


STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County  
Robin B. Stilwell, Circuit Court Judge  
\_\_\_\_\_

 ORIGINAL  
RECEIVED  
MAY 15 2015  
S.C. Supreme Court

TRAVIS MONTGOMERY BROWN, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA

RESPONDENT

APPELLATE CASE NO. 2014-001874  
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JOHNSON PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Did the PCR court err in finding Petitioner knowingly and intelligently pled guilty to a drug offense where the PCR record revealed that defense counsel was not even aware that co-defendant, Christopher Todd, had admitted that the drugs seized from the home of Petitioner's sister belonged to him?

## STATEMENT

### **Procedural History**

On April 25, 2011, law enforcement executed a search warrant on the home of Petitioner's sister in Greenville County and found five and six hundredths grams of cocaine base. App. 5, ll. 12 – App. 6, ll. 6. Police also discovered items they alleged were used in the manufacture of cocaine, including glass cookware, forks, and a file. *Id.* Petitioner was staying with his sister at the time of the raid and was arrested. App. 31, ll. 1-5. Petitioner did not live in the house. *Id.*

The sister's boyfriend, Christopher Todd, was also living at the residence and was arrested. App. 24, ll. 24 – App. 25, ll. 17. Todd acknowledged to police that the drugs belonged to him. App. 28, ll. 5-20. However, Petitioner's fingerprints were found on glass cookware that tested positive for cocaine residue. App. 5, ll. 12-22.

### **Indictment**

On February, 21, 2012, the Greenville County Grand Jury indicted Petitioner for one count of possession of cocaine base with intent to distribute and one count of manufacturing crack cocaine. App. 52 – App. 55. Caroline Horlbeck was appointed to represent Petitioner.

### **Guilty Plea**

On December 3, 2012, Petitioner appeared before the Honorable William H. Seals, Jr. and pled guilty to both indictments in exchange for a reduction in the charges from third offenses to second offenses. App. 3, ll. 7 – App. 4, ll. 8. There was no recommendation on sentencing. *Id.* The State was represented by Assistant Solicitor Elizabeth Coble Major.

After the State provided the factual basis for the guilty plea, Horlbeck cited to Petitioner's struggles with drug addiction, his supportive family, and extensive work history as mitigation. App.

10, ll. 10 – App. 7, ll. 17. Judge Seals sentenced Petitioner to two concurrent terms of twelve years incarceration. *Id.* at ll. 18-20.

### **PCR Application and Evidentiary Hearing**

On June 21, 2013, Petitioner filed an application for post-conviction relief alleging that plea counsel was ineffective and that Petitioner had entered into an involuntary guilty plea. App. 9 – App. 15. The State filed a Return on October 18, 2013. App. 16 – App. 19.

On June 19, 2014, an evidentiary hearing was held before the Honorable Robin B. Stilwell. App. 20 – App. 43. Petitioner was represented by R. Mills Ariail, Jr. The State was represented by Senior Assistant Deputy Attorney General Karen C. Ratigan.

### Testimony of Petitioner, Travis Brown

Petitioner testified that he and plea counsel never discussed in detail how the drugs found at the residence could be attributed to Petitioner, when Todd had acknowledged to law enforcement that the drugs were his. App. 24, ll. 24 – App. 27, ll. 23. Petitioner's further testified that Todd was on probation when the drugs were discovered. *Id.*

Petitioner stated that plea counsel never reviewed discovery with him and only advised him that he could be charged with constructive possession of all of the drugs found in the house. App. 28, ll. 11-19. Plea counsel also never discussed the possibility of moving to suppress the fruits of search warrant. App. 28, ll. 21 – App. 29, ll. 25.

Petitioner further recalled that the lead investigator had found that Petitioner was “negative for possession of anything. . . . of any of the things that was found in this house.” App. 31, ll. 22 – App. 32, ll. 7. Petitioner reflected that he involuntarily pled guilty because, “I was in no position to go to no trial” and that he would not have pled guilty if counsel had scrutinized the investigator's statement and Todd's admission that the cocaine belonged to him. App. 30, ll. 2-19.

