STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable Jean Hoefer Toal, Circuit Court Judge

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JERELL JACKSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000916

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# JOHNSON PETITION FOR WRIT OF CERTIORARI

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## INDEX

## ISSUE PRESENTED

Whether Petitioner's plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) was knowingly, intelligently, and voluntarily made when plea counsel improperly coerced and pressured Petitioner into pleading guilty on the morning of his jury trial after his codefendant unexpectedly pled guilty and agreed to testify against Petitioner, and where Petitioner was prejudiced because he would not have pled guilty but for counsel's undue pressure?

## STATEMENT OF THE CASE

Petitioner's charges stemmed from two separate, but similar incidents related to postings for sexual services online. Brittany Gillenkirk and Shakeera Jefferson, who went by the names Honey and Chocolate, advertised as prostitutes on the website backpage.com. On July 11, 2013, a man allegedly contacted Petitioner, whose telephone number was obtained from the backpage.com advertisement, and arranged to meet Gillenkirk at the North Charleston Inn. App. 38, ll. 8-18. The man ultimately met Gillenkirk in a room rented by Tommie Johnson, but apparently thought Gillenkirk did not appear as she did in the photographs. He left the room and got in his car in an attempt to leave. Petitioner and Tommie Johnson allegedly pulled their vehicle in behind the man and prevented him from leaving. The state claimed Petitioner punched the man once in the face, brandished a firearm, and stole one hundred dollars from him. App. 38, l. 17 – 39, l. 4. The man reported the robbery to law enforcement and provided a description of the perpetrators, their vehicle, and the names Honey and Chocolate as the individuals he contacted from the backpage.com website. App. 39, ll. 5-9.

Subsequently, on July 14, 2013, another individual also responded to the same advertisement on backpage.com and arranged for sexual services at his residence in Ladson. Gillenkirk travelled the man's home and engaged in sexual activity with him. At some point, Gillenkirk opened the door for Petitioner and Tommie Johnson. The state claimed Petitioner and Johnson held the man at gunpoint and ransacked his house ultimately stealing a Rolex, a PlayStation console, and approximately two hundred dollars in cash before fleeing. App. 39, l. 10 – 40, l. 2.

The following day, this man reported the robbery to law enforcement and gave a description of the perpetrators. The man then obtained a new telephone, called the number listed

on the backpage.com advertisement, and arranged to meet Gillenkirk at the Relax Inn in North Charleston. He notified police where the suspects would be located. An officer with the North Charleston Police Department responded to the Relax Inn and observed a vehicle matching the description of the car previously described by the complainants. The officer also saw Tommie Johnson sitting outside a certain hotel room. He conducted a knock and talk, smelled marijuana, and detained all four suspects, Gillenkirk, Jefferson, Johnson, and Petitioner. In the room, the officer saw a PlayStation console and a Rolex, both of which were reported as stolen by the second complainant. After obtaining a search warrant, law enforcement seized the stolen property as well as a firearm. App. 40, ll. 3-18.

A Charleston County Grand Jury indicted Petitioner on October 8, 2013 for two counts of armed robbery, two counts of possession of a weapon during the commission of a violent crime, and first degree burglary. App. 164-167. His case was called to trial on March 2, 2015 before the Honorable Kristi Lea Harrington, and a jury. Petitioner was to be tried jointly with his codefendant, Tommie Johnson. App. 1. However, on March 3, 2015, Johnson unexpectedly pled guilty and agreed to testify against Petitioner at trial. App. 23, ll. 6-22. Gillenkirk and Jefferson were also expected to testify against Petitioner if he proceeded to trial. App. 107, ll. 4-15.

Petitioner ultimately pled guilty to two counts of armed robbery pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) on March 3, 2015. App. 31. His remaining charges were dismissed by the prosecutor. Assistant Solicitor Culver Kidd represented the state, and J. Michael DeTreville represented Petitioner. App. 32. Petitioner was sentenced to twenty years imprisonment on each count to be served concurrently. App. 45, ll. 12-15.

