THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

RECEIVED
DEC 28 2016
S.C. SUPREME COURT

The Honorable Maite Murphy, Circuit Court Judge

Appellate Case No. 2016-001449

Kentrell Liburd, 357498, ... Appellant,

v.

State of South Carolina, ... Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER TRIAL COUNSEL WAS INEFFECTIVE AND DEFICIENT IN FAILING TO PROPERLY INVESTIGATE AND FAILING TO ADVISE PETITIONER CONCERNING HIS RIGHT TO NOT PROCEED WITH A PLEA AFTER SIGNING A PLEA AGREEMENT FORM BUT LATER LEARNING BEFORE THE ENTRY OF THE PLEA IN COURT THAT THE STATE COULD NOT FIND TWO CRITICAL WITNESSES AND THAT HIS CO-DEFENDANT WAS FOUND INCOMPETENT TO STAND TRIAL, WHICH PREVENTED PETITIONER FROM MAKING A KNOWING AND INTELLIGENT DECISION ABOUT WHETHER HE SHOULD PROCEED TO TRIAL AND UNDERMINED THE WILFUL AND VOLUNTARY NATURE OF PETITIONER'S PLEA?

II. WHETHER PLEA COUNSEL'S CONDUCT SO UNDERMINED THE PROPER FUNCTIONING OF THE ADVERSARIAL PROCESS THAT THE PLEA CANNOT BE RELIED ON AS HAVING PRODUCED A JUST RESULT?

STATEMENT

Petitioner was only sixteen years old when he was charged with murder and an unrelated armed robbery. The events occurred about a month after his sixteenth birthday. The state alleged that Petitioner and two other young men, who were both older than Petitioner, attempted to burglarize a "camper" where three Hispanic males lived. However, as the young men attempted to break in, the decedent "started fighting" and during the struggle "the gun [carried by one of the assailants] went off." The decedent died from a single gunshot wound to the chest. App. 8, l. 24 – 10, l. 8.

The state's case against Petitioner was based in large part on a statement given to law enforcement by his co-defendant, Gregory Foye. However, shortly before Petitioner pled guilty, his counsel, Margaret Hinds, learned Foye had been found incompetent to stand trial and that his statement would not be admissible against Petitioner at trial. App. 55, ll. 6-19. Nevertheless, Hinds did not communicate this significant fact to Petitioner before he agreed to plead guilty and had signed a plea agreement form. App. 44, ll. 2-23. She also did nothing to further investigate the nature of Foye's incompetency. Significantly, Counsel Hinds was also aware that the state could not locate the two Hispanic male witnesses, who were both "illegal immigrants." App. 42, l. 13 – 43, l. 3. These circumstances clearly weakened the state's case against Petitioner, yet counsel still advised Petitioner that he should pled guilty.

If Petitioner would have known that Foye was found incompetent to stand trial before he agreed to plead guilty and that Foye's statement implicating Petitioner in the murder would not be admissible against him at trial, Petitioner would not have pled guilty. Instead, he "would have went to trial." App. 48, ll. 9-14.

Petitioner was indicted by an Orangeburg County Grand Jury in June 2012 for murder, and in December 2012 for armed robbery. App. 67-70. Based on the advice of his counsel, he ultimately pled guilty to armed robbery and the lesser included offense of voluntary manslaughter on October 22, 2013 before the Honorable Edgar W. Dickson. App. 1. Assistant Solicitor Harrison Bell represented the state, and Margaret Hinds of the First Circuit Public Defender Office represented Petitioner. App. 1. Judge Dickson sentenced the teenaged Petitioner to twenty-five years imprisonment for voluntary manslaughter and ten years consecutive for armed robbery based on a sentence recommendation from the state. App. 3, ll. 10-13; App. 18, ll. 10-17. The aggregate sentence was thirty-five years imprisonment.

On June 12, 2014, Petitioner filed an application for post-conviction relief (PCR). App. 21-28. The state filed a return to this application dated January 29, 2015. App. 29-33. An evidentiary hearing was convened on May 21, 2015 before the Honorable Maité Murphy. App. 34. Assistant Attorney General J. Clayton Mitchell represented the state, and Jonathan D. Waller represented Petitioner. App. 34. By order filed August 26, 2015, Judge Murphy denied Petitioner relief. App. 60-66.

