

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**ORIGINAL**

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Certiorari to Richland County

Clifton Newman, Circuit Court Judge

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THOMAS E. DUBOSE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000208

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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Susan B. Hackett  
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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JUL 29 2019  
S.C. SUPREME COURT

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**ISSUE PRESENTED**

Was Petitioner's guilty plea involuntarily, unknowingly, and unintelligently entered due to plea counsel rendering ineffective assistance by failing to investigate the facts and legal issues surrounding the charges and evidence against Petitioner and develop a defense to present at trial?

## STATEMENT

On April 9, 2014, a Richland County grand jury indicted Petitioner for attempted murder (2014-GS-40-2067). App. 112-113. John Christopher Shipman, an attorney with the Richland County Public Defender Office, was assigned to represent Petitioner. App. 48, l. 10 – App. 50, l. 8; App. 78, ll. 14-16; App. 78, ll. 14-16. Shipman asked his colleague, Anastasia Walker, to assist him with Petitioner’s trial because Shipman had very little trial experience. App. 62, ll. 21-23; App. 86, l. 19 – App. 87, l. 2. In fact, Shipman had tried only two cases in the Court of General Sessions. App. 62, ll. 23-25; App. 88, ll. 12-23. In early May 2015, the state served its notice of intent to seek life without parole as a sentence for Petitioner if he were convicted of attempted murder. App. 2, ll. 18-23; App. 4, ll. 3-10; App. 12, ll. 22-24; App. 84, ll. 16-19. This was the first case in which life without parole was a possible sentence for which Shipman had been involved. App. 54, ll. 5-6.

Plea counsel’s inexperience with criminal charges in General Sessions Court showed when plea counsel advised Petitioner about the impact of a verdict finding him guilty of assault and battery of a high and aggravated nature (ABHAN). App. 81, ll. 6-17. Plea counsel indicated he “was mistaken about [Petitioner’s] prior record” when he told Petitioner that he would receive a life sentence even if convicted of ABHAN. App. 81, ll. 6-17.

During the days leading up to Petitioner’s trial, the parties engaged in plea negotiations. App. 85, l. 19 – App. 86, l. 4; App. 89, ll. 7-14. On the day Petitioner’s trial was set to start, Petitioner accepted the state’s plea offer of a negotiated sentence of twenty-years in exchange for Petitioner’s guilty plea to attempted murder. App. 2, ll. 16-18; App. 7, ll. 10-15; App. 9, l. 19 – App. 10, l. 2; App. 53, ll. 23-25; App. 88, l. 25 – App. 89, l. 4. The Honorable Alison R. Lee accepted Petitioner’s guilty plea. App. 1; App. 16, ll. 8-11. Meghan Walker represented the

state during the guilty plea. App. 1. Judge Lee sentenced Petitioner to twenty years imprisonment in accordance with the terms of the negotiated guilty plea. App. 22, ll. 6-12; App. 114.

On February 20, 2016, Petitioner filed an application for post-conviction relief (PCR). App. 24-34. The matter proceeded to an evidentiary hearing before the Honorable Clifton Newman on December 11, 2017. App. 42. Jonathan D. Waller represented Petitioner, and Jessica E. Kinard represented the state. App. 42. At the conclusion of the hearing, Judge Newman orally denied Petitioner relief from his conviction and sentence. App. 95, ll. 2-19. By an order filed February 4, 2019, Judge Newman denied Petitioner relief. App. 97-111.

On February 11, 2019, Petitioner served his notice of appeal. This petition for writ of certiorari follows.

## ARGUMENT

Petitioner's guilty plea was involuntarily, unknowingly, and unintelligently entered due to plea counsel rendering ineffective assistance by failing to investigate the facts and legal issues surrounding the charges and evidence against Petitioner and develop a defense to present at trial.

