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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable William A. McKinnon, Circuit Court Judge

GREGORY S. GREENE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001470

JOHNSON PETITION FOR WRIT OF CERTIORARI

JOANNA K. DELANY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether Petitioner received effective representation in connection with his "straight up" guilty pleas, where Petitioner pleaded guilty because counsel advised he would receive the maximum sentences at trial, and where a defendant may not be punished for exercising his constitutional right to trial, since Petitioner's pleas were based on erroneous advice and therefore not knowingly, voluntarily, and intelligently entered?

STATEMENT

Petitioner was in his fifties and had been in the mortuary business since the age of fifteen. He worked for the same family, the Eggers, at their funeral homes for approximately thirty years. Petitioner was not married and he did not have children. His mother became ill and died in 2016, around the same time as his old boss, Mr. Eggers, died. Petitioner paid for his mother's funeral; his brothers were supposed to help but they did not. Petitioner's home was broken into and his pet cat was lost. "[A]ll of this just piled up and piled up and piled up." Petitioner began to drink heavily. He owned an AR-15. App. 28, l. 5 – 30, l. 10; App. 75, ll. 5-8; App. 7, ll. 8-19.

Petitioner did the embalming at the funeral home. He quit his job about a month before the incident because he was always being called in on his days off to do things "nobody else wanted to do" such as "trauma cases." Petitioner was also owed a three percent commission on close to a million dollars of prearrangement or "preneed" funeral services which he had sold. The business owners had promised to pay him that money but never did so. "[F]inally he felt that he was really being taken advantage of . . ." App. 74, l. 19 – 75, l. 4; App. 29, l. 21 – 30, l. 1; App. 62, l. 23 – 63, l. 23.

On November 8, 2018, Petitioner went to the funeral home before it opened and let himself in with a key he was given while employed there. He took his AR-15 with him. He was intoxicated. When Gerald Hutchins, who also worked at the funeral home, walked in through the door, Petitioner tried to fire a shot at the door. The gun misfired. However, Petitioner cleared the misfired shot and shot into the floor. Petitioner threatened to kill Hutchins if he called the police. Nevertheless, Hutchins moved freely about the funeral home, and he texted a police officer he knew. App. 14, l. 16 – 21, l. 25; App. 64, l. 2 – 78, l. 8; App. 26, ll. 19-22. When the police arrived, Petitioner cooperated and surrendered. App. 30, l. 18-23; App. 20, ll. 23-25.

On December 7, 2018, a Spartanburg County Grand Jury indicted Petitioner for attempted murder, kidnapping, and possession of a weapon during the commission of a violent crime. App. 108 – 111. On June 24, 2019, Petitioner pleaded guilty before the Honorable Lee S. Alford. Petitioner was represented by Andrea Price. Barry Barnette prosecuted the case. App. 1. This was a "straight up plea" with "no negotiations or recommendations." App. 5, ll. 3-5. The court sentenced Petitioner to concurrent twenty-year terms for attempted murder and kidnapping, with a consecutive five-year term for the weapons offense. App. 33, l. 10 – 34, l. 3.

No direct appeal was taken, and on December 9, 2019, Petitioner filed an application for post-conviction relief (PCR). App. 36 – 42. The State made its return on March 9, 2020. App. 43 – 54. A hearing was held on the matter before the Honorable William A. McKinnon on September 13, 2021. Petitioner was represented by Rodney Richey and the State was represented by William Ray. App. 55 – 56.

Petitioner explained that counsel did not correctly advise him about his right to a trial. Petitioner said while counsel told him he had a right to go to trial, counsel advised him that if he went to trial he would be sentenced to the maximum consecutive sentences (65 years). Therefore, Petitioner pleaded guilty. Petitioner may have actually wanted a trial. App. 68, ll. 7-21; App. 73, l. 6 – 77, l. 20. It was apparent that Petitioner had decent potential defenses to the crimes: he maintained throughout the process that he did not intend to harm anyone (i.e., he did not have the requisite intent for attempted murder), and the evidence for the kidnapping was, in counsel's words "fairly weak." App. 79, l. 17 – 81, l. 13. However, the Solicitor threatened to charge Petitioner with burglary if he did not plead guilty. App. 80, l. 10 – 81, l. 1.

