

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Orangeburg County

Honorable Kristi Lea Harrington, Circuit Court Judge

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**RECEIVED**

AUG 12 2018

SC SUPREME COURT

RONALD SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002526

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PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether the PCR court erred in ruling that the trial/guilty plea transcript was not necessary to its determination and ruling where neither Petitioner nor trial/plea counsel had a complete recollection of the untranscribed proceedings, particularly since witness Harmon's testimony was not available for transcription and the interpretation of his testimony played an integral role in the mid-trial decision to plead guilty?

## STATEMENT OF THE CASE

### Indictment, Partial Trial, and Guilty Plea

On May 23, 2011, the Orangeburg County Grand Jury indicted Petitioner Ronald Smith for the murder of Samuel Sims. App. 225. Sims was a bystander at the Shell gas station/Bojangles located in Orangeburg, South Carolina. A shooting took place in the lot of the establishment and a stray bullet struck and killed Sims. App. 200, ll. 6-24.

On September 14, 2011, Smith proceeded to trial before the Honorable Edgar W. Dickson and a jury. App. 1. Smith was represented by Margaret Hinds, and the State was represented by solicitor David Pascoe and assistant solicitor Donald Sorenson. App. 1. Only a portion of the trial, the first day of the proceedings, was able to be transcribed. App. 121, ll. 18-19. During the untranscribed portion of the transcript, at least two additional witnesses testified, Smith pled guilty to murder, and Judge Dickson imposed a sentence of thirty-one years incarceration. App. 162, ll. 1-9; App. 174, l. 17 – 176, l. 14 (referencing testimony of Donald Harman and guilty plea); Supp. App. 3 (referencing testimony of a SLED agent).

A Notice of Appeal and Explanation were filed on September 21, 2011. Supp. App. 1 – 2. Smith filed a *pro se* explanation on November 9, 2011. Supp. App. 3 – 4. On November 23, 2011, the Court of Appeals issued an Order dismissing the appeal. Supp. App. 5. The Remittitur was filed on December 14, 2011. Supp. App. 6.

### PCR Application and Motion for Summary Judgment

On June 26, 2012, Smith filed an application for post-conviction relief (“PCR”). App. 123. On November 28, 2012, the State filed its Return. App. 130.

At a hearing before the Honorable Diane S. Goodstein, held November 1, 2013, PCR counsel advised the court that the trial/plea transcript had not yet been provided. App. 142, ll. 16-18.

AAG Jameson said that they had sent multiple requests for the transcript but the court reporter from Smith's case was retired. She assured the court that an additional request for the transcript was sent that day and that they had some success in other cases in having another court reporter transcribed the notes of the retired court reporter. App. 142, l. 20 – 143, l. 5; App. 143, ll. 9-11.

After waiting an additional eight months for production of the transcript, on June 4, 2014, PCR counsel filed a "Notice of Motion and Motion to Grant Post Conviction Relief" on Smith's behalf. App. 147. Counsel argued that the PCR application should be summarily granted because the Attorney General's Office was unable to obtain the transcript after numerous requests for it. App. 147.

The State filed its Return on July 1, 2014, arguing that Smith's motion was "premature and unnecessary." App. 150 – 151. Respondent indicted that the State had since provided **a portion of the trial transcript** to PCR counsel. App. 151. In a footnote, Respondent explained that the original court reporter's cassette tapes and notes were given to another court reporter for transcription. The transcriptionist was only able to locate the tapes for a portion of the proceedings in Smith's case such that "a complete transcript of all proceedings is unavailable." App. 151 n. 1. Respondent further argued: "[T]he allegations asserted by Applicant in his application for post-conviction relief include allegations that can be presented, and refuted, by testimony of Applicant, his trial counsel, and other witnesses without reliance on a transcript of the proceedings." App. 151.

On September 10, 2014, Smith filed a motion to amend his PCR application to include a ground that his "guilty plea was not knowing, intelligent, and voluntarily entered due to ineffective assistance of trial counsel," who failed to inform him of evidence supporting a third party guilt defense. App. 154.

### Evidentiary Hearing

On October 27, 2014, an evidentiary hearing was held before the Honorable Kristi L. Harrington. App. 158. Smith was represented by James B. Jackson, Jr., and the State was represented by assistant attorney general Clay Mitchell. App. 159. At the beginning of the hearing, PCR counsel made a motion for summary judgment based on the inability of the State to produce the complete transcript, such that there was no evidence that the guilty plea was freely and voluntarily made. App. 162, l. 16 – 165, l. 3. Judge Harrington said that while a transcript would be “most helpful,” the client and trial attorney were both present and could testify as to what happened, at which point it would “become an issue of credibility and believability.” App. 163, l. 22 – 164, l. 9; App. 165, ll. 4-6.

