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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Cherokee County

Honorable Brian M. Gibbons, Circuit Court Judge

SHAUN ROGERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000503

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in ignoring the impact of plea counsel's erroneous advice that petitioner would not be eligible for time served credit for incarceration of almost three years if he did not plead guilty?

STATEMENT OF FACTS

On October 2, 2018, petitioner Shaun Rogers and an acquaintance, Jermaine Jeffries, drove to the home of Overton Good (the victim). App. p. 222, l. 5 – p. 223, l. 10. While outside victim's home, Jeffries produced a handgun and tried to forcibly enter the victim's dwelling. App. p. 108, l. 5 – p 109, l. 1; p. 133, ll. 1 – 18. As petitioner drove the vehicle from the scene, Jeffries leaned out of the side of the car and fired his gun into the dwelling, with a round striking and killing victim inside the residence. App. p. 125, l. 12 – p. 126, l. 25; p. 133, ll. 1 - 18. Petitioner was 19 years old at the time. App. p. 240, ll. 8 – 15. Petitioner has been consistent throughout that he was not aware of Jeffries' intention to use the gun. App. p. 258, l. 22 – p. 259, l. 6; p. 327, ll. 1 – 13; p. 353, ll. 23 – 25; p. 355, ll. 20 – 25.

Petitioner was indicted for murder, attempted murder, attempted armed robbery, burglary, discharging a firearm into a dwelling, and possession of a firearm during commission of a violent crime. App. p. 360 – 368. Petitioner was tried before the Honorable J. Derham Cole and a jury from October 7 – 9, 2019. During his jury trial, petitioner was represented by E. Joshua Shultz and the state was represented by solicitor Barry Barnette. The jury returned guilty verdicts on the burglary and attempted armed robbery charges, but was unable to reach a verdict on the charges of murder, attempted murder, possession of a firearm, and discharging a firearm into a dwelling. App. p. 307, l. 20 – p. 308, l. 8.

Prior to sentencing, trial counsel indicated petitioner desired to enter a plea to voluntary manslaughter instead of the murder charge and along with the remaining charges. App. p. 312, ll. 1-12. Petitioner's reluctance to plead was evident as Judge Cole questioned petitioner, with petitioner repeatedly telling Judge Cole he had a defense and did not commit the crimes charged. App. p. 320, ll. 4 – 22. The plea was eventually withdrawn, and Judge Cole then sentenced

petitioner to 20 years for both the burglary and attempted armed robbery charges. App. p. 337, ll. 10 – 21. Petitioner appealed his convictions on the ground that there was no evidence he knew of the shooter's intent to engage in criminal conduct, but the Court of Appeals affirmed his conviction in an unpublished decision. State v. Rogers, Appellate Case No. 2019-001778 (filed June 15, 2022).

While his appeal was pending, petitioner's remaining charges were called to trial before the Honorable R. Keith Kelly.[1] App. p. 340. Petitioner was represented by Tracy Racine (plea counsel) and Russ Racine, with solicitor Barnette representing the state. Plea counsel negotiated a guilty plea to voluntary manslaughter instead of murder and to the remaining charges with a twenty-five year sentence recommendation. App. p. 343, l. 2 - p. 345, l. 16. Once again, petitioner's reluctance to plead was apparent:

> THE COURT: Yes, sir. Are you pleading guilty because you are guilty?
>
> THE DEFENDANT: I'm pleading guilty because I feel I couldn't win in trial.

App. p. 347, ll. 9 - 12. Following a telephone conference between plea counsel and petitioner, Judge Kelly took petitioner's Alford plea.[2] Even at this stage, petitioner's confusion was apparent, as he asked Judge Kelly about appeal rights before the plea was completed and before

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[1] Petitioner attended this hearing through remote access due to COVID protocols allowing the conduct of hearings in Circuit Court via remote communication technology under Supreme Court Order dated February 26, 2021.

[2] North Carolina v. Alford, 400 U.S. 25 (1970).

he was sentenced. App. p. 356, ll. 6 – 13. Judge Kelley sentenced petitioner to twenty-five years concurrent with credit for time served of 1,148 days.[3] App. 357, l. 22 – p . 358, l. 11.

