

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Allendale County
Donald B. Hocker, Circuit Court Judge

JEFFREY LEE MOORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLANT CASE NO. 2015-000889

JOHNSON PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR judge err in refusing to find that the guilty plea was rendered involuntary by the fact that Petitioner did not have a copy of his discovery and was unaware of a prior contradictory and favorable statement by one of the State's witnesses?

STATEMENT

In May 4, 2012, the Greenwood County Grand Jury indicted Petitioner Moore for burglary first degree, indictment #2012-GS-40-0830. On May 14, 2012, Petitioner appeared before the Honorable J. Cordell Maddox and moved for a continuance and a motion to relieve court appointed counsel and hire private counsel. (App. pp. 3-13). Janna Nelson represented Petitioner and Andrew Hodges prosecuted the case. Judge Maddox denied the motion to relieve counsel but gave counsel a day to determine if a continuance was necessary to prepare for trial. On May 15, 2012, Petitioner appeared before Judge Maddox and pled guilty as charged. Sentencing was deferred to the next day. The next day Petitioner moved to withdraw his guilty plea based on the fact that Petitioner was unaware that a State's witness who lived close to the scene of the burglary had initially stated that Petitioner was **not** at his house on the night of the burglary. The witness later changed his statement to indicate that Petitioner had been at his house on the night of the burglary. (App. p. 22, line 15 – p. 23, 24, 25, lines 1-13). The judge denied the motion to withdraw the guilty plea. (App. p. 26, lines 17-20). Pursuant to negotiations with the State, Judge Maddox sentenced Petitioner to fifteen (15) years in prison. A timely notice of intent to appeal was filed but the appeal was dismissed on October 10, 2012, for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR¹.

On November 26, 2012, Petitioner filed an application for post conviction relief. The State filed a return on August 25, 2014. On February 17, 2015, an evidentiary hearing was held before the Honorable Donald B. Hocker. Carson M. Henderson represented Petitioner. J. Rutledge Johnson represented the State. In a written order signed March 24, 2015, Judge Hocker denied

relief and dismissed the application. A timely notice of intent to appeal was served on April 20, 2015. This petition for writ of certiorari follows.

¹ It is unclear why the denial of the motion to relieve counsel and the denial of the motion to withdraw the guilty plea would not have provided a sufficient explanation to allow the direct appeal to proceed.

ARGUMENT

The PCR judge erred in refusing to find that the guilty plea was rendered involuntary by the fact that Petitioner did not have a copy of his discovery material and was unaware of a prior contradictory and favorable statement by one of the State's witnesses

During the PCR hearing Petitioner testified that prior to entering his guilty plea he was unaware that a State's witness had provided conflicting statements. (App. pp. 63-67). Petitioner testified that plea counsel did not provide him with a copy of his discovery material prior to the guilty plea. (App. p. 63, lines 17-23). Plea counsel confirmed at the PCR hearing that Petitioner did not have a copy of the discovery material containing the conflicting witness statements until after the guilty plea. (App. p. 84, line 19 – p. 85, 86, lines 1-3). Counsel, however, testified that she reviewed the discovery with Petitioner and she believed that she read to Petitioner or paraphrased a report including the favorable statement made by the witness. (App. p. 85, lines 7-13). Petitioner's position that he was unaware of the favorable statement made by the witness is supported by Petitioner's motion to withdraw the guilty plea at the time of sentencing. (App. pp. 22-25).

In the order of dismissal the PCR judge wrote, "Counsel testified that she did, in fact, review all of the discovery responses with Applicant including the witness statements, and she found no inconsistencies in the statements. Counsel also testified it was Applicant's decision to plead guilty. This Court finds Counsel's testimony more credible than Applicant's. This Court finds Counsel reviewed all of the discovery with applicant and that Applicant was fully aware of all of the evidence before he made the decision to plead guilty." First, counsel did not testify that she found no inconsistencies in the statements. Counsel confirmed at the time that Petitioner moved to withdraw his guilty plea and at the PCR hearing that a State's witness gave conflicting statements. (App. p. 24, lines 8-18; p. 84, lines 19-23). Second, although counsel may have reviewed the

discovery with Petitioner, this was not sufficient to allow him to make an intelligent decision as to whether he should plead guilty or proceed to trial. Plea counsel was ineffective in failing to provide Petitioner with copies of the discovery material. Petitioner testified that if he had known about the conflicting statement, he would not have pled guilty. (App. p. 67, lines 21-24). The PCR judge erred in refusing to find that the guilty plea was rendered involuntary.

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).

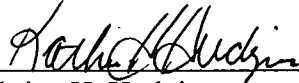
Counsel’s representation in failing to provide Petitioner with a copy of his discovery material falls below an objective standard of reasonableness. The guilty plea was rendered involuntary by counsel’s failure to provide Petitioner with a copy of the discovery material. Without having his own copy of the discovery material, the plea does not represent a voluntary and intelligent choice among the alternative courses of action open to Petitioner. Petitioner was prejudiced by the deficient performance. There is a reasonable probability that, but for counsel's

errors, Petitioner would not have pled guilty, but would have insisted on going to trial on the murder and attempted armed robbery charge.

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 7th day of December, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ALLENDALE COUNTY
DONALD B. HOCKER, CIRCUIT COURT JUDGE

JEFFREY LEE MOORE,

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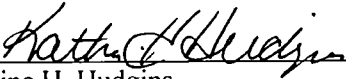
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jeffrey Lee Moore 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 February 17, 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 Jeffrey Lee Moore.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 7th day of December, 2015

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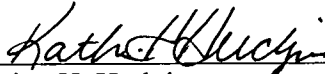
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STATE OF SOUTH CAROLINA,

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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 J. Rutledge Johnson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Jeffrey Lee Moore, #263267, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827 this 7th day of December, 2015.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of December, 2015.


_____(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.