circuit court judges to consider the mitigating factors of youth articulated in Aiken v. Byars, 410 S.C. 534, 544, 765 S.E.2d 572, 577 (2014). While consideration of the factors enumerated in Aiken provides sufficient attention to actual juvenility, circuit court judges are not required to do so in a separate Aiken hearing when sentencing pursuant to this subsection.

Jones v. State, 440 S.C. 14, 25, 889 S.E.2d 590, 596 (2023).

This special treatment for a minor stems in part from the State's traditional role under *parens patriae*:

[The] General Assembly has created a system for juveniles that is distinctly different from adult offenders based on the premise that 'South Carolina, as *parens patriae*, protects and safeguards the welfare of its children.'

In re Kevin R., 409 S.C. 297, 304, 762 S.E.2d 387, 390 (2014) (*quoting Harris v. Harris*, 307 S.C. 351, 353, 415 S.E.2d 391, 393 (1992)).

To date, petitioner has found no guidance from this Court regarding any requirement that a minor be provided with clear guidance on the impact a guilty plea will have on a review of the decision to transfer a minor from Family Court to General Sessions. However, since a minor is waiving all appellate review of the Family Court's decision to transfer the minor to General Sessions to be tried as an adult, it is incumbent upon plea counsel to fully explain and discuss this waiver before advising a guilty plea by a minor. This Court has required, in other settings, adequate legal advice regarding the impact of a guilty plea. *See Taylor v. State*, 422 S.C. 222, 810 S.E.2d 862 (2018) (finding the PCR judge erred in refusing to find plea counsel was ineffective in failing to advise regarding deportation consequences of pleading guilty); Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000) (finding counsel was ineffective in advising plea was to a misdemeanor instead of a felony); Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991) (noting trial counsel's improper sentencing advice induced petitioner's guilty plea); Hinson v. State, 297 S.C. 456, 458, 377 S.E.2d 338, 339 (1989) (finding counsel's advice regarding parole eligibility misstated the law).

Here, trial counsel has admitted not discussing the impact of a guilty plea on review of the Family Court's decision to transfer petitioner to General Sessions. At the time of the transfer decision, petitioner was 15 years old. At the time of the guilty plea, petitioner was still a minor.

Plea counsel was ineffective in failing to advise petitioner, a minor, on the impact of a guilty plea on any review of the Family Court's transfer decision.

The PCR court erred in finding counsel was effective when he admitted he failed to discuss the impact of petitioner's guilty plea on the transfer from Family Court. Plea counsel's admitted error was compounded by the plea colloquy which was also silent on the impact of the guilty plea on review of the transfer order. Further compounding plea counsel's ineffectiveness, as Judge Hill only discussed the generic "defenses" being waived, with no specific reference to the impact of the plea on the transfer decision:

THE COURT: Did you go over with your lawyer this three-page acknowledgement of rights form, and did you answer each question on it truthfully?<sup>4</sup>

DEFENDANT GERMAN: Yes, sir.

THE COURT: Do you understand you have the right to a jury trial on these charges?

DEFENDANT GERMAN: Yes, sir.

THE COURT: And, at a jury trial, you'd be presumed innocent. You wouldn't have to prove you were not guilty, or prove you were innocent. The burden of proof would be entirely on the State.

DEFENDANT GERMAN: Yes, sir.

THE COURT: You could confront the evidence against you, see and hear the witnesses, bring witnesses in using the subpoena power of the Court. You could testify and present any defenses you may have. You could choose to remain silent and not testify. No one could require you to testify or take the stand. And if you chose to remain silent, the Court would tell the jury you have the absolute right to remain silent guaranteed by the Constitution, and they could not hold that against you or take it into account whatsoever. Do you understand that?

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<sup>4</sup> This waiver document was discussed during the evidentiary hearing, and it was acknowledged to be silent on the impact regarding the transfer from Family Court. App. 118 – 120.

DEFENDANT GERMAN: Yes, sir.

THE COURT: You could present any defenses you might have, as I said, and your right to challenge or contest any of the evidence against you, including any searches or seizures made by law enforcement, any statements you may have made, any testing that was done or should have been done. You could do that at your trial. But if you plead guilty, you give up those rights. Do you understand all that, sir?

DEFENDANT GERMAN: Yes, sir.

App. 5, l. 3 – 6, l. 10.

As this Court has held that a guilty plea in General Sessions waives any appellate review of the Family Court’s decision to transfer a minor under S.C. Code Ann. § 63-19-1210 (2008 as amended), plea counsel has an affirmative duty to advise minor clients of this legal consequence before advising and allowing minor clients to plead guilty.