Both Smith and his trial counsel, Margaret Hinds, testified at the PCR hearing. App. 160. They both agreed that the State did not extend any plea offers prior to Smith’s trial. App. 173, ll. 11-24; App. 194, ll. 13-19. Smith said that on the second day of trial, Hinds told them that she was unaware that Donald Harmon, who the State initially charged with murder with respect to the incident, was going to testify against him. App. 174, l. 17 – 175, l. 12; App. 182, ll. 11- – 183, l. 3; App. 190, ll. 10-13. Notably, Smith first indicted that Hinds was unaware that Harmon would testify in his *pro se* explanation regarding his direct appeal, nearly three years prior to the PCR hearing. Supp. App. 4. After Harmon testified, Hinds told Smith that Harmon “sunk the ship” and that it was not “looking good.” Hinds spoke with the judge about a guilty plea, and the judge indicated that he would sentence Smith to thirty years. Hinds asked Smith’s aunt and mother to join them and said that if Smith did not accept the offer, he would be sentenced to “sixty to life.” App. 175, l. 13 – 176, l. 14; App. 182, l. 11 – 183, l. 3.

Regarding the guilty plea, Smith said that he did not go over his constitutional rights with Hinds. Though the PCR court characterized Smith's testimony as "self-serving," App. 221, Smith did not feign that he could not recall anything regarding the plea hearing. Rather, Smith admitted that the plea judge did conduct portions of what would be considered a "standard" colloquy. App. 183, l. 11 – 186, l. 21; App. 221. Smith also said that he did not agree with the "facts" recited by the solicitor but could not recall whether the judge asked him if he agreed. App. 186, ll. 1-21.

Smith testified that it was not until after his guilty plea that he learned of Detective Shumpert's report, which indicated that Shumpert viewed the video surveillance tapes and determined that Donald Harmon fired the shot that hit the victim. App. 176, l. 15 – 178, l. 19; App. 214 (Petitioner's Ex. 1). Shumpert wrote that the surveillance video showed Harmon sitting in the car of a female when Brandon Bradley came up and leaned against the car to speak with Harmon. A grey Impala pulled into the parking lot. Smith, Orlando Haynes and Jarrod Jacques got out of the Impala. Haynes and Jacques approached Bradley. When they turned around, Bradley pulled out a weapon and began shooting. Bradley ran away and the car that Harmon was in began to back out. Harmon jumped out of the car, as Smith, Haynes, and Jacques tried to get back into the Impala. Smith allegedly fired a shot toward Harmon. Harmon fired back, shooting Sims in the back of the head. Harmon then ran away. App. 214 (Petitioner's Ex. 1). Smith testified that had he known about the report indicating that Harmon shot the victim, he would not have pled guilty and instead pursued a third party guilt defense. App. 178, ll. 20-24; App. 179, l. 13 – 180, l. 4.

Though trial/plea attorney Hinds did not recall specifically showing Detective Shumpert's report to Smith, she said that they went over discovery and that Smith saw the surveillance videos multiple times. App. 190, ll. 18-24; App. 194, ll. 21-25; App. 198, ll. 1-19; App. 199, ll. 12-25.

Hinds testified that the solicitors office originally thought that Harmon was more culpable but later decided that it was Smith's gun that fired the fatal bullet, based primarily on the location of shell casings. According to Hinds, the State would have called an expert to testify that based on where people were standing and where the shell casings ejected, the bullet that killed Sims "had to come from Mr. Smith's gun." App. 189, l. 24 – 194, l. 12. However, no guns were ever seized or ballistics testing ever conducted. App. 193, ll. 2-22. Hinds spoke with an expert but never obtained a written report from him because she said that his opinion was not favorable. App. 202, ll. 11-20. Hinds said that the defense's argument at trial was that the State could not prove beyond a reasonable doubt to who fired the shot. App. 201, l. 13 – 202, l. 4. But, Hinds feared that the jury would believe the State's theory that the shell casings proved that Smith was the shooter. App. 193, l. 2 – 194, l. 12. Hinds stated that she also advised Smith that he could be convicted under the theory of accomplice liability, though she provided no explanation of how the State would have shown that Smith was an "aider or abettor" of the people shooting at him. App. 202, ll. 5-10; see State v. Mattison, 388 S.C. 469, 479-80, 697 S.E.2d 578, 584 (2010).

