

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Orangeburg County

Honorable Robin B. Stilwell, Circuit Court Judge  
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ANTONIO DESMOND FAIREY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000138  
—————

PETITION FOR WRIT OF CERTIORARI  
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### **ISSUE PRESENTED**

Whether the PCR court erred in denying relief, where plea counsel failed to contact multiple witnesses provided by Petitioner, where two of the witnesses provided exculpatory testimony at the PCR hearing, where their testimony cast doubt on the allegations giving rise to Petitioner's arrest, and where Petitioner would have gone to trial had plea counsel interviewed these witnesses?

## STATEMENT

Petitioner was indicted by an Orangeburg Count grand jury in 2016 for kidnapping, attempted murder, and domestic violence in the second degree. App. 137 – 142. He pleaded guilty before the Honorable Edgar W. Dickson on December 14, 2016. App. 19. Petitioner was represented by Jim Adams, and Sarah Ford appeared on behalf of the state. The state recommended a twenty year sentence suspended to a range of between ten and fifteen years, followed by probation. App. 21 ll. 15 – 21.

The facts as alleged by the state revolved around two separate occasions. On March 6, 2016, the state alleged Petitioner struck Shanika Moorer in the face with his hand. App. 30 ll. 5 – 13. On June 9, 2016, the state claimed Petitioner tied up Moorer, hit her, and sliced her hand with a knife. App. 30 l. 14 – App. 31 l. 21. He pleaded guilty on each indictment. App. 34 l. 4 – App. 35 l. 5.

Judge Dickson found Petitioner's plea was entered into freely, voluntarily, and intelligently, and he accepted the plea. App. 35 l. 25 – App. 36 l. 7. Petitioner was sentenced to three years on the domestic violence charge and twenty years, suspended to thirteen years' incarceration followed by five years' probation, on the kidnapping and attempted murder charges. App. 39 ll. 11 – 20.

Petitioner filed an application for post-conviction relief on April 13, 2017. App. 43 – 50. The state filed its Return, a Partial Motion to Dismiss, and a Motion for a More Definite Statement on or about August 14, 2017. App. 51 – 58. An evidentiary hearing was held on July 9, 2018 before the Honorable Robin B. Stilwell. App. 59. Jonathan Waller represented Petitioner, and Christian Saville appeared on behalf of the state. The state withdrew its motion to

dismiss at the hearing. App. 64 ll. 5 – 9. Petitioner, Angela Kitt, Adrienne Felder, and plea counsel testified at the hearing.

The PCR court denied relief at the conclusion of the hearing. App. 118 ll. 4 – 12. An Order of Dismissal was filed on January 18, 2019. App. 124. The PCR court found Petitioner failed to meet his burden that counsel was deficient. App. 132 – 133.

This petition follows.

## ARGUMENT

**The PCR court erred in denying relief, where plea counsel failed to contact multiple witnesses provided by Petitioner, where two of the witnesses provided exculpatory testimony at the PCR hearing, where their testimony cast doubt on the allegations giving rise to Petitioner's arrest, and where Petitioner would have gone to trial had plea counsel interviewed these witnesses.**

### Relevant facts

Facing a maximum sentence of sixty-three years, Petitioner met with plea counsel only three times outside of court appearances. App. 68 ll. 11 – 21. During the first meeting, Petitioner provided plea counsel with the names of multiple witnesses, including Angela Kitt, Shelton Simpson, Cassandra Shuler, Kristie Green, and Adrienne Felder.<sup>1</sup> App. 69 ll. 17 – 22. Although Kitt was a witness for just the domestic violence charge, Petitioner provided counsel with her contact information. App. 70 ll. 3 – 23. Felder was Petitioner's neighbor and, by contrast, was a witness for the kidnapping and attempted murder allegations. She unsuccessfully attempted to contact counsel in order to discuss the events she had occurred. App. 71 l. 9 – App. 72 l. 11.

The third meeting between Petitioner and counsel took place at the jail. App. 73 l. 22 – App. 74 l. 20. During that meeting, plea counsel indicated that the state was willing to let Petitioner plead to all three offenses with a recommended sentence of ten years. Id. However, when that offer turned out to be the result of miscommunication between plea counsel and the solicitor's office, Petitioner filed a motion to have plea counsel relieved. Id. Petitioner and plea

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<sup>1</sup> Felder also went by the name Adrienne Jackson. App. 71 ll. 15 – 16.

counsel both admitted that they believed the state had offered a ten year maximum, but the assistant solicitor clarified that the range was going to be between ten and fifteen years. App. 10 l. 25 – App. 11 l. 25.

As a result, Petitioner mistrusted plea counsel. App. 75 ll. 11 – 17. He believed that if he had elected to go to trial with plea counsel representing him, he would have been convicted and received the maximum sentence, sixty-three years. Id. Had counsel spoken with Petitioner about applicable defenses or contacted the witnesses Petitioner provided, Petitioner would have gone to trial. App. 79 l. 18 – App. 80 l. 5. However, Petitioner was forced to make a hurried decision; the assistant solicitor noted at the outset that if Petitioner did not plead guilty, his case was going to be placed on the trial docket. App. 4 ll. 2 – 4.