D. Prejudice.

As this Court has noted in cases dealing with ineffective advice impacting the decision to plead guilty, the PCR court should not “avoid a finding of prejudice on the basis of the likelihood of a guilty verdict, even if Petitioner is throwing a ‘Hail Mary.’” Taylor v. State, 422 S.C. 222, 233, 810 S.E.2d 862, 867 (2018). As noted by petitioner’s counsel during the PCR evidentiary hearing: “I do think it’s significant that we had a 15 and a half year old with a waiver hearing. I do think that he should have been advised of his -- the fact that he was giving up his challenge to that on appeal by pleading guilty.” App. 103, l. 22 – 104, l. 1.

According to petitioner, the lack of advice concerning the impact of pleading guilty on review of the decision to treat a fifteen-year-old as an adult impacted his decision to pled guilty:

Q. Okay. Now, we also had testimony from Mr. Kornfeld regarding the waiver hearing. And I’ll ask you, *did Mr. Kornfeld*

*ever inform you that if you pled guilty in General Sessions that you would not be able to raise any issues regarding the waiver hearing?*

*A. No, ma'am.*<sup>5</sup>

Q. Okay. And you understand that? That by pleading guilty you would not have been able to raise any waiver hearing issues on appeal? You understand that?

*A. Now I understand that.*

Q. Okay. And now -- and as you say, now you understand that, if you had known that, would that have impacted your decision to plead guilty?

*A. Yes, ma'am.*

App. 83, ll. 6 – 19 (emphasis added).

Here, the PCR simply footnoted away the clear statements by petitioner that he would not have pled guilty had he been advised he was waiving any review of the Family Court's decision to transfer a fifteen-year-old to General Sessions:

Lastly, to the extent Applicant testified that if he had known he could appeal he 'probably would have never even took a plea arrangement,' (PCR Tr. at 28), that testimony is patently speculative and insufficient to carry his burden of showing he would not have pled guilty. In fact, the totality of his PCR testimony appears to demonstrate his desire to have another opportunity to argue his 'side in court.' (PCR Tr. at 31-32). That does not bear on the decision to plead at the time under the circumstances in question.

App. 114, fn. 7.

The PCR Court also noted the perceived favorable plea and sentence:

Lastly, this Court has carefully considered the sentence imposed in light of the multitude of charges and overwhelming evidence of guilt. The 17-year sentence, though certainly a significant term of

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<sup>5</sup> Plea counsel acknowledged not discussing the impact of pleading guilty on appellate review of the Family Court transfer order with petitioner. App. 79, ll. 21 – 23.

years, was concurrent and only slightly beyond the minimums possible (15 and 10), that Applicant confirmed he understood.

App. 114. Petitioner acknowledges the sentence received was just beyond the minimum and does not contest the constitutional status of the mandatory minimal sentence as applied to juveniles. *See Jones v. State*, 440 S.C. 14, 30, 889 S.E.2d 590, 599 (2023) (noting the plea court properly considered the mitigating factors of youth and thoroughly explored Jones's juvenility on the record and upholding the validity of statutory minimum sentences as applied to juveniles).<sup>6</sup>

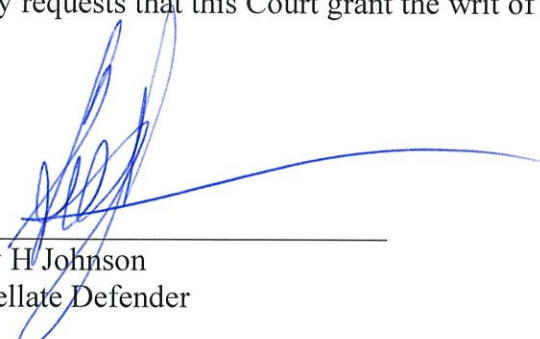
Of course, had petitioner not been transferred from Family Court and remained under the umbrella of juvenile justice, his outcome would have been much more favorable. Thus, petitioner's assertion that he would not have pled guilty had he known about the impact on the ability to seek review of the Family Court's transfer order constrains this court to "conclude [Petitioner] has demonstrated a 'reasonable probability' that, but for [his] counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Taylor v. State*, 422 S.C. 222, 233–34, 810 S.E.2d 862, 867–68 (2018) (internal citations omitted).

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<sup>6</sup> Petitioner would point out that his own guilty plea and sentencing failed to follow the guidelines this Court has set for sentencing minors to consider "(1) the chronological age of the offender and the hallmark features of youth, including 'immaturity, impetuosity, and failure to appreciate the risks and consequence'; (2) the 'family and home environment' that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the 'incompetencies associated with youth—for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to assist his own attorneys'; and (5) the possibility of rehabilitation.'" *Jones v. State*, 440 S.C. 14, 29, 889 S.E.2d 590, 599 (2023). However, the validity of the sentence imposed and the failure to follow the guidelines established in *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014) was not presented to the PCR court.

**CONCLUSION**

Based upon the foregoing, petitioner respectfully requests that this Court grant the writ of certiorari to allow full briefing on these issues.



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Gary H Johnson  
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of November, 2024.