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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable Clifton Newman, Circuit Court Judge

NATHANIEL NESMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2024-000789

JOHNSON PETITION FOR WRIT OF CERTIORARI

JOANNA K. DELANY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in denying post-conviction relief where counsel advised Petitioner he would get ten-year sentences if he pleaded guilty to voluntary manslaughter and armed robbery but Petitioner instead received thirty-year sentences, and where a guilty plea is invalid when it is entered in ignorance of its direct consequences, since Petitioner's guilty pleas were not knowingly, intelligently, and voluntarily tendered?

STATEMENT

On June 5, 2014, a Florence County Grand Jury indicted Nathaniel Nesmith, Petitioner, for murder, armed robbery, conspiracy, kidnapping, and possession of a weapon during the commission of a violent crime. App. 124 – 126. On October 21, 2014, Petitioner appeared before the Honorable Benjamin H. Culbertson for a guilty plea hearing. Petitioner was represented by William Grove. Ed Clements prosecuted the case. App. 1. Pursuant to a plea bargain, Petitioner pleaded guilty to the lesser offense of voluntary manslaughter and to armed robbery. The conspiracy, kidnapping, and weapons charges were dismissed by nolle prosequi. App. 2, ll. 15-16; App. 108; App. 56.

During the plea colloquy,¹ the court asked Petitioner if he had been made any promises and Petitioner stated that he had not. App. 10, ll. 13-15. At the conclusion of the plea colloquy, the court accepted Petitioner's guilty pleas. App. 22, ll. 18-24. The court sentenced Petitioner to concurrent thirty-year terms for both offenses. App. 22, l. 24 – 23, l. 3. On October 23, 2014, counsel filed a motion to reconsider the sentences. App. 47. A hearing was held on the matter on April 18, 2016.² App. 109. The court denied the motion, and an order denying the motion was filed on September 12, 2019.³ App. 48.

On June 9, 2016, Petitioner filed an application for post-conviction relief (PCR). App. 49 – 55. On February 25, 2021, the State made its return. App. 56 – 63. On October 11, 2022,

¹ During the colloquy, the court told Petitioner he faced a maximum of thirty years' imprisonment for each offense, for a total exposure of sixty years. The court also stated that armed robbery carried a mandatory minimum of ten years. App. 8, ll. 10-25.

² No transcript of the motion hearing was available due to the passage of time. App. 86, ll. 5-25. However, the post-conviction relief court had before it a transcript of the guilty plea hearing. App. 112.

³ The order stated the judge was unaware that a written order had not been issued in the case until he received a letter from Petitioner dated August 27, 2019. App. 48.

Petitioner filed an amended PCR application. App. 64 – 68. On October 20, 2023, a hearing was held on the matter before the Honorable Clifton Newman. Petitioner was represented by Joshua Bailey. Russell Barlow and Danielle Dixon represented the State. App. 69.

Petitioner testified he only pleaded guilty because he believed he would receive ten years' imprisonment. Petitioner stated he would not have pleaded guilty if he thought he would receive thirty years. Petitioner explained he thought he faced thirty years only if he lost at trial. Petitioner further explained he told the plea court no promises had been made to him because that was what plea counsel advised him to say. App. 81, ll. 4-16; App. 83, ll. 14-25; App. 90, ll. 3-12; App. 92, ll. 5-12. Petitioner also entered into evidence an affidavit of his mother, Marguree Nesmith, in which Ms. Nesmith averred that she received a telephone call from plea counsel on October 20, 2014, and plea counsel told her that Petitioner would be receiving a ten-year sentence. App. 106.

In contrast, plea counsel claimed he never assured Petitioner of a ten-year sentence, and plea counsel claimed he did not tell Petitioner's mother that Petitioner would get ten years either. App. 97, ll. 3-25; App. 98, ll. 1-13.

On April 12, 2024, the PCR court issued an order of dismissal⁴ in which it addressed Petitioner's claim that plea counsel provided ineffective assistance by advising Petitioner that he would only receive ten years if he pleaded guilty, and that this resulted in the entry of involuntary guilty pleas. App. 107 – 123; App. 116 – 120. The order concluded that a combination of the record from the plea hearing and plea counsel's credible testimony at the PCR hearing showed that Petitioner understood the consequences of pleading guilty. The order further stated that the plea colloquy cured any alleged deficiency regarding plea counsel's

⁴ The order of dismissal stated the PCR court found plea counsel's testimony credible and Petitioner's testimony not credible. App. 115.

advice. App. 116 – 120. The order also stated Petitioner did not allege any facts to show he was prevented from informing the plea court that counsel told him he would only receive ten years. The order concluded that Petitioner “freely, knowingly, and voluntarily pled guilty.” App. 120.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in denying post-conviction relief where counsel advised Petitioner he would get ten-year sentences if he pleaded guilty to voluntary manslaughter and armed robbery but Petitioner instead received thirty-year sentences, and where a guilty plea is invalid when it is entered in ignorance of its direct consequences, since Petitioner's guilty pleas were not knowingly, intelligently, and voluntarily tendered.

