

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

—————  
CERTIORARI TO YORK COUNTY  
Court of Common Pleas  
The Honorable R. Lawton McIntosh, Circuit Court Judge

—————  
Appellate Case No. 2017-001968  
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**RECEIVED**

SEP 27 2018

**S.C. SUPREME COURT**

DAVONTAY DARRELL HENSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

—————  
**RETURN TO PETITION FOR WRIT OF CERTIORARI**  
—————

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<sup>1</sup> 410 S.C. 534, 545, 765 S.E.2d 572, 578 (2014).

**RESPONDENT'S STATEMENT OF THE ISSUES**

- I. Did the post-conviction relief court properly deny Petitioner's assertion that Counsel was ineffective for failing to appropriately advise Petitioner on the potential sentence he faced if convicted of murder?
  
- II. Did the post-conviction relief court properly deny Petitioner's assertion that Counsel was ineffective for failing to advise Petitioner that he would be entitled to a separate sentencing hearing under Aiken v. Byars if Petitioner was convicted of murder?

## STATEMENT OF THE CASE

Petitioner is presently in the South Carolina Department of Corrections pursuant to orders of commitment from the York County Clerk of Court. During the December 2010 term, the York County Grand Jury indicted Petitioner for murder (2010-GS-46-04457), assault and battery with the intent to kill (2010-GS-46-04458), three counts of armed robbery (2010-GS-46-04459, 04460, 04461), and five counts of possession of a firearm during the commission of a violent crime (2010-GS-46-04457A, 04457A, 04459A, 04460A, 04461A). Petitioner was represented by Philip Wayne Jamieson, Esquire (hereinafter Counsel). Deputy Solicitor Walter William Thompson of the Sixteenth Circuit Solicitor's prosecuted the case.<sup>2</sup>

On May 28, 2015, Petitioner appeared before the Honorable John C. Hayes, III and pled guilty under North Carolina v. Alford<sup>3</sup>. Pursuant to plea negotiations, all possession of a firearm indictments were dismissed other than the one relating to the murder indictment (04457A). Judge Hayes imposed a negotiated sentence of thirty years imprisonment for murder, thirty years imprisonment for each count of armed robbery, twenty years imprisonment for assault and battery with intent to kill, and five years imprisonment for possession of a firearm during the commission of a violent crime. All sentences were imposed to run concurrently.

Petitioner filed a timely notice of appeal to the South Carolina Court of Appeals. Petitioner's appeal was dismissed for failure to provide a sufficient guilty plea explanation, as required by Rule 203 (d)(1)(B)(iv) of the South Carolina Appellate Court Rules. An order to that effect was issued September 9, 2015. The Remittitur was returned on September 25, 2015.

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<sup>2</sup> Petitioner was originally tried and convicted on all of these charges in November of 2011. He was sentenced to life imprisonment at that time. On appeal, his convictions were overturned on a Confrontation Clause issue. Petitioner opted to enter an Alford plea rather than face a new trial on these charges. (State v. Henson, Op. No. 27354 (S.C. Sup. Ct. Order dated January 22, 2014).

<sup>3</sup> 400 U.S. 25 (1970).

Petitioner filed his application for post-conviction relief on September 7, 2016, alleging ineffective assistance of counsel because Counsel gave him erroneous advice concerning his possibility of a life sentence, failing to correct the amount of time-served he was credited, erroneous advice concerning parole eligibility, failing to investigate, and failing to ascertain the effect of Applicant's medication on Applicant during the plea hearing. Respondent made its Return on November 28, 2016. On July 31, 2017, an evidentiary hearing was held before the Honorable R. Lawton McIntosh. Petitioner was represented by Leah Moody, Esquire. Respondent was represented by Assistant Attorney General Justin Hunter. At the evidentiary hearing, Petitioner testified on his own behalf. Philip Jamison, Esquire testified for the State. By order filed September 15, 2017, Judge McIntosh denied Petitioner's application in its entirety.

Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his Petition for Writ of Certiorari and Appendix.

## STATEMENT OF FACTS

On October 1, 2009, Petitioner, along with his co-defendants, got together and discussed the possibility of robbing someone. (Appx. 14.) The group decided to rob one of the co-defendant's friends, Maurice Jackson. (Appx. 14.) The co-defendant went to Mr. Jackson's residence to see who was present. (Appx. 14.) The group believed Mr. Jackson would have cash and marijuana that they could take. (Appx. 14.) The co-defendant discovered Mr. Jackson had two other friends at his residence that night. (Appx. 15.) The co-defendant borrowed Mr. Jackson's cell phone and communicated to the rest of his group that there were additional people at the residence with Mr. Jackson. (Appx. 15.) The co-defendant then left the residence and returned to his group. (Appx. 15.)

