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S.C. Supreme Court

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Florence County

D. Craig Brown, Circuit Court Judge

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MONTEZ N. BARKER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001313

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether Petitioner's *Alford* plea was knowingly, intelligently, and voluntarily made where plea counsel failed to properly explain the nature of an *Alford* plea and its consequences to Petitioner before he entered the plea and where Petitioner would have proceeded to trial if he would have fully understood the nature of an *Alford* plea?

## STATEMENT

A Florence County Grand Jury indicted Petitioner at the July 2012 term of General Sessions for two counts of murder, conspiracy, grand larceny, and third degree arson. App. 140-142. The state served Petitioner and his counsel with a Notice of Intent to Seek the Death Penalty on September 20, 2010. App. 1-3. Petitioner pled guilty as indicted pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) on May 8, 2013 before the Honorable Thomas A. Russo. App. 4. The state withdrew its intent to seek the death penalty as part of the plea deal. App. 7, ll. 9-11. Solicitor Edgar Lewis Clements, III represented the state, and William Vickery Meetze and Marshall Solomon Weaver represented Petitioner. App. 4. Petitioner was sentenced by Judge Russo to life without parole for each count of murder, five years for conspiracy, ten years for grand larceny, and ten years for third degree arson. All sentences were ordered to be served consecutively. App. 51, l. 14 – 52, l. 10.

Petitioner filed a Notice of Intent to Appeal. App. 72-73. However, the South Carolina Court of Appeals dismissed the appeal for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. App. 74.

On February 21, 2014, Petitioner filed an application for post-conviction relief (PCR). App. 76-84. The state filed a return to this application dated June 24, 2014. App. 85-91. The matter proceeded to an evidentiary hearing on April 15, 2015 before the Honorable D. Craig Brown. App. 92. Assistant Attorney General Josh Thomas represented the state, and Jonathan Waller represented Petitioner. App. 92. By order dated June 1, 2015, Judge Brown denied Petitioner relief. App. 135-139.

This petition for writ of certiorari follows.

## ARGUMENT

Petitioner's Alford plea was not knowingly, intelligently, and voluntarily made where plea counsel failed to properly explain the nature of an Alford plea and its consequences to Petitioner before he entered the plea and where Petitioner would have proceeded to trial if he would have fully understood the nature of an Alford plea.

### **Guilty Plea**

At the beginning of the proceeding, Solicitor Clements informed the court that Petitioner was pleading guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) to two counts of murder, conspiracy, grand larceny, and third degree arson. App. 7, l. 13 – 9, l. 13. In exchange for Petitioner's plea, the solicitor indicated the state was withdrawing its intent to seek the death penalty. App. 7, ll. 9-11. During a routine colloquy, Judge Russo advised Petitioner of the sentencing range for each offense, the consequences of his plea, and his constitutional rights, including his right to remain silent and his right to a trial by jury. App. 10, l. 15 – 11, l. 15; App. 13, l. 8 – 14, l. 8; App. 15, l. 14 – 19, l. 15.

After this colloquy with the court, Petitioner stated he was pleading guilty as indicted pursuant to North Carolina v. Alford. App. 11, ll. 16-21. Judge Russo asked plea counsel whether he had advised Petitioner of “the effect and what it means to enter a plea under North Carolina versus Alford” to which counsel indicated he had. App. 12, ll. 2-7. Judge Russo then advised Petitioner of his understanding of an Alford plea. Specifically, the following discussion took place:

The Court: When someone pleads guilty under North Carolina versus Alford, Mr. Barker [Petitioner], basically what that says is this. When a person pleads under Alford, they're basically saying this: Judge, I am going to plead guilty to these charges, although I'm not admitting any wrongdoing. The reason I'm going to plead guilty is because the State has made me an offer.

They have made me a plea offer. And I know the facts that the State has that if the case went before a jury, my concern is that I

would likely be convicted. So in an effort to take advantage of the State's offer, I am willing to plead guilty to the charge in an effort for me to accept the State's offer.

Is that your understanding of an Alford plea?

Mr. Barker: Yes, sir.

The Court: Okay. Now, you understand that when someone pleads guilty under Alford that whatever sentence the Court imposes, you would serve that sentence just the same as if you pled guilty straight-up. You understand that?

Mr. Barker: Yes, sir.

App. 14, l. 9 – 15, l. 13.

When asked for the state's version of the facts, Solicitor Clements asserted that the murders were initiated by Travis Fonnelle Delaine, who had numerous drug distribution charges pending in state court. Delaine conspired with LaRoss Graham to kill Billy Hall and Talya Poston because both were potential witnesses against Delaine. Graham in turn allegedly recruited Petitioner to assist with the murders.

