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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

R. Lawton McIntosh, Circuit Court Judge

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JUN - 3 2013

S.C. Supreme Court

HOWARD THOMPSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213031

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in finding Petitioner intelligently waived his right to counsel when his counsel incorrectly advised him that he needed to proceed pro se in order to examine his accuser at trial?

STATEMENT

On May 21, 2007, in the Anderson County Court of General Sessions, Petitioner Howard Thompson, III sat in trial anticipating his long-awaited opportunity to confront his accuser, which he knew would result in exoneration once and for all. App. 57. Just two years prior, Petitioner was a typical 19 year-old high school student. App. 226. But his life changed that spring when, on the day before his graduation, he was arrested based on allegations that he engaged in criminal sexual conduct with a minor for whom he had previously babysat. App. 223; App. 226. Petitioner had always maintained his innocence. App. 544.

Back in the courtroom, Petitioner suddenly spoke up and addressed the court in the middle of his hearing. He was acting as his own lawyer—an aberrant tactic resulting from the advice of his previous, court-appointed trial counsel. App. 239. “Your Honor, I object to hearsay.” *Id.* The trial judge summarily overruled his objection. *Id.* Persistent, Petitioner moved in limine to stop the testimony flowing from the accuser’s mother on direct examination about the alleged sexual conduct. App. 241.

The court: Which part of 801?

Mr. Thompson: Part (B)(1)—under 801(A)(1)(B).

The court: There is no 801(B). I think the only part you have is (D) that has subparts (1) and (2). What is it, as to hearsay?

Mr. Thompson: Yes, your Honor.

The court: Well, hearsay, as I said, the exceptions to the hearsay rule are found in 803, and in this case would be . . . 803(1) present sense impression; or (2), excited utterances. . . .

And then, of course, (3) is existing state of mind. . . . So I’m going to deny that.

App. 242, l. 22 – App. 243, l. 16. Petitioner momentarily pressed back, but was never able to muster a more specific objection to the satisfaction of the court: the jury could receive the hearsay testimony of the accuser against Petitioner. App. 243-246.

Petitioner soon set his case back even further. Petitioner did not have the accuser on his witness list, App. 577, and later during the testimony of the accuser's mother, the State's attorney declared the State would not even call the accuser to testify and face Petitioner. He contrived another objection:

Mr. Thompson: Your honor, the state does not have the right to state that the victim or why the victim is not going to testify.

The court: All right. Is that where you're going?

[Counsel for the State]: Your honor, I think I do have a right to explain to the jury, since I do have the burden, on why the victim is not here. She doesn't have to tell me what [the minor] told her, I'm not trying to elicit hearsay testimony, I just want to know why she as a mother is not letting her son testify.

The court: All right. I'm going to overrule the objection.

You may answer the question.

Q: So, Ms. Hiott, as a mother, why is he not going to be testifying today? Without telling what [the accuser] said to you.

A: Well, he is scared and I don't want to put him through that.

App. 250, ll. 2-21. Unable to sort out of the legal principles scattered before him, Petitioner could do nothing but watch his chance at exoneration vanish.

Petitioner's pro se trial stemmed from indictments on June 28, 2005 alleging criminal sexual conduct with a minor first degree and criminal sexual conduct with a minor second degree. App. 486. In April of 2006, Charles Whiten was appointed trial counsel. App. 542. On December 7, 2006, Mr. Whiten and Petitioner appeared before the Honorable Howard P. King for a hearing on

Petitioner's motion to relieve his appointed counsel and represent himself in the trial on the indictments. App. 486. In January of 2007, Judge King issued an order relieving him and naming him as Mr. Whiten. *Id.* App. 486.

