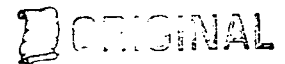

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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

ETHAN MACK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

2014-001042

JOHNSON PETITION FOR WRIT OF CERTIORARI

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether Petitioner was denied his Sixth Amendment right to effective assistance of counsel where plea counsel coerced the plea by failing to advise Petitioner that he could challenge additional indictments brought by the State as vindictive and incorrectly advising Petitioner that he would receive consecutive sentences if convicted at trial?

STATEMENT

Procedural History

Petitioner was indicted by the Charleston County Grand Jury on January 11, 2010 for murder, forgery, and obstruction of justice.

On October 4 – 15, 2010, Petitioner appeared before the Honorable J.C. Nicholson, Jr. and was tried by a jury for the offenses listed in the indictments. Petitioner was represented at trial by David Aylor and Steven Harris, and the State was represented by Solicitor Scarlett Wilson and Chief Deputy Solicitor Bruce Durant. The jury found Petitioner guilty of forgery and obstruction of justice. The jury could not reach a unanimous verdict on the charge of murder and Judge Nicholson declared a mistrial as to that offense. Judge Nicholson sentenced Petitioner to five years incarceration for forgery and ten years incarceration for obstruction of justice, to run consecutively. App. 7, 23 – 8, 3.

On April 1, 2011, Petitioner entered an Alford[1] plea to voluntary manslaughter before the Honorable Deadra L. Jefferson. App. 5-25. Petitioner was represented by David Aylor (hereinafter "plea counsel"), and the State was represented by Solicitor Scarlett Wilson. App. 5. The plea agreement included a negotiated sentence of twenty-five years incarceration to run concurrent to his prior sentences for forgery and obstruction of justice and for time-served since Petitioner's arrest on October 7, 2009. App. 3, 6-13. Pursuant to the agreement, the State *nolle prossed* two related charges for conspiracy and accessory after the fact to murder, both indicted after the prior trial.[2] App. 3, 12-18. Petitioner was separately indicted on January 7, 2008 for an unrelated offense of

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[1] North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970).

[2] According to the public index, indictment 2010GS1008710 for accessory after the fact to murder and indictment 2010GS1008711 for conspiracy were filed December 6, 2010, less than two months after the mistrial as to murder and nearly four months prior to entry of the plea.

unlawful carrying of a firearm. Id. This charge was also *nolle prossed* pursuant to Petitioner's plea. Id.

No direct appeal followed.

Application for Post-Conviction Relief and Evidentiary Hearing

On March 27, 2012, Petitioner filed his application for post-conviction relief ("PCR") alleging ineffective assistance of counsel. App. 26 -35. The State filed its original Return on January 7, 2013 and filed an Amended Return on June 7, 2013. App. 36-39, 40-44. Petitioner, through PCR counsel, filed a Brief in Support of and Amendment for Post-Conviction Relief Application on June 17, 2013.[3] App. 45-50.

An evidentiary hearing was held before the Honorable R. Markley Dennis on April 17, 2014. App. 45. Petitioner was represented by Charles Brooks, and the State was represented by Assistant Attorney Generals Karen Ratigan and Ashleigh Wilson. Id. Petitioner and plea counsel, David Aylor, testified at the hearing. App. 45-104.

At the PCR hearing, Petitioner testified that there was no evidence to convict him of murder because he did not do it. App. 56, 3-8; 62, 21. However, he said that plea counsel informed him that rather than just re-trying him on the murder charge, the State was going to file other charges against him, including kidnapping, extortion, and accessory before the fact. App. 56, 9-24; 68, 2-8. He testified that he was unaware of the indictment for accessory after the fact at the time of his plea, and learned of it only after a later request for court documents. App. 58, 13-19; 59, 15-20. Petitioner also testified that plea counsel told him that if he was found guilty, he would get consecutive time, like the prior sentencing judge did with his forgery and obstruction convictions.

