

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**S.C. Supreme Court**

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Certiorari to Greenville County

Letitia H. Verdin, Circuit Court Judge  
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BRANDON JABAR CHRISTIAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000123  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
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KATHRINE H. HUDGINS  
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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Did the PCR judge err in refusing to find plea counsel ineffective for not investigating Petitioner's mental health status?

## STATEMENT

In March of 2011, the Oconee County Grand Jury indicted Petitioner Christian for armed robbery and possession of a weapon during the commission of a violent crime, indictment #2011-GS-37-233. In May of 2011, the Greenville County Grand Jury indicted Petitioner for murder, possession of a weapon during the commission of a violent crime armed robbery and attempted murder, indictments #2011-GS-23-3395, 3396, 3397. On May 16, 2011, Petitioner appeared before the Honorable Edward W. Miller and pled guilty to the reduced charge of voluntary manslaughter, armed robbery and attempted murder. Christopher Scalzo and Nihar M. Patel represented Petitioner at the plea. Howard Steinberg prosecuted the case. Judge Miller deferred sentencing.

On April 17, 2012, Petitioner appeared before Judge Miller, pled guilty to the armed robbery and weapons charges from Oconee County. Brian Johnson represented Petitioner at the plea and sentencing. Judge Miller imposed sentence for both the Greenville and the Oconee charges. Judge Miller sentenced Petitioner to twenty five (25) years for voluntary manslaughter, twenty (20) years for attempted murder, twenty (20) years for the Greenville armed robbery, twenty (20) years for the Oconee armed robbery and five (5) years for Oconee weapons charge. Petitioner did not appeal.

On October 25, 2012, Petitioner filed an application for post conviction relief. The State filed a return on May 2, 2013. On October 21, 2014, an evidentiary hearing was held before the Honorable Letitia H. Verdin. Mills Arial represented Petitioner at the PCR hearing. Karen Ratigan represented the State. At the time of the evidentiary hearing the transcript from the guilty plea hearing in Greenville County on May 16, 2011, was unavailable. (PCR. p. 5, lines 1-11; App. p. \*\*, Court's Exhibit #1). The only transcript available was the transcript from the April 17, 2012, hearing where Petitioner pled guilty to the Oconee County charges and was sentenced to both the Oconee County charges and the Greenville County charges he pled guilty to on May 16, 2011. It

appears that the present PCR action only addresses the Greenville charges. The State called plea counsel Scalzo, prosecutor Steinberg and the Petitioner in an attempt to reconstruct the record of the guilty plea. ((PCR pp. 5-25). There was no objection to the reconstruction hearing. The PCR judge then heard testimony from Petitioner, plea counsel Scalzo, and plea counsel Johnson. In a written order signed December 8, 2014, Judge Verdin denied relief and dismissed the application. A timely notice of intent to appeal was served on January 12, 2015. This petition for writ of certiorari follows.

## ARGUMENT

The PCR judge erred in refusing to find plea counsel ineffective for not investigating Petitioner's mental health status.

During the PCR hearing Petitioner testified that in 2009 he was found incompetent and committed to the William S. Hall Mental Institution in Columbia, South Carolina. (App. p. 86, lines 13-17). Petitioner did not allege that he was incompetent at the time of the plea, but argued that counsel failed to conduct a complete independent investigation of the case. (App. p. 86, lines 21-25). During the April 17, 2012, plea and sentencing hearing Petitioner told Judge Miller that he had been treated for psychosis and bipolar disorder but was not receiving his medications of Abilify and Wellbutrin at the jail. (App. p. 4, lines 6-16). Judge Miller asked Petitioner, "Does the fact that you are off your medication, does that impair your ability to understand what's going on?" (App. p. 4, lines 17-19). Petitioner answered, "No, sir." (App. p. 4, line 20).

When asked about Petitioner's mental health during the PCR hearing, plea counsel Scalzo testified, "I believe we requested some records from, I don't know if it was William S. Hall or wherever else he was. We were aware of mental health as an overall issue. I would not have any specific notes or recollection that the mental health was an ongoing problem that I had with Brandon personally." (App. p. 91, line 19 – p. 92, lines 1-2). Plea counsel Johnson testified at the PCR hearing that he was unaware that Petitioner had previously been found incompetent. (App. p. 94, lines 1-12). Plea counsel Johnson testified that he had no reason to believe that Petitioner did not understand the proceedings. (App. p. 94, lines 20-25).

The PCR judge erred in refusing to find plea counsel ineffective for not investigating Petitioner's mental health status. Information in regard to Petitioner's mental health status could

have formed the basis of a defense. Plea counsel was deficient and Petitioner was prejudiced by the deficient performance.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the

constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' ” Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). “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, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

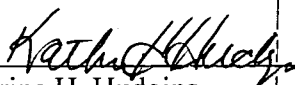
“The second, or ‘prejudice,’ requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. at 59, 106 S.Ct. 366. “A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a 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.” Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

Plea counsel was ineffective in failing to investigate Petitioner's mental health status. There is a reasonable probability that if plea counsel had investigated Petitioner's mental health status, information in regard to Petitioner's mental health status could have formed the basis of a defense and Petitioner would not have pled guilty. Petitioner is entitled to a remand for a trial based on ineffective assistance of counsel.

CONCLUSION

Based on the above argument, Petitioner's convictions and sentences should be reversed and the case remanded for a trial.

Respectfully submitted,

  
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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of September, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO GREENVILLE COUNTY  
LETITIA H. VERDIN, CIRCUIT COURT JUDGE

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BRANDON JABAR CHRISTIAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000123

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PETITION TO BE RELIEVED AS COUNSEL


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Counsel for Brandon J. Christian 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 October 21, 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 Brandon J. Christian.

Respectfully submitted,



Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 18th day of September, 2015

STATE OF SOUTH CAROLINA  
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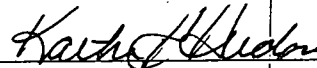
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000123  
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CERTIFICATE OF SERVICE  
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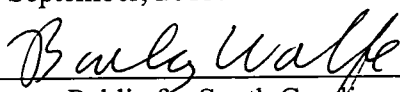
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire and Brandon J. Christian, #350508, at Perry Correctional Institution this 18th day of September, 2015.



\_\_\_\_\_  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day  
of September, 2015.

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

My Commission Expires: October 24, 2021.