

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Horry County

Honorable Kristi F. Curtis, Circuit Court Judge  
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BRANDON JAMES LITTELL,

**RECEIVED**  
DEC 04 2019  
S.C. SUPREME COURT

**ORIGINAL**

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2019-000643  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

Lara M. Caudy  
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ATTORNEY FOR PETITIONER

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Petitioner’s guilty plea to murder was not knowingly, intelligently, and voluntarily made when (1) plea counsel advised Petitioner to cooperate with the state and provide a full confession before counsel received and reviewed all of the evidence the state had against Petitioner and without any proffer agreement concerning a negotiated or recommended sentence and (2) Petitioner pled guilty strictly because of his prior confession, and where Petitioner was prejudiced by counsel’s deficient performance because he would not have given a confession or pled guilty but for counsel unsound advice. ....5

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**ISSUE PRESENTED**

Whether Petitioner's guilty plea to murder was knowingly, intelligently, and voluntarily made when (1) plea counsel advised Petitioner to cooperate with the state and provide a full confession before counsel received and reviewed all of the evidence the state had against Petitioner and without any proffer agreement concerning a negotiated or recommended sentence and (2) Petitioner pled guilty strictly because of his prior confession, and where Petitioner was prejudiced by counsel's deficient performance because he would not have given a confession or pled guilty but for counsel unsound advice?

## STATEMENT OF THE CASE

Petitioner was arrested for murder, attempted murder, and armed robbery on June 20, 2013 when he was eighteen years old. Petitioner's appointed counsel, Eric Fox, first met with Petitioner on June 25, 2013. App. 83, l. 3-18. Petitioner told Fox "what happened" during this meeting. After this discussion, Fox "started down a path looking to cooperation with the solicitor." App. 85, ll. 12-24. Based on what Fox "believed" the state could prove and the fact that Petitioner had two codefendants, Fox "felt very strongly" that Petitioner "needed to be first in line to cooperate." App. 86, ll. 3-7; App. 92, ll. 16-22. Consequently, in October 2013, after receiving very limited discovery, Fox arranged for Petitioner to meet with the solicitor and give a full confession. App. 84, l. 23 – 86, l. 24; App. 93, ll. 11-14.

Petitioner ultimately met with the solicitor on October 28, 2013 based on the advice of his counsel. He provided the state with information it could have not learned from anyone but one of the participants and ultimately helped the state prosecute his codefendants. App. 99, l. 8 – 100, l. 2. Petitioner had not given any incriminating statements before that day. App. 86, ll. 22-24. Significantly, there was no proffer agreement concerning a potential negotiated or recommended sentence in place before Fox advised Petitioner to cooperate. App. 98, ll. 9-21. There was zero consideration from the state in exchange for Petitioner's confession.

In January 2015, Fox met with the solicitor, the attorneys for Petitioner's codefendants, and the Honorable Larry B. Hyman, Jr., who they determined would be the plea judge. App. 101, ll. 8-24. Fox told Judge Hyman the background facts concerning the murder. After this in chambers meeting, Fox was confident Petitioner would be sentenced to thirty years, although he made clear to Petitioner that it was not guaranteed he would be sentenced to thirty years. App.

101, l. 24 – 104, l. 22. Based on his counsel’s advice, Petitioner, who by then was nineteen years old, agreed to plead guilty.

Petitioner later testified at his evidentiary hearing that it was counsel’s idea from the beginning that this was “a plea instead of a trial.” App. 62, ll. 7-11. “[H]e was really pressing for a plea.” App. 73, ll. 18-19. Before Petitioner or counsel had seen the evidence the state had against Petitioner, counsel told Petitioner “talking to the solicitor would be the best way.” App. 63, ll. 17-23. Despite telling counsel that he wanted to go to trial, Petitioner ultimately gave in and gave a statement to the solicitor based on counsel’s advice. App. 74, l. 25 – 75, l. 5. Petitioner testified that he would have gone to trial but for counsel’s advice. App. 75, ll. 11-13. He ultimately pled guilty because counsel told him to “expect” thirty years. App. 68, ll. 14-16.

A Horry County Grand Jury indicted Petitioner on January 22, 2015 for the offense of murder. App. 152-153. On February 26, 2015, Petitioner pled guilty as indicted before Judge Hyman.<sup>1</sup> App. 1. Assistant Solicitor Nancy Livesay represented the state, and J. Eric Fox represented Petitioner. App. 1. There was no sentence recommendation from the state. App. 3, ll. 7-8. Despite his cooperation with the state, Judge Hyman ultimately sentenced Petitioner to life without parole. App. 29, ll. 6-8.

Petitioner’s direct appeal was dismissed by order filed January 26, 2016 for failure to state an issue which could be reviewed on appeal as required by Rule 203(d)(1)(B)(iv), SCACR. App. 37.

On August 8, 2016, Petitioner filed an application for post-conviction relief (PCR). App. 39-45. The state filed a return to this application dated July 27, 2017. App. 46-53. With the assistance of counsel, Petitioner filed an amended application on November 20, 2018 raising the

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<sup>1</sup> Petitioner’s related attempted murder and armed robbery charges were dismissed in exchange for his guilty plea to murder. App. 3, ll. 9-11.

claim argued in this petition. App. 54-55. An evidentiary hearing was convened on November 27, 2018 before the Honorable Kristi F. Curtis. App. 56. Assistant Attorney General Johnny Ellis James, Jr. represented the state, and Erin E. Bailey represented Petitioner. App. 56.

