

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Richland County

MAR 04 2019

Honorable Jean H. Toal, Circuit Court Judge

S.C. SUPREME COURT

DESMOND MAYO,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001756

JOHNSON PETITION FOR WRIT OF CERTIORARI

Joanna K. Delany
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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The court erred where it found counsel provided effective representation in advising petitioner to plead guilty to attempted murder where petitioner said he was merely present and he did not intend for anyone to get hurt, that his codefendant unexpectedly shot the complainant, since mere presence was a viable defense under these circumstances where petitioner did not have the specific intent to kill necessary for attempted murder 5

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ISSUE PRESENTED

Whether the court erred where it found counsel provided effective representation in advising petitioner to plead guilty to attempted murder where petitioner said he was merely present and he did not intend for anyone to get hurt, that his codefendant unexpectedly shot the complainant, since mere presence was a viable defense under these circumstances where petitioner did not have the specific intent to kill necessary for attempted murder?

STATEMENT

On December 8, 2011, a Richland County Grand Jury indicted petitioner for attempted murder. App. 90 – 91. On April 1, 2014, petitioner pleaded guilty as indicted before the Honorable R. Ferrell Cothran, Jr. App. 1. Nicole Singletary represented petitioner and Hans Pauling represented the state. App. 1.

The state alleged petitioner and his codefendant Jarquis Davis confronted Rondon Brown, the complainant, after Brown and petitioner's girlfriend got in a "verbal altercation at work." App. 7, ll. 6-16. According to the complainant, petitioner ordered Davis to shoot him and Davis did so, leaving the complainant paralyzed. App. 7, l. 16 – 8, l. 6.

Although he pleaded guilty, petitioner's counsel told the plea court: "[M]y client strongly disagrees with the fact that he ordered his co-defendant to actually shoot the victim in this case; however, he is accepting responsibility here today, Your Honor." App. 11, ll. 15-19. Petitioner addressed the court and said, "I would like to apologize for this tragedy, [] I never intended for no one to get hurt or harmed in any way." App. 13, ll. 17-19.

Petitioner had no prior criminal record. App. 8, ll. 24-25. He had been in jail for one thousand and thirty days prior to the plea. App. 18, ll. 15-19. The court sentenced petitioner to twelve years imprisonment. App. 92.

On February 24, 2015, petitioner filed an application for post-conviction relief (PCR). App. 21 – 27. The state made its return and motion for a more definite statement on June 25, 2015. App. 28 – 32. On November 3, 2015, petitioner filed an amendment to his PCR application and alleged, *inter alia*, that his "plea was not freely, voluntarily, intelligently, and knowingly given" since he was detained "for a period of 34 months prior to his plea," and since he did not know his codefendant intended to shoot the victim. App. 33 – 35.

A hearing was held on the matter December 5, 2016, before the Honorable Jean H. Toal. App. 36. Tommy Thomas represented petitioner and Jessica Kinard represented the state. App. 36.

At the PCR hearing, petitioner testified he merely went to speak with the complainant, that he was unarmed, and that he did not intend any harm to the complainant. App. 47, ll. 5-11. Petitioner maintained he did not know his codefendant would shoot the complainant and he did not know his codefendant was armed. App. 48, ll. 10-14. Petitioner explained he only intended to “communicate” with the complainant but that a “misunderstanding” resulted in petitioner walking away and his codefendant shooting the complainant. App. 47, ll. 10-14; App. 48, ll. 10-12.

Petitioner said his plea was not knowingly or intelligently given and asked to be granted a new trial. App. 50, ll. 14-17; App. 49, l. 24 – 50, l. 3. According to petitioner, counsel did not adequately explain possible defenses in the case to him. App. 44, ll. 8-12; App. 52, ll. 14-17.

