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**MAY 31 2018**

**SC SUPREME COURT**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Richland County  
Court of Common Pleas  
The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2015 – 001089  
Lower Court Case No. 2013-CP-40-06813

Larry L. Prophet, #354669,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## **PETITIONER'S QUESTIONS PRESENTED**

Whether Petitioner's trial counsel's failure to present witness James Hamrick resulted in a violation of Petitioner's Sixth and Fourteenth Amendment rights, and thus would have affected the outcome of the waiver hearing if presented.

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Petitioner was charged with first degree burglary, first degree criminal sexual conduct (CSC), armed robbery, and kidnapping in Petition Numbers 2010-JU-1524, -1525, 1527, 1528. (App. p. 294-97). On May 7, 2012, a contested waiver hearing was held before the Honorable Leslie K. Riddle to determine whether the charges should be transferred from family court to the Court of General Sessions. (App. p. 1). Judge Riddle ruled that jurisdiction should be transferred by written order signed May 18, 2012. (App. p. 138-45). Petitioner was then indicted at the June 2012 term of the Richland County Grand Jury for first degree burglary (2012-GS-40-03068), first degree criminal sexual conduct (CSC) (2012-GS-40-03065), armed robbery (2012-GS-40-03067), and kidnapping (2012-GS-40-03069). (App. p. 286-293). Petitioner was represented by Melissa Armstrong, Esquire. Petitioner proceeded to plead guilty before the Honorable G. Thomas Cooper, Jr. on March 18, 2013. Judge Cooper sentenced Petitioner to thirty (30) years' for first degree CSC, a concurrent thirty (30) years' for armed robbery, a concurrent forty-five (45) years' suspended upon the service of thirty (30) years' with five (5) years' probation to follow for first degree burglary, and a consecutive fifteen (15) years' suspended upon the service of five (5) years' probation for kidnapping. Applicant did not appeal his guilty pleas or sentences.

Petitioner filed his application for post-conviction relief (PCR) on November 6, 2013. (2012-CP-40-06813). (App. p.206-214). Respondent filed a Return on March 4, 2014. (App. p. 215-219). Petitioner, through Counsel, submitted an Amendment to the Application on March 16, 2015 (App. p. 220-221). A hearing was held on April 1, 2015 before the Honorable Brooks

P. Goldsmith. (App. p. 222). Petitioner was represented by Kristy G. Goldberg, Esquire. (App. p. 222). The State was represented by Assistant Attorney General J. Clayton Mitchell, III. (App. p. 222). Judge Goldsmith denied Petitioner relief by order dated May 8, 2015. (App. p. 276-285). A petition for writ of certiorari was filed on January 13, 2016. This Return follows.

## STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

## ARGUMENT

**Certiorari is not warranted where the PCR court correctly found that Petitioner waived all nonjurisdictional challenges to his convictions and sentences by pleading guilty and therefore could not raise any issues arising from the family court's waiver hearing.**

Petitioner argues that Counsel was ineffective for failing to present witness James Hamrick, Petitioner's special education teacher, at the family court waiver hearing. Petitioner argues that the presentment of this witness, who would testify to Petitioner's intellectual, emotional, and developmental disabilities, as well as his lack of maturity and sophistication and poor environment he was raised in, would have affected the outcome of the waiver hearing. Petitioner argued that this testimony would have been relevant to the eight Kent<sup>1</sup> factors that are normally considered by the family court when determining if jurisdiction should be transferred to the Court of General Sessions.

### How The Issue Was Raised

After jurisdiction over the matter was transferred to the Court of General Sessions, Petitioner pled guilty where he engaged in a thorough colloquy with the plea judge. During mitigation, Petitioner presented witness James Hamrick, Petitioner's former special education teacher, to discuss Petitioner's intellectual, emotional, and developmental disabilities, in addition to his maturity, sophistication, and what kind of home environment he had growing up. (App. p. 191-197). Hamrick emphasized his belief that Petitioner is mentally retarded and learning disabled, as reflected by his fluctuating I.Q. scores. (App. p. 191-197). Hamrick also claimed that he believed Petitioner would benefit from rehabilitation and an opportunity to be employed as a mechanic if released. In addition, he testified that Petitioner was heavily influenced by his co-defendant, Zacoata Lopey. Petitioner argued at the PCR hearing that Counsel was deficient in

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<sup>1</sup> Kent v. United States, 383 U.S. 541 (1966).

failing to present this witness at the contested waiver hearing in family court. Petitioner claims that but for Counsel's error in failing to present this witness, relevant and favorable evidence was absent from the record that would have affected the outcome of the waiver hearing. Further, Petitioner asserts that absent this evidence, the family court was at a disadvantage as to attempt to understand how and why Petitioner committed such acts.

The PCR court found that Petitioner failed to meet the burden to prove that counsel's performance was ineffective for failing to investigate and to call James Hamrick as a witness at the family court waiver hearing. The Court ruled that Petitioner's allegation rests on speculation. Further, the Court ruled that even if Hamrick's statement was considered, it would not have changed the result of the family court waiver hearing.

#### Analysis

Petitioner's argument is without merit. Petitioner waived all nonjurisdictional challenges to his convictions and sentences when he pled guilty. He cannot raise any challenges to Counsel's performance at the family court hearing. Petitioner can only challenge the voluntary nature of his plea. Petitioner's guilty plea constituted a waiver a nonjurisdictional defects and claims of violations of constitutional rights. See Rivers v. Strickland, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975) (a plea of guilty constitutes a waiver of nonjurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea); Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891 (1981). State v. Jamison<sup>2</sup> is instructive. In Jamison, this Court held that by pleading guilty, a defendant waives all "nonjurisdictional defects and claims of violations of constitutional right." Id at 332, 737 S.E.2d at 485-86. Notably, "[a] guilty plea represents a break in the chain of events which has preceded it in the criminal process." Id (citations omitted). "When a criminal defendant has solemnly admitted in open court that he is in

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<sup>2</sup> 410 S.C. 456, 467, 765 S.E.2d 123, 129 (2014)

fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.” Id (citing Rice, 401 S.C. at 332, 737 S.E.2d at 486).

