STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Florence County

Honorable Edgar W. Dickson, Circuit Court Judge

MAURICE WILSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001433

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

The PCR court erred in finding that plea counsel was not ineffective for failing to seek readily available hospital records proving that Petitioner did not have a staph infection at the time that he was accused of spitting on a police officer, as the State alleged during the guilty plea, but was suffering from a non-infectious case of hidradenitis. Had plea counsel obtained this information there was a reasonable probability that the plea judge would have imposed a substantially shorter sentence for throwing bodily fluids on a police officer.

STATEMENT

Indictment and Guilty Plea

Petitioner was indicted by the Florence County Grand Jury for: driving under the influence, second offense; habitual traffic offender; throwing bodily fluids; trafficking cocaine base; criminal domestic violence, third offense; leaving the scene the scene of an accident with property damage; and leaving the scene of an accident with great bodily injury

On August 6, 2012, Petitioner pled guilty before the Honorable D. Craig Brown to throwing bodily fluids; CDV, third offense; leaving the scene of an accident with property damage; leaving the scene of an accident with great bodily injury; and habitual traffic offender. App. 3, ll. 1-9; App. 113 – 117. The remaining indictments were dismissed. Petitioner was represented by William Grove. Assistant Solicitor Catherine Wyse represented the State.

Relevant Facts

On February 3, 2011, Florence City police officers were dispatched to Petitioner's fiancée's house in response to a reported domestic dispute. App. 11, l. 24 – 16, l. 1. Petitioner and his fiancée were loudly fighting in the front yard. The fiancée accused Petitioner of being drunk and hitting her in the face. *Id.* Petitioner was arrested after police observed that the fiancée's face was red and bruised. On July 19, 2011, returned to his fiancée's house. A fight ensued. *Id.* The fiancée again called the police and Petitioner was arrested.

On March 21, 2012, Petitioner was stopped on suspicion of drunk driving. During the traffic stop, Petitioner "became very loud and boisterous." App. 14, ll. 1-6. Petitioner did not pass field sobriety tests and was arrested for driving under the influence. App. 14, l. 9 – 16, l. 1.

Petitioner was taken to the Florence City police station for a breathalyzer. Petitioner "kept charging towards [the arresting officer] trying to [hit him] with his shoulders," while

handcuffed. The arresting officer believed Petitioner was being disorderly and a breathalyzer test was never conducted. *Id.*

According to police, Petitioner continued to resist the arresting officers at the station. As Petitioner was taken to a holding cell, he spit on one of the arresting officers. App. 15, ll. 3-23. At the time of his arrest, Petitioner had a visible rash on his face. During his time in pre-trial detention, the jail's nurse believed that Petitioner had a highly contagious MERSA staph infection. *Id.*

Petitioner was being treated for MERSA at the time of the guilty plea. At sentencing the assistant solicitor emphasized that Petitioner's purported staph infection made the throwing bodily fluids charge more serious:

> Your Honor, I just like to point out the fact that Officer Anderson, you know, became aware that Mr. Wilson had a very serious [staph] infection. . . . I hope that you will take that into consideration.

App. 23, ll. 7-16. In actuality Petitioner was suffering from hidradenitis aggravated by the unsanitary conditions of pre-trial detention. However, defense counsel never sought to investigated Petitioner's condition.

The trial court sentenced Petitioner to a total sentence of fifteen years for all of the remaining charges. As required by statute, seven years of Petitioner's sentence was for the throwing bodily fluids charge, which was ordered to be served consecutive to the other charges. App. 24, l. 3 – 25, l. 14.

PCR Application and Evidentiary Hearing

Petitioner filed an application for post-conviction relief on January 23, 2013 alleging that plea counsel was ineffective with respect to his representation of Petitioner on the throwing bodily fluids charge. App. 27 – 33. The State filed a Return on May 21, 2013. App. 38 – 42. Petitioner filed an amendment to his application for post-conviction relief on February 6, 2014. App. 43 – 44.

An evidentiary hearing was held before the Honorable Edgar W. Dickson on October 9, 2014. App. 45 – 94. Jonathan Waller represented Petitioner. Assistant Attorney General Croom Hunter represented the State. Petitioner and plea counsel both testified.

Petitioner stated that he provided plea counsel with multiple witnesses who would testify that he was not driving the car involved in the hit and run. App. 52, l. 4 – 55, l. 5. Petitioner testified that during his time in pre-trial detention he developed an inflamed rash on his scalp, "my scalp – it went from, like, being normal-sized to a lot of inflammation during the course of my stay." App. 55, ll. 11-25.

