STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

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Certiorari to Spartanburg County

Robin B. Stilwell, Circuit Court Judge



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CHARVUS T. NESBITT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001223

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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Susan B. Hackett
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ATTORNEY FOR PETITIONER

# INDEX

## ISSUE PRESENTED

Was Petitioner's plea pursuant to North Carolina v. Alford involuntary due to plea counsel's ineffective assistance where counsel failed to review evidence with Petitioner showing the only independent and neutral witnesses in the case (1) were unable to positively identify Petitioner as a participant in the crimes and (2) identified one of the co-defendants as the shooter and Petitioner indicated he would not have entered a plea if he had been aware of the evidence?

## STATEMENT

On March 25, 2017, a Spartanburg County grand jury indicted Petitioner for murder, possession of a weapon during a violent crime (2011-GS-42-1414) and attempted murder (2011-GS-42-1415). App. 186-187; App. 190-191. On January 9, 2012, the grand jury indicted him for attempted armed robbery (2012-GS-42-349). App. 193-194. On February 13, 2012, Petitioner appeared before the Honorable Roger Couch. App. 1. Fletcher Smith represented Petitioner. App. 1. Derick Bulsa represented the state. App. 1. Although the solicitor announced all four charges, the judge reviewed only three of the four with Petitioner. App. 4, ll. 5-11; App. 5, l. 8 – App. 6, l. 1; App. 8, ll. 18-20. During the plea, Petitioner indicated he was not satisfied with plea counsel's services, particularly, the amount of time plea counsel negotiated on his behalf. App. 7, l. 23 – App. 8, l. 17. After the judge explained the charges, Petitioner entered his "no contest" plea or plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). App. 9, ll. 6-16. The judge accepted Petitioner's plea. App. 24, ll. 8-15. After learning of Petitioner's minimal prior record – a trespassing conviction – the judge sentenced Petitioner to thirty years imprisonment for attempted murder, twenty years imprisonment for attempted armed robbery, and forty years imprisonment for murder. App. 27, ll. 1-2; App. 28, ll. 14-21; App. 188-189; App. 192; App. 195. After the sentencing, Petitioner exited the courtroom. App. 28, l. 24. Then, the solicitor requested the judge sentence Petitioner on the pistol charge, which was the second count of the murder indictment. App. 29, ll. 2-5. Judge Couch sentenced Petitioner to five years imprisonment on the pistol charge. App. 29, l. 18.

Petitioner retained new counsel, Kenneth Shabel, and filed a motion for reconsideration and/or motion for new trial on February 23, 2012. App. 31-32. On March 7, 2012, Petitioner filed an amended motion. App. 33-34. Judge Couch heard arguments on the motion on April

26, 2012. App. 35. Bulsa represented the state, and Shabel represented Petitioner. App. 35. By an order filed May 24, 2012, Judge Couch granted the motion to reconsider as to the five year sentence for the pistol. App. 48-49. The judge reviewed the plea hearing transcript and found that he had failed to question Petitioner about the pistol charge. App. 48-49. On March 27, 2013, the solicitor entered a *nolle prosequi* on the pistol charge. App. 186. Thereafter, Petitioner filed a notice of appeal, which was perfected by Shabel. App. 50-63. The appeal challenged the plea judge's refusal to set aside Petitioner's pleas on all charges. App. 50-63. Petitioner contended this Court "mandates full disclosure of plea agreements and ensures that no one can enforce them unless it is completely within the record." App. 59. Further, Petitioner explained, "the record was clear as to what [Petitioner]'s full and complete agreement was. It was four charges, not three." App. 59. Petitioner concluded that "[o]nce one portion of the complete plea agreement became invalid, there was no plea agreement to enforce." App. 59. On May 6, 2014, this Court certified the case for review. App. 85. This Court affirmed Petitioner's convictions and sentences on January 14, 2015. App. 86-93. State v. Nesbitt, Op. 27477, (S.C. Sup. Ct. filed Jan. 14, 2015). This Court held Petitioner "received the forty-year sentence which he negotiated, and further received the benefit of having one of the charges against him essentially dropped, as his criminal record will only reflect three convictions and not four. Therefore, to the extent there was error, [Petitioner] has suffered no prejudice." App. 92. Remittitur issued on January 30, 2015. App. 94-95.

Petitioner then filed an application for post-conviction relief (PCR) on January 13, 2016. App. 96-101. The Honorable Robin B. Stillwell presided over an evidentiary hearing on March 23, 2017. App. 109. Valerie Giovanoli represented the state, and Christopher Brough

represented Petitioner. App. 109. By an order filed on April 26, 2017, Judge Stillwell denied Petitioner relief from his convictions and sentences. App. 176-185.

