STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

R. Knox McMahon, Circuit Court Judge

CHARLES GAMBLE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213328

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in finding Petitioner knowingly, voluntarily, and intelligently pled guilty and where Petitioner testified that his trial counsel did not advise him about evidence showing a lack of credibility in the State's principal witness, and where the State did not offer contravening testimony from trial counsel or otherwise rebut Petitioner's testimony?

STATEMENT

Facts

On January 19, 2011, Petitioner Charles E. Gamble, Jr. appeared in a plea hearing before the Honorable Clifton B. Newman. App. 1. Petitioner held the distressing belief that his co-defendant might give damning testimony against him at trial. App. 95. However, he was completely unaware that the co-defendant had given police entirely conflicting statements about the events of the night of the murders in question. App. 84-85.

Petitioner's plight arose from allegations that early in the morning on November 2, 2006, he entered the residence of his girlfriend at the Colony Apartments on Beltline Boulevard in Richland County. App. 13-14. According to the State, Petitioner entered without consent and shot and stabbed to death three victims: his ex-girlfriend, a male in her bedroom, and another male on a couch outside the bedroom. App. 15-16. The State alleged that sometime thereafter, Petitioner, with the help of his co-defendant, Jeremal Robinson, removed the bodies from the apartment and dragged them to an area in front of the apartments. App. 16.

Later that day, Columbia police apprehended Petitioner and sought out co-defendant Robinson. App. 16-17. Co-defendant Robinson gave the police two entirely inconsistent statements about his involvement in the murders. In the first, taken at 5:35 p.m., he stated that he had not seen Petitioner since 2:00 p.m. the previous day and spent the previous night with his mother and girlfriend. App. 154. In the second, taken at 8:34 p.m., he stated that around 2 or 3 a.m. that morning, Petitioner came to his residence and asked him to leave with Petitioner because Petitioner had been threatened earlier by some other individuals in the area. App. 155. Co-defendant Robinson then claimed the two went to the crime scene and began disposing of three bodies. App. 156. For the remainder of the investigation and his prosecution, Petitioner was never

made aware of his co-defendant's conflicting statements. App. 84-85.

On November 16, 2006, Petitioner was indicted by the Richland County Grand Jury for three counts of murder, one count of first degree burglary, and one count of use of a weapon during the commission of a violent crime. App. 139-152.

At the plea hearing, Petitioner was represented by Public Defender Douglas S. Strickler and Assistant Public Defender E. Fielding Pringle, and the State was represented by Deputy Solicitor John P. Meadors. *Id.* The State had already served Petitioner with a notice of intent to seek the death penalty. App. 64. In order to avoid a potential death sentence, believing that his co-defendant's testimony could condemn him, Petitioner pled guilty to all five charges, and in exchange the State requested a negotiated sentence of three consecutive life sentences. App. 4-6. The plea court found that a sufficient factual basis supported the plea and sentenced Petitioner to the negotiated three life sentences, in addition to one life sentence for the first degree burglary charge and a five-year sentence of the count of use of a weapon during the commission of a violent crime. App. 43-47.

PCR Application and Evidentiary Hearing

On May 13, 2011, Petitioner filed his application requesting post-conviction relief (PCR). App. 49-53. The State filed a return on May 23, 2011. App. 54-59. An evidentiary hearing was held before the Honorable R. Knox McMahon on August 13, 2012, in which Petitioner was represented by David E. Belding, and the State was represented by Rob Corney. App. 60.

At the PCR hearing, attorney Pringle explained that she and the other attorneys in her office worked long and hard for a plea agreement that they long hoped would come. App. 119. She offered extensive testimony about her firm belief that Petitioner should not have pursued trial, and when asked about the merits of a defense in the guilt phase, she repeatedly espoused the gruesome

and "born out of passion" nature of the crimes, the relationship of the victims to Petitioner, and the potential sentences in case of a conviction. App. 113-116. Ultimately, counsel stated she could not "look at this case except through the prism of the fact that they had served him with notice of intent to seek the death penalty," and to her, there was no "upside to going to trial." App. 113, ll. 12-14; App. 114, ll. 20-21. Therefore, she "spent a lot of time on the mitigation specialist" and offered Petitioner "strenuous advice" to plead because, in her words, "[t]here's always a huge risk when you have a death qualified jury and you just don't take that risk if you don't have to . . . ." App. 117, ll. 1-15.

With respect to the merits of a defense in the guilt phase, Petitioner said his counsel "made it seem like [his co-defendant's] statement was the statement that was going to get a conviction," App. 95, ll. 19-20, and "the only thing that they said tied me to the crime was my co-defendant and witnesses said they seen me leaving the crime scene," App. 101, ll. 16-18. However, Petitioner testified that when his counsel provided him with the State's evidence including the statements from his co-defendant, he was never made aware that his co-defendant had given two inconsistent statements. App. 84-85. Indeed, Petitioner explained three separate times, on both direct and cross-examination, that counsel did not even discuss the meaning of any such evidence with him:

> Q: Did you discuss any defenses you had for the charges?
>
> A: Nah, we ain't discussed any defense like what we going to do. He was just telling me certain things I need to look – look at, something like the statements and stuff like that.

