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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

Honorable Diane Schafer Goodstein, Circuit Court Judge

JASON FORDE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000658

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Did the PCR court err in determining trial counsel was not ineffective where he failed to advocate and obtain a ruling on petitioner's repeated requests for a speedy trial when petitioner was incarcerated for two years before trial?

2. Did the PCR court err by ruling trial counsel was not ineffective in advising petitioner to plead guilty rather than continuing trial and seeking potential appellate review of prosecutorial misconduct that invaded his Sixth Amendment right to counsel?

3. Did the PCR court err in refusing to grant petitioner a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) because petitioner did not understand he was waiving his direct appeal rights on matters for which dismissal of the charges was the appropriate remedy?

STATEMENT OF FACTS

Petitioner was arrested on May 30, 2008, and indicted on February 19, 2009, on seven counts of armed robbery. App. 370-71. His jury trial did not begin until April 10, 2010. App. 1. Petitioner was unable to make bond and remained incarcerated until trial. App. 445, l. 23 – p. 446, l. 5. While petitioner repeatedly pressed his trial counsel, Timothy Murphy, for a speedy trial, counsel resisted those efforts and only filed a motion asserting the right in March of 2009. App. 413-414, 419, 574. Murphy indicated a delay in obtaining discovery from the state was the cause of the initial delays in getting the case to trial. App. 413; 414; 415. Petitioner was told by letter from Murphy dated November 18, 2008, that discovery was to be provided that month. App. 415. At the PCR hearing, Murphy indicated the state did not provide discovery until January of 2009, and that he finally filed the motion for speedy trial in March of 2009, at petitioner's insistence, to start "putting some pressure on the solicitor's office. . ." App. 530, ll. 8-22. Petitioner was told his case would "definitely" be called to trial on July 27, 2009. App. 421. When that date passed, he was told in another letter from Murphy on November 20, 2009, that his motion for speedy trial would be ruled upon at his trial. App. 424. Despite these assertions and being "ready" for trial when the motion for speedy trial was finally filed in March of 2009, Murphy did not pursue a ruling on this issue. Petitioner was incarcerated for almost two years before trial, during which time he was under pressure due to criminal charges against his wife and the recent birth of his child, who was born a week before his arrest. App. 119, l. 6; 504, ll. 15-20.

While indicted for seven armed robberies in Sumter County, a single indictment was called to trial on April 10, 2010, before the Honorable George C. James[1] and a jury. App. 1. Mattison Gamble represented the state. During petitioner's trial, members of law enforcement who were actively assisting in the prosecution looked at Murphy's notes during a break in court proceedings and actively advised the prosecution to recall witnesses to fix mistakes that were made during trial. App. 244, l. 16 - 246, l. 17. After being informed of the misconduct, Murphy requested the indictment be dismissed with prejudice, which was denied. App. 299, ll. 14-17. Following a hearing on the extent of the invasion of petitioner's Sixth Amendment right to counsel and the attorney-client privilege, the court noted "I would grant a motion for a mistrial if Mr. Murphy asked for it and if it was within my power I would make certain rulings as to whether or not certain witnesses could testify the next time." App. 320, ll. 2-7. During the PCR hearing, Murphy explained that this misconduct was "the only issue I thought was probative – that was appealable." App. 564, l. 23-24. He also did not move for a mistrial or accept the court's invitation to request one, testifying at the PCR hearing that a mistrial was not what he wanted since "if we continue down the trial, this is an issue that's viable." App. 532, ll. 1-2. Despite this "viable" issue and the other issues he had raised for petitioner, Murphy indicated a change of plea following the court's denial of the motion to dismiss. App. 71, ll. 6-23. This sudden change was prompted by Murphy's advice that "now is the time" to plead since the trial judge was "livid and wanted to send a message to those officers." App. 534, ll. 8-16. As noted by petitioner in connection with his guilty pleas, the promise of a "light sentence" and the pressure from Murphy as to the need for the "formalities" to be followed pushed petitioner to plead guilty against his own wishes. App. 506, l. 1 – 507, l. 7. Petitioner was also informed of the

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[1] Now Justice James of this Court.

likelihood he would face a life sentence for the additional indictments if he did not plead guilty. App. 536, ll, 5-7. Following the guilty plea on April 15, 2010, the trial judge sentenced petitioner to twenty-two years for each of the seven charges, to run concurrently. App. 368, ll. 18-23; 370-390.

