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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Honorable Jocelyn J. Newman, Circuit Court Judge

STEVEN RANDALL COBB,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002005

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding counsel provided effective representation where petitioner wanted to go to trial, had awaited trial in jail for 848 days, and pleaded guilty only because his retained attorney brought another attorney the weekend before trial who told petitioner if he did not plead guilty his mother would be incarcerated, leaving his daughter homeless, since petitioner was coerced into pleading guilty based on this threat?

STATEMENT

Petitioner was indicted for murder by an Anderson County Grand Jury on April 17, 2012, for an offense that occurred on July 10, 2011. App. 142 – 143. Petitioner retained Sarah Drawdy to represent him upon his arrest. App. 99, l. 25 – 100, l. 1; App. 12, ll. 1-2. "[H]e hired me in July of 2011." App. 99, l. 25 – 100, l. 1. Drawdy said she met with petitioner at least nineteen times during the course of her representation. App. 124, l. 18 – 125, l. 2. Petitioner said: "With her being my lawyer in this case, I trusted her." App. 48, ll. 15-16. Petitioner awaited trial in jail for eight hundred and forty-eight days. App. 3, ll. 16-18.

On Monday, November 4, 2013, petitioner was prepared to go to trial. "[T]he day my trial was supposed to start, my mom brought my clothes in, my suit, my tie, and I put my stuff on downstairs. I was prepared to go to trial." App. 45, ll. 3-66. However, petitioner pleaded guilty to voluntary manslaughter for a negotiated sentence of twenty-three years before the Honorable J. Cordell Maddox. App. 1; App. 3, ll. 15-21; App. 144. Lauren Price appeared on behalf of the state and Sarah Drawdy represented petitioner. App. 1.

Petitioner filed an application for post-conviction relief (PCR) on June 2, 2014, alleging ineffective assistance of counsel. App. 18 – 24. The state filed its return on October 30, 2014. App. 25 – 29. A hearing was held on the matter before the Honorable Jocelyn Newman on June 27, 2017. App. 30. Petitioner was represented by Rodney Richey,[1] and the state was represented

[1] At the PCR hearing, petitioner expressed dismay at the lack of preparation by his PCR counsel, Rodney Richey. "I know the issues that I want to bring up. And he's just brushing it to the side." Petitioner explained that he wanted a previously-retained ballistics expert to come and testify at the PCR hearing about a report the expert wrote. App. 36, ll. 10-14; App. 49, ll. 1-6; App. 80, ll. 17-23; App. 110, ll. 1-3. Petitioner asked the court for a continuance to secure the expert's presence, and the court denied the request for a continuance: "We're going to finish up with it today. This case is more than three years old." App. 50, ll. 4-6; App. 50, ll. 17-19.

by Lindsey McAllister. App. 30. The PCR court heard testimony from petitioner and his plea counsel, Sarah Drawdy. App. 31.

Petitioner maintained that he had wanted to go to trial, but was coerced into pleading guilty by plea counsel and her law partner, Bruce Byrholdt. App. 43, ll. 14-20. Petitioner said the weekend before trial, "they came [to the jail] and they told me that if I didn't take the plea, they were scared for my mom and my wife, that they would get arrested because the witnesses said that they had—that she had offered the[m] money not to come to court." App. 43, l. 23 – 44, l. 2. The only other witness to the decedent's death besides petitioner was Ben Grayson, and petitioner's mother was arrested two weeks prior to petitioner's plea, because of an allegation she "tried to pay him not to come to court." App. 44, ll. 3-9; App. 103, ll. 12-13; App. 93, ll. 22-24; App. 46, ll. 10-14.

"[T]he first time I had seen Bruce was that weekend. He came with Sarah to the jail." App. 45, ll. 21-23. "And Bruce, this is his exact words—his exact words, 'I'm scared for your mom.'" App. 46, ll. 6-8. "[M]y mom had been arrested like two weeks prior to this. App. 46, ll. 10-11. "And it's the first time she had been arrested." App. 46, l. 12. "I broke." App. 47, ll. 13-14. "I didn't want to take [the plea], but all I could think about was my mom and my wife getting in trouble, and that's all I had out there to take care of my kids." App. 47, ll. 16-19. If "[m]y mom got arrested—that's who takes care of my daughter." App. 60, ll. 1-2.