Petitioner filed an application for PCR on April 15, 2022. Petitioner was represented at his PCR hearing by Rodney Richey and Chelsey Marto appeared on behalf of the state. An evidentiary hearing was held on October 18, 2022, before the Honorable Brian M. Gibbons. Petitioner presented testimony as did both Tracy Racine and Russell Racine.

During his PCR hearing, petitioner testified regarding the advice he was given over credit for time he had already served:

> Q. Was there any conversation about you getting credit for the time you already been in jail?
>
> A. Yes, sir. She [Ms. Racine] said -- *she said that the only way that I would get credit from the first day I was locked up* -- so the point then was that if I was to take the plea -- *she said if I was to go to trial, and I was to lose, that I would lose all the time that I had been locked up.*
>
> Q. On the case, itself, do you believe if you went to trial you -- you'd be found not guilty?
>
> A. Yeah. I don't think I would been found guilty for murder.

App. p. 404, l. 17 – p. 405, l. 2 (emphasis added). Petitioner's belief that he would not be found guilty of the murder of victim is not without reason as a jury was unable to reach a verdict on the charge at his trial. App. p. 306, l. 12 – p. 308, l. 7.

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[3] Petitioner timely appealed the guilty plea, but the appeal was dismissed by the Court of Appeals under Rule 203(B), SCACR, due to no preserved issue for appellate review by order filed February 23, 2022.

ARGUMENT

1. The PCR court erred in finding petitioner's *Alford* plea was freely and voluntarily given by not addressing the impact of plea counsel's inaccurate advice to petitioner regarding credit for time served.

The PCR order fails to address the most important aspect of petitioner's claim that plea counsel was ineffective: her erroneous advice that he would not receive credit for the 1,148 days of his pretrial incarceration if he went to trial and was convicted. Petitioner testified about this issue. "She said -- she said that the only way that I would get credit from the first day I was locked up -- so the point then was that if I was to take the plea -- *she said if I was to go to trial, and I was to lose, that I would lose all the time that I had been locked up.*" App. p. 404, 19 - 23. (emphasis added). This testimony was uncontradicted at the PCR hearing.

While a Rule 59, SCRCP, motion over the omission of this ground from the PCR order would have been desirable, "because the United States Constitution's Sixth Amendment guarantee to a defendant's right to effective assistance of counsel is engrained in PCR cases, we cannot continue to permit a party's procedural shortcoming—such as the failure to file a Rule 59(e) motion—to prevent this Court from remanding claims of ineffective assistance of counsel when the PCR court's order does not comply with section 17-27-80." Fishburne v. State, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019). Since the PCR order is silent on the accuracy of plea counsel's advice concerning sentencing, this Court should review the merits of the issue and grant relief or remand the case to the PCR court for appropriate findings under Fishburne.

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). However, this Court may "not avoid a finding of prejudice on the basis of the likelihood of a guilty verdict, even if Petitioner is throwing a 'Hail Mary.'" Taylor v. State, 422 S.C. 222, 233, 810 S.E.2d 862, 867 (2018).

In advising defendants to accept a plea, counsel must be accurate in their statements of the law. See Taylor, 422 S.C. at 229, 810 S.E.2d at 865 ("Given that Petitioner's offense was manifestly one subjecting Petitioner to deportation, we are compelled to find that counsel's failure to correctly advise Petitioner was deficient as a matter of law."); Robinson v. State, 422 S.C. 78, 86, 810 S.E.2d 32, 36 (2018) ("Because the PCR court failed to recognize that plea counsel's advice was deficient—as an increased punishment under the amended law would have violated the *ex post facto* clauses of the United States Constitution and South Carolina Constitution—the PCR court's decision is controlled by an error of law and we reverse."); Goins v. State, 397 S.C. 568, 574–75, 726 S.E.2d 1, 4 (2012) (holding plea counsel's incorrect advice

regarding search of hotel room in violation of well-established law constituted deficient performance).

