

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Lexington County

Honorable Alison Renee Lee, Circuit Court Judge

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MARGARET M. DRIGGERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000497

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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**ISSUE PRESENTED**

Whether the original attorney appointed to represent Petitioner but who was later relieved was ineffective in allowing Petitioner to speak with law enforcement and the prosecutors without first providing discovery material to Petitioner and without preparing Petitioner for the interviews?

## STATEMENT

In March of 2014, the Lexington County Grand Jury indicted<sup>1</sup> Petitioner, Margaret Marie Driggers, for murder, armed robbery and burglary first degree, indictments #2014-GS-32-897, 898, 899. On April 11, 2014, Petitioner appeared before the Honorable Thomas A. Russo and pled guilty to the lesser included offense of voluntary manslaughter, armed robbery and burglary first degree. The transcript of the guilty plea is not available. (App. p. 1). Emily Howard represented Petitioner at the guilty plea. Solicitor Rick Hubbard and Deputy Solicitor Shawn Graham prosecuted the case. Judge Russo sentenced Petitioner to the maximum thirty years, pursuant to the negotiated sentencing range of between fifteen and thirty years, for each charge with the sentences to be served concurrently. Counsel for Petitioner filed a motion to reconsider sentence. A hearing on the motion to reconsider sentence was held on May 6, 2014, but the transcript of the hearing is also not available. (App. p. 31, line 21- p. 32, lines 1-3). Judge Russo denied the motion to reconsider sentence. Petitioner did not file a notice of intent to appeal.

On March 6, 2015, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on December 19, 2016. On August 10, 2017, an evidentiary hearing was held before the Honorable Allison Renee Lee. Aimee Zmroczek represented Petitioner at the PCR hearing. W. Joseph Maye represented the State. On November 30, 2017, Judge Lee signed a written order denying relief and dismissing the application. On December 18, 2017, Petitioner filed a motion to reconsider pursuant to Rule 59(e) SRCP. Judge Lee denied the motion on February 20, 2018, and the order denying the motion was filed on February 23, 2018. A timely notice of intent to appeal was served on March 21, 2018. This petition for writ of certiorari follows.

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<sup>1</sup> It appears that Petitioner was initially indicted for murder in 2011. (App. pp. 163-165).

## ARGUMENT

**The original attorney appointed to represent Petitioner but who was later relieved was ineffective in allowing Petitioner to speak with law enforcement and the prosecutors without first providing discovery material to Petitioner and without preparing Petitioner for the interviews.**

Petitioner, Demetriss Shawn Glenn and Kenneth Walters were all charged in the murder of Timothy Tice. A jury convicted Glenn of murder and he was sentenced to life in prison. (App. p. 42, lines 3-5). Walters pled guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to voluntary manslaughter, armed robbery and burglary first degree and received a sentence of twenty years. (App. p. 44, lines 1-9; p. 138, lines 4-8). Petitioner pled guilty to voluntary manslaughter, armed robbery and burglary first degree and received a sentence of thirty years.

Attorney Mark Schnee was originally appointed to represent Petitioner but was later relieved. (App. p. 56, lines 11-25; p. 36, lines 5-7). Petitioner testified that she and Mr. Schnee met with the solicitors and she provided statements quite a few times. (App. p. 56, lines 19-25). When asked when she viewed her discovery, Petitioner testified, "Mark Schnee showed while they were in there, you know, there was a little bit, but he was looking at it. I didn't see it then because we left; we parted ways. Emily, [plea counsel] showed it to me, like four days before she came in. We went in a room and she was going through it. It wasn't like I really saw it. We talked about different things, you know, so." (App. p. 57, lines 18-24).

Plea counsel, Emily Howard was appointed in December of 2013. (App. p. 110, lines 9-13). Petitioner told plea counsel that in the two and half years while the case was pending Mr. Schnee did not provide any of the discovery material. (App. p. 116, line 2 – p. 117, lines 1-21). By the time plea counsel was appointed to represent Petitioner, Petitioner had already spoken

with law enforcement and the solicitors. Plea counsel testified, “She [Petitioner] had communicated with authorities, authorities not associated with the solicitor’s office, and she had communicated with the solicitor’s office, and sometimes represented by counsel in those communications and sometimes not.” (App. p. 114, lines 5-12).