Petitioner served his notice of appeal on May 24, 2017. This petition for writ of certiorari follows.

## ARGUMENT

Petitioner's plea pursuant to *North Carolina v. Alford* was involuntary due to plea counsel's ineffective assistance where counsel failed to review evidence with Petitioner showing the only independent and neutral witnesses in the case (1) were unable to positively identify Petitioner as a participant in the crimes and (2) identified one of the co-defendants as the shooter and Petitioner indicated he would not have entered a plea if he had been aware of the evidence.

**Relevant Facts**

At the plea hearing, the state alleged Petitioner was part of a conspiracy to rob a drug dealer. App. 16, l. 21 – App. 22, l. 1. The state alleged that two people were shot during the robbery. App. 16, l. 21 – App. 22, l. 1. One person died. App. 16, l. 21 – App. 22, l. 1.

On December 7, 2010, Daniel Tremayne Landrum lived with his sister, Germicka Rooker, and her two sons. App. 16, l. 25 – App. 17, l. 3. Teddy Byers called Landrum to buy marijuana as a ruse for the robbery. App. 17, ll. 3-9. Byers, his half-brother, Petitioner, his cousin, Hazel Stoudemire, and a friend, Johnathan Petty, drove to the residence to make the purchase. App. 17, ll. 9-15. According to the state, Petitioner, Stoudemire, and Petty approached the home while Byers stayed in the car. App. 17, ll. 15-17. Petitioner and Stoudemire were armed with guns owned by Petitioner. App. 17, ll. 17-24. Per the state's theory, Petitioner and Stoudemire entered the home. App. 17, l. 24 – App. 18, l. 1. Relying upon Stoudemire's statement to police, the state claimed Petitioner pulled out his gun and fired it multiple times. App. 18, ll. 3-12. When the shots started, Rooker went toward the gunfire. App. 19, ll. 1-3. Rooker was shot, but survived. App. 19, ll. 5-6. Landrum was shot three times, and died from his injuries. App. 18, ll. 14-15.

Stoudemire told police he did not fire his gun and promptly dropped it during the shooting. App. 19, ll. 15-16. Stoudemire, Petty, and Petitioner returned to the car where Byers was waiting. App. 19, ll. 17-22. Stoudemire claimed that when the group realized he had dropped the gun and that it could be traced to Petitioner, the group decided to report the gun as stolen. App. 20, ll. 1-6. During the investigation, Stoudemire and Petty pointed their fingers at Petitioner as the shooter. App. 21, ll. 1-7. Byers also told police Petitioner was the gunman. App. 21, ll. 9-10. According to the solicitor at the plea hearing, the "state would've went to trial on that premise that this was the actual gunman." App. 18, ll. 10-11; App. 21, l. 25 – App. 22, l. 1.

After the state reviewed its version of the facts for the plea judge, the judge engaged in the following colloquy with Petitioner:

The Court: So that again tell me that after the review of that evidence, it's your belief that if that evidence were presented to a jury during a trial, that it would more than likely result in a conviction in this matter, and that has led you to the decision to plead no contest given the negotiated sentence. Have I correct[ly] stated your position?

Mr. Nesbitt: Sir?

The Court: Now, have you told me the truth today, Mr. Nesbitt?

Mr. Nesbitt: Yes, sir.

The Court: Did anyone tell you how to respond to my questions?

Mr. Nesbitt: No, sir.

The Court: So that means the responses I have received to my questions were you own. Is that right?

Mr. Nesbitt: Yes, sir.

The Court: Is there any part of what you and I have discussed that you'd like to reconsider or go back over at this time?

Mr. Nesbitt: I just want to say no contests (sic) to the facts that he's present with. No, sir. That's it.

The Court: Well, you've already pled no contest ---

Mr. Nesbitt: Okay.

The Court: --- and I'm in the process of being sure that that's how you wish you [to] plead. And is that how you wish to plead?

Mr. Nesbitt: Yes, sir.

App. 22, l. 14 – App. 23, l. 18. Thereafter, the judge accepted the Alford plea. App. 23, l. 19 – App. 24, l. 15.