According to Solicitor Clements, on September 1, 2009, Hall, Poston, Graham, and Petitioner were all traveling in Poston's 2004 Ford Explorer. Hall was driving, Poston was in the front passenger seat, and Graham and Petitioner were supposedly sitting in the back. While the four were traveling, either Graham or Petitioner allegedly shot Hall in the back of the head. However, it was the state's theory that Petitioner was the shooter. After Hall was shot, Poston attempted to flee the vehicle and was shot as she was jumping out of the car. She was able to call 911 as she was running down the road. Graham admitted to chasing after Poston and continuing to shoot, but claimed she had already been fatally wounded by Petitioner. After the murders, Graham drove Poston's Ford Explorer from the scene and allegedly parked it near Petitioner's home. Clements claimed Petitioner later moved the car and burned it. App. 23, l. 6 – 25, l. 18.

At the time of the murders, Petitioner was on parole and subject to GPS monitoring. Petitioner was allegedly wearing his ankle monitor at the time of the murders which allowed the state to track his whereabouts. According to Clements, the GPS tracking showed Petitioner was at the location of the murders and the location where Poston's Ford Explorer was burned. App. 22, l. 16 – 23, l. 5.

After the solicitor's recitation of the facts, the court found there was a substantial factual basis to support each offense and that Petitioner's decision to plead pursuant to Alford was freely, voluntarily, and intelligently made. App. 29, ll. 17-23. Judge Russo further noted that both plea counsel and the court had discussed with Petitioner the ramifications of pleading pursuant to Alford and that Petitioner indicated he understood the ramifications. App. 30, ll. 8-17.

At the end of the hearing, the court sentenced Petitioner to consecutive sentences of life without parole for each count of murder, five years for conspiracy, ten years for grand larceny, and ten years for third degree arson. App. 51, l. 14 – 52, l. 10.

### **PCR Hearing**

Petitioner testified at the PCR hearing that plea counsel discussed the meaning of an Alford plea with him and he understood, based on this discussion, that if he pled pursuant to Alford than he would avoid admitting any guilt or that he "did it." However, Petitioner said he did not understand that an Alford plea was "just another name for" a "regular . . . guilty plea." At the time of his plea, Petitioner had been continuously incarcerated for forty-four months patiently awaiting a jury trial and had maintained his innocence throughout that period. Petitioner testified he would not have given up his constitutional rights if he would have understood an Alford plea was "just a regular . . . guilty plea." However, Petitioner said plea counsel had given him "the impression that it [an Alford plea] was . . . a whole 'nother plea other than a guilty plea."

Petitioner testified that he always wanted to go to trial and he believed he could “beat” the charges. However, plea counsel told him it would be in his best interest to plead and avoid a death sentence because, although he would be incarcerated for the rest of his life, he “still [had] a good life to live” and could still “achieve things.” Despite counsel’s advice, Petitioner said he thought he should go to trial and felt it “would be better to go to trial knowing that I’m not guilty than just going and giving up my rights” in order to avoid the death penalty. App. 105, l. 6 – 106, l. 22.

Lastly, Petitioner testified that if he would have fully understood the nature of an Alford plea and its consequences, he would not have pled, but would have exercised his constitutional right to a jury trial, even with the knowledge that he was facing a possible death sentence. App. 109, ll. 4-21; App. 113, ll. 5-8. He explained, “I preferred to die for something that I know that I’m innocent of rather than plead guilty for something that I know that I didn’t do.” App. 113, ll. 9-13.

Vick Meetze, Petitioner’s plea counsel, testified he was appointed to represent Petitioner, along with Marshall Weaver, after Petitioner’s original appointed counsel, Jack Lawson passed away in 2011. App. 114, l. 23 – 115, l. 5. Meetze explained that Petitioner’s case was set to be tried on a date certain in October 2013. After the trial date was set, Meetze said Solicitor Clements approached him with an offer to allow Petitioner to plead guilty “straight up” in exchange for the state removing its notice of its intent to seek the death penalty. App. 120, l. 24 – 121, l. 6.

After his discussion with Clements, Meetze conveyed the offer to Petitioner. Meetze testified Petitioner “always maintained that he wanted a trial,” but once Petitioner had the opportunity to avoid a death sentence, “he decided he wanted to take it.” App. 121, ll. 7-13. According to Meetze, the initial “conversation was not with regards to an *Alford* plea.” He said Petitioner had agreed to plead guilty and, it was not until the day of the actual plea, that discussions about a possible Alford plea arose. App. 121, ll. 14-20; App. 125, ll. 8-23.