The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). The record must establish the defendant had “a full understanding of what the plea connotes and of its consequence.” *Boykin v. Alabama*, 395 U.S. 238, 244 (1969). Before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he or she is waiving. Specifically, a defendant must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. *Id.*, 395 U.S. at 243. Additionally, a “defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived.” *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citing *Boykin*, *supra*). “A plea made in ignorance of its direct consequences is entered in ignorance and is invalid.” *Burnett v. State*, 352 S.C. 589, 592, 576 S.E.2d 144, 145 (2003) (citing *State v. Hazel*, 275 S.C. 392, 275 S.E.2d 602 (1980)).

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove “that counsel's

performance was deficient” and fell below reasonable professional norms, and the deficient performance prejudiced the petitioner. *Id.* A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). “[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.” *Hill*, 474 U.S. at 58.

“A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s errors, the defendant would not have pled guilty, but would have insisted on going to trial.” *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009) (citing *Hill v. Lockhart*, *supra*). “The crux of the inquiry is whether counsel’s ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial.” *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018). “When considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether information conveyed by the plea judge cured any possible error made by counsel.” *Burnett v. State*, 352 S.C. at 592, 576 S.E.2d at 145 (citing *Moorehead v. State*, 329 S.C. 329, 496 S.E.2d 415 (1998)).

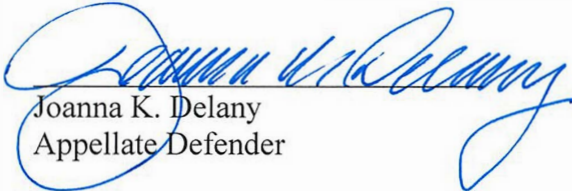
Counsel’s performance was constitutionally deficient because he misadvised Petitioner about the direct consequences of his plea bargain—the amount of time in prison that he faced. Petitioner’s pleas were therefore tendered in ignorance, without a full understanding of the consequences. The PCR court’s finding that Petitioner’s pleas were knowingly and voluntarily entered was error. *Boykin v. Alabama*, 395 U.S. at 244; *Burnett v. State*, 352 S.C. at 592, 576 S.E.2d at 145. Petitioner established through his testimony at the PCR hearing that he would not

have pleaded guilty but for counsel's erroneous advice that he would receive ten-year sentences. The affidavit of Petitioner's mother corroborated this testimony. App. 106; App. 92, ll. 5-12. The PCR court's conclusion that any deficiency by counsel was cured by the plea colloquy was incorrect, since Petitioner explained that he answered the plea court's questions in the manner in which plea counsel advised him to do. App. 83, ll. 14-25. Petitioner also explained he thought he faced thirty years only if he lost at trial. App. 90, ll. 3-12.

Petitioner's decision to plead guilty was not knowing and intelligent. Had Petitioner known he would receive thirty-year sentences he would not have pleaded guilty and would have insisted on going to trial. By incorrectly advising Petitioner about his sentencing exposure, counsel's deficient performance resulted in Petitioner's entry of guilty pleas that were not knowingly, intelligently, and voluntarily tendered. *Hill v. Lockhart*, 474 U.S. at 56; *Frierson v. State*, 423 S.C. at 262, 815 S.E.2d at 436.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.

A handwritten signature in blue ink, appearing to read "Joanna K. Delany", is written over a horizontal line.

Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of October, 2024.

STATE OF SOUTH CAROLINA
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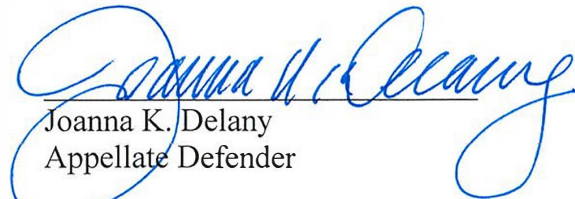
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Nathaniel Nesmith states:

1. She is 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 before Judge Clifton Newman, which was held on October 20, 2022, 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 Nathaniel Nesmith.

Respectfully Submitted,



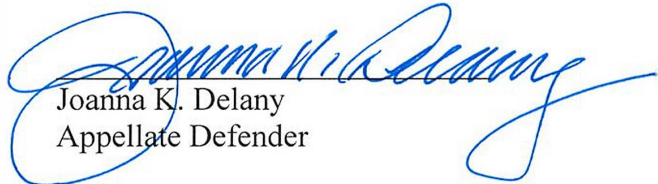
Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of October, 2024.

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.”



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