

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Horry County  
J. Cordell Maddox, Jr., Circuit Court Judge  
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**S.C. Supreme Court**

BRANDON S. MCDEVITT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002468  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
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DAVID ALEXANDER  
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in finding that petitioner's guilty plea was involuntary because plea counsel failed to explain one of the elements of the offenses with which he was charged?

## STATEMENT

On March 26, 2009, petitioner was indicted by an Horry County grand jury for murder, first degree burglary, three counts of leaving the scene of an accident where great bodily injury resulted, and one count of leaving the scene of an accident where death resulted. App. 94 – 112. On June 9, 2010, petitioner pled guilty before the Honorable Larry B. Hyman, Jr. App. 1. Elizabeth Vaughn Tilley represented the State. App. 2. William Henry Monckton, VI, represented petitioner. App. 2.

The plea was accepted pursuant to a negotiated sentence of twenty-two years. App. 6, ll. 9 – 15. The murder indictment and a conspiracy indictment were dismissed. App. 6, ll. 9 – 15. Judge Hyman accepted the negotiated plea. App. 25, ll. 15 – 23. Judge Hyman sentenced petitioner accordingly: ten years' imprisonment on the three counts of leaving the scene where great bodily injury occurred; twenty-two years' imprisonment for leaving the scene of an accident where death resulted; and twenty-two years' imprisonment for burglary. App. 36, ll. 3 – 21. The sentences were concurrent. App. 36, ll. 19 – 21. Petitioner did not appeal.

On February 15, 2011, petitioner filed a PCR application. App. 39. On August 28, 2013, a hearing was held before the Honorable J. Cordell Maddox, Jr. App. 48. Josh Thomas represented the State. App. 48. L. Morgan Martin represented petitioner. App. 48. On October 1, 2013, Judge Maddox denied petitioner's application. App. 84. This petition follows.

## ARGUMENT

The PCR court erred in finding that petitioner's guilty plea was involuntary because plea counsel failed to explain one of the elements of the offenses with which he was charged.

Plea counsel explained the evidence against Petitioner. At a trial the State would allege that Petitioner and his co-defendant drove up to a dock on the intracoastal waterway in a boat. App. 66, l. 21 – 71, l. 6. They entered a house and took a television. App. 66, l. 21 – 71, l. 6. Someone across the waterway saw them and gave chase on their boat. App. 66, l. 21 – 71, l. 6. The boat in which petitioner was riding collided with another boat being loaded on a trailer. App. 66, l. 21 – 71, l. 6. One person was killed and three others were severely injured. App. 66, l. 21 – 71, l. 6. Petitioner and his co-defendant fled the scene. App. 66, l. 21 – 71, l. 6.

Had the case been tried, the key issue would have been whether petitioner was the one driving the boat. App. 66, l. 21 – 71, l. 6. Plea counsel explained that the State would seek to introduce a call petitioner made to 911 admitting he was the driver of the boat and another statement to a witness that they thought they hit a stump. App. 66, l. 21 – 71, l. 6. Petitioner explained to plea counsel that his co-defendant was actually the person driving the boat and petitioner subsequently passed a polygraph test to that effect. App. 66, l. 21 – 71, l. 6.

Plea counsel admitted that in order to convict petitioner of leaving the scene if he was not the driver, that the State would be required to prove aiding and abetting. App. 73, l. 14 – 76, l. 6. Plea counsel admitted that he failed to advise petitioner about this additional element of proof. App. 66, l. 21 – 71, l. 6. When asked whether he had “any discussions with [petitioner] about the elements of present aiding and [abetting] and how that would play into whether he was driving the boat,” plea counsel responded, “Honestly, I can probably say I didn’t go that far.” App. 76, ll. 1 – 6.

Petitioner adamantly testified at the PCR hearing that he would not have pled guilty had he known he had a possible defense to leaving the scene because he was not the driver of the boat. App. 52, l. 25 – 53, l. 14. Petitioner also testified that had he known that his mere presence in the boat was not enough to convict him, he would not have pled guilty. App. 54, ll. 5 – 15. Petitioner never admitted during the plea colloquy that he was the driver of the boat. App. 54, ll. 16 – 24.

This failure to fully advise petitioner regarding the law constituted ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). “Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel.” Padilla v. Kentucky, 130 S.Ct. 1473, 1480-81 (2010) (internal quotations omitted). “The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Hill v. Lockhart, 474 U.S. 52, 56 (1985). “Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process.” Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012).

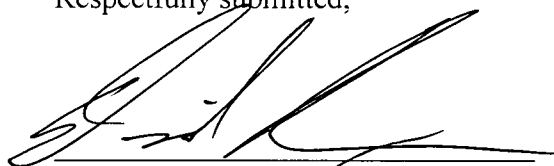
This Court has found deficient performance where attorneys provided erroneous advice that induced a guilty plea. In Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989), the defendant’s trial attorney told him he would be eligible for parole after serving ten years when, in reality, defendant would have to serve twenty years. Id. at 457-58, 377 S.E.2d at 339. This Court found such advice deficient and reversed the PCR court. Id.; see also Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991) (reversing guilty plea on PCR where attorney misadvised defendant on maximum exposure at sentencing). Similarly, in this case, plea counsel failed to fully advise petitioner on an important element of the offense and this constituted deficient performance under Hill and Strickland.

Petitioner also can prove that he was prejudiced by trial counsel's ineffectiveness. In order to prove prejudice under Strickland in a plea context, "a defendant must show the outcome of the plea process would have been different with competent advice." Lafler, 132 S.Ct. at 1384. "[A] petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla, 130 S.Ct. at 1485. Petitioner's testimony shows that he would not have pled guilty had he known about the defense based on the fact that he was not driving the boat. Therefore, petitioner has shown prejudice because the outcome of the plea hearing would have been different.

CONCLUSION

For the foregoing reasons, the Court should grant the petition with the ultimate result of reversing petitioner's convictions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Alexander', written over a horizontal line.

David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of July, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO HORRY COUNTY  
J. CORDELL MADDOX, JR., CIRCUIT COURT JUDGE

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BRANDON S. MCDEVITT,

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APPELLATE CASE NO. 2013-002468

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PETITION TO BE RELIEVED AS COUNSEL

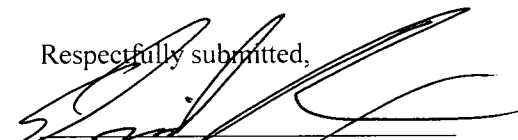
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Counsel for Brandon S. McDevitt states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on August 28, 2013. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He 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 him as counsel for Brandon S. McDevitt.

Respectfully submitted,



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David Alexander  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 14th day of July, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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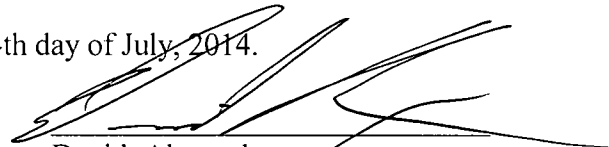
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CERTIFICATE OF SERVICE

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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Joshua L. Thomas, Esquire and Brandon S. McDevitt, #331683, at Lieber Correctional Institution this 14th day of July, 2014.



David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day  
of July, 2014.

David J. Anderson (L.S.)  
Notary Public for South Carolina

My Commission Expires: July 3, 2023.