Petitioner also noted he had been jailed at the Richland County detention center pre-trial for three years—from May 2011 to April 2014. App. 42, ll. 18-23. He said the length of his detention affected his decision to plead guilty because the experience was “just unbearable,” and that he had “lost loved ones” while he was detained. App. 55, l. 19 – 56, l. 7. Petitioner said he would have “done anything” to get out of the detention center. App. 56, ll. 9-11.

According to plea counsel, petitioner was “not interested in a trial.” App. 66, ll. 7-8. Counsel said she did talk to petitioner about “hand of one, hand of all,” and “being merely present.” App. 65, ll. 16-19. Counsel testified she agreed with petitioner’s decision to plead guilty because petitioner told her he knew that his codefendant had a gun prior to confronting the complainant. App. 71, l. 19 – 72, l. 7. Counsel said petitioner’s codefendant had “lift[ed] up his

shirt” to show petitioner he had a gun when they were at the scene. App. 72, ll. 2-8. According to counsel, she thought petitioner would be convicted at trial because she expected his girlfriend and his codefendant to testify that petitioner “went over there looking for a fight, looking for something to happen.” App. 73, ll. 14-23.

However, counsel told the PCR court petitioner had “always said that he did not intend for [his codefendant] to actually shoot the victim.” App. 64, ll. 13-14. Counsel said, “I truly believe that he didn’t want—I think they just went over there to scare the individual and it just escalated.” App. 71, ll. 16-18.

The court denied petitioner relief. In its order of dismissal, the court found counsel’s testimony credible that she discussed a possible defense of mere presence with petitioner. App. 85. The court found petitioner’s testimony that his plea was not freely and voluntarily made was not credible, and that he had not presented valid reasons why he should be allowed to depart from his testimony at the plea. App. 86 – 88.

The order of dismissal also stated that the length of petitioner’s pretrial detention in jail “prior to his informed decision to plead guilty is of no moment where, at the plea, he was given the opportunity to explain whether any factor or circumstance was causing him to feel forced or coerced to plead, yet he testified he was not suffering from any threat.” App. 88.

This petition for writ of certiorari follows.

ARGUMENT

The court erred where it found counsel provided effective representation in advising petitioner to plead guilty to attempted murder where petitioner said he was merely present and he did not intend for anyone to get hurt, that his codefendant unexpectedly shot the complainant, since mere presence was a viable defense under these circumstances where petitioner did not have the specific intent to kill necessary for attempted murder.

The PCR court erred when it found petitioner did not present valid reasons why he should be allowed to depart from his testimony at the plea, since petitioner always maintained, and continued to maintain at the plea, that he did not have the specific intent to kill.

“[P]resence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal.” *State v. Hill*, 268 S.C. 390, 395-96, 234 S.E.2d 219, 221 (1977). To be guilty, “the participant must be chargeable with knowledge of the principal’s criminal conduct. Mere presence at the scene is not sufficient to establish guilt as an aider or abettor.” *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987).

Specific intent to commit murder is an element of attempted murder. *State v. King*, 422 S.C. 47, 63-64, 810 S.E.2d 18, 27 (2017). Counsel recognized that petitioner lacked the requisite criminal intent—counsel told the plea judge petitioner “strongly disagree[d]” that he ordered his codefendant to shoot. App. 11, ll. 16-17. Petitioner testified he was unarmed and merely went to speak with the complainant, and did not intend to harm him. App. 47, ll. 5-11. Because petitioner always professed that he did not intend for or know that his codefendant would shoot, he lacked the specific intent necessary to sustain a conviction at trial.

According to petitioner, counsel did not adequately explain possible defenses to him. App. 44, ll. 8-12; App. 52, ll. 14-17. 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, 686 (1984). 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 v. Lockhart*, 474 U.S. 52, 56 (1985).

