

STATE OF SOUTH CAROLINA  
In The Supreme Court

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DEC 04 2019

CERTIORARI TO FLORENCE COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Michael G. Nettles, Circuit Court Judge

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Appellate Case No. 2018-002067

Donetelle Cannon, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ATTORNEYS FOR PETITIONER

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## **RESPONDENT'S QUESTION PRESENTED**

Did the PCR court correctly find plea counsel was not constitutionally ineffective for failing to investigate a mental-illness defense where Counsel had no reason to believe Petitioner had any mental health issues; where Petitioner failed to inform Counsel of the full background of the events leading up to the incident in question, so Counsel was never on notice of the potential avenue of investigation; and where the defense of "diminished capacity" is not recognized in South Carolina?

## STATEMENT OF THE CASE

Donetelle Cannon (Petitioner) is incarcerated with the South Carolina Department of Corrections pursuant to the Florence County Clerk of Court's orders of commitment. Petitioner was indicted at the January 2015 term of the Florence County Grand Jury for two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime (2015-GS-21-00048). Vick Meetze, Esquire, represented him. On January 21, 2016, Petitioner appeared before the Honorable D. Craig Brown, and pleaded guilty as indicted to two counts of attempted murder. The charge for possession of a weapon during the commission of a violent crime was dismissed. The sentencing was without negotiation or recommendation. Judge Brown sentenced Petitioner to fifteen years' imprisonment for the first charge of attempted murder and ten years for the second charge, to be run consecutively.

Applicant filed a pro se notice of appeal, which was ultimately dismissed as untimely by the South Carolina Court of Appeals by Order filed August 15, 2016. The remittitur was returned on September 1, 2016.

Petitioner then timely filed an application for post-conviction relief on November 28, 2016, and with amendments filed through PCR counsel on January 25, 2018. Respondent made its Return on April 19, 2017. An evidentiary hearing into the matter was convened on February 1, 2018, at the Florence County Courthouse before the Honorable Michael G. Nettles. Jonathan D. Waller represented Petitioner. Lindsey A. McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Petitioner testified on his own behalf, and his mother, Elizabeth Evans, also testified. Vick Meetze (Counsel), Petitioner's plea counsel, testified for the State. The PCR court issued an order filed October 18, 2018, denying and dismissing the application with prejudice.

Petitioner then filed a notice of appeal from the denial of his claim for relief, and, through counsel, filed a petition for writ of certiorari on September 16, 2019.

## STATEMENT OF THE FACTS

Although the shooting at issue in this case took place on October 2, 2014, the events leading up to it began on September 30, 2014, when the victim, Darwin Hamm (Hamm), noticed Petitioner and a female companion sitting in a car in the parking lot of his barbershop for several hours. Tr. pp. 14-15. A neighboring businessman, Robert Frost (Frost), also noticed Petitioner waiting in the parking lot and later spoke to him at a convenience store down the road. Tr. p. 15. Petitioner began complaining to Frost about Hamm. Tr. p. 15. Several years before, Petitioner received a haircut from Hamm, but refused to pay Hamm the ten dollars he owed, and Petitioner believed Hamm held a grudge against him for it. Tr. p. 15. Petitioner then moved to Texas, but continued to keep tabs on Hamm, and in checking Hamm's Facebook page, Petitioner learned Hamm had been to visit Texas. Tr. p. 15. Petitioner told Frost he believed Hamm had put a hit out on him over the ten-dollar haircut. Tr. p. 15.

Frost and Petitioner returned to the parking lot, and Frost called Hamm to come outside and talk to them. Tr. pp. 15-16. Petitioner explained his memory of the haircut to Hamm, and implored Hamm to take ten dollars from him. Tr. p. 16. Hamm did, although he told Petitioner he did not remember the incident at all. Tr. p. 16. Petitioner then wrote out a statement, which Hamm signed, attesting he had "no beef" with Petitioner. Tr. p. 16. Petitioner then asked Hamm to swear on his mother's grave that he had "no beef" with Petitioner, at which point Petitioner's female companion intervened, and they left. Tr. p. 16.

The next day, October 1, 2014, Petitioner returned to the barber shop and requested a haircut. Tr. p. 17. One of the stylists in the shop, Tina Gabbison, saw and spoke to Petitioner and then told Hamm she felt something was off with the situation. Tr. p. 17. Frost also saw Petitioner had returned and confronted him. Tr. p. 17. Hamm, in an attempt to keep the peace, gave Petitioner

a haircut. Tr. p. 17. During the course of cutting Petitioner's hair, Hamm learned Petitioner was an aspiring rapper and offered to put some of his CDs out in the shop. Tr. p. 17. Petitioner paid for his haircut and left without any further incident. Tr. p. 17.

