

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County  
Daniel D. Hall, Circuit Court Judge  
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ORIGINAL

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SEP 14 2016

S.C. SUPREME COURT

KENNETH DARRELL RIVERA,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000737  
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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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Susan B. Hackett  
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Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Did plea counsel provide ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to ensure Petitioner understood the terms of the plea agreement and/or ensure the plea agreement was placed on the record accurately?

## STATEMENT

During its July 2014 term, a Greenville County grand jury indicted Petitioner for possession of a firearm by a person convicted of a crime of violence (2014-GS-23-5139). App. 59-60. Additionally, Petitioner was charged with armed robbery (2014-GS-23-10896)<sup>1</sup> and possession of a firearm by a person convicted of a crime of violence (2014-GS-23-10897). App. 62-63; App. 65-66.<sup>2</sup> On March 5, 2015, Petitioner entered guilty pleas to those charges. He was represented by Dorothy A. Manigault. App. 1. Mark L. Moyer represented the state. App. 1. The Honorable R. Scott Sprouse accepted the guilty pleas. App. 1. Judge Sprouse sentenced Petitioner to fifteen years' imprisonment for armed robbery and to five years' imprisonment for each of the weapons charges. App. 10, ll. 13-24; App. 61; App. 64; App. 67. Petitioner did not file a direct appeal. App. 13; App. 20; App. 53.

On May 20, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 12-18. The state filed a return. App. 19-23. On February 16, 2016, the matter proceeded to an evidentiary hearing before the Honorable Daniel D. Hall. App. 24. Karen C. Ratigan represented the state, and Caroline M. Horlbeck represented Petitioner. App. 24. At the conclusion of the hearing, Judge Hall found that Petitioner had not met his burden and denied the application for relief. App. 49, ll. 3-5. By an order filed on March 15, 2016, Judge Hall formally denied Petitioner relief. App. 52-58.

Petitioner filed a notice of appeal. This petition for writ of certiorari follows.

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<sup>1</sup> In the indictment charging Petitioner with armed robbery, Petitioner was also charged with possession of a weapon during the commission of a violent crime (2014-GS-23-10896). App. 62-63. However, this charge was dismissed as a result of the guilty plea. App. 68.

<sup>2</sup> Petitioner waived presentment on the offenses of armed robbery (2014-GS-23-10896) and possession of a weapon by a person convicted of a crime of violence (2014-GS-23-10897). App. 5, ll. 11-22.

## ARGUMENT

Plea counsel provided ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to ensure Petitioner understood the terms of the plea agreement and/or ensure the plea agreement was placed on the record accurately.

### **Relevant facts**

A Greenville County grand jury indicted Petitioner for possession of a firearm by a person convicted of a crime of violence (2014-GS-23-5139). App. 59-60. Although Petitioner was also charged with armed robbery and possession of a weapon during the commission of a violent offense (2014-GS-23-10896) and possession of a firearm by a person convicted of a crime of violence (2014-GS-23-10897), he was not indicted for those offenses. App. 62-63; App. 65-66. Petitioner was also charged with unlawful carrying of a pistol (2014-GS-23-4934) and possession of a stolen pistol (2014-GS-23-10895). App. 69-70.

On March 5, 2015, Petitioner pled guilty to two counts of possession of a firearm by a person convicted of a crime of violence and armed robbery. App. 2, ll. 3-13. The state recommended a sentence of fifteen years' incarceration. App. 3, ll. 14-20. Plea counsel asked the court to accept the state's recommendation. App. 8, ll. 14-16. At the conclusion of the hearing, Judge Sprouse sentenced Petitioner to fifteen years' imprisonment for the armed robbery and to five years' imprisonment for each of the weapons charges. App. 10, ll. 13-24; App. 61; App. 64; App. 67. He ordered the sentences to be served concurrently. App. 10, ll. 18-22; App. 61; App. 64; App. 67.

