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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Florence County

Honorable William A. McKinnon, Circuit Court Judge

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ZACHARY D. MCCLAIN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000784

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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## ISSUE PRESENTED

Whether the PCR court erred by finding defense counsel was not ineffective for not making a motion for a continuance so that petitioner could hire private counsel where the record shows petitioner's appointed counsel only met with him a couple of times in a three-year COVID related time frame and petitioner testified that he would have gone to trial had his attorney requested and received a continuance from the trial judge?

## ARGUMENT

The PCR court erred by finding defense counsel was not ineffective for not making a motion for a continuance so that petitioner could hire private counsel where the record shows petitioner's appointed counsel only met with him a couple of times in a three-year COVID related time frame and petitioner testified that he would have gone to trial had his attorney requested and received a continuance from the trial judge.

**Relevant facts**

Petitioner was indicted at the August 22, 2019, term of the Florence County grand jury for the offenses of armed robbery and possession of a weapon during the commission of a violent crime. App. 127-128. Chief Florence public defender Scott Floyd represented petitioner. David Richardson was the assistant solicitor. App. 1.

Petitioner appeared on July 18, 2002, before the Honorable D. Craig Brown and pled guilty to both charges. App. 1; App. 4, ll. 10-16. There was no negotiated plea or recommendation from the state. App. 4, ll. 14-15.

Assistant solicitor Richardson told the judge at the guilty plea proceeding that on March 11, 2019, at 10:35, petitioner was alleged to have robbed the Breakers gas station on West Evans Street in Florence. He was wearing a black hoodie, a red bandana, white striped Adidas pants, and a distinctive pair of Air Jordans. Richardson offered that petitioner was well covered from head-to-toe except for his hands, and he was not wearing gloves to rob the store. App. 11, ll. 17-21.

The owner of the store watched a surveillance video from a prior date and allegedly recognized petitioner as the robber from petitioner being in the store on that earlier occasion. A search warrant was then executed on petitioner's apartment. Clothing items matching those the

armed robber wore were found in petitioner's apartment. App. 11, l. 22 – 13, l. 20. In addition, Richardson said fingerprints left behind on the cash register were a positive match for petitioner. App. 13, l. 21 – 14, l. 8. Richardson also told the judge that petitioner had turned down an eight-year plea deal earlier in the year and a fifteen-year offer a week before the guilty plea. App. 14, ll. 9-22.

Defense counsel Floyd then told the judge that petitioner had been very polite to him, and his staff and he had been "very compliant with whatever I ask, your Honor. It's just – you know, I see – see that screen there (video of the robbery), and it's just very hard for me to imagine Mr. McClain doing that, but here we are." App. 16, ll. 3-22.

Petitioner's mother spoke at the guilty plea also. App. 17, l. 21 – 22, l. 7. Judge Brown sentenced petitioner to seventeen years' imprisonment for armed robbery and he imposed a concurrent five-year sentence for possession of a weapon during a crime. App. 24, ll. 14-21.

**PCR**

Petitioner filed an application for post-conviction relief after his direct appeal was dismissed for failure to identify a preserved appellate issue. App. 26-32. The state filed a return and motion for a more definite statement on November 23, 2022. App. 33-37.

An evidentiary hearing was convened on October 31, 2023, before the Honorable William A. McKinnon. Michael H. Lifsey represented petitioner and D. Russell Barlow II was the assistant attorney general. App. 39.

Petitioner testified that his attorney, Scott Floyd, "maybe talked to him about two times. I met with him and talked to him maybe two times. And besides that, I only saw him at appearances." App. 45, ll. 17-24. This pretrial period lasted for several years because of COVID-19. Petitioner further explained that their conversations at court appearances were only

about pleading guilty. App. 46, ll. 2-25. Although the robbery was captured on a surveillance tape, you could not see the face of the robber on the videotape. App. 47, ll. 5-16.

Petitioner added that he told Counsel Floyd he had witnesses who could be helpful in his defense, but that Floyd did not seem interested. "I ain't (sic) felt like I had nobody representing me. We never talked about how we was gonna [sic] go about defending this trial, none of this, and we – were at trial at this point." App. 48, ll. 17-22. Petitioner wanted a jury trial, and he absolutely did not want to plead guilty. Petitioner told Floyd that he needed more time to hire a private attorney so he needed counsel Floyd to get him a continuance. Petitioner testified that Floyd made a request for a continuance late into the process and the administrative judge apparently set a date for trial instead of granting the continuance.

On the day of trial, petitioner wanted to Floyd to renew the motion for a continuance before the jury judge so that he could hire private counsel, but Floyd did not move for a continuance. App. 50, ll. 1-11. "I really just wanted a continuance so I could have gotten me a lawyer that actually [was] wanting to go over the case with me." App. 53, ll. 5-14.

Petitioner had been saving money to hire a private lawyer and "I actually went and talked to another lawyer and I told him that as well. I told him who the lawyer was." Petitioner stressed he would have hired an attorney if Floyd would have moved for the continuance rather than just selecting a jury. App. 60, l. 19 – 61, l. 4.

