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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Jasper County

Honorable Roger M. Young, Circuit Court Judge

SAMUEL OLALDE GONZALEZ,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000135

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

Whether the PCR court erred in finding trial counsel was credible regarding his ineffective advice to reject a pre-trial plea offer to involuntary manslaughter when trial counsel denied the existence of any plea offer and claimed it would be ridiculous to proceed to trial if an offer had been made when the trial transcript established that such an offer was in fact made and rejected?

2.

Whether the PCR court erred in finding trial counsel was effective when he failed to object to the state's introducing evidence of petitioner's inadmissible "Nazi" tattoo when trial counsel's entire strategy required the jury to reject the malice element of murder to return a verdict on a lesser included offense?

STATEMENT

Petitioner admitted to killing his girlfriend and cooperated with investigators during the investigation of her death. App. 130, l. 1 – 134, l. 5. The only question before the jury during trial was whether the killing involved murder or voluntary manslaughter.[1] App. 231, l. 1 – 7; 245, l. 11 – 246, l. 23. At trial, petitioner was represented by Robert Hughes while Hunter Swanson and Brian Hollen represented the state. App. 1 – 2.

Trial counsel's strategy depended on the jury rejecting the malice element of murder. App. 231, ll. 1 - 7. Trial counsel elicited testimony regarding petitioner's demeanor and work habits. App. 100, ll. 7 – 14. Trial counsel focused on petitioner's cooperation with law enforcement, including petitioner leading them to the scene of the location of the killing. App. 150, ll. 2 – 16. Trial counsel called petitioner to the stand to testify about the heated and lengthy argument, and his girlfriend's reactions leading up to the killing. App. 187, l 1 – 194, l. 25. The only question before the jury was whether the killing involved murder or voluntary manslaughter. App. 231, l. 1 – 7; 245, l. 11 – 246, l. 23.

Unfortunately for petitioner, despite basing the entire trial strategy around the jury rejecting malice, trial counsel failed to object to the introduction of a "Nazi" tattoo on petitioner's hand when the state solicited testimony from two witnesses regarding the tattoo. App. 102, ll. 2 – 7; 161, ll. 1 – 11. Trial counsel also failed to object when the solicitor tied the "symbol of hate" tattooed onto petitioner's flesh to the malice element of murder during closing argument. App. 237, ll. 11 – 19 (emphasis added).

Equally unfortunate for petitioner, trial counsel recommended that petitioner reject a plea offer for voluntary manslaughter, telling petitioner that the proposed negotiated sentence of

[1] Petitioner was charged with murder and tried before the Honorable Brooks Goldsmith and a Jasper County jury from April 23 – 25, 2018.

thirty-years was too high, and that petitioner would receive less than twenty-years at trial. App. 300, ll. 15 – 25. By contrast, at the PCR hearing, trial counsel denied an offer had ever been made, claimed he would have bent over backward to convince petitioner to take such an offer and that "it would be ridiculous" to take the case to trial if an offer had been on the table. App. 311, ll. 15 – 22; 319, ll. 12 – 23. During sentencing following trial, the solicitor affirmatively placed on the record the terms of the voluntary manslaughter offer that mirrored the offer described by petitioner during his PCR testimony. App. 258, ll. 9 – 16.

Following a guilty verdict on the murder charge, Judge Goldsmith sentenced petitioner to thirty-seven years in prison. App. 262, ll. 3 – 6; 346. Petitioner appealed and Chief Appellate Defender Robert M. Dudek filed an Anders[2] brief asserting an error in the admission of petitioner's statements made without the benefit of a qualified interpreter. The South Carolina Court of Appeals dismissed the appeal in an unpublished opinion. *See* State v. Gonzalez, No. 2018-000807 (S.C. Ct. App. Mar. 25, 2020).

Petitioner timely filed an application for PCR. App. 264. The application was amended before the evidentiary hearing to include allegations surrounding counsel's failure to object to testimony surrounding the "Nazi" tattoo and ineffective assistance of counsel in rejecting the pre-trial plea offer. App. 288. An evidentiary hearing was held before the Honorable Roger Young on November 27, 2023. App. 291. Chelsey Marto appeared on behalf of petitioner and Chase Seymour represented the state. App. 291. Petitioner and trial counsel, Robert Hughes, presented testimony. By order dated January 16, 2024, Judge Young denied the application for relief. App. 328 – 343.