"[T]he only thing I knew is that I had to plead guilty because if I didn't that—I didn't know what would happen with my daughter." App. 59, ll. 22-24. "I was under the impression that—that my mom and my wife were going to get arrested if I did not take this plea." App. 66, ll. 15-17. Petitioner said that but for this fear, he would not have pleaded guilty. App. 63, l. 15 – 64, l. 16.

Ms. Drawdy agreed that petitioner had maintained that he wanted a jury trial, that he had rejected an offer of twenty-five years the Friday before trial, and that petitioner signed documentation that he understood he was rejecting the offer. App. 98, ll. 20-24; App. 111, ll. 15-23. "I specifically said after all of this, you're still turning down the 25. And he said, yes." App. 114, l. 25 – 115, l. 2. Counsel agreed that she came to court Monday prepared to begin trial, but over the weekend had gotten "the offer of 23 years." App. 111, l. 22 – 112, l. 4.

Ms. Drawdy confirmed that petitioner's case was her responsibility, and not Mr. Byrholdt's. App. 99, ll. 22-25. "It was mine. He hired me . . ." App. 99, l. 25. Drawdy explained: "[W]hat happened was, I merged with Bruce Byrholdt, and we became Byrholdt Drawdy in October of 2013. And this was a murder case. We were up for trial—on the trial docket. And Mr. Byrholdt, I had him accompany me. I wanted some extra eyes on the case." App. 100, ll. 1-6. On the "eve of trial," "the prosecutor contacted my partner . . . He lives in Anderson, so he got the 23 year offer. We ran out immediately to the jail. Bruce may have gotten there before me, to relay, hey, we just got 23 years." App. 115, ll. 20-25.

Petitioner's testimony was that Byrholdt "took over" the case the weekend before trial. "Now, when my trial came up, [Bruce Byrholdt] was the one that took sole control over it. It was like she wasn't even talking anymore. That day they came to the jail, he's the one that sat in front of me and pretty much—like he was teaching her." App. 76, ll. 21-25. "When we hired her as an attorney—right—can he come into my case, in the middle of my case, and take over when he's merging in there? I mean, at my trial? I never talked to him concerning my case whatsoever. Not even one time." App. 76, ll. 15-19.

"And then, especially when Bruce got with her, he really kept filling up my head." App. 77, ll. 10-11. Petitioner explained he did not tell the plea judge he had been threatened "because

of the way he said it. I'm scared for your mom. They are—they are probably going to arrest her if you don't take the plea." App. 67, ll. 13-19. "If I had another opportunity, I wouldn't take [the plea]. I would take my chances with the—with a jury." App. 87, ll. 11-12.

The PCR court wrote in its order of dismissal: "[H]aving weighed the credibility of the testifying witnesses and having considered the admissions and explanations offered, the Court cannot find that plea counsel was not a 'reasonably competent attorney' or that her advice was not 'within the range of competence demanded of attorneys in criminal cases.'" App. 137. The PCR court denied petitioner relief, concluding that because it found no errors on the part of plea counsel, no prejudice could have resulted. App. 137.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding counsel provided effective representation where petitioner wanted to go to trial, had awaited trial in jail for 848 days, and pleaded guilty only because his retained attorney brought another attorney the weekend before trial who told petitioner if he did not plead guilty his mother would be incarcerated, leaving his daughter homeless, since petitioner was coerced into pleading guilty based on this threat.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. *Gilchrist v. State*, 350 S.C. 221, 226, 565 S.E.2d 281, 284 (2002) (citing *Strickland*, 466 U.S. at 687).

"[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). To establish prejudice when challenging a guilty plea, a PCR applicant must prove "there is a reasonable probability that, but for, counsel's errors, the defendant would not have pled guilty, but would have gone to trial." *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). "The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial." *Frierson v. State*, Op. No. 27801 (S.C. Sup. Ct. filed May 23, 2018) (Davis Adv. Sh. No. 21 at 16).

A defendant's Sixth Amendment right to the assistance of counsel is "fundamental." *Luis v. United States*, 136 S.Ct. 1083, 1088-89 (2016); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

"[A]n element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). "Given the necessarily close working relationship between lawyer and client, the need for confidence, and the critical importance of trust . . . the Court has held that the Sixth Amendment grants a defendant a fair opportunity to secure counsel of his own choice." *Luis*, 136 S. Ct. at 1089 (internal quotations omitted) (quoting *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

Petitioner retained Sarah Drawdy as his legal counsel, met with her at least nineteen times during his lengthy pre-trial detention, and trusted her. Both petitioner and Ms. Drawdy said they were prepared to go to trial on the Monday he pleaded guilty. Mr. Byrholdt was not involved in the case at all, and then over the weekend he became the driving force in it. Ms. Drawdy's decision to bring Mr. Byrholdt into the case at the last minute and allow him to take the primary role in advising petitioner to plead guilty deprived petitioner of his Sixth Amendment right to counsel of his choice. *Luis*, 136 S. Ct. at 1089; *Gonzalez-Lopez*, 548 U.S. at 144.