During the PCR hearing, Petitioner explained that the plea offer from the state was that if he would plead guilty to armed robbery and possession of a firearm by a person convicted of a

violent crime, then all other charges would be dismissed by the solicitor. App. 27, l. 16 – App. 28, l. 2; App. 31, ll. 13-21. Petitioner produced a letter from the solicitor indicating that if he pled guilty to those two charges, then the state would dismiss the charge of possession of a weapon during a violent crime and possession of a stolen pistol. App. 51. This document was entered as Applicant’s Exhibit #1. App. 51. Upon receipt of this offer, Petitioner accepted the state’s terms. App. 28, ll. 12-15. However, at Petitioner’s guilty plea hearing, the state informed the judge that Petitioner was pleading guilty to three charges: armed robbery and two counts of possession of a firearm by a person convicted of a crime of violence. App. 29, ll. 9-15. Petitioner was too frightened to speak up during the guilty plea hearing because he knew the solicitor’s offer was generous. App. 32, ll. 16-21; App. 33, ll. 3-10. Petitioner admitted the offer was “good” and knew he “probably would have got[ten] over 20 years” had he not entered the guilty plea, even if the terms were not as he expected. App. 38, ll. 20-25. Additionally, Petitioner explained that to his knowledge the state had not dismissed the charges as promised pursuant to the plea agreement. App. 40, ll. 6-10.

According to plea counsel, Petitioner was arrested for two counts of weapons charges and one count of criminal domestic violence. App. 42, ll. 16-20. While out on bond, Petitioner was arrested for armed robbery and two more weapons charges. App. 42, ll. 20-22. In total, he had six charges, four of which were weapons violations. App. 42, ll. 16-23. Plea counsel claimed that the letter from the solicitor in which the plea offer was presented was two pages long rather than the single page submitted by Petitioner at the hearing. App. 43, ll. 4-7. Further, she claimed the second page listed when the offer expired. App. 43, ll. 6-7. When plea counsel discussed a guilty plea with Petitioner, he requested she pursue a ten-year offer. App. 43, ll. 14-20. Plea counsel did so, but the solicitor declined. App. 43, ll. 20-22. The solicitor stated “the

best that he could do” “would be 15.” App. 43, ll. 22-24. Then, the solicitor “just picked the armed robbery and the two weapons charges out of the four.” App. 43, ll. 24-25; App. 44, l. 8. Further, plea counsel explained that she never received a written plea offer concerning all six charges. App. 47, ll. 20-22. Rather, the final plea offer to which Petitioner agreed was a verbal one. App. 47, l. 23 – App. 48, l. 3.

Also, plea counsel indicated the additional three charges were dismissed by the state. App. 44, ll. 9-15; App. 48, ll. 5-9.<sup>3</sup> Plea counsel asserted that Petitioner “wanted to plead guilty to the least amount of charges as possible.” App. 46, ll. 2-6. Petitioner never expressed “any surprise that there were three charges” and never requested to halt the proceedings or withdraw his guilty plea based upon the state requiring him to plead guilty to three charges. App. 46, ll. 7-9.

In his order of dismissal, the PCR judge held Petitioner “failed to meet his burden of proving plea counsel did not adequately discuss the plea offer with him.” App. 56. After recounting the testimony, the PCR judge found plea counsel’s testimony “credible.” App. 56. The PCR court’s review of the plea transcript revealed no objection to the three charges when those were announced. App. 56. Accordingly, the PCR judge determined the transcript “refuted” Petitioner’s “allegation that he believed he was only pleading guilty to two charges that day.” App. 56. Finally, the PCR court examined the Clerk of Court records and determined the documentation to dismiss certain charges had been submitted by the solicitor. App. 56. The PCR judge concluded that Petitioner “failed to present specific and compelling evidence that

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<sup>3</sup> Although the documents were not admitted as exhibits during the PCR hearing, the state provided the judge with documents indicating three charges had been dismissed by the solicitor. App. 48, ll. 21-24. Despite the fact that these documents were not admitted as exhibits, Petitioner has included them in the Appendix because they were made available to the judge and reviewed by the judge as indicated by the order. App. 56; App. 68-70.

plea counsel committed either errors or omissions in his [*sic*] representation” of Petitioner and that Petitioner had failed to prove prejudice. App. 56-57.

