

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Anderson County

J. Cordell Maddox, Jr., Circuit Court Judge

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S.C. SUPREME COURT

EDRICK PEREGO,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000928

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PETITION FOR WRIT OF CERTIORARI

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## ISSUES PRESENTED

I. Did plea counsel provide ineffective assistance by advising Petitioner to plead guilty when he suffered from dementia and there was no alleged injury to support to the charge of ABHAN or evidence of intent to kill to support the indicted charge of attempted murder?

II. Did the PCR court err in concluding as a matter of law that Petitioner's plea was knowingly, voluntary, and intelligently made despite his dementia, hearing loss, and the lack of a factual basis for his guilty plea.

III. Did the PCR court err in finding no basis for altering or amending its ruling in response to Petitioner's Motion to Alter or Amend filed pursuant to Rule 59(e) SCRCP.

## STATEMENT OF THE CASE

In September of 2014 Petitioner was indicted in Anderson County for two counts of third-degree arson. In October he was indicted for an additional two counts of attempted murder. App. 197-204. Petitioner plead guilty before the Honorable R. Scott Sprouse to the two counts of third degree arson and two counts of assault and battery of a high and aggravated nature as a lesser included offense of attempted murder. Petitioner, who was eighty-seven (87), was charged with setting fire to two cabins at the Tiger Cove Campground and ramming his truck into the Tiger Cove Grill (Grill), on June 5, 2014, in Anderson County. There were two individuals inside the Grill; they were uninjured. App. 13-15. Herverly Young, Esquire, represented the petitioner on these charges and Rame Campbell appeared for the State. App. 1.

### *Dementia*

Competency evaluations were ordered and performed twice with reports issued on September 19, 2014 and again on March 22, 2016. App. 117-9. The second evaluation was ordered in response to an opinion of Dr. Amanda Salas that based on screening tests and a June 5, 2014, computed tomography (CT) scan showing generalized cortical atrophy in his brain, the Petitioner had dementia. App. 146-7. However, the South Carolina Department of Mental Health (SCDMH) diagnosed malingering after reviewing audio recordings of Petitioner's telephone conversations with his wife where he seems to comprehend and engage her in conversation and again found the Petitioner competent. App. 45-46. SCDMH's second evaluation also considers records that his jailers felt the Petitioner was exaggerating and faking his symptoms and a number of prior arrests that did not result in criminal convictions. App.43-4. Petitioner's first criminal conviction occurred when he was eighty-five and sentenced to probation.

### ***Guilty plea hearing***

On May 13, 2016, Petitioner appeared before the Honorable R. Scott Sprouse to enter a guilty plea. App. 1 The State recommended a sentence of no more than ten years. Petitioner was on the trial docket for the following week. App. 3. Judge Sprouse was given a copy of the SCDMH report with a cover letter dated May 3, 2016, which was entered as court's exhibit one. App. 3-6. When asked if he understood the judge's questions, the Petitioner responded that he was having a hard time hearing but will ask if he needs explanation. App. 6. When asked how he wished to plead, Petitioner initially responds, "Yes, sir" and then says guilty after speaking to his attorney. App. 10. After the presentation of the facts, Petitioner again stated that he was having difficulty hearing. App. 13-19.

Though there was no allegation that anyone was injured or Petitioner intended to kill anyone in the grill, Judge Sprouse found a factual basis and accepted Petitioner's plea as freely, voluntarily and knowingly made, and sentenced him to ten years. He also revoked Mr. Perego's probation for the full ten years to be served concurrently. App. 19, 57.

During the plea hearing the victims asked for the maximum sentence; they cited three threatening phone calls made that morning as well as incidents of stalking that caused them to fear for their lives if Petitioner was released. App. 27-8. The Solicitor then read into the record a letter from the lawyer of a victim who was not present in court, which alleged thefts and threats that were attributed to the Petitioner. App. 27-31. The Solicitor then went on to say that law enforcement was investigating these threatening phone calls and that the Petitioner was a threat. App. 30. However, the Petitioner was incarcerated for the prior seven hundred and eight days

since the incident and his phone conversations had been recorded by the jail and reviewed by the state as well as SCDMH with no reports of Petitioner conveying threats or soliciting any crimes; in addition no criminal charges were ever made against the Petitioner. App. 22, 44-5.

