

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Oct 22 2025

S.C. SUPREME COURT

—————
Certiorari to Lexington County

Honorable David P Caraker, Jr, Circuit Court Judge
—————

MICHAEL M. NOWINSKI,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-001128
—————

JOHNSON 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

INDEX

INDEX.....i

ISSUE PRESENTED.....1

STATEMENT.....2

ARGUMENT

The PCR court erred in focusing on whether the plea court’s sentence would have been different rather than whether petitioner would have agreed to plead guilty in the face of plea counsel’s inadequate investigation of reasonably available mitigation evidence.....4

CONCLUSION.....10

PETITION TO BE RELIEVED AS COUNSEL.....11

ISSUE PRESENTED

Whether the PCR court erred in focusing on whether the plea court's sentence would have been different rather than whether petitioner would have agreed to plead guilty in the face of plea counsel's inadequate investigation of reasonably available mitigation evidence?

STATEMENT

Petitioner was indicted by a Lexington County grand jury on July 13, 2020, for offenses arising out of a home invasion on or about August 18, 2019, including possession of a weapon during a violent crime, two counts of kidnapping, first degree burglary, and armed robbery. App. 44 – 53. In a negotiated plea, the state dropped several other charges related to the event (including three counts of assault and battery in the first degree and two additional counts of kidnapping) and reduced the burglary charge to a second degree. App. 16 – 24. Petitioner appeared before the Honorable Walton J. McLeod, IV, on October 15, 2020, and entered a guilty plea. App. 1. Petitioner was represented by Taylor Bell and Sutania Fuller appeared on behalf of the State. App. 1. Judge McLeod sentenced petitioner, concurrent, to incarceration for twenty years on the armed robbery and two kidnapping charges; five years on the possession of a weapon during a violent crime; and fifteen years on the burglary second. App. 42, ll. 4 – 8.

Plea counsel filed a motion to reconsider sentence based in part on an undisclosed letter supplied by the victims which undermined the state’s presentation of the event as a traumatic home invasion of a random and innocent family. App. 61 - 65. Judge McLeod denied the motion without a hearing. App. 73 – 75. No direct appeal was filed.

Petitioner sought remedy by application for post-conviction relief. App. 76 – 88. The application included a detailed description of the events leading to the plea. App. 85 – 88. The state filed a return. App. 91 – 111. An amended PCR application was filed by Ashley McMahan on petitioner’s behalf alleging plea counsel failed to present mitigation evidence, including petitioner’s mental health history, during the guilty plea. App. 112. An evidentiary hearing was held before the Honorable David P. Caraker, Jr., on August 27, 2024. App. 114. Ms. McMahan

appeared on behalf of petitioner and Donald J. Zelenka appeared on behalf of the State. App.

115. Judge Caraker denied relief by Order of Dismissal dated April 22, 2025. App. 165 – 198.

This petition for certiorari follows.

ARGUMENT

The PCR court erred in focusing on whether the plea court's sentence would have been different rather than whether petitioner would have agreed to plead guilty in the face of plea counsel's inadequate investigation of reasonably available mitigation evidence.

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). To establish a claim for ineffective assistance of counsel, a PCR applicant must show (1) counsel's performance was deficient because it fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

In a guilty plea setting, "the prejudice analysis is limited to the outcome of the plea process—whether but for counsel's deficiency, the defendant would have declined to plead and instead proceeded to trial." Frierson v. State, 423 S.C. 257, 263, 815 S.E.2d 433, 436 (2018). "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985). However, this Court may "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).

A. How the matter was raised at PCR.

Petitioner testified at the evidentiary hearing that he would have gone to trial if he knew trial counsel was not going to present a complete mitigation picture for the plea court to consider, particularly surrounding his mental health issues:

Q. So, what's different now between the time you pled guilty and now that makes you realize that you should have gone to trial?

A. Just discoveries through my own search the last five years of -- you know, and things that I could have done, different avenues that could have been taken, and frankly, the way our judicial system operates.

Q. What -- what were some of the iss -- different avenues you could have taken?

A. Well, for one, we didn't have to -- I -- I didn't have to accept the second plea and I could have said no to it and went to trial. I only got twenty years -- or five years less than I could have gotten in the -- in a trial.