He recalled that the resulting rash and swelling were a major subject of conversation among law enforcement and jailers. He remembered that the lawyers and the judge in the moments leading up to his guilty plea also discussed his skin condition and its implications for the throwing bodily fluids charge:

> Well, I know there was a point where there was speculation that it was a possible chance that I had a staph infection and -- and it was a city police officer involved with the crime and, when that was mentioned by the prosecutor, Your Honor Craig Brown took that in consideration, whereas I could have put that police officer at home with a highly contagious, you know, staph infection like that.

App. 55, ll. 13-25

Appellant stated that he would not have pled guilty to the throwing bodily fluids charge had he known that it was a mandatory consecutive sentence. App. 57, ll. 5-20. He further testified he was under the impression that the solicitor was primarily concerned with securing a long sentence on the hit and run charges. App. 57, l. 21 – 58, l. 20. Petitioner was surprised when the plea judge gave him an additional seven years for the throwing bodily fluids charge. *Id.*

Plea counsel did not recall how many times he met with Petitioner. App. 80, ll. 2 – 81, l. 20. Plea counsel admitted that "up until this PCR was filed, I was under the impression – I was still under the impression that it was staph infection." App. 82, ll. 12-23. Counsel claimed that he sought to have Petitioner released on bond so that he could get treatment for his medical condition, but he was unsuccessful. *Id.*

He further stated that the skin condition worried the jail's medical staff because the medicine they were using to treat it, on the assumption that it was a staph infection, was ineffective. Counsel stressed during his testimony that he successfully pushed the State to dismiss several of Petitioner's charges. App. 86, l. 22 – 87, l. 22.

During direct questioning from the PCR judge, plea counsel conceded that the judge's erroneous belief that Petitioner had a staph infection very likely impacted his sentencing:

> I'm sure -- I mean it had to have affected it at some point on some level. To what degree, I don't know, but I do know that -- that that -- the judge took that one fairly -- fairly seriously, as well as did the officer. I think that given the fact that he had what everybody believed at the time to be a staph infection, that made it a little bit different than just a normal person who would otherwise appear to be healthy. Mr. Anderson -- Officer Anderson had to go and -- go to the hospital and get treatment to make sure that he hadn't gotten any sort of infection and that he hadn't been negatively affected. . . .
>
> . . . And that was -- I think that was addressed by either Ms. Wyse, the prosecutor, or the judge during the plea. . . .

> Without -- I mean without that, it would have been a run-of-the-mill throwing bodily fluids on an officer case. I think it -- I think it made it a little more serious certainly.

App. 90, l. 13 – 91, l. 8.

Order of Dismissal

The PCR court denied Petitioner's application in an order of dismissal issued on July 24, 2015. The Court rejected Petitioner's claim that counsel was ineffective for failing to investigate his medical records prior to the guilty plea. App. 100. The Court determined that counsel was not ineffective because he had "no reason to believe Appellant did not have a staph infection." App. 101.

Specifically, the Court concluded that – despite Petitioner having surgery in the weeks leading up to the guilty plea and the hospital diagnosing him as suffering from "obvious hidradenitis" – counsel had no duty to inspect the hospital records prior to the guilty plea. *Id.*

The order of dismissal concluded, counsel satisfied the Sixth Amendment's effective representation mandate by uncritically accepting his client's belief that the skin condition was a staph infection. Despite, hospital records to the diagnosing him with hidradenitis being readily available.

The Court also concluded that Petitioner could not demonstrate prejudice because his seven year sentence was within the one to fifteen sentencing range for throwing bodily fluids. Contrary to plea counsel – whom the court found credible – the PCR court determined that whether the plea judge's erroneous belief that Petitioner had a staph infection impacted his sentencing of Petitioner was pure speculation. App. 103.

Post-Trial Motions

On July 17, 2015, Petitioner filed a Rule 59(e), SCRCP, motion arguing that the PCR court misapprehended Petitioner's claims regarding the staph infection. Petitioner was being unsuccessfully treated for the staph infection while in pre-trial detention. App. 105 – 107. "Applicant asserts that the fact that he was being unsuccessfully treated for a staph infection and his condition remained unchanged until his diagnosis and treatment for hidradenitis suggests that the diagnosis of staph was incorrect all along and that the Court should have concluded as such." App. 106.

The State filed a Return to Petitioner's Rule 59(e) motion on July 24, 2015. App. 108 – 110. On May 27, 2016, the trial court issued an order denying Petitioner's motion. App. 112 – 113.

This petition follows.