Petitioner asserted his desire to have certain issues presented and ruled upon in connection with Murphy's representation. App. 413-429. Petitioner and Murphy discussed these issues in detail. App. 444, ll. 4-8; 515, ll. 1-23; 520, l. 8 – 521, l. 14. During trial, Murphy raised objections and preserved several of these issues for appellate review, particularly related to petitioner's arrest without probable cause in violation of the Fourth Amendment, petitioner's custodial statements obtained in violation of the Sixth Amendment right to counsel, and the prosecutorial misconduct that occurred during trial. App. 568-585. Murphy indicated he told petitioner the importance of winning the motions at trial due to the "deference" an appellate court would show in reviewing such decisions. App. 536, ll. 2-7. Murphy also testified to his opinion that the motions were not likely to be granted by the trial judge. App. 521, ll. 11-14.

Petitioner filed his initial application for post-conviction relief on April 15, 2011. App. 391-405. The state filed its return dated August 3, 2011, denying the substance of the application and requesting an evidentiary hearing on the ineffective assistance of counsel allegations. App. 430-434. An amendment to the application was filed on petitioner's behalf by David C. Holler on November 4, 2013. App. 406-408. A Second Amended Post-Conviction Application, dated November 5, 2021, was filed on petitioner's behalf by Ashley McMahan which asserted trial counsel was ineffective in not filing an appeal and requesting a belated appeal. App. 409-410. A Third Amended Application was filed on petitioner's behalf by McMahan dated November 15, 2021. App. 411-429. The matter was heard by the Honorable

Diane S. Goodstein on November 19, 2021, with McMahan representing petitioner and Michael Neubauer representing the state. Judge Goodstein denied the petitioner's application by order of dismissal filed March 13, 2023. App. 568-585. This Petition for Certiorari follows.

ARGUMENT

1. The PCR court erred in finding counsel effective related to petitioner's right to a speedy trial since trial counsel failed to obtain a ruling on his belated motion for a speedy trial.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). "Thus, when challenging a guilty plea, a PCR applicant must show (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, the applicant would not have pled guilty." Ervin v. State of South Carolina, 438 S.C. 559, 565, 885 S.E.2d 387, 390 (2023) (internal citations omitted). In a guilty plea setting, "the prejudice analysis is limited to the outcome of the plea process—whether but for counsel's deficiency, the defendant would have declined to plead and instead proceeded to trial." Frierson v. State, 423 S.C. 257, 263, 815 S.E.2d 433, 436 (2018). "In other words, in order to satisfy the 'prejudice' requirement, 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." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Generally, a guilty plea waives non-jurisdictional defects and violations of constitutionally protected rights. State v. Green, 436 S.C. 492, 494, 872 S.E.2d 869, 870 (Ct. App. 2022). When counsel is ineffective in pursuing a speedy trial, it is properly a matter for post-conviction relief, even after a guilty plea. *See* Nelson v. Hargett, 989 F.2d 847, 850 (5th Cir. 1993) ("It is difficult, on these facts, to view [counsel]'s failure to pursue the speedy trial claim as the product of a reasonable litigation strategy."); People v. Stanley, 641 N.E.2d 1224, 1227

(Ill. 1994) ("If counsel's failure to move for a speedy trial discharge is the result of actual incompetence on the attorney's part and results in prejudice to the defense, defendant is entitled to a new trial."); Parks v. State, 326 So. 3d 505, 510 (Miss. Ct. App. 2021) (holding a trial "counsel's decision to waive the right to a speedy trial in exchange for the guilty plea may constitute ineffective assistance of counsel.").

Petitioner was arrested on May 30, 2008, and indicted on February 19, 2009. App. 370-71. His trial began on April 15, 2010. App. 1. Petitioner repeatedly pressed Murphy for a speedy trial, while Murphy resisted those efforts and only filed the motion in March of 2009. App. 411-12, 417, 572.

The almost two-year delay between arrest and trial should have triggered the presumptive prejudice analysis and a full inquiry under Barker v. Wingo, 407 U.S. 514, 521 (1972). Had Murphy promptly moved for a speedy trial, or at least sought a ruling on the issue once a motion was in fact filed, the court would have reviewed "(1) length of delay; (2) the reason for the delay; (3) the accused's assertion of his right to a speedy trial; and (4) whether the delay prejudiced the accused." State v. Hunsberger, 418 S.C. 335, 343, 794 S.E.2d 368, 372 (2016). "The remedy for a speedy trial violation is dismissal of the charges." Id., 418 S.C. at 342, 794 S.E.2d at 371.

Despite being pressed by petitioner, Murphy resisted filing for a speedy trial since it "was prejudicial to us to rush this case to trial when I wouldn't have had time to really prepare adequately." App. 574, ll. 16-18. Petitioner indicated and the evidence supports multiple efforts on his part to get Murphy to assert his speedy trial rights. App. 447, ll. 20-25. Even after filing a motion to assert the right to a speedy trial, Murphy failed to raise the matter again and never obtained a ruling on the issue *despite promising petitioner the matter would be addressed by his trial judge*. App. 424.

