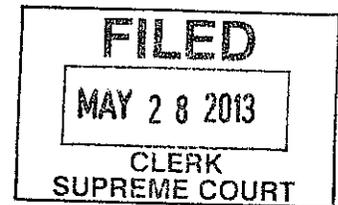


SUPREME COURT OF KENTUCKY
FILE NOS. 2011-SC-737 and 2012-SC-599



COMMONWEALTH OF KENTUCKY

APPELLANT/
CROSS APPELLEE

VS.

ON DISCRETIONARY REVIEW FROM
COURT OF APPEALS
CASE NOS. 2009-CA-080 and 2009-CA-1270

ON APPEAL FROM BELL CIRCUIT COURT
HON. JAMES L. BOWLING, JUDGE
INDICTMENT NO. 03-CR-00082

SHAWN TIGUE

APPELLEE/
CROSS APPELLANT

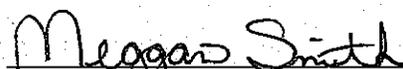
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Brief for Appellee/Cross-Appellant has been mailed via first-class postage prepaid to Hon. James L. Bowling, Jr., Farmer Helton Judicial Center, 101 Park Ave., P.O. Box 751, Pineville, Kentucky 40977; Hon. Karen Blondell, Bell County Commonwealth Attorney, P.O. Box W, Middlesboro, Kentucky 40965; Hon. W. Bryan Jones, Assistant Attorney General, Criminal Appellate Division, 1024 Capital Center Drive, Frankfort, Kentucky 40601-8204, and by registered mail to Ms. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, 700 Capital Avenue, Frankfort, Kentucky 40601-3488; all on this 23rd day of May, 2013. I further certify that the record on appeal was not checked out from the Clerk of this Court.



MEGGAN SMITH

INTRODUCTION

Shawn Tigue, Appellee/Cross Appellant, challenged his convictions and sentence pursuant to RCr 11.42, RCr 10.02, 10.06, 10.26, and CR 60.02(b), (c), (e) and (f), arguing that (1) he received ineffective assistance of counsel; (2) his plea was not knowing, intelligent, and voluntary; (3) he was denied counsel at a critical stage; (4) his counsel was acting under a conflict of interest; (5) the Circuit Court’s order denying his RCr 11.42 motion was based on perjury, fraud, and falsified evidence presented at the evidentiary hearings, and (6) his conviction must be vacated due to the Court’s failure to hold a Faretta hearing when he wanted to withdraw his guilty plea. The Court of Appeals granted Shawn relief, holding that his was denied counsel at a critical stage -- his motion to withdraw his guilty plea. See Appendix 1, Court of Appeals Opinion Remanding and Reversing. The Court did not rule on Shawn’s other claims. Thereafter, this Court granted the Commonwealth’s Motion for Discretionary Review, as well as Shawn’s Cross-Motion.

STATEMENT CONCERNING ORAL ARGUMENTS

Appellee/Cross-Appellant requests oral argument regarding all the issues due to their factual and legal complexity.

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STATEMENT OF THE CASE

A. Procedural History

Appellee/Cross-Appellant, Shawn Tigue, pled guilty to Murder, Burglary in the First Degree, Possession of Controlled Substance in the Second Degree, First Offense, Possession of Controlled Substance in the Third Degree, First Offense, and Prescription Controlled Substance Not in Original Container, First Offense, and was sentenced to life without the possibility of parole for twenty-five years. Thereafter, Shawn filed a pro se RCr 11.42 motion to vacate his conviction and sentence. In his pro se motion, Shawn raised the following claims: 1) that he was incompetent to enter a guilty plea; 2) that his guilty plea was not knowingly, intelligently, and voluntarily entered; and 3) that his trial counsel was ineffective for failing to investigate the charges against him, to challenge the admissibility of Shawn's statement to the police, and to investigate Shawn's competency to plead guilty.

The Bell Circuit Court appointed counsel to assist Shawn with his RCr 11.42 motion. Counsel offered the following supplemental grounds for granting Shawn the requested relief: 1) Shawn was deprived of his right to counsel at a critical stage of the proceeding, and 2) Shawn was denied conflict-free representation. The Court held evidentiary hearings on August 6, 2008 and September 24, 2008, but denied Shawn's RCr 11.42 motion after post-hearing briefing. T.R. Vol. II, pg. 217-225.

B. Factual Background

Shawn Tigue falsely confessed to killing Ms. Bertha Bradshaw for one very simple and understandable reason – the person who had actually murdered Ms. Bradshaw threatened to harm Shawn's family if he told anyone the truth. Shawn went into the

Bradshaw home, at the request of Danny Smith, in an effort to clean up the crime scene after Danny Smith had broken in and shot Mrs. Bradshaw. V.R. 8/6/08, 01:56:25-01:57:50. As part of this clean-up, Shawn removed several items from the Bradshaw residence, which were later found in his possession by KSP Detective Don Perry. After Shawn had helped Danny clean up the Bradshaw's home, Danny threatened to harm Shawn's family if he ever told the police that he, Danny, had killed Ms. Bradshaw. Shawn feared for his family's safety.

While Shawn was at the Bradshaws', a neighbor, Ms. Debra Bradshaw, saw his truck in the driveway. After Ms. Bradshaw's body was discovered, Debra Bradshaw informed the police about seeing Shawn's truck. Based on this information, the police stopped Shawn's truck when they saw it driving down Dorton Branch. Candace Tigue, Shawn's wife, was driving the truck and he was in the passenger seat. With weapons drawn, the police ordered Candace out of the truck and placed her in the back of a police cruiser. V.R. 8/6/08, 01:29:15-01:31:10. They then ordered Shawn out of the truck, handcuffed him, searched his pockets and the truck, and arrested him. Both Shawn and Candace were taken to the courthouse for questioning.

After initially denying any knowledge or involvement in the burglary and murder, Shawn told Det. Perry that he received the items found in his pockets and the truck from Danny Smith but that he (Shawn) did not kill Ms. Bradshaw. Det. Perry told Shawn that he was going to look into Danny Smith's involvement. Immediately after Det. Perry left the jail, Shawn attempted to call his family in order to tell them to get out of the house. V.R. 8/6/08, 01:57:00-01:58:41. Because Danny lived just next door to Shawn's family, he feared what might happen to them once Det. Perry showed up to question Danny and

Danny found out that Shawn had given his name to the police. When the jailer informed Shawn that Det. Perry had instructed the jail not to allow him any phone calls and he realized that he would not be able to warn his family, he asked the jailer to call Det. Perry and ask him to come back to the jail to take Shawn's confession. Id. Rather than risk Danny discovering that Shawn had given the police his name and following through on his threat to harm his family, Shawn falsely confessed to murdering Ms. Bradshaw. Id. He had to protect his family.

C. Pre-Trial Representation

During Shawn's first meeting with Cotha Hudson, one of his trial attorneys, and Lisa Evans, his defense investigator, he told them his confession to Det. Perry was false. V.R. 9/24/08, 11:18:00-11:18:15. Although he immediately told his defense team that his confession was false, Shawn did not initially admit that he had gone into the Bradshaw residence with Danny Smith after Danny had killed Ms. Bradshaw. Id. When Ms. Evans told him that she would be looking into the alibi he initially offered, he explained that he knew who killed Ms. Bradshaw but, still fearing for his family's safety, refused to give them Danny's name and said that he was not a rat. V.R. 9/24/08, 9:52:15-9:52:31; 11:20:45-11:21:21; V.R. 8/6/08, 2:07:15 – 2:07:29.

Although Shawn's defense team had his statement to them that he knew who killed Ms. Bradshaw and to Det. Perry that Danny Smith had provided him with items from the Bradshaw residence, they did nothing to investigate Danny's possible involvement in Ms. Bradshaw's murder. V.R. 9/24/08, 09:54:20-9:54:35; 9:55:15-9:56:16. In addition to Ms. Hudson and Ms. Evans, Lowell Lundy and Robin Wilder, a mitigation specialist, were assigned Shawn's case. To varying degrees and with various

explanations, Ms. Hudson, Ms. Evans, and Mr. Lundy acknowledged at the evidentiary hearings that little to no investigation was conducted to prepare for the guilt-innocence phase of Shawn's trial.