Counsel Hinds maintained at the evidentiary hearing that she advised Petitioner to plead guilty despite the fact that Foye was found incompetent to stand trial and that his statement implicating Petitioner would have been inadmissible at a trial because she believed "there was plenty of other evidence" against Petitioner. This evidence supposedly included a statement Petitioner gave to law enforcement. App. 55, ll. 6-19.

Noting that Hinds claimed she was aware that Foye had been found incompetent before she advised Petitioner to plead guilty and that she did not believe this fact was helpful to Petitioner, the PCR court found Petitioner failed to prove Hinds' performance was deficient. The

court emphasized Hinds' claims that there was plenty of other evidence of Petitioner's guilt, and that Petitioner "fully admitted his guilt to the plea court." App. 64. Consequently, the court denied Petitioner relief.

Because Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made due to plea counsel's ineffective assistance for failing to investigate and properly advise Petitioner after his co-defendant Gregory Foye was found incompetent to stand trial, this petition for writ of certiorari follows.

ARGUMENTS

I. Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made, and his decision about whether he should proceed to trial and the willful and voluntarily nature of his plea was undermined when plea counsel failed to properly investigate and advise Petitioner after it was determined that his co-defendant, who implicated Petitioner in a written statement, was incompetent to stand trial and that two of the State's critical witnesses could not be found, thereby violating Petitioner's constitutional right to effective assistance of counsel.

Before the then seventeen (17) year old Petitioner pled guilty, plea counsel was aware that his co-defendant, Gregory Foye, was found incompetent to stand trial and that, consequently, the statement Foye gave to law enforcement implicating Petitioner would not be admissible against Petitioner at trial. Counsel was also aware that the state could not locate the two Hispanic male witnesses to the murder which made it unlikely that the men would testify against Petitioner at trial. Despite knowledge that Foye was incompetent, plea counsel failed to investigate the nature of his incompetency or properly advised Petitioner of this fact before he agreed to plead guilty and signed the plea agreement form. Counsel's actions constituted deficient performance and violated Petitioners Six Amendment right to the effective assistance of counsel. Petitioner was prejudiced because if he would have known Foye was found incompetent and that the State's two witnesses to the murder could not be found before he agreed to plead guilty, he "would have went to trial." (App. 48, 11.9-14). Instead, Petitioner felt under duress to accept a plea because plea counsel did not reveal to him vital information before he signed a plea agreement, and he was advised that he could not change his mind regarding the plea after learning that his co-defendant was incompetent to stand trial only days before he was scheduled to enter his plea. Moreover, Petitioner felt at that point that his plea counsel was not prepared for trial. Because he had not received accurate information and advise from his plea counsel, Petitioner pled guilty and expressed satisfaction with his plea counsel's

representation because he lacked the necessary information to raise any challenge during the plea proceeding.

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). In a PCR proceeding, the burden of proof is on the applicant to prove the allegations in his application. *Bell v. State*, 321 S.C. 238, 467 S.E.2d 926 (1996). For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) he was prejudiced by his counsel's ineffective performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *Judge v. State*, 321 S.C. 554, 471 S.E.2d 146 (1996). In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. A PCR judge's findings should not be upheld if there is no probative evidence to support them. *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996).

Here, plea counsel was deficient in failing to properly advise Petitioner regarding the incompetency of his co-defendant and inadmissibility of that co-defendant's written statement as well as the State's missing witnesses prior to his decision to plead guilty. In *Kolle v. State*, 690 S.E.2d 73, 386 S.C. 578 (S.C., 2010), because plea counsel misadvised Kolle not to plead guilty prior to the suppression hearing, which in turn resulted in the withdrawal of the State's negotiated sentence, the PCR judge found that these facts "undermined the willful and voluntary nature of Kolle's plea." The PCR judge in that case found plea counsel would have discovered exculpatory

evidence regarding the search warrant and radio/dispatch logs had he properly prepared for trial. The PCR judge believed "such discovery would have reversed the outcome." Thus, the judge held that plea counsel's lack of preparation satisfied the standard of deficiency under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Ultimately, the judge concluded that this deficient performance "deprived [Kolle] of adequate representation and that a different verdict from a verdict of guilty could have been a logical conclusion."

