

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Dorchester County

Honorable Maite Murphy, Circuit Court Judge

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LAVONTE FAVOR,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001119

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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 PCR court erred in denying relief, where plea counsel was ineffective for failing to investigate Petitioner's case and communicate trial strategy and defenses with him, where additional investigation would have shown that a missing warrant used to arrest Petitioner could have been the grounds for a successful suppression motion, where a successful suppression argument would have resulted in the dismissal of Petitioner's charges, and where Petitioner would have proceeded to trial had counsel been willing to challenge this issue for him?

## STATEMENT

Petitioner was indicted for trafficking heroin, trafficking cocaine, trafficking cocaine base, manufacturing or possession of a schedule IV drug with the intent to distribute, and possession of a firearm during the commission of a violent crime by a Dorchester County grand jury on September 1, 2016. App. 117 – App. 128. On March 21, 2017, after a jury had been selected, Petitioner pleaded guilty before the Honorable W. Jeffrey Young. App. 1. Donald Sorenson served as the Assistant Solicitor, and John Kornegay represented Petitioner. As part of a “global plea,” Petitioner pleaded guilty to charges arising out of Charleston County as well. App. 22 ll. 22 – 24. These charges included distribution of crack and trafficking cocaine. App. 25 ll. 11 – 23.

The facts offered by the State at the plea were as follows: Petitioner allegedly sold cocaine and cocaine base to undercover law enforcement officers in Charleston County. App. 9 l. 23 – App. 14 l. 15. The Dorchester County charges allegedly originated after Petitioner was pulled over by law enforcement for supposedly speeding and officers noticed scales in the car. Petitioner was arrested for an outstanding warrant for distribution of heroin; an unloaded handgun as well as drugs were located in the car. Id.

Petitioner pleaded guilty subject to a negotiated fifteen year sentence. App. 15 ll. 17 – 21; App. 19 l. 13 – App. 20 l. 20. Judge Young found that a substantial factual basis existed for the plea and accepted it. App. 20 ll. 21 – 25. Petitioner received a fifteen year sentence on the distribution of crack offense, fifteen years on the additional distribution of crack offense, ten years on the trafficking for cocaine offense, fifteen years on the additional trafficking cocaine charge, fifteen years on the trafficking in meth or cocaine base charge, fifteen years on the

trafficking heroin charge, and five years on the possession of a weapon charge. App. 25 l. 11 – App. 26 l. 18. The sentences were crafted to run concurrently. App. 26 ll. 19 – 20.

On or about October 12, 2017, Petitioner filed an application for post-conviction relief. App. 28 – App. 35. It contained allegations of ineffective assistance, including a claim that counsel failed to investigate, as well as a claim that the plea court lacked subject matter jurisdiction. App. 31. The State made its Return in January 2018. App. 36 – App. 41.

On March 2, 2018, an evidentiary hearing took place before the Honorable Maite Murphy. App. 42. Rodney Davis represented Petitioner, and Christian Saville appeared on behalf of the State. Petitioner and plea counsel testified at the hearing.

By way of a written Order of Dismissal, Judge Murphy denied relief. App. 106 – 116.

This petition follows.

## ARGUMENT

**The PCR court erred in denying relief, where plea counsel was ineffective for failing to investigate Petitioner’s case and communicate trial strategy and defenses with him, where additional investigation would have shown that a missing warrant used to arrest Petitioner could have been the grounds for a successful suppression motion, where a successful suppression argument would have resulted in the dismissal of Petitioner’s charges, and where Petitioner would have proceeded to trial had counsel been willing to challenge this issue for him.**

### *Relevant facts*

At the outset of the evidentiary hearing, counsel for Petitioner indicated that Petitioner may file a separate post-conviction relief application for the Charleston charges. App. 49 l. 5 – App. 51 l. 17. The PCR court ruled that the hearing would proceed and that Petitioner would be allowed to file a separate PCR in Charleston for those charges. Id.

After plea counsel was appointed to Petitioner’s case, Petitioner then decided to hire Leon Stavrinakis. App. 52 ll. 9 – 24. Petitioner hired Stavrinakis “[b]ecause [he] knew the lawyer was going to fight with [him.]” App. 53 ll. 11 – 14. However, Stavrinakis was seemingly relieved, and plea counsel resumed representation of Petitioner. App. 54 l. 13 – App. 55 l. 24. Plea counsel did not meet with Petitioner until Petitioner’s case was called for trial. Id. In fact, Petitioner did not believe he had an attorney after Stavrinakis ceased representation. App. 56 ll. 4 – 7.