In the present case, petitioner was facing a trial while incarcerated for a prior conviction arising out of the same occurrence. At the time of both petitioner's trial and guilty plea, S.C. Code Ann. § 24-13-40 (effective June 7, 2013) required credit for time served absent two exceptions.[4] Having been charged with multiple offenses arising from the same occurrence, petitioner was entitled to credit for time served for any sentence for those offenses following either a guilty plea or trial by jury. The procedural posture of the case having generated convictions on some of the offenses and mistrial on others would not have eliminated his credit for time served. State v. Boggs, 388 S.C. 314, 316–17, 696 S.E.2d 597, 598–99 (Ct. App. 2010) ("A judge's disappointment in the maximum sentence he can impose is not one of the exceptions to the mandatory language in section 24–13–40. Accordingly, the trial judge's decision to deny . . . credit for time served is reversed."); *see also* State v. McCord, 349 S.C. 477, 487, 562 S.E.2d 689, 694 (Ct. App. 2002) (holding sentence "was in error because section 23-13-40 mandates credit for time served unless an exception applies.").

The legislature did not intend for S.C. Code Ann. § 24-13-40 to penalize a defendant following a split verdict by denying them credit for time served on subsequent trial. Plea counsel was ineffective in advising petitioner he would lose credit for the *1,148 days of pretrial incarceration* if he did not plead guilty. This "trial tax" was not envisioned by the "serving a sentence for one offense and is awaiting trial and sentence for a second offense" language of S.C.

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[4] The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence. . . . Provided, however, that credit for time served prior to trial and sentencing shall not be given: . .. when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense. S.C. Code Ann. § 24-13-40 (2013 Act No. 34, § 1, eff June 7, 2013).

Code Ann. § 24-13-40 and counsel's advice that petitioner would not be eligible for credit for his time served was not an accurate statement of law.[5]

Since plea counsel's advice concerning credit of time served was deficient and fell below an objective standard of reasonableness, the record supports a finding of a "reasonable probability" that, "but for counsel's" improper advice regarding credit for times served, petitioner "would not have pleaded guilty and would have insisted on going to trial." Lockhart, 474 U.S. at 59. Much like his interactions with Judge Cole regarding pleading following his original trial, petitioner was clear he believed he was not guilty since he had no knowledge of the intent by the actual shooter to commit a crime during his plea before Judge Kelly. "I'm pleading guilty because I feel I couldn't win in trial." App. p. 347, ll. 11 - 12. His decision to plead was driven by his lack of confidence in his attorney and the erroneous advice that he would not receive credit for time served if he went to trial.

> Q. Well, then why did you decide to plead?
>
> A. Because I felt if *I was to go to trial with her*, I was going to get a life sentence.

App. p. 407, ll. 4 – 6 (emphasis added).

At the plea hearing, plea counsel noted petitioner's reluctance to plea. "We've gone over all possible scenarios and I think this is the best possible outcome. *And I think Mr. Rogers reluctantly agrees with me on that one.*" App. p. 355, ll. 22 – 25 (emphasis added). Petitioner's continued reluctance to plead guilty, as evidenced over two hearings before two separate judges and through his appellate court filings following both his conviction and plea, establish the

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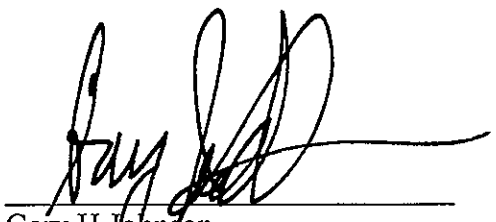
[5] The PCR order only mentions the danger of a life sentence under the "Trial Tax" heading and does not address the issue regarding credit for time served being lost if petitioner went to trial.

prejudice prong. Here, petitioner "would have declined to plead and instead proceeded to trial." Frierson, 423 S.C. at 263, 815 S.E.2d at 436.

In the order denying relief, the PCR court failed to address this issue. The PCR court's conclusory review of the voluntary nature of petitioner's plea and the "trial tax" concentration on the danger of receiving a life sentence did not touch on the impact of the improper advice of counsel that the only way to obtain credit for pretrial incarceration was through a guilty plea. The "fear of more time if he went to trial" may have not been sufficient to undermine the Alford plea, but erroneous advice that the "trial tax" would take the form of lost time served of over 1000 days of incarceration does undermine the voluntary nature of the Alford plea.

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

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This 7th day of August, 2023.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Shaun Rogers 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 Brian M. Gibbons, which was held on October 18, 2022, 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 Shaun Rogers.

Respectfully Submitted,

Gary H. Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of August, 2023.

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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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ATTORNEY FOR PETITIONER

This 7th day of August, 2023.