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**May 02 2022**

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County

Honorable George M. McFaddin, Circuit Court Judge

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XAVIER U. BRANNON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001015

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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## **ISSUE PRESENTED**

Whether the PCR court erred in denying relief, where Petitioner was induced into pleading guilty, where he was approached with a plea offer the day his trial was set to begin, where counsel's conduct made him feel nervous, and where counsel's advice to take the plea offer overbore his desire to go to trial?

## STATEMENT

On July 15, 2015, a Richland County grand jury indicted Petitioner for murder. App. 115. On February 13, 2017, Petitioner pled guilty before the Honorable R. Knox McMahon. App. 1. Fielding Pringle, John Tate, and Catherine Mubarak represented Petitioner; Luck Campbell and Lamar Fyall appeared on behalf of the state. Petitioner pled guilty to the lesser-included offense of voluntary manslaughter, and the state recommended a sentence of fifteen years. App. 3 ll. 11 – 15. A rioting charge was dismissed pursuant to the plea as well. App. 7 ll. 21 – 23.

The facts giving rise to the charge were as follows: Petitioner was shot on February 17, 2015 near Gonzales Gardens. Less than a week later, Petitioner and others retaliated by shooting at the decedent and three other individuals. According to the state, one of Petitioner's co-defendants, Alvin Anders, fired the fatal shot. App. 10 l. 20 – App. 13 l. 10.

Judge McMahon found a substantial factual basis for the plea. He further found that Petitioner's decision to plead was freely, voluntarily, knowingly, and intelligently made. App. 15 l. 19 – App. 16 l. 12. As a result, Petitioner's plea was accepted. Id. Judge McMahon sentenced Petitioner to fifteen years' incarceration. App. 22 ll. 17 – 21.

Petitioner filed a post-conviction relief application in December 2017. App. 25. It contained allegations of ineffective assistance of counsel, including a claim of after-discovered evidence. App. 28. The state filed a Return and Motion to Dismiss and for a More Definite Statement on May 31, 2018. App. 33. On November 13, 2018, Petitioner filed an oppositional motion to the state's Motion to Dismiss, thereby amending and supporting some of his allegations.

An evidentiary hearing was held before the Honorable George M. McFaddin, Jr. on June 16, 2021. App. 38. Nancy Fennell represented Petitioner, and Yasmeen Klein appeared on behalf of the state. The PCR court heard from Petitioner and plea counsel Pringle.

At the conclusion of the hearing, the PCR court indicated it was unlikely to grant relief but was going to take time to review the record. App. 89 l. 15 – App. 90 l. 10. An Order of Dismissal was filed on August 11, 2021. App. 97.

This petition follows.

## ARGUMENT

**The PCR court erred in denying relief, where Petitioner was induced into pleading guilty, where he was approached with a plea offer the day his trial was set to begin, where counsel's conduct made him feel nervous, and where counsel's advice to take the plea offer overbore his desire to go to trial.**

### Relevant facts

Petitioner recalled meeting with Counsel Pringle for the first time approximately one month after he was initially charged. App. 42 ll. 9 – 12. Although he indicated he was unsure, he testified that the two met approximately five times. App. 42 ll. 16 – 19. According to Petitioner, the two never spoke about accomplice liability. App. 60 ll. 13 – 17. Petitioner's goal was always to proceed to trial. App. 43 ll. 10 – 14. However, on the day trial was set to begin, Counsel Pringle approached him with an offer:

Well, she just - - like, it was just - - it was different. Like, she said that we were - - they had an offer and stuff and they - - that was the first offer I ever got when I got to, to getting - - the day of trial and stuff. So, it just wasn't - - I didn't know - - I didn't think it was going to be that. So, I just thought we were getting ready for trial. So, it kind of - - it just threw me off.

And she was, like, she just was - - she seemed like she wasn't ready or she, you know - - and she was, like I think that was the best thing to do is to take the offer. And she didn't want to see me get a life sentence and stuff. So, I was - - I got nervous and I just, I, I took the plea.

App. 43 l. 17 – App. 44 l. 3.

Petitioner confirmed that he had not received any offers prior to the one he ended up accepting. App. 44 ll. 9 – 11. As such, the strategy up until that point was to prepare for trial. App. 44 ll. 12 – 14. A trial strategy had even been developed: discredit Petitioner's co-defendant's statements. App. 44 ll. 15 – 21.

