

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

**Apr 27 2020**

**S.C. SUPREME COURT**

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Certiorari to Sumter County

Honorable Brooks P. Goldsmith, Circuit Court Judge

—————  
MARCUS A. NELSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-001505

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
—————

Joanna K. Delany  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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## **ISSUE PRESENTED**

Whether the PCR court erred where it found Petitioner's guilty pleas were freely and voluntarily made where it was undisputed Petitioner told counsel he did not want to plead guilty but counsel told Petitioner not to "do himself a disservice" by asking for trial, and where counsel advised Petitioner the solicitor was a "tiger" who would be "mean and nasty" and "a real problem" if he did not accept the plea offer, since the decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant?

## STATEMENT

On May 10, 2018, a Sumter County Grand Jury indicted Petitioner for two counts of distribution of crack cocaine. App. 152 – 153; App. 155 – 156. Petitioner proceeded to a plea hearing before the Honorable R. Ferrell Cothran on August 21, 2018. App. 1. Petitioner was represented by Charles Brooks, III. App. 1. The State was represented by Bronwyn McElveen. App. 1.

Petitioner had a number of charges pending, and he entered pleas pursuant to what the parties would later refer to as a “package deal.” At the August 21, 2018 plea hearing, Petitioner pleaded guilty to the following offenses: possession of a stolen motor vehicle; leaving the scene of an accident; possession of a pistol by a person convicted of a violent crime; two counts of habitual traffic offender; and two counts of distribution of crack, first offense. App. 3, l. 6 – 4, l. 4; App. 8, l. 5 – 18, l. 23. The State recommended concurrent sentences and dismissed by nolle prosequi four indictments as part of the plea bargain: three counts of habitual traffic offender and one count of distribution of crack cocaine. App. 3, l. 9 – 4, l. 4; App. 19, ll. 4-6.

Petitioner is herein appealing the denial of post-conviction relief (PCR) as to only two of those pleas: two counts of distribution of crack cocaine, first offense. App. 47; App. 56, ll. 21-23; App. 136 – 137. Petitioner was sentenced to serve concurrent terms of ten years’ imprisonment for each count of distribution of crack cocaine. App. 25, ll. 14-21.

No direct appeal was taken, and Petitioner timely filed an application for PCR. App. 29 – 37. The State made its return and motion for a more definite statement, and Petitioner filed an amended PCR application. App. 38 – 46; App. 47 – 52. A hearing was held on the matter before the Honorable Brooks P. Goldsmith, on July 31, 2019. App. 53. Petitioner was represented by Timothy Griffith. App. 53. The State was represented by Brianna Schill. App. 53.

Petitioner testified at the PCR hearing that although he wished to plead guilty to some of his charges, he did not want to plead guilty to the distribution charges and he told counsel so. App. 60, ll. 1-12. Counsel also testified at the PCR hearing, and recalled that Petitioner “said, you know, some of these drug charges, I don’t think I did.” App. 82, ll. 12-13. Petitioner explained to the PCR court that he was innocent of the distribution charges and asked that he be granted a new trial. App. 64, ll. 7-12; App. 67, ll. 4-5.

Petitioner recalled that counsel only met with him a single time to discuss all of his cases. App. 70, ll. 2-4. Counsel said he represented Petitioner for less than a week. App. 86, ll. 7-16.

Petitioner explained that he told the plea judge he was guilty of the distribution charges “[b]ecause that is what my lawyer told me to do, to enter the plea.” App. 65, ll. 15-21. Petitioner said that counsel told him if he answered the court’s questions with a no, the judge would not accept the plea. App. 65, ll. 9-14. Counsel seemed to agree with Petitioner’s testimony about his advice as to how Petitioner should respond during the plea colloquy. Counsel said he told Petitioner to keep in mind when the judge was questioning him during the colloquy that, “in order to take the plea, you have got to take the package.” App. 105, ll. 1-23.

Although counsel claimed he did not coerce Petitioner into pleading guilty, counsel said he advised Petitioner not to do “himself a disservice” by going to trial. App. 90, ll. 18-20; App. 82, l. 14 – 83, l. 10. Counsel told Petitioner he should accept the plea offer, which was a “package deal.” App. 82, l. 12 – 83, l. 10.

