STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Saluda County

Honorable William A. McKinnon, Circuit Court Judge

ORIENTHAL J. CHARLEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001223

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made when plea counsel failed to properly inform Petitioner of the terms of the plea agreement before Petitioner pled guilty, specifically that there was no agreement with the state as to a sentence recommendation, and where Petitioner was prejudiced by counsel's deficient performance because he would not have pled guilty if he would have known the state had not agreed to recommend a sentence of eight years' imprisonment?

STATEMENT OF THE CASE

Al Jerome Young robbed Petitioner at gunpoint of thirty-two thousand dollars. App. 826, l. 16 – 829, l. 23; App. 853, l. 24 – 855, l. 6. Two days later, in an effort to get the money back, Petitioner and Gerald Williams drove to a residence in Saluda County where Young was located. App. 858, ll. 1-9. The men were both armed. App. 860, l. 14 – 861, l. 25. As they approached the front door, Young opened the door and began shooting. Petitioner shot once in the air and Young retreated back into the home. Young continued to shoot at Petitioner and Williams from inside the trailer. Petitioner's gun jammed after that first shot and he fled back towards his van, which was parked down the road. Williams fired numerous shots into the trailer and then followed after Petitioner. The two discarded their weapons on the way to the van. Williams also threw the latex gloves he was wearing on top of the guns. App. 860, l. 1 – 867, l. 4; App. 871, l. 25 – 874, l. 19. Within seconds of reaching the van, officers pulled in behind them and ordered them out of the vehicle. Petitioner and Williams were both arrested. App. 867, l. 4 – 870, l. 12. Petitioner ultimately cooperated with investigators. App. 13, ll. 2-7.

Immediately after the shooting, officers interviewed Al Jerome Young at his trailer. They "discovered $20,140 in a Camelbak water pack strapped to his back under his T-shirt." App. 11, ll. 20-24. Young admitted this was Petitioner's money. He claimed Petitioner "fronted" him thirty-two thousand dollars to buy cocaine, but Young "ripped him off." App. 11, l. 25 – 12, l. 2.

A Saluda County Grand Jury indicted Petitioner on May 9, 2012 for three counts of attempted murder, possession of a weapon during the commission of a violent crime, and malicious injury to real property. App. 234-235. On June 11, 2012, less than two months after his arrest, Petitioner pled guilty to one count of attempted murder before the Honorable William

P. Keesley. App. 1. Assistant Solicitor Ervin Mayes represented the state, and Jerry Screen represented Petitioner. App. 1.

On the same day Petitioner pled guilty, Petitioner and his attorney signed a "voluntary assignment" in which Petitioner agreed to forfeit the twenty thousand dollars that was found on Al Jerome Young's person after the shooting to the Saluda County Sheriff's Office "with the agreement that Seven Thousand Five Hundred Dollars ($7,500) be returned to his Attorney of Record Jerry Screen." App. 200.

At the beginning of the plea hearing, the assistant solicitor maintained Petitioner had agreed to cooperate against his codefendant, Gerald Williams, and intended to testify against Williams should Williams proceed to trial. App. 4, l. 13 – 5, l. 4; See App. 13, ll. 19-24. The solicitor requested the judge defer sentencing Petitioner until after Williams' potential trial. App. 4, ll. 16-17. Moreover, the solicitor stated he was "going to hold in abeyance the disposition of [Petitioner's] other charges." App. 4, ll. 17-19.

Before accepting Petitioner's plea, the judge advised Petitioner, "Any plea bargains the State might have made with you, any agreements about dropping charges, reducing charges, recommending sentences, anything like that, they have to say it on the record in open court here or you're going to lose it." App. 14, ll. 14-19. When the judge asked Petitioner whether he understood, Petitioner hesitated and conferred with plea counsel. App. 14, ll. 19-20. Petitioner then responded, "Currently, we're in negotiations about . . . reduction of the charges." App. 14, ll. 21-25. In response to Petitioner's assertion, the assistant solicitor maintained he had made no recommendation as to sentence and would only later make a recommendation based on Petitioner's cooperation in the prosecution of Williams. App. 15, ll. 7-25.

Petitioner later disputed the solicitor's claim and explained during his post-conviction relief action what he and his attorney discussed when they privately conferred during the plea hearing. Petitioner testified that before he pled guilty plea counsel told him the solicitor had agreed to recommend a sentence of eight years' imprisonment if Petitioner pled guilty to one count of attempted murder and agreed to voluntarily waive any right to the funds seized from Al Jerome Young after the shooting. App. 95, ll. 6-14; App. 96, ll. 5-18. Petitioner accepted this offer. He signed the "voluntary assignment" form immediately before he pled guilty. App. 100, l. 22 – 101, l. 15; App. 200. Petitioner further maintained that counsel advised him there were no other conditions on this plea offer. Counsel never mentioned any requirement that he would need to testify against his codefendant Williams. App. 100, ll..9-17.