A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill*, 474 U.S. at 56.

In *State v. Corns*, 310 S.C. 546, 549, 426 S.E.2d 324, 325 (Ct. App. 1992), the defendant was arrested for possession with intent to distribute marijuana that was found in his home. A detective interviewed the defendant, did not threaten or intimidate him, but "informed Corns he had a warrant for Corns's wife, that his wife could be arrested, and that the Department of Social Services could take his children." *Id.* The detective said that Corns was very uneasy and then

stated something to the effect of "I'll plead guilty to the marijuana, just don't mess with my wife and kids." *Id.* at 549-50, 426 S.E.2d at 325-26. The South Carolina Court of Appeals found Corns' statement admitting possession of the marijuana should have been suppressed because the statements were involuntarily made in response to remarks that his wife could be arrested and his children taken by DSS. *Id.* at 552, 426 S.E.2d at 327. The Court concluded that "at the very least, the officers coerced Corns's confession on the marijuana by means of veiled threats against his family." *Id.*

Corns involved the voluntariness of a statement, while petitioner's claim involves the voluntariness of a guilty plea, but both have the same underlying coercion—fear that the defendant's family member would be arrested, and thus the defendant's child would be left without a caregiver if the defendant did not undertake the suggested behavior.

Mr. Byrholdt, an experienced trial attorney, came to the jail on the "eve of trial" and told petitioner: "I'm scared for your mom," when he relayed the new plea offer. Petitioner said this statement caused him to enter the guilty plea, and he was understandably frightened because his mother was the caregiver for his daughter. Petitioner's guilty plea was thereby rendered involuntary because the avenue of resolving his case by trial was blocked by the fear his daughter would become homeless if he did not plead guilty. *Corns*, 310 S.C. at 552, 426 S.E.2d at 327.

Petitioner testified that but for counsel's errors he would have continued to plead not guilty. A fair reading of this record shows that petitioner had continuously evinced a desire to exercise his right to trial. He had awaited trial for eight hundred and forty-eight days in jail, had just rejected a similar plea offer, and was prepared to go to trial. Petitioner testified: "If I had another opportunity, I wouldn't take [the plea]. I would take my chances with the—with a jury."

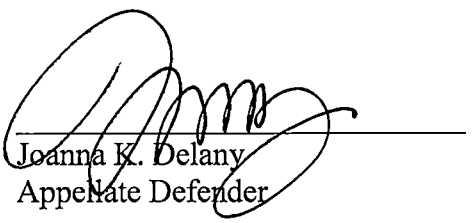
App. 87, ll. 11-12. Petitioner thereby demonstrated that counsel's ineffective performance affected the outcome of the plea process. *Harden*, 360 S.C. at 408, 602 S.E.2d at 49.

The PCR court erred[2] in concluding petitioner received effective assistance of counsel where Ms. Drawdy was petitioner's retained counsel for over two years, and on the eve of trial she injected Mr. Byrholdt into the attorney-client relationship. Mr. Byrholdt's statement that he was "scared for" petitioner's mother resulted in a coerced guilty plea, because petitioner was afraid that if he did not plead guilty his mother would be imprisoned, leaving no one to care for his daughter. *Strickland*, 466 U.S. at 687.

[2] The PCR court also erred in denying petitioner's request for a continuance on the basis that the case was three years old. Petitioner himself moved for the continuance. Since petitioner is the party who is incarcerated, this was an improper basis for denying his request for a continuance.

CONCLUSION

By reason of the foregoing argument, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of July, 2018.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Steven Randall Cobb states:

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

2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Jocelyn J. Newman, which was held on June 27, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She 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 her as counsel for Steven Randall Cobb.

Respectfully Submitted,

Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 23rd day of July, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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."

Joanna K. Delany
Appellate Defender

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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 Kelly Oppenheimer, 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 Steven Randall Cobb, #255377, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 23rd day of July, 2018.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 23rd day of July, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023