Petitioner told the PCR court that counsel said, “it would have been dangerous” for him to go to trial, and that counsel convinced Petitioner he “didn’t want to do that.” App. 71, ll. 17-18.

Similarly, counsel testified that when Petitioner said he did not want to plead guilty to the drug distribution charges, counsel told Petitioner he should take the plea offer because the solicitor assigned to the cases “can be a real problem to deal with.” App. 100, ll. 1-14. Counsel said he told Petitioner that Petitioner needed to resolve his cases now, since counsel had gotten the “mean and nasty” “tiger” of a prosecutor to “calm down a little bit.” App. 102, ll. 4-12.

Counsel further testified that he told Petitioner he thought Petitioner could get a five year sentence, and that he, counsel, was “stunned” when Petitioner received a ten year sentence, and so was Petitioner. App. 84, ll. 8-23. Nevertheless, counsel claimed that had Petitioner insisted on going to trial, “I guess I would have sat on down and played court with [the prosecutor] and tried whatever case she would have been ready to try.” App. 92, ll. 12-16.

On August 29, 2019, the PCR court issued an order of dismissal, in which it addressed Petitioner’s claim that his guilty pleas were involuntary. App. 136 – 150. The order stated, Petitioner “asserts his guilty plea was not freely and voluntarily made. This Court disagrees.” App. 148. The order cited counsel’s testimony that he did not promise Petitioner a particular sentence. Ap. 149. The order also cited to Petitioner’s responses to the plea judge during the plea colloquy, in which he indicated he was satisfied with his counsel and that he “was not threatened, coerced, or promised anything to plead guilty.” App. 149.

The order of dismissal continued, “This [c]ourt finds credible the testimony of [the solicitor] and [c]ounsel, while also finding [Petitioner’s] testimony not credible.” App. 149. “It is clear from the testimony and the record that [Petitioner’s] plea was freely and voluntarily made.” App. 149.

This petition for writ of certiorari follows.

## ARGUMENT

The PCR court erred where it found Petitioner’s guilty pleas were freely and voluntarily made where it was undisputed Petitioner told counsel he did not want to plead guilty but counsel told Petitioner not to “do himself a disservice” by asking for trial, and where counsel advised Petitioner the solicitor was a “tiger” who would be “mean and nasty” and “a real problem” if he did not accept the plea offer, since the decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant.

Counsel’s advice to Petitioner was alarming, confusing, belittled his trial rights, and left Petitioner with the understanding that he had no real option but to plead guilty. This was ineffective representation.

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).

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). The Due Process Clause requires guilty pleas be entered into voluntarily, knowingly, and intelligently. *Boykin v. Alabama*, 395 U.S. 238 (1969).

“[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. at 58. 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*, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018).

It was undisputed that Petitioner told counsel he was factually innocent on charges of drug distribution and that he did not want to plead guilty. Rather than properly advising Petitioner of his trial rights, counsel’s advice here discounted those rights. Instead, counsel made alarming remarks about the character of the prosecutor. Any rational defendant would have been intimidated by the unprofessional characterizations counsel made of the solicitor and would have likely felt compelled to plead guilty here. Counsel’s advice that the solicitor was a “tiger” and would be “mean and nasty” and a “real problem” unless Petitioner waived his trial rights was coercive. Given counsel’s advice, Petitioner reasonably believed “it would have been dangerous” for him to go to trial. App. 71, ll. 17-18.

Counsel’s deficient performance prejudiced Petitioner because it altered his decision to seek a trial on the drug distribution indictments and persuaded him he must plead guilty. Therefore, the PCR court erred where it found Petitioner’s pleas were freely and voluntarily entered. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985); *Strickland v. Washington*, 466 U.S. 668 (1984).

**CONCLUSION**

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

*s/ Joanna K. Delany*

Joanna K. Delany  
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of April, 2020.

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Counsel for Marcus A. Nelson 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 Brooks P. Goldsmith, which was held on July 31, 2019, 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 Marcus A. Nelson.

Respectfully Submitted,

*s/Joanna K. Delany*

Joanna K. Delany

Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of April, 2020.

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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.”

*s/Joanna K. Delany*

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South Carolina Commission on Indigent  
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ATTORNEY FOR PETITIONER

This 27th day of April, 2020.