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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

MARK A. EARLS, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001413

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made where plea counsel coerced Petitioner to plead guilty because counsel believed it was in Petitioner's best interest to accept the negotiated sentence of thirty years imprisonment for murder and where Petitioner was prejudiced because he would not have pled guilty if counsel had not told Petitioner "he would not fight" for Petitioner if Petitioner proceeded to trial and that Petitioner would be sentenced to life without parole if he was convicted at trial?

STATEMENT OF THE CASE

A Cherokee County grand jury indicted Petitioner on July 9, 2015 for murder, possession of a weapon during the commission of a violent crime, and two counts of attempted armed robbery. App. 195-200. His case was called to trial on February 4, 2019 before the Honorable R. Keith Kelly, and a jury. App. 1. Assistant Solicitors Kimberly Leskanic and Jennifer Jordan represented the state. Richard Whelchel and Matthew Craft represented Petitioner. App. 1.

After jury selection, Petitioner pled guilty as indicted. App. 35, l. 22 – 51, l. 16. The state alleged that Petitioner shot and killed Abelardo Baltazar during an attempted armed robbery. During the plea proceeding, the assistant solicitor explained that law enforcement responded shortly after six o'clock in the evening on May 6, 2015 to Cemetery Alley in Cherokee County in regard to a shooting. They found Baltazar slumped over in his pickup truck with two gunshot wounds. Sandra Tessnear, a prostitute, was in the vehicle with Baltazar when the shooting occurred. Law enforcement obtained surveillance footage from Gaffney Self Storage, which showed a male and a female walking in the alley and the "actual attempted robbery." Officers posted still photographs from the surveillance footage online and on social media. They received multiple tips identifying the suspects as then sixteen year old Petitioner and his girlfriend, Lyric Morgan.

The assistant solicitor stated that when questioned, Morgan claimed she and Petitioner set out that day to commit a robbery. They chose Baltazar and Tessnear as their target. Petitioner approached the driver's side and Morgan approached the passenger side of Baltazar's truck. According to Morgan, Petitioner demanded Baltazar give him "everything that you have got" and pointed a .22 caliber pistol at Baltazar. When Baltazar reached down, Petitioner shot him twice.

Petitioner was also interviewed by law enforcement. His mother was present during the interview. Petitioner's mother allegedly identified Petitioner in the surveillance footage as the male who participated in the attempted robbery. The solicitor told the judge that Petitioner admitted to trying to rob Baltazar and when Baltazar tried to reach for Petitioner's gun, Petitioner "pulled his hand back and the gun went off." App. 44, l. 25 – 50, l. 7.

Notably, after the judge asked Petitioner whether anyone, such as a family member or a close friend, pressured him or convinced him to plead guilty, there was a break in the proceedings. When the record resumed, plea counsel stated, "You just tell him you talked to your momma, but she didn't make you plead. That's what he's asking you." Petitioner then answered, "No, sir." The plea judge then stated, "Well, I want to ask that again. I just overheard what your lawyer said. Now you can talk to your mother. You can talk to all the family members that you want, but it has to be your decision, not their decision. So I now ask you, is it your decision to plead guilty?" Petitioner responded, "Yes, sir." App. 41, l. 21 – 42, l. 12.

Immediately thereafter, the plea judge asked Petitioner if he was satisfied with the services of his attorney. Petitioner told the judge he was not satisfied with his counsel, Richard Whelchel. Petitioner explained that Whelchel did not prepare a defense and never reviewed the discovery materials with Petitioner. Petitioner then answered affirmatively when asked if he wanted more time to talk with his lawyers. After a brief recess, Petitioner stated he was not being forced to plead guilty and that he wished to proceed. App. 42, l. 16 – 44, l. 22.

After the judge accepted Petitioner's plea, sentencing was deferred until the following day because the state needed to notify the victims and determine whether they wanted to be present for sentencing. App. 50, ll. 15-25.

