STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Aug 26 2022

S.C. SUPREME COURT

Certiorari to Cherokee County

Honorable William A. McKinnon, Circuit Court Judge

ROBERT J. HORD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000035

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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The PCR court erred in finding defense counsel was not ineffective where counsel determined a letter, written by an eyewitness to the incident, would not benefit petitioner where the letter described petitioner's actions as self-defense and where counsel later advised petitioner that he should plead guilty because his actions did not meet the requirements for self-defense resulting in petitioner pleading guilty pursuant to *Alford* and receiving an aggregate sentence of thirty years' imprisonment. 4

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ISSUE PRESENTED

Did the PCR court err in finding defense counsel was not ineffective where counsel determined a letter, written by an eyewitness to the incident, would not benefit petitioner where the letter described petitioner's actions as self-defense and where counsel later advised petitioner that he should plead guilty because his actions did not meet the requirements for self-defense resulting in petitioner pleading guilty pursuant to *North Carolina v. Alford* and receiving an aggregate sentence of thirty years' imprisonment?

STATEMENT

On September 22, 2016, a Cherokee County grand jury indicted petitioner for possession with intent to distribute methamphetamine and armed robbery. On December 15, 2016, a Cherokee County grand jury indicted petitioner for armed robbery and possession of a weapon during the commission of a violent crime. On March 21, 2019, a grand jury indicted petitioner for murder and possession of a weapon during the commission of a violent crime. App. 124-33. On March 25, 2019, petitioner pled guilty, pursuant to *North Carolina v. Alford*,[1] before the Honorable J. Mark Hayes. Tracy Racine represented petitioner and Matthew Kendall, assistant solicitor, represented the state. App. 1.

Judge Hayes sentenced petitioner to concurrent terms of thirty years' imprisonment for murder, thirty years' imprisonment for armed robbery, thirty years' imprisonment for the second count of armed robbery, fifteen years' imprisonment for possession with intent to distribute methamphetamine, five years' imprisonment for possession of a weapon during the commission of a violent crime, and five years' imprisonment for the second count of possession of a weapon during the commission of a violent crime. App. 24.

Thereafter, petitioner filed an application for PCR on November 1, 2019. App. 26-35. An evidentiary hearing was held on September 17, 2021, before the Honorable William A. McKinnon. App. 49. Rodney Richey represented petitioner and William Ray, assistant attorney general, represented the state. App. 49.

On November 24, 2021, Judge McKinnon signed an order denying PCR. App. 113-23. The court found petitioner's claim that defense counsel was deficient for failure to investigate a letter written by the decedent's wife, Terri Burden, who was an eyewitness to the incident,

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1 400 U.S. 25 (1970)

stating that she did not believe petitioner intended to murder anyone, was without merit. The court found the record showed that the letter was written at defense counsel's request and that defense counsel later determined the letter would not benefit petitioner where Ms. Burden stopped responding to defense counsel. The court further found petitioner was not prejudiced because the letter would have been no benefit to petitioner if Ms. Burden was not willing to testify to its contents at trial because the letter alone would not have refuted all the other incriminating evidence that likely would have been presented. App. 119-20.

ARGUMENT

The PCR court erred in finding defense counsel was not ineffective where counsel determined a letter, written by an eyewitness to the incident, would not benefit petitioner where the letter described petitioner's actions as self-defense and where counsel later advised petitioner that he should plead guilty because his actions did not meet the requirements for self-defense resulting in petitioner pleading guilty pursuant to *Alford* and receiving an aggregate sentence of thirty years' imprisonment.

Guilty plea hearing

At petitioner's guilty plea hearing, the state alleged petitioner and two other individuals picked up alleged victim, Mr. Potts, drove him to a remote location and at gunpoint demanded money and Potts' cell phone. The state alleged, a few days later on March 29, 2016, petitioner and other individuals drove and found CJ Burden and his wife, Terri Burden, to retrieve a tattoo kit they claimed CJ had stolen. The Burdens were in their vehicle and petitioner and his party approached the car. During the incident Terri Burden, the driver, panicked and pulled the car forward trapping petitioner between the car and a fence. Petitioner drew his gun and fired into the car killing CJ.[2] App. 10-14.

When asked if he was satisfied with his attorney, petitioner responded, "I just feel like [there] could have been a lot more done as far as preparing a defense for my case, but other than that I'm satisfied." App. 8, ll. 1-9. Petitioner later said that he wanted to go forward with the plea because he felt like there was enough evidence to convict him but he maintained, "there was really never a defense discussed." Throughout his colloquy with the plea court petitioner contended that he was not a lawyer but that he felt like he had a defense to these charges that was

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2 At the guilty plea hearing, the state did not allege any facts that supported a charge of possession with intent to distribute methamphetamine.

not fully investigated or discussed with him. App. 8-9; 15-17.

The plea court appeared concerned about whether petitioner really wanted to admit guilt in these charges and eventually instructed defense counsel Racine to discuss an *Alford* plea with him. App. 17, ll. 5-11. After their discussion it was agreed petitioner would plead pursuant to *Alford*. App. 17, l. 16-20, l. 17.