Hinds described Harmon's testimony as "setting up more of where everybody was" and "corroborating and explaining what was on the video." App. 196, l. 12 – 197, l. 1. She agreed that Harmon never testified that it was Smith who shot the bystander. Hinds said that she "[did not] think . . . any one of them knew who" shot Sims. App. 197, ll. 2-5. Yet, Hinds claimed that Smith raised the possibility of pleading after Harmon testified. App. 195, l. 14 – 196, l. 1; App. 197, ll. 6-15. Hinds said that the judge "indicated" that he would sentence Smith to thirty one years, which she opined was the minimum sentence for murder plus one additional year as "a ding for taking up a day in court." App. 196, ll. 3-11; but see Castro v. State, \_\_\_ S.E.2d \_\_\_, 2016 WL 3962647 \*3 (July 20, 2016) ("[A] trial judge abuses his or her discretion when he or she *considers* the fact

that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant.”).

When asked about what happened at the guilty plea, Hinds responded: “If you’re asking me do I remember line for line what happened, of course I don’t. We went through the colloquy and Mr. Smith pled guilty.” App. 197, ll. 21-25. Though she had no specific recollection of Smith’s plea, Hinds testified that Judge Dickson was one of the resident judges in Orangeburg County and that she “would have noticed” and objected if he did not go through his usual colloquy. App. 203, l. 20 – 207, l. 11. Hinds claimed that Smith signed a waiver of rights checklist, though no such document was admitted into evidence at the PCR hearing. App. 195, ll. 1-13; App. 201, ll. 7-12. The PCR judge then asked Hinds the following questions:

THE COURT: In preparing for today’s hearing, did the fact that there was not a transcript impact you in any way?

MS. HINDS: I don’t believe so.

THE COURT: You indicated that there were several things that you didn’t remember. Do you believe that there would have been anything that would have assisted you? Of course, that would be the best-case scenario. But Judge Dixon is your resident judge; is that correct?

MS. HINDS: That’s correct.

THE COURT: And he typically does his colloquy in a standard way and if he had deviated from that in any way, would you have brought that to his attention?

MS. HINDS: Absolutely.

App. 207, l. 17 – 208, l. 8.

PCR counsel argued that Smith “did not fully understand his defenses, he did not understand the report that he says he did not see, and therefore his guilty plea was not voluntarily and freely made.” App. 208, l. 24 – 209, l. 2. He asked the Court to also “consider the fact that there is no transcript” of the plea. App. 209, ll. 3-5.

## Order of Dismissal

On February 4, 2015, Judge Harrington filed an Order of Dismissal, denying Smith's PCR application. App. 215. With respect to the incompleteness of the trial/plea transcript, Judge Harrington ruled:

This Court finds that, although a transcript of the guilty plea proceeding was not available for review, it is not necessary to its determinations and ruling. *See Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008) (In determining guilty plea issues in a PCR proceeding, it is proper to consider the plea transcript *as well as* evidence at the PCR hearing.) (emphasis added). A presumption of regularity attaches to proceedings in the Court of General Sessions. *Weathers v. State*, 319 S.C. 59, 62, 459 S.E.2d 838, 839 (1995) (citing *Pringle v. State*, 287 S.C. 409, 411, 339 S.E.2d 127, 128 (1986) *State v. Jones*, 211 S.C. 319, 45 S.E.2d 29 (1947)). It is incumbent upon one who challenges a proceeding to prove his claims. *See Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998).

Applicant argues relief should be granted because the Court is without the full record of the plea proceeding. Applicant has presented no evidence other than his own self-serving testimony that the plea was not proper and that he did not knowingly and voluntarily plead guilty. This allegation is without merit as Counsel's testimony was persuasive to this issue. It is important to note that Applicant pled guilty before Judge Dickson, the resident Orangeburg circuit court judge, with whom Counsel Hinds has appeared before numerous times. Counsel is familiar with the structure of Judge Dickson's normal plea proceedings and testified that there is no reason to think Applicant's plea deviated from those practices. Applicant's testimony supports this finding. Applicant testified that he was asked a number of questions at the plea hearing including whether he wished to waive his constitutional rights, whether he agreed with the solicitor's recitations of the facts, and whether he was threatened or promised anything in exchange for his plea. Therefore, this Court finds that the plea transcript is not necessary to its ruling.