When given an opportunity to speak at the sentencing hearing the next day, Petitioner stated, "I just want it to be put on the record, the only way that I accepted the plea was because of ineffective assistance of counsel that I received and I didn't feel like I was going to have a fair trial, so I accepted the plea for the 30 years." App. 56, l. 24 – 57, l. 5.

Pursuant to a negotiated sentence agreement, the judge sentenced Petitioner to the mandatory minimum of thirty years for murder, twenty years for each count of attempted armed robbery, and five years for the weapons offense. All sentences were ordered to be served concurrently. App. 57, l. 13 – 58, l. 2.

On August 15, 2019, Petitioner filed an application for post-conviction relief (PCR). App. 60-66. The state filed a return to this application on October 24, 2019. App. 67-84. With the assistance of counsel, Petitioner filed an amended application on June 6, 2022 raising the claim argued in this petition. App. 85-93. An evidentiary hearing was convened on August 11, 2022 before the Honorable Daniel Hall. App. 95. Assistant Attorney General Chelsey Marto represented the state. Dayne Phillips represented Petitioner. App. 95.

During the hearing, Petitioner testified that plea counsel had no trial strategy and did not prepare a defense. App. 108, ll. 18-20. He explained that after jury selection, the court took a break and Petitioner was placed in a holding cell. Plea counsel came into the holding cell with a phone. Petitioner's mother was on the phone. Petitioner testified, "My mom, she was crying, being very hysterical. She was like: Take the plea. If not, they're going to give you life. You're going to spend the rest of your time, rest of your life in prison. She was very adamant on me taking a plea." Petitioner's mother said that plea counsel told her that if Petitioner did not take the plea, Petitioner "was going to get life." App. 109, l. 21 – 111, l. 1.

Petitioner testified that after speaking with his mother, he was "very confused and lost." Plea counsel also told him "to accept the plea for 30 years." Counsel said "he was not going to fight for [Petitioner] at trial because [it was] in [Petitioner's] best interest to take the plea instead of going to trial and getting a life sentence." App. 111, ll. 2-16. Petitioner felt like he had no other option than to accept the negotiated sentence and plead guilty. He did not believe he would receive a fair trial given that plea counsel said "he was not going to fight for [Petitioner]." App. 112, l. 12 – 113, l. 2.

In addition to being coerced into plead guilty, plea counsel's second chair, Matthew Craft, incorrectly advised Petitioner that he would only have to serve 85% of the thirty year sentence for murder. Craft told Petitioner that with credit for time served, Petitioner would only have to serve an additional twenty-one years in prison. Petitioner was never informed that he would have to serve whether sentence he received for murder day for day. App. 111, l. 17 – 114, l. 1.

Lastly, Petitioner testified that after he pled guilty but before sentencing, he told plea counsel that he no longer wanted to take the plea. However, counsel told Petitioner "it was already finalized . . . so [Petitioner] had to go through with it." He did not tell Petitioner that he could move to withdraw his guilty plea. App. 116, ll. 6-17.

Laurie Richardson, Petitioner's mother, testified that plea counsel called her on the first day of trial after the jury had been selected. Counsel told Richardson that the state "had enough evidence" to convict Petitioner and "send him to prison." It was "an open and shut case." He said if Petitioner was convicted at trial, he would be sentenced to life without parole. Counsel asked Richardson to talk to Petitioner because Petitioner "was still saying that he wanted to take it to trial" and was "not listening" to counsel. Plea counsel wanted Richardson to explain to

Petitioner that if he did not accept the plea offer and was later convicted at trial, he would be sentenced to life without parole. Richardson did as counsel asked. She talked to Petitioner and "told him to take this plea for 30 years." App. 127, l. 8 – 129, l. 2. She was "hysterical" and "begged" Petitioner to plead guilty. She told him, "Baby, please do this for me. . . . I'm getting older. I want to see you on the outside. I might not be here. I'm not going to be here for you to do life. I want to see you back on the outside. I don't want you on the inside. Please take these 30 years so you can come back home to your momma." App. 130, ll. 3-22.