This petition for *certiorari* follows.

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[2] Anders v. California, 386 U.S. 738 (1967)

ARGUMENT

1. The PCR court erred in finding trial counsel was credible regarding his ineffective advice to reject a pre-trial plea offer to involuntary manslaughter when trial counsel denied the existence of any plea offer and claimed it would be ridiculous to proceed to trial if an offer had been made when the trial transcript established that such an offer was in fact made and rejected.

A. How the matter was raised at PCR.

Petitioner required a Spanish language translator through his interactions with trial counsel, during trial, and during his PCR hearing. App. 6, ll. 1 -8; 294, ll. 6 – 12; 309, ll. 21 310, l. 4. Through his interpreter, petitioner testified that he did not want a trial, had accepted there were consequences to his actions, and wanted to plead guilty. App. 300, ll. 3 - 14. He referenced that trial counsel visited him and relayed that the state was "offering 30 years" and petitioner told trial counsel "I will sign." App. 300, ll. 15 – 20. Petitioner related that trial counsel advised rejecting the offer since he would "definitely get less than 20 years" if petitioner went to trial. App. 300, ll. 10 – 14. Petitioner also noted that trial counsel only visited him on this single occasion, and the conversation was hard to follow due to problems with the interpreter. App. 302, l. 17 – 303, l. 16.

Trial counsel admitted he did not speak Spanish and required the use of a translator which restricted his visits to petitioner to "two, maybe three times" before trial. App. 309, l. 21 – 310, l. 4. Trial counsel noted the communication barrier created an exception to his general approach in meeting with clients regularly. App. 319, ll. 12 – 16. However, trial counsel testified that it was petitioner who wanted a trial, and "it would have been ridiculous with a confessed killer to go to trial." App. 311, ll. 15 – 17. Trial counsel claimed that no plea offer had been made and that "if the State had ever made an offer in this case, *I would have bent over*

backwards to get an interpreter there to talk with [petitioner]." App. 319, ll. 16 – 18 (emphasis added). In response to a question about the existence of any plea offer before trial from the PCR judge, trial counsel claimed "[i]f that had been the case [a 30-year offer], I would have loved to have an offer in [this] case." App. 323, ll. 2 -6.

B. How the PCR court ruled.

At the conclusion of the PCR hearing, the PCR court orally found petitioner had failed to provide any evidence that a plea offer had been made. App. 324, ll. 23 – 24. In making this finding, the PCR court noted that trial counsel met with petitioner "several times" with the aid of a translator and that counsel would have liked some option for petitioner to plead guilty to a lesser included offense but that no such option was available. App. 325, ll. 2 -9.

However, in the written order of dismissal, the PCR court acknowledged the fact that an offer had been made and was placed on the record by the state during sentencing. App. 258, ll. 10 – 16; 335. In fact, this offer was exactly as petitioner relayed during the PCR hearing: voluntary manslaughter with a negotiated thirty-year sentence. App. 258, ll. 10 – 16. Rather than reconsider its oral ruling on the effectiveness of trial counsel in light of the direct contradiction to trial counsel's testimony, the PCR court's order found petitioner's testimony regarding trial counsel rejecting this deal and telling petitioner he would receive less time at trial "not credible" and finding trial counsel "credibly testified that [trial counsel] did not want [petitioner] to proceed to trial" and "would have attempted to negotiate a plea deal if [petitioner] had expressed to him that [petitioner] had wanted a plea deal." App. 335.

C. How the PCR court erred.

Under prevailing "professional standards, *counsel is required to fully communicate with the client so that the client can make an informed decision regarding any proposals by the State*." Davie v. State, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009)(emphasis added).[3] Put simply, defendants have a Sixth Amendment right to effective counsel, "a right that extends to the plea-bargaining process." Lafler v. Cooper, 566 U.S. 156, 162 (2012).

In connection with the rejection of a pre-trial plea, petitioner "must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." Cooper, 566 U.S. at 164.

Here, petitioner testified at the PCR hearing that he acknowledged the killing and wanted to accept the state's plea offer but by the advice of trial counsel. App. 300, ll. 15 – 20. Rather than contradict this testimony, trial counsel erroneously asserted that no offer had been made, that it would have been ridiculous to take the case to trial if an offer had been made, and that he would have "bent over backwards" to advice petitioner to accept any such offer. App. 311, ll. 15 – 17; 319, ll. 12 – 18.

