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Nov 12 2026

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Walton J. McLeod, IV, Circuit Court Judge

FRANK GUNBY, JR.,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2026-001706

JOHNSON PETITION FOR WRIT OF CERTIORARI

Gary H Johnson
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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in failing to set aside Petitioner's guilty plea due to his intoxication from drugs during the plea which made it involuntary?

STATEMENT

Petitioner was indicted in September of 2025 by a Spartanburg Grand Jury for three counts of trafficking in methamphetamine. App. 20 – 26. By plea agreement, Petitioner plead guilty to two of the counts before the Honorable G.D. Morgan, Jr., on January 19, 2025. App. 1. Grace Kerley appeared on behalf of the State and Louei Christopher Nmair represented Petitioner. The plea was a negotiated sentence of fifteen years. App. 11, l. 15 – 12, l. 3. Judge Morgan sentenced Petitioner to the negotiated fifteen years for each count, sentences to run concurrent with credit for time served. App. 18, ll. 8 – 22. No appeal was taken.

Petitioner filed for post-conviction relief asserting ineffective assistance of counsel. App. 28. An evidentiary hearing was held before the Honorable Walton J. McLeod, IV, on March 3, 2026. App. 52. Susannah Ross represented Petitioner and McConnell Harrison appeared on behalf of the State. App. 52. Judge McLeod denied relief by written order of dismissal.[1] App. 79.

This petition for certiorari follows.

[1] The Order of Dismissal mentions an amended PCR application, but no such amendment was filed with the Clerk of Court's office. Counsel for Petitioner contacted PCR counsel who has no record of any such amendment in her files.

ARGUMENT

The PCR court erred in failing to set aside Petitioner's guilty plea due to his intoxication from drugs during the plea which made it involuntary.

A. Standard of review.

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). To establish a claim for ineffective assistance of counsel, a PCR applicant must show (1) counsel's performance was deficient because it fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

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). However, this Court may "not avoid a finding of prejudice on the basis of the likelihood of a guilty verdict, even if Petitioner is throwing a 'Hail Mary.'" Taylor v. State, 422 S.C. 222, 233, 810 S.E.2d 862, 867 (2018).

However, the United States Supreme Court has "repeatedly and consistently recognized that 'the criminal trial of an incompetent defendant violates due process.'" Cooper v. Oklahoma, 517 U.S. 348, 354 (1996) (citing Medina v. California, 505 U.S. 437, 453 (1992)). Therefore,

> [w]hen a PCR applicant raises issues of competency in the context of a plea proceeding, the two-prong Strickland analysis still applies; however, because of the nature of the claim, proof of deficiency of counsel is intertwined with prejudice. Specifically, when establishing Strickland prejudice in the context of plea counsel's failure to request a mental competency evaluation, 'the [applicant] need only show a 'reasonable probability' that he was ... incompetent at the time of the plea.'

Ramirez v. State, 419 S.C. 14, 21, 795 S.E.2d 841, 844–45 (2017) (quoting Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992)). In the present case, petitioner had the burden at the PCR hearing to show a "reasonable probability" he was incompetent at the time of his plea.

B. How the matter was addressed at PCR.

"Before a defendant may plead guilty, it must be established that the defendant is competent and that the defendant's decision to plead guilty is a knowing and voluntary one." Garren v. State, 423 S.C. 1, 14, 813 S.E.2d 704, 711 (2018). Here, Petitioner asserted his habitual drug use made his plea involuntary. "I mean -- so I'm like, "Well" -- I mean, I understand they were trying to help me, but I didn't understand what was going on because I'm a user. I was not -- I didn't have a clear mind." App. 61, ll. 7 – 10. As relayed by Petitioner:

> I just come off the street doing drugs. I was high. I was high every day, 24/7 -- 24 hours a day. (Indiscernible) people telling me I'm driving -- I'm falling asleep while I'm driving. I don't notice because I'm thinking -- I'm thinking I'm in control. But I wasn't. I was out of control.

App. 61, ll. 20 – 24.

"If a PCR applicant claims his guilty plea was involuntary due to the influence of medication, he must show 'that his mental faculties were so impaired by drugs when he pleaded that he was incapable of full understanding and appreciation of the charges against him, of comprehending his constitutional rights, and of realizing the consequences of his plea.'" Garren, 423 S.C. at 15, 813 S.E.2d at 712.

Petitioner's continued use of narcotics and intoxicated condition during the plea made his plea involuntary. *See* Garren v. State, 423 S.C. 1, 813 S.E.2d 704 (2018). Here, plea counsel was later arriving to the plea itself, preventing any opportunity for counsel to assess Petitioner's sobriety before the plea was entered.

> THE COURT: All right. Who is representing you, Mr. Gunby?
>
> THE DEFENDANT: It's Louei Nmair. I don't know where he is.
>
> MR. NMAIR: Sorry, Your Honor.
>
> THE COURT: Hold on. All right. I have gone – were you in here when I went through the constitutional rights and everything with him?
>
> MR. NMAIR: No, Your Honor.

App. 9, ll. 5 – 13.

Plea counsel admitted his knowledge about Petitioner's drug addiction and history of substance abuse. App. 17, ll. 12 – 16; 73, ll. 12 – 16. The PCR court, in reviewing plea counsel's effectiveness during the guilty plea proceedings, failed to address the impact of Petitioner's intoxication at the time of his guilty plea on its voluntariness.[2] Rather, the PCR court focused on

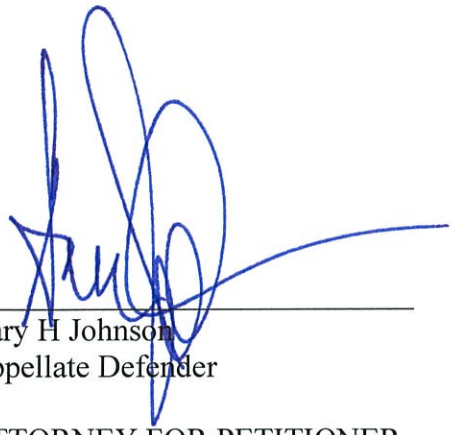
[2] A remand may be required under Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019) to have the PCR court fully address Petitioner's claim that his plea was involuntary due to intoxication.

the wisdom of accepting the plea and plea counsel's efforts to assist Petitioner in securing a favorable plea. App. 93 – 94.

This analysis is an error of law. The PCR court may "not avoid a finding of prejudice on the basis of the likelihood of a guilty verdict, even if Petitioner is throwing a 'Hail Mary.'" Taylor, 422 S.C. at 233, 810 S.E.2d at 867. The appropriate standard was whether Petitioner was "incapable of full understanding and appreciation of the charges against him, of comprehending his constitutional rights, and of realizing the consequences of his plea" as a result of his intoxicated state. Garren, 423 S.C. at 15, 813 S.E.2d at 712. Plea counsel was ineffective in failing to properly confirm Petitioner, who plea counsel knew was a chronic drug user, was sober when the plea was entered.

CONCLUSION

This Court should grant review and either reverse the PCR court and set aside Petitioner's guilty plea or remand this matter to the PCR court to appropriately address the impact of Petitioner's intoxication on his guilty plea.



Gary H Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of November, 2026.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Frank Gunby 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 Walton J. McLeod, IV, which was held on March 3, 2026, 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 Frank Gunby.

Respectfully Submitted,

Gary H Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of November, 2026.

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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 12th day of November, 2026.