ARGUMENT

The PCR court erred in finding that plea counsel was not ineffective for failing to seek readily available hospital records proving that Petitioner did not have a staph infection at the time that he was accused of spitting on a police officer, as the State alleged during the guilty plea, but was suffering from a non-infectious case of hidradenitis. Had plea counsel obtained this information there was a reasonable probability that the plea judge would have imposed a substantially shorter sentence for throwing bodily fluids on a police officer

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, 90 S.Ct. 1463, 1474 (1970). An "unsound result" occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969) (finding a guilty plea is voluntarily and knowingly entered into when the accused has a full understanding of the consequences of his plea and the charges against him).

"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, 683 S.E.2d 471 (2009) (citing Hill, 474 U.S. at 57-59; *See Ray v. State*, 303 S.C. 374, 401 S.E.2d 151 (1991) (finding defendant's guilty plea was not intelligently and voluntarily made in light of the erroneous advice given by plea counsel).

Furthermore, the United States Supreme Court has held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691; *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (noting "[i]n assessing the reasonableness of an attorney's investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known

evidence would lead a reasonable attorney to investigate further").

This Court has held that trial counsel has a duty "to discover all reasonably available mitigation evidence and reasonable 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); *See Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007) (finding "[w]ithout a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation") (internal quotation omitted).

As this Court explained, "[W]hile the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Lounds v. State*, 380 S.C. 454, 460, 670 S.C. 646, 649 (2008) (citing *Ard*, 372 S.C. at 331-32, 642 S.E.2d at 597); *See Von Dohlen v. State*, 360 S.C. 598, 605, 602 S.E.2d 738, 742 (2004) (holding trial counsel's investigation concerning defendant's mental state was not reasonable despite the fact that counsel made "some effort" where the defense psychiatrist testified that had he been provided with additional medical and psychiatric records that post-conviction counsel uncovered, he would have testified Von Dohlen suffered from "'major depressive episodes with severe symptoms of anxiety and possible prepsychotic features'").

In this case, Petitioner did not freely and intelligently waive his constitutional trial rights because plea counsel failed "to discover all reasonably available mitigation evidence and reasonable available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight*, 378 S.C. at 46, 661 S.E.2d at 360; *see also Boykin*, 395 U.S. 238. Specifically, plea counsel failed to conduct a reasonable investigation by not seeking copies of hospital records relating to Petitioner's surgery.

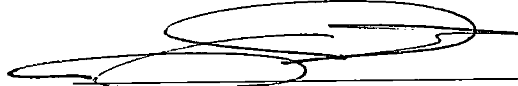
In the months leading up to Petitioner's guilty plea, he had been unsuccessfully receiving treatment for a skin condition thought to be staph infection on his scalp. This should have led plea counsel to question whether Petitioner had been correctly diagnosed by the jail medical staff. The condition became so serious that Petitioner was taken to a local hospital for surgery. Once there, medical professionals realized that Petitioner did not have a staph infection, but a severe case of non-contagious hidradenitis. App. 61, l. 6 – 64, l. 20.

During Petitioner's guilty plea, when arguing for a lengthy sentence, the solicitor stressed to the court that Petitioner had a severe staph infection when he spit on the officer. App. 55, ll. 13-25. Plea counsel said nothing in mitigation because he was unaware that Petitioner did not have a staph infection. *Id.* Plea counsel manifestly failed to investigate readily available, compelling mitigation evidence. *See McKnight*, 378 S.C. at 46

Petitioner's decision to plead guilty did not relieve plea counsel of his duty to conduct a reasonable and independent investigation into possible defenses. *See Praylow*, 761 F.2d 179. Accordingly, the PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty when "there is a reasonable probability that, but for counsel's errors, [Petitioner] would not have pled guilty and would have insisted on going to trial." App. 57, l. 5 – 64, l. 20; *Hill*, 474 U.S. at 57-59.

CONCLUSION

Based on the foregoing reasons, Petitioner Maurice Wilson's petition for writ of certiorari should be granted to allow full briefing on the issue.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of February, 2017.

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RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Maurice Wilson states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. He has reviewed the record of petitioner's trial before Judge Edgar W. Dickson, which was held on October 9, 2014, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

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

Therefore, counsel requests that the Court relieve him as counsel for Maurice Wilson.

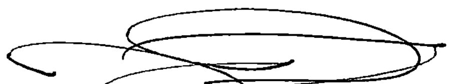
Respectfully Submitted,

John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

This 6th day of February, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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."



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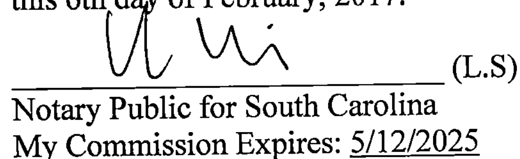
CERTIFICATE OF SERVICE

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 Lindsey McCallister, 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 Maurice Wilson, #222456, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 6th day of February, 2017.

John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 6th day of February, 2017.



______________________ (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025