On the day of his plea, after signing the "voluntary assignment" form, Petitioner also signed the sentencing sheet. At the time Petitioner signed the sentencing sheet, the form indicated it was a "negotiated sentence" of eight years. The box next to negotiated sentence on the form was checked and eight years was written below this box. However, at some point after Petitioner signed the sentencing sheet, the checked box next to negotiated sentence and the eight years written under this box were "whited out." App. 100, l. 22 – 103, l. 13; See App. 199. This alteration was confirmed by counsel for Williams who later informed the trial judge at Williams' subsequent trial that he had obtained a copy of Petitioner's sentencing sheet from the clerk of court and that "an eight in the sentence block" appeared to be "whited out." App. 982, ll. 4-19.

Petitioner further explained during his evidentiary hearing what occurred after the plea judge advised him that all the terms of his plea agreement must be put on the record or he would "lose" them. See App. 14, ll. 14-19. He testified, "I conferred with Mr. Screen [plea counsel] and asked him do I say something now about the eight years or do I just let it ride? And he

[counsel] was like just tell them that we're still in negotiations so I say that." App. 104, ll. 16-24. Petitioner asserted that even though the solicitor said there was no agreement as to any sentence recommendation, Petitioner still thought the state was going to recommend eight years because Petitioner had voluntarily waived his right to the twenty thousand dollars based on this agreement and because when he signed the sentence sheet it stated there was a negotiated eight year sentence. App. 105, l. 23 – 106, l. 20. When the solicitor suddenly maintained during the plea hearing that there was no recommendation, Petitioner continued forward with the plea because he "was instructed to go along with the plea by Mr. Screen. He was like you're gonna get your eight years anyway so just chill and just let them read off whatever they're gonna read off." App. 108, l. 22 – 109, l. 5.

Lastly, Petitioner asserted he had no reason to plead guilty a mere two months after his arrest to attempted murder, an offense that carried up to thirty years, without negotiations or a favorable sentence recommendation. The only reason he pled guilty was because he understood, based on the advice of his counsel, that the state was going to recommend an eight year sentence. Petitioner maintained he would not have pled guilty if he would have known there was no agreement as to the sentence recommendation. App. 116, ll. 9-18.

On October 17, 2013, after Petitioner testified at his codefendant Williams' trial, Petitioner was sentenced to twenty years imprisonment.[1] App. 36, ll. 9-18. The assistant solicitor refused to make any recommendation as to sentence during the hearing. App. 27, ll. 13-14.

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[1] Petitioner testified as a defense witness during Williams' trial. During his direct examination, he testified Williams was merely present during the shooting. He maintained Williams drove Petitioner to Al Jerome Young's residence, but that Williams was under the impression the pair was "going to see some girls." App. 832, l. 21 – 833, l. 25. However, during cross-examination by the solicitor, Petitioner admitted Williams was an active participant in the shooting. See App. 824, l. 1 – 879, l. 24.

On May 15, 2014, Petitioner filed an application for post-conviction relief (PCR). App. 38-46. He filed an amended application on June 13, 2014. App. 47-56. The state filed a return to this application dated March 17, 2015. App. 57-61. With the assistance of counsel, Petitioner filed a second amended application on September 17, 2017 raising the claim argued in this petition. App. 62-64. The state filed an amended return dated October 30, 2017. App. 65-83. An evidentiary hearing was convened on April 18, 2018 before the Honorable William A. McKinnon. App. 84. Senior Assistant Attorney General William Edward Salter, III represented the state, and Kristy Goldberg represented Petitioner. App. 84.

Jerry Screen, Petitioner's plea counsel, testified at the evidentiary hearing that he never promised Petitioner that he would be sentenced to eight years. App. 152, ll. 13-16. Screen maintained the "eight years came about when I told him [Petitioner] that if he [the solicitor] hits you with the minimum sentence here which is 10 years, you have got to do 85 percent because this case is classified as violent." App. 152, ll. 2-12. Screen later acknowledged that attempted murder, which is the offense Petitioner pled guilty to, did not have a mandatory minimum sentence. App. 164, ll. 7-12. He testified that he asked the solicitor to recommend a sentence of eight years, but that the solicitor "wanted 10 on it." App. 163, l. 18 – 164, l. 13. He further explained, "I think eight came out but we were really negotiating probably closer to like 10 which would make service time eight or so." App. 164, ll. 14-25. Either way, Screen maintained that the solicitor never agreed to any sentence recommendation prior to Petitioner's guilty plea because the solicitor "wanted to wait until after my client [Petitioner] testified [against codefendant Williams] to see exactly where he would come down at [sentence wise]. He never told me he was absolutely going to close the door on it [a ten year recommendation] but he never signed off on it." App. 165, ll. 3-7.

