STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Clifton Newman, Circuit Court Judge

OMAR SINGLETON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213561

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Does the record support the PCR court's finding that when making his plea, Petitioner was accurately advised about the recidivist statute and its impact where both plea counsel and the PCR court mistakenly believed that Petitioner could be separately tried on multiple charges arising from the same incident and thereby become eligible for life without parole?

STATEMENT

On January 20, 2008, Petitioner Omar Singleton's codefendant attempted to hold up an occupied private club in Richland County. App. 9, l. 24 – App. 11, l. 8. The codefendant entered the front door with a shotgun, whereupon the club owner made a counterattack resulting in a physical struggle over control of the gun. *Id.* During the struggle, at least three shots were fired, and two of the occupants in the club were struck with shotgun pellets. *Id.* Shortly thereafter, Petitioner entered the back door and fired a warning shot directly into the ceiling from his own shotgun. *Id.*; App. 16, ll. 10-12. Seeing his codefendant had been disarmed, he fled the scene. *Id.* Petitioner was nineteen at the time. App. 15, ll. 18-20.

On June 20, 2008, a Richland County grand jury indicted Petitioner on one count of attempted armed robbery, two counts of assault and battery with intent to kill, and six counts of assault with intent to kill. App. 147-188. Petitioner came forward to take responsibility and cooperate with law enforcement. Tr. 13, ll. 6-20. He identified his codefendant, who had previously been unknown to officers. *Id.* The State agreed to a plea deal recommending a cap of fifteen years for Petitioner's part in the incident. *Id.*; App. 2, ll. 13-15.

On April 21, 2011, Petitioner was woken in a detention center and told he was due in court for a plea hearing. App. 72, l. 21-23. He had no idea he would be going to court that day. App. 72, ll. 24-25. The last time he had spoken to plea counsel was two months prior. App. 72, ll. 14-19. Petitioner attended a plea hearing before the Honorable Thomas W. Cooper. App. 1. Dan Goldberg represented the State, and James May represented Petitioner. *Id.* The judge initiated a plea colloquy

with Petitioner and specifically addressed the impact of South Carolina's recidivist statute:[1]

> Assault and battery with intent to kill and attempted armed robbery are most serious offenses in the eyes of the law. That means that they're classified as most serious offenses. So today you use up at least one of those strikes that you have for most serious offenses, and what that means is when you get out of jail, if you ever commit another most serious offense, you will go to jail for the rest of your life.

App. 3, ll. 14-22. Petitioner then pled guilty to the counts as the judge read each one. App. 6, l. 4 – App. 8, l. 16. The court found a substantial factual basis existed for the plea. Tr. 14, ll. 22-25.

Later in the colloquy, plea counsel attempted to recap the impact of the recidivist statute based on Petitioner's plea:

> **Mr. May:** . . . At the time that this occurred he was at Midlands Tech training to become an auto mechanic. We have gone over this numerous times, that in my reading of the law that he is L-WOP eligible if he has any offense, including a serious, not only just a most serious.
>
> **The Court:** That's right.
>
> **Mr. May:** That he has used up all three strikes, that he is going to do violent time as Your Honor advised him.
>
> **The Court:** Right.

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[1] S.C. Code Ann. § 17-25-45(A) (1976) provides:

> Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has either:
>
> (1) one or more prior convictions for:
>
> (a) a most serious offense; or
>
> (b) a federal or out-of-state conviction for an offense that would be classified as a most serious offense under this section . . . .

App. 16, ll. 17-25.

The judge sentenced Petitioner to twelve years imprisonment to run concurrently for each count of attempted armed robbery and assault and battery with intent to kill ten years also to run concurrent for each count of assault with intent to kill. App. 19, l. 23 – App. 20, l. 6.

Petitioner filed an application for post-conviction relief on January 25, 2012, claiming ineffective assistance of counsel in his plea and sentencing. App. 22-26. The State submitted a return on January 26, 2012. App. 27-32. On October 17, 2012, a hearing was held before the Honorable Clifton B. Newman. App. 34. Robert D. Corney represented the State, and David E. Belding represented Petitioner. *Id.*

At the PCR hearing, plea counsel testified to his understanding of the recidivist statute and how it affected Petitioner's sentencing. He noted that the State did not serve notice of intent to seek life without the possibility of parole ("LWOP"), and he did not think the State could seek LWOP unless it "actually tr[ied] him in separate trials because he had at least three armed robberies. They would have had to got [sic] a conviction on one to be able to serve life without parole on the next one." App. 40, ll. 6-14. He claimed that he explained to Petitioner how under the recidivist statute, the State could try him separately on multiple "most serious" charges and obtain a mandatory life sentence. App. 40, l. 20 – App. 41, l. 3.

Petitioner also testified about his conversations with plea counsel and his understanding of the impact of the recidivist statute:

> Q: And every time you talked to him, what did you two talk about?
>
> . . .
>
> A: He talking about life without parole or plead, plead guilty. . . .
>
> . . .

> Q: Okay. He started talking about life without parole early on. Did you know whether or not you were facing live without parole?
>
> A: Not – no.

Tr. 71, l. 20 – Tr. 72, l. 7.

> Q: Okay. I want to make sure I understand. What was your understanding in April of 2011 about life without parole? Did you think you were facing life without parole at that time?
>
> A: I mean, yeah. That's what he told me.