Petitioner's mother-in-law Shelly Dolford remembered when petitioner was arrested for armed robbery. He was released on bond two or three days later. He was "out for four years" before his case was called for trial and petitioner ended up pleading guilty. App. 64, l. 13 – 66, l. 5. Dolford said that Floyd did not stay in touch with petitioner during the COVID period and only talked to him at "routine court appearances." App. 66, ll. 1-16.

Defense Scott Floyd testified that he was available to talk to petitioner during the COVID period if petitioner wanted to call him. App. 76, l. 11 - 77, l. 12. Floyd remembered while petitioner was out on bond, the state made an offer for him to plead guilty to attempted armed robbery with an eight-year sentence in return. It would have been a violent offense and a no-parole offense. Petitioner turned that plea offer down. App. 77, l. 23 – 78, l. 22.

Floyd testified after petitioner rejected the plea offer on June 13, 2022 that Judge Seals ordered the case to go to trial on July 18, 2022. Floyd maintained that petitioner wanting to hire private counsel was not a reason that Judge Seals would have a valid reason to grant a continuance. Floyd said the judge also stated that even if petitioner hired a private attorney in the interim, that attorney needed to be ready for trial without a continuance. App. 80, l. 20 – 81, l. 10. On cross-examination, Floyd admitted that he did not object to the judge's order that the case would go to trial on July 19, 2022, and that a continuance would not be granted.

When the case was called for trial, Floyd admitted that he did not move for a continuance from Judge Craig Brown so that petitioner could hire private counsel. App. 89, l. 24 -90, l. 4. At the end of the PCR hearing, the judge took the matter under advisement. App. 95, ll. 14-15.

**Order of Dismissal**

The order of dismissal noted that petitioner testified he requested trial counsel to make a motion for a continuance so he could hire a private attorney. Petitioner further stated that if he had gotten a continuance hire private counsel he would have gone to trial. App. 114.

Conversely, the order stated that plea counsel Floyd testified that when a trial date was set by Judge Seals, the judge ordered that no continuances could be granted and that petitioner hiring private counsel would not be a sufficient reason for a continuance. The order did not discuss defense counsel Floyd's failure to move for a continuance before the trial judge, Judge

Brown. The order then concluded that "applicant's testimony that if he had gotten a continuance and hired private counsel, then he would have gone to trial is pure conjecture." App. 114-115. The order also stated petitioner could have expressed his dissatisfaction with counsel Floyd to Judge Brown, the plea judge, and he failed to do so.

**Discussion**

Petitioner testified that defense counsel never discussed a defense at trial or calling his witnesses in his defense at trial. Instead, petitioner asserted that defense counsel was only interested in petitioner pleading guilty. Petitioner was committed to going to trial and he therefore concluded his only chance at presenting a meaningful defense to the charges was to hire private counsel.

If petitioner had hired private counsel, he would have gone to trial. Therefore, this is not a case where the appellate court can conclude that even if defense counsel had moved for a continuance it would not have made any difference. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997); Bozeman v. State, 307 S.C. 172, 414 S.E.2d 144 (1992); State v. Babb, 299 S.C. 451, 385 S.E.2d 827 (1989).

In this case, petitioner testified he had been saving his money to hire private counsel and that he had, in fact, spoken with private counsel. In addition, petitioner told his defense counsel about witnesses that he had in his defense. Therefore, it was not "mere conjecture" that the granting of a continuance would have allowed petitioner to obtain private counsel so that he could go to trial and present a defense as he wished to do.

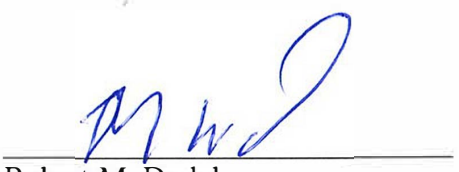
Petitioner said his strong desire to have private counsel came about because defense counsel did not show any interest in his case and did not follow up on suggestions petitioner made to counsel about calling witnesses and doing a minimally adequate investigation to prepare

for trial. Counsel has a duty to conduct a reasonable investigation into the defendant's case, and petitioner here said counsel was only interested in him pleading guilty. See Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986), Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007).

In this case, counsel's disinterest in petitioner's trial defense and his failure to investigate led to the defense ultimately not obtaining a continuance because of defense counsel's inaction for years, and his failure to move for a continuance before Judge Brown when his case was called to trial. Defense counsel was deficient. and petitioner was prejudiced because he had been saving money to hire private counsel, and in fact had conversed with private counsel about representing him at trial. Petitioner therefore proved by a preponderance of the evidence that he was ineffectively represented under the Strickland v. Washington, 466 U.S. 668 (1984), standard.

## CONCLUSION

By reason of the foregoing argument, the ruling of the PCR court should be reversed, and petitioner should be granted a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of October, 2024.

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---

PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Zachary Deon McClain states:

1. He is Chief 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 William A. McKinnon, which was held on October 31, 2023, 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 Zachary Deon McClain.

Respectfully Submitted,

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of October, 2024.

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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."

Robert M. Dudek
Chief Appellate Defender

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This 4th day of October, 2024.