While Mr. Young did not object to these unfounded allegations he pointed out that the jail had no records of the calls. App. 33. Mr. Young requested a sentence under the home incarceration program citing Petitioner's age, numerous health issues including dementia, and eligibility for VA benefits. App. 38. He presented Dr. Salas who gave an expert opinion that she saw indications of dementia from a CT scan and other tests that would be impossible to fake. App.40-41. Mr. Campbell referred Dr. Salas to the SCDMH report, Petitioners recorded jail calls, and the opinion of his jailers that he was exaggerating his symptoms which did not change her opinion that the tests could not be faked. App. 44-46. The Petitioner addressed the court at length referencing his health issues, medical treatment, and veteran status. App. 49-52. He said his brain was not working one hundred percent, but when it was clear, it was clear. App.53-54. In response, Mr. Campbell said again that the Petitioner was faking it and chose to drive that truck through that bar to which Petitioner declared, "I didn't drive no truck though no bar." App. 55-6.

### ***Appeal***

Mr. Young filed a timely notice of appeal but failed to include the violation of probation (VOP) for which the Petitioner was given a ten year concurrent sentence. App. 137, 193. Appellate Defender Laura Baer represented Petitioner and counseled that he withdraw his appeal. An Order to such effect was issued December 15, 2016.

### ***Post-conviction relief hearing***

On June 5, 2017, Petitioner filed a post-conviction relief (PCR) application. App. 61-68.

The State filed a Return and Partial Motion to Dismiss on September 12, 2017. App 69-80. The undersigned filed a Supplemental Application on Petitioner's behalf on February 13, 2018. An evidentiary hearing was held in Anderson County before the Honorable L. Cordell Maddox, Jr. on February 21, 2018, with the undersigned representing Mr. Perego and Kelly Oppenheimer representing the State. App. 82.

During the PCR hearing Petitioner stated that his plea attorney told him that if he pled guilty he could go home wearing a monitor and that he did not really understand the charges to which pled. He testified that he did not plan to hurt anyone explaining he has serious side effects from his blood thinner medicine. App. 89-90. He denied lodging a stick against the accelerator of his truck to ram the grill as the State had alleged. App. 93. He said that his memory goes and comes and that he wanted a trial to explain about the medicine and its bad effects on him. App.94-7. Ms. Perego testified that she was married to the Petitioner for eighteen years and though they were separated by the time of the incident, they spoke often. App. 101. She stated that she had noticed a change in the Petitioner and suspected dementia. App. 102. In cross-examination, when questioned whether she could say with any degree of medical certainty whether Mr. Perego had dementia, Ms. Perego said that her mother had dementia. App. 103. Ms. Perego said that she had told Mr. Young that she thought Mr. Perego had dementia and would have told the court that if asked. App.105. Mr. Perego's granddaughter, Jessica Ford also testified at the hearing and said that she also noticed changes in Mr. Perego and she also would have testified if asked. App. 25. She said she and her brother had been staying at the Petitioner's house just before the incident, and she noticed him acting out of character. She was fifteen at the time. The day prior to the incident he left the teens alone overnight; when he returned he told them he

got lost and slept overnight in his truck. App. 107. This was out of character and her grandma came and picked them up. App. 208. She said that he was forgetful, reported being constantly cold, and building a fire in his wood stove in warm weather. App.108-9.

Hervy Young testified for the State. App.111. He said he hired Dr. Salas because he questioned the Petitioner's competency and she reported moderate brain damage in a March 3, 2016, letter. App. 127, 146. He said that in contrast to the facts presented in the guilty plea transcript that the Petitioner had lodged a piece of wood between the seat and accelerator pedal of his truck to ram the Grill, the evidence did not describe a stick or piece of wood found at the scene and there was no mention if it by the man who backed the truck away from the grill. Young believed the evidence supported the fact that the truck rolled down a hill into the Grill. App. 14, 51. He did not recall any of the victims saying they suffered physical injury. App. 133. He admitted that he made no objections during the guilty plea and probably should have included the probation warrant on the notice of appeal. App.135, 140.

