ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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SC SUPREME COURT

Certiorari to Orangeburg County

Honorable Frank R. Addy, Circuit Court Judge

LATROY BROWN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000263

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made when plea counsel failed to properly advise Petitioner of his constitutional rights, the elements of the charges against him, or the consequences of pleading guilty thereby violating Petitioner's constitutional right to the effective assistance of counsel?

STATEMENT

Petitioner is bipolar schizophrenic and only has a ninth grade education. App. 3, l. 7 – 4, l. 7. His mother was murdered by her boyfriend when Petitioner was only twelve years old. Petitioner witnessed the murder and since that tender age has suffered from mental illness and behavioral problems. His father was physically abusive and, like Petitioner, also suffered from mental illness, which led to his hospitalization on numerous occasions. App. 13, l. 18 – 14, l. 12. In addition to his severe mental illness, Petitioner also suffered from a cocaine addiction.

He was indicted by an Orangeburg County Grand Jury in October 2011 for two counts of carjacking, kidnapping, common law robbery, and purse snatching. App. 74-83. Petitioner ultimately pled guilty as indicted on May 16, 2012 before the Honorable Edgar W. Dickson without a sentence recommendation from the state. App. 1; App. 2, ll. 5-12. Sarah Anne Ford was the Assistant Solicitor. Petitioner was represented by John Davis Stroud, who started with the Public Defender Office in Orangeburg in January 2012, less than five months before Petitioner pled guilty. Stroud only started practicing law in 2010, and it appears he had little, if any, criminal defense experience when he took over Petitioner's case. App. 49, ll. 13-23.

Defense Counsel Stroud told the judge that Petitioner's cocaine dependency fueled the events that led to these indictments. App. 14, ll. 11-12. He explained that substance abuse and mental illness run rampant throughout Petitioner's family and that his tumultuous upbringing and experiences as a child is what led Petitioner to begin using drugs. App. 14, ll. 3-12.

Petitioner, who was thirty-four years old, told the court that he took medication daily to treat his mental illness, bipolar schizophrenia. App. 3, l. 25 – 4, l. 15. Petitioner later clarified at the evidentiary hearing that he was under the influence of Haldol when he pled guilty, which is an antipsychotic medication. Petitioner said "they shot me up with it . . . to keep me from

flipping out." This medication made him "feel real strange." As a result, at the time of his plea, he did not "know what was going on." App. 36, l. 22 – 39, l. 20.

Despite being aware that Petitioner suffered from Bipolar Schizophrenia and was taking medication to treat his illness, the plea court only asked Petitioner *pro forma* questions. During an *unusually brief* colloquy, the judge asked Petitioner whether he understood he could "have a jury trial" and that he was "facing a whole lot of time." App. 5, l. 2 – 7, l. 4. Petitioner stated he understood. Additionally, the judge briefly explained to Petitioner that carjacking and kidnapping were "violent and most serious offenses" and that "each one of those count as a strike." Petitioner again stated he understood. App. 5, ll. 11-20. Significantly, the court failed to inform Petitioner that he had the constitutional right to remain silent and that, if he chose to proceed to trial, he had the right to confront the witnesses against him and present evidence in his own defense.

The assistant solicitor told the judge that Petitioner charges stemmed from four separate events. The first occurred on August 13, 2011 at a "community store." Petitioner allegedly approached a woman and asked her if she would give him a ride. When the woman refused, he pushed her to the ground and ran off with her purse. App. 10, ll. 11-18.

The next two events occurred on August 28, 2011 at the Pitt Stop, a convenience store in Orangeburg. During the first event on that day, Petitioner allegedly asked a woman for a ride. The woman agreed and began to drive Petitioner as he directed. Petitioner supposedly told the woman that he needed to put something in the trunk and, after the woman stopped, he forced her into the trunk and drove away while she was inside. This woman was able to release the trunk latch from inside and escape. App. 10, l. 19 – 11, l. 6.

Later that same day, Petitioner allegedly approached a third woman at the Pitt Stop and asked for a ride. This woman likewise agreed and began to drive Petitioner as he directed. According to the solicitor, when Petitioner stated he needed to put something in the trunk, the woman refused to stop. Petitioner allegedly tried to push her out of the car and eventually dragged her out of the vehicle and drove off in her car. App. 11, ll. 7-15.

Lastly, the assistant solicitor maintained Petitioner approached a woman at a laundromat in Orangeburg on January 24, 2012 and, when this woman "told [Petitioner] to move on," he allegedly grabbed her purse and ran. App. 11, ll. 16-21.

None of the complainants were injured during these events. Defense Counsel Stroud told the court that Petitioner's motivation was "money" and that he needed cash to support his cocaine addiction. App. 14, ll. 11-15.

The court ultimately found Petitioner's decision to plead guilty was freely, voluntarily, and intelligently made and that there was a factual basis for the plea. App. 13, ll. 7-14. Judge Dickson sentenced him to eighteen years' imprisonment for each count of carjacking, eighteen years concurrent for kidnapping, fifteen years concurrent for common law robbery, and three years concurrent for purse snatching. App. 17, ll. 9-20. Petitioner did not appeal.

On October 30, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 19-24. The state filed a return to this application dated March 13, 2013. App. 25-30. An evidentiary hearing was convened on October 27, 2015 before the Honorable Frank R. Addy, Jr. App. 31. Assistant Attorney General J. Clayton Mitchell represented the state, and Grant Smaldone represented Petitioner. App. 31. By order dated January 8, 2016, Judge Addy denied Petitioner relief. App. 66-73.

