

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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SC SUPREME COURT

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Certiorari to Lexington County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

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DAVID ONLEY

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002089

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PETITION FOR WRIT OF CERTIORARI

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Tiffany L. Butler  
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Division of Appellate Defense  
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### ISSUE PRESENTED

Whether the PCR court erred by concluding defense counsel could not have been deficient for failing to have available forensic evidence examined from the inside of the wrecked automobile to show Petitioner was not the driver, but the passenger, in this felony DUI case, where there was no evidence supporting the PCR court's conclusion that "there was never a question as to whether [Petitioner] was the driver," where defense counsel even conceded such evidence existed, including the hospital records which listed Petitioner as the "front passenger," especially since Petitioner had no memory of the accident and received the maximum twenty-five year sentence despite pleading guilty and waiving a trial?

## STATEMENT OF FACTS

On December 27, 2011, at approximately 3:22 p.m., Petitioner and seventeen-year-old Jonathan Humphrey were riding in Petitioner's 1999 Ford pickup truck on Founders Road in Lexington County, South Carolina. App. 9, ll. 17 – 21. The truck was speeding at a rate of "85 miles per hour in a 35-mile-per-hour zone." App. 10, ll. 13 – 16. Who was driving was the issue.

The driver "drove off the right-hand side of the road [and] overcorrected as he tried to re-establish his lane of travel." App. 9, ll. 22 – 25. The truck then "slid through the oncoming lane of traffic and off the road." App. 9, l. 25 – App. 10, l. 1. The truck "became airborne and collided with an embankment in a wooded area." App. 10, ll. 1 – 5. Hospital records, which cited EMS, indicated Humphrey was the "unrestrained driver" and Petitioner was the "front passenger." App. 118 – 123. Humphrey died at the hospital from traumatic brain injury sustained in the collision. App. 10, ll. 1 – 5. Petitioner sustained head injuries and was also transported to the hospital. App. 10, ll. 6 – 12.

Petitioner had no recollection of the accident, but recalled meeting the decedent at a gas station and giving him a ride to Lexington. App. 23, l. 25 – App. 24, l. 13. Petitioner and the decedent did not know each other and had no prior relationship. App. 21, ll. 11 – 21. Because of "various indicators of alcohol impairment," specifically, the "strong odor of alcohol," Petitioner's blood was drawn at 5:30 p.m. for alcohol and drug testing. App. 10, ll. 6 – 11. The test results from SLED indicated Petitioner had "a BAC level of .20." App. 10, ll. 9 – 12. The decedent's blood also tested positive for alcohol, and his urine tested positive for marijuana. App. 69, ll. 13 – 20; App. 112.

On December 12, 2012, Petitioner waived presentment to the Lexington County Grand Jury and pled guilty to felony DUI resulting in death before the Honorable Roger M. Young. App. 3, ll. 1 – 5. Matthew Buchanan represented Petitioner. App. 1. Todd Wagoner represented the State. App. 1. The State made no recommendations on sentencing.

Judge Young sentenced Petitioner to the maximum sentence of twenty-five years' imprisonment. App. 26, l. 23 – App. 27, l. 1. A notice of appeal was filed on Petitioner's behalf. On April 18, 2013, the South Carolina Court of Appeals dismissed the appeal for failure to state an appealable issue pursuant to Rule 203(d)(1)(B)(iv), SCACR. App. 39.

### **PCR Hearing**

Petitioner filed a PCR application on June 21, 2013, alleging counsel was ineffective for failing to investigate whether Petitioner was the driver of the automobile. App. 29 – 38. The State filed its return on December 23, 2013, requesting an evidentiary hearing. App. 39 – 44. On October 13, 2014, an evidentiary hearing was held before the Honorable DeAndrea G. Benjamin. App. 45. Aimee Zmroczek represented Petitioner. Clay Mitchell represented the State. App. 45.

Defense counsel explained that Petitioner sustained head injuries in the car accident and could not remember what happened. App. 50, l. 25 – App. 51, l. 6. Counsel stated that it was difficult getting Petitioner's input because Petitioner "just did not have memory of that incident." App. 51, ll. 3 – 6. Counsel only had "the evidence gathered by the other officers and the investigators in that case." App. 51, ll. 3 – 6. Petitioner was not sure if he was driving at the time of the accident. App. 51, l. 23 – App. 52, l. 4. However, Petitioner recalled making several stops prior to the accident. App. 51, l. 23 – App. 52, l. 4.

