ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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SC SUPREME COURT

Appeal from Charleston County

Honorable Larry B. Hyman, Circuit Court Judge

JOSHUA MONROE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002434

ANDERS BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

Tiffany L. Butler
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by accepting Appellant's guilty plea to armed robbery, kidnapping, and first-degree criminal sexual conduct pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), where Appellant stated that he did not think a jury would find him guilty based on the facts presented by the State at the guilty plea hearing, the judge told Appellant that he has to say a jury would find him guilty before his Alford plea could be accepted by the court, and Appellant's Alford plea was not feely and voluntarily given?

STATEMENT OF THE CASE

On October 6, 2008, Appellant was indicted for two counts of armed robbery, one count of attempted armed robbery, two counts of kidnapping, and one count of first-degree criminal sexual conduct. R. 177 – 190. On November 18, 2010, Appellant pled guilty before the Honorable J.C. Nicholson. R. 1. Milton Demetrios Stratos represented Appellant. Burns Malone Wetmore represented the State. R. 1.

On February 3, 2011, Appellant was sentenced before the Honorable Roger M. Young, Sr. R. 28. Judge Young sentenced Appellant to a concurrent twenty-five year prison sentence. R. 80.

On November 18, 2015, Appellant was granted a belated appeal of his guilty plea pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), by the Honorable Larry B. Hyman. R. 176. This appeal follows

STATEMENT OF FACTS

This case involved a series of armed robberies committed in Charleston County, South Carolina in April, May, and June of 2008.

The State's Evidence

On April 28, 2008, the Applebee's restaurant on Rivers Avenue in Charleston County, South Carolina, was robbed. R. 17, ll. 3 – 7. At around 2:40 a.m., employees were leaving the restaurant after closing up for the night. R. 17, ll. 11 – 12. The employees were met in the parking lot by individuals with guns. R. 17, ll. The employees were forced back into the restaurant at gunpoint. R. 17, ll. 12 – 14. The robbers ordered the employees to turn off the security alarm and open the safe. R. 17, ll. 14 – 15. Fifty-five hundred dollars were stolen from the safe. R. 17, ll. 15 – 16.

The next robbery occurred on May 25, 2008 at the Noisy Oyster restaurant in North Charleston. R. 20, ll. 2- 6. At around 3:20 a.m., two restaurant employees were leaving the restaurant for the night and met individuals with guns pointed at them in the parking lot. R. 20, ll. 6 – 9. The two employees were forced back into the restaurant. R. 20, ll. 6 – 9. The armed individuals took the night deposit bag with cash inside and cash from inside the safe. R. 20, ll. 10 – 11. They stole a total of sixty-seven hundred dollars and some personal property from the employees. R. 20, ll. 11 – 14.

After taking the money, one of the robbers forced the female employee to take off her clothes and perform oral sex on him at gunpoint. R. 20, ll. 15 – 20. She was also forced to perform oral sex on the male employee. R. 21, ll. 1 – 8. Both employees were left naked inside the walk-in refrigerator of the restaurant. R. 21, ll. 9 – 10.

On June 2, 2008, individuals attempted to rob the Chuck E. Cheese restaurant in Charleston County. R. 17, ll. 17 – 19. A restaurant employee was closing up the restaurant at around 12:50 a.m. that morning. R. 17, ll. 22 -23. Three individuals, who police later identified as Appellant, Bryan Mulligan and Corey Larkin, followed the employee to his home in Dorchester County. R. 17, l. 23 – R. 18, l. 5. They allegedly forced him into the back seat of his car at gunpoint and drove the car back to the restaurant. R. 17, l. 23 – R. 18, l. 5.

The employee's car ran out of gas on the way back to the restaurant. R. 18, ll. 6 – 7. Appellant, Mulligan, Larkin, and the employee got into what was later identified as Mulligan's car and abandoned the employee's. R. 18, ll. 6 – 8. When they arrived back at the restaurant, the employee was ordered to turn off the security alarm and open the safe at gunpoint. R. 18, ll. 10 – 13. However, he was not able to open the safe. No money was taken from the restaurant and the employee was tied up and left inside. R. 18, ll. 14 – 15.

The employee of the Chuck E. Cheese identified Mulligan's vehicle as the one used in the robbery. R. 49, ll. 24 – 25. Police found Mulligan's identification inside the vehicle. R. 49, l. 25 – R. 50, l. 4. Mulligan turned himself in to police and gave a verbal statement in which he confessed to committing the Chuck E. Cheese robbery. R. 50, ll. 5 – 9. Further, Mulligan's girlfriend showed police the location of the apartment where Appellant and Larkin lived. R. 50, ll. 10 – 12.