Tr. 102, ll. 11-15. Cross-examination:

> Q: [Y]ou were talking about Judge Cooper's talking to you at the plea hearing. And you said, based on what he said, I thought I was already life without parole eligible.
>
> A: Yeah.

Tr. 111, ll. 6-10.

At the close of the hearing, the judge ruled and denied Petitioner's PCR claim. App. 124, ll. 19-24. On December 4, 2012, the court issued a written order dismissing Petitioner's claims. App. 131-145. The court found that Petitioner entered the guilty plea "freely and voluntarily and with a full understanding of the nature and consequences of doing so." App. 136.

> Further, Applicant was fully and appropriately advised by counsel as to the potential "life without parole" exposure he could incur *in the future* as a result of having his several unrelated, "most-serious" charges called to trial separately by the state. Applicant's allegation that he believed he was facing a life without parole sentence at the time of his 2011 plea is not credible; further, that contention is conclusively refuted by the plea hearing transcript and the credible testimony presented by counsel.

Tr. 137. The court also found that Petitioner did not suffer any prejudice from the alleged deficiencies, stating that, "but for counsel's advice, Applicant would have still pled guilty, only it

would have been under the terms of a plea offer which left Applicant exposed to the potential of more jail time." App. 141.

ARGUMENT

I. The record does not support the finding that Petitioner was accurately advised about the recidivist statute and its impact on Petitioner based on his plea because both plea counsel and the PCR court misunderstood the statute.

The record does not support the finding that Petitioner was accurately advised about the recidivist statute and its impact on Petitioner based on his plea because both plea counsel and the PCR court misunderstood the statute. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington,* 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland,* 466 U.S. at 687. The two-part test adopted in *Strickland* "applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart,* 474 U.S. 52, 58 (1985); *see generally Brady v. United States*, 397 U.S. 742, 758 (1970) ("Guilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results.").

Specifically, 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," a defendant sufficiently undermines the required voluntary and intelligent character of a plea. *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009); *accord State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980) (holding record must reflect that defendant freely and intelligently waived constitutional trial rights and had full

understanding of the consequences of the plea); *Berry v. State*, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009) (holding the difference "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea"). Deficient performance by plea counsel can therefore deprive a defendant of his Constitutional right "to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." *Suber v. State,* 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "Specifically, the voluntariness of a guilty plea is not determined by an examination of a 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 also from the record of the PCR hearing." *Roddy v. State*, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000).

In this case, the record does not support the finding that Petitioner was accurately advised about the recidivist statute and its impact on Petitioner based on his plea. In its order, the PCR court stated that plea counsel fully and appropriately advised Petitioner about the "potential 'life without parole' exposure he could incur *in the future* as a result of having his several unrelated, 'most-serious' charges called to trial separately by the state." In other words, the court agreed with plea counsel's understanding that the State could seek LWOP based solely on the current charges by trying each one independently. This understanding erroneously overlooked the intent of the recidivist statute to deter relapsing to criminal behavior after one has been convicted and fully punished for a prior, independent offense. *See* S.C. Code Ann. § 17-25-50 (1976) ("In determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in

point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses."); *State v. Boyd*, 288 S.C. 206, 209, 341 S.E.2d 144, 146 (Ct. App. 1986) ("[W]e do hold that the same logic and fairness of [sections 45 & 50] require the adoption of Boyd's thesis that a conviction of two or more counts under the Controlled Substance Act which arose out of acts committed in the course of a single incident should count as one for the purpose of sentencing for conviction of a subsequent and separate violation of the Controlled Substance Act."). Thus, Petitioner could not have faced LWOP liability in the event that the State separately tried his charges if he did not plead. The shared misunderstanding of the PCR court and plea counsel predicates that Petitioner was not fully and accurately advised in making the plea.

Second, the record does not support the finding that Petitioner was accurately advised because plea counsel was unclear during the plea colloquy in stating for the record Petitioner's LWOP liability:

> We have gone over this numerous times, that in my reading of the law that he is L-WOP eligible if he has any offense, including a serious, not only just a most serious. . . . That he has used up all three strikes, that he is going to do violent time as Your Honor advised him.

A reasonable person unstudied in the applicable statutes could easily interpret this explanation as stating Petitioner was facing LWOP based on a conviction for the current charges—that he "has used up all his strikes," and therefore, after a conviction for the charges at issue, "he is L-WOP eligible" unless he pleads today the deal offered by the State.

Finally, the record does not support the finding that Petitioner was accurately advised and pled knowingly because Petitioner expressly and repeatedly testified at the PCR hearing that his understanding at the time of the plea was that he was facing life without parole. He based this

understanding on both plea counsel's statements to that effect and on plea counsel's repeatedly raising LWOP as an imminent consequence that Petitioner should fully consider in deciding whether to plead.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner Omar Singleton's petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of September, 2013.

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IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
CLIFTON NEWMAN, CIRCUIT COURT JUDGE

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STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213561

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Omar Singleton states:

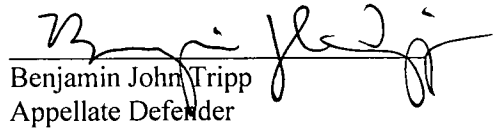
1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on October 17, 2012. In his opinion seeking certiorari from the order of dismissal is without merit.

3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Omar Singleton.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 18th day of September, 2013

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CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Omar Singleton, #308111, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 18th day of September, 2013.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day of September, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.