Had Murphy promptly moved for and or attempted to secure a ruling on petitioner's right to a speedy trial, the trial judge would have looked at the length of delay (over two years) which would have been in petitioner's favor. According to Murphy, the reason the matter was originally not ready for trial was a combination of plea negotiations but also related to a failure by the state to complete discovery responses to allow defense counsel to properly prepare for trial. App. 530, l. 8 – 531, l. 20. The yearlong delay after the speedy trial motion was finally filed would have likely been solely attributed to the state since, according to Murphy's testimony, he was "prepared for trial cause, at that time, it was around the time it was very clear to me we were gonna go to trial" and it was "time to start putting some pressure on the solicitor's office to try and get us to go there." App. 530, ll. 18-22. In addition, Murphy was told the case would be called in July of 2009, and when that date passed assured petitioner in November of 2009 that the motion would be ruled upon by the trial judge when the case finally was called to trial. App. 421; 424. It would have been entirely reasonable for the trial judge to rule the reason for the delay fell upon the state, not petitioner. Petitioner actively asserted the right, first directly with Murphy and eventually through a motion. App. 419; 447, ll. 20-25. The trial judge could have found this factor in petitioner's favor.

As to the final fact, prejudice, the "Supreme Court has identified three different types of prejudice the right to a speedy trial seeks to prevent: (1) oppressive pre-trial incarceration; (2) anxiety stemming from being publicly accused of a crime; and (3) the possibility that the accused's defense will be impaired due to the death or disappearance of witnesses or the loss of memory with the passage of time." State v. Langford, 400 S.C. 421, 445, 735 S.E.2d 471, 484 (2012). Here, petitioner was incarcerated for two years before trial, during which time he was confronted with legal issues surrounding his wife and the recent birth of his child. App. 119, l. 6

- 120, l. 8; 445, l. 23-446, l. 8; 451, ll. 24-25. Extensive pre-trial detention, along with being separated from his wife and newborn child for over two years, would have been grounds for the trial judge to determine petitioner was prejudiced by long delay.

Petitioner testified regarding Murphy's failure to pursue his right to a speedy trial:

> "[H]e didn't do nothing about it. But I feel, I feel as though this – that if he had done these things, the situation would have been different -- the situation would have been way different."

App. 449, ll. 18-22. Petitioner further noted, when speaking on the speedy trial issue, that trial counsel "didn't advise me, he didn't advise me right at all." App. 450, ll. 13-14.

The PCR court erred by only considering the filing of a speedy trial motion by trial counsel, and not the expected professional judgment to pursue the motion and obtain a ruling on it before advising petitioner to plead guilty. Since the long delay between arrest and trial warranted an inquiry under Barker, and dismissal of the charges was the appropriate remedy if petitioner's speedy trial right was violated under Hunsberger, Murphy was ineffective in failing to secure a ruling on petitioner's right to a speedy trial. Hill v. Lockhart, 474 U.S. 52 (1985) (petitioner would not have entered a guilty plea but for counsel's error in failing to advocate and obtain a ruling on this issue before trial). Petitioner is entitled to new trial, where pre-trail in can be determined if his speedy trial right was violated.

2. The PCR court erred in not granting relief on petitioner's argument that his guilty pleas were not free and voluntary due to trial counsel's ineffective advice to plead guilty rather than to continue trial and seek review of direct appeal issues.

During his trial, members of the prosecution team reviewed Murphy's notes during a break in trial. Following a hearing on the extent of the invasion of petitioner's Sixth Amendment right to counsel and the attorney-client privilege, the trial judge stated "I would grant a motion for a mistrial if Mr. Murphy asked for it and if it was within my power I would make certain rulings as to whether or not certain witnesses could testify the next time." App. 320, ll. 2-7. During the PCR hearing, Murphy explained that this misconduct was "the only issue I thought was probative – that was appealable." App. 564, l. 23-24. Murphy did not move for a mistrial or accept the court's invitation to request one, testifying at the PCR hearing that a mistrial was not what he wanted since "if we continue down the trial, this is an issue that's viable." App. 532, ll. 1-2. Rather than accepting the mistrial offer or potentially pursuing appellate review of the misconduct issue and dismissal of the charge, Murphy spoke with petitioner about changing his plea. It was a "very emotional" conversation, with petitioner crying, and Murphy referencing the other pending charges and a potential notice for a "life sentence" before the "dam broke" and petitioner finally agreed to plead guilty. App. 535, l. 21 – 536, l. 15.

