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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Cherokee County

Honorable Daniel D. Hall, Circuit Court Judge

ELIJAH M. THOMPSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000021

JOHNSON PETITION FOR WRIT OF CERTIORARI

Sarah E. Shipe
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether The PCR court erred finding defense counsel was not ineffective for erroneously advising petitioner to plead guilty when a suppression hearing would likely have resulted in petitioner's charges being dismissed?

STATEMENT

On May 23, 2019, a Cherokee County grand jury indicted petitioner for murder, attempted murder, first degree burglary, armed robbery, and three counts of possession of a weapon during the commission of a violent crime. App. 81-88. On July 2, 2021, petitioner pled guilty to murder, assault and battery of a high and aggravated nature, first degree burglary, armed robbery, and possession of a weapon during the commission of a violent crime before the Honorable R. Keith Kelly. App. 1-28. Petitioner was represented by Steven Epps and the state was represented by assistant solicitor George Kendall. App. 1. Judge Kelly sentenced petitioner to an aggregate term of 35 years' imprisonment. App. 27-27; 89-94.

Thereafter petitioner filed an application for PCR. App. 29-34. On August 8, 2022, an evidentiary hearing was held before the Honorable Daniel E. Hall. App. 45-66. Petitioner was represented by Rodney Richey and the state was represented by assistant attorney general Chelsey Marto. App. 45.

On December 28, 2022, Judge Hall signed an order denying PCR. App. 67-80. The court found petitioner's plea was entered freely, knowingly, intelligently, and voluntarily. App. 76-77. The court found counsel was not ineffective for failure to move to suppress petitioner's "self-incriminatory" statement to law enforcement where counsel credibly testified the only grounds to suppress was petitioner's age but he believed—based on experience—the motion would be unsuccessful. App. 79.

This petition follows.

ARGUMENT

The PCR court erred finding defense counsel was not ineffective for erroneously advising petitioner to plead guilty when a suppression hearing would likely have resulted in petitioner's charges being dismissed.

Relevant facts

At petitioner's guilty plea hearing the state alleged that on August 9, 2018, petitioner, Dominick Smith, and Daniel Eaton entered the home of Kala Jacobson and Marshall Cooper. App. 12-13. The state went on to say the three robbed Jacobson and Cooper. As they were leaving a gun was fired. The bullet killed Cooper and injured Jacobson. App. 13, ll. 6-12. Law enforcement discovered that petitioner sold one of the items stolen during the incident. App. 13, ll. 17-21. When petitioner spoke to law enforcement, he admitted having been there but denied he was the shooter. App. 13, l. 22-14, l. 21.

During mitigation defense counsel told the court that petitioner was eighteen when he began representing him. App. 16, l. 20-17, l. 9. He explained that petitioner had been very forthcoming with counsel but described petitioner as a quiet and reserved person. App. 17, ll. 10-13. Counsel told the court that petitioner was neglected and abused by his mother and then ultimately abandoned and placed in foster care. App. 21, l. 14-22, l. 11. He stated petitioner had no prior criminal record and asked the court to impose a sentence of less than life based on the above and petitioner's cooperation with law enforcement. App. 23, l. 11-25, l. 18.

At his PCR hearing petitioner testified regarding defense counsel's representation. He told the court defense counsel never informed him that counsel could move to suppress his statements to law enforcement. App. 53, ll. 1-25. Petitioner denied his statements to law enforcement were confessions of guilt. App. 56, ll. 16-23. Petitioner told the court he pled

guilty on the advice of defense counsel due to his young age and inexperience with the criminal legal system. App. 54, l. 5-55, l. 5. Petitioner explained now that he was older, he no longer thought pleading guilty was the best course of action. App. 55, ll. 6-16.

Defense counsel testified that it was petitioner's decision to plead guilty and that petitioner did not want to go to trial. App. 62, ll. 10-18. Counsel said he reviewed petitioner's statements with him. He contended that petitioner's being "very young" was not a guarantee that his statements would have been suppressed. App. 60, ll. 13-16. Counsel testified that after he reviewed petitioner's case it was his opinion the case was not "triable," and told the PCR court that a guilty plea was the best-case scenario. App. 64, ll. 1-4; 65, ll. 5-9.

Discussion

The PCR court erred finding defense counsel was not ineffective, and that petitioner's guilty plea was entered freely, knowingly, intelligently, and voluntarily.

"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction ... has two components." *Strickland v. Washington*, 466 U.S. 668 (1984). The defendant must first demonstrate that counsel was deficient and then must also show this deficiency resulted in prejudice. *Id.* To satisfy the first prong, a defendant must show counsel's performance "fell below an objective standard of reasonableness." *Franklin v. Catoe*, 346 S.C. 563, 570–71, 552 S.E.2d 718, 722 (2001). "However, there is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal quotation omitted).