Mr. Lundy testified that their plan for trial was to simply put Shawn on the stand if he wanted to testify. V.R. 8/6/08, 10:15:40-10:15:57. In response to questions about what fact investigation was completed, Mr. Lundy stated "What was I supposed to investigate?" and "I'm not gonna go out here, and ya know, look all over the country to try to find a witness . . ." V.R. 8/6/08, 10:30:45-10:34:34. When asked generally about his investigation in cases involving incriminating statements by defendants, Mr. Lundy responded, "I don't know what kind of investigation you'd otherwise do." V.R. 8/6/08, 10:57:19-10:57:37.

Ms. Hudson testified that she spoke with Debra Bradshaw herself and Ms. Evans spoke with other witnesses from Dorton Branch, V.R. 9/24/08, 9:48:40-9:48:59. However, as discussed below, Ms. Evans testified that she did not speak with any witnesses. When asked why she had not requested any investigation into Danny Smith, Ms. Hudson stated "we hadn't gotten that far in the case when he settled." V.R. 9/24/08, 9:55:27-9:55:34. Ms. Hudson offered this explanation for the lack of investigation despite her later statement that she works cases "all along," V.R. 9/24/08, 9:56:30, and despite the fact that Shawn's case had been pending for ten months by the time he entered a guilty plea. Ms. Hudson testified that she believed "a full fact investigation had been done" despite being able to identify only one witness that anyone on the defense team spoke with. V.R. 9/24/08, 9:59:15.

Ms. Evans testified that, while she attempted to locate Debra Bradshaw, she did not attempt to locate or speak with any other witnesses in preparing Shawn's case for trial. V.R. 9/24/08, 11:26:39-11:26:43. Ms. Evans explained that they had to change tracks often due to Shawn changing his story a few times. However, she also acknowledged that it was very early on in the case when Shawn told them that he knew who killed Ms. Bradshaw and that he had gone into the house. Yet, even after that, she did not interview any witnesses or conduct any investigation. When working on cases with Ms. Hudson, Ms. Evans' practice was not to conduct any investigation unless requested to do so by Ms. Hudson; Ms. Hudson never requested any such investigation in Shawn's case.

While Shawn's case was pending, members of his family, at his request, asked his attorneys to speak with potential witnesses who lived on Dorton Branch and may have had information about Ms. Bradshaw's murder. V.R. 8/6/08, 11:15:00-11:16:52; 12:53:20-12:54:54. They attempted to provide a list of potential witnesses to Shawn's attorney, but the list was refused. Id. Theresa Monroe, Shawn's sister, and Faye Neal, his mother, both testified that when they tried to present the witness list to Ms. Hudson, Ms. Hudson told them that Shawn had confessed and that was all she needed and that she did not have time to talk to any other witnesses. Ms. Monroe, Ms. Neal, and Candace Tigue, all testified that Shawn's attorneys told them that he would definitely get the death penalty if he went to trial, something Ms. Hudson acknowledged telling Shawn directly. V.R. 9/24/08, 10:10:20-10:10:46.

Charles Edward Griffin was one of the witnesses on the list Shawn's family presented to his defense attorneys. V.R. 8/6/08, 11:15:00-11:16:52. At the time of Ms.

Bradshaw's death, Mr. Griffin lived across the way from the Bradshaw home on Dorton Branch. Mr. Griffin heard a gunshot around 8:30 a.m. on the morning of Ms. Bradshaw's murder, approximately two hours before Debra Bradshaw saw Shawn's truck in the Bradshaw drive. V.R. 9/24/08, 10:46:50-10:50:20. He added that it was unusual to hear gunshots during that time of year, that early in the day, and in that area. A minute to a minute and a half after Mr. Griffin heard the gunshot, he saw Danny Smith at the bottom of the Bradshaws' hill. When Danny realized that Mr. Griffin had seen him, he turned and ran back up the hill. When Mr. Griffin heard the gunshot and later when he saw Danny Smith, there were no trucks in the Bradshaws' drive. Mr. Griffin explained that he did not tell the police this information because, on the day of Ms. Bradshaw's murder, he was concerned about his wife's mental state because she had discovered Ms. Bradshaw's body, and then, later, he heard that Shawn had confessed so he did not come forward. Based on what he knows of Danny Smith and Shawn Tigue and information he has heard from other people, including allegations that Virginia Middleton, Danny's aunt, hid Danny's bloody clothes for him, Mr. Griffin worries that the wrong man is in prison for Ms. Bradshaw's murder.

Barbara Helton, another resident of Dorton Branch, testified at the evidentiary hearing that, on the day of Ms. Bradshaw's death, Danny Smith showed up at her house trying to sell pain medications. V.R. 9/24/08, 10:35:30-10:37:10. Ms. Helton explained that she did not tell the police about this because Shawn was arrested so quickly.

Shawn's defense team never spoke with either Ms. Griffin or Ms. Helton and Shawn was not aware of their potential testimony when he pled guilty.

C. Guilty Plea

Approximately a week before Shawn pled guilty, he and his family were informed about the Commonwealth's offer of Life without Parole for 25 years (LWOP/25). V.R. 8/6/08, 11:03:02-11:03:13; 1:37:20-1:38:30. From the time Shawn was informed of the plea offer until the morning he was brought to court on February 2, 2004, he consistently told his attorneys, mitigation specialist, and his family that he would not accept the Commonwealth's offer. Id.; V.R. 9/24/08, 10:01:10-10:01:50. In order to convince Shawn to take the plea deal, his defense team enlisted his wife, mother, and sister to beg him not to go to trial. Theresa Monroe, Shawn's sister, testified that everyone told her to tell Shawn to take the plea. She described the situation as "high-pressure" and "intimidating." V.R. 8/6/08, 11:13:30-11:16:19. Even though Shawn kept telling her that what the plea agreement said was a lie and that the truth would come out at a trial, Ms. Monroe told him to take the plea because he did not have anyone willing or prepared to defend him a trial.

Faye Neal, Shawn's mother, testified that she "begged" him to plead guilty because his attorneys told her he would "definitely, no question about it" get the death penalty if he went to trial. VR 8/6/08, 12:50:30-12:51:30. She added that she was afraid for him to go to trial with his defense attorneys. Ms. Neal went so far as to tell Shawn that if he went to trial, she would not be there to support him.

Candace Tigie testified that Shawn's lawyers and Robin Wilder told them he would die if he went to trial.

While Shawn's family, at the request of counsel, were pressuring him to accept the plea offer, the bailiff, Mark Wilder, also told Shawn that he should take the deal.

V.R. 8/6/08, 11:41:45-11:44:20; 12:58:50-12:59:59; 1:41:45-1:42:50. Mr. Wilder explained to him that, if he went to trial, a Bell County jury would certainly give him the death penalty. Mr. Wilder made such statements several times in the presence of Shawn's family and Robin Wilder, as well as to Shawn individually. See, T.R. Vol. I, pg. 135-138.

When asked how he felt as he was being pressured to plead guilty, Shawn responded "overpowered" and "afraid." V.R. 8/6/08, 1:55:28-1:55:40; 2:04:35-2:04:43. He explained that nobody would take no for an answer, that he felt he had no choice but to plead guilty. Robin Wilder, the mitigation specialist, even told him that he would be killing himself and his mother if he went to trial. See, T.R. Vol. I, pg. 135-138. During the course of the day, he asked the bailiff to take him back to the jail a few times in an effort to escape the pressure being put on him by his family and defense team. What finally convinced Shawn to accept the plea offer was Mr. Lundy telling him that he would not defend him at trial.