Petitioner testified at the PCR hearing that plea counsel failed to explain to him his constitutional rights, including his right to a jury trial, his right to confront the witnesses against him, and his right to remain silent and not incriminate himself. Petitioner said he did not know that if he chose to go to trial he would be able to cross-examine the state's witnesses and present evidence in his defense. App. 40, l. 16 – 41, l. 4; App. 46, ll. 3-6. The only reason Petitioner pled guilty is because he "just wanted it to be over with." However, if he would have properly understood his constitutional rights, he "would have took it to trial." App. 41, ll. 3-9.

Additionally, Petitioner maintained that counsel never explained to him the elements of charges against him or what the state would be required to prove if he went to trial. Consequently, he did not "really" understand what he was pleading guilty to at the time of his plea. App. 42, ll. 3-11.

As mentioned, Defense Counsel John Stroud was a newly hired assistant public defender when he represented Petitioner and had little, if any, prior criminal defense experience. App. 49, ll. 13-23. According to Stroud, he "[a]bsolutely" advised Petitioner of his constitutional rights, including his right to a jury trial, the elements of each offense, and the penalties each offense carried. App. 50, ll. 12-21. He also said he reviewed with Petitioner the evidence the state would have presented if Petitioner had chosen to go to trial, including witness statements, surveillance footage, and the photographic lineups where Petitioner was supposedly identified by the complainants. App. 51, ll. 15-25.

Stroud maintained that the assistant solicitor who represented the state threatened to seek a sentence of life without parole pursuant to the "two strikes" or "three strikes" law if Petitioner did not plead guilty. He was "very happy" when Petitioner was sentenced to eighteen years because he thought it "was a good plea deal." App. 52, l. 20 – 53, l. 1.

The PCR judge ultimately found the "plea court's very thorough colloquy with [Petitioner] demonstrates that he understood the charges, penalties, and his rights." App. 70. The court further found Appellant's testimony that counsel failed to review the charges, potential penalties, and his constitutional rights with him not credible. App. 69-70.

Because Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made due to counsel's ineffective assistance for failing to properly advise Petitioner of his constitutional rights, the elements of the charge and potential penalties, and the consequences of pleading guilty, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made when plea counsel failed to properly advise Petitioner of his constitutional rights, the elements of the charges against him, or the consequences of pleading guilty thereby violating Petitioner's constitutional right to the effective assistance of counsel.

There is no evidence to support the PCR court's finding that the "plea court's **very thorough** colloquy" with Petitioner demonstrated he understood the elements of the charges against him, the potential penalties, and his constitutional rights. See App. 70 (emphasis added). Instead, the record from Petitioner's plea hearing shows the plea court engaged in an unusually brief colloquy with Petitioner regarding his constitutional rights, the nature of the charges, and the consequences of pleading guilty. The plea court merely asked Petitioner *pro forma* questions despite knowledge that Petitioner suffered from a severe mental illness, namely bipolar schizophrenia, and was on medication to treat or maintain his condition.

The plea judge only questioned Petitioner whether he understood he could "have a jury trial" and that he was "facing a whole lot of time." The court wholly failed to review with Petitioner his important constitutional right to remain silent. Moreover, the court failed to inform Petitioner that, if he chose to exercise his right to a jury trial, he would be able to cross-examine the state's witnesses and present evidence in his defense. Instead, the plea judge improperly relied on his understanding that plea counsel had advised Petitioner of his rights and reviewed the elements and penalties of each offense. See App. 6, l. 8 – 7, l. 1. However, as shown through Petitioner's testimony at the PCR hearing, plea counsel had failed to do so.

Rather than focusing on whether Petitioner understood his rights and the nature of the offenses, most of the plea court's colloquy with Petitioner regarded whether he agreed with the

allegations contained in each indictment. See App. 7, l. 13 – 10, l. 9. Consequently, the court's colloquy with Petitioner at the plea hearing did not and could not have cured the ineffective assistance he received from counsel.

"The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel." Bailey v. State, 392 S.C. 422, 432, 709 S.E.2d 671, 676 (2011) (citing U.S. Const. amend. VI and Strickland v. Washington, 466 U.S. 668 (1984)). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. A PCR applicant must show that (1) counsel's performance was deficient, and that (2) the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under the second prong, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

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, 466 U.S. 668, 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)).

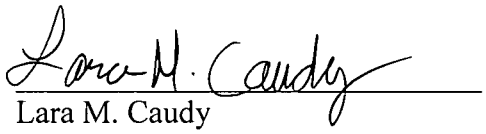
Here, Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made when he pled guilty without a full understanding of his constitutional rights, the elements of the offenses he was pleading guilty to, or the possible penalties he faced as a result of counsel's ineffectiveness. Petitioner was prejudiced by counsel's deficient performance because if he would have properly understood his rights, the nature of the charges, and the consequences of pleading guilty, he would have "took it to trial." App. 41, ll. 7-9.

Based on counsel's deficient performance and the resulting prejudice, 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 12th day of July, 2016.

STATE OF SOUTH CAROLINA

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Certiorari to Orangeburg County
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APPELLATE CASE NO. 2016-000263

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Latroy Brown 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 that was held on February 25, 2016. 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 one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Latroy Brown.

Respectfully submitted,

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of July, 2016

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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 Jessica Kinard, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Latroy Brown, #265525 at Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC, 29472, this 12th day of July, 2016.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 12th day of July, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.