### **Discussion**

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel’s performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one’s accusers. Boykin v. Alabama, 395 U.S. 238, 243-244 (1969). The record must show with certainty that the plea is “an intentional relinquishment or abandonment of a known right or privilege.” State v. Patterson, 278 S.C. 319, 322, 295 S.E.2d 264, 265 (1982) *overruled on other grounds* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Judges are required to give the defendant an explanation of the defendant’s waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263

S.C. 594, 598, 211 S.E.2d 889, 891 (1975). Entering a guilty plea results in a waiver of several constitutional rights; therefore the Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently. Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003).

In order for a defendant to knowingly and voluntarily plead guilty, the defendant must have a full understanding of the consequences of the plea. Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991)(citing State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). The judge must question the defendant about the possible punishment that could be imposed. Id. at 434-435.

The PCR judge erred in concluding Petitioner had not met his burden of proof concerning plea counsel's ineffective assistance. Petitioner's misapprehension of the plea offer, which was based upon plea counsel's failure to ensure he understood the terms, rendered his guilty plea involuntary. At its core, a guilty plea must be entered with an understanding of the terms of the plea offer, and more specifically, an understanding of the offenses for which the defendant is admitting guilt. Here, Petitioner testified that the terms of the plea offer were for Petitioner to plead guilty to two offenses and for four offenses to be dismissed. However, at the guilty plea hearing, he entered guilty pleas to three offenses and only three offenses were dismissed. This was a fundamental change in the terms of the offer as Petitioner understood it. Additionally, Petitioner provided documentation to support his understanding – the written plea offer from the state. Although that offer only concerned four of the six charges, it showed the state's willingness to permit Petitioner to plead guilty to two charges and for two charges to be dismissed. Plea counsel's failure to advise Petitioner adequately and correctly of the plea offer and/or to ensure the plea was placed on the record accurately amounted to ineffective assistance of counsel rendering Petitioner's guilty plea

involuntary. As a result, this Court should reverse the PCR court and hold that plea counsel's advice fell below the standard of reasonableness and prejudiced Petitioner.

**CONCLUSION**

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court decides to grant the petition and dispense with further briefing, Petitioner respectfully requests this Court find plea counsel ineffective, reverse his convictions, and remand for a new trial.

Susan B. Hackett  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of September, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Daniel D. Hall, Circuit Court Judge

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KENNETH DARRELL RIVERA,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Kenneth Darrell Rivera states:

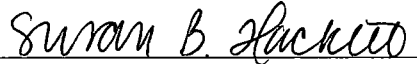
1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.

2. She has reviewed the record of petitioner's post-conviction relief hearing before the Honorable Daniel D. Hall, which was held on February 16, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial. She has also reviewed the transcript of the guilty plea hearing.

3. Pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), she has briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Kenneth Darrell Rivera.

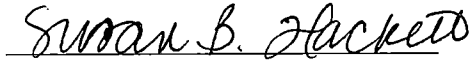
Respectfully Submitted,

  
Susan B. Hackett  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 14th day of September, 2016.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

  
Susan B. Hackett  
Appellate Defender

S.C. Commission on Indigent Defense  
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PO Box 11589  
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ATTORNEY FOR PETITIONER

This 14th day of September, 2016.

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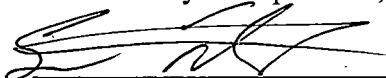
RESPONDENT

—————  
CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Karen C. Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Kenneth Darrell Rivera, #318979, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 14th day of September, 2016.

*Susan B. Hackett*  
Susan B. Hackett  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 14th day of September, 2016.

 (L.S)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.