

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Edgefield County  
Honorable William P. Keesley, Circuit Court Judge  
\_\_\_\_\_

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WADE ROUSE,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001780  
\_\_\_\_\_

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

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**ISSUE PRESENTED**

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when plea counsel failed to ensure Petitioner viewed the videotape of the alleged controlled buy before Petitioner pled guilty, which prevented Petitioner from making a voluntary, knowing, and intelligent decision about whether to plead guilty or exercise his right to a jury trial?

## STATEMENT OF THE CASE

Petitioner was charged with distribution of crack cocaine after the state alleged he sold 0.7 grams of crack cocaine to a confidential informant who was wearing a wire and captured the purchase on audio and video. App. 12, l. 13 – 14, l. 6. While Petitioner was incarcerated pretrial, he repeatedly sought to view the videotape of the alleged controlled buy so that he could make a knowing and intelligent decision about whether to plead guilty or proceed to trial. App. 52, l. 22 – 54, l. 11. However, the prosecution refused to allow Petitioner to personally view the tape out of fear of revealing the identity of the confidential informant and the possibility of witness tampering. App. 53, ll. 14-17. The state was also concerned about compromising current and future investigations that may involve the confidential informant. Consequently, the solicitor only permitted Petitioner's counsel to view the videotape at the sheriff's office with the lead investigator. Counsel was not allowed to have a copy of the tape. App. 121, l. 8 – 122, l. 6.

Any and all plea offers from the state were conditioned on Petitioner not personally viewing the videotape of the alleged controlled buy. App. 91, ll. 7-24. The solicitor ultimately offered to allow Petitioner to plead guilty to distribution of crack cocaine, second offense, as opposed to third offense, with a sentence recommendation of a "cap of ten years." App. 3, ll. 4-12. The solicitor also agreed to dismiss several other charges Petitioner had pending. App. 3, l. 23 – 4, l. 19. However, if Petitioner watched the tape of the alleged controlled buy, the solicitor would have withdrawn this and any other offer and refused to engage in any further negotiations. At that point, Petitioner would have been forced to plead guilty without the benefit of any negotiations or proceed to trial. App. 91, ll. 7-24.

Greg Seigler, Petitioner's plea counsel, testified at the evidentiary hearing that he watched the videotape of the alleged controlled buy and discussed the contents with Petitioner.

Seigler also showed Petitioner several still photographs taken from the video that he was provided by law enforcement. App. 90, l. 11 – 91, l. 6. He maintained it was Petitioner's decision to plead guilty after considering his options and the evidence against him. App. 93, ll. 12-19.

Petitioner complained at the hearing that it was difficult for him to determine how watching the videotape of the alleged controlled buy would have affected his decision about whether to plead guilty or proceed to trial because he had still never been permitted to view the tape. App. 55, l. 14 – 56, l. 5. However, he consistently maintained that he wanted to watch the tape and had requested to do so on numerous occasions both before and after he pled guilty. App. 53, l. 1 – 54, l. 6.

An Edgefield County grand jury indicted Petitioner on January 14, 2013 for distribution of crack cocaine. App. 187-188. Petitioner pled guilty as indicted on August 13, 2013 before the Honorable Thomas A. Russo. App. 1. Assistant Solicitor H. Franklin Young, III represented the state, and W. Greg Seigler represented Petitioner. App. 1. Judge Russo sentenced Petitioner to ten years imprisonment based on the state's sentence recommendation. App. 26, ll. 10-16.

Petitioner's direct appeal was dismissed pursuant to Rule 203(d)(1)(B)(iv), SCACR, for failure to file a written explanation showing there was an issue which could be reviewed on appeal. App. 160.

On June 20, 2014, Petitioner filed an application for post-conviction relief (PCR). App. 28-34. With the assistance of counsel, Petitioner filed an amended application on November 26, 2014 raising the claim argued in this petition. App. 35-36. The state filed a return to this application dated May 15, 2015. App. 37-43. Petitioner filed a second amended application on June 14, 2016. App. 44-46. An evidentiary hearing was convened on July 6, 2016 before the

Honorable William P. Keesley. App. 47. Assistant Attorney General Johanna Valenzuela represented the state, and Kristy Goldberg represented Petitioner. App. 47. At the conclusion of the hearing, Judge Keesley ordered the record remain open for either party to present additional evidence or testimony. App. 100, l. 25 – 101, l. 5.