### Testimony of Plea Counsel

Plea counsel testified that she was appointed to represent Petitioner after he failed to show-up for a court appearance. App. 23, ll. 6-25; App. 37, ll. 4-12. Counsel did not remember if Todd had confessed to police that the drugs found at the residence were his, but she did not deny that a confession was possible. App. 35, ll. 13-24.

Counsel averred that, in her opinion, Petitioner simply did not want to go to trial and that Petitioner knew the elements and consequences of the charges he was facing. App. 36, ll. 10-19. Plea counsel recalled that the State's case against Petitioner was based on cookware and other items police claimed were used to manufacture crack cocaine being found in Petitioner's room and with his fingerprints on them. App. 38, ll. 3-10.

With respect to explaining to Petitioner the difference between constructive and actual possession, plea counsel alleged, "I would have gone over [constructive and actual possession] with him . . . I understand what [Petitioner] is saying about that possession charge. I certainly understood that argument. And I agree with that. I certainly – I hated that charge for him." App. 39, ll. 19-24.

### **Order of Dismissal**

Judge Stilwell denied Petitioner's application by an Order of Dismissal issued August 11, 2014. App. 44 – App. 51. In denying Petitioner relief, the court concluded that plea counsel had adequately consulted with Petitioner and had conducted a proper investigation into Petitioner's case. App. 48. Specifically, the court held that plea counsel was not deficient for failing to determine whether Christopher Todd admitted the drugs found in the residence were his before advising Petitioner to plead guilty. App. 49.

## ARGUMENT

**The PCR court erred in finding Petitioner knowingly and intelligently pled guilty to a drug offense where the PCR record revealed that defense counsel was not even aware that co-defendant, Christopher Todd, had admitted that the drugs seized from the home of Petitioner's sister belonged to him.**

Plea counsel's failure to investigate Todd's confession to law enforcement that the cocaine found at the residence was his was objectively unreasonable and constituted deficient performance. Plea counsel admitted at the PCR hearing that she may not have been aware of Todd's confession when she advised Petitioner to plead guilty. App. 30, ll. 17-19. Absent plea counsel's failure to investigate Todd's confession Petitioner would not have pled guilty, but would have insisted on going to trial. *See Nance v. Ozmint*, 367 S.C. 547, 557 n. 8, 626 S.E.2d 878, 883 n. 8 (2006); *see also Hill v. Lockhart*, 474 U.S. 52 (1985) (applying the *Strickland v. Washington*, 466 U.S. 668 (1984) ineffective assistance of counsel standard to guilty plea challenges).

### **Ineffective Assistance of Counsel**

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*, 466 U.S. at 686. "Where allegations of ineffective assistance of counsel are made, the question becomes, '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.'" *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 686). As such, 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).

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. "Under this prong, '[t]he proper 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). 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

The United States Supreme Court has held that “[g]uilty pleas are no more foolproof than full trials to the court or jury. . . [a]ccordingly, we take great precautions against unsound results.” *Brady v. United States*, 397 U.S. 742, 758 (1970). An “unsound result” occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. *See Boykin v. Alabama*, 395 U.S. 238 (1969) (finding a guilty plea is voluntarily and knowingly entered into when the accused has a full understanding of the consequences of his plea and the charges against him); *see also Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999) (finding a defendant must understand the sentencing consequences of his plea for it to be considered voluntarily given).

In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief. *See Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). “In the context of a guilty plea, the court must determine whether 1) counsel's advice was within the range of competence demanded of attorneys in criminal cases, and 2) if there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty.” *Smith v. State*, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (citing *Hill v. Lockhart*, 474 U.S. at 56–58). On review, a PCR judge's findings will be upheld if there is evidence of probative value sufficient to support them. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

“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). At a minimum, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Walker v. State*, 407 S.C. 400, 406, 756 S.E.2d 144, 147 (2014) (citing *Strickland*, 466 U.S. at 691).