On May 21 and 22, 2007, Petitioner proceeded to trial before the Honorable Alexander S. Macaulay and a jury on the charge of criminal sexual conduct first degree with a minor. *Id.* The jury returned a verdict of guilty as indicted, and Judge Macaulay sentenced Petitioner to thirty years in prison and ordered his registration as a sex offender. *Id.*

On May 29, 2007, Mr. Whiten filed a notice of appeal. *Id.* One of the issues Petitioner submitted was whether the trial court improperly allowed the testimony of the accuser's mother. App. 491. On February 4, 2010, the South Carolina Court of Appeals affirmed Petitioner's conviction, ruling in part that Petitioner did not preserve the issue for review because he did not specify a particular ground for his objection during the trial. App. 516. On November 24, 2010, Petitioner filed an application for post-conviction relief in the Anderson County Court of Common Pleas, arguing that Petitioner was denied effective assistance of trial counsel. App. 519. On March 8, 2012, a hearing was held before the Honorable R. Lawton McIntosh. App. 537.

At the hearing, Petitioner testified that when he met with Mr. Whiten in November of 2007, they discussed the likelihood that the victim would make a voluntary statement exonerating Petitioner at trial. App. 570. Petitioner believed that his best chance to elicit such a statement would result from Petitioner himself questioning the accuser on the witness stand. *Id.* Petitioner testified that Mr. Whiten told him that the only way to question the accuser in that manner would be for Petitioner to represent himself. *Id.* Mr. Whiten confirmed this explanation of how the idea of self-representation arose:

The ways it came up was, he said, "I think if I can talk to [the accuser] either before the trial or at the trial, he would

change, he would be honest about it and say I didn't do anything." That's how it started and then we went into detail about it, what he would say, what he maybe would not say, and when we went over what [the accuser's] testimony would be and Mr. Howard said, "Well, I don't think he would say that particular thing, you know, and I said, "Well, if you want to be able to cross examine him yourself or question him yourself, then you have to represent yourself because you cannot question him. I can, but you can't.

App. 558, l. 16 – App. 559, l. 2.

Petitioner could remember Mr. Whiten saying once or twice not to represent himself, but he did not remember Mr. Whiten telling him that it would be a mistake and that he needed an attorney. *Id.* He felt like the decision to represent himself was "more of a 65% of his advice than [him] wanting to." App. 572. Ultimately, Petitioner followed Mr. Whiten's instructions for proceeding pro se, all the way through Mr. Whiten coaching him through the hearing in front of Judge King. App. 573. Petitioner testified that only at the time of trial did Mr. Whiten inform him that the accuser likely would not appear as a witness because Petitioner was pro se. App. 580.

Mr. Whiten testified that when the two initially discussed Petitioner's self-representation, he merely informed Petitioner of the possibility that the accuser would not testify, and he explained that even then the State would have to provide sufficient justification for failing to produce the witness. App. 544. He did not explain the likelihood that the accuser would not testify until much later. App. 546-547. "It's your decision. If you want to do that, then you need to do it and if you don't, then I'll continue on with representing you in the case," he told Petitioner. App. 544, ll. 20-23.

Mr. Whiten said that he did advise Petitioner of the consequences of representing himself, but never went into detail about substance of the conversations. App. 548. He did not specifically

review the *Gardner*¹ factors considered in determining whether a defendant voluntarily and intelligently elects to represent himself. *Id.* In fact, Mr. Whiten could only guess that he talked about the consequences of self-representation in “general terms.” App. 556, ll. 19-25. He merely told Petitioner that “it was very dangerous to do this because he was not trained, a trained lawyer. He didn’t know the nuances of questioning and answering, that the answers, that the answers that the witness gave may be damaging and he wouldn’t even understand the damage that had been done.” App. 557, ll. 2-7. Nevertheless, Mr. Whiten assuaged concerns Petitioner had by telling him he could serve in an advisory capacity and “help [him] right there during trial with these things if you follow my advice.” App. 560, ll 14-17. Mr. Whiten did testify about other warnings he gave Petitioner, but these all occurred just prior to or during trial, well after Petitioner and Mr. Whiten had decided on self-representation. App. 557.

Mr. Whiten confirmed that if he were representing Petitioner at the criminal hearing, he would have more knowledgeably objected when the State asserted the accuser would not testify:

I would have object that the, that there had been no testimony, no petition that Minor was unable to testify on his own, other than his mother said he was afraid and in my mind, that doesn’t comply with the statute. You have to have a better reason. What they should have done, probably, is examine [the accuser] in camera to see whether he was able to testify or not.