App. 221. The PCR judge further ruled that the allegation that Smith's plea was not knowing or voluntary was "without merit" and that the allegation that counsel failed to properly investigate was "unfounded." App. 221 – 222. The PCR judge did not make any specific finding that Smith's testimony was not credible. See App. 215 – 224.

This appeal follows.

## ARGUMENT

**The PCR court erred in ruling that the trial/guilty plea transcript was not necessary to its determination and ruling where neither Petitioner nor trial/plea counsel had a complete recollection of the untranscribed proceedings, particularly since witness Harmon's testimony was not available for transcription and the interpretation of his testimony played an integral role in the mid-trial decision to plead guilty.**

### *Introduction*

The PCR judge's lack of appreciation for the weight that the transcript of the underlying proceedings should have in a PCR proceeding is alarming. The PCR judge said that she would "rely on the testimony of the people that were there, which is what [she] typically [does]" and it "just become an issue of credibility and believability." App. 164, ll. 6-9; App. 165, ll. 4-6. While the PCR judge was correct that the lack of transcript does not foreclose review, the review must be meaningful. See State v. Ladson, 373 S.C. 320, 321, 644 S.E.2d 271, 271 (Ct. App. 2007). The proper remedy was to remand the case for reconstruction, which was not accomplished by the desultory approach taken at the PCR hearing where only Smith and Hinds testified.

In its analysis regarding the missing the transcript, the PCR could not "see the forest for the trees." The court focused on the specific questions asked by the plea judge during the colloquy rather than the overarching allegation that Hinds was deficient in advising Smith to plead guilty in light of the testimony presented at the trial and Shumpert's written report naming Harmon as the shooter. See App. 208, l. 24 – 209, l. 5; App. 221. At a minimum, there was evidence that a SLED agent and Harmon both testified on the second day of trial prior to the guilty plea. App. 162, ll. 1-9; App. 174, l. 17 – 176, l. 14; Supp. App. 3. At the PCR hearing, Smith and Hinds each said that it was the other who wanted to stop the trial and enter a plea after Harmon testified. App. 175, ll. 1-25; App. 195, l. 16 – 196, l. 4. Absent damning testimony, it is difficult to

comprehend why Hinds would counsel Smith to plead to murder midway through trial. Thus, the missing testimony from the second day of trial was critical to determining the credibility of Smith and Hinds and whether Hinds' advice to Smith was deficient.<sup>1</sup>

Additionally, the theory of the State's case presented during the plea colloquy would have been significant to the PCR court's determination, as Smith's *pro se* explanation on direct appeal indicated that Hinds told him he was pleading under the theory of hand of one, hand of all. Supp. App. 4; see State v. Rikard, 371 S.C. 295, 301, 638 S.E.2d 72, 75 (Ct. App. 2006) (“[T]he record in a guilty plea proceeding must establish a factual basis for the plea.”). However, there was no evidence in the trial transcript of an arranged plan to meet at in the gas station parking lot and have a “shoot out” and Smith was not a part of the same group as Harmon. Cf. State v. Ward, 374 S.C. 606, 613-14, 649 S.E.2d 145, 149 (Ct. App. 2007) (affirming jury charge on “hand of one, hand of all” when co-defendants were both part of the same group that confronted, drove after, and shot at the intended victim when a bystander was struck with a bullet).<sup>2</sup> Furthermore, mutual combat, to preclude the assertion of self-defense, requires more than the “wild west” analogy used in the solicitor's opening statement. App. 42, l. 24 – 43, l. 12. There must be a “mutual agreement to

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<sup>1</sup> For example, Bob and Dan are both charged in connection with a robbery of a convenient store. Dan testifies at Bob's trial for armed robbery and says that Bob was with him at the store but he does not know whether Bob knew that Dan was going to rob the store. Trial counsel tells Bob that Dan's testimony has “sunk the ship” and he had better plead guilty. Dan's trial testimony supports Bob's later PCR allegation that trial counsel's advice that Dan's testimony supported a conviction for armed robbery and to plead guilty was deficient because she never explained that “mere presence” at the scene of the crime is not enough to convict.

<sup>2</sup> See also People v. Peterson, 652 N.E.2d 1252, 1258-60 (Ill. App. 1995), *cert denied*, 657 N.E.2d 634 (Ill. 1995) (holding that neither transferred intent nor accomplice liability support convictions where the defendants “acted at cross purposes, spontaneously shooting at each other” and it was unknown who fired the bullet that struck a bystander); Crawford v. Georgia, 480 S.E.2d 573, 575 (Ga. 1997) (under the principle of transferred justification “no guilt attaches if an accused is justified in shooting to repel an assault, but misses and kills an innocent bystander”).

fight on equal terms for purposes other than protection.” State v. Taylor, 356 S.C. 227589 S.E.2d 1 (2003). Thus, it is questionable whether Hinds properly advised Smith regarding his potential criminal liability and possible defenses.