Petitioner was provided just one day to contemplate the state's offer. App. 45 ll. 9 – 14. Factoring into his decision was his attorney's statement that she did not feel comfortable proceeding with trial, according to Petitioner. App. 45 l. 23 – App. 46 l. 2. When counsel informed Petitioner that he could receive a life sentence, he became frightened and accepted what he believed to be counsel's advice and pled guilty. App. 47 ll. 2 – 6. Petitioner's claim of ineffective assistance of counsel revolved around her advice to Petitioner on the day he would decide to plea: "I didn't expect to have a plea then." App. 47 ll. 7 – 18.

During cross-examination, Petitioner was asked why he pled since he wanted a trial. App. 54 ll. 20 – 24. His response was the same as during direct examination, that counsel made him nervous and he did not know what else do to. App. 54 l. 25 – App. 55 l. 2; App. 57 ll. 9 – 16. Similarly, when asked by the judge if it was his decision to plead guilty, Petitioner indicated he was nervous and "just went with it." App. 58 ll. 8 – 14. He felt like pleading guilty was his "only option." App. 67 ll. 8 – 16. He therefore relied upon the advice of counsel in order to enter into the guilty plea. App. 67 ll. 22 – 24.

The Order of Dismissal found Petitioner's testimony not to be credible. App. 107. As a result, the PCR court concluded "[Petitioner] failed to show any deficiency on behalf of Plea Counsel, and has additionally failed to establish any resulting prejudice." App. 109.

### Discussion

"An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (citation omitted). "To establish deficient performance, a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" Id. (quoting Strickland v. Washington, 466

U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). “[T]o establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Id. at 534, 123 S.Ct. 2527 (quotations and citation omitted). In assessing prejudice, appellate courts “reweigh the evidence in aggravation against the totality of available mitigating evidence.” Id. Prejudice is established where “there is a reasonable probability that at least one juror would have struck a different balance.” Id. at 537, 123 S.Ct. 2527 (citation omitted). A “reasonable probability” is less than a preponderance of the evidence but still “a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 693–94, 104 S.Ct. 2052.

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 PCP, hearing. Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

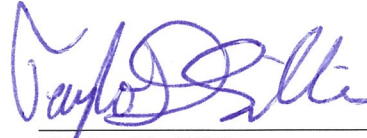
The appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. Cherry v. State, supra. However, the appellate court will not uphold the findings of the PCR court if there is no probative evidence to support those findings. Holland v. State,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

Petitioner wanted to go to trial. During his meetings with his team of attorneys, they developed strategies and plans that would assist him at trial. Counsel was ready to attack the credibility of Petitioner's co-defendants. However, Counsel Pringle confused Petitioner when

she brought him the offer of fifteen years and voluntary manslaughter. He was previously under the impression that he was going to trial. Then, at the final hour, his appointed advocate advised him to take a plea. This advice was contrary to the strategies that had been developed which Petitioner was hoping to rely on at trial. This sudden change of heart made Petitioner nervous, yet he trusted his attorney's advice. The result, however, was an involuntary guilty plea. Petitioner based his decision purely on the advice of counsel; the decision was not his. As a result, he is entitled to a new trial. The PCR court erred in denying relief.

**CONCLUSION**

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



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Taylor D. Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of May, 2022.

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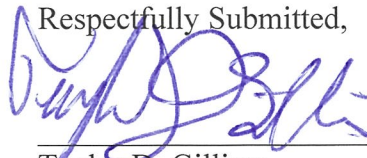
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PETITION TO BE RELIEVED AS COUNSEL  
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Counsel for Xavier U. Brannon states:

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 George M. McFaddin, which was held on June 16, 2021, 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 Xavier U. Brannon.

Respectfully Submitted,



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Taylor D. Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of May, 2022.

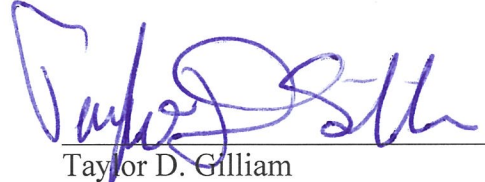
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CERTIFICATE OF COUNSEL

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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