

**ORIGINAL**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Spartanburg County

Honorable Michael G. Nettles, Circuit Court Judge

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**RECEIVED**

**AUG 27 2019**

**S.C. SUPREME COURT**

MICHELLE S. ALLISON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000290

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made when plea counsel promised Petitioner she would receive a concurrent sentence to the ten year sentence she was already serving on an unrelated conviction if she pled guilty, and where Petitioner was prejudiced by counsel's deficient performance because she would not have pled guilty if she would have known the judge could sentence her to consecutive time?

## STATEMENT OF THE CASE

Petitioner's brother, Michael Allison, and his friend, Christopher Lamb, burglarized Wayne Riley's house in Inman, South Carolina sometime between December 21, 2016 and December 26, 2016 while the Rileys were out of town for the Christmas holiday. App. 16, l. 23 – 18, l. 11. The pair stole several pieces of jewelry, two televisions, a laptop computer, a digital camera, and a semiautomatic pistol. App. 17, ll. 6-8. A few days after the burglary, Michael was arrested on unrelated charges. At the time of his arrest, he was in possession of several of the Rileys' belongings, including the pistol and some jewelry. App. 17, ll. 19-23.

Michael originally claimed Petitioner, who used to live with the Rileys, told him the family would be out of town that week. App. 18, ll. 2-5; App. 49, l. 19 – 50, l. 2. However, he later admitted Petitioner had no prior knowledge of the burglary and was not involved. The evidence established that Michael had access to Petitioner's cell phone and likely read a text message from Mr. Riley to Petitioner stating he would be out of town that week. App. 47, ll. 6-21; App. 52, l. 22 – 53, l. 8.

There was no evidence Petitioner ever entered the house. The only evidence against Petitioner was a recorded telephone call from Christopher Lamb while he was incarcerated in which Lamb asked Petitioner to sell some of the Rileys' possessions. App. 17, l. 24 – 18, l. 2; App. 49, ll. 10-14.

A Spartanburg County grand jury indicted Petitioner on May 8, 2017 for first degree burglary and grand larceny. App. 73-76. On July 24, 2017, Petitioner waived presentment to the grand jury and pled guilty to accessory after the fact of grand larceny before the Honorable J. Mark Hayes, II. App. 1; App. 77-79. Assistant Solicitor Timi Poulos represented the state, and Suzanne White represented Petitioner. App. 13. Petitioner was sentenced to five years

suspended upon the service of two and a half years' imprisonment and five years' probation. App. 23, ll. 16-20; App. 79. The judge ordered the sentence be served consecutive to the ten year sentence Petitioner was already serving for an unrelated conviction for distribution of methamphetamine. App. 23, ll. 20-22; App. 79.

On October 17, 2017, Petitioner filed an application for post-conviction relief (PCR) alleging the claim argued in this petition. App. 26-32. The state filed a return to this application dated January 11, 2018. App. 33-39. An evidentiary hearing was convened on February 22, 2018 before the Honorable Michael G. Nettles. App. 40. Assistant Attorney General Valerie Giovanoli represented the state, and Susannah Ross represented Petitioner. App. 40.

During the hearing, Petitioner testified that plea counsel advised her to plead guilty to accessory after the fact and assured her she would be sentenced to concurrent time. Counsel told Petitioner she "had nothing to worry about because it would be run concurrent" with the ten year sentence she was already serving for distribution of methamphetamine, second offense, to which she had pled guilty to only a month earlier. App. 45, l. 20 – 46, l. 9. In an effort to convince Petitioner to plead guilty, counsel told her "it won't be like you're doing anymore time." App. 46, ll. 5-6.

Based on counsel's advice, Petitioner pled guilty. However, Petitioner was adamant that she would not have pled guilty but for counsel's promise that she would be sentenced to concurrent time. App. 46, ll. 13-16. Petitioner testified that she had a strong defense to the charges and, if it were not for counsel's advice, she would have gone to trial. App. 47, l. 1 – 48, l. 4.

Suzanne White, Petitioner's plea counsel, testified that Petitioner had "always maintained she was not guilty of the burglary." App. 52, ll. 20-23. White explained that Petitioner

consistently asserted “she had not given her brother any information, that if he had gotten information about Mr. Riley being out of town, it had to have been because he had access to her cell phone.” App. 52, l. 23 – 53, l. 2. White admitted the state had no evidence Petitioner entered the home or was present when the burglary occurred. App. 53, ll. 2-5. However, there was some circumstantial evidence concerning Petitioner’s involvement. App. 53, ll. 5-8.

Despite only circumstantial evidence of Petitioner’s guilt, the state “seemed very adamant that she go to trial on the burglary first” because Mr. Riley wanted Petitioner “held responsible.” App. 53, ll. 8-12. However, White was able to negotiate a plea offer with the state in which Petitioner was allowed to plead guilty to accessory after the fact to grand larceny “based on the fact that she had had some knowledge after the fact that her brother had stolen some items” in exchange for a sentence recommendation of concurrent time to the ten year sentence Petitioner was already serving. App. 53, l. 12 – 54, l. 4.

While White maintained she did not promise Petitioner she would receive concurrent time or guarantee to Petitioner that she would be sentenced to concurrent time, she admitted she told Petitioner she was “confident” the judge would sentence her to concurrent time based on the state’s recommendation. App. 54, l. 14 – 55, l. 20. White also admitted she never discussed with Petitioner the possibility of a consecutive sentence. App. 54, ll. 14-24.