Shawn insisted to *everyone* that he would not plead guilty. But as he waited in court that day Shawn endured his family begging him to plead guilty, the bailiff repeatedly telling him that a Bell Co. jury would give him the death penalty, his attorneys repeatedly telling him he would die if he went to trial, and his attorneys ignoring his repeated requests to prepare for trial. Only after all of this did Shawn finally give in and agree to plead guilty. He was told to just answer the judge's questions "yes" when he was brought out into the courtroom. V.R. 8/6/08, 2:08:35-2:09:09. When Shawn asked the bailiff if he could ask the judge some questions, the bailiff responded that, if he tried

to ask the judge anything, he would drag him out of the courtroom kicking and screaming. Id.; See also, T.R. Vol. I, pg. 137.

Shawn was finally brought before the Court and answered the Court's questions "yes" as he had been instructed – not because he wanted to accept the plea offer, but because he felt he had no other choice. As he explained to the Court in his pre-sentencing letter, "Everytime I was hesitant answering the judge, I felt as if I'd die, or my mother would, or I would lose my wife that I so dearly love. These were the impressions I were [sic] given and at that time they felt set in stone." T.R. Vol. I, pg. 137.

The very same day that Shawn entered his guilty plea, he voiced his desire to withdraw his plea to his attorneys and family. V.R. 8/6/08, 11:21:30-11:22:55; 1:03:00-1:03:35; 1:44:25-1:44:55; 9/24/08, 10:02:20-10:02:45. He asked his mother, sister, and wife to write letters to the Court explaining what had transpired prior to him accepting the plea offer. Shawn also asked his attorneys to file a motion to withdraw his plea, but they did not. Even after the Court stated that it was concerned about some of the things in Shawn's and his family's letters, V.R. 2/26/04, Shawn's attorneys did not make a motion to withdraw his plea, nor did they move to have conflict-free counsel to file a motion to withdraw his plea for him. Instead, his attorney stood beside Shawn – knowing that Shawn desired to withdraw his plea, knowing that he felt he had not received adequate representation, and knowing that the Court was concerned – and informed the Court that he felt the evidence against Shawn was "overwhelming." V.R. 2/26/04.

Despite the compelling testimony at the evidentiary hearing, the Bell Circuit Court denied Shawn's RCr 11.42 motion. Thereafter, Mr. Tigie filed a motion pursuant to RCr 10.02, 10.06, 10.26, and CR 60.02(b), (c), (e), and (f) to vacate the order denying

his RCr 11.42 motion and the judgment of conviction and sentence against him. T.R. pgs. 10-36. In said motion, Shawn argued (1) that the Circuit Court's order denying his RCr 11.42 motion was based on perjury, fraud, and falsified evidence presented at the evidentiary hearings and (2) that his conviction must be vacated due to the Court's failure to hold a Faretta hearing when Shawn wanted to withdraw his guilty plea at his final sentencing hearing. Specifically, Shawn's motion contended that his trial counsel provided the Circuit Court with false testimony when they testified that fibers from Shawn's shirt matched fibers found at the crime scene. Shawn submitted lab reports showing that the fibers from Shawn's shirt *did not* match the fibers found at the scene. T.R. pgs. 53-54. The Circuit Court denied said motion without a hearing by order entered June 2, 2009. T.R. pgs. 164-169.

On appeal of Shawn's RCr 11.42 and CR 60.02 motions, the Court of Appeals reversed the Circuit Court and remanded Shawn's case for a new trial based on the deprivation of counsel when Shawn wanted to withdraw his plea. See Appendix 1. The Commonwealth's Motion for Discretionary Review was granted, as was Shawn's cross-motion. This appeal follows. Further facts will be developed as necessary.

ARGUMENT I

The Court of Appeals Correctly Held that Shawn Was Denied His Right to Counsel, as Protected by the Sixth and 14th Amendments to the U.S. Constitution and Sections Seven and Eleven of the Kentucky Constitution, When He Was Denied the Assistance of Counsel at a Critical Stage in the Proceeding

On February 26, 2004, the day of Shawn's sentencing, Shawn indicated to the court that he wanted to withdraw his guilty plea. He informed the court that the only reason he pled guilty was because his trial attorneys had told him that he was going to die

if he went to trial. The Court indicated that some of the things contained in letters from Shawn and his family caused him concern, but he expected to discuss those issues at a later date. Although Shawn indicated his desire to withdraw his plea, his attorney did not make a motion to withdraw his guilty plea. In fact, rather than endorsing Shawn's wish to withdraw his plea, counsel stated to the Court that he felt the evidence against Shawn was overwhelming. Despite the concerns about counsel's representation that were raised, Shawn was not appointed counsel to present his motion to withdraw his plea to the court, and therefore, Shawn was unconstitutionally denied the assistance of counsel at a critical stage of the proceeding against him.

In denying this claim, the Circuit Court simply stated, "The Court need not determine the substantive merits of the Movant's claim here, because the Court has been provided with no authority from either the 6th Circuit or the state of Kentucky that would suggest that a motion to withdraw a guilty plea is a critical stage of a proceeding." T.R. Vol. II, pg. 223. The Court of Appeals reversed, holding, "we hold that Tigue was deprived of counsel at a critical stage of the proceeding when counsel either *refused* or *failed* to file a motion to withdraw Tigue's guilty plea. Appendix 1, p. 14 (emphasis in original).

A. The Question of Whether a Motion to Withdraw a Guilty Plea is a "Critical Stage" is not Preserved for Review

Despite the fact that the Commonwealth did not ask in their Motion for Discretionary review that this Court review the Court of Appeals' holding that a motion to withdraw a guilty plea is a critical stage, the Commonwealth argues in their brief that it is not. Brief for Commonwealth, pgs. 11-12. The Questions of Law presented to this Court were:

QUESTION 1

If a motion to withdraw a guilty plea is a critical stage of the proceedings requiring counsel for the Respondent, and the Respondent was found by the Court of Appeals to have been denied counsel at that stage, is the appropriate remedy a remand for a new trial or a remand for a hearing on the motion to withdraw the guilty plea with the benefit of counsel for the Respondent, without invalidating the Respondent's guilty plea?

QUESTION 2

If a motion to withdraw a guilty plea is a critical stage of the proceedings, did the Court of Appeals correctly hold that the Respondent did not have benefit of counsel at the motion to withdraw his guilty plea?

Commonwealth's Motion for Discretionary Review, p. 5.

Because the question of whether a motion to withdraw a guilty plea is a "critical stage" is not preserved for this Court's review, Appellee has filed a motion, simultaneous to the filing of this Brief, to strike pages 11-12 of Appellant's Brief. Should the Court determine that this question is preserved for review, Appellee requests an opportunity to file supplemental briefing on this question.

B. Shawn Was Without Counsel When He Attempted to Withdraw His Guilty Plea

Appellee argues that Shawn had counsel when he attempted to withdraw his guilty plea: "[A]ll of [the cases cited by the Court of Appeals] were different from Tigue's case, as the defendants in these matters all filed *pro se* motions to withdraw their pleas and did not have the assistance of counsel at any hearings that may have been held, while Tigue had counsel present." Brief for Commonwealth, p. 12. In fact, the Circuit Court found – twice – that Shawn had made a motion to withdraw his guilty plea without the assistance of counsel. At Shawn's sentencing hearing, where he attempted to withdraw his guilty plea, the Circuit Court referred to the motion to withdraw his plea as

“*pro se.*” V.R. 2/26/04, 10:03:53-10:04:10. In its order denying Shawn’s RCr 11.42 motion, the Circuit Court stated, “The Movant communicated this desire to the Court, and the Court denied his motion to withdraw his guilty plea.” T.R. Vol. II, p. 222. The Circuit Court clearly did not act as if Shawn was represented in his efforts to withdraw his plea.