Kitt testified that she had to take the initiative to speak with plea counsel. App. 89 ll. 17 – 25. Nobody from plea counsel’s office reached out to her; rather, she contacted him and drove to the courthouse in Orangeburg. Id. She spoke at length about the night Petitioner supposedly punched Moorner and indicated that Petitioner never attacked Moorner. App. 90 l. 4 – App. 91 l. 15. Notably, Kitt remarked that she shared all of that information with plea counsel. Id. She refuted the state’s contention that Moorner’s two minor children witnessed the events, clarifying that they were sleeping on the night in question. App. 92 ll. 14 – 19.

Felder, Petitioner’s neighbor, similarly testified that she was not contacted by plea counsel. App. 97 ll. 2 – 15. She credibly testified to calling plea counsel’s office three times; nobody ever called her back. Id. As to the night in question, she was with Moorner from approximately 11:30 p.m. until around 2:00 a.m. App. 96 ll. 18 – 23. At that time, Moorner did not have any injuries. App. 96 ll. 22 – 23.

According to plea counsel, the state alleged Moorer had been tied up from 10:00 p.m. until around 8:00 a.m. the next morning. App. 113 ll. 1 – 7. Although an investigator was employed in the office where plea counsel worked, counsel did not ask the investigator to locate any of the witnesses. App. 110 ll. 5 – 11.

### Discussion

Counsel failed to get into touch with the witnesses provided by Petitioner. Petitioner provided contact information for them and even noted that Felder was his neighbor. Felder made the effort to call plea counsel's office three times, but she was never contacted. Her testimony, coming from a neutral and unbiased source, would have been helpful and relevant in Petitioner's case. As argued by PCR counsel, Petitioner had valid defenses. App. 116 ll. 7 – 16. However, those defenses were neither developed nor evaluated because they were not explored by plea counsel.

“The benchmark for judging any claim of ineffectiveness must be whether 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.” Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984). To prove ineffective assistance of counsel, “the defendant must show that counsel's performance was deficient” and “that the deficient performance prejudiced the defense.” Id. “When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.” Id. at 687-688; 104 S.Ct. at 2064. Concerning prejudice, “a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case.” Rather, “[t]he 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694, 104 S.Ct. at 2068.

The difference, “between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea.” Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). The longstanding test for determining the validity of a 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) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984) to claims of the same against plea counsel).

First, “the voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases.” Id. On the other hand, the prejudice requirement focuses on whether “there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” Id. at 59, 106 S.Ct. at 370. “[T]he 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.” Holden v. State, 393 S.C. 565, 572-74, 713 S.E.2d 611, 615-12 (2011).

In Missouri v. Frye, 566 U.S. 134, 132 S.Ct. 1399 (2012), the United States Supreme Court noted that the, “Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings[, which] . . . include arraignments, postindictment interrogations, postindictment line ups, and the entry of a guilty plea.” Id. at 141, 132 S.Ct. at 1405 (citations and internal quotation omitted). The Court further emphasized that “[i]n today’s criminal justice system, . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost

*always the critical point for a defendant.*” Id. (emphasis added). Accordingly, “[a]nything less [than effective counsel during plea negotiations]... might deny a defendant ‘effective representation by counsel at the only stage when legal aid and advice would help him.’” Id. at 1408 (citing Massiah v. United States, 377 U.S. 201 (1964) (quotation citation omitted)).

“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Strickland 466 U.S. at 691, 104 S.Ct. 2052. One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable. Grooms v. Solem 923 F.2d 88, 90 (8th Cir. 1991).

In Walker v. State, this Court held that the Court of Appeals “relied on this Court’s language in Glover that ‘since an alibi derives its potency as a defense from the fact that it involved the physical impossibility of the accused’s guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all’ and its holding that a PCR petitioner is not prejudiced by his counsel’s failure to interview a potential alibi witness who cannot present testimony that meets the legal definition of an alibi.” 407 S.C. 300, 405-06, 756 S.E.2d 144, 147 (2014). Counsel for the state cited Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). App. 116 l. 25 – App. 117 l. 7.

Counsel failed to contact and interview Felder. He never performed a complete investigation. He only met with Kitts because she drove to meet him. Petitioner was prejudiced by plea counsel’s failure to interview Felder. Had he spoken with the witnesses in the case, he may have been able to argue for a lower recommended sentence or have gleaned a meritorious defense to use at trial. However, because that was not done, Petitioner received deficient representation; he was represented by counsel who did not have a full understanding of his case.

**CONCLUSION**

Based upon the foregoing, Petitioner respectfully requests that this Court grant certiorari, reverse the charges against him, and remand the case for a new trial.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of September, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Orangeburg County

Honorable Robin B. Stilwell, Circuit Court Judge

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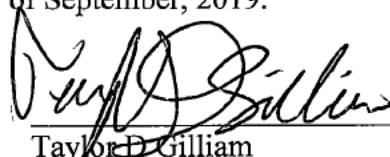
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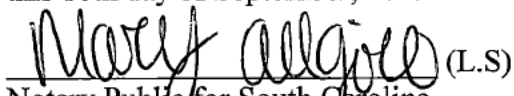
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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Benjamin Limbaugh, 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 Antonio Desmond Fairey, #276486, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 16th day of September, 2019.



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Taylor D. Gilliam  
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER  
this 16th day of September, 2019.

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