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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Derham Cole, Circuit Court Judge

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OCT 20 2014

S.C. Supreme Court

THOMAS EDWARD PORTER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014000551

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

INDEX

INDEX.....	1
ISSUE PRESENTED	2
STATEMENT	3
ARGUMENT	
The guilty plea to attempted armed robbery was rendered involuntary by counsel's failure to advise and investigate the defense of entrapment.....	4
CONCLUSION	7
PETITION TO BE RELIEVED AS COUNSEL.....	8

ISSUE PRESENTED

Was the guilty plea to attempted armed robbery rendered involuntary by counsel's failure to advise and investigate the defense of entrapment?

STATEMENT

In December of 2008, the Spartanburg County Grand Jury, in a two count indictment indicted Petitioner Porter for attempted armed robbery and possession of a firearm during the commission of a violent crime, indictment #08-GS-42-7535. It is unclear who testified before the grand jury as the Spartanburg County Sheriff's Office is listed as the witness. (App. p. 32). On February 4, 2010, Porter appeared before the Honorable Roger L. Couch and pled to count one, attempted armed robbery. Robert Hall represented Porter at the plea. Barry Barnette prosecuted the case. Sentencing was held in abeyance and Porter was allowed to remain on bond to assist the State. The State scheduled sentencing for June 8, 2011. Porter failed to appear and a bench warrant was issued. On November 8, 2011, Judge Couch sentenced Porter to fifteen (15) years. Porter did not appeal his sentence or conviction.

On February 27, 2012, Porter filed an application for post conviction relief. The State filed a return on January 30, 2013. On October 3, 2013, an evidentiary hearing was held before the Honorable J. Derham Cole. Hattie D. Boyce represented Porter at the PCR hearing. Suzanne H. White was present for the State. In a written order filed February 20, 2014, Judge Cole denied relief and dismissed the application. A timely notice of intent to appeal was served on March 4, 2014. This petition for writ of certiorari follows.

ARGUMENT

The guilty plea to attempted armed robbery was rendered involuntary by counsel's failure to advise and investigate the defense of entrapment.

Officers with the Spartanburg County Sheriff's Department received a tip from a confidential informant about an attempted armed robbery/home invasion of an apartment in Cowpens. (App. p. 24, line 22 – p. 25, lines 1-4). Officers received information that Charity Smith, Frederick Gergin and Petitioner Thomas Porter would be traveling to the apartment in a green Buick Skylark with a North Carolina license tag and driven by Gergin. (App. p. 25, lines 5-10). Officers conducted an unspecified traffic stop and found a gun in Smith's purse and a ski mask and a shot gun in the backseat. The officers attributed the items in the backseat to Porter. (App. p. 25, lines 10-20). Smith and Porter gave statements to the police that they planned to rob a drug dealer at the apartment of his money and drugs. (Tr. p. 25, lines 21 –p. 26, lines 1-4). The driver, Gergin, claimed to have no knowledge of the plan to rob the drug dealer. (Tr. p. 26, lines 4-7).

During the PCR hearing Porter testified that plea counsel was ineffective in failing to advise and investigate the defense of entrapment. (App. p. 67, lines 4-14). Porter testified that the confidential informant, Fredrick Drummond, came to him and Smith with the plan to rob the drug dealer. (App. p. 67, lines 6-16). Porter testified that if he had known about the defense of entrapment he would have gone to trial. (App. p. 67, lines 16-17).

In the order of dismissal the PCR judge wrote, "The Applicant failed to point to any specific matters Counsel failed to discover, or any defenses that could have been pursued had Counsel been more fully prepared. Furthermore, the applicant failed to show any prejudice that may have resulted from Counsel's alleged inadequate preparation or investigation." (App. p. 110). The PCR judge erred. Counsel was deficient in failing to advise Porter about and investigate the defense of

entrapment. But for counsel's deficient performance, Porter would not have pled guilty and instead would have insisted on going to trial.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). “To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him.” Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). “A defendant's knowing and voluntary waiver of the

constitutional rights which accompany a guilty plea ‘may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.’ ” Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). “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, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

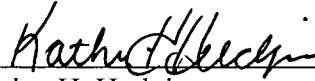
“The second, or ‘prejudice,’ requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. at 59, 106 S.Ct. 366. “A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character 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).

The guilty plea in the present case was rendered involuntary by counsel's failure to advise and investigate the defense of entrapment. The affirmative defense of entrapment is available where there is the “conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for trickery, persuasion, or fraud of the officer.” State v. Jacobs, 238 S.C. 234, 244, 119 S.E.2d 735, 740 (1961). Counsel's failure to advise Porter of the entrapment defense falls below an objective standard of reasonableness. There is a reasonable probability that but for counsel's error, Porter would not have pled guilty, but would have insisted on going to trial.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of October, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
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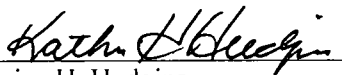
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Thomas Edward Porter 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 records and transcript of petitioner's post-conviction relief hearing which was held on October 3, 2013. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She 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 her as counsel for Thomas Edward Porter.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 20th day of October, 2014

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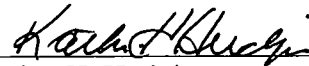
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CERTIFICATE OF SERVICE

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 Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Thomas Edward Porter, #318797, at McCormick Correctional Institution this 20th day of October, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of October, 2014.

Bailey Reed (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.