Additionally, given the nature of the concerns raised by Shawn at his sentencing hearing and in the letters to this Court, Mr. Lundy was prevented by a conflict of interest from adequately representing Shawn. Denial of conflict-free counsel amounts to the complete denial of counsel. See, United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039, 40 L.Ed.2d 657 (1984). Because Shawn alleged to the trial court that he had been coerced into taking the plea deal by threats from his trial attorneys and by his attorneys’ failure to prepare his case for trial, his trial attorneys could not vigorously argue Shawn’s position to the court. This actual conflict was made quite clear by counsel’s statement, while Shawn was informing the Court about his desire to withdraw his plea, that the evidence against Shawn was overwhelming. Even if somehow Mr. Lundy’s physical presence in the courtroom while Shawn informed the Court that he wanted to withdraw his plea amounts to having “counsel present,” Brief for Commonwealth, p. 12, Shawn was denied *conflict-free* counsel and therefore was still denied his rights under the Sixth and Fourteenth Amendments. See Argument IV below.

At the sentencing hearing, the Court remarked that some of the things that Shawn and his family had brought to the Court’s attention were concerning. During the August 6, 2008 evidentiary hearing on Shawn’s RCr 11.42 motion the Court noted that it had a strong sense, while the charges were pending against Shawn, that he was not being well

attended by his attorneys. Shawn needed, and was constitutionally entitled to, the assistance of counsel to adequately present his grievances to the Court in his efforts to withdraw his guilty plea. The Court of Appeals was correct in finding, as the Circuit Court had, that Shawn was without such assistance.

C. Because a Sufficient Record Exists in Shawn's Case, Remand for a Hearing on His Motion to Withdraw His Guilty Plea is Unnecessary¹

The Commonwealth argues that the remedy in Shawn's case should be a remand for a hearing on his motion to withdraw his plea. While that would be true if there was no record upon which to determine whether Shawn's motion to withdraw his plea should have been granted, there is a sufficient record in Shawn's case. The Circuit Court held an evidentiary hearing on Shawn's RCr 11.42 motion, where Shawn was represented by counsel and information relevant to Shawn's motion to withdraw his plea was presented. The Court of Appeals considered that record when determining that Shawn's convictions and sentence should be reversed. Therefore, a hearing on Shawn's motion to withdraw his plea is just such an "unnecessary step" that should "be eliminated from the criminal justice process" when "judicial economy dictates." Brief for Commonwealth, p. 21.

As the Court of Appeals' recitation of the Factual and Procedural Background of Shawn's case makes clear, the Court was well aware of what evidence would be presented at any hearing it ordered to be held on remand:

Tigue regretted pleading guilty immediately upon returning to the jail. Tigue and his wife testified that they made numerous attempts to contact trial counsel to withdraw his plea. Tigue testified that when he finally spoke with counsel, his counsel refused to make a motion to withdraw his plea. Subsequently, on the day of sentencing, Tigue advised the court that he wished to withdraw his plea. He stated that he had not reviewed the

¹ If this Court determines that the Court of Appeals' remedy was inappropriate, Appellee/Cross-Appellant asks this Court to remand for the Circuit Court to hold a hearing on his motion to withdraw his guilty plea, where he will have conflict-free counsel.

presentence investigation report, nor had he cooperated with the investigating officer. Tigue advised the court that his plea had not been voluntary because Danny Smith had threatened his family with harm and he had been coerced into taking the plea. He further explained that his fear or receiving the death penalty caused him to lie to the court about his involvement in the death of Ms. Bradshaw. The court was presented with letters written by both him and his wife explaining that defense counsel, the court bailiff, the mitigation specialist, as well as Tigue's mother, all urged him to plead guilty to avoid the death penalty. Tigue further advised the court that he had asked his counsel to move the court to withdraw his plea, although counsel had not done so.

Because no written motion to withdraw the plea had been filed, the court denied Tigue's oral motion to withdraw his plea, which the court treated as a *pro se* oral motion. The court thereafter proceeded with sentencing.

The hearing on [Shawn's] RCr 11.42 motion was held on August 6 and September 24, 2008. Tigue testified at the hearing that when he broke into Ms. Bradshaw's home, she was already dead. He further testified that he was only at Bradshaw's home to help Danny Smith clean up after the murder. Tigue admitted to taking items from the house at this time. Tigue testified that he only confessed to the murder of Ms. Bradshaw because Danny Smith threatened to harm his family members. Tigue testified that it was Danny Smith, rather than himself, who murdered Ms. Bradshaw.

Tigue testified that he explained to counsel that he was not the murderer and he asked counsel to speak to all of the residents on Dorton Branch Road. Tigue stated that his trial attorneys coerced him into pleading guilty and that one of the trial attorneys appointed for him by the Department of Public Advocacy ("DPA"), Lowell Lundy, went so far as to say he would not represent him in a trial. Tigue testified that he reviewed the plea offer with Robin Wilder, a mitigation specialist hired by the defense, prior to the plea date. Tigue told Wilder that the statement on the plea sheet was a lie. Tigue further testified that he was urged to plead guilty by his mother, wife, sister, and a court bailiff.

The neighbor, Edith Griffin's husband Charles Griffin, upon being interviewed by police, advised that he heard a gunshot from Ms. Bradshaw's property on the morning of the murder. He testified that only a couple of minutes later, he saw an individual named Danny Smith standing on Bradshaw's property. Charles testified that when Smith saw him, he ran away. Charles testified that the only vehicle in the driveway at the time he saw Danny on the property was Ms. Bradshaw's vehicle. Tigue's vehicle was not present at this time. Charles's testimony tended

to corroborate Tigue's theory of the case, although Charles had not previously given police this information. Charles testified that he did not previously give police this information, *at first*, because he was concerned about his wife's mental state after finding their neighbor's dead body, *and then later*, because he heard police had already picked up Tigue and that Tigue had confessed. Tigue's counsel did not speak to Charles or other neighbors with possible information after Tigue was arrested or during the ten months he say in jail prior to accepting a plea. Thus, this information was first brought to light at the hearing.

Testimony at the hearing indicated that it was approximately two hours after Charles heard the gunshot when other neighbors saw a maroon truck in the victim's driveway, ostensibly belonging to Tigue. This information had been supplied to the police on the day of the murder.

Lowell Lundy testified at the post-conviction hearing concerning his involvement in the plea negotiations. Unfortunately, time had dulled Lundy's memory as to many events. He remembered telling Tigue that the case was "as bad a one as [he]'d ever been involved in." Lundy explained that he did not feel he had *any trial strategy*, other than allowing Tigue to take the stand and simply tell his side of the story. When asked whether further investigation would have been undertaken if Tigue had not pled guilty, Lundy answered, "I don't really know what else there was to do about his case other than to let the jury hear what he's said he'd done." Lundy did not feel he should have interviewed witnesses on Dorton Branch Road. When asked what factual investigation he generally undertook in cases where defendants had given incriminating statements to police, he said, "I don't know what kind of investigation you'd otherwise do."

Lundy denied ever telling Tigue he had to plead guilty. Lundy further testified that he did not *think* Tigue asked him to withdraw his plea, although he could not specifically "recall it." When asked what his typical practice was when a defendant asked to withdraw a guilty plea, he said, "I don't think it's ever happened to me, so I can't tell you." Lundy had just previously testified that he had practiced law for fifty-one years, mostly in criminal defense.

When asked what investigation was undertaken in preparation for the guilt phase of trial, Lundy said, "What was I supposed to investigate?" He continued by saying that, "[Tigue] walked into a woman's house and he took a shotgun and shot her and got her pills. Now what do you need to investigate about that?" When asked whether potential witnesses were identified for him to investigation, he said, "there were no witnesses other than [Tigue]. He was the only one there." Lundy added, "I don't know who I would talk to," and "it was a one-man job."