At the conclusion of the PCR hearing the Petitioner argued the plea lacked a factual basis and was not knowingly, intelligently, and voluntarily made. The State requested time to brief the issue. App 143. The record was left open for the State to address the issue of whether the guilty plea was knowingly and voluntarily made and whether plea counsel was ineffective for advising Mr. Perego to plead guilty when there was no factual basis to support the charge of ABHAN. As to the issue of whether further testimony from Dr. Salas beyond the letter presented in the hearing would assist the judge, the judge stated that it would not assist him and that he would almost take judicial notice that dementia might cause a lack of impulse control. App. 143.

***Post-hearing memorandi***

On February 27, 2018, the State submitted a post hearing memorandum. App. 148. The State argued that because Mr. Perego got the benefit of a bargain by pleading to a lesser-included offense of attempted murder, the plea was reasonable for strategic reasons and also knowingly, voluntarily and freely given. They relied on *Anderson v. State*, 342 S.C. 54, 57-58, 535 S.E.2d 649, 651 (2000). They also argued that *Van Selner v. State* was distinguishable because there the original charge lacked a factual basis whereas here there was a factual basis to charge Mr. Perego with attempted murder. *Van Selner v. State*, 416 S.C. 606, 787 S.E.2d 525 (2016). App. 152. The Petitioner submitted a reply on March 5, 2018, arguing *Van Selner* was applicable because the facts presented in Mr. Perego's plea did not include physical injury, attempt to kill with malice aforethought, or intent to kill, and do not form a sufficient factual basis for either the indicted charge of attempted murder or ABHAN. App. 155. *Id.* It further argued plea counsel was ineffective for advising Mr. Perego to plea when the facts of the case did not amount to attempted murder and given his age and dementia Mr. Perego did not benefit from pleading to the lesser included offense of ABHAN.

#### ***Order of dismissal***

Judge Maddox denied Petitioner relief by an order of dismissal filed April 2, 2018. In the order Judge Maddox found that the Petitioner failed to carry his burden of proving ineffective assistance of counsel. App. 158. He found counsel hired an investigator and was not deficient for failing to investigate or advising a plea. App. 170. While counsel testified that Petitioner asked him to file an appeal and that he probably should have included the VOP, the court found there was no deficiency or prejudice for failing to do so. App. 59, 171. Judge Maddox found that because Petitioner did not present evidence at the hearing that counsel was ineffective for failing

to object to victim testimony regarding unsubstantiated allegations of criminal acts, the issues were abandoned. App 174. The court found that Petitioner failed to prove that counsel was ineffective for advising the plea to ABHAN, or that the plea was violative of due process or not freely, voluntarily, and intelligently made. App 176-9.

Petitioner filed a timely Motion to Alter or Amend the Judgment. App. 182. The motion averred (1) That the appeal issue was not abandoned because the court records show that the appeal was withdrawn and the case sent straight to PCR because the failure to include the VOP in the Notice of Appeal negated any benefit of a reversal on appeal because the Applicant would still be serving ten years on the VOP. App 182. (2) The Order of Dismissal erred in finding that the Applicant abandoned the issue of failing to object to victim testimony regarding unsubstantiated allegations of criminal acts by the Applicant, because the record supports the argument. App. 183. (3) The lack of a factual basis of the plea was both a due process violation bringing into question the knowing and voluntary nature of the plea and an ineffective assistance of counsel claim for advising a plea to ABHAN, when there was no alleged injury or evidence of intent to kill to support the indicted charge of attempted murder especially because Petitioner was a nearly deaf, an octogenarian, a World War II veteran with moderate dementia and attempted murder requires both an attempt to kill with malice aforethought and specific intent to kill. App.183-4.