[3] The filing consisted of a cover page executed by PCR counsel with an attached document written by Petitioner. The PCR judge did not consider this document due to the prohibition against hybrid representation. App. 111, fn. 1 (Order of Dismissal).

App. 68, 8-14. Petitioner testified that he felt like something with his attorney changed after his trial and that plea counsel no longer had his best interest in mind. App. 60, 12-25. He testified that plea counsel pressured him to plead guilty. App. 56, 14-24. Petitioner testified that had he known then what he knows now (i.e., had plea counsel accurately advised Petitioner), " I would never have took [sic] that plea. I would have waited until trial, until I went to trial, just like I insisted on going to trial on murder once again." App. 58, 3-7; see also App. 66, 15-18.

Plea counsel testified that he advised Petitioner to accept the plea agreement and that he still thought it was a very good plea. App. 80, 23 – 81, 7. He testified that Petitioner's main concern about accepting a plea was that he did not believe he was responsible for the victim's death. App. 87, 12-17. Plea counsel testified that there were other charges outside of the murder that the State could have brought against Petitioner. App. 75, 22 – 76, 1; App. 83, 1-11. Plea counsel thought that any sentence on those other charges would run consecutively because Judge Nicholson had run the forgery and obstruction sentences consecutively, even though he admitted that such was not a common practice. App. 76, 2-5; App. 91, 6-10. Plea counsel testified that the solicitor never indicated that they would bring additional charges or seek consecutive sentences. App. 76, 6-12. However, the record reflects that the State obtained indictments for conspiracy and accessory after the fact to murder "in anticipation of trial" on or about December 6, 2010. App. 3, 12-18. Plea counsel's testimony implies that he did not even know what the other outstanding indictments were prior to the plea hearing, but rather only learned of them at the plea hearing itself when the State indicated what other charges would be *nolle prossed.* Plea counsel testified that regardless of the other charges, which he admittedly did not specifically know, the "bottom line" was that the plea would resolve the case completely – the State would not bring further charges against Petitioner. App. 90, 5-19.

Order of Dismissal

Judge Dennis issued oral findings and a ruling from the bench at the conclusion of the PCR hearing, denying Petitioner's PCR application. App. 101, 14 – 104, 6. Judge Dennis' written Order of Dismissal denying Petitioner's PCR application was filed May 6, 2014. App. 110-116. Judge Dennis found that plea counsel adequately conferred with Petitioner, conducted a proper investigation, did not pressure Petitioner into pleading guilty, and did not fail to explain an Alford plea. App. 115. Judge Dennis further found that even had plea counsel not explained an Alford plea, such error was cured when Petitioner agreed at the plea hearing that the State could produce sufficient evidence to prove his guilt beyond a reasonable doubt. App. 115. Therefore, he found that Petitioner failed to meet either prong under Strickland to prove ineffective assistance of counsel.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner was denied his Sixth Amendment right to effective assistance of counsel where plea counsel coerced the plea by failing to advise Petitioner that he could challenge additional indictments brought by the State as vindictive and incorrectly advising Petitioner that he would receive consecutive sentences if convicted at trial.

In this case, plea counsel coerced Petitioner into pleading guilty to voluntary manslaughter where he advised Petitioner that the State could bring additional charges against him and try them at Petitioner's re-trial on murder but never informed Petitioner of the potential claim for vindictive prosecution. Plea counsel further coerced Petitioner's guilty plea by advising him that any sentences he received would run consecutive and he would spend sixty or seventy years in prison. App. 55, 24 – 56, 1; App. 68, 9-14. Plea counsel never indicated that they could argue against consecutive sentencing or raise any double jeopardy challenge. Were it not for the bleak picture painted by plea counsel, Petitioner would have proceeded to trial and would not have pled guilty.

Right to Effective Assistance of Counsel

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 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). 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).

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. "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). 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results." Brady v. United States, 397 U.S. 742, 758 (1970). An "unsound result" occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238 (1969). Therefore, in the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); see also Hill v. Lockhart, 474 U.S. 52, 56 (1985) ("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.' " (quoting North Carolina v. Alford, 400 U.S. 25, 31(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. 52 at 59. In other words,

> A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the 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.

Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (quoting Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); see also Hill, 474 U.S. at 59 (footnote omitted).

Failure to Advise Regarding Vindictive Prosecution

"It is a due process violation to punish a person for exercising a protected statutory or constitutional right." State v. Fletcher, 322 S.C. 256, 259, 471 S.E.2d 702, 704 (Ct.App.1996). The Sixth Amendment to the United States Constitution provides for a defendant's right to a jury trial. U.S. CONST. amend. VI. Plea counsel did not advise Petitioner of any potential challenge to additional charges brought by the State as vindictive. A claim of prosecutorial vindictiveness can succeed either where there is a presumption of prosecutorial retaliation or proof of actual retaliation. State v. Blakley, 402 S.C. 650, 657-60, 742 S.E.2d 29, 33-34 (2013). In order for a presumption of prosecutorial retaliation to apply, a defendant "must show there is a 'reasonable likelihood' that retaliation was a motive behind bringing the additional charges." Patrick v. State, 349 S.C. 203, 209, 562 S.E.2d 609, 612 (2002). If no such reasonable likelihood exists, the defendant has the burden to prove actual retaliation. Id.

In the present case, there is no evidence that plea counsel did any investigation into the motive or timing of the additional indictments against Petitioner. Rather, plea counsel told Petitioner that the State had a right to bring any additional charges. App. 75, 22 – 76, 1; App. 83, 1-11. Further, Petitioner was not aware of what the actual additional charges were against him until after the plea. App. 68, 2-8; 68, 22 – 69, 1. According to his testimony at the PCR hearing, plea counsel did not recall the nature or number of the other charges brought against Petitioner either, but was instead concerned with the fact that the plea would fully resolve the case. App. 90, 5-19. The filing of the additional indictments less than two months after the mistrial, along with the increase in the plea offer from a prior offer of seventeen years to twenty-five years, points to prosecutorial vindictiveness. App. 57, 4-7. Additionally, in his closing argument at the trial, co-defense counsel made several remarks regarding the State's failure to properly charge Petitioner for

accessory after the fact instead of murder, stating "The State got greedy. They wanted murder. They want blood." and "It is not your job to correct their mistake of charging him with murder and not accessory after the fact."[4] App. 121, 21-23, 122, 6-11; 123, 2-13; 123, 24 – 124, 2. These statements certainly could have provoked vindictive prosecution.

Under these circumstances, a reasonable attorney should know what the outstanding indictments against his client are at the time of the plea and advise their client regarding the possibility of pursuing a claim for vindictive prosecution. Instead, plea counsel used the possibility of a whole host of charges, including kidnapping and extortion, which were never charged, to coerce Petitioner into entering a plea. App. 56, 9-13; 68, 2-8; 83, 4-10. Had Petitioner known he could challenge the additional indictments, he would have chosen to do so, as he was not concerned about facing trial on murder again but was concerned about that State's ability to prove other related charges. See North Carolina v. Pearce, 395 U.S. 711, 725, 89 S.Ct. 2072, 2080 (1969) (a fear of vindictiveness may unconstitutionally deter a defendant's exercise of his constitutional rights).

Failure to Accurately Advise of Potential Sentence

Reversal is required where counsel provides erroneous sentencing advice that induces the client's guilty plea. Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 486 (1991). Absent a statutory requirement that a sentence run consecutively, the sentencing judge has discretion to order sentences to run consecutively or concurrently. However, the presumption is that sentences are served concurrently. Finley v. State, 219 S.C. 278, 282, 64 S.E.2d 881, 882 (1951) (The rule of law is well settled that two or more sentences of a defendant to the same place of confinement run concurrently, in the absence of specific provisions in the judgment to the

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[4] It does not appear that the transcript of the original trial was reviewed by the PCR court; however, the Court can take judicial notice of the transcript and these few page that are relevant to why plea counsel should have recognized and advised Petitioner of vindictive prosecution.