During his PCR hearing, petitioner testified as follows:

> And, yes, he used the circumstances of the trial where it, where it went and it was, it was something that I didn't understand and it was overwhelming and, and it seemed to be going in a point -- in a bad direction and he used that he used them circumstances in -- for -- to, to cause to for me to plead. He said this is the best time. If you want to get any type of, you know, that I do (indiscernible) just do it now and I'm telling you that.
>
> So he never advised me that -- he never advised me that the petitioners [issues] that he made were preserved for direct appeal. He never advised me that those issues would not be addressed ever can, cannot be raised again.

> He never, he never, he never advised me to a, a bunch of stuff that I could of had rights to. He never advised me this -- I know you read -- gonna read the transcript and it say what's there right there. Bu~ he never advised me to the, to the (indiscernible). Had I known these things, we would not be here today. We could be having a different discussion today.

App. 501, ll. 2-20.

Murphy's advice that petitioner plead guilty, rather than continue his jury trial and pursue direct appeal or accept a mistral when offered by the trial judge, constitutes ineffective assistance of counsel under Hill v. Lockhart, 474 U.S. 52 (1985). Petitioner is entitled to new trial due Murphy's failure to accept mistral, or a delated appeal on this issue as set forth in Argument 3, *infra*.

3. The PCR court erred in refusing to grant petitioner a belated appeal because petitioner did not understand he was waiving his direct appeal rights on matters for which dismissal of the charges was the appropriate remedy.

The PCR court erred in finding that petitioner knowingly and voluntarily waived his direct appeal rights when he plead guilty to the charges. As noted in Arguments 1 and 2, *supra*, trial counsel was ineffective in advising petitioner to plead guilty rather than seek the appropriate remedies for those issues. In a guilty plea setting, "the prejudice analysis is limited to the outcome of the plea process—whether but for counsel's deficiency, the defendant would have declined to plead and instead proceeded to trial." Frierson v. State, 423 S.C. 257, 263, 815 S.E.2d 433, 436 (2018).

Here, petitioner testified regarding his understanding of waiving his direct appeal rights:

> [I] was coerced by Mr. Murphy because he told me this, this how I should is not to plead if you want to plead because the judge is upset with the State to plead and (indiscernible) about it. He actual yelled at me at that in the, in the break room. we had a, we had a back and forth because I didn't want to plead.
>
> I did not (indiscernible) at all to his advice at the last day of trial because, because my, my family showed up and they created a situation, crying, and all that kind of stuff, and Mr. Murphy kept at me asking about you don't want your family to see you get a whole bunch of time on these people. Just do it what you suppose to do, do it now, and that's what I did.
>
> Q. Do you remember during your guilty plea Judge James asking you if anybody used any threat, force, pressure, or intimidation to make you plead guilty?
>
> A. Right. I apologize.
>
> Q. Do you remember saying that nobody had threatened, forced, coerced, or intimidated you to plead guilty?
>
> A. Mr. Murphy advised me to say that. He said there's a form (indiscernible) that you have to go by it. In order for the plea to go forward, you have to be -- you have to say these things.
>
> Q. But you did tell the judge on two separate occasions at your guilty plea that you were not threatened, forced, coerced to plead guilty, correct?

A. I didn't know any better. I, I followed Mr. Murphy's advice, yes. I followed Mr. Murphy's advice.

Q. so---

A. I didn't know any better at the time. Had I know better I would not.

App. 491, l. 1 – 492, l. 6.

Since petitioner relied upon the erroneous advice of ineffective counsel on the issues outlined in Arguments 1 and 2, *supra*, the PCR court erred in finding petitioner was not entitled to a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), despite petitioner's guilty plea, on issues for which dismissal was the appropriate remedy.

STATEMENT OF ISSUES ON APPEAL

Did the almost two-year delay between arrest and trial, and one year delay between moving for a speedy trial and actual trial, violate petitioner's right to a speedy trial?

Did the misconduct of the prosecution team in reading from defense counsel notes and planning rebuttal require dismissal as the appropriate remedy?

CONCLUSION

Based upon the foregoing, petitioner respectfully requests that this Court grant the writ of certiorari to allow full briefing on these issues.

Gary H Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of July, 2023.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jason J. Forde states:

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

2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Diane Schafer Goodstein, which was held on November 19, 2021, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He 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 him as counsel for Jason J. Forde.

Respectfully Submitted,

Gary H Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of July, 2023

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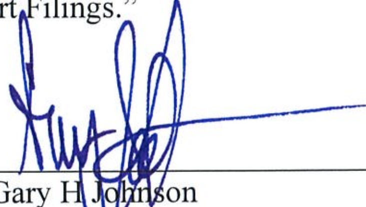
S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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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