Officers stopped Larkin's vehicle as he was leaving the apartment and discovered evidence of the other robberies inside. R. 50, ll. 12 – 17. Larkin gave a written statement in which he confessed to committing all three armed robberies. R. 50, ll. 12 – 17. He also identified Mulligan and Appellant as being involved in the robberies. R. 50, ll. 12 – 17. According to Larkin, Mulligan was the one who sexually assaulted the employees of the Noisy

Oyster restaurant. R. 21, ll. 14 – 22. The police were not able to determine exactly which of the three men committed the sexual assault. R. 21, ll. 11 – 13.

Appellant also turned himself in and gave a written statement in which he confessed to the Applebee's and Chuck E. Cheese robberies. R. 50, ll. 18 – 21. He later confessed to being involved in the Noisy Oyster robbery. R. 50, ll. 21 – 23. However, he denied committing the sexual assault on the restaurant employees.

Guilty Plea

On November 18, 2010, Appellant pled guilty to armed robbery, two counts of kidnapping, and attempted armed robbery for the Applebee's and Chuck E. Cheese robberies. R. 1. Appellant pled guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to armed robbery, kidnapping, and first-degree criminal sexual conduct for the robbery of the Noisy Oyster restaurant. R. 9, ll. 7 – 9. After finding that there was a factual basis for the guilty pleas and that Appellant was freely and voluntarily pleading guilty, the judge accepted the pleas to the Applebee's and Chuck E. Cheese robberies. R. 21, ll. 11 – 17.

The judge then heard the State's facts for the Noisy Oyster restaurant robbery for Appellant's Alford plea. R. 20, l. 1 – 21, l. 22. When the solicitor concluded his recitation of the facts, the judge asked Appellant:

> "Mr. Monroe, if those facts were presented to a Jury, do you think a Jury would find you guilty."

R. 21, ll. 23- 25. Appellant responded, "No, sir." R. 22, ll. 1.

The judge informed Appellant that he could not accept his Alford plea and allowed Appellant speak to defense counsel. R. 22, ll. 2 – 7. Counsel asked the judge if he would "attempt to explain" what the court was asking Appellant. R. 22, ll. 11 – 13. The judge explained:

> "Uh, and in order for an Alford plea to be effected, you don't have to acknowledge your (sic) guilty, but in this Court's opinion you have to have three things.
>
> Number one, The State's got to consent to it, which they have.
>
> Number two, uh, they have . . . to receive some benefit. . . Number three, you have to acknowledge that if those facts as the State presented then to the Court were presented to the Jury – and I'm not talking about anything else presented to the Jury, just those facts – do you, in your opinion, do you think the Jury would find you guilty? And it's this Court's opinion you have to acknowledge that yes – affirmatively – in order for . . . the Alford plea to take effect. Do you understand?"

R. 22, l. 19 – R. 23, l. 21.

The judge asked Appellant, once again, whether he thought a jury would find him guilty. R. 24, ll. 12 – 16. Appellant responded that he did. R. 24, l. 17. The judge found that Appellant's Alford plea was done "freely, voluntarily, knowingly, and intelligently." He accepted the Alford plea and deferred sentencing per the State's request. R. 25, ll.18 – 23

ARGUMENT

The trial judge erred by accepting Appellant's guilty plea to armed robbery, kidnapping, and first-degree criminal sexual conduct pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), where Appellant stated that he did not think a jury would find him guilty based on the facts presented by the State at the guilty plea hearing, the judge told Appellant that he has to say a jury would find him guilty before his *Alford* plea could be accepted by the court, and Appellant's *Alford* plea was not feely and voluntarily given.

A guilty plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), "is, in essence, a guilty plea and carries with it the same penalties and punishments." State v. Herndon, 403 S.C. 84, 91, 742 S.E.2d 375, 379 (2013). Thus, the trial court must determine the voluntariness of a defendant's Alford Plea pursuant to factors outlined in Boykin v. Alabama, 395 U.S. 238 (1969). Gaines v. State, 335 S.C. 376, 517 S.E.2d 439 (1999).