By order filed February 8, 2019, Judge Nettles denied Petitioner relief. App. 64-72. The judge found credible plea counsel’s testimony that she did not promise or guarantee a concurrent sentence and that she informed Petitioner of the potential sentence she faced. App. 70-71. The judge further found counsel was not deficient for advising Petitioner that she was confident Petitioner would receive a concurrent sentence based on the state’s recommendation concluding it was “a reasonable belief to have.” App. 70-71. The judge found “it unreasonable and not

credible that [Petitioner] would have proceeded to trial instead of pleading guilty had counsel not promised her concurrent sentencing.” App. 71. Lastly, the judge concluded Petitioner “received the benefit of the bargain by pleading to a lesser offense and receiving a relatively insignificant amount of time.” App. 71.

Because Petitioner’s guilty plea was not knowingly, intelligently, and voluntarily made due to plea counsel’s promise that Petitioner would receive a concurrent sentence to the ten year sentence she was already serving on an unrelated conviction if she pled guilty, and since Petitioner was prejudiced by counsel’s deficient performance because she would not have pled guilty if she would have known the judge could sentence her to consecutive time, this petition for writ of certiorari follows.

## ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made when plea counsel promised Petitioner she would receive a concurrent sentence to the ten year sentence she was already serving on an unrelated conviction if she pled guilty, and where Petitioner was prejudiced by counsel's deficient performance because she would not have pled guilty if she would have known the judge could sentence her to consecutive time.

Petitioner did not knowingly, intelligently, and voluntarily plead guilty due to plea counsel's promise that Petitioner would receive a concurrent sentence to the ten year sentence she was already serving for distribution of methamphetamine to which she had pled guilty only the month before. Plea counsel admitted she told Petitioner she was "confident" Petitioner would receive a concurrent sentence and that the two never discussed "the possibility of consecutive" time. App. 54, ll. 14-24. Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability that but for counsel's promise, Petitioner would not have pled guilty. Instead, Petitioner would have proceeded to trial, particularly given her strong defense to the charges.

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)).

Petitioner did not knowingly, intelligently, and voluntarily plead guilty due to plea counsel's deficient performance. Petitioner only pled guilty because counsel promised Petitioner

that she would receive concurrent time to the ten year sentence she was already serving based on the state's sentence recommendation. Counsel assured Petitioner she would not be "doing anymore time" and that she "had nothing to worry about." App. 46, ll. 2-6. Counsel admitted she told Petitioner she was "confident" Petitioner would receive a concurrent sentence and that the two never even discussed "the possibility of consecutive" time. App. 54, ll. 14-24. This constitutes deficient performance. Any reasonably competent criminal defense attorney would have advised Petitioner of the maximum sentence she faced and made her aware that, despite the state's recommendation, the plea judge could sentence her to consecutive time. Petitioner did not and could make a "voluntary and intelligent choice among the alternative courses of action open to" her at the time of the plea. See Hill, 474 U.S. at 56.

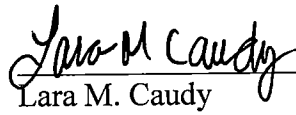
Petitioner was prejudiced by counsel's deficient performance because she testified she would not have pled guilty but for counsel's advice and ultimate promise that she would be sentenced to concurrent time. See Smith v. State, 369 S.C. 135, 631 S.E.2d 260 (2006) (A "defendant's undisputed testimony that he would not have pled guilty but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty."). Petitioner believed she had a strong defense to the charges and, if she would have known she could be sentenced to consecutive time, she would not have pled guilty. App. 46, ll. 13-16; App. 48, ll. 1-4. Moreover, the sentence Petitioner ultimately received, five years suspended upon the service of two and a half years' imprisonment and five years' probation to be served consecutive to the ten year sentence she was already serving, is proof of prejudice since it is significantly more time than Petitioner would have received based on her understanding of the plea bargain.

Because Petitioner did not knowingly, intelligently, and voluntarily plead guilty, this Court should reverse her conviction and sentence and remand for a new trial.

**CONCLUSION**

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. She ultimately requests this Court reverse her conviction and sentence and remand for a new trial.

Respectfully Submitted,



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Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of August, 2019.

STATE OF SOUTH CAROLINA  
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PETITION TO BE RELIEVED AS COUNSEL

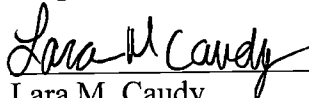
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Counsel for Michelle S. Allison states:

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 record of Petitioner's post-conviction relief hearing, which was held on February 20, 2018 before the Honorable Michael G. Nettles, 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 that the Court relieve her as counsel for Michelle S. Allison.

Respectfully Submitted,

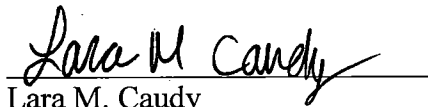
  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of August, 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."



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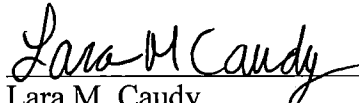
RESPONDENT

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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 Johnny Ellis James, Jr., 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 Michelle S. Allison, #356182, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 27th day of August, 2019.

  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 27th day of August, 2019.

  
(L.S)

Notary Public for South Carolina

My Commission Expires: September 27, 2028.

