

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County

Brooks P. Goldsmith, Circuit Court Judge  
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RECEIVED

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SC SUPREME COURT

MAURICE C. KINARD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001205  
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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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South Carolina Commission on Indigent Defense  
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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Did the PCR judge err in refusing to find that the guilty plea was rendered involuntary by the fact that plea counsel failed to warn Petitioner of how strongly the State would argue for the maximum sentence pursuant to the negotiated sentencing range?

## STATEMENT

In February of 2011, the Richland County Grand Jury indicted Petitioner for murder, indictment #2011-GS-40-1134. On December 9, 2013, Petitioner appeared before the Honorable Diane S. Goodstein and pled guilty to the lesser included offense of voluntary manslaughter. Tivis C. Sutherland, IV represented Petitioner at the plea. Joanna A. McDuffie and Nicole M. Simpson represented the State. Pursuant to a negotiated sentencing range, Judge Goodstein sentenced Petitioner to twenty five (25) years. A notice of intent to appeal was not filed.

On April 7, 2014, Petitioner filed an application for post conviction relief. The State filed a return on June 10, 2014. An evidentiary hearing was held before the Honorable Brooks P. Goldsmith on April 1, 2015. Jonathan D. Waller represented Petitioner at the evidentiary hearing. J. Clayton Mitchell represented the State. In a written order filed May 22, 2015, Judge Goldsmith denied relief and dismissed the application. A timely notice of intent to appeal was served on June 2, 2015. This petition for writ of certiorari follows.

## ARGUMENT

The PCR judge erred in refusing to find that the guilty plea was rendered involuntary by the fact that plea counsel failed to warn Petitioner of how strongly the State would argue for the maximum sentence pursuant to the negotiated sentencing range.

Prior to jury selection but after the qualification of the jury pool, the State offered to allow Petitioner to plead guilty to the lesser included offense of voluntary manslaughter for a negotiated sentencing range of between fifteen (15) and twenty five (25) years. (App. p. 22, lines 17-20; p. 87, line 16 – p. 88, lines 1-5). Petitioner hoped for a sentence of the minimum of fifteen (15) years pursuant to the negotiation. (App. p. 87, lines 22-25). During the guilty plea both prosecutors and a sergeant from the Richland County Sheriff's Department strongly argued for the maximum sentence of twenty five (25) years. (App. p. 22, lines 21-25; p. 31, line 8; p. 33, lines 16-18; p. 34, lines 14-17). The judge sentenced Petitioner to the maximum sentence pursuant to the negotiated sentencing range and as requested by the State.

During the PCR hearing Petitioner testified that he could not remember if plea counsel discussed with him the factors the judge would take into account during the sentencing hearing. (App. p. 75, lines 9-11). While Petitioner admitted that he knew the judge would hear from the State in regard to sentencing, (App. p. 75, lines 15-17), the record does not establish that Petitioner knew the State would be asking for the maximum. The record does not establish that Petitioner was aware of how strongly the State would argue for the maximum sentence. The guilty plea was rendered in voluntary by plea counsel's failure to warn Petitioner about how strongly the State would argue for the maximum sentence.

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)).

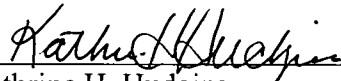
“The second, or ‘prejudice,’ requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. at 59, 106 S.Ct. 366. “A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character 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).

Petitioner did not enter a knowing and voluntary guilty plea. The record fails to establish that Petitioner was fully aware of the consequences of the guilty plea. Plea counsel was ineffective in failing to warn Petitioner about how strongly the State would argue for the maximum sentence pursuant to the negotiated sentencing range. There is a reasonable probability that but for counsel's deficient performance, Petitioner would not have pled guilty, but would have insisted on going to trial.

**CONCLUSION**

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,

  
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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of February, 2016.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO RICHLAND COUNTY  
BROOKS P. GOLDSMITH, CIRCUIT COURT JUDGE

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MAURICE C. KINARD,

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APPELLATE CASE NO. 2015-001205

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PETITION TO BE RELIEVED AS COUNSEL

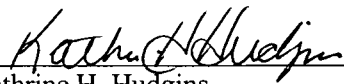
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Counsel for Maurice C. Kinard states:

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 April 1, 2015. 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 Maurice C. Kinard.

Respectfully submitted,

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of February, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County

Brooks P. Goldsmith, Circuit Court Judge

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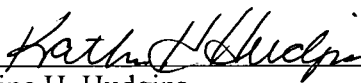
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CERTIFICATE OF SERVICE

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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 Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Maurice C. Kinard, #271081, at Lee Correctional Institution, 990 Wisacky Highwaym, Bishopville, SC 29010, this 1st day of February, 2016.

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 1st day  
of February, 2016.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.