In Boykin v. Alabama, the United States Supreme Court established that the test for determining whether a guilty plea is valid is whether the record established that the plea was given intelligently and voluntarily. Id. at 241 – 242. The trial court must ensure that a defendant understands the charges against him and the consequences of pleading guilty, and explain the constitutional rights that are being waived. Gaines, 335 S.C. at 380, 517 S.E.2d at 441 (citing State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975).

According to the Supreme Court, "a plea of guilty is more than an admission of conduct; it is a conviction." Boykin, 395 U.S. at 242. "Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." Id.

Here, Appellant's plea was not intelligently and voluntarily given. Appellant told the trial judge that he did not think a jury would convict him based on the facts presented by the State of the Noisy Oyster restaurant robbery. Although the judge did inform Appellant that he

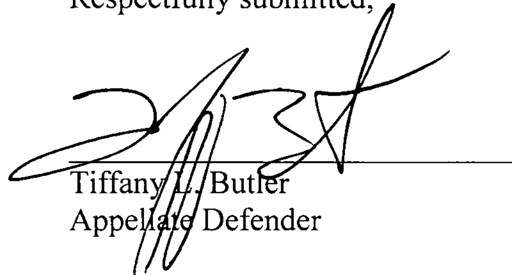
could not accept the Alford plea because of Appellant's response, the judge told Appellant that it was the "Court's opinion" that he had to answer "affirmatively" that a jury could convict him based on the evidence before the Alford plea could "take effect." See R. 23, ll. 18 – 21. Appellant asserted that he believed a jury could find him guilty only after the trial judge said Appellant had to answer "Yes" before the Alford plea could be accepted.

The trial judge should not have accepted the Alford plea and should have allowed Appellant to withdraw. Because Appellant's Alford plea was not given intelligently and voluntarily, his plea and sentences should be reversed.

CONCLUSION

For the reasons argued above, Appellant Joshua Monroe respectfully requests this Court to reverse his guilty plea and sentence and remand to the lower court for a new trial.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of July, 2016.

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APPELLATE CASE NO. 2015-002434

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joshua Monroe states:

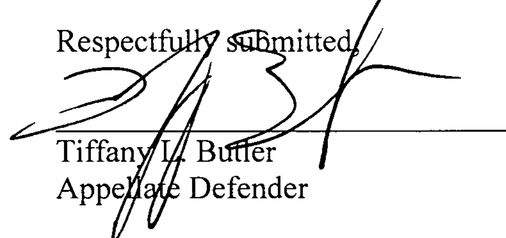
1. SHE is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. SHE has reviewed the record of appellant's trial before Judge Larry B. Hyman, which was held on September 10, 2015 (PCR hrg), and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. SHE has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Joshua Monroe.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

This 5th day of July, 2016.

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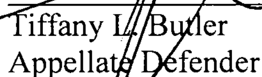
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Guilty Plea Transcript Dated November 18, 2010;
(2) Sentencing Hearing Dated February 3, 2011
(3) Application for Post-Conviction Relief Filed
(4) Memorandum of Law in Support of Application for Post-Conviction Relief
(5) First Amended PCR Application Dated August 20, 2015
(6) Return Dated February 19, 2014
(7) Post-Conviction Relief Transcript Dated September 10, 2015
(8) Order of Dismissal and Grant of Appeal Pursuant to White v. State Filed November 23, 2015
(9) True- Billed Indictments

I certify that this designation contains no matter which is irrelevant to this appeal.



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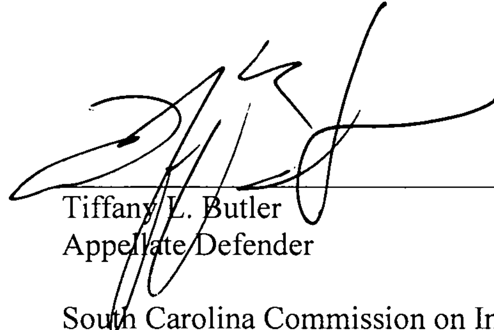
(803) 734-1343

ATTORNEY FOR APPELLANT

This 5ht day of July, 2016

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant pursuant to White v. State complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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APPELLATE CASE NO. 2015-002434

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Anders Brief of Appellant pursuant to White v. State and Record on Appeal in the above referenced case has been served upon J. Rutledge Johnson, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Columbia, SC 29201; and Joshua Monroe, #344735 at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 5ht day of July, 2016.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of July, 2016

Christian Ford (L.S.)
Notary Public for South Carolina
My Commision Expires: March 1, 2026