

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

**Oct 26 2023**

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Certiorari to Cherokee County

S.C. SUPREME COURT

Honorable Brian M. Gibbons, Circuit Court Judge  
\_\_\_\_\_

CARL STONE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000474  
\_\_\_\_\_

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

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**ISSUE PRESENTED**

Did the PCR judge err in refusing to find plea counsel ineffective for failing to move to suppress the drugs found inside the house pursuant to a search warrant when the basis for the search warrant was tainted by information obtained from a warrantless protective sweep of the house without exigent circumstances?

## STATEMENT

In March of 2021, the Cherokee County Grand Jury indicted Petitioner, Carl Anthony Stone, for trafficking in methamphetamine 100 grams or more but less than 200 grams, indictment #21-GS-11-350. (App. pp. 37-38). On November 29, 2021, Petitioner appeared before the Honorable J. Derham Cole, waived grand jury presentment on an indictment for possession of a firearm by a person convicted of a violent crime and a two-count indictment for trafficking in methamphetamine 28 grams or more but less than 100 grams and possession of a weapon during the commission of a violent crime, indictments #21-GS-11-1444, 445. (App. pp. 39-42). On the first indictment, #21-GS-11-350, Petitioner pled guilty to the lesser offense of trafficking in methamphetamine 28 grams or more but less than 100 grams. Petitioner also pled guilty to both waiver indictments, #21-GS-11-1444, 445. Pursuant to negotiations with the State, Judge Cole sentenced Petitioner to fifteen (15) years concurrent on the two trafficking charges and five (5) years concurrent on the weapons charges. (App. pp. 43-50). Petitioner did not appeal the conviction or sentence.

On May 5, 2022, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 51-60). On July 18, 2022, the State filed a return and motion for a more definite statement. (App. pp. 61-72). On October 17, 2022, an evidentiary hearing was held before the Honorable Brian M. Gibbons. Rodney Richey represented Petitioner at the PCR hearing. Chelsey Marto represented the State. In a written order signed March 7, 2023, Judge Gibbons denied relief and dismissed the application. A timely notice of intent to appeal was served on March 18, 2023. This petition for writ of certiorari follows.

## ARGUMENT

**The PCR judge erred in refusing to find plea counsel ineffective for failing to move to suppress the drugs found inside the house pursuant to a search warrant when the basis for the search warrant was tainted by information obtained from a warrantless protective sweep of the house without exigent circumstances.**

During the plea colloquy the prosecutor told the judge that on December 8, 2020, law enforcement officers went to an address because they received information that a stolen car may be at the location. (App. p. 23, lines 18-24). When law enforcement arrived at the address they met a man sitting in his van. (App. p. 23, line 25 – p. 24, lines 1-2). As they were asking the man questions about who may be inside the house, the man attempted to drive away but was stopped and detained. (App. p. 24, lines 3-8). The prosecutor continued to tell the judge that a lieutenant with the sheriff's department saw Petitioner step outside the house. (App. p. 24, lines 9-11). According to the prosecutor the lieutenant recognized Petitioner and "told him to hold on a second," but Petitioner closed the door and went back inside. (App. p. 24, lines 11-13). The prosecutor told the judge, "Law enforcement knocked on the door. They ended up speaking with Mr. Stone [Petitioner] outside." (App. p. 24, lines 13-15). No one claimed ownership of the house and according to the prosecutor, it was a known drug house. (App. p. 24, lines 15-20).

The prosecutor then told the judge, "Police did a protective sweep of the home, and in plain view, they saw scales with residue. They also found some syringes in Mr. Stone's possession. He was not a diabetic. One of them was loaded with a little bit of blood in it." (App. p. 24, line 21 – p. 25, line 1). Based on this information law enforcement secured a search warrant, searched the house, and found over one hundred grams of methamphetamine. (App. p. 25, lines 3-8). Petitioner provided a statement admitting that 82 grams of the methamphetamine

found in a black bag belonged to him. (App. p. 25, lines 8-19). This formed the basis of the first indictment ##21-GS-11-350 that had been true billed by the grand jury.