Cotha Hudson, Tigue's other trial attorney, also testified at the hearing. She testified that Tigue told her early on that he did not commit the murder although he knew who did. Nonetheless, Tigue had informed her that he would not be "a rat" and tell her the person's name. Hudson described Tigue as being uncooperative during the plea process. She testified that Tigue's family could not provide him with an alibi and that Tigue refused to provide counsel with the name of the alleged killer. Hudson testified that no investigation was undertaken concerning other suspects because they had not "gotten that far along" in the case, although Hudson also testified that they normally "work" the cases "all along" and that a "full investigation" had been undertaken in Tigue's case. Hudson testified that the only thing she thought she could try to do was to try to prevent Tigue from being executed. Hudson testified that she was out of town when Tigue pled guilty and that she was not present during sentencing. However, Hudson testified that she knew Tigue had called the DPA office and left a message requesting to withdraw his plea.

Lisa Saylor Evans, an investigator for the DPA, testified at the hearing that Tigue told them his confession to the police was false, although his story had changed several times concerning the true events of that day. Evans testified that Tigue eventually told them that he went into Ms. Bradshaw's home alone, that he found Ms. Bradshaw already dead, and that he stole several items from her home. Evans testified that one Tigue decided to plead guilty, no further investigation was undertaken.

Appendix 1, p. 5-10.

Such testimony from the post-conviction hearings was sufficient for the Court of Appeals, or this Court, to determine that Shawn's motion to withdraw his guilty plea would have been granted if he had the assistance of counsel and a hearing on the motion. RCr 8.10 states that "[a]ny time before judgment the court may permit the plea of guilty . . . to be withdrawn and a plea of not guilty substituted." The American Bar Association has formulated the following standard for trial courts ruling on requests to withdraw guilty pleas:

After entry of a plea of guilty . . . and before sentence, the court should allow the defendant to withdraw the plea for any fair and just reason. In determining whether a fair and just reason exists, the court should also weigh any prejudice

to the prosecution caused by reliance on the defendant's plea.

ABA Standards for Criminal Justice 14 2.1(a) (3d ed. 1999).

Shawn's request to withdraw his guilty plea was made before he was sentenced and before final judgment was entered. The overwhelming evidence presented at Shawn's evidentiary hearing that his attorneys had conducted little to no investigation, that his family, defense team, and a bailiff pressured him to plead guilty, and that he immediately wanted to withdraw his plea surely amounts to a "fair and just" reason for granting Shawn's motion to withdraw his guilty plea.

Once Shawn established a "fair and just" reason for withdrawing his guilty plea, the burden shifted to the prosecution to establish what, if any, prejudice resulted from its reliance on his guilty plea. There is simply no suggestion that the Commonwealth relied in any way to its detriment on Shawn's guilty plea, nor had the prosecution been substantially prejudiced by any such reliance.

"Society cannot be harmed by withdrawal of the plea by the defendant as he is not set free but instead must proceed to run the gauntlet of a trial with the attendant risk of the maximum punishment prescribed by statute." Kennedy v. Commonwealth, 962 S.W.2d 880, 882 (Ky. App. 1997). As the Kentucky Supreme Court stated in Haight v. Commonwealth, 938 S.W.2d 243, 250 (Ky. 1996), when a guilty plea is withdrawn the slate is "wiped [] clean" and all involved are restored to "the status quo immediately after the indictment."

When, as here, the defendant moves to withdraw his guilty plea before sentencing, establishes a "fair and just" reason for doing so, and the prosecution has not relied to its detriment on the guilty plea, "the courts should show solicitude for a

defendant who wishes to undo a waiver of all the constitutional rights that surround the right to trial – perhaps the most devastating waiver possible under our Constitution.” Dukes v. Warden, 406 U.S. 250, 92 S.Ct. 1551, 1555 (1974) (Stewart, J. concurring).

The Court of Appeals did nothing more than this.

ARGUMENT II

Shawn Was Denied His Right to Effective Assistance of Counsel, as Protected by the Sixth and 14th Amendments to the U.S. Constitution and Sections Seven and Eleven of the Kentucky Constitution When His Counsel Failed to Investigate the Charges Against Him

This issue was preserved by Shawn’s pro se RCr 11.42 motion and counsel’s supplement. T.R. Vol. I, pg. 55-79, 126-150. Because it granted relief on another issue, the Court of Appeals did not address this claim. Ineffective assistance of counsel claims are mixed questions of law and fact which this Court reviews *de novo*.

The Circuit Court held that “the fact that the defense team did not investigate Danny Smith is not sufficient to satisfy even the first prong of the Strickland inquiry.” T.R. Vol. II, pg. 218. “Nevertheless, if the Court were to assume, for the sake of argument, that trial counsel had acted unreasonably, the Movant is unable to meet the second element of the Strickland analysis. The only evidence the Movant is able to offer regarding the involvement of Danny Smith is highly circumstantial.” T.R. Vol. II, pg. 220. Contrary to the Circuit Court’s holding, the evidence presented at the RCr 11.42 evidentiary hearing established both that trial counsel’s performance was deficient and that Shawn was prejudiced by counsel’s failure to investigate.

In order to show ineffective assistance of counsel, Shawn must show: 1) that counsel’s representation was deficient in that it fell below an objective standard of

reasonableness, measured against prevailing professional norms, and 2) that the defendant was prejudiced by his attorney's deficient performance. Strickland v. Washington, 466 U.S. 668 (1984); see, Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1986) (adopting Strickland standard). To determine whether counsel's performance was deficient, a court "must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" Wiggins v. Smith, 539 U.S. 510, 523 (2003) (quoting, Strickland at 688).

Prejudice results if there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Strickland. In the context of a guilty plea, prejudice results if there is a reasonable probability that, but for counsel's deficient performance, the defendant would not have plead guilty, but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). When determining whether prejudice resulted from counsel's deficient performance, the appropriate question is whether counsel's conduct so undermined the proper functioning of the adversarial process that the court cannot be confident that the outcome of the proceeding against Shawn would have been the same. Thompson v. Commonwealth, 177 S.W.3d 782 (Ky. 2005). The test is not whether it is more likely than not that the outcome would have been different, Glenn v. Tate, 71 F.3d 1204, 1210-1211 (6th Cir. 1995), but "whether counsel's conduct so undermined the functioning of the adversarial system that the [proceeding] cannot be relied on as having produced a just result." Strickland at 687.

Shawn's counsel's failure to perform an adequate investigation into the charges against him amounted to ineffective assistance of counsel. Pre-trial investigation and preparation are widely recognized as fundamental parts of defense counsel's duty to his client. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and the penalty in the event of conviction." The American Bar Association Standards for Criminal Justice, 2d Edition, The Defense Function, Standard 4-4-1 (1980). "Adequate preparation by an attorney employed by one charged with a crime includes full consultation with his client, interviews of prospective witnesses, study of the facts and law applicable thereto, and the determination of the character of defense to be made and the policy to be followed during a trial." Morgan v. Commonwealth, 399 S.W.2d 725, 726 (Ky. 1966). Failure to fulfill this duty is deficient performance. Austin v. Bell, 126 F.3d 843 (6th Cir. 1997). This is no less true in the context of advising a client to plead guilty than in the context of representing a client at trial. See, Dando v. Yukins, 461 F.3d 791 (6th Cir. 2006).

While counsel's failure to investigate could be a reasonable strategic decision in some circumstances, "counsel's failure to investigate key evidence or to make a reasonable decision that particular investigation is not necessary constitutes ineffective assistance, and thus precludes an argument that counsel's course of action was based on a legitimate strategic choice. In such circumstances, it is not possible to discern strategy in counsel's omissions, only negligence." Lewis v. Alexander, 11 F.3d 1349, 1353 (6th Cir. 1993) (internal citations omitted). Counsel cannot simply make a determination that

investigation is unnecessary based on an assumption that the investigation would not turn up anything helpful.