### **Relevant facts**

During the PCR hearing, Petitioner explained that plea counsel failed to discuss completely the discovery with him. App. 51, ll. 11-17. According to Petitioner, he and plea counsel discussed the state's evidence "to a certain extent." App. 51, ll. 11-15. Due to the lack of preparation, Petitioner was unaware of what his defense would be had he gone to trial on the day he entered his guilty plea. App. 54, ll. 1-3; App. 54, ll. 17-22; App. 64, ll. 21-24; App. 70, ll. 14-16. In fact, Petitioner did not think plea counsel was prepared to start his trial on the day he entered his guilty plea. App. 54, ll. 14-16. Plea counsel simply failed to investigate, according to Petitioner. App. 58, l. 25 – App. 59, l. 10; App. 64, l. 25 – App. 65, l. 3; App. 70, ll. 10-13. Plea counsel never provided Petitioner with a copy of the state's evidence against him. App. 59, ll. 4-14; App. 65, l. 24 – App. 66, l. 2. When Petitioner requested to see the hospital report, plea counsel provided him with only a few pages of the hospital records. App. 59, ll. 5-18; App. 66, ll. 3-7.

Petitioner provided plea counsel with the address for his wife, the alleged victim in the attempted murder case, to assist in the investigation. App. 56, ll. 6-9; App. 64, ll. 11-15. Petitioner explained that if plea counsel had investigated his case properly, then Petitioner would not have entered a guilty plea and he would have insisted on going to trial. App. 62, ll. 7-16.

When asked if he reviewed the discovery materials with Petitioner, plea counsel simply said he was "sure" that he did. App. 79, ll. 14-15. He did not recall giving Petitioner a copy of the discovery materials. App. 79, ll. 17-24. Plea counsel claimed that the defense he prepared was to

admit Petitioner's guilt to the lesser-included offense of ABHAN to avoid the life without parole sentence. App. 82, ll. 16-21; App. 84, ll. 7-15.

According to plea counsel, his "in-house investigator" was unable to find Petitioner's wife. App. 84, ll. 22-25. Therefore, plea counsel hired an outside investigator to find her. App. 85, ll. 1-2. With little elaboration, plea counsel claimed the investigator found Petitioner's wife. App. 85, ll. 1-5. Further, plea counsel found the wife's daughter, but she declined to speak to the defense. App. 85, ll. 6-9. Plea counsel was unable to find Petitioner's brother. App. 85, ll. 10-18.

Plea counsel met with Petitioner over the weekend prior to the trial date in order to deliver the state's plea offer. App. 86, ll. 5-10. When Petitioner accepted the offer, plea counsel "knew [they] were not going to trial" on Monday. App. 86, ll. 10-11. He insisted, however, that he "would have been prepared to do it" if needed. App. 86, ll. 11-12. Nevertheless, "it was never contemplated that [they] were going to trial that Monday after accepting the plea that weekend." App. 86, ll. 12-14.

In his order, the PCR judge found Petitioner failed to show plea counsel was deficient in the investigation or in developing a defense. App. 105. According to the PCR judge, plea counsel "fully and thoroughly investigated the case and shared with [Petitioner] the discovery and evidence in the case." App. 105. Plea counsel "could not develop any defense to the charge[] other than argue a lesser included offense." App. 105. The PCR judge found the record supported that plea counsel's "investigation, development of a defense and advice was reasonable and sound given the evidence in the case against [Petitioner] and the risks involved to [Petitioner], and it was [Petitioner] who instead chose to accept the 'negotiate plea/sentence' and plead guilty rather than proceed with that defense in a jury trial." App. 105.

Additionally, the PCR judge found Petitioner failed to show prejudice resulting from plea counsel's deficient performance. App. 105. He based this finding upon the record in the case and trial counsel's credible testimony at the PCR hearing. App. 105. He determined there "was no reasonable probability, but for counsel's alleged deficient performance, [Petitioner] would not have pled guilty and would have proceeded to trial given the overwhelming evidence of his guilt and the fact that he was facing LWOP if convicted of attempted murder." App. 106.

### **Discussion**

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The right to the effective assistance of counsel extends to the plea-bargaining process. Lafler v. Cooper, 566 U.S. 156, 162 (2012); Missouri v. Frye, 566 U.S. 133, 141 (2012); Padilla v. Kentucky, 559 U.S. 356 (2010); Hill v. Lockhart, 474 U.S. 52, 57-59 (1985); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), *overruled on other grounds by* Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984).

To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the

outcome in the case.” Rather, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694.

