THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
Honorable George C. James Jr., Circuit Court Judge

Case No. 2015-CP-23-05719

Michael Weatherspoon, #352593,

Petitioner,

vs.

State of South Carolina,

Respondent,

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

QUESTIONS PRESENTED

1. Did the PCR judge err in finding that Petitioner's plea counsel was not ineffective for failing to request that the plea be stood aside or discontinued prior to its acceptance by the court due to Petitioner's clear statements that he did not understand the parameters of his plea?

2. Did the PCR judge err in finding that Petitioner's plea counsel was not ineffective for failing to object to the plea court's *sua sponte* decision to shift the plea from a straight guilty plea to a plea made pursuant to NC v. Alford without consultation with the parties?

3. Did the PCR judge err in finding that Petitioner's plea counsel was not ineffective for failing to object to the plea court's persistent, repetitive, and inappropriate questioning of the Petitioner in a clear attempt to get the Petitioner to change his responses?

4. Did the PCR judge err in finding that Petitioner's counsel was not ineffective for failing to make a motion for mistrial followed by a motion bar further prosecution pursuant to the US Constitutional bar against Double Jeopardy prior to advising his client to plead guilty?

5. Did the PCR judge err in finding that Petitioner was not entitled to a belated appeal based on plea counsel's failure to file a Notice of Intent to Appeal on Petitioner's behalf pursuant to *White v. State*?

STATEMENT OF THE CASE

The Respondent is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Greenville County. The Petitioner was indicted for one count of Murder (2013-GS-23-4778) and one count of Attempted Armed Robbery (2013-GS-23-4779). Alex R. Stalvey, Esq. represented the Petitioner on the charges. On November 12, 2014, the Petitioner pled guilty to Voluntary Manslaughter and Attempted Armed Robbery. The Honorable Edward W. Miller sentenced the Petitioner to concurrent terms of fifteen (15) years for Voluntary Manslaughter and fifteen (15) years for Attempted Armed Robbery. The Petitioner did not appeal his conviction or sentence.

The Petitioner subsequently filed an application for post-conviction relief on September 17, 2015. The State made its return on February 3, 2016. An evidentiary hearing was held at the Greenville County Courthouse on June 14, 2016, before the Honorable George C. James. The Petitioner was represented by Brian P. Johnson, Jr., Esquire. The State was represented by Patrick Schmeckpeper, Esquire of the South Carolina Attorney General's Office. At the hearing, the Petitioner testified on his own behalf along with Alex Stalvey, Esq., Petitioner's plea counsel. On November 2, 2016, Judge James issued an Order denying Petitioner's application for post-conviction relief. Petitioner subsequently filed a Notice of Appeal and this Petition follows.

STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland v. Washington. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985). Further, the applicant need not show that he would have been better off going to trial. Lee v. United States, 137 S.Ct. 1958 (2017).

ARGUMENT

I. The PCR judge erred in finding that the Petitioner's plea counsel was not ineffective for failing to request that the plea be stood aside or discontinued prior to its acceptance by the court

due to Petitioner's clear statements that he did not understand the parameters of the plea.

Petitioner alleges that plea counsel was ineffective in failing to request that he and his client be allowed to step aside from the Petitioner's guilty plea once it was obvious that the Petitioner did not understand the parameters of his plea. This became especially crucial when the plea court shifted the plea from one of straight guilty to guilty pursuant to NC v. Alford.

The plea transcript shows that the Petitioner gave what was basically appropriate responses to form the basis of a plea of guilty to the Voluntary Manslaughter charge, despite the plea court's repeated referral to the charge as "involuntary manslaughter". App. pp. 15-19. The only exception to this is the Petitioner's clear lack of understanding of accomplice liability, i.e. "the hand of one is the hand of all" or the felony murder rule (inferring malice from the fact that the codefendants were acting in furtherance of an inherently dangerous felony). App. p.18 ll. 7-25, p. 19 ll. 1-10. What was abundantly clear from this colloquy was that the Petitioner adamantly denied any knowledge of the co-defendant's plan to rob the victim. It was error on the part of the PCR Court not to find that Mr. Stalvey's failure to intervene at this point and request time with his client in order to ensure that he fully understood accomplice liability, the felony murder rule, and to question the Petitioner further as to any plea to Attempted Armed Robbery constituted ineffective assistance of counsel.