The next day, October 2, 2014, around 9:30 a.m., Petitioner returned to Hamm's barber shop for the third time. Tr. pp. 17-18. At that time, the shop was crowded with customers, both men and women, and several small children. Tr. p. 18. Hamm was cutting the hair of another customer (the second victim, Jimmy King), and, thinking Petitioner was returning with the CDs, pointed to where Petitioner could put them. Tr. p. 18. Instead, Petitioner drew a gun and shot Hamm, striking him five times. Tr. p. 18. King jumped out of the barber chair and attempted to take the gun from Petitioner, but Petitioner turned the gun on King and shot him in the head. Tr. p. 18. Petitioner left via the front door and drove off in a car driven by a woman. Tr. pp. 18-19.

Witnesses gave police Petitioner's nickname, "Michi Mich," through which they found Petitioner's Facebook profile. Tr. p. 19. Hamm, Frost, and another witness all identified Petitioner as the perpetrator in a photo lineup. Tr. p. 19. Petitioner turned himself in later the same day. Tr. p. 20.

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, questions of law are reviewed de novo without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, a petitioner has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When a petitioner alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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 v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Petitioner must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, Petitioner must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. When there has been a guilty plea, the applicant must prove counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the petitioner as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 688.

## ARGUMENT

**The PCR court correctly found plea counsel was not constitutionally ineffective for failing to investigate a mental-illness defense where Counsel had no reason to believe Petitioner had any mental-health issues; where Petitioner failed to inform Counsel of the full background of the events leading up to the incident in question, so Counsel was never on notice of the potential avenue of investigation; and where the defense of “diminished capacity” is not recognized in South Carolina.**

The PCR court correctly found Counsel was not deficient, nor was Petitioner prejudiced by Counsel’s representation. Petitioner alleges Counsel was deficient because he failed to adequately investigate a potential defense based upon Petitioner’s alleged mental-health issues. PWC pp. 6-7. At the evidentiary hearing, Petitioner contended only that Counsel should have developed the issue of “diminished capacity” as mitigation or as a defense to the required element of malice. Petitioner’s PCR counsel conceded, however, South Carolina does not recognize an affirmative defense of diminished capacity, and he did not contend Petitioner’s mental faculties were so impaired as to render him unable to enter a guilty plea or assist Counsel with preparing the case. App. pp. 107-08, 110-11. Accordingly, the PCR court correctly found Petitioner failed to meet his burden proof as to deficiency. App. pp. 131-32. In any event, Petitioner did not present the testimony of the correct witnesses to support this claim, and therefore, the PCR court correctly found Petitioner had failed to meet his burden of proof as to prejudice. App. pp. 131-32. This Court should therefore deny certiorari as to this issue.

Petitioner argues Counsel was deficient because Counsel did not make a sufficient effort to develop a mental-health defense. PWC p. 4. At the evidentiary hearing, Counsel testified he spoke with Petitioner about his version of the facts, and Petitioner never brought up the history of the alleged bad blood between himself and Hamm. App. p. 87. At most, Counsel testified Petitioner briefly mentioned the background to the investigator, but Counsel credibly and

unequivocally testified he asked Petitioner if Petitioner wanted to tell him anything about the case and gave Petitioner sufficient opportunity to explain his side of the story, but Petitioner never did. App. p. 87. Counsel also testified although the State's theory of the case was that the shooting related back to Petitioner skipping out on a haircut ten years prior, Counsel did not recall that theory being immediately or obviously apparent from the discovery, although he was aware of it by the time of the plea hearing. App. pp. 85-86. Finally, Counsel testified he believed the evidence of Petitioner's flight from the scene showed a consciousness of wrongdoing, and therefore, he did not believe it necessary to investigate a potential defense based on competency or criminal responsibility. App. p. 94.

“[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (reversed on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.” Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel, especially when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)); see also Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (holding a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence in order to prove counsel was ineffective for failing to call a witness.).