The two-pronged test adopted in Strickland “applies to challenges to guilty pleas based on ineffective assistance of counsel.” Hill v. Lockhart, 474 U.S. 52, 58 (1985). “A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s errors, the defendant would not have pled guilty, but would have insisted on going to trial.” Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009). “[I]n the context of determining the voluntariness of a guilty plea that is entered upon the advice of counsel,” the deficiency prong of the Strickland test requires “an inquiry into whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases.” Alexander, 303 S.C. at 542, 402 S.E.2d at 485. “The defendant’s undisputed testimony that he would not have pled guilty to the charges but for trial counsel’s advice is sufficient to prove that defendant would not have pled guilty.” Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006).

Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one’s accusers. Boykin v. Alabama, 395 U.S. 238, 243-244 (1969); see also Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003). The record must show with certainty that the plea is “an intentional relinquishment or abandonment of a known right or privilege.” State v. Patterson, 278 S.C. 319, 322, 295 S.E.2d 264, 265 (1982)

*overruled on other grounds* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Judges are required to give the defendant an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975). In order for a defendant to knowingly and voluntarily plead guilty, the defendant must have a full understanding of the consequences of the plea. Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991) (citing State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). The judge must question the defendant about the possible punishment that could be imposed. Id. at 434-435.

Without question, a trial attorney "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (quoting Strickland, 466 U.S. at 691). "[C]ounsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment." Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633 (Ct. App. 2014). "[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Id. at 265, 763 S.E.2d at 634 (quoting Ard v. Catoe, 372 S.C. 318, 331-332, 642 S.E.2d 590, 597 (2007)).

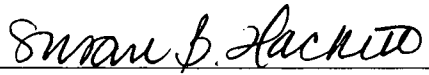
Although attorneys are not required to investigate every conceivable defense no matter how unlikely the effort would be to assist the defendant, the decision not to investigate must be reasonable. Wiggins v. Smith, 539 U.S. 510, 533 (2003) (holding counsel's decision not to extend their investigation fell short of prevailing professional norms in light of their failure to retain a forensic social worker to prepare a social history report, which was standard practice in the state at the time, and their failure to investigate all reasonably available mitigating evidence); see also Von Dohlen v. State, 360 S.C. 598, 605, 602 S.E.2d 738, 742 (2004) (holding trial

counsel's investigation concerning Von Dohlen's mental state was not reasonable despite the fact that counsel made "some effort" where the defense psychiatrist testified during post-conviction proceedings that had he been provided with the additional medical and psychiatric records that post-conviction counsel uncovered, he would have testified Von Dohlen suffered from "major depressive episodes with severe symptoms of anxiety and possible prepsychotic features").

Plea counsel's failure to investigate the facts and circumstances surrounding the charges against Petitioner forced Petitioner to enter a guilty plea. Petitioner explained that he pled guilty on the day his trial was to begin because plea counsel failed to investigate his case and develop a defense. Based on plea counsel's lack of preparation and investigation, Petitioner knew he had no chance at trial. Plea counsel admitted he had never handled a case involving a charge as serious as the one Petitioner faced. Further, plea counsel admitted he never tried a case where the client may be sentenced to life without the possibility of parole. Quite frankly, he was out of his depth. Had plea counsel properly investigated Petitioner's case and prepared for trial, Petitioner would not have entered a guilty plea, but he would have insisted upon a trial. The PCR judge erred by denying Petitioner relief.

**CONCLUSION**

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order briefing on the issue presented.

  
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Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of July, 2019.

STATE OF SOUTH CAROLINA  
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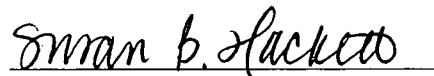
RESPONDENT

\_\_\_\_\_  
PETITION TO BE RELIEVED AS COUNSEL  
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Counsel for Thomas E. DuBose 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 Clifton Newman, which was held on December 11, 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 Thomas E. DuBose.

Respectfully Submitted,

  
\_\_\_\_\_  
Susan B. Hackett  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 29th day of July, 2019.

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RESPONDENT

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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 J. Anthony Mabry, 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 Thomas E. DuBose, #166218, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 29th day of July, 2019.

Susan B. Hackett  
Susan B. Hackett  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 29th day of July, 2019.

Marcy Allgire (L.S)  
Notary Public for South Carolina  
My Commission Expires: May 12, 2027