On May 9, 2018, Judge Maddox filed an order finding no basis for altering or amending his prior ruling and denied Petitioner's 59(e) motion in its entirety. App. 189. Petitioner served notice of appeal May 16, 2018. This petition for writ of certiorari follows.

## ARGUMENT

### I. I. Plea counsel provided ineffective assistance by advising Petitioner to plead guilty when he suffered from dementia and there was no alleged injury to support to the charge of ABHAN or evidence of intent to kill to support the indicted charge of attempted murder and the court erred in finding intent to kill could be inferred

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendment. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Cherry v. State*, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). 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 upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see also 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.

In the context of a guilty plea, a petitioner must show that counsel was ineffective and that there is a reasonable probability but for counsel's errors, he would not have pled guilty. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *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). "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*, 474 U.S. at 56. "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." *Lafler v. Cooper*, 566 U.S. 156, 162 (2012).

Petitioner pled to ABHAN, a lesser-included offense of the attempted murder despite the fact that there was no allegation of physical injury as required by S.C. Code Ann. § 16-3-600. App. 204. Relying on *Anderson v. State*, the PCR court found a jury could infer intent to kill and malice from the facts of the case to support the factual basis for the indictment for attempted murder, and thus the plea to ABHAN was advised for strategic reasons. *Anderson v. State*, 342 S.C. 54, 57-58, 535 S.E.2d 649, 651 (2000). App. 177-9. This reasoning is based on an error of law because "one cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill." *Id.* at 57, 810 S.E.2d at 23 (quoting *Keys v. State*, 104 Nev. 736, 766 P.2d 270, 273 (1988)). *State v. Smith*, 425 S.C. 20, 819 S.E.2d 187 (S.C. App., 2018).

There must be a sufficient factual basis for the indicted offense to support a plea to a lesser-included offense for it to be considered a tactical maneuver to avoid the *very real* possibility that the jury might come back with a verdict of [the indicted charge]." [emphasis added] *Anderson* at 58 & 651. App. 178. There was no very real possibility that a jury would convict Petitioner, a nearly deaf octogenarian World War II veteran with moderate dementia, of attempted murder because the facts do not show a specific intent to kill. As Petitioner argued at the PCR hearing, *Van Sellner v. State* is applicable in this matter because facts presented in

Petitioner's plea do not include physical injury, attempt to kill with malice aforethought, or intent to kill, and would not support a conviction at trial for the indicted charge of attempted murder or of ABHAN. App. 13-9, 141-2, 155-6. *Van Sellner v. State*, 416 S.C. 606, 787 S.E.2d 525 (2016). For the foregoing reasons, plea counsel was ineffective for advising Mr. Perego to plead guilty to ABHAN.<sup>1</sup>

The PCR court found that Petitioner failed to establish prejudice because he reduced his sentence exposure and did not state with specificity that he would have insisted on going to trial during his PCR testimony. App. 97, 100, 173-4. A defendant must prove "there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have gone to trial". *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). The record established a reasonable probability that Petitioner would not have pled had plea counsel advised him that there was not a factual basis for a conviction if he went to trial. At the plea hearing, the hard of hearing Petitioner with diagnosed dementia, was insistent that he did not drive his truck into the bar as alleged by the State; he was hesitant to agree to the facts before plea counsel informs the court that Petitioner's hesitancy has nothing to do with the factual basis for the elements of the crimes. App. 57, 18-9. At the PCR hearing, Petitioner denied making his truck ram into the Grill; he testified he did not try to hurt anyone and he testified a number of times that he wanted a trial. App. 90, 93, 97; 100. The facts of the case do not contain evidence of a specific intent to kill to support a conviction of attempted murder. Counsel was ineffective for advising the guilty plea.

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<sup>111</sup> *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (S.C. App., 2015) *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (S.C. App., 2015) found attempted murder required a specific intent to kill.

II. The PCR court erred in concluding as a matter of law that Petitioner's plea was knowingly, voluntary, and intelligently made due to Petitioner's dementia and hearing loss as well as the lack of a factual basis for his guilty plea.