In general, a defendant's guilty plea is more than an admission of conduct; rather, it is a conviction that can deprive him of his liberty or other constitutionally protected interests. *Mabry v. Johnson*, 467 U.S. 504, 507, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984); Boykin, 395 U.S. at 242, 89 S.Ct. 1709. Therefore, the entry of a guilty plea implicates the protections of the Due Process Clause of the federal and state constitutions. See U.S. Const. amend. XIV (providing that states may not deprive a person of life, liberty, or property without due process of law); S.C. Const. art. I, § 3 (same).

In *Berry v. State*, 675 S.E.2d 425 (S.C., 2009), the Court stated that the Sixth Amendment guarantee of effective assistance of counsel requires that counsel accurately inform a defendant, to the extent possible, of evidence the State has against him and any possible legal challenges he may have, as an accused is entitled to counsel's considered and reasonable judgment. In fact, the Court reasoned, uncertainty concerning a potential legal challenge may well provide a defendant a catalyst in plea negotiations with the State. A decision to waive a viable legal challenge must be made knowingly and voluntarily with the advice of constitutionally competent counsel. Simply saying "I never gave it a thought" falls short of the Sixth Amendment guarantee of effective assistance of counsel. The difference in such circumstances between a valid guilty plea and an invalid guilty plea

lies in the knowing and voluntary nature of the plea.

Here, counsel never informed Petitioner of the potential challenge to the use of his co-defendant's statement implicating him. Although Petitioner's plea counsel claimed this was immaterial due to Petitioner's own confession after being confronted with his co-defendant's statement implicating him, plea counsel never evaluated the admissibility of Petitioner's statement given his age, which was sixteen at the time, and the assertion by law enforcement that he could be tried as a juvenile to induce Petitioner's confession. The Supreme Court has long recognized that a false promise is a powerful force in overcoming a person's free will. See; *Bram v. United States*, 168 U.S. 532, 542-43 (1897) ("[A] confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.") (quoting 3 H. Smith & A. Keep, Russell on Crimes and Misdemeanors 478 (6th ed. 1896)). Consequently, "[a] false promise of lenience is 'an example of forbidden [interrogation] tactics, for it would impede the suspect in making an informed choice as to whether he was better off confessing or clamming up.'" *United States v. Stadfeld*, 689 F.3d 705, 709 (7th Cir. 2012) (quoting United States v. Baldwin, 60 F.3d 363, 365 (7th Cir. 1995)).

In *Dassey v. Dittmann* (E.D. Wis., 2016), the Court said this is especially true when the investigators' promises, assurances, and threats of negative consequences are assessed in conjunction with the Petitioner's age, intellectual deficits, lack of experience in dealing with the police, the absence of a parent, and other relevant personal characteristics, the free will of a reasonable person in Petitioner' s position would have been overborne. Once considered in this proper light, Petitioner's plea counsel's assertion that Petitioner's confession amounted to overwhelming evidence

which would support his conviction despite inadmissibility of his co-defendant's statement implicating him is unsustainable. Consequently, the Petitioner's confession could not have been the basis of overwhelming evidence to support conviction because based on the circumstances under which it was obtained, it was clearly involuntary in a constitutional sense.

As a result, Petitioner's plea counsel's failure to even consider and investigate the implications of his co-defendant's incompetence and inadmissibility of his statement implicating Petition at trial, and so inform Petitioner, fell below the standard of objective reasonableness. Petitioner's guilty plea was not knowingly, intelligently and voluntarily made when plea counsel failed to properly investigat6e the nature of Gregory Foye's incompetency7 and how it affected Petitioner in violation of Petitioner's Sixth Amendment rights. Counsel also failed to properly advise Petitioner that Foye was found incompetent before he signed a ple agreement , which prevented him from making a knowing and intelligent decision about whether he should proceed to trial. Therefore, Petitioner's plea counsel provided constitutionally deficient representation, and petitioner was prejudiced by counsel's deficient performance because if he would have known Foye was found incompetent and that the State's two witnesses to the murder could not be found before he agreed to plead guilty, he "would have went to trial."

(App. 48, 11.9-14).

Based on counsel's deficient performance and resulting prejudice, this Court should reverse the order of the PCR court and remand this matter for a new trial.

II. Plea counsel's conduct so undermined the proper functioning of the adversarial process that the plea cannot be relied on as having produced a just result

Based on Plea counsel's failure to reveal critical information to Petitioner upon which to base his decision as to whether he should proceed to trial or pled guilty, Petitioner contends that the PCR judge erred in finding that his defense counsel was effective as required under the Sixth Amendment.