Moreover, petitioner had been held in pre-trial detention for three years prior to the plea and said his experience was “unbearable,” and that he would have “done anything” to get out of the detention center. App. 55, l. 19 – 56, l. 11. “The stress of incarceration—or even just the threat of jail time—frequently prompts defendants to plead guilty and give up their right to trial.” Liana M. Goff, *Pricing Justice: The Wasteful Enterprise of America’s Bail System*, 82 Brook. L. Rev. 881, 897 (2017). “The pressure on pretrial detainees to plead guilty seems a particularly apt explanation for how detention leads to unfavorable case outcomes. An individual who is facing a noncustodial sentence can be freed immediately after entering a guilty plea, whereas refusing to accept a plea deal may mean spending days, weeks, or months in jail.” *Id.* at 900. “[T]he state level is where some of the most egregious detention abuses occur without much critical comment.” Marc Miller, Martin Guggenheim, *Pretrial Detention and Punishment*, 75 Minn. L. Rev. 335, 345 (1990).

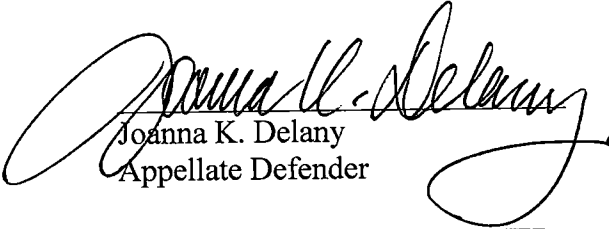
Petitioner maintained throughout the proceedings that he did not intend for anyone to get hurt—he said this at his plea and at his PCR hearing. So too did defense counsel at both of the hearings—she told the plea judge petitioner did not agree he told his codefendant to shoot and she told the PCR judge that petitioner’s position had always been that he did not intend his codefendant to shoot. Under these circumstances, mere presence was a viable defense and

counsel erred when she failed to fully discuss the defense with petitioner and instead encouraged him to plead guilty.

Given counsel's failure to adequately discuss the application of mere presence to his case and petitioner's lengthy and unexplained pre-trial detention, his plea was not freely, knowingly, intelligently, and voluntarily entered. *Hill v. Lockhart*, 474 U.S. 52; *Strickland v. Washington*, 466 U.S. 668.

CONCLUSION

Based on 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 4th day of March, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

Honorable Jean H. Toal, Circuit Court Judge

DESMOND MAYO,

PETITIONER

V.

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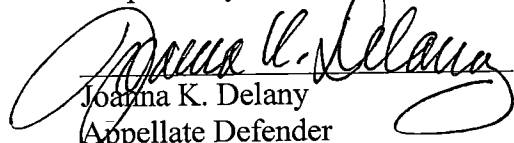
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Desmond Mayo 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 Former Chief Justice Jean H. Toal, which was held on December 5, 2016, 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 Desmond Mayo.

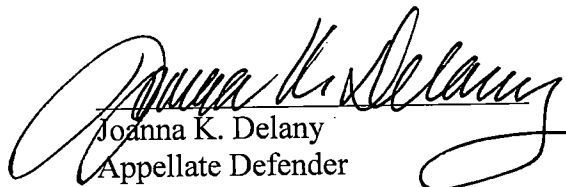
Respectfully Submitted,


Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 4th day of March, 2019.

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

South Carolina Commission on Indigent
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ATTORNEY FOR PETITIONER

This 4th day of March, 2019.

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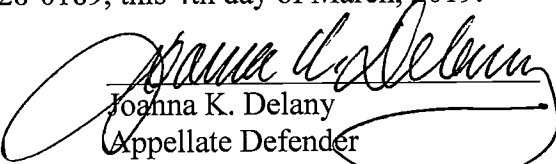
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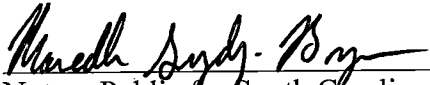
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CERTIFICATE OF SERVICE
—————

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 Lindsey McCallister, 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 Desmond Mayo, #359416, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 4th day of March, 2019.


Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 4th day of March, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028