

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

**Nov 30 2020**

S.C. SUPREME COURT

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Certiorari to Spartanburg County

Honorable G. Thomas Cooper, Circuit Court Judge

\_\_\_\_\_  
LARRY D. BROWN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000824

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

Taylor D Gilliam  
Appellate Defender

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 denying relief, where Petitioner's plea was not knowingly, voluntarily, or intelligently made, where Petitioner felt coerced into pleading upon receipt of a life without parole notice?

## STATEMENT

Petitioner was indicted in Cherokee County on three counts of burglary in the first degree, one count of possession of stolen goods, one count of escape or attempt to escape, and one count of malicious injury to a courthouse or jail. App. 98 – 110. On August 17, 2017, Petitioner appeared before the Honorable J. Mark Hayes, II for a plea. App. 1. E. Joshua Schultz represented Petitioner; Kimberly Leskanic appeared on behalf of the state. Subject to a negotiated sentence, Petitioner plead guilty as indicted. App. 15 l. 5 – 16 l. 2. The negotiation allowed Petitioner to receive a sentence of twenty-five years on the burglary first, malicious injury, and escape charges. Id. The sentence on the stolen goods charge was negotiated to ten years, suspended to probation. Id.

The solicitor presented the state's version of the facts giving rise to Petitioner's indictments. App. 17 l. 15 – App. 20 l. 4. Petitioner pleaded guilty subject to the negotiation, and the plea judge found a factual basis for the plea. App. 21 ll. 2 – 21; App. 33 ll. 10 – 11.

Petitioner was sentenced in accordance with the negotiation: twenty-five years for the burglary offenses concurrent with the malicious injury and escape charges. App. 33 ll. 12 – 23. Petitioner was also sentenced to ten years on the stolen goods charge, ten years consecutive, suspended to probation. App. 33 l. 12 – 34 l. 13.

Petitioner filed an application for post-conviction relief on July 20, 2018. App. 36. It contained allegations of ineffective assistance of counsel, including claims that plea counsel failed to perform an adequate investigation. App. 38. The state filed its Return and Motion for More Definite Statement on May 3, 2019, almost ten months later.

An evidentiary hearing was held before the Honorable G. Thomas Cooper on October 11, 2019. App. 53. Rodney Richey represented Petitioner; Jacob Isenberg appeared on behalf of the

state. Petitioner and plea counsel testified at the hearing. The PCR judge requested proposed orders from both parties at the conclusion of the hearing. App. 80 ll. 20 – 25.

The Order of Dismissal was filed on April 24, 2020. App. 84. The PCR judge found that Petitioner's plea was voluntarily, knowingly, and intelligently entered. App. 94.

This petition follows.

## ARGUMENT

**The PCR court erred in denying relief, where Petitioner's plea was not knowingly, voluntarily, or intelligently made, where Petitioner felt coerced into pleading upon receipt of a life without parole notice.**

### Relevant facts

At the outset of the PCR evidentiary hearing, Petitioner waived his allegation of malicious prosecution. App. 56 l. 3 – 57 l. 18. The PCR court first heard from Petitioner, who noted the shortcomings in the state's evidence against him. For example, in one of the alleged burglaries, Petitioner's DNA and blood was located on a panel outside the home, but there was no evidence that Petitioner had entered the home. App. 60 ll. 9 – 19. Because there was no proof that Petitioner entered the home, Petitioner contended that plea counsel did not properly represent him. App. 60 ll. 3 – 8. Petitioner denied going in the home and indicated that the state should have perhaps charged attempted burglary. App. 62 l. 1 – 63 l. 10; App. 71 ll. 22 – 25. Plea counsel never discussed the discrepancy between the alleged facts and the required elements with Petitioner. App. 67 ll. 6 – 8.

Plea counsel suggested that Petitioner plead guilty, not based on the evidence in the case, but based on Petitioner's prior criminal record. App. 61 ll. 4 – 25. Petitioner testified that was the sole reason he pled guilty: his prior history. App. 63 ll. 11 – 16. He believed he would be convicted based on his prior record. Id.; App. 73 ll. 15 – 24.

Petitioner had been served with a life without the possibility of parole notice. App. 63 l. 17 – 64 l. 4. But for the LWOP notice, Petitioner would not have pled guilty. App. 74 ll. 8 – 10. The following exchange between Petitioner and plea counsel explained why Petitioner pled guilty:

Q: So, so you pled to these charges so you would not get a life sentence because you were worried about getting a life sentence, correct?