As far as the sentence sheet, Screen testified that the box beside negotiated sentence on the form was not checked when he signed it before Petitioner's guilty plea nor was a sentence of eight years written on the form. App. 165, l. 16 – 166, l. 19. He further explained that during the plea proceeding when the plea judge advised Petitioner that any terms of the plea agreement must be put on the record or they would be lost, Petitioner hesitated and the two conferred. During their off the record conversation, Screen told Petitioner "we don't have eight locked on. We don't have that yet. We may never get that but we don't have that. I wanted him to make sure he knew that before he continued with his guilty plea." App. 166, l. 15 – 167, l. 8.

By order filed May 4, 2018, the PCR judge denied Petitioner relief. The judge found:

> [T]he credible evidence is that there was no offer from the Solicitor's Office for an eight year sentence. The Court further finds that the Deputy Solicitor and plea counsel had not yet reached an agreement on a recommendation as to sentence when [Petitioner] entered his plea. Rather, the agreement was that the Deputy Solicitor would make a recommendation as to sentence only after the trial of [Petitioner's] co-defendant, and that the sentencing recommendation would be based upon [Petitioner's] cooperation in prosecuting his co-defendant.
>
> The Court finds that any confusion [Petitioner] may have had about the plea negotiations, after his discussions with counsel, were unerringly clarified by Judge Keesley's [the plea judge's] lengthy colloquy with him at the time of his plea. The Court further finds that his [Petitioner's] responses to Judge Keesly reflect that he fully understood the agreement that the State and counsel had reached.

App. 223.

Consequently, the PCR judge, while finding it unnecessary to address the deficiency prong, concluded Petitioner could not prove "he was prejudiced by any of counsel's supposed errors in light of the colloquy Judge Keesly [the plea judge] had with him at the time of his plea." App. 222.

Because Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made when plea counsel failed to properly inform Petitioner of the terms of the plea agreement before

he pled guilty, specifically that there was no agreement with the state as to a sentence recommendation, and since Petitioner was prejudiced by counsel's deficient performance because he would not have pled guilty if he would have known the state had not agreed to recommend a sentence of eight years' imprisonment, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made when plea counsel failed to properly inform Petitioner of the terms of the plea agreement before Petitioner pled guilty, specifically that there was no agreement with the state as to a sentence recommendation, and where Petitioner was prejudiced by counsel's deficient performance because he would not have pled guilty if he would have known the state had not agreed to recommend a sentence of eight years' imprisonment.

Petitioner did not knowingly, intelligently, and voluntarily plead guilty. At the time Petitioner pled guilty, he understood that the solicitor intended to recommend a sentence of eight years' imprisonment in exchange for Petitioner's plea to one count of attempted murder and Petitioner's agreement to waive any right to the twenty thousand dollars law enforcement seized from Al Jerome Young after the shooting. Petitioner was prejudiced by counsel's deficient performance because he would not have pled guilty but for counsel's failure to properly advise him on the terms and conditions of his plea agreement. Instead of recommending ten years, the solicitor ultimately took no position as to sentencing and Petitioner was sentenced to twenty years' imprisonment.

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 counsel's deficient performance. Petitioner only pled guilty a mere two months after his arrest because plea counsel advised him that if he pled guilty to one count of attempted murder and agreed to waive any right to the twenty thousand dollars seized from Al Jerome Young, the solicitor would dismiss Petitioner's remaining charges and recommend a sentence of eight years. Plea counsel failed to ensure Petitioner fully understood the terms of the plea agreement before he pled guilty. Consequently, Petitioner did not and could make a "voluntary and intelligent choice among the alternative courses of action open to" him at the time of the plea. See Hill, 474 U.S. at 56.

Petitioner was prejudiced by counsel's deficient performance because he testified he would not have pled guilty but for counsel's promise that the solicitor was going to recommend a sentence of eight years. See App. 116, ll. 12-18; 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 asserted he had no "reason to plead to a 30 year offense without negotiations on that day." App. 116, ll. 12-14. Moreover, the sentence Petitioner ultimately received, twenty years' imprisonment, is proof of prejudice.

Because Petitioner did not knowingly, intelligently, and voluntarily plead guilty, this Court should reverse his conviction 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

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of February, 2019.

STATE OF SOUTH CAROLINA

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ORIENTHAL J. CHARLEY,

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V.

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RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Orienthal J. Charley 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 April 18, 2018 before the Honorable William A. McKinnon, 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 Orienthal J. Charley.

Respectfully Submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of February, 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."

Lara M. Caudy
Appellate Defender

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ATTORNEY FOR PETITIONER

This 8th day of February, 2019.

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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 have been served upon Kelly Oppenheimer, 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 Orienthal J. Charley, #357460, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 8th day of February, 2019.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 8th day of February, 2019.

Scott Leverette (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.