To satisfy the second prong of the analysis in the context of an allegation that a guilty plea was improvidently accepted, the "'defendant must show that 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.'" *Stalk v. State*, 383 S.C. 559, 562, 681 S.E.2d 592, 594 (2009) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

Defense counsel was deficient for failure to move to suppress petitioner's statements to law enforcement and instead advising petitioner to plead guilty. Petitioner was unaware counsel should have moved to suppress his statements. When PCR counsel asked him about suppression petitioner stated, "I don't even know what that means." App. 53, ll. 21-25. Petitioner's statements to law enforcement, though not a confession, were the state's best evidence against him. Those statements put petitioner at the scene of the incident and made it very likely that a jury would convict him under the hand of one hand of all theory if he continued to trial. Counsel admitted that petitioner was very young at the time, but counsel asserted that alone was insufficient to suppress his statements made to law enforcement. Defense counsel did not suggest any strategy behind not moving to suppress the statements. Counsel's testimony demonstrated that he only ever prepared for a guilty plea and did not even consider moving to suppress petitioner's statements.

Petitioner was prejudiced by counsel's failure and asserted at his hearing that he would not have pled guilty but for the advice of counsel. Petitioner did not have the understanding that his statements could have been suppressed. Had he understood that he would not have pled and would have insisted on going to trial instead.

"A criminal defendant is deprived of due process if his conviction is founded, in whole or in part, upon an involuntary confession." *State v. Pittman*, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007) (citing *Jackson v. Denno*, 378 U.S. 368, 377 (1964)), cert. denied, 552 U.S. 1314 (2008). In *State v. Miller*, this court instructed:

> The process for determining whether a statement is voluntary, and thus admissible, is bifurcated; it involves determinations by both the judge and the jury. First, the trial judge must conduct an evidentiary hearing, outside the presence of the jury, where the State must show the statement was voluntarily made by a preponderance of the evidence. *Jackson v. Denno*, 378 U.S. 368, 376 (1964). If the statement is found to have been given voluntarily, it is then submitted to the jury, where its voluntariness must be established beyond a reasonable doubt. *State v. Washington*, 296 S.C. 54, 56, 370 S.E.2d 611, 612 (1988).

Miller, 375 S.C. at 380, 652 S.E.2d at 448; *Arrowood*, 375 S.C. at 366, 652 S.E.2d at 442. *See also Lego v. Twomey*, 404 U.S. 477, 489, 92 S.Ct. 619, 30 L.Ed.2d 618 ("[T]he prosecution must prove ... by a preponderance of the evidence that the confession was voluntary."); *State v. Smith*, 268 S.C. 349, 354, 234 S.E.2d 19, 21 (1977) ("It has been uniformly held, a confession may be introduced upon proof of its voluntariness by a preponderance of the evidence."); *State v. Neeley*, 271 S.C. 33, 40, 244 S.E.2d 522, 526 (1978) ("[T]he burden is on the State to prove by a preponderance of the evidence that [these] rights were voluntarily waived.").

In *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007), this Court instructed:

> In determining whether a confession was given "voluntarily," this Court must consider the totality of the circumstances surrounding the defendant's giving the confession. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). As the United States Supreme Court has instructed, *the totality of the circumstances includes "the youth of the accused, his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights*, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep." *Id.* (internal citations omitted). Furthermore, no one factor is determinative, but each case requires careful scrutiny of all the surrounding circumstances. *Id.*

Pittman, 373 S.C. at 566, 647 S.E.2d at 164. (emphasis added).

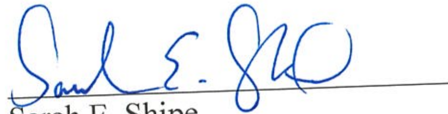
The PCR court found counsel was not ineffective for failure to "pursue a motion at trial that would not have been successful and likely led to a harsher sentence." App. 79. However, it

is not a forgone conclusion that a motion to suppress petitioner's statements would have been unsuccessful. Petitioner's young age was a factor that a court would have considered in addition to his lack of parental guidance. The court likely would have determined after a hearing that his statement was not voluntary based on the totality of the circumstances.

The evidence in the record demonstrates that had counsel moved to suppress petitioner's statements petitioner would have gone to trial. Petitioner and defense counsel both testified regarding his young age and inexperience with the legal system. Petitioner had no criminal record and he relied fully on counsel to advise him and was gravely prejudiced by counsel's erroneous advice in this regard.

CONCLUSION

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



Sarah E. Shipe
Appellate Defender

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This 14th day of June, 2023.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Elijah M. Thompson states:

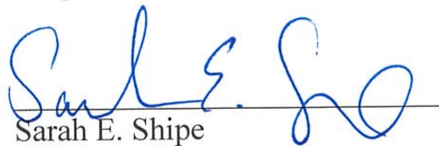
1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Daniel D. Hall, which was held on August 8, 2022, 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 Elijah M. Thompson.

Respectfully Submitted,



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of June, 2023.

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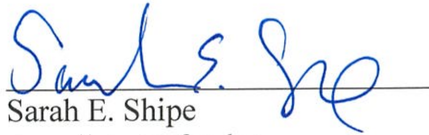
CERTIFICATE OF COUNSEL

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."



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This 14th day of June, 2023.