

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marion County

Honorable Clifton Newman, Circuit Court Judge

CYNTONIO HOWARD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-001314

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR court err in determining that plea counsel was effective when he allowed petitioner to plead guilty to a negotiated plea in which plea counsel took no part and allowed another lawyer, who did not represent petitioner, to negotiate the details of the plea?

STATEMENT

In August 2019, the Marion County Grand Jury indicted petitioner for distribution of cocaine, third or subsequent offense (2019-GS-33-0324). App. 15-16. On November 5, 2019, petitioner entered a guilty plea before the Honorable Thomas A. Russo. App. 1. During the guilty plea, petitioner was represented by Kevin Etheridge and Deputy Solicitor John Jepertinger represented the State. App. 1. Judge Russo sentenced petitioner as negotiated to ten years' incarceration. App. 17.

Critically, this negotiated plea was arranged on November 4, 2019. App. 55, l. 15 – 56, l. 24. Petitioner appeared in court and was informed the case was on the trial docket. App. 56, l. 20 – 57, l. 3. Petitioner's retained counsel, Kevin Etheridge, was not present. App. 55, l. 15 – 56, l. 24. Instead, Scott Suggs appeared and negotiated the plea deal. App. 57, l. 4 – 58, l. 24. At the evidentiary hearing, Suggs admitted he met with petitioner while not his attorney and discussed the facts and circumstance of petitioner's case and plea offer. App. 77, l. 24 – 78, l. 21. No paperwork or notice of appearance was filed with the Court and petitioner had never met nor discussed his case with Suggs before November 4, 2019. App. 78, ll. 5 – 24. Petitioner was confused and upset about the sudden change and was pressured by the knowledge the case was on the docket for a jury trial. App. 56, l. 7 – 57, l. 24. Under this cloud of uncertainty, compounded by the absence of Suggs on November 5, 2019, petitioner entered a guilty plea. App. 57, l. 4 – 59, l. 25.

Petitioner timely commenced this PCR action. App. 18. Petitioner's counsel, William G. Yarborough, filed an amended PCR application prior to the evidentiary hearing. App. 31. An evidentiary hearing was held before the Honorable Clifton Newman on October 21, 2022. App.

49. Mr. Yarborough represented petitioner and Danielle Dixon appeared on behalf of the state.

App. 49. Judge Newman denied relief by written order dated April 3, 2024. App. 110.

This petition for certiorari follows.

ARGUMENT

The PCR court erred in determining that plea counsel was effective when he allowed petitioner to plead guilty to a negotiated plea in which plea counsel took no part and allowed another lawyer, who did not represent petitioner, to negotiate the details of the plea.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant 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). “Thus, when challenging a guilty plea, a PCR applicant must show (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, the applicant would not have pled guilty.” Ervin v. State of South Carolina, 438 S.C. 559, 565, 885 S.E.2d 387, 390 (2023) (internal citations omitted). In a guilty plea setting, “the prejudice analysis is limited to the outcome of the plea process—whether but for counsel's deficiency, the defendant would have declined to plead and instead proceeded to trial.” Frierson v. State, 423 S.C. 257, 263, 815 S.E.2d 433, 436 (2018). “In other words, in order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.” Hill v. Lockhart, 474 U.S. 52, 59 (1985).

How the issue was addressed during the PCR hearing.

At the PCR hearing, Suggs acknowledged negotiating the plea deal without representing petitioner:

Q And do you remember you all went to the courthouse for Mr. Etheridge as a favor in dealing with Mr. Howard?

A No, I don't remember specifically going. I may have been there. I don't know if I was going specifically for Mr. Howard or not.

Q Do you remember meeting with Mr. Howard?

A Yes.

Q Okay. But you weren't his lawyer, right?

A That's correct.

Q And so did you talk to him about the case against him?

A Yes.

Q Do you remember what the facts were about that?

A Yes, sir, I remember.

Q Sir?

A Yes, sir, I do.

Q What did you tell him he should do?

A I don't know that I told him to do anything. I laid out the case for him and told him it's his decision to make whether he wanted to accept the plea offer or go to trial.

Q Had you ever met him before?

A Well, the first time I met him, no, I had not met him before.

App. 77, l. 24 – 78, l. 24 (emphasis added).

Based upon this unapproved late change in counsel, petitioner felt compelled and trapped into pleading guilty.

Q Okay. So when you got over there, what did Mr. Suggs tell you?

A Well, he said he was coming and doing a favor for Mr. Etheridge.

Q And that favor was to try your case?

A Yes.

Q What did you think about that?

A I didn't think it was right.

Q Did you tell Mr. Suggs that?

A Yes, sir -- well, just told him, you know

Q I'm sorry?

A I didn't think it was right, and I was -- I was really wanting Kevin to be there.

Q Had you been over the case at all with Mr. Suggs?

A Just at the courthouse.

Q Had you ever met him before?

A Never.

Q So you hired Mr. Etheridge, and Mr. Suggs showed up to help you with this jury trial. Were you scared?

A Yes.

Q What did Mr. Suggs tell you about the case at that point?

A The same way, too. He said that we can take it to trial and -- well, I wasn't comfortable taking it to trial, I told Mr. Suggs. He didn't know much about my case, obviously.

Q And who did you -- did you hire him, Mr. Suggs?

A No, sir.

Q Okay. You hired Mr. Etheridge. Were you concerned why he wasn't at your hearing before the trial?

A Yes.

Q Okay. And did you end up going home that day?

A Yes.

Q Before you went home, did you meet with the Solicitor?

A Yes.

Q Tell me about that.

A Well, I had talked to him, and I asked him if I could go home because, you know, I have – I didn't know that I was going on the trial docket, and I hadn't spoken with my family. And he told me that he'll let me go home if I can be there in the morning, and if I don't, they'll try me in my absence.