Towards the end of the guilty plea Racine asked the court if she could put some things on the record. Racine told the court that she and petitioner had met "extensively over the past two years" and that he was upset because she had explained to him that he was responsible for these crimes under accomplice liability. She further explained that she had discussed self-defense with petitioner and explained to him that because he was in the process of committing armed robbery when he shot CJ Burden self-defense was not available to him. App. 22, ll. 4-24.

Evidentiary Hearing

Petitioner testified that he was acting in self-defense on the day of the incident and that the letter written by Terri Burden, applicant's exhibit 1, corroborated his account of the incident. App. 58, ll. 4-25. He discussed this with defense counsel Racine, but she told him that because the shooting occurred during the commission of an armed robbery, he did not have a claim of self-defense. App. 59-60. Petitioner testified that he pled guilty because Racine was not adequately preparing his case and she told him that if he did not plead guilty, he would likely receive a sentence of life without parole. App. 62, ll. 10-21; 67, ll. 5-17. Petitioner insisted that had Racine followed up on the letter and fully investigated his case he would have gone to trial and not taken a guilty plea. App. 68, l. 7-69, l. 3.

The letter written by Ms. Burden, applicant's exhibit 1, was admitted at the hearing. In the letter Ms. Burden writes that she was present and driving the day of the incident. She says, "I

do not feel [] there was any intent for murder." App. 11; applicant's exhibit 1. Ms. Burden goes on to write that, "the use of the gun [was] a reaction to my action." App. 11; applicant's exhibit 1. The letter also stated Burden believed petitioner acted in self-defense. App. 13; applicant's exhibit 1.

Defense counsel Racine testified that she discussed self-defense with petitioner a number of times and she was the person that had Ms. Burden draft a letter on his behalf. Racine stated that after she wrote the letter Ms. Burden disappeared and stopped returning her calls or emails. Racine claimed the solicitor told her that. Burden would recant the statement made in the letter and would testify against petitioner at trial. App. 82, ll. 3-17; 89, ll. 16-23. After that Racine did not believe petitioner had a viable claim of self-defense for trial. App. 82, ll. 18-21. Racine testified that it was petitioner's decision to forgo a jury trial and accept a guilty plea. App. 83, ll. 12-20.

Discussion

The PCR court erred finding trial counsel was not ineffective because counsel's performance was deficient where there was a letter written by the widow of the victim in this case who was also an eyewitness to the incident in which she wrote that petitioner did not have any intention to murder her husband and that her actions driving likely caused petitioner to shoot and because petitioner was prejudiced where he pled guilty because counsel incorrectly advised him that he could not raise self-defense at trial.

A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that the applicant was prejudiced by that deficiency. *Hill v. Lockhart*, 474 U.S. 52 (1985). Plea counsel is ineffective within the meaning of the Sixth Amendment only when

the applicant satisfies both requirements. *Id.*

The two-part *Strickland v. Washington*, 466 U.S. 668, (1984) test applies to challenges to guilty pleas based on ineffective assistance of counsel. In the context of guilty pleas, the first half of the *Strickland* test is nothing more than a restatement of the standard of attorney competence already set forth in *Tollett v. Henderson*, 411 U.S. 258 (1973) and *McMann v. Richardson*, 397 U.S. 759 (1970). The prejudice requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, to satisfy the prejudice requirement, the applicant must show there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill*, 474 US at 58-59.

Counsel was deficient where she made an unreasonable decision not to pursue self-defense in petitioner's case and instead advised petitioner to either plead guilty or potentially be sentenced to life without the possibility of parole. Racine testified that she abandoned self-defense in petitioner's case when Ms. Burden stopped responding to her and the solicitor told her that Ms. Burden would recant her earlier statement and testify for the state. However, the letter was not worthless simply because Burden had turned state's witness. The letter could have served as powerful evidence to impeach Burden at trial.

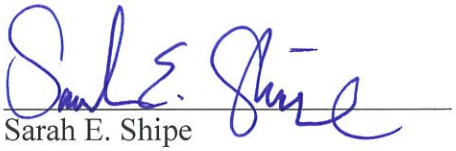
In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This

assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. *See, e.g., Evans v. Meyer*, 742 F.2d 371, 375 (C.A.7, 1984) ("It is inconceivable to us ... that [the defendant] would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received"). As the Court explained in *Strickland*, these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the "idiosyncrasies of the particular decision maker." *Id.*, 466 U.S., at 695.

Racine was admittedly aware of the letter and testified that it was written by Ms. Burden by her request. Petitioner was prejudiced where counsel Racine failed to diligently pursue a valid claim of self-defense resulting in petitioner pleading guilty and receiving an aggregate sentence of thirty years' imprisonment. Had Racine fully investigated petitioner's claim of self-defense petitioner would have chosen a trial. At trial Racine could have vigorously cross-examined Burden regarding her prior statement that petitioner was acting in self-defense during the incident. This would have been powerful evidence that went to the jury and petitioner likely would have succeeded at trial.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be granted to allow full briefing on the issue.



Sarah E. Shipe
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This 26th day of August, 2022.

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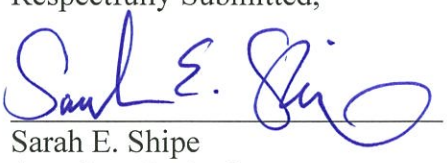
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert Justin Hord 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 17, 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 Robert Justin Hord.

Respectfully Submitted,



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of August, 2022.