contrary, and, where a defendant is already in execution on a former sentence, and the second sentence does not state that the time is to commence at the expiration of the former, the sentences will run concurrently, in the absence of a statute providing for a different rule."). Additionally, the Double Jeopardy Clause provides defendants the following protection:

> Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense. Where successive prosecutions are at stake, the guarantee serves 'a constitutional policy of finality for the defendant's benefit.' That policy protects the accused from attempts to relitigate the facts underlying a prior acquittal, [ ] and from attempts to secure additional punishment after a prior conviction and sentence.

Brown v. Ohio, 432 U.S. 161, 165–66 (1977) (internal citations omitted).

In order to enter a voluntary guilty plea, "a defendant must know the direct consequences of his plea, including the actual value of any commitments made to him." Hammond v. United States, 528 F.2d 15, 19 (4th Cir. 1975). In Hammond, the defendant was misinformed about the consequences if he were to be convicted after a trial. Id. at 17. Hammond believed that he was trading a maximum possible sentence of ninety or ninety-five years for a sentence of twenty-five years, when in fact the maximum possible sentence was fifty-five years. Id. The Court found that Hammond's lawyer misadvised him regarding the factual bases on which he was required to decide whether to plead guilty, constituting ineffective assistance of counsel and resulting in a lack of voluntariness in the plea. Id. at 18.

In Alexander v. State, the defendant pled guilty to one count of trafficking ten or more grams of cocaine and received a sentence of fifteen years. 303 S.C. at 541, 402 S.E.2d at 484. This Court found that Alexander's counsel was deficient in advising him that if he went to trial he faced a potential penalty of one-hundred years incarceration. Id. at 542, 402 S.E.2d at 485.

The indictments contained overlapping and greater and lesser charges, such that counsel should have concluded that the maximum sentencing exposure would have been seven to twenty-five years incarceration and a fifty-thousand dollar fine for the fifty grams of cocaine found in the automobile and twenty-five years incarceration and a fifty-thousand dollar fine for the one hundred fifty grams of cocaine found in the motel room. Id. at 542-43; 402 S.E.2d at 485. Petitioner further testified that "had trial counsel not misinformed him that he would face a potential life sentence if he proceeded to trial, he would not have pled guilty." Id. at 543; 402 S.E.2d at 485. Thus, this Court found that Petitioner's uncontradicted testimony on this point satisfied the "prejudice" requirement of Strickland and Hill.

Similar to Hammond and Alexander, the present case involves plea counsel's misadvice to Petitioner regarding a pertinent factor to the plea determination. Petitioner was already convicted and sentenced to five years for forgery and ten years for obstruction of justice, to be served consecutively. App. 3, 6-13. The potential charges and penalties for the other indicted offenses included fifteen years for accessory after the fact to murder,[5] five years for conspiracy,[6] and five years for unlawful possession of a firearm.[7] Petitioner and plea counsel both agreed that Petitioner had a strong case against the murder charge due to the lack of forensic evidence

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[5] S.C. CODE ANN. § 16-1-55 ("A person who commits the offense of accessory after the fact, . . . [i]f the principal offense is a Class A, Class B, or Class C felony or murder, the penalty must be as prescribed for a Class D felony."); S.C. CODE ANN. § 16-1-20(A)(4) ("A person convicted of classified offenses, must be imprisoned as follows: . . . for a Class D felony, not more than fifteen years").

[6] S.C. CODE ANN. § 16-17-410 ("A person who commits the crime of conspiracy is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than five years.").