Here, Petitioner is attempting to challenge Counsel’s performance at family court hearing which is exactly what the case law prevents. Petitioner makes no jurisdictional claims and only raises allegations that his constitutional rights were violated because he was denied effective assistance of counsel at the family court hearing. Petitioner is only able to challenge the voluntary and intelligent nature of his plea. Pursuant to requirements set forth in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed 274 (1969), no evidence suggests that Petitioner’s guilty plea was not knowingly and voluntarily entered. Therefore, by pleading guilty, Petitioner waived any challenges to Counsel’s performance at the family court hearing. Respondent requests the Petition be denied on these grounds.

Even considering the merits of Petitioner’s argument, Petitioner failed to prove Counsel was ineffective by failing to investigate and call Hamrick at the family court hearing. Respondent asserts Petitioner’s allegation that Hamrick’s testimony would have mitigated the serious nature of the offense is based wholly on speculation because he did not testify at the PCR hearing. A failure to adequately investigate is not dispositive of ineffective assistance of counsel when it supported purely by speculation. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (“failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.”).

Even if Hamrick’s testimony was offered at the family court waiver hearing, it would likely not have been helpful to Petitioner. Hamrick spoke at the guilty plea hearing that if

released, Petitioner would most likely reoffend. (App. p. 196). Hamrick gave a number of opinions that he was not qualified to give and that would not have been admissible at the family court hearing. For example, he stated that Petitioner was mentally retarded. (App. p. 193, lines 9-11). He also stated Petitioner's codefendant had a "manipulative antisocial personality disorder" and described him as a sociopath. (App. p. 195, lines 15-16; 194, lines 14-19). Therefore, it is very unlikely that the result of the family court hearing would have been different had Hamrick testified for Petitioner.

Despite not calling Hamrick, Counsel was able to present a compelling argument for Petitioner's case to remain in family court. During the waiver hearing, the State presented Department of Juvenile Justice (DJJ) Psychologist LaShonda Smith. Even though a State witness, Smith actually offered very favorable testimony and mitigating evidence in favor of Petitioner. Smith was an independent actor who was court ordered to conduct the waiver evaluation. Smith completed a psychological evaluation that analyzed Petitioner's intellectual functioning, academic functioning, psychological traits, and overall mental health. (App. p. 79, line 12 – 80, line 14). Smith also evaluated Petitioner's mental health records, school records, and a prior DJJ evaluation. (App. 80, line 15 – 82, line 18). In addition, Smith reviewed records from a former hospitalization resulting from a self-inflicted injury, as well as testimony from Petitioner's mother regarding his issues with a quick temper, anger, and frustration. (App. p. 83, line 15 – 84, line 14). Smith diagnosed Petitioner with a conduct disorder. (App. p. 103, lines 1 – 16). She further testified as to the medication that Petitioner was prescribed in order to control his behavior resulting from anger problems. (App. p. 94, line 1 – 95 line 2). Perhaps the most mitigating evidence Smith offered in favor of the Petitioner was her belief that he could benefit from rehabilitation, specifically from services that DJJ offered. Lastly, Smith testified to the

fluctuation in Petitioner's I.Q. scores, to which she interpreted as evidence strong enough for her to confidently diagnose him as mentally retarded. (App. p. 100, lines 11-20; App. p. 113, lines 3-5). Accordingly, Counsel was able to use Smith's expert testimony to Petitioner's advantage in presenting a strong argument for the family court not to transfer the case to the court of general sessions.

Counsel did call Petitioner's family members to testify. They testified to the topics that Hamrick likely would have detailed in his testimony. These family members testified that Petitioner was placed in special education classes at a young age and had essentially always suffered from anger problems, which led to his behavior issues. (App. p. 126, lines 10 – 127, lines 12). Respondent submits the thrust of what Hamrick would have testified to was covered by both Smith and by family members. Therefore, Petitioner's claims also fail under an analysis on the merits.

**CONCLUSION**

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling as there is ample evidence of probative value to support the PCR Court's denial of Petitioner's application. Should this Court grant Certiorari, Respondent requests permission under the rules to fully brief the issue discussed above.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

May 31, 2016

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APPEAL FROM RICHLAND COUNTY  
The Honorable Brooks P. Goldsmith, Circuit Court Judge

**SC SUPREME COURT**

Appellate Case No. 2015-001089

Larry Prophet, #354669,.....Petitioner,

v.

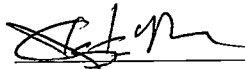
State of South Carolina,.....Respondent.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by mailing two (2) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

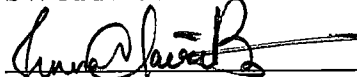
**Lara M. Caudy, Esquire  
Appellate Defender  
S.C. Commission on Indigent Defense  
PO Box 11589  
Columbia, SC 29201**

This 31<sup>st</sup> day of May, 2016.



J. CLAYTON MITCHELL  
ATTORNEY FOR RESPONDENT

SWORN to before me this 25<sup>th</sup> day of May, 2016.



Notary Public for South Carolina.

My Commission Expires: 04-28-2025