During the PCR hearing, Petitioner explained that he did not see several vital pieces of evidence prior to entering his plea. App. 119, ll. 11-19. Specifically, Petitioner never saw an investigation report indicating the eyewitnesses inside the home were unsure of their identifications of Petitioner as the shooter. App. 121, l. 11 – App. 122, l. 12; App. 163-166. Starr Burgess, who was in the home, identified Petitioner from the photographic line-up, but she indicated she was only "40-50% sure he was one of the suspects." App. 122, l. 16 – App. 123, l. 13; App. 163-164; App. 167. Subsequently, she identified Teddy Byers as the shooter. App. 164. Jermeka Rookard, who was shot, viewed a line-up, including a photo of Petitioner. App. 164. While she selected the photo of Petitioner as a participant she "scored it 5 out of 10 as being him." App. 131, ll. 5-12; App. 164. When her son was shown the line-up, he was unable to identify anyone. App. 164. B.J. saw two black guys enter the home. App. 125, l. 1; App. 169-170. He described the shooter as the shorter of the two and with dreadlocks. App. 125, ll. 2-5; App. 169-170. This description contrasted drastically with Petitioner, who was a least six feet tall and did not have dreadlocks. App. 125, ll. 6-15. However, this description matched Teddy Byers – the same person identified by Starr Burgess as the shooter. App. 129, ll. 3-11.

Petitioner explained that if he had reviewed these items of evidence, he would not have entered an Alford plea. App. 132, l. 24 – App. 133, l. 1. Instead, he would have insisted on going to trial. App. 133, ll. 2-3; App. 133, ll. 16-18. When Petitioner went before the plea judge, he did not have the necessary information to enter a voluntary plea. App. 133, ll. 7-10. Plea counsel's failure to advise Petitioner of this evidence amounted to ineffective assistance rendering his plea involuntary. App. 133, ll. 11-15.

Plea counsel, on the other hand, claimed he "went over the evidence in detail" with Petitioner. App. 144, ll. 305. Plea counsel acknowledged that Petitioner denied he was the shooter. App. 144, 11. 8-12. To convince Petitioner to enter an Alford plea, counsel explained "the hand of one is the hand of all." App. 144, ll. 10-12. Plea counsel assured the PCR judge he had reviewed all the discovery he had received with Petitioner. App. 144, ll. 18-21; App. 150, ll. 5-8. He could not remember "every detail a every police report and every statement that was given." App. 144, ll. 22-23. However, "by and large," plea counsel "went over the evidence with regard to the particular witnesses that were going to be against [Petitioner] which were three individuals who were involved in the conspiracy to go inside and rob this guy." App. 144, l. 23 – App. 145, l. 2. Relying solely upon the plea transcript, which showed the solicitor mentioned "problems" with two witnesses, plea counsel claimed Petitioner "was well aware of ... the strengths and weaknesses of his case." App. 145, ll. 3-7.

> Yeah, we knew that there was some witnesses out there that couldn't, you know, some who were victims who couldn't actually identify him properly, I mean, with percentages but the fact a the matter is he, the people who went in there with him that actually resulted in shooting that lady's daughter in the neck and murdering the other fella, uh, had him a hundred percent and so when you make an assessment although I know Mr. Brough ask him own questions when you make an assessment on the hand a one, the hand a all, he doesn't have to be the one to actually be the shooter but if he's there participating in that crime he can go down with life in prison.

App. 145, ll. 14-24. According to plea counsel, Petitioner decided to enter an Alford plea after plea counsel "gave him the odds [he] thought that he was most probably going to be convicted and that he was gonna to spend the rest of his life in prison without the negotiated plea." App. 147, ll. 17-21.

At the conclusion of the PCR hearing, the judge denied Petitioner relief. App. 159, ll. 7-10. The judge characterized the plea colloquy as "very thorough and exhaustive." App. 159, ll. 10-13. He found it was "clear in the record" "that there were some problems with some [of] the testimony from the witnesses, um, that was acknowledged by the defense attorney in his uh, uh, when he addressed the court as well." App. 159, ll. 15-19. According to the judge, "questions about witnesses" "were obviously known at the time because the transcript represents that they were known at the time." App. 159, l. 25 – App. 160, l. 2.

In the order denying relief, the PCR judge found plea counsel's "testimony with regard to fully reviewing all of the discovery with [Petitioner] to be credible, while finding [Petitioner]'s testimony that he was not aware of some of the discovery to be not credible." App. 183. "The record is clear that during the plea hearing, counsel indicated that he had a full understanding of the inconsistencies in the victim identification, but that he also had a full understanding of all the other inculpatory evidence the state had against [Petitinoer]." App. 183. The judge was persuaded to deny relief because Petitioner was present at the plea hearing "and did not question anything put forth to the plea court by his counsel." App. 183-184. The PCR judge found plea counsel "reviewed all of the discovery" with Petitioner. App. 184.