Defense counsel agreed that there was blood found on the driver's side door frame and steering wheel, and urine on the passenger seat. App. 54, ll. 11 – 20; App. 106. Counsel agreed that the blood in that location would have had to come from the driver's left side. App. 21 – 8. Petitioner's laceration was on his right temple. App. 56, ll. 23 – 25; App. 115. Counsel also subpoenaed Petitioner's emergency room records which stated that Petitioner was the "front passenger" and suffered "loss of consciousness." App. 57, l. 23 – App. 58, l. 5; App. 118 – 119.

Counsel admitted that he failed to subpoena the emergency room records of the decedent. App. 59, ll. 5 – 6. The emergency room records stated that "[p]er EMS patient was an unrestrained driver of one car TC rollover with patient unresponsive." App. 59, ll. 19 – 25; App. 122 – 123. There was also alcohol and marijuana found in the decedent's blood. App. 69, ll. 17 – 20.

Counsel conceded that, based on the emergency room records, there was a question of whether Petitioner was driving at the time of the accident. App. 61, l. 22 – App. 62, l. 5. Counsel also agreed that if the blood on the driver's side and the steering wheel had been tested, he could have known whether it was Petitioner's blood. App. 62, ll. 1 – 5. Counsel acknowledged that Petitioner's laceration on his right temple could have been "consistent with him sitting in the passenger seat and hitting some . . . object from the passenger seat." App. 62, ll. 14 – 18.

Counsel asserted that the State made no plea offers. App. 60, ll. 3 – 5. Counsel also agreed that if he had known about the confusion as to who was driving the truck at the time of the accident, he could have used that fact during mitigation to help Petitioner get a more favorable sentence. App. 70, ll. 17 – 22.

Petitioner was not aware of the decedent's emergency room records and did not know that the blood and urine in the truck could have been tested. App. 74, ll. 3 – 13. Petitioner stated that he had no information to help him “piece together what happened.” App. 76, ll. 19 – 21.

Petitioner confirmed that he had no memory of the accident and only remembered picking up the decedent and waking up in the hospital. App. 72, ll. 18 – 25. Petitioner asserted that if he had known there were discrepancies in the record as to who was driving at the time of the accident, he would have gone to trial. App. 73, ll. 21 – 25. The State did not extend any plea offers to Petitioner or allow him to plead under North Carolina v. Alford, 400 U.S. 25 (1970). App. 81, ll. 9 – 13.

### **Order of Dismissal**

On June 11, 2015, the PCR court issued an order of dismissal. App. 152. The PCR court found that “there was never a question as to whether [Petitioner] was the driver of the vehicle, and therefore, Counsel's representation was not deficient.” App. 157. The court found that the MAIT report indicated that Petitioner was the driver. App. 157. The court held that Petitioner “was not prejudiced by any error by Counsel.” App. 157.

On July 15, 2015, Petitioner filed a motion to reconsider pursuant to Rule 59(e), SCRCP, asking the court to reconsider its prior ruling and “all allegations submitted in the memoranda by [Petitioner]” as part of his PCR application. App. 160. The State filed its return to Petitioner's motion to reconsider on September 2, 2015, requesting that the motion be denied. App. 162.

On September 9, 2015, the PCR court issued an order denying Petitioner's motion to reconsider. App. 166. The court ruled that it was “not persuaded to alter or amend its judgment” after “careful reconsideration of the evidence in this case.” App. 166.

Petitioner appealed the judge's order. This petition for writ of certiorari follows.

## ARGUMENT

The PCR court erred by concluding defense counsel could not have been deficient for failing to have available forensic evidence examined from the inside of the wrecked automobile to show Petitioner was not the driver, but the passenger, in this felony DUI case, where there was no evidence supporting the PCR court's conclusion that "there was never a question as to whether [Petitioner] was the driver," where defense counsel even conceded such evidence existed, including the hospital records which listed Petitioner as the "front passenger," especially since Petitioner had no memory of the accident and received the maximum twenty-five year sentence despite pleading guilty and waiving a trial.