On November 9, 2015, Petitioner filed an application for post-conviction relief (PCR) raising the claim argued in this petition. App. 47-53. The state filed a return to this petition dated May 9, 2016. App. 54-60. An evidentiary hearing was convened on September 14, 2016 before the Honorable Jean Hoefer Toal. App. 61. Assistant Attorney General J. Rutledge Johnson represented the state, and Rodney Davis represented Petitioner. App. 61. Judge Toal held the record open to permit the parties to obtain an additional pretrial transcript as well as the transcript of Tommie Johnson's guilty plea proceeding. App. 127, ll. 13-24.

A second evidentiary hearing was held on January 10, 2017 where further arguments were heard after the parties had obtained the additional transcripts. App. 133. Assistant Attorney General Alicia Olive represented the state, and Rodney Davis represented Petitioner. App. 133.

During the first evidentiary hearing, Petitioner asserted that he always planned to proceed to trial. When he first met with plea counsel, the two discussed a possible guilty plea, but Petitioner "refused it." App. 86, ll. 2-4. Petitioner continued to turn down repeated offers made by the state to plead guilty. Both Petitioner and counsel were "optimistic about [Petitioner's] chances" at trial given the numerous inconsistencies in the statements given by his codefendants, Gillenkirk and Jefferson. App. 86, l. 1 – 87, l. 3; App. 88, l. 1 – 89, l. 5.

During the week before Petitioner's scheduled jury trial, counsel met with Petitioner at the county jail. Petitioner testified, "At that time, he [counsel] was still optimistic about the case." App. 89, ll. 19-24. They did not discuss anything about a possible plea. Instead, the two discussed how counsel would question Gillenkirk and Jefferson and challenge their credibility at trial. App. 89, l. 23 – 90, l. 3.

On the morning of trial, counsel informed Petitioner that Tommie Johnson had suddenly agreed to plead guilty. Counsel told Petitioner that Johnson's decision to plead guilty and testify

against Petitioner was "the nail in the coffin" for Petitioner and that if Petitioner did not plead guilty, he would certainly be sentenced to life without parole and "would never see [his] children or [his] family again." App. 92, ll. 1-21. On the other hand, counsel promised Petitioner that if he pled guilty, he would be sentenced to ten years imprisonment given that Petitioner did not have a significant prior record. App. 92, l. 22 – 93, l. 20.

During their rushed meeting, counsel never discussed with Petitioner the terms of Johnson's proffer agreement with the state or how counsel would cross examine Johnson if Petitioner proceeded to trial. App. 94, ll. 11-22. Instead, counsel repeatedly pressured Petitioner to plead guilty. He even brought in Petitioner's mother, who was crying and "frantic," to convince Petitioner to plead guilty. His mother repeated what counsel claimed: Petitioner would be sentenced to life without parole if he did not plead guilty. App. 95, ll. 1-11. Counsel ultimately "led [Petitioner] to believe [he] didn't have a choice but to take the plea." App. 96, ll. 21-22.

Due to plea counsel's extensive pressure and his promise that Petitioner would only be sentenced to ten years, Petitioner pled guilty. App. 98, ll. 10-13. However, but for counsel's advice, Petitioner would have proceeded to trial. App. 105, ll. 10-17.

Michael DeTreville, Petitioner's plea counsel, acknowledged at the evidentiary hearing that Petitioner always "intended to fight these charges" and that he repeatedly turned down offers from the state to plead guilty. App. 106, l. 22 – 107, l. 3. He further admitted that on the morning of trial, after Tommie Johnson decided to plead guilty, he advised Petitioner that he should likewise plead guilty. App. 110, l. 23- 111, l. 2. DeTreville "felt there was a reasonable probability, based on the evidence that the State was going to present, that they would be able to garner a conviction against Mr. Jackson [Petitioner], even if he was innocent." App. 115, ll. 5-8.

DeTreville told Petitioner, given his limited prior record, that he would likely be sentenced to "the lower end of the range for armed robbery," which was ten years. App. 111, l. 13 – 112, l. 2.

However, given the "pinch for time," DeTreville never discussed with Petitioner the terms of Johnson's proffer agreement or how he would potentially cross examine Johnson at trial. App. 109, l. 16 – 110, l. 3. DeTreville ultimately conceded that even after Johnson pled guilty, Petitioner was "reluctant" to plead. Petitioner had always wanted a jury trial. App. 117, ll. 10-11.