A: Yes, sir.

Q: And you didn't plead guilty to them based off the evidence and the facts in the case, correct?

A: Correct.

App. 64 ll. 9 – 15. Petitioner would have preferred a trial. App. 64 ll. 16 – 21.

Petitioner did not believe plea counsel was working in his best interests. App. 66 ll. 13 – 18. Petitioner suggested that plea counsel did not perform an adequate investigation into the facts in his case. App. 66 ll. 19 – 22.

Plea counsel validated Petitioner's testimony that a major deciding factor in the case was the LWOP notice. App. 76 ll. 20 – 24. Both Petitioner and plea counsel were concerned about the possibility of a life sentence. Id.

### Discussion

“There is a two-prong test for evaluating claims of ineffective assistance of counsel. First, a PCR applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness.” Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Alexander v. State, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991) ). “Second, an applicant must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Id. (citing Strickland, 466 U.S. at 687, 104 S.Ct. 2052; Alexander, 303 S.C. at 541–42, 402 S.E.2d at 485).

A PCR applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a 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 upon going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence. Rule 71.1(e), SCRPC.

A defendant who pleads guilty on the advice of counsel may collaterally attack the voluntariness of his plea only by showing that (1) counsel was ineffective and that (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he is waiving. Id. Specifically, a defendant must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Id.

“That the plea be voluntary is not only a requirement of due process, but a premise of the defendant's meaningful participation in the plea process.” United States v. Savinon-Acosta, 232 F.3d 265, 268 (1st Cir. 2000) (citing McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969)).

When determining issues relating to guilty pleas, appellate courts will consider the entire record, including the transcript of the guilty pleas and the evidence presented at the PCR hearing. Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984). Specifically, 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. Id. If there is any evidence to support the findings of the PCR judge, those findings must be upheld. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, where there is no evidence of probative value to support the findings of the PCR judge, the ruling will not be upheld. Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993).

When 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 information conveyed by the plea judge cured any possible error made by counsel. Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). The Court will uphold the PCR court's findings if there is *any* evidence of probative value to support them. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of the plea. Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991) (citing State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). To ensure the defendant understands the consequences of his guilty plea, the trial judge usually questions the defendant about the facts surrounding the crime and punishment that could be imposed. Id. at 434-435, 405 S.E.2d at 392. Although the trial court is not required to direct defendant's attention to each right and obtain a separate waiver, the record should indicate the defendant was fully aware of the consequences of the guilty plea. State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976). Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and “may be accomplished by colloquy between court and

defendant, between court and defendant's counsel, or both.” State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993). See, e.g., Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997) (guilty plea not involuntary where the colloquy demonstrated the trial judge asked defendant twice whether he understood there were no promises and that no sentencing recommendations were binding on the judge).

Plea counsel failed to perform an adequate investigation such that he was able to convey the substance of his findings to Petitioner. Without an exchange of communication and ideas, Petitioner’s plea was made without the full knowledge of the facts that would be alleged against him. In particular, he was not made aware how the evidence would relate to the elements of the charged crimes. As a result, Petitioner made a decision to plead guilty without a full understanding of what his options were. Had plea counsel explained that not all of the state’s evidence did not fit squarely within the burglary charges, Petitioner may have realized that he stood a better chance at trial than previously realized. However, because plea counsel failed to inform Petitioner of the shortcomings of the state’s evidence, Petitioner felt like he had no choice but to plead guilty. Had he been armed with the knowledge that his attorney could have provided, Petitioner likely would have gone to trial.

**CONCLUSION**

Based on the foregoing, Petitioner respectfully requests that this Court grant his petition and allow further briefing.

s/Taylor D. Gilliam  
Taylor D. Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of November, 2020.

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PETITION TO BE RELIEVED AS COUNSEL  
—————

Counsel for Larry D. Brown 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 G. Thomas Cooper, which was held on October 11, 2019, 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 Larry D. Brown.

Respectfully Submitted,

s/Taylor D. Gilliam  
Taylor D Gilliam  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 30th day of November, 2020.

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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.”

s/Taylor D. Gilliam

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Appellate Defender

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ATTORNEY FOR PETITIONER

This 30th day of November, 2020.