The PCR court's credibility finding on this issue lacks support in the record. Trial counsel denied any offer was made and testified there was no way he discussed petitioner getting a sentence of less than thirty years. However, trial counsel acknowledged communication with

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[3] Abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

petitioner was difficult and limited to only two, or at most three, total visits. App. 309, l. 21 – 310, l. 4. In contrast, petitioner testified that he wanted to accept the voluntary manslaughter charge and rejected it only on the advice of counsel that he would receive a lesser sentence at trial. App. 300, ll. 10 – 25. Petitioner also testified to the limited contact with trial counsel and the difficulty in understanding trial counsel created by the environment and the use of the interpreter. App. 302, l. 17 – 303, l. 2.

This Court is not bound by a credibility finding, as it lacks support in the record. *See* Washington v. State, 440 S.C. 550, 569, 891 S.E.2d 668, 678 (Ct. App. 2023) ("An appellate court will not uphold a PCR court's findings when no probative evidence supports them."). Due to the nature of the difficulty in communicating with petitioner caused by the language barrier, trial counsel's adamant denial of any offer having been made, and trial counsel's questionable assertion of a valid strategy for not objecting to the introduction of petitioner's "Nazi" tattoo, discussed *supra*, the record does not support a finding that trial counsel's memory of the discussions over the plea offer were credible.

D. Prejudice and remedy.

"As to prejudice, respondent has shown that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea. In addition, as a result of not accepting the plea and being convicted at trial, respondent received a minimum sentence 3 & half; times greater than he would have received under the plea." Lafler v. Cooper, 566 U.S. 156, 174 (2012). Here, petitioner testified that he actively wanted to accept responsibility and plead guilty to the thirty-year sentence offer. App. 300, ll. 15 – 25. Instead, based upon ineffective advice of counsel, he went to trial and was convicted of murder and sentenced to thirty-seven years. App. 262, ll. 3 – 6.

Prejudice is established by the disparity in sentence and the nature of the conviction. In connection with ineffective assistance of counsel related to the rejection of a plea offer, the proper remedy is also outlined in Cooper: "The correct remedy in these circumstances, however, is to order the State to reoffer the plea agreement." Id., 566 U.S. at 174. As this was a plea offer to voluntary manslaughter with a negotiated sentence for the maximum time, there is little question of the outcome that would have occurred had counsel been effective. On remand, if petitioner "accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement . . . or to leave the convictions and sentence from trial undisturbed." Id. The PCR court should be reversed, and the matter remanded with instruction for the state to reoffer the voluntary manslaughter plea and allow petitioner to either accept the plea offer or, if a new trial is warranted under as argued in Issue 2, *supra*, proceed to a new trial.

2. The PCR court erred in finding trial counsel was effective when he failed to object to the state's introducing evidence of petitioner's inadmissible "Nazi" tattoo when trial counsel's entire strategy required the jury to reject the malice element of murder to return a verdict on a lesser included offense.

A. How the matter was raised at PCR.

Petitioner asserted trial counsel was ineffective in failing to object to the introduction of evidence related to a "Nazi" tattoo on his hand. Petitioner testified at the PCR hearing that:

> Q. Now, do you recall questioning concerning the Nazi tattoos on your arm?
>
> A. Yes, I remember.
>
> Q. Okay, and just for the record I will highlight that. It's on pages 102 and 161. Now, did you wish counsel objected to those questions?
>
> A. I wish that he had intervened, or at the very least had asked me how I got it, why I got it, how long ago I got it, because to be completely honest I was in primary school. I was ten years old when I got it, and the neighborhood I lived in was in the hood in Mexico, and so everyone there did it, so I just wanted to do it to see how it felt to have a tattoo, and didn't even know what it meant; but when I found out what it meant, then I covered it.

App. 303, l. 17 – 304, l. 6. Petitioner asserted trial counsel was ineffective for failing to object to the introduction of the "Nazi" tattoo during his trial or at least allowing him to explain the tattoo for the jury. App. 288; 303, l. 17 – 304, l. 6.