It was at this point where the Plea Court switched into questioning the Petitioner based on the NC v. Alford factors. App. p. 19 ll. 20-24. At the PCR Hearing, Petitioner referred in his testimony to the transcript of the plea hearing and he begins by reading what the Plea Court said to him:

"You heard what the evidence is that they would put up. What I'm asking you is, do you think that this jury would infer other than the eyewitness to say that your sister went in there to demand money and guns? There is other evidence out there with respect to -- to these text messages and all that. Do you think that the jury could infer or is there -- or is there a reasonable likelihood that this jury would believe she was -- she was there for an armed robbery. Do you understand if they believe what the eyewitness -- eyewitness said, do you think the jury would agree with that?' I said, 'I have no idea because you're asking a question. I have no idea. That's why I am having a jury trial.' And then he went on and said, basically, you know, just switching up the question. He says, 'Well, I know that, but I'm asking is there a reason for -- is there a reason that jury could agree?' And I said, 'I guess so.' Once I said I guess so, he said, 'Well, I'm going to accept that pursuant to Alford.' I never knew what an Alford plea was. He never informed me of what an Alford plea was, so how can he accept a guilty plea or even say he's going to accept an Alford plea if I didn't know what an Alford plea was?" App. p. 53, ll. 14-25, App. p. 54, ll.1-15.

It is quite clear from the plea transcript that the Petitioner did not know what an Alford plea was at that time. As cited above, he then testifies under oath at the PCR hearing that he did not know what an Alford plea was. However, if that were not enough, plea counsel then corroborates this by testifying during cross-examination by Petitioner's contract-appointed PCR counsel that he had not discussed Alford with the Petitioner.

"BY MR. JOHNSON: (Petitioner's PCR counsel)

Q. Do you recall that the plea was accepted under U.S. v. Alford?

A. Yes, sir.

Q. Okay. Was that something that you recall discussing with Mr. Weatherspoon?

A. No. I would – I recall not discussing that with Mr. Weatherspoon. Mr. Weatherspoon and I never discussed an Alford plea, and it was – I became aware that it was an Alford plea at the same time Mr. Weatherspoon was notified by the judge that it was an Alford – or that he was going to accept the plea under North Carolina v. Alford.

Q. So you would agree that he verified he did not understand the ramifications of that at the time because y'all had not discussed it?

A. I agree that Mr. Weatherspoon and I had not discussed a plea under North Carolina v. Alford. And I – feel comfortable that Mr. Weatherspoon would not be able to understand the – the aspects of that – of that type of plea without discussing it with me." App p. 83 ll. 5-25, App. p. 84 l. 1.

In the order denying Post-Conviction Relief, the PCR Court states "While the plea colloquy does not reflect the plea was initially presented as an Alford plea, it is abundantly clear that the applicant wanted to plead guilty and avoid a potential 30 year to life sentence." App. P. 109. Yet, at the PCR hearing, the PCR Court points out that the Petitioner clearly states to the Plea court at that time that he does not believe the jury would find him guilty.

[Court speaking] "But the plea – the plea transcript says – when he said, "Do you think the State can convince a – or likely convince a jury with this evidence?" And he said, "No, I really don't." And he said, you know, they went on and on and on." App. p. 94 ll. 15-19.

This directly contradicts the notion that the Petitioner was pleading guilty to avoid a 30 to life sentence.

The PCR Court continues to express doubts based on the record that the plea was properly accepted. In response to the State's argument that everything is easily covered by the accomplice liability theory known as "the hand of one is the hand of all", the PCR Court stated;

> "And you're 100 percent correct on the robbery. Okay. If – if – if he knew she was going to steal money from that guy at gunpoint, you've got it. But according to what he said, that's what I've got to go by because it's got to be free and voluntary, he said she was going in there to sell drugs." App. p. 95, ll. 15-22

The PCR Court went on to ask if a shooting death was a probable consequence of a "garden variety drug transaction". App. pp. 95-96. When the State then argued that the Petitioner took advantage of what he called a "beneficial" plea deal, and that the Petitioner was now trying to "get off on a technicality", the PCR Court reminded counsel for the State that Petitioner would go back to facing a life sentence if PCR were granted. App. p. 96, ll. 13-24.

Where there is a clear indication from the plea transcript as well as testimony at the PCR hearing that Petitioner did not understand the parameter of his plea, it is clearly reversible error that the PCR court did not find that plea counsel was ineffective for failing to object and ask that the plea be put aside.