Richard Whelchel, Petitioner's plea counsel, explained that he "inherited" Petitioner's case from Don Thompson after Thompson retired and Whelchel became the chief public defender for Cherokee County on April 30, 2018. He met with Petitioner on numerous occasions and reviewed all of the paper discovery and videos with Petitioner. Whelchel explained that the primary evidence against Petitioner was his codefendant, Lyric Morgan, who planned to testify against Petitioner at trial. Petitioner also gave a statement to law enforcement that Whelchel believed would likely be admissible.

Whelchel testified that after jury selection, while Petitioner was in a holding cell at the courthouse, he asked to speak with his mother in person. Whelchel acknowledged that it is "highly unusual" to allow a family member into a holding cell. However, Whelchel went to Judge Kelly and told him that Petitioner wanted to speak with his mother. Judge Kelly and the clerk of court facilitated the meeting. Petitioner's mother came into the cell and met with Petitioner. She cried and "pleaded with [Petitioner] to take the deal." According to Whelchel, Petitioner decided on his own to plead guilty. After Petitioner decided to plead guilty, Whelchel obtained the sentence sheets and reviewed with Petitioner the questions the judge would ask Petitioner during the plea proceeding. App. 138, l. 7 – 139, l. 11.

Additionally, Whelchel testified that he advised Petitioner that it was a negotiated sentence, meaning he and the prosecutor would ask the judge to impose the mandatory minimum thirty year sentence. App. 139, ll. 13-16. According to Whelchel, Petitioner knew he would have to serve the sentence day for day. App. 140, ll. 4-7.

Matthew Craft testified that he became involved in Petitioner's case about a week before it was scheduled for trial. Craft offered to assist Whelchel with technology during the trial. He explained that there were several body camera videos that the defense expected would be admitted during trial. Because the courtroom at the time utilized an "old fashioned projector," they anticipated that there could be problems with the technology. Craft met Petitioner for the first time on the Friday before trial. He told Petitioner that he would be assisting Whelchel with technology and helping Whelchel in whatever way needed. App. 156, l. 24 – 158, l. 9.

Craft testified that during *voir dire* and jury selection, he sat with Petitioner and explained the process to him and why certain strikes were made. Once jury selection was complete, Whelchel left to call Petitioner's mother who had previously said she would be present in court, but had not shown up. App. 158, l. 10 – 159, l. 13. While Craft was sitting with Petitioner, Petitioner asked "what sentencing might look like." Craft testified that he told Petitioner "ordinarily" one would only have to serve 85% of his or her sentence for an armed robbery conviction. However, "murder is a little bit different." Craft told Petitioner that murder is classified as both "violent" and "most serious." Consequently, Petitioner would have to serve any sentence for murder day for day. However, Craft told Petitioner that Petitioner would not have to serve thirty years in the Department of Corrections because he would receive credit for the time he had already served in pretrial detention. While Craft admitted he told Petitioner he would not have to serve the entire thirty years in the Department of Corrections, he did not

remember telling Petitioner he would only have to serve an additional twenty-one years. App. 159, l. 1 – 160, l. 17.

By order filed March 24, 2023, the PCR court denied Petitioner relief. App. 168-182. The court found Petitioner freely, voluntarily, knowingly, and intelligently pled guilty. App. 177. In support of its finding, the court cited solely to Petitioner's statements during the plea proceeding. Specifically, the statements in which Petitioner stated (1) he understood the charges against him, the elements of the offenses, and the sentencing range each carried; (2) he understood the violent and most serious classifications; (3) he understood he was waiving his right to remain silent, his right to a jury trial, and his right to call and confront witnesses; (4) he talked to his mother but she did not force him to plead guilty; (5) it was his decision to plead guilty and no promises were made; (6) he talked to counsel, counsel reviewed the discovery materials with him, and he had no complaints about counsel's performance; and (7) he agreed with the facts as alleged by the prosecutor. App. 177-178.

On April 6, 2023, Petitioner filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP. App. 183-186. The state filed a return to the motion to alter or amend on August 7, 2023. App. 187-189. By order filed September 5, 2023, the PCR court denied Petitioner's motion. App. 190-194.

