

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County

S.C. Supreme Court

Stephanie P. McDonald, Circuit Court Judge  
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JERRY JEROME SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001041  
\_\_\_\_\_

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

BENJAMIN JOHN TRIPP  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

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### **ISSUE PRESENTED**

Whether the PCR court committed reversible error by finding Petitioner's plea was knowing and voluntary where although the plea court engaged him in a routine plea colloquy, Petitioner expressly testified that he had no understanding of the issues underlying the colloquy and answered the way he did based on the instructions of counsel and where counsel could not specifically confirm that he did not so advise Petitioner?

## STATEMENT

In Petitioner Jerry Jerome Smith's criminal case, the State alleged that on August 24, 2006, Petitioner and four codefendants entered the home of a wheelchair-bound man, pushed him into his bathroom to secure him, removed items from the house, and left with the man alive but overturned on his back in the wheelchair in the bathroom. Police later discovered the man dead due to positional asphyxiation. App. 41, ln. 4—App. 46, ln. 20.

On March 21, 2007, the Charleston County Grand Jury indicted Petitioner on one count of grand larceny, one count of first degree burglary, and one count of involuntary manslaughter. App. 153-158; App. 136, ll. 11-15. On December 5, 2008, Petitioner appeared at a plea hearing before the Honorable R. Markley Dennis, Jr. John Knobeloch represented Petitioner and Bruce Durant represented the State. App. 5. Petitioner pled guilty to all three charges. App. 17, ln. 15—App. 20, ln. 11. The plea court sentenced Petitioner to twenty-three years imprisonment for the burglary charge and five years concurrent for the other two. App. 92, ll. 1-8.

On August 29, 2011, Petitioner filed an application for post-conviction relief alleging ineffective assistance of counsel. App. 104-114. The State filed a return on December 12, 2011. App. 115-119; App. 142. Petitioner proceeded to a PCR hearing on July 24, 2012 before the Honorable Stephanie P. McDonald. Charles T. Brooks represented Petitioner, and Ashleigh Wilson represented the State. App. 120. Petitioner testified that plea counsel told him that he should answer "Yes" to all of the plea judge's question, and he would receive a fifteen year sentence. App. 124, ll. 11-17; App. 125, ll. 8-15. Plea counsel also testified and could not recall specifically whether he so instructed Petitioner. App. 135, ll. 8-13.

On April 30, 2013, the PCR court issued its order dismissing Petitioner's application. App. 142-150. The court found that Petitioner was advised of his rights and the potential sentences for

the charges and entered his plea voluntarily and intelligently. Citing *Knox v. State*, 340 S.C. 81, 530 S.E.2d 827 (2000), the court stated that any misconceptions Petitioner may have had about the terms of his plea were cleared by his colloquy with the plea court. App. 147. Moreover, citing *Moorehead v. State*, 329 S.C. 329, 333, 496 S.E.2d 415, 417 (1997) and *Wolfe v. State*, 326 S.C. 158, 485 S.E.2d 367 (1997), Petitioner's claims that he did not understand the plea court's questions and thought they were meaningless was insufficient to show that the plea was not knowing and voluntary. App. 148.

### ARGUMENT

**The PCR court committed reversible error by failing to consider all of the evidence bearing on Petitioner's knowledge and voluntariness in determining whether his plea was valid.**

The PCR court committed reversible error by failing to consider all of the evidence bearing on Petitioner's knowledge and voluntariness in determining whether his plea was valid. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. The two-part test adopted in *Strickland* "applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985); *see generally Brady v. United States*, 397 U.S. 742, 758 (1970) ("Guilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results.").

Specifically, by showing that "counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty," a defendant sufficiently undermines the required

voluntary and intelligent character of a plea. *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009); accord *State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980) (holding record must reflect that defendant freely and intelligently waived constitutional trial rights and had full understanding of the consequences of the plea); *Berry v. State*, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009) (holding the difference “between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea”). It follows that incorrect or omitted advice may deprive a defendant of his Constitutional right “to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.” *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

“In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing.” *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). “Specifically, the 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.” *Roddy v. State*, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000).

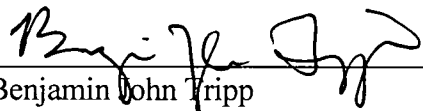
In this case, the PCR court committed reversible error by failing to consider all of the evidence bearing on Petitioner’s knowledge and voluntariness in determining whether his plea was valid. The court interpreted evidence that Petitioner engaged in a routine plea colloquy to conclusively show Petitioner pled knowingly and voluntarily and that he was cleared of any misapprehensions about the plea. However, Petitioner expressly testified that he had no understanding of the issues underlying the colloquy and answered the way he did based on the instructions of counsel. Further, counsel could not specifically deny that he so advised Petitioner or that he did not have a specific discussion with Petitioner about the terms of the plea. Had the PCR

court properly considered all the evidence in the record regarding Petitioner's mindset when making his plea, it would have properly found that plea counsel's advisements regarding the proceeding were insufficient, thereby undermining the knowing and voluntary nature of the plea.

**CONCLUSION**

For the foregoing reasons, this Court should grant Petitioner Jerry Smith's petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,

  
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Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of January, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO CHARLESTON COUNTY  
STEPHANIE P. MCDONALD, CIRCUIT COURT JUDGE

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JERRY JEROME SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001041

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PETITION TO BE RELIEVED AS COUNSEL


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Counsel for Jerry Jerome Smith states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on July 24, 2012. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Jerry Jerome Smith.

Respectfully submitted,

  
Benjamin John Tripp  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 2nd day of January, 2014

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County  
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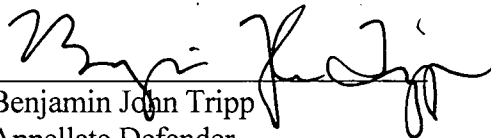
RESPONDENT

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CERTIFICATE OF SERVICE

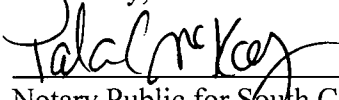
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Jerry Jerome Smith, #332155, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 2nd day of January, 2014.

  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day  
of January, 2014.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022.