On September 26, 2016, Petitioner filed a motion to amend the pleadings to conform to the evidence presented and a third amended application again raising the claim argued in this petition. App. 103-107. A second evidentiary hearing was held on September 29, 2016 before Judge Keesley. App. 108. Assistant Attorney General Johanna Valenzuela represented the state, and Kristy Goldberg represented Petitioner. App. 108. The state presented the testimony of Lieutenant Roosevelt Young with the Edgefield County Sheriff's Office at this hearing. Lieutenant Young claimed the confidential informant in Petitioner's case was still working as an informant with the sheriff's office, four years after the alleged controlled buy which led to this appeal, and that law enforcement was concerned for this confidential informant's safety if his identity was revealed. App. 114, l. 21 – 116, l. 24.

By order filed October 5, 2016, Judge Keesley granted Petitioner's motion to amend the pleadings to the evidence presented. App. 157. However, almost two years later, by order filed September 10, 2018, Judge Keesley denied Petitioner relief. App. 158-186.

The judge found Petitioner failed to prove counsel was deficient for not ensuring Petitioner viewed the videotape of the alleged controlled buy before he pled guilty. App. 173. The judge further found Petitioner failed "to demonstrate any prejudice in his accepting the State's negotiated plea offer" and "failed to demonstrate that his plea was entered involuntarily." App. 173. Citing to this Court's opinion in Hyman v. State, 397 S.C. 35, 723 S.E.2d 375 (2012), the judge asserted, "Our South Carolina Supreme Court has held that an applicant is not entitled

to PCR relief when defense counsel is permitted to view video evidence from a confidential informant and discuss the strength of that evidence with the defendant for purposes of considering a negotiated offer to plead guilty.” App. 173.

Finding this case “precisely on point” with Hyman, Judge Keesley dismissed Petitioner’s allegation. App. 174. He asserted, “[P]lea counsel was informed of the videotape, was permitted to view the tape, reviewed and discussed the contents of the tape with his client, and provided [Petitioner] with still photographs from the video that clearly identified him. [Petitioner] was offered a negotiated plea deal that enabled him to avoid prosecution on his four charges, reduced his distribution of crack cocaine from a third offense to a second offense, and limited his sentencing exposure to a ten year cap. [Petitioner] had sufficient opportunity to discuss with plea counsel what specifically occurred in the video, and made an informed decision to plead guilty based on his chances at trial.” App. 175. Consequently, the judge denied Petitioner relief. App. 174.

Because Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when plea counsel failed to ensure Petitioner viewed the videotape of the alleged controlled buy before he pled guilty, which prevented Petitioner from making a voluntary, knowing, and intelligent decision about whether to plead guilty or exercise his right to a jury trial, this petition for writ of certiorari follows.

## ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when plea counsel failed to ensure Petitioner viewed the videotape of the alleged controlled buy before Petitioner pled guilty, which prevented Petitioner from making a voluntary, knowing, and intelligent decision about whether to plead guilty or exercise his right to a jury trial.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when plea counsel failed to ensure Petitioner viewed the videotape of the alleged controlled buy before he pled guilty, which prevented Petitioner from making a voluntary, knowing, and intelligent decision about whether to plead guilty or exercise his right to a jury trial. It was impossible for Petitioner to properly weigh the evidence against him without having watched the videotape of the alleged buy, the most important piece of evidence in this case. Without knowing the strength of the state's case, Petitioner was unable to make an intelligent decision regarding the likelihood of an acquittal at trial. Consequently, his guilty plea, based on the condition that he not view the tape, was involuntary.

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 v. Washington, 466 U.S. 668 (1984). "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 687-688. "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 Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea." Hyman v. State, 397 S.C. 35, 43, 723 S.E.2d 375, 379 (2012), *abrogated by* Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (citing Hill v. Lockhart, 474 U.S. 52, 58 (1985)). "In the guilty plea context, the inquiry with respect to the counsel's alleged deficiency turns on whether the plea was voluntarily, knowingly, and intelligently entered." Id. (citing Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000)). "The second, or 'prejudice,' requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. Id. (citing Hill, 474 U.S. at 59). Consequently, 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." Id. (quoting Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011), *abrogated by* Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018)).