App. 79, ll. 11-15.

> Q: Okay and did you get a chance to talk with Mr. Strickler about everything that you might have brought up as a defense to these charges?
>
> A: No.

Q: What was it that you didn't get to talk to him about?

A: I mean it's certain -- certain things I was trying to see in my case, especially with my statements and the statements right here and, you know, I was trying to figure out what kind of defense they had if I was to go to trial.

App. 87, ll. 6-14.

Q: Ms. Pringle said that she had reviewed the discovery with you and you had reviewed it on your own and you agreed with that when the Court asked you; correct?

A: She did go over my motion of discovery with me, but there was certain parts of my motion that wasn't there because she was waiting for certain people to give it to her. Investigators had certain parts of my motion, too.

Q: Okay and you told the Court also that based on that evidence that you believed a jury would be able to find would most likely find you guilty of all the charges?

A: I mean that's what she led me to believe.

App. 108, ll. 3-13.

Petitioner also testified that while he wanted to focus on the guilt phase, his counsel only seemed concerned with issues of sentencing. When asked whether he talked to his attorneys much about potential defenses, he replied, "I mean we talked. We talked, but it was basically me trying to get [legal research]"; and when pressed about the "whether you did it or not part? Was anybody investigating the facts of the case to find out if they could pin it on [him] or not," Petitioner testified, "I mean they asked me did I do it, but actually doing anything about it, no." App. 92, l. 6 – App. 93, l. 18.[1]

[1] Importantly, although Petitioner had copies of the statements of his co-defendant at the hearing, he stated that he never originally saw them, and the State objected to their entry into evidence on grounds that his Petitioner had no personal knowledge of them. App. 82, l. 7 – 83, l. 21.

Thus, although Petitioner thought his counsel "was going to help [him] out building a defense . . . [counsel instead] got an attorney or talked to the solicitor to get [him] a . . . plea so [he] went with the plea." App. 88, ll. 8-11.

When asked at the PCR hearing whether he fully understood the potential consequences of being on death row, including severely restricted confinement and possible execution, Petitioner avowed that fighting for his case was worth the risks: "I'd rather know I fought my case instead of just, you know, I took a plea. . . . [T]here's certain things with my case right now that . . . were good arguments, but nobody made an issue about it." App. 98, l. 3 – App. 99, l. 3.

Order of Dismissal

On October 18, 2012, Judge McMahon issued an Order of Dismissal, ruling Petitioner failed to prove plea counsel provided ineffective assistance of counsel and denying his PCR claim. App. 128-138. The PCR court found that plea counsel investigated several potential defenses for trial, but "it was important to view their potential strengths in the context of a potential death penalty trial." App. 133. The court also noted that plea counsel was especially credible because of her experience as a public defender with death penalty cases. *Id.* Pointing out her focus on the sentencing phase, her commentary on the nature of the crimes, and the availability of mitigation evidence, the Court found that counsel sufficiently investigated the case and presented defenses to Petitioner. App. 134. Therefore, the court found that Petitioner failed to prove his counsel was deficient, and he entered his plea freely and voluntarily after being fully advised of all relevant issues. App. 135. The court also found that Petitioner failed to prove any prejudice because he adduced no evidence showing a defense would have been meritorious or swayed his decision to plea. *Id.*

This petition for writ of certiorari follows.

ARGUMENT

STANDARD OF REVIEW

"This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law." *Lomax v. State,* 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

DISCUSSION

The PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty because the evidence in the record establishes that his plea counsel failed to advise Petitioner about key evidence showing a lack of credibility in the State's principal witness.

The PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty because the evidence in the record establishes that his plea counsel failed to advise Petitioner about key evidence showing a lack of credibility in the State's principal witness. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington,* 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland,* 466 U.S. at 687. The two-part test adopted in *Strickland* "applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart,* 474 U.S. 52, 58 (1985); *see generally Brady v. United States*, 397 U.S. 742, 758 (1970) ("Guilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results.").

Specifically, by showing that "counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty," a defendant sufficiently undermines the required

voluntary and intelligent character of a plea. *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009); *accord State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980) (holding record must reflect that defendant freely and intelligently waived constitutional trial rights and had full understanding of the consequences of the plea); *Berry v. State*, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009) (holding the difference "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea"). Of course, representation is deficient and unreasonable when counsel fails to advise or incorrectly advises a defendant on a material evidentiary issue:

> [W]e recognize that a defendant, for a host of legitimate reasons, may plead guilty to an offense for which a valid legal challenge may exist. . . . The difference . . . between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea. Here, counsel never informed [the defendant] of the potential challenge to the use of the drug paraphernalia conviction for enhancement.