In explaining why he did not object to the introduction of the nature of the tattoo, trial counsel claimed there was no basis for objecting and that the change showed "growth" in petitioner:

> Q. Okay. Now, do you recall any questionings about his Nazi tattoos?
>
> A. The Nazi tattoos were covered. The only way they would have ever been acknowledged or even known about would have been from him, and that was a statement by party opponent, and I couldn't object, because it wasn't hearsay.
>
> Q. Okay. Do you think you could have objected based upon relevance?
>
> A. A tattoo that has been covered up is more beneficial, it's no longer an acknowledgement. It's not like some that have swastikas, it is a I had this, it's gone. That's better than I have it here and look at it.

App. 314, 12 – 25.

B. How the PCR court ruled.

The PCR court found trial counsel articulated a valid and credible reason for not objecting: it was "favorable testimony that Applicant's tattoo was now covered up by another tattoo" and "it was better that the tattoo was covered up so that others could not see the Nazi symbol" and that "covering up the Nazi tattoo with another tattoo showed that [petitioner] had changed." App. 339. The PCR court also found there was no prejudicial impact to the introduction of the Nazi tattoo. App. 340.

C. How the PCR court erred.

The reference to "Nazi" tattoos was not in passing, as implied by the PCR court's reference, in a footnote, to a single mention of it in the trial. App. 339. The state inquired about the tattoo in questioning petitioner's former employer:

> Q. Have you seen the black widow that's on his hand?
>
> A. I never paid attention to that on his hands.
>
> Q. Did you know that was to cover up a Nazi symbol?

A. No, I didn't know.

App. 102, ll. 4 – 7. As referenced by the PCR court, the state also solicited testimony from investigator Crosby on the tattoo:

> A. On his right hand, right here by his waist, there's a tattoo of a black widow spider.
>
> Q. Did you ask him about that tattoo?
>
> A. Yes, I did. It should have been on the video, but I think that portion was redacted because of the statement that he wrote. He advised me that that tattoo was to cover up a Swastika or the Nazi symbol that he had in the web of his hand right there.

App. 161, ll. 4 – 11. The state also entered a picture of the tattoo into evidence. App. 161, ll. 1 – 11. Finally, the state returned to the tattoo during closing in arguing against a finding of voluntary manslaughter: "I challenge you to find that Samuel Gonzalez is this great guy who made a mistake, this great guy who had a symbol of hatred tattooed on his body." App. 237, ll. 11 – 13.

This testimony regarding a "Nazi" tattoo was introduced without objection from petitioner's counsel.

> Evidence concerning a defendant's tattoo or nickname is not prejudicial when used to prove something at issue in a trial, such as the identification of the defendant. *See generally* Stevenson v. Texas, 963 S.W.2d 801 (Tex.App.1998) (holding defendant's 'bitch killa' tattoo was admissible evidence of gang membership). In the instant case, the State did not use Day's tattoo or nickname for any purpose other than to attack his character. The solicitor repeatedly referred to Day as an outlaw in her closing argument in order to paint a picture of Day as someone who was proud of his status as an outlaw, who felt he was above the law, and who was able to deceive law enforcement by hiding evidence and concocting a story about self-defense.

State v. Day, 341 S.C. 410, 422–23, 535 S.E.2d 431, 437–38 (2000).

As in Day, there was no question regarding petitioner's identity that would have justified the introduction of evidence regarding a tattoo that was originally a Nazi symbol that had been altered to the image of spider. Absent some justification for the introduction of the evidence, the state's sole purpose was demonstrated in its closing argument: "I challenge you to find that Samuel Gonzalez is this great guy who made a mistake, this great guy who had a symbol of hatred tattooed on his body." App. 237, ll. 11 – 13. Trial counsel was ineffective in failing to object to this evidence, either as irrelevant or improper character evidence under Rule 404(a), SCRE.[4]

At the PCR hearing, trial counsel attempted to explain his lack of objection by claiming "[a] tattoo that has been covered up is more beneficial, it's no longer an acknowledgement. It's not like some that have swastikas, it is a I had this, it's gone. That's better than I have it here and look at it." App. 314, 21 – 25. The PCR court found this explanation credible in an apparent finding that counsel had a valid strategic reason for not objecting.[5] App. 339.