[7] S.C. CODE ANN. § 16-23-50 (providing a penalty for unlawful possession of a firearm, described in §16-23-20, of a fine not more than two thousand dollars and imprisonment for not more than five years, or both).

connecting him to the crime and the State's reliance upon a sole witness, who lacked credibility and gave inconsistent statements. App. 56, 3-8; App. 77, 10 – 79, 4; 83, 10-11; 92, 11-14. Thus, setting aside an unlikely murder conviction from the potential sentence, Petitioner was looking at a total potential sentence of twenty-five years on the indicted charges outside of murder. This is the same amount of time that Petitioner received by pleading guilty to voluntary manslaughter. However, the plea agreement provided that the sentence would run concurrent to Petitioner's prior sentences. Even so, had Petitioner proceeded to trial and had the judge ordered consecutive sentencing, Petitioner was facing a total of forty years incarceration.[8] In order to receive forty years, Petitioner would have to be convicted and sentenced to the maximum on all three of the other indicted offenses, all of those sentences run consecutively to each other, and those sentences run consecutive to his prior fifteen year sentence. This potential sentence is much less than the sixty to seventy years that plea counsel advised Petitioner he would receive.

Moreover, had Petitioner proceeded to trial and been convicted of any additional offenses, the sentencing judge could have ordered that they be served concurrently – consecutive sentencing is discretionary. Petitioner also could have argued that consecutive sentences would violate the Double Jeopardy Clause. Despite this, plea counsel told Petitioner that any additional sentences would run consecutively, though that was just one possibility and consecutive sentencing would have been subject to constitutional challenges. App. 68, 8-14. While plea counsel had an obligation to inform Petitioner of the potential for consecutive sentencing, his obligation did not end there. He should have informed Petitioner of the other possibility of

[8] Factoring a potential murder conviction, Petitioner's potential sentence would have been life plus twenty-five years, which could have run consecutively or concurrently to the prior fifteen year sentence. However, Petitioner's testimony does not include any mention of consideration of a life sentence versus the twenty-five year plea offer, likely due to his position that he would not be convicted of murder.

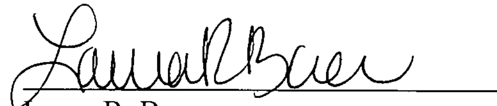
concurrent sentencing and the Double Jeopardy argument against consecutive sentencing. Counsel's dire presentation to Petitioner regarding his potential sentence coerced Petitioner into pleading guilty. If plea counsel had accurately advised Petitioner, he would have proceeded to trial and would not have pled guilty. App. 58, 3-7.

Petitioner is accordingly entitled to the grant of post-conviction relief because his trial counsel coerced his plea by failing to advise him of the ability to challenge additional indictments as vindictive prosecution and inaccurately advising him that any sentence would be consecutive. But for counsel's misadvice, Petitioner would not have pled guilty, but would have instead gone to trial. See Hill v. Lockhart, 474 U.S. 52, 56 (1985).

CONCLUSION

For the reasons set forth herein, Petitioner Ethan Mack respectfully requests this Court grant certiorari to allow full briefing on this issue.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of January, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
R. MARKLEY DENNIS, JR., CIRCUIT COURT JUDGE

ETHAN MACK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ethan Mack states:

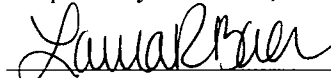
1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on April 17, 2014. 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 Ethan Mack.

Respectfully submitted,



Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

This 12th day of January, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

ETHAN MACK,

PETITIONER,

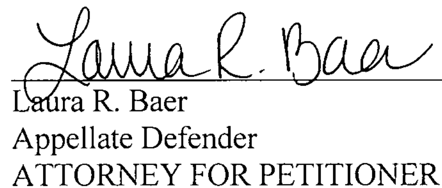
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

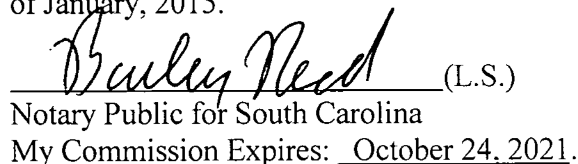
CERTIFICATE OF SERVICE

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 Ashleigh R Wilson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Columbia, SC 29201, and Ethan Mack, #343243, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 12th day of January, 2015.



Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of January, 2015.



________________________(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.