Q. Did you have some mental health issues that were going on before all of this?

A. I did.

Q. And -- and what were those issues?

A. I suffered from a lot of things. That I coped with drugs and alcohol. I was taken advantage of as a young boy. I held that in for a long time and it -- it ruined me. And I -- I just dealt with it in my own way and it just caused a lot of dysfunction and eventually it caught up with me. And --

Q. Did you tell Mr. Bell about all of this?

A. I did.

Q. Do you feel like Mr. Bell adequately presented those issues to the Court at the time that you were sentenced?

A. -- no, I don't.

App. 122, l. 10 – 123, l. 14.

Petitioner related that records would have been available supporting his mental health problems and history of drug addiction:

A. I've had multiple diagnosis. I've been to Three Rivers Behavioral Health. I've been to Baptist Mental Health. I've been to William S. Hall when I was barely a teenager. I mean, --

Q. So, you've been in and out of some mental health facilities pretty much your whole life?

A. -- yes, ma'am.

Q. And was that presented to the judge during your sentencing?

A. No.

App. 124, ll. 4 – 13.

While petitioner acknowledges some version of his lengthy struggles was presented in mitigation, plea counsel presented no concrete document or support that would have firmly established these events. Despite these reasonably accessible records being available, plea counsel did not obtain or present them as mitigation evidence. App. 142, ll. 14 – 21.

Plea counsel admitted having access to at least some of these important records, but failed to present them to the court during the plea hearing:

Q. Okay. Did you -- as part of your defense, seek to acquire any mental health records?

A. I believe so. I believe his mother actually provided those to me. I can't recall off the top of my head. It's been a while. But I do -- I do know I had -- I had -- I mentioned it in my plea. In -- in -- in the plea, as I was reading over the transcript the other day when it was sent to me and I think I did mention an exact time in which he was diagnosed with those conditions at a younger age.

I -- I -- I don't know exactly if I -- if I had all of the records, but I do know that I -- I was made aware of the conditions and -- and I

think it -- ultimately, it led to non-compliance with medications is -
- is what led to the -- to the -- to the drug use.

App. 149, ll. 2 – 16; 159, ll. 18 – 22.

B. How the PCR court ruled.

The PCR court found plea counsel effective in his presentation of mitigating evidence and that petitioner could not show prejudice from the allegations surrounding plea counsel's allegedly deficient performance. App. 189 - 198. The PCR court also found that plea counsel's mitigation investigation was not deficient due to the mitigation evidence counsel did provide during the guilty plea. Finally, the PCR court found a lack of prejudice in connection with plea counsel's representation since the sentencing judge acknowledged consideration of the mitigation evidence presented during sentencing.

The test for prejudice in the sentencing is from Strickland, the 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." Strickland, 466 U.S. at 694. This Court concludes that the Applicant has failed to satisfy that burden. He has failed to present any item in mitigation of sentence that undermines confidence in Judge McLeod's sentencing-decisions. Judge McLeod all the items in his rejection of the motion for reconsideration, At most, though not actually presented here, his argument is that he wanted the counsel to present the same facts, but speculated only more persuasively.

App. 197.

C. How the PCR court erred.

The PCR court committed an error of law in evaluating the "prejudice" aspect of petitioner's guilty plea. *While the plea judge certainly acknowledged taking into consideration the mitigating evidence that was presented*, the fact that the sentence connected to a guilty plea

would not have changed is not the proper standard concerning prejudice in an evaluation of a claim of ineffective assistance of counsel in connection with a guilty plea.

“Thus, when challenging a guilty plea, a PCR applicant must show (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, *the applicant would not have pled guilty.*” Ervin v. State of South Carolina, 438 S.C. 559, 565, 885 S.E.2d 387, 390 (2023) (emphasis added) (internal citations omitted). In a guilty plea setting, “the prejudice analysis is limited to the outcome of the plea process—whether but for counsel's deficiency, the defendant would have declined to plead and instead proceeded to trial.” Frierson v. State, 423 S.C. 257, 263, 815 S.E.2d 433, 436 (2018).

Here, the PCR court focused solely on whether the failure to properly investigate and present mitigation evidence *would have changed the outcome of the sentence* as the “prejudice” element, rather than whether or not plea counsel’s ineffective investigation and presentation of mitigation evidence, would have resulted in petitioner rejecting the plea offer and going to trial.

