

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Lexington County

Honorable R. Keith Kelly, Circuit Court Judge

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DAN DEMETRI FORD,

V.

STATE OF SOUTH CAROLINA,

**RECEIVED**  
FEB 22 2019  
PETITIONER  
S.C. SUPREME COURT

RESPONDENT

APPELLATE CASE NO 2018-001579

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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Joanna K. Delany  
Appellate Defender

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

ATTORNEY FOR PETITIONER

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### **ISSUE PRESENTED**

Whether the PCR court erred in finding counsel provided effective representation where there was evidence petitioner felt coerced to plead guilty because counsel was not prepared to present the testimony of an alibi witness, Lenae Stevenson, where Stevenson testified at the PCR hearing that petitioner was with her until at least 1:00 or 1:30 on the day of the robbery, where there was evidence the robbery occurred after lunch?

## STATEMENT

On April 8, 2013, a Lexington County Grand Jury indicted petitioner for the offenses of first degree burglary and armed robbery. App. 156 – 159. On March 13, 2014, petitioner appeared before the Honorable Brian M. Gibbons and pled guilty to first degree burglary and armed robbery pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). App. 1; App. 3, ll. 1-6. Bradley Kirkland was appointed to represent petitioner and Angela Garrick represented the state. App. 1; App. 3, ll. 24-25.

Defense counsel told the plea court that throughout his representation of petitioner, petitioner “has persisted in claiming that he is innocent.”<sup>1</sup> App. 4, l. 9. Defense counsel said petitioner had raised the possibility of an alibi defense and that his investigator located the alibi witness, but the witness broke off contact and, according to defense counsel, petitioner instructed him to cease the investigation.<sup>2</sup> App. 4, ll. 12-21.

The court accepted petitioner’s plea and sentenced him to negotiated<sup>3</sup> terms of seventeen years imprisonment for each offense, to be served concurrently. App. 20, l. 25 – 21, l. 8; App. 160 – 161. No direct appeal was taken. On December 18, 2014, petitioner filed an application for post-conviction relief (PCR). App. 23 – 32. The state made its return September 31, 2015. App. 33 – 38. On October 14, 2016, petitioner filed an amended application. App. 39 – 41.

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<sup>1</sup> Defense counsel told the plea court that petitioner was “adamant” he was not guilty but was also “adamant” that he did not want a trial. App. 4, ll. 6-9.

<sup>2</sup> Defense counsel also claimed petitioner had recently raised “another potential alibi defense” but did not want counsel to pursue it. App. 5, l. 17 – 6, l. 5. According to defense counsel, he was “putting this on the record” to ensure the court questioned petitioner thoroughly. App. 6, ll. 5-8.

<sup>3</sup> As part of the negotiations, the state dismissed by nolle prosequi petitioner’s attendant charges of kidnapping, grand larceny, first degree assault and battery, and possession of a weapon during the commission of a violent crime. App. 18, ll. 2-8.

A hearing was held on November 8, 2016, before the Honorable R. Keith Kelly. App. 42. Kristy Goldberg represented petitioner and Johanna Valenzuela represented the state. App. 42.

Petitioner testified that he wanted a trial but pled pursuant to *Alford* based on defense counsel's advice. App. 51, ll. 11-25. Petitioner said he felt pressured to take the plea because defense counsel "was not prepared to present [his] alibi witness." App. 61, l. 18 – 62, l. 5. Petitioner agreed that he asked counsel to stop investigating an alibi defense but explained that a couple of weeks later, well before the plea, he told counsel that he did want counsel to continue pursuing an alibi defense. App. 87, l. 23 – 89, l. 3. Petitioner explained the alibi witness could verify that, "I couldn't have been at this place at the time of this crime, I couldn't have been . . ." App. 61, ll. 10-11.

Lenae Stevenson testified at the PCR hearing. Stevenson was petitioner's girlfriend at the time of the offense. App. 90, ll. 17-24. She had no prior criminal record and worked as a housekeeper. App. 108, ll. 21-24; App. 100, ll. 23-25. She said that on the date of the offense petitioner was with her at her home until between "1:00 and 1:30" in the afternoon. App. 92, ll. 15-16. At the plea, the solicitor stated the offense occurred "after lunch." App. 14, l. 7. Petitioner recalled that according to discovery the offense occurred "between 1:00 and 1:30." App. 53, ll. 9-17.

Petitioner's defense counsel said that his private investigator successfully contacted Stevenson as an alibi witness, but once the investigator told Stevenson law enforcement would likely contact her and tell her they would charge her with perjury if she falsely testified in court, she broke off contact.<sup>4</sup> App. 114, l. 18 – 115, l. 21. Defense counsel said his investigator

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<sup>4</sup> Defense counsel also claimed the name of the alibi witness petitioner first provided him was "Michelle," second was Lenae Stevenson, and third was a man at the mall. App. 114, l. 10; App. 121, ll. 17-23.

attempted to call Stevenson for a seven-day span “from November 30th to December 5th” but “she would not return his call.”<sup>5</sup> App. 119, ll. 11-16.

The PCR court denied petitioner relief and issued an order of dismissal in which it found defense counsel’s testimony credible that he adequately prepared for trial, and found counsel adequately investigated the case. App. 149 – 151. The PCR court’s order stated that “counsel thoroughly investigated [petitioner’s] case, and only ended investigation when he was specifically asked by [petitioner] to cease all investigation.” App. 150. The court also found defense counsel did not coerce or induce petitioner to plead guilty. App. 151 – 152.