On December 6, 2021, the PCR court issued an order of dismissal. App. 95 – 107. As to the allegation that counsel was ineffective for failing to discuss Petitioner's right to a jury trial

with him, the order stated that, "Counsel['s testimony indicates that she did inform Applicant of his right to a jury trial. The plea court also specifically informed him of this right at the plea hearing, he indicated he understood, and chose to continue with the plea. Therefore, counsel's performance was not deficient in this regard." App. 100 – 101. "Furthermore, the testimony shows that any possible confusion about his right to a trial was not what caused him to enter the plea. His own testimony indicates that he did not want to proceed to trial and entered his guilty plea because of his sentencing exposure at trial. Applicant has failed to meet his burden of proving prejudice." App. 101.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner did not receive effective representation in connection with his "straight up" guilty pleas, where Petitioner pleaded guilty because counsel advised he would receive the maximum sentences at trial, and where a defendant may not be punished for exercising his constitutional right to trial, since Petitioner's pleas were based on erroneous advice and therefore not knowingly, voluntarily, and intelligently entered.

Petitioner entered "straight up" guilty pleas—therefore, he faced the same potential punishment at trial as he did at the plea. Had Petitioner been convicted at trial, the trial judge would have been forbidden from punishing him more harshly at sentencing simply because he exercised his right to trial. Petitioner's pleas were not knowingly, voluntarily, and intelligently tendered here, because they were based on counsel's inaccurate and improper advice that he would get the maximum sentences at trial.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. *Gilchrist v. State*, 350 S.C. 221, 226, 565 S.E.2d 281, 284 (2002) (citing *Strickland*, 466 U.S. at 687).

"[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). To establish prejudice when challenging a guilty plea, a PCR applicant must prove "there is a reasonable probability that, but for, counsel's errors, the defendant would not have pled guilty, but would

have gone to trial." *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). "The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial." *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018).

A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill*, 474 U.S. at 56. The Due Process Clause requires guilty pleas be entered into voluntarily, knowingly, and intelligently. *Boykin v. Alabama*, 395 U.S. 238 (1969). "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . ." U.S. CONST. amend. VI. The Sixth Amendment right to a jury trial is fundamental to the American scheme of justice and incorporated against the States under the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). Here, counsel's erroneous advice left Petitioner with the incorrect understanding that he had no real choice but to plead guilty when he had the right to proceed to trial.

The court is constitutionally prohibited from imposing a so-called "trial tax" in sentencing a defendant. "When a trial judge considers the fact that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant, it is an abuse of discretion." *Castro v. State*, 417 S.C. 77, 83, 789 S.E.2d 44, 47 (2016). *See also Davis v. State*, 336 S.C. 329, 333, 520 S.E.2d 801, 803 (1999); *State v. Hazel*, 317 S.C. 368, 370, 453 S.E.2d 879, 880 (1995). Petitioner did not believe he had a real choice between entering a plea and standing trial since he thought he would be more harshly punished for standing trial, so his pleas were not knowingly, voluntarily, and intelligently entered. This was based on counsel's deficient

performance in advising him of his trial rights. Petitioner believed counsel's erroneous advice—that he must plead guilty to avoid being punished with maximum sentences for going to trial. These facts supported a finding that Petitioner established deficiency and prejudice, and this Court should grant certiorari. *Strickland v. Washington*, 466 U.S. at 687

CONCLUSION

Based on the foregoing argument, this Court should grant the petition for writ of certiorari and allow full briefing on this issue.

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender
S.C. Bar No. 76081

ATTORNEY FOR PETITIONER

This 22nd day of July, 2022.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Gregory Scott Greene states:

1. She is 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 hearing before Judge William A. McKinnon, which was held on September 13, 2021, 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 Gregory Scott Greene.

Respectfully Submitted,

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender
S.C. Bar No. 76081

ATTORNEY FOR PETITIONER

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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."

s/ *Joanna K. Delany*
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