Due process of law requires that before a guilty plea can be entered knowingly, 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). In addition to the requirements of *Boykin*, a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived. *State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980) (emphasis added); *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991). In *State v. Armstrong*, 263 S.C. 594, 211 S.E.2d 889 (1975), the Court held that before a guilty plea may be accepted, the court must be certain the defendant understands the charge and the consequences of the plea and that the record indicates a factual basis for the plea. *Anderson v. State*, 535 S.E.2d 649, 342 S.C. 54 (S.C., 2000)

As argued above, the guilty plea record itself did not indicate a sufficient factual basis for the plea to ABHAN because there was no evidence of a specific intent to kill. Furthermore, even though Mr. Perego was found to be competent, his dementia and inability to hear well are apparent in the record of the guilty plea. There is no explanation of the elements of the charges in

the guilty plea transcript beyond the reading of the charge. App. 3, 7. When asked how he wished to plead, Petitioner initially responds, "Yes, sir" and then says guilty after speaking to his attorney. App. 10. While being informed of the potential sentences, Mr. Perego replies in the affirmative while repeatedly saying he cannot hear. App.7-9. When asked if he agrees to the facts, Mr. Perego responds "As I understand them, it seems like it is", confers with Mr. Young, and says that he cannot hear before saying finally saying yes. App. 18-19. This record does not show with certainty that Mr. Perego understands the charge and consequences of the plea or that the plea was knowingly, voluntary, and intelligently made in compliance with the Due Process clause of Fifth and Fourteenth Amendments.

III. The PCR court erred in finding no basis for altering or amending its ruling in response to Petitioner's Motion to Alter or Amend filed pursuant to Rule 59(e) SCRCP.

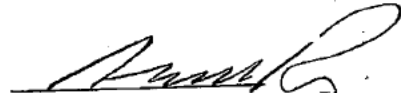
Trial counsel failed to appeal Petitioner's VOP. PCR counsel argued this prejudiced Petitioner's rights, as shown by court records that showed the appeal was withdrawn and the case sent straight to PCR because plea counsel failed to include the VOP in the Notice of Appeal. App.171. This negated any benefit of a reversal on appeal because the Applicant would still be serving ten years on the VOP. Therefore, the Applicant submits that it was ineffective to not appeal the VOP with the guilty plea that triggered it. The prejudice was the loss of the right of appellate review through the denial of any potential relief from a reversal on appeal.

The court also erred in finding that the Applicant failed to present any testimony or argument that he was prejudiced when counsel failed to object to allegations of other uncharged crimes. The record showed no objection to the State's reading of a letter referencing unproven hearsay, accusations crimes attributed to Mr. Perego which were unproven. Plea counsel admitted he did not object when the Solicitor told the plea judge that the victim, Ms. Lash, was hysterical after receiving threatening phone calls that day when jail records showed the Applicant did not access phone or visitation without any protest by Mr. Young. App. 174, 183.

Finally, Petitioner again argued that facts presented in his plea did not form a sufficient factual basis for either the indicted charge of attempted murder or ABHAN because they do not include physical injury or specific intent to kill. At the PCR hearing Petitioner's family members testified that they had noticed him acting strangely and out of character. All of these issues were raised in Petitioner's Rule 59(e) motion.

**CONCLUSION**

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event, this Court grants the petition, but dispenses with further briefing, Petitioner respectfully requests this Court reverse the PCR court, find plea counsel rendered ineffective assistance, vacate Petitioner's guilty plea and sentence, and remand for a new trial.

  
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Attorney for Appellant

This 1st day of April, 2019.

STATE OF SOUTH CAROLINA

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EDRICK PEREGO,

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v.

STATE OF SOUTH CAROLINA,

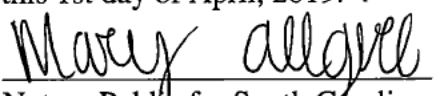
RESPONDENT

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Taylor Z. Smith, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Edrick Perego, #368192, McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 1st day of April, 2019.

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 1st day of April, 2019. .

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