“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) (internal citation omitted). Therefore, “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) (internal citation omitted).

In Hyman, the defendant argued that because he was not provided with an opportunity to view the videotape of the drug transaction forming the basis of his convictions, he did not enter his guilty plea freely, voluntarily, and knowingly, and as a result, his counsel was ineffective. 397 S.C. at 42, 723 S.E.2d at 378. This Court disagreed. Id. The Court acknowledged that an applicant “may challenge the voluntary nature of his guilty plea in a PCR action by asserting an alleged Brady violation” and laid out the framework to evaluate the success of a PCR applicant’s claim: (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Hyman, 397 S.C. at 46, 723 S.E.2d at 380 (citing Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999)). However, this Court exclaimed, “Tantamount to any Brady claim is the withholding of evidence. Under the present facts, it is undisputed that the solicitor disclosed the videotape to defense counsel.” Id. at 46, 723 S.E.2d at 381. This Court held disclosure to defense counsel was “satisfactory.” Id. Moreover, the Court concluded Hyman had not proven the videotape was favorable to him. Instead, the Court asserted the tape was inculpatory because it depicted Petitioner engaged in a drug transaction. Id. at 47, 723 S.E.2d at 381.

Furthermore, the Court held the state properly complied with Rule 5, SCRCrimP, because the state not only disclosed the existence of the videotape, but also made the evidence available for inspection by defense counsel and also took the extra step of generating still photographs to assuage Petitioner's concerns about the contents of the videotape. Id.

Lastly, the Court held Hyman failed to prove how he was prejudiced by counsel's alleged deficient performance because Hyman testified at the evidentiary hearing that if he had seen the videotape he would have pled guilty earlier, not that he would have proceeded to trial. Id. at 48, 723 S.E.2d at 381-382.

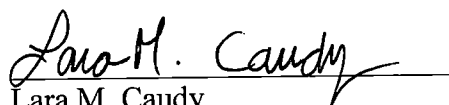
In this case, it is undisputed that Petitioner was not allowed to view the videotape of the alleged controlled buy despite repeated requests pretrial to do so. Due to his deficient performance, plea counsel failed to ensure Petitioner viewed the tape before he pled guilty. The state conditioned its plea offer on Petitioner not viewing the tape. This prevented Petitioner from making a voluntary, knowing, and intelligent decision regarding his alternative courses of action. Petitioner could not weigh the strength of the state's case against him and determine whether an acquittal at trial was likely. This rendered Petitioner's guilty plea involuntary.

Because Petitioner's guilty plea was involuntary, Petitioner respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

**CONCLUSION**

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition and order further briefing on the issue presented.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Lara M. Caudy". The signature is written in black ink and is positioned above a horizontal line.

Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of April, 2019.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Edgefield County

Honorable William P. Keesley, Circuit Court Judge

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PETITION TO BE RELIEVED AS COUNSEL

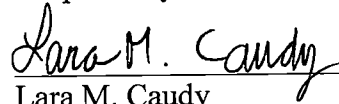
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Counsel for Wade Rouse states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.
2. She has reviewed the record of Petitioner's post-conviction relief hearings, which was held on July 6, 2016 and September 29, 2016 before the Honorable William P. Keesley, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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 her as counsel for Wade Rouse.

Respectfully Submitted,

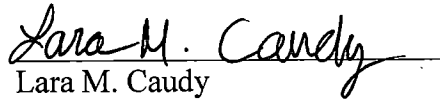
  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of April, 2019.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of her 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."



Lara M. Caudy  
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ATTORNEY FOR PETITIONER

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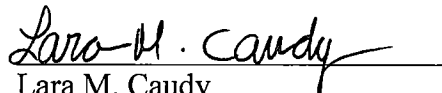
RESPONDENT

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CERTIFICATE OF SERVICE


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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Taylor Z. Smith, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Wade Rouse, #, at 475 Park Ave, Apt. B, Johnston, SC 29832, this 8th day of April, 2019.

  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 8th day of April, 2019.

  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: September 27, 2028.