Plea counsel never described the elements of each crime for which Petitioner was charged. App. 61 ll. 2 – 6. Plea counsel did not use or define the phrase “serious offense” in

conversations with Petitioner. App. 61 ll. 10 – 12. The two never discussed strikes or strike offenses. App. 61 ll. 16 – 25. Similarly, Petitioner never learned from counsel about potential parole eligibility. App. 62 ll. 2 – 10; App. 77 ll. 22 – 24. Counsel never discussed trial procedures or strategy with Petitioner. App. 63 ll. 3 – 7. Counsel never explained how to pick a jury or opening statements. App. 63 ll. 8 – 10. Furthermore, plea counsel did not discuss with Petitioner any applicable defenses, including suppression. App. 63 l. 21 – App. 64 l. 23; App. 65 ll. 11 – 20. Petitioner was wholly unaware of counsel’s trial strategy. App. 66 ll. 16 – 20. Petitioner was not informed by counsel what a negotiated plea was. App. 67 ll. 7 – 17.

At the time of the plea, counsel was in his second year of practice. App. 80 ll. 7 – 23. He had not previously tried a general sessions case. App. 81 ll. 4 – 7. Although he had drafted suppression memoranda, he had not argued a suppression motion. App. 81 ll. 8 – 13. Although counsel indicated that he provided Petitioner with a copy of the discovery for the Dorchester County charges, he never received any discovery in the Charleston matters. App. 83 l. 23 – App. 84 l. 3.

### *Discussion*

A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty. Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998).

The test for determining the validity of a guilty plea based upon alleged ineffective assistance of counsel is whether counsel's advice was within the range of competence demanded of attorneys in criminal cases and whether there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88

L.Ed.2d 203 (1985); Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991); Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989). “A defendant who pleads guilty upon the advice of counsel may only attack the voluntary and intelligent character of the guilty plea by showing the advice he received from counsel was not within the range of competence demanded of attorneys in criminal cases.” Richardson v. State, 310 S.C. 360, 363, 426 S.E.2d 795, 797 (1993).

“A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction ... has two components.” Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must first demonstrate that counsel was deficient and then must also show this deficiency resulted in prejudice. Id. To satisfy the first prong, a defendant must show counsel's performance “fell below an objective standard of reasonableness.” Franklin v. Catoe, 346 S.C. 563, 570–71, 552 S.E.2d 718, 722 (2001).

Petitioner did not believe his attorney was prepared for trial. As a result, he felt forced into a plea; the alternative was a trial for which neither counsel nor Petitioner were prepared. As a result of counsel's advice to plead guilty, Petitioner received a fifteen-year sentence when he could have otherwise had the charges dropped after a successful suppression motion. However, he believed he did not have an attorney willing to zealously advocate on his behalf.

To satisfy the second prong of the analysis in the context of an allegation that a guilty plea was improvidently accepted, the “ ‘defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.’ ” Stalk v. State, 383 S.C. 559, 562, 681 S.E.2d 592, 594 (2009) (quoting Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)).

In this regard, PCR counsel noted:

And to the second prong, the outcome would have been different, [the] only person that knows whether they would have continued with trial or pled guilty is

Mr. Fabor. He has testified to you. It's undisputed evidence that had the situation with his attorney in preparation and advice been different, he would have continued with trial. That's undisputed. It's the second prong we met.

App. 101 l. 25 – App. 102 l. 6.

The Order of Dismissal found that Petitioner “failed to prove that he [was] entitled to post-conviction relief on any of his allegations of ineffective assistance of counsel.” App. 112. Regarding the failure to investigate allegation, the PCR court found that plea counsel “conducted a thorough investigation in this case.” App. 114.

Petitioner testified that if plea counsel had “show[n] ... that he was willing to go fight” then Petitioner would have elected to go to trial. App. 72 ll. 14 – 24; App. 73 ll. 18 – 21. Petitioner did not feel like he had any option but to plead guilty. App. 73 l. 22 – App. 74 l. 4. According to counsel, the negotiated plea offer was no longer an option once the trial began. App. 92 ll. 10 – 16. Petitioner credibly testified that if he had an attorney who was “willing to go fight” the suppression and other issues, he would have gone to trial. App. 72 ll. 14 – 24.

**CONCLUSION**

For the foregoing reasons, Petitioner requests that this Court grant his petition for writ of certiorari to allow full briefing on this issue, reverse the charges against him, and remand the case for a new trial.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of December, 2018.

STATE OF SOUTH CAROLINA

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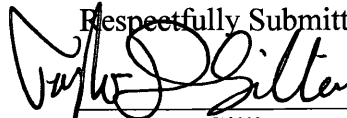
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Lavonte Andrea Fabor 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 post-conviction relief hearing before Judge Maite Murphy, which was held on March 2, 2018, 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 Lavonte Andrea Fabor.

Respectfully Submitted,



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Taylor D Gilliam


Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of December, 2018.

**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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ATTORNEY FOR PETITIONER

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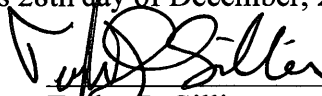
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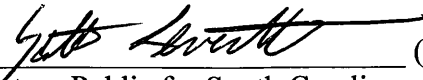
RESPONDENT

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 Christian Saville, 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 Lavonte Andrea Fabor, #371906, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 28th day of December, 2018.

  
Taylor D Gilliam  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 28th day of December, 2018.

  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: September 27, 2028