Berry at 635, 675 S.E.2d at 427 (citations omitted). *See also Shirley v. State*, 306 S.C. 241, 411 S.E.2d 215 (S.C. 1991) (counsel ineffective for failing to inform defendant prior to guilty plea that he may have made statements involuntarily, in which case they would be inadmissible); *Segura v. State*, 749 N.E.2d 496, 502 (Ind. 2001) (addressing "prejudice from an error or omission of counsel that has the effect of overlooking or impairing a defense"). It follows that incorrect or omitted advice may deprive a defendant of his Constitutional right "to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." *Suber v. State,* 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record

made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." *Roddy v. State*, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000).

In this case, the PCR court erred in finding that Petitioner's plea counsel adequately advised him about key evidence showing his co-defendant's lack of credibility as required under the Sixth Amendment. Both the court in its order and counsel in her testimony focused on the counsel's studied evaluation of the consequences of going to trial as well as her profound understanding of why trying the case presented severe risks for Petitioner. While these functions are necessary to adequate representation, they are not sufficient. The Constitution required that Petitioner be advised about his case in such a manner that he could make a fully informed decision as to whether to plead guilty. Thus, Petitioner needed full knowledge of the material evidence in his case in order to knowingly evaluate his options and decide whether to accept the plea bargain in accord with his own principals and interests. However, the evidence in the record shows counsel denied him this information. Petitioner testified that counsel conveyed to him that the issue of guilt for the murders turned on the testimony of his co-defendant. However, he repeatedly stated that his counsel never discussed the fallibility of his co-defendant's testimony based on the inconsistent statements he gave police. In fact, his counsel never discussed with him the inconsistencies in the statements at all.

Further, Petitioner's plea counsel adduced no evidence contravening his testimony. When counsel was asked whether she discussed with Petitioner the impeaching statements, she instead turned to and discussed at length considerations involved in mitigation and the criticality of reaching a deal to avoid the death penalty. She then expressly admitted that she could not advise Petitioner on the evidence and issue of guilt without thinking about the consequences of a conviction. Instead of considering Petitioner's interests as her individual client, she steadfastly

adhered to her office's general principle that "you just don't take the risk if you don't have to."

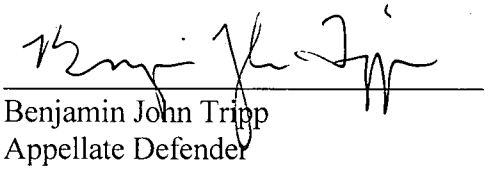
Thus, the record contains no probative evidence to support the PCR court's finding that Petitioner was adequately advised of the existence and impact of the impeachment evidence against the state's key witness. When his counsel withheld advisement and impressed him upon that pleading was his "best option," Petitioner in effect adopted his counsel's values and interests and was denied the opportunity to pursue his own—the principle of fighting on the merits of his case, which by his testimony he wanted to consider separately from the sentencing aspects of the case. While counsel may have had honorable intentions in avoiding a death sentence and resolving this case in Petitioner's best interest, the decision of whether to plead or fight for his case at trial was not hers to make.

Finally, the PCR court erred because the record also discloses a reasonable probability that, but for plea counsel's deficiency, Petitioner would not have pled guilty. When asked at the PCR hearing whether he fully understood the potential consequences of being on death row, including severely restricted confinement and ultimately execution, Petitioner avowed that fighting for his case was worth the risks: " . . . I'd rather know I fought my case instead of just, you know, I took a plea. . . . [T]here's certain things with my case right now that . . . were good arguments, but nobody made an issue about it." Furthermore, the testimony at the PCR hearing establishes that Petitioner had not considered to any extent the potential weakness of his co-defendant's testimony because the issue was never raised. Finally, the State neither adduced evidence nor attempted to elicit from Petitioner testimony suggesting he would have opted to plead even had he been adequately advised of the impeachment evidence. Accordingly, the PCR court erred in finding that trial counsel's deficient performance did not prejudice Petitioner.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner Charles Gamble's petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of May, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
R. KNOX MCMAHON, CIRCUIT COURT JUDGE

CHARLES GAMBLE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213328

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Charles Gamble states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on August 12, 2012. In his opinion seeking certiorari from the order of dismissal is without merit.

3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Charles Gamble.

Respectfully submitted,

Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 31st day of May, 2013

STATE OF SOUTH CAROLINA
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Certiorari to Richland County
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CHARLES GAMBLE,

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CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Charles Gamble, #344426, at Lee Correctional Institution this 31st day of May, 2013.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 31st day
of May, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.