This petition for writ of certiorari follows.

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<sup>5</sup> Defense counsel offered that after “watching [Stevenson] here today, I wouldn’t have called her as an alibi witness.” App. 120, ll. 2-4.

## ARGUMENT

The PCR court erred in finding counsel provided effective representation where there was evidence petitioner felt coerced to plead guilty because counsel was not prepared to present the testimony of an alibi witness, Lenae Stevenson, where Stevenson testified at the PCR hearing that petitioner was with her until at least 1:00 or 1:30 on the day of the robbery, where there was evidence the robbery occurred after lunch.

Lenae Stevenson was a witness willing to provide petitioner with alibi testimony, as evidenced by her appearance and testimony at the PCR hearing. Again, Stevenson testified that petitioner was with her at her home until 1:00 or 1:30 on the day of the robbery. Counsel's failure to undertake preparations to ensure her presence at trial was deficient performance. Petitioner was prejudiced as he entered a plea that was not voluntarily made rather than exercising his trial rights, based on counsel's deficient performance.

A criminal defense attorney has a duty to conduct a "reasonable investigation." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). "One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable." *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). "[S]trategic choices made by counsel after an incomplete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on the investigation." *McKnight v. State*, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (internal quotations omitted).

Here, defense counsel said that after Stevenson provided the defense's investigator with an alibi for petitioner, the investigator only attempted to contact Stevenson for a mere seven-day period (which was four months before petitioner's plea) before abandoning her as a potential

witness. Counsel himself never attempted to follow up on Stevenson as a defense witness. Counsel's failure to complete the investigation begun by his investigator was unreasonable, given that Stevenson could have supplied a vital defense to petitioner—that of alibi. Stevenson said that on the date of the offense petitioner was with her at her home until between "1:00 and 1:30" in the afternoon. App. 92, ll. 15-16. The offense occurred "after lunch" according to the solicitor and "between 1:00 and 1:30" according to what petitioner remembered from his discovery. App. 14, l. 7; App. 53, ll. 9-17. Stevenson's testimony would have provided petitioner with what was objectively an alibi, and counsel provided deficient representation when he failed to follow up to ensure her presence at trial.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

"In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case." *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (citing *Strickland*, 466 U.S. at 687). "[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill*, 474 U.S. at 58.

To establish prejudice when challenging a guilty plea, a PCR applicant must prove "there is a reasonable probability that, but for, counsel's errors, the defendant would not have pled

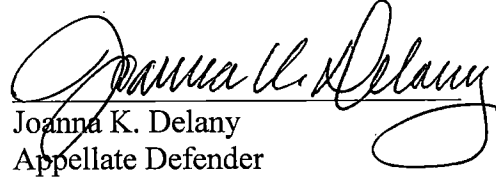
guilty, but would have gone to trial.” *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). “The crux of the inquiry is whether counsel’s ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial.” *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018).

Here, petitioner established prejudice pursuant to *Harden* and *Frierson* because he would not have pleaded guilty if he believed counsel was prepared to call his alibi witness at a trial—therefore his plea was not voluntarily entered and counsel’s deficient performance affected the outcome of the plea process.

The prejudice to petitioner was apparent when he presented the testimony of the alibi witness, Lenae Stevenson, to the PCR court. *See Glover v. State*, 318 S.C. 496, 498–99, 458 S.E.2d 538, 540 (1995) (to show ineffective assistance for failure to interview or call potential alibi witness a PCR applicant must produce the witness’ testimony at the PCR hearing).

**CONCLUSION**

Based on the foregoing argument, petitioner requests a writ of certiorari be granted to allow full briefing on this issue.

  
Joanna K. Delany  
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of February, 2019.

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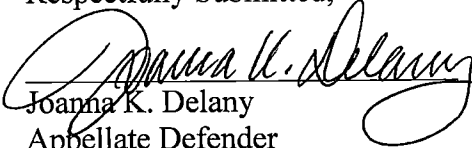
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Dan Demetri Ford 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 R. Keith Kelly, which was held on November 8, 2016, 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 Dan Demetri Ford.

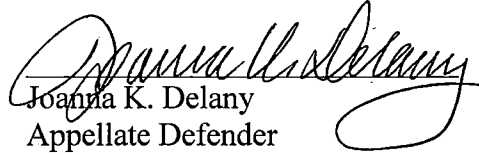
Respectfully Submitted,

  
Joanna K. Delany  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 22nd day of February, 2019.

**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."

  
Joanna K. Delany  
Appellate Defender

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

ATTORNEY FOR PETITIONER

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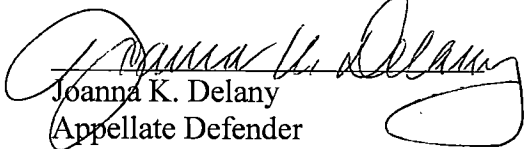
RESPONDENT

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CERTIFICATE OF SERVICE

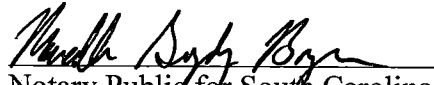
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Kelly Oppenheimer, Esquire, at the Rembert Dennis Building, 1000 Assembly 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 Dan Demetri Ford, #359232, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 22nd day of February, 2019.

  
Joanna K. Delany  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 22nd day of February, 2019.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 26, 2028