Petitioner, who was armed with a rifle at the time, and a female co-defendant returned to Mr. Jackson's residence. (Appx. 15.) Petitioner's rifle, which was hidden in his pants, was rigged to fire automatically at the time. (Appx. 15.) As the duo approached Mr. Jackson and his friends, the female co-defendant asked if she could have a smoke. (Appx. 15.) Petitioner was immediately behind his female co-defendant and when he came into the yard, he pulled out the rifle, and told the group they were being robbed. (Appx. 15.) The duo took cell phones, wallets, cash, a box of cigarettes that contained at least one marijuana cigarette. (Appx. 15-16.)

As Petitioner and his female co-defendant began to leave the yard, she told Petitioner to do something because the victims had seen her face. (Appx. 16.) Petitioner began to fire his rifle at that point. (Appx. 16.) One victim was shot in the leg and foot, one victim was shot in the head and died as a result of that wound. (Appx. 16.)

Petitioner and his female co-defendant fled the area and met back up with their group. (Appx. 17.) Another co-defendant drove the group back to her residence where the participants

were staying at that time. (Appx. 17.) The group dispersed later that night and into the next day. (Appx. 17.) Through the police investigation, Petitioner was identified as a suspect in this case. Petitioner fled the state and was arrested eleven months later in Baltimore, MD. (Appx. 19.)

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., 300 S.C. at 117-18, 386 S.E.2d at 625. When there has been a guilty plea, the applicant must prove counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

## ARGUMENT

### **I. The Post-Conviction Relief Court properly found Counsel appropriately advised Petitioner that he was facing a sentence of thirty years to life for the murder charge.**

Petitioner asserts Counsel was ineffective for providing Petitioner “erroneous” sentencing advice, which led Petitioner to enter an Alford plea on his charges. However, the record in both the plea hearing and the post-conviction relief hearing refute Petitioner’s allegation that he was not appropriately advised of his potential sentence prior to his plea. After the post-conviction relief hearing, the post-conviction relief court properly found, “Counsel’s testimony to be credible that he explained that [Petitioner] was facing a sentence of thirty years to life imprisonment for murder, and not a sentence of life without parole.” (Appx. 77.) Since Petitioner was properly advised of his potential sentence prior to his plea, this Court should deny certiorari.

Petitioner entered a plea pursuant to Alford during his plea hearing. The plea, although not admitting guilt, should still be made knowingly, voluntarily, and intelligently. State v. Herndon, 403 S.C. 84, 95, 742 S.E.2d 375, 381 (2013). “[T]he general consensus [is] that an Alford plea is merely a guilty plea with the gloss of judicial grace allowing a defendant to enter a plea in her best interest.” Id. An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel’s errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe, 345 S.C. at 20, 546 S.E.2d at 419. An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel’s advice was not “within the competence demanded of attorneys in criminal cases.” Hill, 474 U.S. at 56. Further, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)). A defendant’s knowing and voluntary waiver of statutory or

constitutional rights must be established by a complete record, and “may be accomplished by colloquy between the court and defendant, between the court and defendant’s counsel, or both.” Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). “In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing.” Id. at 138-39, 654 S.E.2d at 874 (citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).

In the case at bar, the record from the plea hearing shows Petitioner was made aware of the sentences he faced on each of his charges during the plea colloquy with the plea judge. Specifically, Judge Hayes stated, “You’re charged with murder; murder carries from thirty years up to life imprisonment. It is a violent offense...A violent offense is an offense which carries with it the prospect that while you are incarcerated you will not be eligible for certain programs non-violent offenders are allowed to enjoy. Do you understand that?” (Appx. 7.) Petitioner replied, “Yes, sir.” (Appx. 7.) Additionally, Counsel testified during the post-conviction relief hearing that he did not tell Petitioner that he would only serve eighty-five percent of the murder sentence, Counsel testified, “I told him he would serve the full sentence. But that he would get credit for time served and that would reduce some of the time that he would be there.” (Appx. 67.)

It is clear from the records of both the plea hearing and the post-conviction relief hearing that Petitioner was fully aware he was facing a potential sentence of thirty years to life imprisonment for the murder charge. Petitioner elected to knowingly, intelligently, and voluntarily enter an Alford plea to his charges and receive the benefit of a negotiated sentence of thirty years, which is within the statutory range. Petitioner, having been convicted of these charges in a

previous trial, was previously sentenced to life, and Counsel made Petitioner aware the State was prepared to present the same case to a jury and the outcome would likely be the same result.<sup>4</sup> Counsel testified at the post-conviction relief hearing that the case against Petitioner was very strong and he believed Petitioner ran the risk of getting more time at trial. (Appx. 60, 68.)