II. The PCR judge erred in finding that Petitioner's plea counsel was not ineffective for failing to object to the plea court's *sua sponte* decision to shift the plea from a straight guilty plea to a plea made pursuant to NC v. Alford without consultation with the parties.

Petitioner contends that plea counsel was ineffective for failing to object to the Plea Court shifting into a plea pursuant to NC v. Alford without having any prior consultation as to this decision with counsel for either party, clearly obviating defense counsel's required duty to advise the Petitioner about NC v. Alford. As was quoted in the previous argument, Petitioner's plea counsel freely admits in his testimony at the PCR hearing that he had no prior notice that the Plea Court would shift into an Alford plea when he did not get the right answers from the Petitioner that would support a plea of guilty, saying; "I became aware that it was an Alford plea at the same time Mr. Weatherspoon was notified by the judge that it was an Alford..." App. p. 83, ll. 13-16. Plea counsel also admitted that when the plea court proceeded to start asking questions based on the factors in NC v. Alford, he realized what was happening, and admitted that this was not discussed prior to the plea with counsel and he had not explained anything about NC v. Alford to his client and was sure he did not understand what was happening in the plea. The fact that plea counsel did not object in order to examine his client as to his understanding and to determine if he truly wished to enter the plea, or to preserve the issue for appeal constitutes clear ineffective assistance of counsel. The court erred in finding that plea counsel's handling of this matter did not constitute ineffective assistance of counsel.

In fact, the PCR court even acknowledges this unannounced, unplanned transition by the Plea Court when it states in the order, "While the plea colloquy does not reflect the plea was initially presented as an Alford plea, ..." App. p. 109. However, the PCR court clearly errs in affirmatively finding that, "I conclude that counsel would have been ineffective if he had **not** sought this deal for the applicant and that he would have been ineffective had he tried to have the plea vacated based on his client's ignorance of Alford." App. p. 109. This sentence clearly demonstrates the PCR Court's decision to join in the inappropriate conduct of the Plea Court and

plea counsel and forces this "great deal" upon the Petitioner over his objections throughout this entire process. The PCR court joined in the error of the Plea Court in missing or willfully ignoring that it is the Petitioner's choice, which must be made freely, voluntarily, and intelligently in order for it to be a valid waiver of his constitutional rights to trial by jury and to remain silent. In State v. Hazel, this court has held that the record must reflect that the defendant freely and intelligently waived constitutional trial rights and had a full understanding of the consequences of the plea. State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980). Additionally, this court has held that 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).

III. The PCR judge erred in finding that Petitioner's plea counsel was not ineffective for failing to object to the plea court's persistent, repetitive, and inappropriate questioning of the Petitioner in a clear attempt to get the Petitioner to change his responses.

In this case, the Plea Court's repetition of questions about the likelihood of the jury believing the States' contentions can be interpreted in no other way but that the Plea Court did not agree with the Petitioner that the jury could find him not guilty. Thus, this questioning was tantamount to improper comment on the facts. It is clear that the Petitioner saw the judge's obvious meaning that he believed the Petitioner was mistaken and thus the Petitioner grudgingly changed his answer to "I guess so." Furthermore, the court's continued questioning of Petitioner amounted to coercion and intimidation of Petitioner as he attempted to dispute the facts

submitted to the court by the State. All the while, plea counsel did not intercede or object to the comments by the court on Petitioner's behalf.

This court has found that an attorney's failure to adequately advise a client constitutes ineffective assistance of counsel. See Pittman v. State, 524 S.E.2d 623, 337 S.C. 597 (S.C. 1999). In State v. Owens, 362 S.C. 175, 607 S.E.2d 78 (2004) this court held that the insertion of a trial court of its own opinions and views "were improper and contrary to South Carolina Law." As a result, this court found that such comments were justified in resulting in a new resentencing proceeding.

This court has found that, "[a]lthough the trial court must strive to ensure that a criminal defendant's waiver of the right of a jury trial is knowing and voluntary, the court should never inject its personal opinion on that decision." Id. Plea counsel was ineffective in that he did not challenge the court's improper questioning of his client, and he admitted that his client continued to claim innocence and continued to express desire to continue his trial and that he did not object or attempt to stop the plea at all. Plea counsel had an obligation to object in order to fulfill his affirmative duty to protect his client against a plea that was not freely, voluntarily, or intelligently made.