### **Involuntary Guilty Plea**

In this case, plea counsel’s performance was deficient, as it fell below an objective standard of reasonableness and resulted in Petitioner entering into an involuntary guilty plea. App. 46 – App. 49; *see Hill*, 474 U.S. at 57-59.

Plea counsel should have investigated Todd’s admitted ownership of the drugs found in the house he shared with Petitioner’s sister. App. 24, ll. 24 – App. 25, ll. 17; *see Lounds v. State*, 380 S.C. 454, 460, 670 S.C. 646, 649 (2008) (the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the case).

Accordingly, the PCR court erred in finding that plea counsel’s representation was reasonable under “prevailing professional norms” where counsel failed to investigate whether Todd claimed ownership of the crack cocaine. App. 24, ll. 24 – App. 25, ll. 17; *see Strickland*, 466 U.S. at 687-88; *see also Cherry*, 300 S.C. 115, 386 S.E.2d 624.

## **Prejudice**

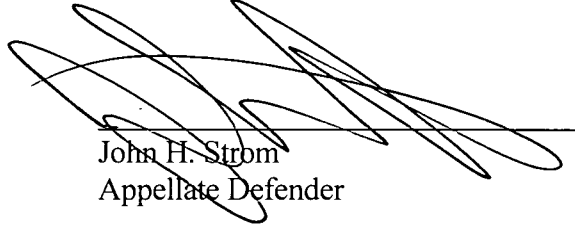
As to prejudice, the PCR court erred in concluding that “[Petitioner] has failed to prove . . . that he was prejudiced by plea counsel’s performance.” App. 50. Petitioner unambiguously stated that he would have gone to trial if plea counsel had interviewed Todd. App. 30, ll. 17-19; *see Hill*, 474 U.S. at 57-59. At the evidentiary hearing, plea counsel had no recollection of Todd’s confession. App. 35, ll. 13-24. Counsel’s deficient representation prevented Petitioner from presenting potentially exculpatory testimony and denied Petitioner a full understanding of the charges against him. App. 28, ll. 5-20; *Boykin*, 395 U.S. at 238.

Accordingly, the PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty when “there is a reasonable probability that, but for counsel’s errors, [Petitioner] would not have pled guilty and would have insisted on going to trial.” App. 30, ll. 17-19; App. 46 – App. 50; *see Hill*, 474 U.S. at 57-59; *see also Boykin*, 395 U.S. 238.

**CONCLUSION**

For the foregoing reason, this Court should grant the petition with the ultimate relief of a new trial for Petitioner, Travis Brown.

Respectfully submitted,



John H. Strom  
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of May, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO GREENVILLE COUNTY  
ROBIN B. STILWELL, CIRCUIT COURT JUDGE

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TRAVIS MONTGOMERY BROWN, JR.,

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APPELLATE CASE NO. 2014-001874

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PETITION TO BE RELIEVED AS COUNSEL

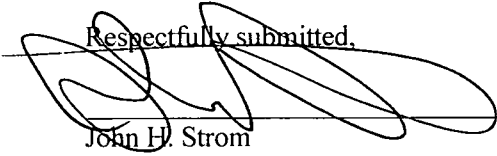
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Counsel for Travis M. Brown states:

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 June 19, 2014. 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 Travis M. Brown.

Respectfully submitted,



John H. Strom  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 15th day of May, 2015

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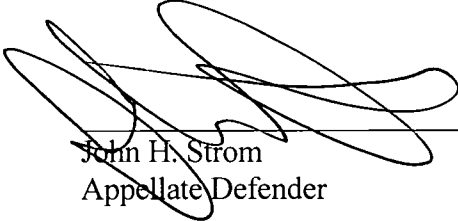
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CERTIFICATE OF SERVICE

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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 Karen Ratigan, Esquire and Travis M. Brown, #353358, at Livesay Pre-Release Center this 15th day of May, 2015.

  
\_\_\_\_\_  
John H. Strom  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day  
of May, 2015.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 30, 2022.