Petitioner has failed to meet his burden to show how Counsel was ineffective in advising Petitioner on the potential sentence he faced for murder. Petitioner bears the burden of establishing first that Counsel did not render reasonably effective assistance under prevailing professional norms to the extent that it “so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Second, Petitioner must establish that this deficiency so prejudiced her that there remains a “reasonable probability that, but for, Counsel’s unprofessional errors, *the result of the proceeding would have been different.*” Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625, (1989) (emphasis added). Here, Petitioner has failed to meet his burden as the record clearly establishes he was aware of the potential sentence he faced, entered an Alford plea knowingly, freely and voluntarily, and received a negotiated sentence of thirty years, which is within statutory range Petitioner was informed of by Counsel and the plea judge. Petitioner has failed to show how Counsel’s representation fell below prevailing professional norms or how he was prejudiced Counsel’s representation. Therefore, this Court should deny certiorari.

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<sup>4</sup> Petitioner’s previous conviction was overturned on a Confrontation Clause issue, not a sentencing issues. State v. Henson, Op. No. 27354 (S.C. Sup. Ct. Order dated January 22, 2014).

**II. The Post-Conviction Relief Court properly denied Petitioner’s assertions that Counsel was ineffective for failing to advise Petitioner that he would be entitled to a separate sentencing hearing under Aiken v. Byars<sup>5</sup> if Petitioner was convicted of murder.**

Counsel was not ineffective for failing to discuss the “mitigation sentencing hearing” with Petitioner because he was not entitled to such a hearing. This Court in Aiken v. Byars did not set forth a separate sentencing hearing for juveniles, rather they set forth factors sentencing courts should consider prior to imposing a life sentence on a juvenile. Juveniles are only entitled to a sentencing hearing where these factors are weighed if they have been convicted of a crime that could result in a life sentence. Here, Petitioner knowingly, voluntarily, and intelligently entered an Alford plea and received a negotiated sentence of thirty years, which does not entitle him to such a hearing. Therefore, Counsel’s failure to explain the Aiken v. Byars factors with Petitioner was neither deficient nor prejudicial and this Court should deny certiorari.

Both the United States Supreme Court and the South Carolina Supreme Court have recognized even a sentence of life without parole is constitutionally permissible for a juvenile convicted of homicide. See Montgomery v. Louisiana, 136 S. Ct. 718, 733 (2016) (recognizing a sentencing judge may encounter a rare juvenile offender for whom a life without parole sentence is justified); Miller v. Alabama, 567 U.S. 460, 479-480 (2012) (instructing a sentencing judge is not constitutionally foreclosed from sentencing a juvenile homicide offender to a life sentence while cautioning the “appropriate occasions for sentencing juveniles to the harshest possible penalty will be uncommon”); See Aiken, 410 S.C. 534, 544, 765 S.E.2d 572, 578 (“[T]he judge may still determine that life without parole is the appropriate sentence in some of these cases in light of other aggravating circumstances.”). Petitioner, facing a thirty years to life sentence for

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<sup>5</sup> 410 S.C. 534, 545, 765 S.E.2d 572, 578 (2014).

murder, chose to take an Alford plea, which allowed him to receive the lowest sentence possible of thirty years for his murder charge. See People v. Applewhite, 409 Ill. Dec. 849, 855, 68 N.E.3d 957, 963 (Ill. Ct. App. 2016) (finding a defendant’s forty-five-sentence for a murder he committed when he was seventeen years old was not unconstitutional where he “did not receive the ‘harshest possible penalty’ nor was he subjected to a sentencing scheme which mandated a sentence of life in prison without parole” and where the “sentencing authority retain[ed] some discretion to consider a juvenile’s youth before imposing a severe sentence”); see also Miller, 567 U.S. at 476-477 (recognizing there is a difference between the culpability level of a fourteen-year-old offender versus a seventeen-year-old offender and criticizing mandatory sentencing schemes for failing to take that difference into account for sentencing purposes).

This Court’s decision in Aiken v. Byars does not prohibit a juvenile from being sentenced to life imprisonment. “Without question, the judge may still determine that life without parole is the appropriate sentence in some of these cases in light of other aggravating circumstances.” Id. This Court established a framework of factors sentencing courts should consider prior to allowing a juvenile be subject to a sentence of life without parole. Id.

... [T]he factors a sentencing court consider at a hearing must include: (1) the chronological age of the offender and the hallmark features of youth, including ‘maturity, impetuosity, and failure to appreciate the risks and consequence’; (2) the ‘family and home environment’ that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender’s participation in the conduct and how familial and peer pressures may have affected him; (4) the ‘incompetencies associated with youth – for example, [the offender’s] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender’s] inability to assist his own attorneys’; (5) the ‘possibility of rehabilitation.’

