

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Spartanburg County

Honorable Grace Gilchrist Knie, Circuit Court Judge

DEANDRE TYSHUN FOSTER,

PETITIONER

RECEIVED

MAR 01 2019

S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001560

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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### **ISSUE PRESENTED**

Whether the PCR court erred by ruling defense counsel was not ineffective for failing to investigate Petitioner's assertion that gunshot residue was only on his hands on the day someone shot at the victim because Petitioner had shot a gun earlier in that day in the presence of a witness since an investigation would have procured the testimony of that corroborating defense witness for trial, and Petitioner would have pled not guilty and gone to trial but for defense counsel's deficient failure to investigate his case?

## STATEMENT

During the July 2016 term, the Spartanburg County Grand Jury indicted Petitioner for two counts of attempted murder, discharging a firearm into a vehicle, and possession of a weapon during the commission of a violent crime. App. 88 – 93.

Pursuant to the plea agreement between Petitioner and the state, Petitioner pled guilty to assault and battery of a high and aggravated nature (ABHAN), the lesser included offense of attempted murder, and the remaining charges were dismissed. App. 1; App. 4, ll. 2 – 13. On April 26, 2017, Petitioner pled guilty before the Honorable J. Mark Hayes, II. App. 1. Richard Warder represented Petitioner. Id. Spenser Smith represented the state. Id.

Judge Hayes accepted Petitioner's guilty plea as made freely, voluntarily, and knowingly made. App. 20, ll. 1 – 7. Judge Hayes sentenced Petitioner to twenty years' imprisonment both counts of ABHAN. Id.

Petitioner filed an application for post-conviction relief (PCR) on February 12, 2018. App. 22 – 29. Petitioner alleged that he pled guilty involuntarily and that his guilty plea was induced by plea counsel's failure to properly investigate his case. Id. Plea counsel failed to follow up on Petitioner's explanation that he had gun-shot residue on his hands from firing a handgun with a relative earlier that day. The state made its return on April 23, 2018. App. 30 – 34.

Petitioner's evidentiary hearing was held on June 21, 2018 before the Honorable Grace Gilchrist Knie. App. 36. Rodney W. Richey represented Petitioner. Id. Jordan A. Cox represented the state. Id.

Judge Gilchrist filed an order of dismissal on March 21, 2018. App. 75 – 83. Judge Knie found that Petitioner failed to show that plea counsel provided deficient performance and that plea counsel testified credibly that there, “was nothing else to investigate.” App. 80 – 81.

This Petition for Writ of Certiorari follows.

## ARGUMENT

The PCR court erred by ruling defense counsel was not ineffective for failing to investigate Petitioner's assertion that gunshot residue was only on his hands on the day someone shot at the victim because Petitioner had shot a gun earlier in that day in the presence of a witness since an investigation would have procured the testimony of that corroborating defense witness for trial, and Petitioner would have pled not guilty and gone to trial but for defense counsel's deficient failure to investigate his case.

### **Relevant Facts**

The state alleged the facts as follows. On April 1, 2016, Petitioner rode in the passenger seat of a car on Valley Falls road in Spartanburg County. App. 8, l. 21 – 9, l. 4. The car pulled up to another car and multiple shots were fired into the second car. Id. A passenger in the second car was grazed with a bullet. Id.

A nearby deputy immediately responded and followed the car. App. 9, ll. 5 – 12. When the chase ended, Petitioner remained in the car. App. 9, ll. 12 – 18. Guns and ammo were found in the vehicle and gun-shot residue on Petitioner's hands. App. 9, l. 19 – 10, l. 12.

Petitioner filed a PCR application alleging that his guilty plea was involuntary because he was induced to plead guilty where his plea counsel failed to conduct an adequate investigation into his case. App. 22 – 29.

At Petitioner's evidentiary hearing, Petitioner testified that the reason he had gunshot residue on his hands was because he had fired his handgun earlier that day with a relative. App. 10, ll. 4 – 12; App. 56, ll. 10 – 16. However, plea counsel never followed up with the relative corroborate Petitioner's statement that he fired his handgun earlier that day. Id. Petitioner explained

that if plea counsel had conducted an adequate investigation he would have found that there were no witnesses that alleged Petitioner was the shooter. App. 70, ll. 18 – 23.

Plea counsel testified at the PCR hearing as well. App. 40, l. 5. Plea counsel stated that Petitioner wanted to plead guilty, “all along.” App. 42, ll. 11 – 15. Plea counsel admitted to not conducting an independent investigation. App. 43, l. 13 – 44, l. 13. The entirety of plea counsel’s investigation consisted of talking to Petitioner and going over discovery materials. Id.

Judge Knie issued an order of dismissal on August 20, 2018. App. 75 – 83. Judge Knie found that Petitioner’s guilty plea was voluntarily, and that plea counsel did not provide ineffective assistance. Id.

### **Discussion**

When plea counsel did not investigate into Petitioner’s claim that the gun-shot residue found on his hands was from when he fired his handgun with a relative earlier that day and did not follow up on witnesses saw the guns were thrown solely out of the driver’s side of the car, plea counsel provided ineffective assistance of counsel. App. 56, ll. 10 – 16; App. 67, ll. 18 – 23.

In McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008) this Court held that trial counsel failed to conduct a reasonable investigation into McKnight’s death by child abuse case. Id. at 47, 661 S.E.2d 361. Although McKnight was not a death penalty case, this Court cited Nance v. Ozmint, 367 S.C. 547, 557 n. 8, 626 S.E.2d 878, 883, n. 8 (2006) and Wiggins v. Smith, 539 U.S. 510 (2003) because the principle that to provide effective assistance of counsel an attorney must conduct a reasonable investigation into “all reasonably available mitigation evidence and reasonably available evidence tending to rebut any aggravating evidence introduced by the State,” applies equally in the non-death penalty context. McKnight, at 46, 661 S.E.2d at 360.

To establish ineffective assistance of counsel, Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). “First, a defendant must show that counsel's performance was deficient.” Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Then Petitioner must show trial counsel’s ineffective assistance prejudiced Petitioner case because, “but for counsel's unprofessional errors, the result of the proceeding would have been different.” Id. at 118, 386 S.E.2d at 625. Therefore, where ineffective assistance of counsel is alleged, the applicant 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, 466 U.S. at 692.

In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590, Ard was convicted of murder and sentenced to death. Id. at 322, 642 S.E.2d at 591. This Court reversed Ard’s conviction because his attorney provided ineffective assistance of counsel when he failed to conduct an adequate investigation. Id. at 336, 642 S.E.2d at 599. In Ard, as in the present case, the failure to contest gun-shot residue evidence was crucial. Id. at 332 – 333, 642 S.E.2d at 597. This Court affirmed the PCR court’s finding that Ard’s, “trial counsel’s failure to adequately evaluate and challenge the State’s gunshot residue testimony was deficient performance that resulted in prejudice to respondent.” Id. at 330, 642 S.E.2d at 596.

In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008) this Court held that Lounds’ attorney provided ineffective assistance when he failed to adequately prepare for trial. Lounds, at 463, 670 S.E.2d at 463. Lounds was convicted of kidnapping and sentenced to life without parole. Id. at 457, 670 S.E.2d at 647. During his trial, Lounds’ testified in his own defense that he did not kidnap the victim and force the victim to give him money, but rather that Lounds met

up with the victim because of an outstanding debt and that the victim volunteered to go to a relative's home to ask for money to pay Lounds back. Id. at 458, 670 S.E.2d at 648.

At Lounds' PCR hearing he claimed he was provided ineffective assistance of counsel because Lounds' trial attorney failed to call witnesses that would have testified in support of Lounds' own testimony. Id. This Court agreed with Lounds and held that his trial counsel had a duty to, "at a minimum... interview potential witnesses." Id.; quoting Ard v. Catoe, 372 S.C. 318, 321, 642 S.E.2d 590, 597 (2007).

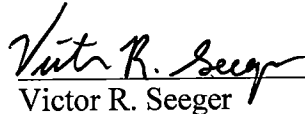
In the present case, plea counsel failed to conduct an adequate investigation. App. 67, ll. 18 – 23. Plea counsel failed to interview the relative that Petitioner stated he fired his hand gun with earlier that day. Had plea counsel conducted an adequate investigation he would have shown that Petitioner had fired his hand gun earlier in the day and disproved the state's allegation that Petitioner was the shooter. Id.

Moreover, plea counsel failed to follow up with the witnesses Petitioner stated saw the guns be thrown out of the driver side of the car. Had he conducted an adequate investigation plea counsel would have been able to present witnesses to testify that Petitioner was not holding a weapon in the car because the guns were not tossed from his side of the car. App. 59, ll. 10 – 16.

Plea counsel's failure constituted deficient performance that induced Petitioner to plead guilty. Therefore, Petitioner's guilty plea could not be voluntarily made and should be vacated.

**CONCLUSION**

By reason of the foregoing arguments Petitioner respectfully requests that this Court grant certiorari and allow for a full briefing on this issue.



Victor R. Seeger  
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of March, 2019.

STATE OF SOUTH CAROLINA

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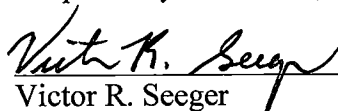
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Deandre Tyshun Foster 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 Grace Gilchrist Knie, which was held on June 21, 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 Deandre Tyshun Foster.

Respectfully Submitted,



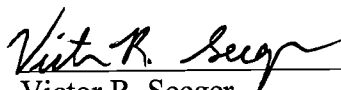
Victor R. Seeger  
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of March, 2019.

**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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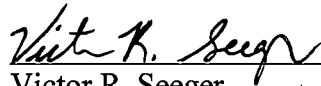
RESPONDENT

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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 Johnny Ellis James, Jr., 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 Deandre Tyshun Foster, #372302, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 1st day of March, 2019.

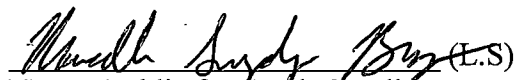


Victor R. Seeger

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 1st day of March, 2019.

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