Furthermore, this court has found that "these comments could never constitute harmless error." State v. Crisp, 362 S.C. 412, 415, S.E.2d 429, 342 (S.C. 2005), citing Butler v. State, 302 S.C. 466, 397 S.E.2d 87 (1990). "Such comments by a trial judge during a guilty plea proceeding are fundamentally erroneous and constitute prejudicial error." Crisp at 432. It is a defendant's counsel's responsibility to be aware of the law concerning the proper conduct of a plea and to protect their client from entering a plea that is not free and voluntary. Plea counsel in this case was very experienced in criminal defense work and was clearly aware of these issues

and even admitted to them under oath in the PCR hearing. To not find this ineffective drastically and permanently harms the integrity of the criminal justice system in our courts by lowering the bar of attorney performance standards to the point where the bar is merely laying on the ground.

It is long-standing black letter law from this state and the U.S. Supreme Court that Defendants cannot be forced into pleas against their will. See State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980) and Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). There is no indication at any point in the record of this case that Petitioner was incompetent or was in any way unable to make his own decision whether to accept a plea or go to trial. To find that PCR Counsel was not ineffective in this matter stands in contradiction to long-standing precedent.

IV. The PCR judge erred in finding that Petitioner's counsel was not ineffective for failing to counsel his client not to pled guilty prior to counsel making a motion for mistrial followed by a motion to bar further prosecution pursuant to the US Constitutional bar against Double Jeopardy.

PCR Counsel was ineffective in failing to advise his client not to take a plea prior to making his motion for mistrial. Based on the plea counsel's testimony at the PCR hearing, there was a discovery violation that would have provided more than adequate grounds for such a motion. Had plea counsel's motion for mistrial had been granted by the plea court, plea counsel could then have moved to bar further prosecution as a violation of constitutional protections against double jeopardy.

At the PCR hearing, Petitioner's plea counsel testified under direct examination by the state as follows:

"After the first day, I was notified by the prosecutor that there was some photographs of a crime scene that had not been provided to me in the discovery, which I felt could possibly give us an opportunity to ask for a mistrial. But at that point, due to the fact that the case could've been mis-tried, the prosecutor was willing to offer Mr. Weatherspoon a negotiated plea of 15 years, which considering the fact that we were there on a murder case, he was looking at 30 years to life which I felt he was -- there was a very good chance he'd be convicted of. I thought it was a good opportunity for him to take, so that's how we ended up doing the guilty plea." App. p. 76, l. 25, p. 77, ll. 1-13.

This testimony from plea counsel clearly demonstrated that he was aware and thinking that the discovery violation was the basis of a motion by the defense for a mistrial. Additionally, since this was the second day of trial and testimony had already been taken, the jury in this case had already been sworn. Violation of the obligation of Rule 5 and Brady v. Maryland falls upon the state and plea counsel, who was an experienced criminal defense attorney, should have known that any action from the state that results in a mistrial motion that is granted by the court would give rise to a following motion by the defense to bar further prosecution due to double jeopardy.

There is no evidence in the record of this case that plea counsel ever discussed this strategy with Petitioner prior to counseling the Petitioner to plead guilty under the terms of the deal that he had negotiated. In fact, based on the above quote, plea counsel chose affirmatively to skip the step of making the mistrial motion in order to pressure the state to make a deal. There

is no evidence and no inference that can be made that plea counsel could not have negotiated this same deal following an unsuccessful motion for mistrial based on the facts above.

While this issue was not raised by Petitioner's PCR Counsel, this issue was preserved for appeal due to the fact that the PCR court made an affirmative ruling about it in its' order denying post-conviction relief. The PCR Court stated in its' order:

"Trial/plea counsel testified that once the trial began, he discovered that the State had not produced some photographs that should have been produced during discovery. He testified that he saw an opportunity to get a pretty good plea deal or get a mistrial. There is no evidence the case would have been dismissed with prejudice for the discovery abuse." App. p. 108.

It is clear reversible error that the PCR court did not find petitioner's plea counsel ineffective for failing to advise Petitioner of this course of action prior to counseling him to plead guilty.

V. The PCR judge erred in failing to grant the defendant a direct appeal under *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

Petitioner testified that he requested that his plea counsel file an appeal of his guilty plea on his behalf immediately after the conclusion of his plea hearing.

[Petitioner under Direct Examination by his PCR Counsel]

Q. Now, after the plea was over, did you decide whether or not you wanted to appeal the guilty plea?

A. Correct.

Q. Can you please tell the Court, again, what your recollection of that situation is?

A. Prior to leaving, I asked my lawyer about my appeal, which never happened as you can see. That's the reason why I filed for – just ran out the courtroom at the time, you know, and just ..." App. p. 55, ll. 10-18.