Aiken, 410 S.C. 534, 765 S.E.2d 572.

In the case at bar, Petitioner was seventeen years old at the time of the murder. There has been no question of Petitioner's competency nor his ability to be an active participant in his various proceedings. According to the State's evidence, Petitioner was an active member in the planning and execution of the armed robbery and was the actual shooter during the incident. It is highly likely that, even with the factors a sentencing court would take into consideration, Petitioner would be sentenced to life imprisonment under the facts of this case if convicted of murder. Counsel's advice to Petitioner that he was facing the same trial as he did in 2011 and, most likely, a similar outcome, was appropriate as the State was prepared to present the same evidence and witness testimony that resulted in Petitioner being found guilty and sentenced to life imprisonment. After discussing this with Petitioner during several meetings, Counsel testified Petitioner came "to see that [taking the plea] was the better choice for him." (Appx. 66.)

Notwithstanding the fact that Petitioner could have been properly sentenced to life imprisonment even after the mitigating factors were weighed during a sentencing hearing, Petitioner bypassed this evaluation by choosing to enter an Alford plea. Pursuant to Petitioner's plea, he was sentenced to thirty years, which does not entitle him to a sentencing hearing where the Aiken v. Byars factors would be weighed. Additionally, Petitioner was not prejudiced by Counsel's representation because Petitioner received a thirty year sentence, which is the lowest possible sentence for his murder charge, and has failed to show how an evaluation of the factors set forth in Aiken v. Byars would have changed the outcome of Petitioner's case.

Petitioner again fails to meet either prong of the Strickland standard as Petitioner has not shown how Counsel's representation fell below the standard norm, nor how Petitioner was prejudiced by Counsel's representation. At the time Petitioner entered his Alford plea, Petitioner knew what the statutory sentencing range was for his murder charge. Petitioner also knew the

State was prepared to present the same evidence and witnesses at trial, which resulted in a previous conviction and life sentence for Petitioner. Petitioner, evaluating his options, decided to enter an Alford plea and did so knowingly, intelligently, and voluntarily. Because Petitioner entered a plea in this case and received a thirty year sentence, he was not entitled to a sentencing hearing where the Aiken v. Byars factors would be weighed by the court. Petitioner has not set forth any facts or evidence that would show how the outcome of his case would have been different had he proceeded to trial and been afforded a “mitigation sentencing hearing” under Aiken v. Byars. In fact, it is highly likely Petitioner would find himself in prison for life under those circumstances as the factors the sentencing court would consider would do little, if anything, to mitigate Petitioner’s guilt in this case. Petitioner received his best case scenario through his Counsel’s representation in this case; he was able to maintain his innocence by pleading under Alford, and receive the lowest sentence available for a conviction of murder. Therefore, he was clearly not prejudiced by Counsel’s representation and the post-conviction relief court properly denied relief. Therefore, certiorari should be denied.

**CONCLUSION**

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied. Should this Court grant the Petition for writ of certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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Attorney General

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By:   
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September 27, 2018

STATE OF SOUTH CAROLINA

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DAVONTAY DARRELL HENSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies via interagency mail:

**Victor R. Seeger, Esquire**  
**SC Commission on Indigent Defense**  
**Post Office Box 11589**  
**Columbia, South Carolina 29211-1589**

This 27<sup>th</sup> day of September, 2018

  
JENNIFER A. JENNISON  
Legal Assistant



ALAN WILSON  
ATTORNEY GENERAL

September 27, 2018

The Honorable Daniel E. Shearouse  
Clerk of the South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

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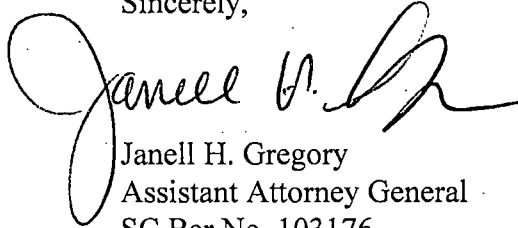
**S.C. SUPREME COURT**

**Re: Davontay Darrell Henson v. State of South Carolina**  
**Appellate Case No. 2017-001968**  
**Lower Court Case No. 2016-CP-46-2637**

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari. By copy of this letter, we are serving opposing counsel today.

Sincerely,



Janell H. Gregory  
Assistant Attorney General  
SC Bar No. 103176

JHG/jaj  
Enclosures

cc: Victor R. Seeger, Esquire (2 copies)