The record does not support trial counsel's valid trial strategy claim. When the evidence was initially introduced, trial counsel did not question petitioner's employer regarding the alteration of the tattoo. App. 102, ll. 2 – 14. Trial counsel asked no questions about the altered tattoo of investigator Crosby. App. 162, ll. 1 – 4. Trial counsel asked petitioner no questions

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[4] At the PCR hearing, when questioned about not objecting to the admission of evidence surrounding the tattoo, trial counsel asserted there was no basis to object to the evidence regarding the nature of the original tattoo and its altered form since the information came from petitioner as was not hearsay. App. 314, ll. 12 – 18. When challenged on whether the evidence was even relevant, trial counsel asserted his strategy that the alteration of the tattoo was beneficial to petitioner, making the decision not to object a strategic choice and a response to any challenged basis for admission of the tattoo evidence, including as improper character evidence under Rule 404(a), SCRE. App. 314, ll. 12 – 25.

[5] The PCR court order does not reference a valid trial strategy directly, but the language used in the Order of Dismissal shows deference to trial counsel's reasoning that an "altered" tattoo showed character growth of petitioner.

about the tattoo on direct or re-direct. App. 179, l. 22 – 212, l. 25. Trial counsel failed to mention this "beneficial" take on the Nazi tattoo during closing argument. App. 225, l. 5 – 232, l. 5. Thus, to be a valid trial strategy, the benefit from covering up a Nazi tattoo must have been so open and obvious that no explanation of that benefit was required from either witnesses or during closing argument.

As this Court noted in Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017), trial counsel's decision to not object to improper evidence as a valid trial strategy must be supported by the actions taken during trial. This Court in Briggs noted that the defense strategy to show "nobody believed the victim, and thus the abuse did not happen, could not have been advanced by allowing [forensic interviewer] to testify she believed [victim]." Briggs, 421 S.C. at 329, 806 S.E.2d at 720.

As with Briggs, there was no valid strategic decision that would support allowing evidence of a Nazi tattoo on petitioner's hand be admitted into evidence unchallenged and allowing the state to reference this "symbol of hate" in support of a finding of malice. The PCR court erred in finding trial counsel's explanation of his decision not to object as credible.

D. Prejudice.

Petitioner required a Spanish language translator through his interactions with trial counsel, trial, and during his PCR hearing. App. 6, ll. 1 -8; 294, ll. 6 – 12; 309, ll. 21 310, l. 4. Petitioner admitted to killing his girlfriend and cooperated with investigators during the investigation. App. 130, l. 1 – 134, l. 5. Trial counsel's entire case depended on the jury rejecting the malice element of murder. App. 231, ll. 1 - 7. Trial counsel elicited testimony regarding petitioner's demeanor and work habits. App. 100, ll. 7 – 14. Trial counsel focused on petitioner's cooperation with law enforcement to guide them to the location of the killing. App.

150, ll. 2 – 16. Trial counsel called petitioner to the stand to testify about the argument and his girlfriend's reactions leading up to the killing. App. 187, l 1 – 194, l. 25.

The only question before the jury was whether or not the killing involved murder or voluntary manslaughter. App. 231, l. 1 – 7; 245, l. 11 – 246, l. 23. The solicitor, during closing argument, established the prejudicial impact of the Nazi tattoo:

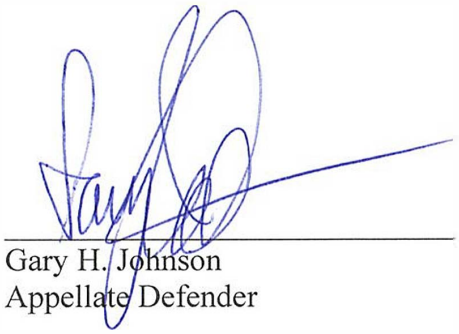
> I challenge you to find that Samuel Gonzalez is this great guy who made a mistake, *this great guy who had a symbol of hatred tattooed on his body.* The great guy that threatened to take a newborn from its mother. The great guy, who choked the life out of his girlfriend for three to five minutes. The great guy that looked at the victim's family over here and said with a straight face, he has always been peaceful, respectful and *never liked evil.* Really?

App. 237, ll. 11 – 19 (emphasis added).

The introduction of the "symbol of hatred" tattooed on his hand, without objection or attempted explanation by trial counsel, was prejudicial. *See* State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) (holding the error in allowing witness to testify to matters beyond the scope of his expertise was "compounded by the solicitor's closing argument"). Allowing this improper character without objection was ineffective assistance of counsel and prejudicial, warranting a new trial. *See* Strickland v. Washington, 466 U.S. 668 (1984); Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014).

CONCLUSION

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



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This 16th day of August, 2024.