Because Petitioner did not knowingly, intelligently, and voluntarily plead guilty due to plea counsel's deficient performance, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where plea counsel coerced Petitioner to plead guilty because counsel believed it was in Petitioner's best interest to accept the negotiated sentence of thirty years imprisonment for murder and where Petitioner was prejudiced because he would not have pled guilty if counsel had not told Petitioner "he would not fight" for Petitioner if Petitioner proceeded to trial and that Petitioner would be sentenced to life without parole if he was convicted at trial.

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where plea counsel coerced Petitioner to plead guilty because counsel believed it was in Petitioner's best interest to accept the negotiated sentence of thirty years imprisonment for murder. Petitioner was prejudiced by counsel's deficient performance because Petitioner would have moved forward with his jury trial if counsel had not told Petitioner "he would not fight" for Petitioner if Petitioner proceeded to trial and that Petitioner would be sentenced to life without parole if he was convicted at trial.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. In the context of a guilty plea, a petitioner must show that counsel's performance was deficient, and "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, 58-59 (1985); See Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000); Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000); Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997); Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994). This Court has held that a "defendant's undisputed testimony that he would not have pled guilty but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 631 S.E.2d 260 (2006) (citing Jackson v. State, 342 S.C. 95, 97-98, 535 S.E.2d 926, 927 (2000)); Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 485-86 (1991)).

"The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Hill v. Lockhart, 474 U.S. 52, 56 (1985) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)). "The voluntariness of a guilty plea is not determined by an examination of the 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 the record of the post-conviction hearing." Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (quoting Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)).

It is apparent from the record that plea counsel believed it was in Petitioner's best interest to accept the state's offer to plead guilty as indicted with a negotiated sentence of thirty years for murder, which is the mandatory minimum. In an effort to convince Petitioner to plead guilty,

counsel told Petitioner that he would "not fight for" Petitioner if Petitioner proceeded to trial. Counsel also told Petitioner that he would be sentenced to life without parole if he was convicted at trial. Because Petitioner was not following plea counsel's advice to plead guilty, counsel recruited Petitioner's mother to convince Petitioner to plead guilty. Counsel likewise told Petitioner's mother that Petitioner would be sentenced to life without parole if he was found guilty of murder at trial. Understandably upset given counsel's erroneous statements, Petitioner's mother begged Petitioner to accept the state's offer and plead guilty. She was hysterical and crying during her conversation with Petitioner. It was only because of counsel's undue pressure and influence that Petitioner ultimately pled guilty on the first day of his jury trial.

Notably, the PCR court relied solely on Petitioner's statements during the guilty plea proceeding in finding Petitioner freely, voluntarily, knowingly, and intelligently pled guilty. The court wholly ignored the testimony from Petitioner, his mother, and plea counsel during the PCR hearing, which supported Petitioner's assertion that plea counsel coerced him to plead guilty. See Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) ("The voluntariness of a guilty plea is not determined by an examination of the 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 the record of the post-conviction hearing."). If the court had properly considered the evidence presented during PCR, it would have determined counsel unduly pressured Petitioner to plead guilty.

Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability that but for counsel's improper coercion Petitioner would not have pled guilty but would have proceeded to trial. Notably, when Petitioner ultimately pled guilty, his

case had already been called to trial and a jury had already been selected. It is clear Petitioner wanted a jury trial. It was only because of counsel's undue pressure and his use of Petitioner's mother to influence Petitioner to plead guilty that Petitioner eventually caved and accepted the negotiated thirty year sentence.

Respectfully, this Court should reverse Petitioner's convictions and sentence and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. Petitioner ultimately requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully Submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of March, 2024.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Mark Antonio Earls states:

1. She is an 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, which was held on August 11, 2022 before the Honorable Daniel D. Hall, 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 Mark Antonio Earls.

Respectfully Submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of March, 2024.

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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."

s/ Lara M. Caudy
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Appellate Defender

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