### *Discussion*

Our State has long recognized the trial court’s authority to reconstruct the record where a portion of the trial transcript cannot be produced. See China v. Parrott, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968). While the trial court has discretion in determining how to reconstruct missing portions of a transcript, this discretion must lie within the limits required by procedural due process. Adams v. H.R. Allen, Inc., 397 S.C. 652, 658, 726 S.E.2d 9, 13 (Ct. App. 2012). The reconstructed record must allow for meaningful appellate review. State v. Ladson, 373 S.C. 320, 321, 644 S.E.2d 271, 271 (Ct. App. 2007). “A new trial is therefore appropriate if the appellant establishes that the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review.” Id. at 325, 644 S.E.2d at 274 (citations and internal quotations omitted).

The United States Supreme Court has held that “[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results.” Brady v. United States, 397 U.S. 742, 758 (1970).

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea 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, but would have insisted on going to trial.

Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (quoting Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); see also Hill, 474 U.S. at 59 (footnote omitted).

Whether a defendant is convicted after a trial or pleads guilty, the transcript of those underlying proceedings and exhibits<sup>3</sup> are an important part of the record to be considered by the PCR court. See Smith v. State, 386 S.C. 562, 568-69, 689 S.E.2d 629, 633 (2010) (finding applicant was prejudiced by trial counsel’s deficient performance after “carefully reviewing the entire transcript of the underlying trial”); Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000) (“When determining issues relating to guilty pleas, **this Court will consider the entire record, including the transcript of the guilty pleas** and the evidence presented at the PCR hearing.” (emphasis added)). “In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing.” Stalk v. State, 375 S.C. 289, 652 S.E.2d 402 (Ct. App. 2007) (citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).

Though Ladson involved a motion to reconstruct on direct appeal, the Court’s reasoning for finding that the reconstructed record was insufficient for meaningful review and remanding for a new trial is instructive. 373 S.C. at 323-28, 644 S.E.3d at 272-75. In Ladson, the defendant filed a timely appeal and request for production of the trial transcript. Id. at 321, 644 S.E.2d at 271. Ten months later, the court reporter finally disclosed that there was no record of the trial proceedings. Id. Thus, much of the difficulty in attempted to reconstruct the record in Ladson stemmed from the length of time – more than one year – that passed between the trial and reconstruction hearing. Id. at 326-27, 644 S.E.2d at 274. The Court noted that “a missing portion of the trial transcript is usually brought to the court’s attention much earlier.” Id. The

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<sup>3</sup> Petitioner’s counsel made multiple requests for the exhibits admitted during Petitioner’s partial trial and was informed by Tammy Valentine in the Orangeburg County Clerk of Court’s office that the exhibits were not retained by the Clerk’s office because Petitioner pled guilty.

Court wrote: “It is simply unrealistic and unreasonable to think that a trial judge and counsel can—under these circumstances—reconstruct a proper record that will permit meaningful appellate review, especially in light of our issue preservation rules.” Id. Both the court and the parties had difficulty recalling who testified and the content of their testimony. Id. at 322-23, 326, 644 S.E.2d at 272, 274. Though the trial judge was confident that the jury returned its verdict the same day that it began deliberating, his recollection was “proven faulty” by documents showing a jury note dated November 9 and that the jury’s verdict was rendered November 10. Id. at 323, 644 S.E.2d at 272. This evidenced that even a judge’s recollection of his “usual” practice may not align with the reality of what occurred in a particular proceeding. Here, the partial trial and plea occurred on September 14-15, 2011, more than **three years** prior to the evidentiary hearing held on October 27, 2014 before Judge Harrington. Hinds had no specific recollection of the guilty plea proceedings and provided only a brief summary of Harmon’s trial testimony.

Moreover, the PCR court did not conduct a traditional reconstruction hearing. Typically, a reconstruction hearing is held before the trial or plea judge, along with the solicitor, trial attorney, defendant, and any witnesses whose testimony was unavailable for transcription. See Ladson, 373 S.C. at 321, 644 S.E.2d at 272; Adams, 397 S.C. at 658, 726 S.E.2d at 12-13. It is proper for the judge to accept the affidavits of counsel and the court reporter to determine what transpired. China, 251 S.C. at 333–34, 162 S.E.2d at 278.