"The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York,* 422 U.S. 853, 862, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593 (1975). The Sixth Amendment guarantees that every criminal defendant shall receive "Assistance of Counsel" in establishing his defense. U.S. Const. amend. VI. On May 14, 1984, the United States Supreme Court handed down two opinions holding that the Sixth Amendment requires that the criminal defendant receive *effective* assistance of counsel. *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. A PCR judge's findings should not be upheld if there is no probative evidence to support them. *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996).

In *Cronic,* the Court characterized the protection that the Sixth Amendment affords the defendant: The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true

adversarial criminal trial has been conducted--even if defense counsel may have made demonstrable errors--the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

The Court stated in *Cronic* that there are three circumstances in which the defendant's representation is so inadequate that the second element of the *Strickland* test, the prejudice element, can be presumed. *Cronic,* 466 U.S. at 658-659, 104 S.Ct. at 2039. The first scenario in which prejudice is presumed is when there is a "complete denial of counsel," which occurs when a trial is rendered unfair because the defendant is denied assistance of counsel during a "critical stage" of his trial. *Id.* In the second scenario, prejudice is presumed if "counsel entirely fails to subject the prosecution's case to a meaningful adversarial testing." When there has been no meaningful adversarial testing, then "the adversary process itself [is] presumptively unreliable." *Id.* In *Bell v. Cone,* the U.S. Supreme Court explained further that "the attorney's failure [to test the prosecutor's case] must be complete" for this standard to be met. 535 U.S. 685, 697, 122 S.Ct. 1843, 1851, 152 L.Ed.2d 914 (2002). Third, prejudice is presumed when circumstances dictate that no attorney could render effective assistance of counsel. *Cronic,* 466 U.S. at 659-662, 104 S.Ct. at 2047-2048. [FN2]

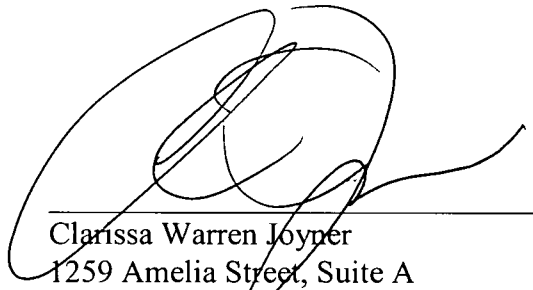
Petitioner's co-defendant was found to be incompetent as a witness, so his statements were inadmissible hearsay. *South Carolina Department of Social Services v. Doe*, 292 S.C. 211, 219–20, 355 S.E.2d 543, 548 (Ct.App.1987) (holding, in a case rejecting the use of a child's out-of-court statements in a prosecution for alleged sexual abuse, that "[t]he admission of hearsay under an exception to the rule presupposes the declarant is possessed of the qualifications of a witness in regard to competency, personal knowledge, and the like," and that "the declarant's competency is a precondition to the admission of his hearsay statements".

Petitioner submits that trial counsel's conduct, lack of investigation and preparation, and her failure to reveal critical information to Petitioner provided no meaningful adversarial challenge to the prosecution's case.

Applying the *Cronic* "meaningful adversarial challenge" analysis to this case demonstrates the classic example of a judicial process that lost "its character as a confrontation between adversaries." *Cronic,* 466 U.S. at 656-657, 104 S.Ct. at 2045-2046. Thus, Petitioner's constitutional right to effective assistance of counsel has been violated.

CONCLUSION

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



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v.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari in this case has been served on Johanna C. Valenzuela, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, by mailing in an envelope properly addressed with postage prepaid on this 28th day of December 2016.

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December 28, 2016

Via Hand-Delivery
Honorable Daniel E. Shearouse
Supreme Court of South Carolina
Clerk of Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Kentrell Liburd, #357498 v. State of South Carolina**
Case No.: 2016-001449

Dear Mr. Shearouse:

Enclosed herewith please find a **Petition for Writ of Certiorari** in regards to the above-referenced case for filing. Please file the original and six (6) copies of the Petition along with the attached Certificates of Service, and return a copy for my records. Also attached are two labels with my name affixed which are for the Appendix previously filed in this matter. Please use these labels to cover previous counsel's name on the Appendix and substitute mine.

Thank you for your assistance. With kind regards, I am

Sincerely,

Clarissa Warren Joyner
Attorney at Law

CWJ/jb
Enclosures
cc: Kentrell Liburd#357498