

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable R. Ferrell Cothran, Circuit Court Judge

CHUCK EDWARD MCCULLOUGH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001416

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR Court err in holding that Petitioner's guilty plea was intelligently, voluntarily, and knowingly entered in light of the fact that the trial court incorrectly applied S.C. Code Ann. § 44-53-375, thereby preventing him from receiving a suspended sentence, probation, or parole?

STATEMENT

On August 1, 2012, Petitioner pled guilty to possession of methamphetamine third offense, manufacturing methamphetamine third offense, unauthorized removal of a dead body, exposing a child to methamphetamine, and unlawful neglect of a child in front of the Honorable J. Mark Hayes, II in Spartanburg County. App. 1. James Cheek and Richard Whelchel represented Petitioner, and Scott Spivey served as the Assistant Solicitor.

The facts presented at the guilty plea by Solicitor Spivey were as follows:

On March 17, 2011, deputies were notified that the two-month-old son of Petitioner and his wife had passed away. App. 8 ll. 8 – 11. A subsequent phone call to law enforcement from a family member of Petitioner's wife yielded additional information which allowed officers to locate Petitioner, his wife, and the body of the two-month-old son. App. 8 l. 15 – App. 9 l. 7. There was no sign of physical injury to the child. App. 9 ll. 4 – 8. Petitioner's wife gave a written statement wherein she admitted to putting the baby face down on the bed after a feeding. App. 9 ll. 10 – 18. Upon awakening the next morning, the baby's body was discovered by Petitioner's wife face down with vomit on the bed. App. 9 ll. 16 – 21.

Law enforcement obtained a search warrant for Petitioner's home in order to search for poisons. App. 9 ll. 22 – 23. Upon entering the residence, officers located a methamphetamine lab. App. 9 ll. 23 – 25. Baby diapers were located in the trash can along with methamphetamine waste. App. 10 ll. 12 – 15.

Petitioner was indicted for possession with intent to distribute methamphetamine third offense, manufacturing methamphetamine third offense, unauthorized removal of a dead body,

exposing a child to methamphetamine first offense, unlawful neglect of a child, and disposal of methamphetamine waste. App. 3 ll. 4 – 15; App. 162 – 173.

At Petitioner's guilty plea, the Assistant Solicitor discussed telephone calls made by Petitioner while he was in jail:

In one of those phone calls, he tells his aunt that he had learned a lesson right here because, 'I got too comfortable with that I was doing. Nobody knew nothing, you know what I'm saying?'

'Quit spending my money on it and started doing it myself. I didn't - - you know what I'm saying? I didn't have to worry about it.' He - - he was talking to his aunt at this time. And in the same phone call she says 'And cooking drugs is your fault. Yes, that is your fault and I ought to kick you in your ass for that shit.' [Petitioner] responded with, 'Well, I agree with that.'

In another phone call on April 7, 2011, ... less than a month after [] he was arrested. [Petitioner] also admitted to paying rent for the [] address at least partially in methamphetamine.

App. 11 ll. 12 – 22.

The CD/DVD containing those telephone calls was subsequently withdrawn as an exhibit. App. 14 ll. 5 – 12. Following the withdrawal of that evidence, the Assistant Solicitor spoke at length regarding the contents of the telephone calls, even though the trial court was without the original source of those remarks. App. 20 l. 17 – App. 21 l. 22.

During the trial judge's colloquy with Petitioner, the following conversation occurred:

The Court: And on the manufacturing of methamphetamine third, do you understand that on the charge I'm required to sentence you to at least 10 [years], but could sentence you up to 30 years and I am required to issue a fine of \$50,000?

Petitioner: Yes, sir.

The Court: And do you understand that whatever sentence I impose, on that particular charge, that it cannot be - - that no probation can be given and that no parts of the sentence can be suspended?

Petitioner: Yes, sir.

App. 17 ll. 1 – 9.

Following that exchange but before Petitioner's guilty plea was accepted, there was a discussion of his prior record. App. 19 l. 12 – 15. Notably, Petitioner had two convictions for possession of methamphetamine. App. 19 ll. 13 – 15. This fact was reiterated by Counsel Whelchel. App. 22 ll. 17 – 18; App. 23 ll. 12 – 17.

Judge Hayes accepted Petitioner's guilty plea. App. 21 – 24. He pled guilty under North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (U.S. 1970) to five out of the six charges; the State dismissed the disposal of methamphetamine waste charge as a condition of the plea. App. 3 ll. 4 – 15.

After accepting Petitioner's Alford plea, Judge Hayes sentenced him to sixty days' imprisonment on the unauthorized removal of a dead body charge, thirty years' imprisonment on the manufacturing of methamphetamine third offense charge, ten years' imprisonment on the possession of methamphetamine third offense charge, ten years' imprisonment on the unlawful neglect of a child charge, and five years' imprisonment on the unlawful manufacturing methamphetamine in the presence of a minor child charge. App. 29 ll. 1 – 18. These sentences were to run concurrent. App. 29 ll. 4 – 5.