In Adams, the Court of Appeals determined that the Worker’s Compensation Commission erred where it conducted “neither a true rehearing of the matter on the merits nor a straight-forward reconstruction of the original transcript.” 397 S.C. at 658, 726 S.E.2d at 13. The Adams Court ruled that “[s]uch a hybrid approach to rehearing constitutes a structural defect

that cannot be reviewed under the harmless error standard.” Id. The Court further wrote: “While we are mindful of the importance of judicial efficiency, we find the hybrid rehearing procedure in this case violated Appellants’ right to procedural due process.” Id. at 658-59, 726 S.E.2d at 13.

Here, neither the trial judge, solicitor, or Harmon himself participated in the “reconstruction” process. Questions regarding Smith and Hinds’ recollection of the second day of proceedings were scattered throughout their testimony and focused on Harmon’s testimony, the plea colloquy, and sentencing. No testimony was provided regarding the SLED agent who testified or anything else that occurred on the second day of trial. Thus, the trial/plea transcript was not properly reconstructed.

Presumably recognizing that reconstruction was not accomplished at the evidentiary hearing, the PCR court ruled that the transcript was “not necessary to its determinations and ruling.” Without the plea transcript, Smith and Hinds were only able to provide general testimony, with little specific recollection of what was said on the record. Inexplicably, though Hinds repeatedly stated that she had no specific recollection of Smith’s plea hearing, the PCR court found her testimony “persuasive.” App. 197, ll. 21-25; App. 203, l. 20 – 207, l. 11; App. 221. Hinds’ response to the PCR judge that her preparation for the PCR hearing was not impacted by the lack of transcript is wholly incredible. App. 207, ll. 20-23. Given her lack of memory, a complete transcript would have undoubtedly aided Hinds in recalling the testimony of Harmon that preceded the guilty plea, the content of the guilty of plea hearing, and the remainder of what occurred on the second day of the proceedings.

As PCR counsel indicated to the court, it is “hard for [him] to determine what happened at the guilty plea without a transcript. And it’s hard for [the PCR court].” App. 165, ll. 1-3. It

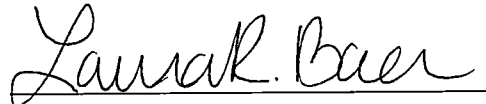
was impossible for the court to determine whether Hinds' advice to Smith was reasonable without reconstructed the content of Harmon's testimony. Additionally, Smith represented that his guilty plea was entered under the theory of hand of one, hand of all. Without evidence of the State's factual basis to support the plea, the PCR cannot determine whether there was "the requisite corroborating evidence" to support a plea to murder under an accomplice liability theory. See Sellner v. State, \_\_\_ S.E.2d \_\_\_, 2016 WL 3595804 \*3 (June 29, 2016). Without the complete transcript, PCR counsel simply could not properly assist Smith in determining what additional allegations he could have raised on PCR. By all accounts, Harmon's testimony precipitated Smith's guilty plea.

Because the missing portions of the trial/plea transcript were not properly reconstructed, this Court should remand Smith's case for a reconstruction hearing before the trial/plea judge, the Honorable R. Knox McMahon. If the record cannot be adequately reconstructed for meaningful review or this Court determines that remand would be futile, Smith should be granted a new trial.

CONCLUSION

Based on the foregoing, Petitioner Ronald Smith respectfully requests that this Court grant this petition for writ of certiorari and order further briefing on the issue raised herein.

Respectfully submitted,

A handwritten signature in cursive script that reads "Laura R. Baer". The signature is written in black ink and is positioned above a horizontal line.

Laura R. Baer  
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of August, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Orangeburg County

Honorable Kristi Lea Harrington, Circuit Court Judge

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RONALD SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

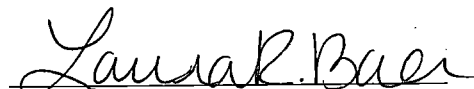
RESPONDENT

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CERTIFICATE OF SERVICE

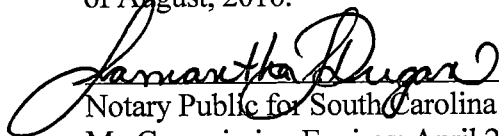
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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Clay Mitchell, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Ronald Smith, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 12th day of August, 2016.

  
Laura R. Baer  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day  
of August, 2016.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: April 27, 2026.