Here, there can be little doubt that both petitioner and plea counsel understood the need to present a complete mitigation case before the court. App. 56, l. 24 – 57, l. 16; App. 70, ll. 19-25. In light of the knowledge that any jail sentence for petitioner was likely a “death sentence,” plea counsel had a duty to conduct a complete investigation into readily available mitigation evidence. This included petitioner’s back condition, which plea counsel admitted was disclosed by petitioner in advance of his guilty plea. App. 76, l. 10 – 77, l. 9. In focusing solely on whether or not the additional mitigation evidence would have changed the sentence, the PCR court erred. The PCR court should have reviewed and ruled upon whether or not, in light of the danger imposed to petitioner by an active period of incarceration, petitioner would have pled guilty knowing plea counsel would present incomplete and inadequate mitigation evidence.

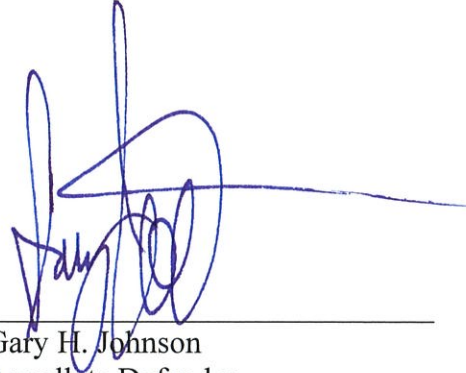
Here, the question is not whether or not plea counsel did an adequate job at presenting some mitigation evidence during sentencing. The question is, but for plea counsel's inadequate investigation of mitigation evidence, would petitioner have pled guilty?

“A criminal defense attorney has the duty to conduct a reasonable investigation to discover *all reasonably available mitigation evidence* and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.” McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (emphasis added). Here, petitioner's records from numerous institutions documenting both his mental health struggles and history of drug abuse were reasonably available to plea counsel. Petitioner had also been shot and injured in the chest during the course of the events surrounding his guilty plea, and those records were equally accessible to plea counsel. App. 142, ll. 3 – 13. Despite these reasonably accessible records being available, plea counsel did not obtain or present them as mitigation evidence. App. 142, ll. 14 – 21; 149, ll. 2 – 16; 159, ll. 18 – 22.

But for plea counsel's inadequate investigation of petitioner's mental health and related records, petitioner would not have entered a guilty plea on the sole basis of seeking to mitigate the offenses. The PCR court committed an error of law in focusing solely on whether the addition of such records and supporting documentation would have altered the sentence. The correct conclusion of law to draw would have been, but for the errors of counsel in investigating and preparing mitigation evidence, petitioner would not have pled guilty.

CONCLUSION

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



Gary H. Johnson
Appellate Defender
SC Bar #8898

ATTORNEY FOR PETITIONER

This 22nd day of October 2025.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Oct 22 2025

S.C. SUPREME COURT

Certiorari to Lexington County

Honorable David P Caraker, Jr, Circuit Court Judge

MICHAEL M. NOWINSKI,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

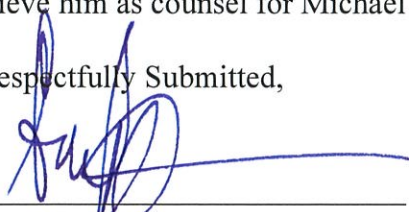
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael Nowinski states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge David P Caraker, Jr, which was held on , and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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 him as counsel for Michael Nowinski.

Respectfully Submitted,



Gary H. Johnson
Appellate Defender
SC Bar #8898

ATTORNEY FOR PETITIONER

This 22nd day of October 2025.

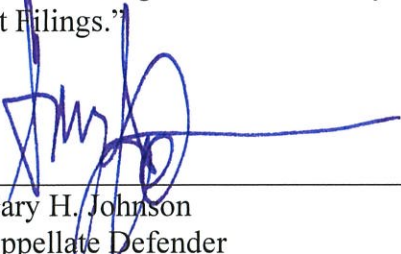
RECEIVED

Oct 22 2025

CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of his 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."



Gary H. Johnson
Appellate Defender
SC Bar #8898

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 22nd day of October 2025.