Counsel Whelchel filed a Motion to Reconsider the Sentence on or about August 13, 2012. A hearing was held on that motion on May 23, 2013 before the Honorable J. Mark Hayes, II with the same attorneys as involved in the guilty plea. App. 32 – 47. Once more, the Assistant Solicitor spoke regarding the jail telephone calls which were not in evidence. App. 42 l. 9 – App. 43 l. 12; App. 43 l. 23 – App. 54 l. 4.

Judge Hayes issued an Order Denying Defendant's Motion to Reconsider the Sentence on May 28, 2013. App. 49. The Order referenced the telephone calls that were not in evidence as a means of coming to the conclusion that the sentence should not be altered. App. 49.

Petitioner's appeal was dismissed by the South Carolina Court of Appeals. He filed a timely application for post-conviction relief on December 16, 2013 which was subject to two subsequent amendments. App. 50 – 54; App. 62 – 63. Petitioner's application contained allegations of ineffective assistance of counsel, including claims that Counsel failed to investigate, failed to suppress evidence, induced Petitioner's guilty plea, and allowed arguments to be influenced by law enforcement. App. 52. The amendments were in letter form and included prosecutorial misconduct, unconstitutional sentence enhancements, subject matter jurisdiction, judicial misconduct, and ineffective assistance of counsel regarding admission of a photo as additional grounds for relief. App. 62 – 63.

The State made its Return on or about August 18, 2014. App. 57 – 60. An evidentiary hearing was conducted on January 13, 2016 before the Honorable R. Ferrell Cothran, Jr. App. 64. Leah Moody represented Petitioner, and Alicia Olive represented the State. App. 64. Petitioner and Counsel Whelchel testified during the hearing.

On June 8, 2016, Judge Cothran issued his order denying Petitioner relief. App. 150 – 161. In particular, he found that Petitioner failed to prove any deficiencies regarding Counsel Whelchel's performance or any prejudice resulting from any alleged deficiencies. App. 155. Additionally, Judge Cothran's Order of Dismissal indicated that the record fully supported the knowing and voluntary nature of Petitioner's guilty plea. App. 156.

This Petition follows.

ARGUMENT

The PCR Court erred in holding that Petitioner's guilty plea was intelligently, voluntarily, and knowingly entered in light of the fact that the trial court incorrectly applied S.C. Code Ann. § 44-53-375, thereby preventing him from receiving a suspended sentence, probation, or parole.

Petitioner was indicted and sentenced to thirty years' imprisonment for manufacturing methamphetamine under S.C. Code Ann. § 44-53-375. The version of S.C. Code Ann. § 44-53-375 which was effective from June 2, 2010 to April 20, 2016 read as follows:

(B) A person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine or cocaine base, in violation of the provisions of Section 44-53-370, is guilty of a felony and, upon conviction:

- (1) for a first offense, must be sentenced to a term of imprisonment of not more than fifteen years or fined not more than twenty-five thousand dollars, or both;
- (2) for a second offense or if, in the case of a first conviction of a violation of this section, the offender has been convicted of any of the laws of the United States or of any state, territory, or district relating to narcotic drugs, marijuana, depressant, stimulant, or hallucinogenic drugs, the offender must be imprisoned for not less than five years nor more than thirty years, or fined not more than fifty thousand dollars, or both;
- (3) for a third or subsequent offense or if the offender has been convicted two or more times in the aggregate of any violation of the laws of the United States or of any state, territory, or district relating to narcotic drugs, marijuana, depressant, stimulant, or hallucinogenic drugs, the offender must be imprisoned for not less than ten years nor more than thirty years, or fined not more than fifty thousand dollars, or both.

Possession of one or more grams of methamphetamine or cocaine base is prima facie evidence of a violation of this subsection. Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a first offense or second offense may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision,

work release, work credits, education credits, and good conduct credits. **Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a third or subsequent offense in which all prior offenses were for possession of a controlled substance pursuant to subsection (A)¹, may have the sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits.** In all other cases, the sentence must not be suspended nor probation granted.

S.C. Code Ann. § 44-53-375 (emphasis added).

During Petitioner's guilty plea, Judge Hayes remarked that "no probation can be given and that no parts of the sentence can be suspended." App. 17 ll. 6 – 8. Because this statement was in error, Petitioner's guilty plea was not knowingly or intelligently made.²

For a third offense where all prior convictions are for possession, a defendant may have the sentence suspended, probation granted, and parole eligibility. S.C. Code Ann. § 44-53-375; App. 114 l. 1 – App. 115 l. 6. However, plea counsel never advised Petitioner that he could have received a suspended sentence or probation. App. 116 ll. 8 – 20. Counsel did not seek to clarify the statute or advocate on Petitioner behalf during the guilty plea; based on Petitioner's record of two prior convictions for possession, his third offense was eligible for suspension, probation,