Q So did that make you uncomfortable?

A Yes.

Q Did you go home and talk to your mother?

A Yeah.

Q And what did you all decide you were going to do?

A Couldn't really do anything, you know. It was like my hand was forced, so I just went along with it.

App. 56, l. 7 – 58, l. 14 (emphasis added).

How the PCR court ruled.

In addressing the unusual nature of the plea negotiations, the PCR court focused on retained counsel's actual appearance during the guilty plea. App. 118. According to the PCR court, retained counsel's appearance at the guilty plea solved any problems associated with Suggs' random appearance to negotiate the details of the plea the day before.

How the PCR court erred.

“Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice ‘was within the range of competence demanded of attorneys in criminal cases.’” Hill v.

Lockhart, 474 U.S. 52, 56 (1985) (*quoting* McMann v. Richardson, 397 U.S. 759, 771 (1970)). “[T]he prejudice analysis is limited to the outcome of the plea process—whether but for counsel’s deficiency, the defendant would have declined to plead and instead proceeded to trial.” Frierson v. State, 423 S.C. 257, 263, 815 S.E.2d 433, 436 (2018).

Petitioner’s counsel, by allowing Suggs to serve as negotiator over the details of the plea offer without formally associating Suggs as a counsel of record for petitioner with petitioner’s consent, abandoned his obligation to properly communicate and advise petitioner regarding the plea details. *See* Collins v. State, 422 S.C. 250, 261, 810 S.E.2d 871, 876–77 (2018) (“Generally, where defense counsel does not communicate such an offer to the defendant, counsel has rendered ineffective assistance.”); Davie v. State, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009) (holding “counsel is required to fully communicate with the client so that the client can make an informed decision regarding any proposals by the State.”).

“In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of his plea. He must also have an understanding of the charges against him.” Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991) (internal citations omitted). This Court in Dover found plea counsel’s brief (a total of 3 meetings lasting less than 30 minutes total) meeting with defendant prior to his guilty plea insufficient. At least in Dover, counsel represented the defendant. In the present case, Suggs met with petitioner a single time to advise him to accept the plea offer and was not his attorney at that time. While petitioner’s retained counsel returned for the actual plea colloquy, at that stage petitioner felt trapped and locked into a plea deal negotiated on the spot by counsel he had never met who did not assume formal representation. In Berry v. State, 381 S.C. 630, 675 S.E.2d 425 (2009), this Court noted:

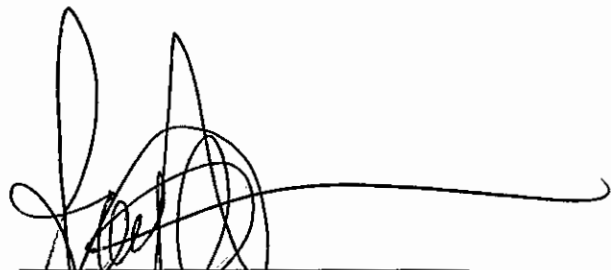
[Plea] decisions must be made knowingly and voluntarily with the *advice of constitutionally competent counsel.*

Id., 381 S.C. at 635–36, 675 S.E.2d at 427. Here, the advice to accept the plea offer was made by Suggs, who did not represent petitioner and met for the first and only time at the plea negotiation.

The conduct of petitioner’s actual plea counsel and of Suggs “undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 686 (1984). Moreover, there is a “reasonable probability that, but for counsel’s errors, [petitioner] would not have pled guilty.” Ervin, 438 S.C. at 565, 885 S.E.2d at 390 (2023) (internal citations omitted).

CONCLUSION

Based upon the foregoing, petitioner respectfully requests that this Court grant the writ of certiorari to allow full briefing on this issue.

A handwritten signature in black ink, appearing to read 'Gary H. Johnson', is written over a horizontal line. The signature is highly stylized and cursive.

Gary H Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of May, 2025.

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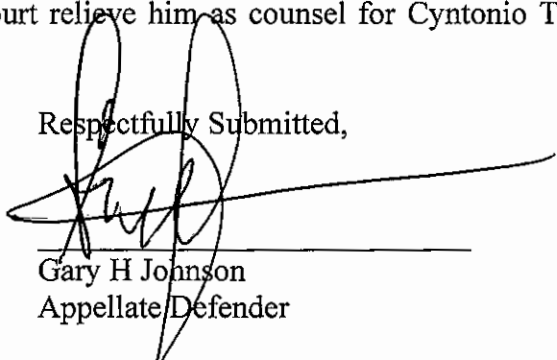
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Cyntonio Tyrossi Howard 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 Clifton Newman, which was held on Oct. 21, 2022, 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 Cyntonio Tyrossi Howard.

Respectfully Submitted,



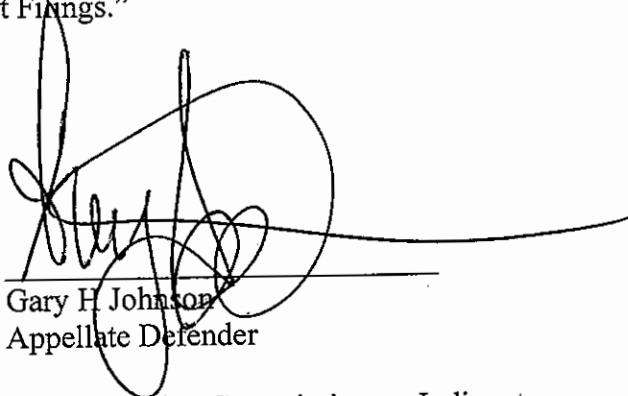
Gary H Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of May, 2025.

CERTIFICATE OF COUNSEL

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 7th day of May, 2025.