Meetze maintained, “I have no question in my mind that he [Petitioner] was fully explained and fully understood the nature of an *Alford* plea, that it was a conviction just as if he was pleading guilty. He understood the consequences. There’s not any question in my mind about all that.” App. 121, ll. 21-25. Meetze testified that not only did he explain to Petitioner the nature of an Alford plea, but Judge Russo also went over the ramifications of an Alford plea with Petitioner as well. App. 122, ll. 1-2.

### **Order of Dismissal**

The PCR court found Petitioner failed to meet his burden of proving his plea was rendered involuntary by plea counsel’s performance. Moreover, the court found Petitioner’s allegation that plea counsel failed to advise him of the nature of an Alford plea to be without merit. The court concluded plea counsel “fully advised Petitioner that his Alford plea would be treated as a guilty plea for all intents and purposes.” Moreover, the court noted Judge Russo had “fully explained the nature of an Alford plea to [Petitioner] [during the plea hearing], and [Petitioner] voiced no misunderstanding at that stage.” Thus, the court indicated that any misconceptions Petitioner may have had about the consequences of his Alford plea were cured by the plea colloquy. App. 136-137.

### **Discussion**

Petitioner’s Alford plea was not knowingly, intelligently, and voluntarily made where plea counsel failed to properly explain the nature of an Alford plea and its consequences to Petitioner before he entered his plea. If counsel would have properly advised Petitioner of the nature and consequences of an Alford plea, Petitioner would have chosen to proceed to trial instead of pleading pursuant to Alford.

The difference “between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea.” Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009).

“The longstanding test for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Hill v. Lockhart, 474 U.S. 52, 56 (1985) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984), to claims of the same against plea counsel).

First, “the voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases.” Id. On the other hand, the prejudice requirement focuses on whether “there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” Id. at 59. “[T]he 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.” Holden v. State, 393 S.C. 565, 572-574, 713 S.E.2d 611, 615 (2011) (citing Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000)).

Petitioner’s Alford plea was not knowingly, intelligently, and voluntarily made due to plea counsel’s deficient performance. Specifically, plea counsel failed to properly explain the nature of an Alford plea and its ramifications to Petitioner before he entered his plea. Petitioner testified that what he understood about an Alford plea based on his discussion with plea counsel was that, while he was entering a plea, he was not admitting any guilt or saying that he “did it.” App. 105, ll. 9-15. However, Petitioner maintained that he did not understand an Alford plea “was just a regular . . . guilty plea or just another name for it.” Plea counsel should have ensured Petitioner fully understood the ramifications of an Alford plea before allowing Petitioner to accept the state’s offer and enter the plea. His failure to do so rendered Petitioner’s plea involuntary.

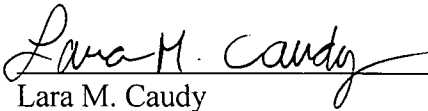
If counsel would have properly advised Petitioner of the nature and consequences of an Alford plea, Petitioner would have chosen to proceed to trial instead of pleading pursuant to Alford. Petitioner said he would not have given up his constitutional right to a jury trial if he would have properly understood the nature of the plea. App. 105, l. 16 – 106, l. 22. Plea counsel corroborated Petitioner's testimony when he admitted Petitioner consistently stated he wanted to go to trial. App. 121, ll. 9-10; App. 125, ll. 8-10.

Because counsel's deficient performance rendered Petitioner's Alford plea involuntary and Petitioner was clearly prejudiced by counsel's performance, this Court should reverse the order of the PCR court and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,

  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of October, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO FLORENCE COUNTY  
D. CRAIG BROWN, CIRCUIT COURT JUDGE

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MONTEZ N. BARKER,

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STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001313

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PETITION TO BE RELIEVED AS COUNSEL

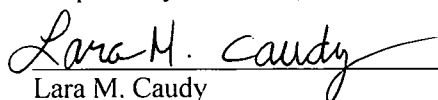
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Counsel for Montez M. Barker states:

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 15, 2015. 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 Montez M. Barker.

Respectfully submitted,



Lara M. Caudy  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 22nd day of October, 2015

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Florence County  
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MONTEZ N. BARKER,

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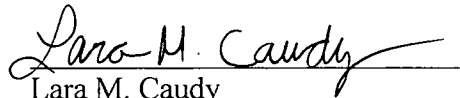
RESPONDENT

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CERTIFICATE OF SERVICE

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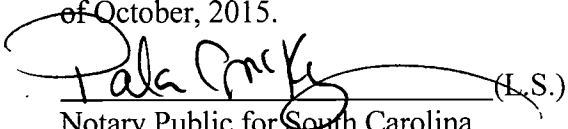
I certify that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in this case have been served on J. Croom Hunter, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Montez M. Barker, #277819, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 22nd day of October, 2015.



Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day  
of October, 2015.



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