¹ (A) A person possessing less than one gram of methamphetamine or cocaine base, as defined in Section 44-53-110, is guilty of a misdemeanor and, upon conviction for a first offense, must be imprisoned not more than three years or fined not more than five thousand dollars, or both. For a first offense the court, upon approval of the solicitor, may require as part of a sentence, that the offender enter and successfully complete a drug treatment and rehabilitation program. For a second offense, the offender is guilty of a felony and, upon conviction, must be imprisoned not more than five years or fined not more than seven thousand five hundred dollars, or both. For a third or subsequent offense, the offender is guilty of a felony and, upon conviction, must be imprisoned not more than ten years or fined not more than twelve thousand five hundred dollars, or both. Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection may have the sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. S.C. Code Ann. § 44-53-375

² Although this issue does not appear in the Order of Dismissal, for the sake of judicial economy it will be discussed herein.

and/or parole. Only at the evidentiary hearing did Counsel Whelchel admit that he believed Petitioner was eligible for parole and/or a suspended sentence. When asked why he did not object when the trial court indicated that it could not give him a suspended sentence or probation, he simply stated "I can't tell you." App. 130 ll. 8 – 11.

As articulated by Leah Moody during the PCR evidentiary hearing, the trial judge misspoke in regards to S.C. Code Ann. § 44-53-375:

[T]hat's absolutely contrary to what the statute says. The statute at that time in 2012 was that if your prior convictions are all possessions, you are eligible for a suspended sentence or probation - - or a suspended sentence, obviously a probationary sentence, as well as parole, furlough, work furlough, credit for a number of things.

It appears that Mr. McCullough ... was not made aware of that, and I understand what counsel says, but he talks in generalities as to what he typically explains and that he took his book in and he talked about this with Mr. McCullough, and Mr. McCullough never mentions this.

App. 141 ll. 10 – 22.

The ensuing prejudice manifested itself in Petitioner's decision to plead guilty. Had Counsel discussed Petitioner's case with him, he would have gone to trial. App. 102 ll. 2 – 12. Petitioner did not wish to plead guilty. App. 81 l. 25 – App. 82 l. 25. Plea counsel induced him to plead guilty, and Petitioner did so based off of the fact that he thought he would be sentenced to ten years' imprisonment. App. 81 ll. 18 – 24; App. 83 ll. 7 – 10. In fact, Counsel and Petitioner never discussed the details of Petitioner's case. App. 85 l. 14 – App. 88 l. 1; App. 92 l. 12 – App. 93 l. 15.

Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 243-244 (1969). The record must show with certainty that the plea is "an intentional relinquishment

or abandonment of a known right or privilege.” State v. Patterson, 278 S.C. 319, 322, 295 S.E.2d 264, 265 (1982) overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Judges are required to give the defendant an explanation of the defendant’s waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975). Entering a guilty plea results in a waiver of several constitutional rights; therefore the Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently. Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003).

An individual who pleads guilty on the advice of counsel may collaterally attack the plea by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel’s errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Hill v. Lockart, 474 U.S. 52; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)).

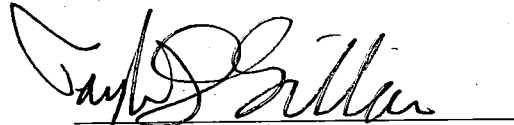
The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The right to the effective assistance of counsel extends to the plea bargaining process. Hill v. Lockhart, 474 U.S. 52, 57-59 (1985); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), overruled on other grounds by Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000). Appellate courts give great deference to the PCR court’s findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). When reviewing a PCR court’s decision, a reviewing court “is concerned only with whether any evidence of probative value exists to support the decision.” Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006).

For Petitioner to knowingly and intelligently enter into a guilty plea, he needs to have understood the charges to which he admitted his guilt as well as the correct accompanying sentences. If Counsel Whelchel had advised Petitioner of the statutory sentence provisions, Petitioner or Counsel could have objected when Judge Hayes stated that no probation could be given and that no part of the sentence could be suspended. Counsel was ineffective for failing to correct the judge regarding the sentence conditions associated with the manufacturing methamphetamine charge. Counsel could have asked the trial court for a suspended sentence, similar to the one Petitioner's wife received. App. 142 ll. 13 - 21.

As a result of Counsel's ineffective assistance, Petitioner elected to plead guilty rather than go to trial. Had Counsel discussed Petitioner's case with him, he would have gone to trial. App. 102 ll. 2 - 12.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his petition for writ of certiorari to allow full briefing on this issue, reverse the charges against him, and remand the case for a new trial.

A handwritten signature in black ink, appearing to read "Taylor D. Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of February, 2017

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RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Chuck Edward McCullough states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
 2. He has reviewed the record of petitioner's trial before Judge R. Ferrell Cothran, which was held on January 13, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
 3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.
- Therefore, counsel requests that the Court relieve him as counsel for Chuck Edward McCullough.

Respectfully Submitted,



Taylor D Gilliam

Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of February, 2017

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of ability this Johnson Petition for Writ of Certiorari 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."

A handwritten signature in black ink, appearing to read "Taylor D. Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent
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ATTORNEY FOR PETITIONER

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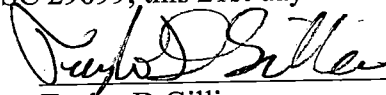
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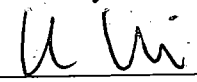
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Chuck Edward McCullough, #311608, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 21st day of February, 2017.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
This 21st day of February, 2017

 (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025