

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM YORK COUNTY  
Court of Common Pleas  
Post-Conviction Relief

Roger L. Couch, Circuit Court Judge

Appellate Case No.: 2019-001317

Jacquese Underwood, ..... Petitioner,

vs.

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

REPLY TO RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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### **QUESTION PRESENTED**

Did the post-conviction relief court erred in not granting relief on the basis plea counsel was ineffective in failing to prepare for or proceed with trial after her motion to suppress evidence was denied and, as a result, cause Petitioner to enter an involuntary guilty plea?

### **RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON CERTIORARI**

Did the post-conviction relief court properly determine Petitioner failed to meet his requisite burden of establishing constitutionally ineffective assistance of counsel for failing to prepare for or proceed to trial, where the record firmly establishes Petitioner entered a knowing, intelligent, and voluntary no contest plea with the advice of competent counsel in exchange for a favorable plea to a lesser-included offense with a significantly reduced sentence following a lengthy, two-day-long hearing on a variety of pre-trial motions to challenge the State's evidence?

## ARGUMENT

In its return to Petitioner's petition for writ of certiorari, the State argues that Petitioner has failed to meet the elements required to prove ineffective assistance of counsel or involuntary guilty plea. In fact, the State spends several pages restating these standards without applying the facts of the case *sub judice* to these elements. Petitioner does not deny that the elements of Strickland v. Washington, 466 U.S. 668 (1984) and its progeny, as well as Cherry v. State, 30 S.C. 115, 386 S.E.2d 624 (1989) and its related factors govern the litigation of post-conviction relief cases in this state. Similarly, Petitioner agrees that Hill v. Lockhart, 474 U.S. 52 (1985) governs the review of voluntariness of guilty pleas. As such, Petitioner properly integrating these cases into his argument.

Petitioner argued and maintains that plea counsel failed to properly investigate his case and, therefore, failed to prepare for trial, thus leading her to encourage Petitioner to either testify on behalf of the State or plead guilty. Petitioner's argument for involuntary guilty plea stems from these same facts as considered in Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009).

Particularly, Petitioner argues that plea counsel failed to meet with Gregory Parker, despite his request for her to do so. This is perhaps one of the instances where the State argues that Petitioner "mischaracterizes"<sup>1</sup> the evidence when making arguments that point to unfavorable facts. The transcript of the post-conviction relief hearing clearly shows that Petitioner spoke to plea counsel about Mr. Parker and she failed to act. App. p.365, lines 1-6. Further, plea counsel deflects any questions regarding her investigation into Mr. Parker, ultimately stating that "he was nowhere in the scene to testify." App. p.344, line 8. See also App. p.342, lines 16-19; p.340, lines 5-15. By taking the analysis required in Hill and extending it, the court in Stalk held the following: "Stalk needed to present some evidence that had counsel done an investigation he would have

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<sup>1</sup> P.8, note 4 of Respondent's Return to Petition for Writ of Certiorari.

found a witness or evidence that was helpful to Stalk, that is, something that would have affected counsel's advice to Stalk to accept the plea bargain offered or that would have caused Stalk to decline to accept it." Stalk, 383 S.C. at 564, 681 S.E.2d at 594. Based on this, the State's argument that Petitioner failed to present him as an alibi witness is incorrect – the content of Mr. Parker's testimony is ultimately irrelevant because it was plea counsel's failure to investigate that was the true harm.<sup>2</sup> Regardless, Petitioner is aware of what Mr. Parker would have testified to, as he has received an affidavit from him. Petitioner is informed and believes that this testimony would have been enough to change the outcome at trial.<sup>3</sup>

Similarly, plea counsel failed to challenge the chain of custody on both the real drugs that were at play in this case. The charge Petitioner faced was all-encompassing in that there were not separate charges for conspiracy and for trafficking. Rather, the trafficking charge has a conspiracy component or theory within it. § 44-53-0372(e)(2)(b)(2), part (e). Therefore, any actions he took in furtherance of a conspiracy still needed to be backed up by the existence of illegal drugs (here, cocaine). Without an appropriate chain of custody established, the drugs that were supposedly removed at the UPS station have disappeared. The drug dog alert on the box is not dispositive for the presence of cocaine in any quantifiable amount, as is evidenced here when there is contraband in the box. These facts together show that there is no chain of custody or even existence of the original cocaine that led to Petitioner's arrest for conspiracy to traffic.

Plea counsel testified at the post-conviction relief hearing that the case turned on whether the trial judge allowed in the records of the phones used by the co-defendants as they would be

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<sup>2</sup> The State makes this argument in footnote 4, page 8 of its return to petition for writ of certiorari. It is also worth noting that, out of an abundance of caution, an affidavit of Gregory Parker was presented by Petitioner at a hearing on his motion to alter or amend the post-conviction court's decision.

<sup>3</sup> This affidavit is not part of the record as Judge Couch declined to re-open the record for its submission as part of Petitioner's motion to alter or amend. It provides an explanation for the existence of the package and why Petitioner retrieved it.

used to prove the existence of a conspiracy and, without that, the State had no case. App. p. 330, line 22. She further argued that, because Petitioner always stated that he was not involved, she did not want to make any challenges that would negatively affect him. App. p.331, line 20- p.332, line 4. This approach, though, kept her from delving into finding evidence that would have helped Petitioner prepare for trial. Her lack of investigation was apparent to him, as evidenced in his testimony, and he had no confidence in her ability to represent him at trial. (App. p.376, lines 10-23; p.384, lines 4-9; p.384, lines 6-10; p.391, lines 10-23; ) This lack of confidence and preparation carried over to her representation of him during the entry of his plea, as he testified that he did not even understand what a no contest plea was at the time of its entry. App. p.392, line 11.

Viewing these facts in their totality, it is apparent that Petitioner has satisfied the elements of Hill insofar as he has shown that plea counsel's performance was deficient and her performance prejudiced Petitioner by causing him to plead guilty rather than go to trial. Hill, 474 U.S. 52. In fact, the opinion considers this exact scenario:

For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

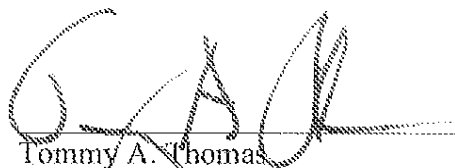
Hill, 474 U.S. at 59. Were Mr. Parker's testimony found through plea counsel's investigation, it is likely that she would not have been so dependent on the suppression of the phone records. If plea counsel had more ammunition against the phone records, she may not have urged Petitioner to testify on behalf of the state or take a plea.

This information also satisfies the requirements of Strickland because, if plea counsel had conducted a more thorough investigation, the outcome of the trial is likely to be different. Her

failure to conduct this investigation significantly prejudiced Petitioner and caused him to plead no contest. Therefore, certiorari must be granted so the court can complete further review and Petitioner's rights can be protected.

**CONCLUSION**

Certiorari must be granted so that the post-conviction relief court's decision may be reversed, and Petitioner may be granted a new trial.



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