Counsel was ineffective for failing to have the blood and urine in the wrecked automobile tested. Counsel was also ineffective for failing to obtain the decedent's emergency room records and the EMS records, which raised a question of who was driving at the time of the accident. Petitioner had no recollection of the incident and could have established reasonable doubt that he was the driver at the time of the accident. But for counsel's ineffective assistance, Petitioner would not have pled guilty and would have insisted on going to trial.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v Washington, 466 U.S. 668, 691 (1984); Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). Counsel also has a duty 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). Further, counsel's "conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions." Strickland, 466 U.S. at 691.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland, 466 U.S. at 685 – 86. In the context of a guilty plea, a court will conduct a two-prong test when determining whether defense counsel's assistance was ineffective. Hill v. Lockhart, 474 U.S. 52, 58 (1985) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel's performance was deficient. Hill, 474 U.S. at 58 – 59. Whether counsel was "deficient" turns on whether the guilty plea was entered voluntarily, knowingly, and intelligently. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994). See Hill, 474 U.S. at 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))).

Second, the applicant must show that he was prejudiced by counsel's deficient performance during the guilty plea process. Hill, 474 U.S. at 59. Specifically, the applicant must show 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." Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000); Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997).

Here, defense counsel was ineffective for failing to have the blood and urine in the wrecked automobile tested and failing to request the decedent's emergency room records. Petitioner's medical records indicated he was the passenger, while the decedent's records indicated he was the driver. However, an additional emergency room document indicated Petitioner was the driver. The MAIT report also indicated Petitioner was the driver. The

discrepancies in the records alone raised a question as to who was driving at the time of the accident.

The blood located on the driver's side truck frame could have been consistent with the driver being injured on the left side during the collision. The decedent sustained a laceration on the left side of his head. However, Petitioner was injured on his right temple. Had counsel obtained testing of the blood on the driver's side and steering wheel, and the urine on the passenger seat, the test results could have determined who was driving at the time of the accident. The EMS records could have also shown who was on the driver's side when the first responders arrived at the scene. See Bagwell v. State, 410 S.C. 259, 763 S.E.2d 630 (Ct. App. 2014) (finding counsel was ineffective for failing to seek DNA testing of blood on the glass from victim's patio door prior to trial, where the State asserted defendant could have cut his eye while running out of the glass door after burglarizing victim's home, but defendant asserted that he was asleep at home at the time of the burglary).

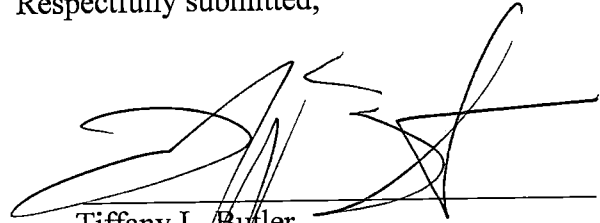
Both counsel and Petitioner confirmed that the State made no plea offers. The State made no recommendations on sentencing or even allowed Petitioner to tender an Alford plea. At a minimum, counsel could have explained to the plea judge the discrepancies as to who was the driver. Petitioner received **no benefit** from pleading guilty and waiving his right to a trial, since he was given the **maximum** twenty-five year sentence.

If counsel had obtained the decedent's emergency room records, the EMS records, and had the blood and urine in the truck tested, Petitioner could have established reasonable doubt that he was the driver at the time of the accident. Petitioner would not have pled guilty and would have insisted on going to trial.

CONCLUSION

For the reasons argued above, Petitioner David Onley respectfully requests this Court to grant his petition for writ of certiorari with the ultimate relief of a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tiffany L. Butler', written over a horizontal line.

Tiffany L. Butler  
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of July, 2016.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Lexington County  
Honorable DeAndrea G. Benjamin, Circuit Court Judge

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DAVID ONLEY

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

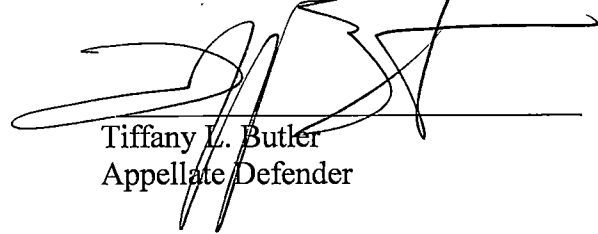
RESPONDENT

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case have been served on Patrick Schmeckpeper, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and David Onley, #277671, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 11th day of July, 2016.



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Tiffany L. Butler  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day of July, 2016.

Christian Ford (L.S.)  
Notary Public for South Carolina  
My Commission Expires: March 1, 2026