Petitioner now contends Counsel should have investigated Petitioner's mental health as a potential avenue for a defense. PWC p. 4. However, at the evidentiary hearing, Petitioner's allegation was that Counsel was ineffective for failing to explore "diminished capacity" as a defense. App. p. 58. Petitioner did not contend Counsel should have pursued a defense based on competency or criminal responsibility. App. p. 107. Here, Counsel testified he asked Petitioner about his version of the facts, and Petitioner never mentioned this alleged history of bad blood between himself and Hamm. App. p. 87. Thus, Counsel was never on notice of this potential avenue for a defense, and in any event, Counsel cannot be deficient for failing to develop a defense which is not recognized in this State. See Gill v. State, 346 S.C. 209, 221, 552 S.E.2d 26, 32 (2001) ("The trial judge did not err by refusing to charge diminished capacity because it is not recognized in South Carolina. Furthermore... a defendant is not entitled to an instruction concerning his capacity to form the requisite intent for malice aforethought when the [jury] instructions, taken as a whole, properly present elements of malice.") (citing State v. Fuller, 229 S.C. 429, 93 S.E.2d 462 (1956), overruled on other grounds by Belcher v. State, 385 S.C. 597, 685 S.E.2d 682 (2009)). Further, at the plea hearing, the plea court specifically inquired of Petitioner whether Counsel had done everything Petitioner wanted him to, and the only issue Petitioner raised was wanting to speak to the solicitor about a better plea offer. App. pp. 7-12. At the evidentiary hearing, Petitioner testified he chose to plead guilty because he knew he was facing a potential sentence of up to sixty years if convicted at trial. App. p. 67. The PCR court's finding Counsel was not deficient and Petitioner's plea was voluntarily entered is thus amply supported by the record.

Additionally, Petitioner also did not introduce any evidence or testimony showing his capacity was diminished in any way. As the PCR court noted, Petitioner's alleged fear would have

been a factual issue at trial as the evidence showed Petitioner left his home in another state to seek Hamm out; visited Hamm's shop multiple times before the shooting without incident; and shot Hamm without any provocation. App. p. 108. Petitioner did not testify he was suffering from any mental disease or defect at the time of the incident or the time of the plea hearing. App. pp. 60-72. In fact, Petitioner did not even testify he was scared of Hamm, only that he felt Hamm was "bothering" him. App. p. 64. Thus, the PCR court thus correctly found Petitioner failed to prove he was prejudiced by Counsel's failure to investigate diminished capacity. Glover 318 S.C. at 498-99, 458 S.E.2d at 540 (holding a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence in order to prove counsel was ineffective for failing to call a witness.) Because the PCR court's decision finding Counsel was not deficient was based on Counsel's credible testimony regarding why he did not investigate this issue further; because in any event, diminished capacity is not a recognized defense in South Carolina; and because Petitioner did not produce any witness to support his contention his capacity was diminished, the PCR court's conclusion is supported by probative evidence in the record. Therefore, this Court should deny certiorari as to this issue.

**CONCLUSION**

For all the foregoing reasons, the State requests this Court deny the petition for a writ of certiorari and affirm the PCR court's denial of Petitioner's application for relief.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

December 2, 2019

STATE OF SOUTH CAROLINA  
In the Supreme Court

RECEIVED

DEC 04 2019

CERTIORARI TO FLORENCE COUNTY  
The Honorable Michael G. Nettles, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2019-000476

DONTELLE CANNON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

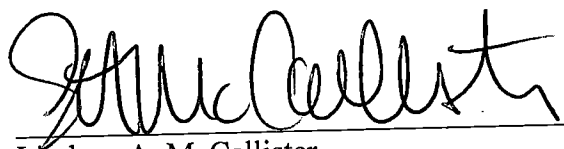
RESPONDENT.

CERTIFICATE OF SERVICE

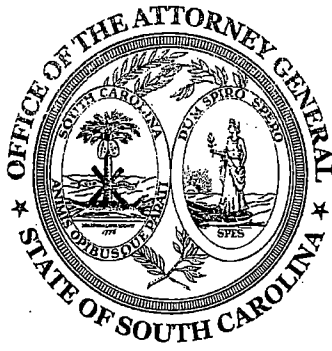
The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by placing two (2) copy in the United States Mail, addressed to:

Wanda H. Carter  
S.C. Commission on Indigent Defense  
Appellate Defense  
PO Box 11589  
Columbia, SC 29211

This 2<sup>nd</sup> day of December, 2019.



Lindsey A. McCallister  
Assistant Attorney General for Respondent



ALAN WILSON  
ATTORNEY GENERAL

RECEIVED

DEC 04 2019

S.C. SUPREME COURT

December 2, 2019

The Honorable Daniel E. Shearouse  
Clerk of the South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re: Dontelle Cannon v. State of South Carolina**  
**Appellate Case No. 2018-001826**  
**Lower Court Case No. 2016-CP-21-2950**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Lindsey McCallister  
Senior Assistant Attorney General  
SC Bar No. 79054

LAM/kk  
Enclosures

cc: Wanda H. Carter, Esquire (2 copies)