App. 549, ll. 16-22. Later, Mr. Whiten specifically admitted that he would have made at least have made a specific enough objection to preserve the issue for review. App. 551.

On August 7, 2012, the PCR court issued its order finding that Petitioner sufficiently understood the consequences of self-representation and that he voluntarily and intelligently waived his right to counsel, and he was therefore not deprived of the right to competent representation by counsel. App. 599.

¹ *Gardner v. State*, 351 S.C. 407, 570 S.E.2d 184 (2002).

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 waived his right to counsel because his counsel inadequately advised him about the necessity of proceeding pro se. The Sixth and Fourteenth Amendments of the Federal Constitution guarantee that a person brought to trial in any state or federal court be afforded the right to assistance of counsel before he can be validly convicted. *Faretta v. California*, 422 U.S. 806 (1975). The Sixth Amendment as made applicable to the States by the Fourteenth guarantees that a defendant in a state criminal trial has an independent constitutional right of self-representation and that he may proceed to defend himself without counsel when he voluntarily and intelligently elects to do so. *Id.* at 806; *see also* S.C. Const. Art.1, Section 14. While a defendant does not have a right to hybrid representation, the trial judge has discretion to permit it. *State v. Stuckey*, 333 S.C. 56, 57, 508 S.E.2d 564, 564 (1998); *see also* Rule 611(a), SCRE.

Whether a defendant has voluntarily and intelligently elected self-representation is a question of fact:

While a specific inquiry by the trial judge expressly addressing the disadvantages of a pro se defense is preferred, the ultimate test is not the trial judge's advice but rather the defendant's understanding. If the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied.

Wrotèn v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990).

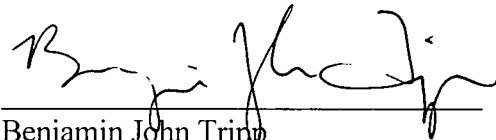
In this case, the trial court erred in finding Petitioner intelligently waived his right to counsel because Petitioner was completely misinformed about the necessity of proceeding pro se. Petitioner believed that if he directly questioned his accuser, he could elicit an exonerating statement. In response, Mr. Whiten specifically told Petitioner that the only way question the accuser in that manner would be for Petitioner to represent himself. Plainly, this advisement was incorrect, and Petitioner therefore never understood that he could continue with his appointed counsel and request that the trial court allow Petitioner himself to question his accuser on the stand. The record reflects that Petitioner would have preferred this strategy. He testified that the decision to represent himself was based mainly on Mr. Whiten's advisement about the need to do so in order to question the accuser.

Furthermore, petitioner did not have an adequate understanding of the level of helpfulness of Mr. Whiten during the trial. Mr. Whiten convinced Petitioner he could competently conduct his own trial by helping him along, and the results of the trial show this advice was incorrect. Finally, the record reflects that had Mr. Whiten represented Petitioner at trial, the disposition of Petitioner's objections would have been different. Mr. Whiten specifically admitted that he would at least have made a specific enough objection to the hearsay testimony of the accuser's mother and to the failure of the accuser to testify at trial to preserve the issues for review. App. 551.

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,

A handwritten signature in black ink, appearing to read "Benjamin John Tripp", written over a horizontal line.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of June, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ANDERSON COUNTY
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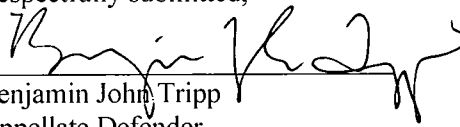
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Howard Thompson, III 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 March 8, 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 Howard Thompson, III.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 3rd day of June, 2013

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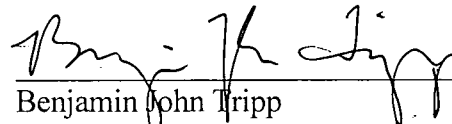
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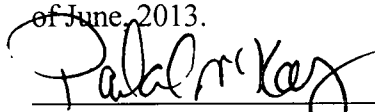
CERTIFICATE OF SERVICE

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 John Walt Whitmire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Howard Thompson, III, #322000, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 3rd day of June, 2013.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day
of June, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.