By order dated March 25, 2019, the PCR judge denied Petitioner relief. The judge found that “although Counsel did initially recommend to [Petitioner] that he cooperate with the State prior to receiving complete discovery, he did so for valid reasons—namely that any delay in fully cooperating would risk losing favorable treatment to codefendants who could themselves inculcate [Petitioner], and that there was a surviving victim who could identify [Petitioner].” App. 141. The judge concluded that counsel was not deficient since he “articulated a reasonable basis for his advice to [Petitioner].” App. 141. The judge further found that counsel “credibly testified that nothing later received in discovery would have changed his advice to proffer and cooperate with the prosecution.” App. 141. Because Petitioner did “not present any evidence, which had it been discussed prior to the proffer, would have changed Counsel’s advice or [Petitioner’s] decision to rely upon Counsel’s advice and cooperate,” the judge found Petitioner failed to prove any prejudice from counsel’s alleged deficient performance. App. 141-142.

Because Petitioner’s guilty plea was not knowingly, intelligently, and voluntarily made due to plea counsel advice that Petitioner cooperate with the state and provide a full confession before counsel had received and reviewed all of the discovery and without any proffer agreement concerning a negotiated or recommended sentence, this petition for writ of certiorari follows.

## ARGUMENT

Petitioner's guilty plea to murder was not knowingly, intelligently, and voluntarily made when (1) plea counsel advised Petitioner to cooperate with the state and provide a full confession before counsel received and reviewed all of the evidence the state had against Petitioner and without any proffer agreement concerning a negotiated or recommended sentence and (2) Petitioner pled guilty strictly because of his prior confession, and where Petitioner was prejudiced by counsel's deficient performance because he would not have given a confession or pled guilty but for counsel unsound advice.

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made when plea counsel advised Petitioner to cooperate with the state and provide a full confession before counsel received and reviewed all of the evidence the state had against Petitioner and without any proffer agreement concerning a negotiated or recommended sentence. Petitioner pled guilty strictly because of his prior confession as a jury trial at that stage was essentially forgone. Petitioner was prejudiced by counsel's deficient performance because he would not have given a confession or pled guilty but for counsel erroneous advice.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "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." Id. at 686; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. In the context of a guilty plea, a petitioner must show that counsel's performance was deficient, and "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); See Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000); Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000); Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997); Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994). This Court has held that a "defendant's undisputed testimony that he would not have pled guilty but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 631 S.E.2d 260 (2006) (citing Jackson v. State, 342 S.C. 95, 97-98, 535 S.E.2d 926, 927 (2000)); Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 485-86 (1991)).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Hill v. Lockhart, 474 U.S. 52, 56 (1985) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

Petitioner did not knowingly, intelligently, and voluntarily plead guilty due to plea counsel's deficient performance. Petitioner ultimately only pled guilty because counsel

convinced him, before counsel had received a complete copy of the discovery and without any sort of proffer agreement, to give a full confession. Petitioner, who was eighteen, wholly relied on counsel's unsound advice to cooperate without any consideration from the state. Once Petitioner had given a confession, proceeding to trial was fruitless. Moreover, counsel assured Petitioner that he would be sentenced to thirty years' imprisonment if he pled guilty to murder.

Petitioner was prejudiced by counsel's deficient performance because he testified he would not have pled guilty but for counsel's advice that he should cooperate and ultimately plead guilty. App. 75, ll. 11-13; See Smith v. State, 369 S.C. 135, 631 S.E.2d 260 (2006) (A "defendant's undisputed testimony that he would not have pled guilty but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty."). There is a reasonable probability that if counsel had not "pressed for a plea" from the beginning of his representation, Petitioner would have proceeded to trial.

Because Petitioner did not knowingly, intelligently, and voluntarily plead guilty, this Court should reverse his conviction and sentence and remand for a new trial.

**CONCLUSION**

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. Petitioner ultimately requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully Submitted,

A handwritten signature in blue ink that reads "Lara M. Caudy". The signature is written in a cursive style and is positioned above a horizontal line.

Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of December, 2019.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Horry County  
Honorable Kristi F. Curtis, Circuit Court Judge

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BRANDON JAMES LITTELL,

PETITIONER,

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STATE OF SOUTH CAROLINA,

RESPONDENT.

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PETITION TO BE RELIEVED AS COUNSEL


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Counsel for Brandon James Littell states:

1. She is an 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, which was held on November 27, 2018 before the Honorable Kristi F. Curtis, and, in her opinion, the seeking certiorari from the order of dismissal is without merit.
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 Brandon James Littell.

Respectfully Submitted,

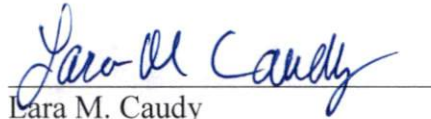
  
\_\_\_\_\_  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of December, 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."



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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 have 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 upon Brandon James Littell, #363181, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 4th day of December, 2019.

  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 4th day of December, 2019.

  
Lindsey M. Matthews (L.S)  
Notary Public for South Carolina  
My Commission Expires: October 22, 2024.