As evidenced by Ms. Hudson and Mr. Lundy's testimony at the evidentiary hearing, Shawn's attorneys felt investigation would be futile because Shawn had confessed to killing Ms. Bradshaw. However, Shawn's confession to Det. Perry did not eliminate trial counsel's obligation to investigate the charges against him. Even voluntary confessions are fallible.² As scientific studies have confirmed, false confessions, even if they are determined to be voluntary for admissibility purposes, are provoked by any number of circumstances, including the manner of interrogation and the psychological attributes of a criminal suspect. People might voluntarily give a false confession for reasons including a pathological desire for attention or notoriety; a conscious or unconscious need to expiate feelings of guilt resulting from unrelated transgressions; an inability to distinguish fact from fantasy; the perception of tangible gain; **a desire to aid and protect the real criminal; and the desire to protect a parent, child, or other individual.** See, Kassin & Gudjonsson, *True Crimes, False Confessions: Why Do Innocent People Confess to Crimes They Did Not Commit?*, *Scientific American Mind*, 24-31 (June 2005). See also, Judith Graham, *Experts See Red Flags in Confession*, *Chicago Tribune*, Aug. 20, 2006, at C-3.

As evidenced by the numerous cases of exoneration where the exonerated individual falsely confessed to the crime, see, Gross et al., *Exonerations in the United States 1989 through 2003*, 95 *J. Crim. Law & Criminology* 523 (2005), confessions rendered by innocent suspects are not readily detected or corrected by prosecutors, courts,

² Mr. Tigue does not stipulate the voluntariness of his confession. However, even assuming that Mr. Tigue's confession was voluntary, his attorneys still had an obligation to investigate the charges against him.

or jurors who may mistakenly credit them with truthfulness. The inability to differentiate between true and false confessions can be attributed to two factors. First, because people tend to behave in self-serving ways, it is natural to conclude that confessions must be particularly indicative of guilt because they represent statements that go against the suspect's self-interest. Second, numerous scientific experiments have shown that people – including police, psychologists, judges, and other supposed experts – are not adept at detecting deception and struggle to accurately distinguish truth from untruth. See, Bond & DePaulo, *Accuracy of Deception Judgments*, 20 Personal. Soc. Psychol. Rev. 214 (2006).

With no reliable way to determine if Shawn's confession was true or false, his attorneys should not have washed their hands of his case simply because he had confessed. If Shawn's counsel had taken the time to investigate his case and show Shawn that they were committed to helping him, they could have discovered that he had confessed to Det. Perry in order to protect his family from Danny Smith. As confirmed by other witnesses, Danny Smith was a violent man, who Shawn knew to have shot and killed Ms. Bradshaw. After he helped Danny clear the crime scene, Danny threatened to harm his family if he told the police about Danny's involvement. When Shawn was unable to warn his family after he gave Danny's name to Det. Perry, he chose to confess rather than risk harm to his family.

Even though Shawn's counsel knew about his initial statement to Det. Perry implicating Danny Smith and about his statements to them that his confession was false, his attorneys simply assumed that his final statement to Det. Perry was the truth and decided any investigation would have been futile. In fact, if Shawn's attorneys had

spoken with Mr. Griffin and Ms. Helton they would have discovered evidence that corroborated his contention that Danny Smith shot and killed Ms. Bradshaw and Shawn went into the house later to help clear the crime scene. Mr. Griffin heard a gunshot from the direction of the Bradshaw residence approximately two hours before Debra Bradshaw saw Shawn's truck in the Bradshaw driveway. A minute to a minute and a half after hearing the shot, Mr. Griffin saw Danny Smith at the bottom of the Bradshaw hill. Later that afternoon, Danny showed up at Ms. Helton's house trying to sell pain medication, which could have been stolen from the Bradshaw home. The evidence offered by Mr. Griffin and Ms. Helton, both relatives of Danny Smith, corroborates Shawn's contention that he went to the Bradshaw house after Danny Smith had already shot and killed Ms. Bradshaw and that both he and Danny took items from the Bradshaw residence.

As a partial explanation as to why they had not investigated Shawn's case, Ms. Hudson stated that he was not cooperating with them and refused to tell them who had actually killed Ms. Bradshaw. However, Ms. Hudson also acknowledged that she deals with uncooperative clients frequently, but must investigate their cases in spite of their failure to cooperate. In Shawn's case, however, that investigation was not performed. As evidenced by his willingness to come forward with what he knew once post-conviction investigation had found other witnesses to corroborate his statements, Shawn was not refusing to cooperate with his trial attorneys out of stubbornness, but out of fear that he was the only person who could implicate Danny Smith in Ms. Bradshaw's murder. If his trial attorneys had conducted the investigation they were obligated to conduct, they would have found evidence to corroborate Shawn's statement to Det. Perry that Danny Smith was guilty of murdering Ms. Bradshaw and, once he was no longer the only

witness implicating Danny, Shawn would have confirmed that Danny was the true killer. Instead, he remained in fear for his family's safety, his attorneys failed to investigate the charges against him, and, as a result, he felt he had no choice but to plead guilty.

In the order denying Shawn's RCr 11.42 motion, the Circuit Court pointed to several factors that supposedly justified the lack of investigation conducted by Shawn's trial counsel. First, the Court stated, "Mrs. Cotha Hudson, one of the Movant's trial attorneys, testified that she talked to witnesses in Dorton Branch, examined the evidence that was provided in discovery, and investigated the Defendant's medical and educational history." T.R. Vol. II, pg. 218. However, Mrs. Hudson testified at the hearing that she spoke with *one* witness, Debra Bradshaw, not "witnesses." V.R. 9:48:40-9:48:59. Additionally, simply reviewing the discovery provided by the Commonwealth does not amount to investigation. As a trial attorney, the discovery tells you where to start your investigation; it does not complete your investigation.

The Court also noted that "Movant had knowledge of a second point of entry that only the person who originally entered the house would have known about." T.R. Vol. II, pg. 219. There was no evidence in the record to support the Court's finding that only the person who *originally* entered the house would have known about the damage to the second door in the victim's home. Shawn acknowledged at the evidentiary hearing that he entered Mrs. Bradshaw's house after Danny Smith had murdered her. V.R. 1:56:25-1:57:50. Clearly, he could have gained the knowledge about the second door when he entered the house *after* Mrs. Bradshaw had been killed.

The Court lastly noted that "[T]he shirt [Shawn] turned over to Ofr. Perry contained fibers that matched the ones found in Mrs. Bradshaw's window." T.R. Vol. II,

pg. 219. There was no evidence in the record to support this finding, and this finding is actually directly contradicted by the lab report turned over to Shawn's trial attorneys in discovery. T.R. pgs. 53-54. None of the factors laid out by the Circuit Court justified Shawn's attorneys' failure to investigate the case against him.

Shawn's attorneys' failure to investigate amounted to deficient performance and he was unquestionably prejudiced by their failure to discover the evidence offered by Mr. Griffin and Ms. Helton. While the Court noted that this evidence was circumstantial, if his attorneys had discovered such evidence, Shawn would not have pled guilty but would have insisted on going to trial. See, Hill, supra.

ARGUMENT III

Shawn Was Denied Due Process of Law, As Protected by the Fifth and 14th Amendments to the U.S. Constitution and Sections Seven and Eleven of the Kentucky Constitution When the Court Failed to Ensure His Guilty Plea Was Knowingly and Voluntarily Made

This issue was preserved by Shawn's pro se RCr 11.42 motion. T.R. Vol. I, pg. 55-79. Because it granted relief on another issue, the Court of Appeals did not address this claim.

Shawn's guilty plea was not voluntarily entered into, but, rather, was the result of undue pressure put on Shawn by his defense attorneys through their inadequate preparation and their use of his family. When a reviewing court analyzes the constitutionality of a guilty plea, it must determine whether the defendant had a full understanding of what the plea meant and of its consequences. Boykin v. Alabama, 395 U.S. 238, 243-244, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The guilty plea must represent a "voluntary and intelligent choice among the alternative courses of action open to the

defendant.” North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). See also, Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

“Due process requires a trial court to make an affirmative showing, on the record, that a guilty plea is voluntary and intelligent before it may be accepted.” Edmonds v. Commonwealth, 189 S.W.3d 558, 565 (Ky. 2006). This Court has analyzed the nature of guilty pleas and determined that

The validity of a guilty plea must be determined not from specific key words uttered at the time the plea was taken, but from considering the totality of circumstances surrounding the plea. These circumstances include the accused’s demeanor, background, and experience, and whether the record reveals that the plea was voluntarily made.

