

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County

S.C. Supreme Court

G. Edward Welmaker, Circuit Court Judge  
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FAVIAN HAYES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2014- 000837  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
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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 knowing, voluntary, and intelligent where plea counsel failed to conduct any investigation prior to Petitioner's guilty plea?

## STATEMENT

### **Indictments**

On April 12, 2011, Petitioner Favian Hayes was indicted by the Greenville County Grand Jury for (1) threatening the life of a public employee; and (2) threatening death, damage, or destruction by explosive. App. 66-72.

### **Guilty Plea**

On May 16, 2012, Petitioner appeared before the Honorable Robin B. Stilwell to plead guilty to the two charges. App. 1 – 15. Petitioner was represented by Christopher T. Posey, and the State was represented by Assistant Solicitor Wanda L. Adams. App. 1.

The State alleged that Petitioner had written a threatening letter to the warden of Perry Correctional Institution where Petitioner was an inmate. App. 8, l. 23 – 10, l. 16. Petitioner stated he had no intention to hurt anyone. App. 11, ll. 15-17.

Judge Stilwell sentenced Petitioner to ten years for threatening death, damage, or destruction by explosive and five years for threatening the life of a public employee. The sentences were ordered to run concurrent. App. 15, ll. 3-5; 69; 73. Petitioner did not file a direct appeal.

### **Application for Post-Conviction Relief and Evidentiary Hearing**

Petitioner filed his application for post-conviction relief (“PCR”) on September 13, 2012. App. 17 – 24. The State filed its Return on or about March 28, 2013. App. 25 – 30.

An evidentiary hearing was held before the Honorable G. Edward Welmaker on February 18, 2014. App. 31 – 54. Petitioner was represented by R. Mills Ariail, Jr. and the State was represented by Assistant Deputy Attorney General Karen C. Ratigan. App. 31. Petitioner and his plea counsel testified at the hearing. App. 35 – 53.

Petitioner testified that with respect to the two charges, he was previously represented by Dorothy Manigault. He said Ms. Manigault had spoken with the assistant solicitor and everyone agreed to a five year, non-violent sentence to run concurrent to the sentence he was already serving. Ms. Manigault had actually received a letter from the solicitor's office dated May 5, 2011 with this plea offer. App. 36, l. 24 – 37, l. 16; 57.

Petitioner did not know what had happened with this plea offer. Ms. Manigault then had a conflict and had to be removed from Petitioner's case and plea counsel proceeded to represent Petitioner. Petitioner testified that he only spoke to plea counsel once on the telephone. The next day, Petitioner was brought up for his plea hearing. Plea counsel conducted no investigation on Petitioner's behalf. Petitioner brought the five year plea offer to plea counsel's attention, but plea counsel told Petitioner that he did not know what the solicitor's office would do. Plea counsel told Petitioner, "[i]f you don't plead guilty to these charges, they going to - - jury's in, they're going to hit you in the head." Petitioner asserted that plea counsel made him feel like he had no choice but to plead guilty to a plea without any recommendation. App. 37, l. 17 – 38, l. 9.

Petitioner testified that his plea counsel should have conducted an investigation into the charges. Petitioner testified that the handwriting on the threatening letter was not his hand writing and that a handwriting analyst should have been employed by his plea counsel. Petitioner also had officers at the correctional institution willing to testify on his behalf, but plea counsel did not look into this either. App. 39, l. 9 – 40, l. 9. Petitioner only pled guilty because his plea counsel led him to believe that he had no defense and plea counsel was completely uninterested in conducting any sort of investigation on Petitioner's behalf. App. 41, l. 21 – 42, l. 7.

Plea counsel believed he was appointed to represent Petitioner ten days to two weeks prior to Petitioner's guilty plea. He received discovery materials when he was appointed. App. 48, ll. 7-16.

Plea counsel recalled speaking to Petitioner once by telephone. He also believed he met with Petitioner the day before the trial was scheduled and that Petitioner decided to enter the plea that day. App. 48, l. 17 – 49, l. 1.

Plea counsel testified that Petitioner did not want to make a decision on the charges in this case until he knew the outcome of a post-conviction relief case he had relating to his prior armed robbery conviction. App. 49, ll. 11-24. Once that post-conviction relief case was denied, Petitioner decided to plead guilty to the current charges. App. 51, ll. 14-20.

Plea counsel also remembered that Petitioner had mentioned that he had affidavits from officers at the correctional institution who would testify on Petitioner's behalf. Plea counsel could not recall if he ever discussed the handwriting issue with Petitioner. App. 49, l. 25 – 50, l. 14.

Plea counsel testified the prior five-year plea offer was no longer valid because those offers expire once the case reaches the trial docket. App. 50, ll. 15-21.

At the conclusion of the hearing, Judge Welmaker ruled that Petitioner failed to present sufficient evidence and denied Petitioner's PCR application. App. 53, l. 21 – 54, l. 11.

### **Order of Dismissal**

Judge Welmaker's Order of Dismissal denying Petitioner's PCR application was filed April 9, 2014. App. 58-65. Judge Welmaker found that plea counsel "adequately conferred with [Petitioner], conducted a proper investigation, and was thoroughly competent

in his representation.” App. 62. Judge Welmaker further ruled that Petitioner failed to show that his plea counsel should have investigated his case before Petitioner entered his guilty plea. App. 63-64.

This petition for writ of certiorari follows.

## ARGUMENT

**The PCR court erred in finding that Petitioner's guilty plea was knowing, voluntary, and intelligent where plea counsel failed to conduct any investigation prior to Petitioner's guilty plea.**

The United States Supreme Court has held that “[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results.” Brady v. United States, 397 U.S. 742, 758 (1970). An “unsound result” occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238 (1969). Therefore, in the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); see also Hill v. Lockhart, 474 U.S. 52, 56 (1985) (“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.’ ” (quoting North Carolina v. Alford, 400 U.S. 25, 31(1970))). “The second, or ‘prejudice,’ requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. 52 at 59. In other words,

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.

Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (quoting Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); see also Hill, 474 U.S. at 59 (footnote omitted).

Petitioner's plea counsel admitted at the evidentiary hearing that he did not investigate the case, including interviewing corrections officers who would testify favorable

on Petitioner's behalf and investigating whether the letter's handwriting matched the handwriting of Petitioner. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011).

Plea counsel failed in this duty where plea counsel did not interview any potential witnesses and made no independent investigation of the facts and circumstances of the case. Plea counsel simply told Petitioner it was in his best interest to plead guilty without undertaking this required reasonable investigation. Accordingly, Petitioner is entitled to a new trial.

**CONCLUSION**

For the reasons set forth herein, Petitioner Favian Hayes respectfully requests this Court to grant his Petition for Writ of Certiorari with the ultimate relief of a new trial.

Respectfully submitted,



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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of November, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO GREENVILLE COUNTY  
G. EDWARD WELMAKER, CIRCUIT COURT JUDGE

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FAVIAN HAYES,

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STATE OF SOUTH CAROLINA,

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Favian Hayes 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 February 18, 2014. 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 Favian Hayes.

Respectfully submitted,



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Carmen V. Ganjehsani  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 24th day of November, 2014.

STATE OF SOUTH CAROLINA

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FAVIAN HAYES,

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APPELLATE CASE NO. 2014- 000837

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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 Karen C. Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Favian Hayes, #293544, at Lee Correctional Institution this 24th day of November, 2014.

  
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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day  
of November, 2014.

 (L.S.)  
\_\_\_\_\_  
Notary Public for South Carolina

My Commission Expires: October 24, 2021.