

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County

Honorable D. Craig Brown, Circuit Court Judge

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MICHAEL DARNELL THOMAS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-001492

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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**Jul 14 2021**

S.C. SUPREME COURT

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**ISSUE PRESENTED**

Whether the PCR court erred in denying relief, where Petitioner was not provided a full and complete copy of discovery from his plea counsel?

## STATEMENT

Petitioner was indicted by a Richland County in 2014 for kidnapping, criminal sexual conduct in the first degree, and burglary in the first degree. App. 94 – 99. He pled before the Honorable DeAndrea Benjamin on April 26, 2016. App. 1. Robert Bank, Jr. represented Petitioner; Margaret Bodman appeared on behalf of the state. A plea agreement had been reached between the parties wherein Petitioner would receive thirty years, concurrent, on each offense. App. 3 ll. 3 – 12. At the time of the plea, a jury had already been selected. App. 15 ll. 9 – 11.

The facts giving rise to the indictments as alleged by the solicitor were as follows: On March 15, 2014, Petitioner sexually assaulted a foreign exchange student in the Five Points area of downtown Columbia. App. 6 l. 22 – 13 l. 11.

The plea judge found that there was a substantial factual basis for the plea and noted that the plea was entered freely, voluntarily, knowingly, and intelligently. App. 19 ll. 10 – 14. The plea was therefore accepted. App. 19 l. 22. The plea judge sentenced Petitioner to thirty years' incarceration, concurrent, on each offense. App. 27 ll. 2 – 6.

On February 22, 2017, Petitioner filed an application for post-conviction relief. App. 29. It contained allegations of ineffective assistance of counsel, including claims that counsel “failed to adequately represent” Petitioner and that Petitioner “was coerced into pleading guilty” by his attorney. Ap. 31. The state made its Return on or about November 30, 2017. App. 36 – 42. Through counsel, Petitioner filed an amendment to his PCR application on June 14, 2019. App. 43.

A hearing was held before the Honorable D. Craig Brown on February 21, 2020. App. 45. Jonathan Waller represented Petitioner; Samuel Key appeared on behalf of the state.

Petitioner and plea counsel testified at the hearing. The PCR judge took the matter under advisement. App. 80 ll. 24 – 25.

An Order of Dismissal was filed on October 26, 2020. App. 84 – 91. This petition follows.

## ARGUMENT

**The PCR court erred in denying relief, where Petitioner was not provided a full and complete copy of discovery from his plea counsel.**

### Relevant facts

At the PCR evidentiary hearing, Petitioner testified that his plea attorney never spoke with him about his constitutional rights, including his right to remain silent. App. 52 ll. 18 – 21. Counsel never explained the state’s burden of proof. App. 63 ll. 4 – 8. Additionally, Petitioner indicated that he did not have a copy of his discovery while awaiting trial. App. 53 ll. 19 – 21. Petitioner testified that he asked plea counsel “numerous” times for his discovery, but counsel “refused” to provide him a copy. App. 54 ll. 10 – 14. Petitioner did not feel comfortable going to trial based on his recollection that plea counsel never spoke of potential defenses or trial strategy. App. 54 l. 18 – 55 l. 3; App. 59 ll. 19 – 21.

Petitioner was confined in the county detention center for the entirety of plea counsel’s representation. App. 53 l. 22 – 54 l. 1. He initially wanted to go to trial but changed his mind when he heard the judge and solicitor speaking about a potential life sentence. App. 58 ll. 16 – 24.

Regarding a DNA report in particular, Petitioner was never shown a copy until after he pled. App. 58 ll. 11 – 15. As a result, he never had an opportunity to fully discuss its findings with counsel. App. 60 ll. 6 – 19.

### Discussion

In order to establish ineffective assistance of counsel, a PCR applicant must establish counsel's performance fell below an objective standard of reasonableness and, “the deficient performance prejudiced the [applicant] to the extent that ‘there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different'.” Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625, (1989), quoting Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Id.

A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing (1) that counsel's representation fell below an objective standard of reasonableness and (2) that there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 56-57, 106 S.Ct. 366, 369, 88 L.Ed.2d 203, 208-09 (1985). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

The appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. Cherry v. State, supra. However, the appellate court will not uphold the findings of the PCR court if there is no probative evidence to support those findings. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

The PCR court noted that Petitioner advised the plea court that nobody forced him into pleading guilty and that he was satisfied with counsel's representation. App. 90. Regarding the discovery dispute, the PCR court found credible counsel's testimony that he would have provided discovery to Petitioner if he had requested it. App. 91. However, the PCR court erred when it concluded:

Based on Counsel's credible testimony, the Court finds Counsel did not provide the discovery to Applicant because Applicant did not want the discovery after being advised of the dangers of having it. Therefore, Counsel reasonably did not

give Applicant a copy of the discovery while Applicant was in the detention center. Accordingly, this allegation is denied and dismissed with prejudice.

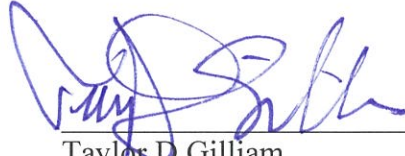
App. 91.

This statement is unsupported by the testimony of Petitioner and counsel at the PCR evidentiary hearing. The PCR court correctly cited counsel's general practice but then incorrectly assumed counsel did not provide the discovery to Petitioner "because [he] did not want the discovery after being advised of the dangers of having it." Counsel testified: "I don't recall whether he asked to retain a copy or not, but I certainly brought the discovery materials down to the jail." App. 67 ll. 1 – 3.

On redirect, counsel was asked if he would give discovery to clients if they insist on having it after being advised of the dangers of possessing it in the county jail. App. 77 ll. 19 – 22. When asked if he recalled whether Petitioner asked for his discovery in this case, counsel responded: "Not specifically. I would rather not dispute whether he did or not. If he believes he did, we could have had that conversation." App. 78 ll. 2 – 6. Similarly, counsel did not recall advising Petitioner of the dangers of maintaining a copy of the discovery while incarcerated. App. 78 ll. 2 – 10. As a result, the PCR court's conclusion is based on conjecture and speculation. The resulting denial of relief should be reversed.

**CONCLUSION**

Based on the foregoing, Petitioner respectfully requests that this Court grant certiorari to allow further briefing.



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Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of July, 2021.

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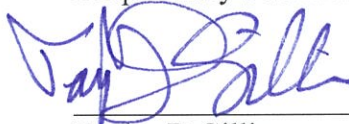
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Counsel for Michael Darnell Thomas states:

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 D. Craig Brown, which was held on February 21, 2020, 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 Michael Darnell Thomas.

Respectfully Submitted,



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Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of July, 2021.

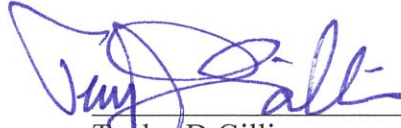
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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

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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This 14th day of July, 2021.