Centers v. Commonwealth, 799 S.W.2d 51, 54 (Ky.App. 1990). See also, Sparks v. Commonwealth, 721 S.W.2d 726 (Ky.App. 1986).

The proper allocation of burdens of proof in Kentucky for Boykin hearings is set out in Dunn v. Commonwealth, 703 S.W.2d 874, 876 (Ky. 1985):

The presumption of regularity of judgment shall be sufficient to meet the original burden of proof. [Then], the burden shifts to the defendant to show any infringement of his rights or irregularity of procedure upon which he relies, such as those set out in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), or other pertinent cases. If the defendant presents evidence, through his testimony or other affirmative evidence, which refutes the presumption of regularity, the burden then falls to the Commonwealth to prove that the underlying judgments were entered in a manner which did, in fact, protect the rights of the defendant. A silent record simply will not suffice.

In the instant case, the Boykin colloquy conducted by the Court with Shawn is insufficient evidence of the voluntariness of Shawn's guilty plea when weighed against the overwhelming evidence of the pressure that was placed on him to plead guilty. Shawn's defense team used his family members to "beg" him to plead guilty rather than proceed to trial. When asked how he felt as he was being pressured to plead guilty, Shawn responded "overpowered" and "afraid." V.R. 8/6/08, 1:55:28-1:55:40; 2:04:35-2:04:43. He explained that nobody would take no for an answer, that he felt he had no choice but to plead guilty.

Shawn insisted to *everyone* that he would not plead guilty. But as he waited in court that day Shawn endured his family begging him to plead guilty, the bailiff repeatedly telling him that a Bell Co. jury would give him the death penalty, his attorneys repeatedly telling him he would die if he went to trial, and his attorneys ignoring his repeated requests to prepare for trial. Only after all of this did Shawn finally give in and agree to plead guilty.

He was told to just answer the judge's questions "yes" when he was brought out into the courtroom. V.R. 8/6/08, 2:08:35-2:09:09. When he asked the bailiff if he could ask the judge some questions, the bailiff responded that, if he tried to ask the judge anything, he would drag him out of the courtroom kicking and screaming. Shawn was brought before the Court and answered the Court's questions "yes" as he had been instructed, not because he wanted to accept the plea offer, but because he felt he had no other choice. As he explained to the Court in his letter, "Everytime I was hesitant answering the judge, I felt as if I'd die, or my mother would, or I would lose my wife that I so dearly love. These were the impressions I were [sic] given and at that time they felt

set in stone.” T.R. Vol. I, pg. 137. A Boykin colloquy conducted under such circumstances clearly does not evidence a voluntary plea of guilty.

The same day that Shawn entered his guilty plea, he voiced his desire to withdraw his plea to his attorneys and family. V.R. 8/6/08, 11:21:30-11:22:55; 1:03:00-1:03:35; 1:44:25-1:44:55; 9/24/08, 10:02:20-10:02:45. He also indicated his desire to withdraw his plea in letters to the Court before his final sentencing. Even after the Court stated that it was concerned about some of the things in Shawn’s and his family’s letters, he was not allowed to withdraw his plea.

In finding that Shawn’s plea was knowing, intelligent, and voluntary, the Circuit Court noted that “[Shawn] was possessed of a more than adequate natural intelligent as well as prior experience in entering a felony level plea.” T.R. Vol. II, pg. 222. The fact that Shawn has entered a guilty plea in the past is totally irrelevant to whether his will was overborne *in this case*. Shawn’s claim that his plea was not knowing, intelligent, and voluntary was based on the pressure put on him by his defense team and his family, at the behest of his defense team. Whether any prior pleas entered by Shawn were knowing, intelligent, and voluntary sheds no light on whether *this plea* was. Given the totality of the circumstances, Shawn’s plea cannot be considered a knowing, intelligent, and voluntary plea.

ARGUMENT IV

Shawn Was Denied His Right to Counsel, as Protected by the Sixth and 14th Amendments to the U.S. Constitution and Sections Seven and Eleven of the Kentucky Constitution When He Was Denied Conflict-Free Counsel

This issue is preserved by counsel's supplement to his RCr 11.42 motion. T.R. Vol. I, pg. 126-150. Because it granted relief on another issue, the Court of Appeals did not address this claim. The Court reviews issues of conflict of interest *de novo*.

As discussed above under Argument I, Shawn attempted to withdraw his guilty plea at his sentencing hearing, informing the Court that he plead guilty as a result of his trial attorneys' coercion and threats. Even after informing the Court of his concerns about the representation he received from his attorneys, Shawn was not appointed conflict-free counsel to represent him in his efforts to withdraw his guilty plea. The Circuit Court held, "The Court has seen no evidence of any conflict of interest on the part of the Movant's trial counsel." T.R. Vol. II, pg. 223. However, it was quite evident at Shawn's sentencing hearing, and from the very nature of the request to withdraw his plea, that Shawn's counsel was operating under a conflict of interest.

The United States Supreme Court has held that the Sixth Amendment right to effective assistance of counsel contemplates representation by fully independent counsel, free of any conflicts of interest posing a risk to the quality of representation. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942). When raising a conflict of interest claim pursuant to the Sixth Amendment to the U.S. Constitution, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348, 100

S.Ct. 1708, 64 L.Ed.2d 333 (1980). Once he has made such a showing, a defendant does not need to demonstrate prejudice in order to obtain relief. *Id.* at 349-350.

Shawn's counsel was unquestionably operating under a conflict of interest. If trial counsel had vigorously presented Shawn's concerns to the Court, he would also be implicating himself in improper pressure to induce a client to plead guilty and in a failure to properly prepare his client's case for trial. Because Shawn's efforts to withdraw his guilty plea were adversely affected by his attorney's conflict of interest, his conviction violates Sections 2, 7, 11, and 17 of the Kentucky Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. *See, Cuyler, supra.*

ARGUMENT V

The Circuit Court Erred in Denying Shawn's CR 60.02 Motion to Vacate on Procedural Grounds

This issue was preserved by Mr. Tigue's pro se motion to vacate. T.R. pgs. 10-36. Because it granted relief on another issue, the Court of Appeals did not address this claim.

The Circuit Court denied Mr. Tigue's motion to vacate on two separate procedural grounds. However, neither ground was sufficient to deny the motion.

A. Appropriateness of CR 60.02

The Circuit Court held that "from a procedural standpoint, the claims that the Movant's trial attorneys perjured themselves and/or offered false evidence are not appropriate for resolution here [in a 60.02 motion]." T.R. pg. 165. The Circuit Court interpreted Mr. Tigue's motion as an improper attempt to relitigate his RCr 11.42 motion. To the contrary, CR 60.02 specifically provides for claims such as Cross-Appellant's:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its **final judgment, order, or proceeding** upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) **perjury or falsified evidence**; (d) **fraud affecting the proceedings**, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

CR 60.02.

CR 60.02 replaced the common law writ of *coram nobis* and is intended to allow parties to bring errors before the court that were unknown at the time the judgment was entered. Davis v. Home Indemnity Co., 659 S.W.2d 185 (Ky. 1983) Its relation to post-conviction matters is summed up well in the United States Supreme Court case of Gonzalez v. Crosby, 545 U.S. 524 (2005), which interpreted the federal analog of CR 60.02. In Gonzalez, the Court discussed the relationship between F.R.C.P. 60(b) and a federal habeas corpus action. Specifically, it was confronted with the issue of whether a 60(b) motion constituted a successive habeas corpus petition. It decided that the key distinction was whether the motion raised a claim and concluded:

When no "claim" is presented, there is no basis for contending that the Rule 60(b) motion should be treated like a habeas corpus application. If neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction, allowing the motion to proceed as denominated creates no inconsistency with the habeas statute or rules. Petitioner's motion in the present case, which alleges that the federal courts misapplied the federal statute of limitations set out in § 2244(d), fits this description.