The PCR judge found Petitioner "pled guilty based on the evidence that would have been presented against him and not any alleged deficiency of counsel." App. 160. Moreover, the judge asserted "[p]leading guilty to avoid a possibly greater sentence, without more, does not render a guilty plea involuntary or counsel's advice to plead guilty deficient." App. 160. Consequently, the judge denied Petitioner relief.

Because Petitioner's plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) was not knowingly, intelligently, and voluntarily made when plea counsel improperly coerced and pressured Petitioner into pleading guilty on the morning of his jury trial, and because Petitioner was prejudiced since he would not have pled guilty but for counsel's undue pressure, this petition for writ of certiorari follows.

## ARGUMENT

Petitioner's plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970) was not knowingly, intelligently, and voluntarily made when plea counsel improperly coerced and pressured Petitioner into pleading guilty on the morning of his jury trial after his codefendant unexpectedly pled guilty and agreed to testify against Petitioner, and where Petitioner was prejudiced because he would not have pled guilty but for counsel's undue pressure.

Since his arrest and his first meeting with counsel, Petitioner consistently maintained his desire for a jury trial and repeatedly turned down offers made by the state to plead guilty. Petitioner's eventual plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) on the morning of trial was not knowingly, intelligently, and voluntarily made since plea counsel improperly coerced and pressured Petitioner into pleading guilty after his codefendant unexpectedly pled guilty and agreed to testify against Petitioner. Petitioner was prejudiced because he would not have pled guilty but for counsel's undue pressure.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. In the context of a guilty plea, a petitioner must

show that counsel's performance was deficient, and "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000); Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000); Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997); Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994). This Court has held that a "defendant's undisputed testimony that he would not have pled guilty but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 631 S.E.2d 260 (2006) (citing Jackson v. State, 342 S.C. 95, 97-98, 535 S.E.2d 926, 927 (2000); Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 485-86 (1991)).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "Specifically, the 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." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000). "The longstanding test for determining the validity of a guilty 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) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

After Tommie Johnson unexpectedly decided to plead guilty and testify against Petitioner at trial, plea counsel strong armed Petitioner into pleading guilty. He made repeated threats to Petitioner that if he did not plead guilty, he would be found guilty at trial and sentenced to life without parole. Counsel further promised Petitioner that if he pled guilty, on the other hand, he

would be sentenced to the lower end of the sentencing range for armed robbery, which is ten years imprisonment. Counsel also brought in Petitioner's mother, who was crying and frantic, to repeat counsel's threat that Petitioner would be sentenced to life without parole if he did not plead guilty. Lastly, counsel failed to advise Petitioner of the terms of Johnson's proffer agreement or discuss how he would cross examine Johnson if Petitioner decided to go to trial. Counsel's conduct ultimately rendered Petitioner's plea involuntary because it prevented him from making an intelligent choice among the alternative courses of action open to him. See Hill v. Lockhart, 474 U.S. at 56.

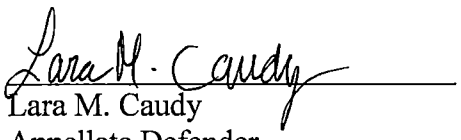
Petitioner was prejudiced by counsel's conduct because he would not have pled guilty but for counsel's undue pressure. Petitioner testified at the evidentiary hearing that if counsel had not pressured him to plead after Johnson's unexpected guilty plea or made repeated threats that he would be sentenced to life without parole if he proceeded to trial, he would have exercised his right to a jury trial. See Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) ("The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty.").

Consequently, Petitioner's respectfully requests this Court reverse his convictions and sentence 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 17th day of September, 2018.

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Jerell Jackson 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 transcripts of Petitioner's post-conviction relief hearings, which were held on September 14, 2016 and January 10, 2017 before the Honorable Jean H. Toal, and, 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 an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests the Court relieve her as counsel for Jerell Jackson.

Respectfully Submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of September, 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."

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ATTORNEY FOR PETITIONER

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CERTIFICATE OF SERVICE

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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 have been served upon Megan Harrigan Jameson, 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 upon Jerell Jackson, #363218, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 17th day of September, 2018.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 17th day of September, 2018.

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