As to the other two indictments that were not presented to the grand jury, the prosecutor told the judge that on March 29, 2021, officers with the Cherokee County Sheriff's Office had been observing Petitioner's movements by GPS monitoring and asserted that Petitioner had visited known drug houses. (App. p. 26, lines 5-8). As a result, officers went to an address where Petitioner sometimes slept and Petitioner admitted having methamphetamine in a teacup in a locked toolbox. (App. p. 26, lines 12-21). A rifle was found in the same room as the toolbox. (App. p. 26, lines 21-23). At the time of the plea the substance in the teacup had not yet been tested by SLED. (App. p. 26, line 23 – p. 27, line 1). Petitioner told the judge that the substance in the teacup was methamphetamine. (App. p. 27, lines 7-19).

In the PCR application Petitioner alleged that plea counsel was ineffective for failing to move to suppress evidence based on a Fourth Amendment violation. (App. p. 60). During the PCR hearing Petitioner testified that plea counsel should have moved to suppress the drugs because the search was unlawful. (App. p. 83, lines 11-25). Plea counsel testified that he did not believe a suppression motion would have been successful. (App. p. 96, lines 6-15). In the order of dismissal the PCR judge wrote, "Applicant claims Counsel was ineffective for failure to discuss a motion to suppress the drugs with him and for failure to argue this motion in Court. Counsel credibly testified that he discussed the motion with Applicant but cautioned him that this motion was only available if he decided to proceed to trial. This Court finds Applicant waived this motion by entering an otherwise valid plea. Accordingly, relief is denied on this ground." (App. p. 113). The PCR judge erred.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). “To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him.” Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). “A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea ‘may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.’ ” Pittman v.

State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). “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, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

In Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018), the South Carolina Supreme Court wrote:

In order to establish prejudice when challenging a guilty plea, 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 crux of the inquiry is whether counsel’s ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). As the United States Supreme Court stated in Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), “[I]n order to satisfy the ‘prejudice’ requirement, the defendant must show there is a reasonable probability that, but for counsel’s errors, he would not have pled guilty and would have insisted on going to trial.”

Plea counsel was ineffective for failing to move to suppress the drugs found as a result of the search warrant based on the “protective sweep.” In State v. Counts, 413 S.C. 153, 163, 776 S.E.2d 59, 65 (2015), the South Carolina Supreme Court wrote:

“The exigent circumstances doctrine provides an exception to the Fourth Amendment[']s protection against warrantless searches, but only where, from an objective standard, a compelling need for official action and no time to secure a warrant exists.” State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct.App.2004); see State v. Brown, 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986) (acknowledging the exigent circumstances doctrine as an exception to the warrant requirement). “For instance, a warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling.” Abdullah, 357 S.C. at 351, 592 S.E.2d at 348 (citing Minnesota v. Olson, 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990)). “In such circumstances, a protective sweep of the premises may be permitted.” Id. (citing Maryland v. Buie, 494 U.S. 325, 337, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990)). “A ‘protective sweep’ is a quick


and limited search of the premises, incident to an arrest and conducted to protect the safety of police officers or others.” Maryland v. Buie, 494 U.S. 325, 327, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990).

While law enforcement in this case obtained a search warrant, the search warrant was based on the “protective sweep.” Exigent circumstances, however, did not exist to justify the “protective sweep.” The search warrant was tainted by the unlawful “protective sweep.” “The ‘fruit of the poisonous tree’ doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality.” State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996).

Plea counsel was ineffective in failing to move to suppress the drugs found inside the house when the police used information obtained from a warrantless protective sweep of the house without exigent circumstances as a basis for the search warrant. Petitioner was prejudiced by the defective performance. There is a reasonable probability that if counsel had properly assessed the strength of the motion to suppress, Petitioner would not have pled guilty and instead would have proceeded to trial.

**CONCLUSION**

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 26<sup>th</sup> day of October, 2023.

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PETITION TO BE RELIEVED AS COUNSEL  
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Counsel for Carl Anthony Stone states:

1. She is 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 before Judge Brian M. Gibbons, which was held on October 17, 2022, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
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 Carl Anthony Stone.

Respectfully Submitted,



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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 26<sup>th</sup> day of October, 2023.

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

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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This 26<sup>th</sup> day of October, 2023.