Gonzalez v. Crosby, 545 U.S. at 533.

Shawn's motion in this case is similar to the motion that the Petitioner in Gonzalez filed. Shawn did not substantively attack his state court conviction in the CR 60.02 motion. Rather, he asked the trial court to vacate its order denying his RCr 11.42 motion. Therefore, this is not a claim that could have been raised before and is not a claim that would constitute a successor post-conviction claim, or an attempt to improperly relitigate unsuccessful RCr 11.42 claims. The trial court misapprehended the issue raised in the motion and improperly rejected it on those grounds.

The trial court is correct that an issue that could have been raised on direct appeal, or in an RCr. 11.42 motion cannot generally be raised in a CR 60.02 motion. McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997); Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983). However, that is not the type of issue that was raised in this case. The issue in this case was whether the trial court should reopen the judgment denying Shawn's RCr. 11.42 motion on the ground that a significant part of the factual basis for the denial of the RCr 11.42 motion has been shown to be false. Certainly, this issue could not have been raised on direct appeal or in Shawn's RCr. 11.42 motion. To the contrary, CR 60.02 specifically contemplates such a motion. Under CR 60.02(c) and (d), a court can relieve a party from its order if that order was affected by perjury or falsified evidence or fraud affecting the proceedings. This was precisely Shawn's claim and the Circuit Court erred in holding that CR 60.02 was the improper procedural vehicle for such a claim.

B. Shawn's Representation by Counsel

As an alternative procedural basis for denying Shawn's CR 60.02 motion, the Circuit Court noted that Shawn was represented by counsel in his RCr 11.42 proceeding and on the currently-pending appeal of his RCr 11.42 and "a movant represented by counsel generally cannot file a *pro se* motion, and from a procedural standpoint, a 60.02 motion to alter the Court's 11.42 Order would properly have been filed by the movant's 11.42 counsel." T.R. pg. 165. This holding is in error for several reasons. First, and most importantly, there is no prohibition on defendants who are represented by counsel filing pro se pleadings and the Court cited to no authority for its contention that persons "represented by counsel generally cannot file a *pro se* motion." Undersigned counsel is aware of no such authority.

Secondly, Shawn was only represented by counsel in his RCr 11.42 proceeding. While counsel *could* have filed Shawn's CR 60.02 motion, the fact that Shawn filed it pro se is not grounds for denying the motion. Lastly, neither Shawn nor the Court proceeded as though he was represented by counsel for purposes of the CR 60.02 motion. Shawn filed a motion for the appointment of counsel on the CR 60.02 motion, T.R. pgs. 160-163, which the Circuit Court denied, T.R. pgs. 168. Additionally, CR 5.02 requires service on the attorney if a party is represented by an attorney. CR 77.04 requires service of a judgment in the manner provided in Rule 5. Undersigned counsel, who represented Shawn in his RCr 11.42 appeal, was not served with the Court's order denying Shawn's CR 60.02 motion. T.R. pg. 168-169. The Court and Shawn clearly did not act as though he was represented by counsel for purposes of his CR 60.02 motion. Therefore, the Court erred in denying Cross-Appellant's CR 60.02 motion on this procedural basis.

ARGUMENT VI

The Circuit Court Erred by Denying Shawn's CR 60.02 Motion to Vacate without Holding an Evidentiary Hearing

This issue was preserved by Mr. Tighe's pro se motion, which contained a request for an evidentiary hearing. T.R. pgs. 14. Because it granted relief on another issue, the Court of Appeals did not address this claim.

Cross-Appellant affirmatively alleged facts which, if true, would justify vacating his judgment and alleged special circumstances that justify relief under CR 60.02 and was therefore entitled to an evidentiary hearing pursuant to Gross v. Commonwealth, 628 S.W.2d 853, 856 (Ky. 1983) and Minton v. Commonwealth, 2009 WL 2837357 (Ky. App. 2009). Such an evidentiary hearing is provided "because under our system of trial, the opportunities for confrontation and cross-examination are deemed imperative as minimal requirements for orderly process in resolving disputed issues of fact." Hall v. Commonwealth, 429 S.W.2d 359, 360 (Ky. 1968). It is only where allegations are clearly refuted by the record that an evidentiary hearing can be dispensed with. *See* Sparks v. Commonwealth, 721 S.W.2d 726, 727 (Ky.App. 1985). A trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." Fraser v. Commonwealth, 59 S.W.3d 448, 452-453 (Ky. 2001); Drake v. United States, 439 F.2d 1319, 1320 (6th Cir. 1971).

In the instant case, the Circuit Court impermissibly assumed that Shawn's allegations were untrue even though those allegations were not clearly refuted by the record and were based on evidence outside the record. Shawn asserted facts which, if true, would demonstrate with reasonable certainty that the Court's order denying his RCr 11.42 motion was based upon perjury, fraud, or falsified evidence and that he was denied

his rights to due process and fundamental fairness the Fifth and Fourteenth Amendments to the U.S. Constitution and Sections 1, 2, 3, 10, 11, 14, and 50 of the Kentucky Constitution.

The record simply does not refute Shawn's contention that the false testimony of his trial attorneys tainted his RCr 11.42 proceedings and the subsequent order denying said motion. In its order denying Cross-Appellant's RCr 11.42 motion, the Court relied on the testimony which Shawn contends was perjurious. In its order the Court stated:

Most damning of all for the Movant was the full confession he gave to Detective Perry. The movant had knowledge of a second entry point that only the person who originally entered the house would have known about. Furthermore, he took Detective Perry to the location where he had hidden the gun used to murder Mrs. Bradshaw and **the shirt he turned over to Officer Perry contained fibers that matched the ones found in Mrs. Bradshaw's window.**

T.R. pg. 40. As the lab report provided by Shawn in his CR 60.02 motion shows, his shirt *did not* match the fibers found in Mrs. Bradshaw's kitchen door. T.R. 53-54. In denying Shawn's CR 60.02 motion, the Court simply disbelieved the evidence provided by Shawn without holding the required evidentiary hearing.

There was also no evidence in the record to support the Court's finding that only the person who *originally* entered the house would have known about the damage to the second door in the victim's home. Shawn acknowledged at the evidentiary hearing that he entered Mrs. Bradshaw's house after Danny Smith had murdered her. V.R. 1:56:25-1:57:50. Clearly, he could have gained the knowledge about the second door when he entered the house *after* Mrs. Bradshaw had been killed.

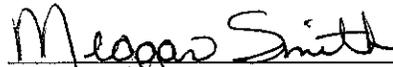
Shawn's trial counsel made materially false statements while testifying at his RCr 11.42 evidentiary hearings. Shawn has alleged that such statements amounted to

intentional misrepresentation to the Circuit Court in an effort to undermine his claims of ineffective assistance of counsel. The Commonwealth allowed such testimony to go uncorrected. The deliberate introduction of perjured testimony by a prosecutor "is incompatible with the rudimentary demands of justice." Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 766, 31 L.Ed.2d 104, 108 (1972). The same is true if a prosecutor, though not soliciting it, allows perjured testimony to go uncorrected. Commonwealth v. Spaulding, 991 S.W.2d 651, 655 (Ky.,1999). Such uncorrected testimony clearly influenced the Circuit Court's decision to deny Shawn's RCr 11.42 motion. The Circuit Court should have held an evidentiary hearing to determine the validity of Shawn's claims.

CONCLUSION

For the foregoing reasons, Shawn asks this Court to affirm the Court of Appeals opinion Reversing and Remanding his case for a new trial. In the alternative, Shawn asks this Court to remand his case for a hearing on his motion to withdraw his guilty plea or to vacate his convictions and sentence on the grounds offered in his Cross-Appeal.

Respectfully submitted,



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APPELLANT