

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County

Honorable William H. Seals, Circuit Court Judge

DERRICK J. BROWN,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001337

JOHNSON PETITION FOR WRIT OF CERTIORARI

Wanda H. Carter
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT
PETITIONER

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ISSUE PRESENTED

Trial counsel erred in allowing petitioner to plead guilty without requesting a hearing prior to the plea proceeding in order for petitioner to show cause on his motion to relieve counsel filed in the case.

STATEMENT

Petitioner Derrick J. Brown pled guilty to attempted murder and carjacking during the September 2013 term of the Florence County General Sessions Court before Judge D. Craig Brown, and was sentenced to imprisonment for an aggregate twenty-year term. App. 1-27. Daniel Jordan represented petitioner at the guilty plea proceeding and Deputy Solicitor John Jepertinger appeared on behalf of the state. Petitioner did not enjoy the benefit of a direct appeal in the case.

On April 24, 2014, petitioner filed a PCR application with the Florence County Office of the Clerk of Court. App. 28-35. The respondent filed a return dated November 4, 2014, requesting that a PCR hearing be held in the case. App. 35-39.

A PCR hearing was convened on August 8, 2016, at the Florence County Courthouse before Judge William H. Seals, Junior. Petitioner was present at the PCR hearing and represented by Tristan Shaffer, and Assistant Attorney General Jessica Kinard appeared on behalf of the state. App. 41-82. On July 16, 2019, Judge Seals filed an Order of Dismissal in the case. App. 84-93.

Petitioner appealed Judge Seals' Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in allowing petitioner to plead guilty without requesting a hearing prior to the plea proceeding in order for petitioner to show cause on his motion to relieve counsel filed in the case.

At the plea proceeding, the solicitor summarized the facts of the case. Apparently, according to the solicitor, petitioner was seen along with Dormiell Wilson in the area of Georell Blather's mother's house in Florence County on April 26, 2012, and that when Blathers arrived on the scene in that neighborhood, he (Blathers) approached and asked petitioner and Wilson why they were present in the area. Then, immediately thereafter, the solicitor claimed that petitioner responded by shooting Blathers and getting into the vehicle driven by Blathers and fleeing. App. 16, 1.1-p. 17, 1.9. However, defense counsel argued at the plea proceeding that it was Blathers who was armed and showed petitioner that he (Blathers), had a gun; and therefore, petitioner reacted with gunfire after processing the event as a "kind of kill or be killed situation." App. 20, 1.1-p.21, 1.9.

During the PCR hearing, petitioner testified that his case was a self-defense case in that he fired a weapon after Georell pulled out a gun on him. App. 62, 1.4-18; App. 63, lines 11-15. Petitioner added that he filed a pro se motion to relieve counsel prior to the plea proceeding, but that he was not afforded a hearing before the plea judge on his motion. App. 64, 1.8-p. 65, 1.25. Rather, trial counsel stated to him that the judge concluded that his motion was not going to be granted, and that he had the option of self-representation. App. 64, 1.24-p. 66, 1.8. Petitioner stated that he filed the motion because trial counsel failed to properly investigate into the charges and evidence in the case. App. 66, lines 9-12. Petitioner stated that he was fearful of self-representation so he had to say he was satisfied with plea counsel instead. App. 74, lines 3-17.

Trial counsel testified during the PCR hearing and explained that it was possible that the motion to have him relieved as counsel was never heard by the plea judge in the case. App. 48, 1.15-p. 49, 1.9.

PCR counsel made the following argument at the close of the PCR hearing:

Your Honor, one thing that sort of struck me in this case is that, you know, he filed this motion to have him relieved and it was never heard. You know, if—you know, if my client credibly testified, if you believe my client that Mr. Jordan came back and said the judge said he's going to relieve him off my case—I mean relieve—if the judge is going to relieve me, he's going to make you represent yourself.

That conversation very well may have happened. I mean I think that my client credibly testified that Mr. Jordan told him that. I don't know if the conversation happened or not. I wasn't there obviously.

But I think that one thing is that's not a ruling on the case. You know, the judge told me this in chambers isn't a ruling and I think that that motion never really got ruled upon and I think that that's a problem. And I think that here today in a PCR, that's ineffective assistance of counsel not to at least make sure that that's at least on the record that the—whether the client wanted to proceed forward with this attorney or not. 78, 1. 20-p. 79, 1.13.

The PCR judge ruled that petitioner failed to show that any prejudice resulted from the error in the handling of the motion to relieve counsel, and that petitioner did not inform the plea judge of this motion in open court because he did not want to represent himself. App. 90.

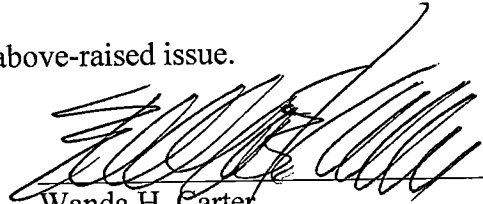
The question of whether a defendant's court appointed counsel should be relieved is a matter addressed to the sound discretion of the trial judge and the defendant bears the burden to show a satisfactory cause for removal. State v. Mazique, 419 S.C. 282, 797 S.E.2d 730 (2017); State v. Graddrick, 345 S.C. 383, 548 S.E.2d 210 (2001). Although the right to an attorney of one's choosing is not unlimited, the Sixth Amendment does give some protection to a defendant's selection of retained counsel. U.S. v. Cunningham, 672 F.2d 1064 (1982).

Here, counsel erred in failing to bring the motion to relieve counsel to the plea judge in

open court and for a hearing on the record in order for petitioner to show cause in support of the motion. The trial judge's ex parte summary dismissal of this motion sans an open hearing and ruling rendered petitioner's subsequent guilty pleas a violation of due process and petitioner's rights under the Sixth Amendment. But for counsel's error in handling this motion, a reasonable probability exists that the outcome of the petitioner's case would have been different. See Hill v. Lockhart, 474 U.S. 52 (1985).

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that this Court grant the petition and allow full briefing on the above-raised issue.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of February, 2020.

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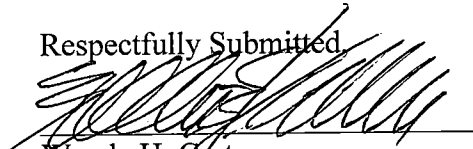
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Derrick J. Brown states that:

1. She is Deputy Chief 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 William H. Seals, which was held on August 8, 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 Derrick J. Brown.

Respectfully Submitted,



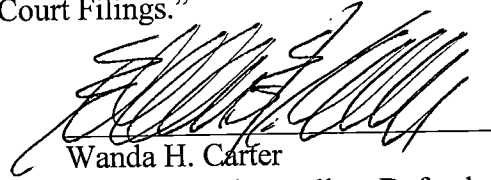
Wanda H. Carter

Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 5th day of February, 2020.

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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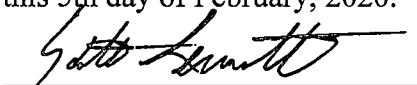
CERTIFICATE OF SERVICE

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 Derrick J. Brown, #315942, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 5th day of February, 2020.


Wanda H. Carter

Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 5th day of February, 2020.



(L.S)

Notary Public for South Carolina

My Commission Expires: September 27, 2028.