However, plea counsel failed to submit a Notice of Intent to Appeal on Petitioner's behalf. Petitioner's plea counsel could not refute Petitioner's testimony. Petitioner's plea counsel testified that he could not recall if Petitioner requested an appeal be filed. He could not remember the conversation at all.

[Petitioner's Plea Counsel in response to questions by State]

A. I cannot remember if he ever asked me to file an appeal. I don't remember ever talking to him about filing an appeal of his guilty plea. I can't remember having a conversation with him after he entered his guilty plea. App. p. 82, ll. 6-10.

The PCR Court in its order denying post-conviction relief erroneously finds that plea counsel's failure to recall the conversation that the Petitioner testified to wherein he requested an appeal of his plea was equivalent to the conversation never happening. This logic is clearly flawed. If the request had never occurred, plea counsel would testify that he clearly remembers that there was no conversation after the plea in which such a request was made. Failing to remember something does not equate to that something not occurring. Absent a specific memory from counsel refuting it, the Petitioners testimony is the only evidence in the record, and there is no evidence that suggests any reason why this testimony should not be considered credible on its face.

Further, the PCR Court further cites that, absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to appeal from a guilty plea. Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029, 145 L.Ed.2d 985 (2000). Despite the fact that plea court customarily include in all guilty plea colloquies information to the defendant about their right to appeal and the time frame to do so, and despite the fact that the Plea Court in this case very blatantly and revealingly left that portion of the colloquy completely out of the Petitioner's plea, the issue of whether the Petitioner was aware of his right to appeal is irrelevant. Here, the Petitioner was clearly aware of his right to appeal, despite the Plea Court's glaring failure to question his knowledge of this right, because Petitioner asked his attorney to file an appeal. The PCR court goes so far as to categorize an inquiry by a defendant as to their appellate rights an "extraordinary circumstance" giving rise to the necessity that a defendant be advised about their appellate rights by their counsel. Petitioner submits that such a ruling itself pushes the boundaries of credulity. Someone asking their attorney what their rights are should always be considered the normal course and not extraordinary in any way. Regardless, Petitioner testified that he made such an inquiry. The PCR Court deals with this by once again simply discrediting the Petitioner's testimony without any basis.

Finally, the PCR Court also finds that another extraordinary circumstance would be if plea counsel believed there to be merit to an appeal from the proceeding. The PCR Court then holds that there was no reason for plea/trial counsel believe such. This holding, once again, is not supported at all by the evidence in the record for this case. At the PCR hearing, plea counsel testified that the Plea Court changed to an Alford plea without notice to either party, that he had not explained anything about Alford pleas to his client, and that he was sure that his client did not understand the plea or its ramifications. All of these could have constituted meritorious

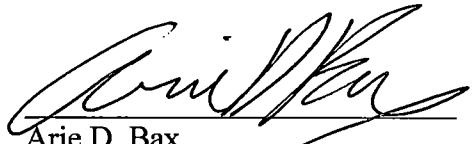
grounds for appeal. Perhaps the more accurate statement would be that counsel had no reason to believe that any meritorious issues could be appealed from this plea because he blatantly failed to preserve any of them by affirmatively choosing to not object to anything in this plea.

However, it must be reiterated that any analysis concerning "extraordinary circumstances" that would require counsel to inform a client of their appellate rights from a plea is irrelevant and unnecessary. The Petitioner was not and is not alleging that he was ignorant of his appellate rights. He is alleging that he requested that his attorney file an appeal of the plea and the record of that plea certainly supports the idea that Petitioner would want an appeal. Without a specific recollection from plea counsel to contradict this evidence, it is reversible error for the PCR Court not to grant the belated appeal.

CONCLUSION

Based on the arguments stated above, Petitioner submits that the PCR court erred in not granting the relief requested pursuant the Post-Conviction Relief Act. This Court should grant the Petition for Writ of Certiorari and reverse the lower court's ruling. If this Court grants certiorari, the Petitioner asks permission under the rules to brief the issues discussed above fully.

Respectfully submitted,



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PROOF OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Writ of Certiorari in the above referenced case has been deposited in the United States Mail, postage prepaid, addressed to DeShawn Mitchell, SC Attorney General's Office, P.O. Box 11549, Columbia, SC 29211, this 3rd day of August 2017.

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