After making these findings, the judge concluded Petitioner "failed to present specific and compelling evidence that counsel committed either errors or omissions in his representation

of" Petitioner. App. 184. The judge also concluded Petitioner failed to show he was prejudiced by plea counsel's conduct. App. 184.

**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.

In the context of a guilty plea, a petitioner must show that counsel was ineffective and that there is a reasonable probability but for counsel's errors, he would not have pled guilty. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000); Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000); Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997); Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994).

In Kolle v. State, 386 S.C. 578, 590-591, 690 S.E.2d 73, 79-80 (2010), this Court held "plea counsel was deficient in failing to procure pertinent discovery materials, in particular the call/dispatch logs and search warrant." This Court explained these materials would have enabled

counsel to effectively cross-examine the officers at the suppression hearing, point out the time discrepancies, and point out other discrepancies in the documents material to the charges against Kolle. Id. at 591, 690 S.E.2d at 80. According to this Court, had counsel "adequately attacked the credibility of the officers, there is a reasonable probability this would have influenced the trial judge's decision regarding the existence of exigent circumstances, *i.e.*, affected the outcome of the suppression motion." Id.

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); see also Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003). 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).

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. This Court has held that a defendant must "be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999)(citing Dover v. State,

304 S.C. 433, 405 S.E.2d 391 (1991); State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). A guilty plea is rendered involuntary, unknowing, and unintelligent when a defendant pleads guilty to a crime without knowing the direct consequences of the guilty plea. Hazel, 275 SC at 394, 271 S.E.2d at 603.

This Court has held that a "defendant's undisputed testimony that he would not have pled guilty but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 631 S.E.2d 260 (2006) (citing Jackson v. State, 342 S.C. 95, 97-98, 535 S.E.2d 926, 927 (2000); Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 485-86 (1991)).

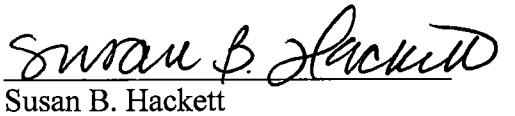
The only people who claimed Petitioner was involved in the crime were those who had an interest in placing blame on Petitioner – his codefendants. See State v. Henson, 407 S.C. 154, 167, 754 S.E.2d 508,515 (2014)(explaining that co-conspirators who faced charges for their participations in the crimes "had an incentive to downplay their involvement and shift blame to others). One of the codefendants, Teddy Byers, was identified by the neutral witnesses as the shooter. Byers also fit the description of the shooter – short with dreadlocks – provided by one of the other independent witnesses. Byers had access to Petitioner's gun because they lived in the same home.

Petitioner admitted that he was aware that his co-defendants were telling police that he was the shooter. However, Petitioner explained plea counsel failed to inform him that the only truly neutral witnesses in the case were unable to identify him with any certainty. Plea counsel failed to inform him that an independent eyewitness described the shooter as short and with dreadlocks. This description did not fit Petitioner at all, but it did describe Byers. Plea counsel's failure to inform Petitioner of this exculpatory evidence was deficient performance.

As Petitioner explained at the PCR hearing, if he had been aware of the witness' statements identifying Byers as the shooter, describing the shooter dissimilar to Petitioner, and making very uncertain identifications, he would have insisted on going to trial. According to Petitioner, this evidence would have empowered him to challenge the state's weak case against him, which relied upon his co-defendants' obviously self-interested blame-shifting.

## CONCLUSION

Petitioner respectfully requests this Court grant the petition and order full briefing on the issue presented. In the event this Court grants the petition but dispenses with full briefing, Petitioner respectfully requests this Court reverse the PCR court, find plea counsel was ineffective, vacate Petitioner's convictions, and order Petitioner be remanded for a new trial.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of January, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

Robin B. Stilwell, Circuit Court Judge

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CHARVUS T. NESBITT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Charvus T. Nesbitt 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 guilty plea hearing before the Honorable Roger Couch on February 13, 2012, and the PCR hearing before the Honorable Robin B. Stilwell on March 23, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

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 Charvus T. Nesbitt.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 5th day of January, 2018.

## 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

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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(803) 734-1330

ATTORNEY FOR PETITIONER

This 5th day of January, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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JAN 05 2018

S.C. SUPREME COURT

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CHARVUS T. NESBITT,

PETITIONER

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STATE OF SOUTH CAROLINA,

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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 Valerie Garcia Giovanoli, 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 Charvus T. Nesbitt, #349711, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 5th day of January, 2018.

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 5th day of January, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022.