Deputy Solicitor Shawn Graham testified that the State wanted to present Petitioner’s testimony and Walters’ testimony at the trial against Glenn because the State lacked physical evidence against Glenn. (App. p. 84, lines 1-25). The State, however, deemed Petitioner’s testimony unreliable and did not call her or Walters as witnesses at Glenn’s trial. In regard to Mr. Schnee’s representation of Petitioner, plea counsel testified, “I found it to be odd that a defense attorney would have a case for two and a half years, allow his client to talk to solicitors and law enforcement when he wasn’t there and do all of that without ever having, A, given the defendant discovery, and, B, gone through it with her. I found that pretty incredulous.” (App. 117, lines 15-21).

In the order of dismissal the PCR judge wrote, “She [Petitioner] confirms that she met quite a few times with the Solicitor’s office to provide her statement, but states that she merely elaborated on her story. Applicant claims that she was scared, upset, and lacked information and discovery to prepare for her meeting with the Solicitor.” (App. p. 241). The order then only addresses plea counsel’s failure to provide discovery as opposed to the original appointed attorney, Mr. Schnee. The PCR judge found that Petitioner failed to meet her burden of proof to establish that plea counsel was ineffective. As to prejudice, the PCR judge wrote, “Applicant has failed to show how receiving her discovery earlier would have had any influence on her decision to plead guilty.” Original appointed counsel, not plea counsel, was ineffective in allowing Petitioner to speak with law enforcement and the prosecutors without first providing discovery

material to Petitioner and without preparing Petitioner for the interviews. As to prejudice from the original appointed attorney's deficient performance, if Petitioner had been provided discovery material and been better prepared for her interviews, her testimony may not have been deemed unreliable, the State could have called her as a witness at Glenn's trial and her cooperation may have resulted in a sentence closer to the fifteen year minimum provided in the negotiated sentencing range.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made:

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). “To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him.” Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). “A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea ‘may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.’ ” Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). “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.’ ” Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

In Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999), the South Carolina Supreme Court wrote:

Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently by defendants. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The United States Supreme Court has held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he or she is waiving. Id. Specifically, a defendant must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. This Court considered the requirements of a voluntary and knowing guilty plea in State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980) and Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In addition to the requirements of Boykin, a defendant entering a guilty plea 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. id.

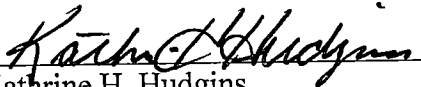
In the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); see also Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203

(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, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970))). “The second, or ‘prejudice,’ requirement ... focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. 52 at 59, 106 S.Ct. 366.

In the present case original appointed counsel was deficient in failing to provide discovery and failing to prepare Petitioner for interviews with law enforcement and the prosecutors. Petitioner was prejudiced by the deficient performance. Based on the deficient performance, Petitioner’s testimony was deemed unreliable and she was not called to testify against her co-defendant and potentially receive a more lenient sentence based on her cooperation.

**CONCLUSION**

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of October, 2018.

STATE OF SOUTH CAROLINA

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Certiorari to Lexington County

Honorable Alison Renee Lee, Circuit Court Judge

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MARGARET M. DRIGGERS,

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\_\_\_\_\_


PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Margaret M. Driggers states:

1. She is 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 Judge Alison Renee Lee, which was held on August 10, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
  3. She 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 her as counsel for Margaret M. Driggers.

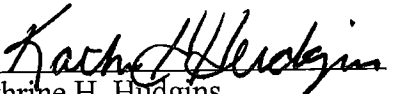
Respectfully Submitted,

  
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Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 19th day of October, 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."

  
Kathrine H. Hudgins  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
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PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

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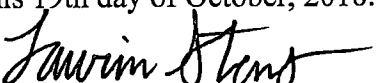
RESPONDENT

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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 Kelly Oppenheimer, 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 Margaret M. Driggers, #359524, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 19th day of October, 2018.

  
\_\_\_\_\_  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 19th day of October, 2018.

  
\_\_\_\_\_  
(L.S)  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027.