STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Richland County

Honorable Brian M. Gibbons, Circuit Court Judge

VENABLE D. MITCHELL,

PETITOINER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-000755

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 adequately object to or challenge the process the State used to setup a lineup for identification of the Petitioner. It is Petitioner's position that defense counsel's decision to not object and/or challenge the State's lineup prejudiced his case. Furthermore, that the evidence the police used to arrest Petitioner was insufficient and therefore his arrest was unconstitutional.

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made when plea counsel, failed to adequately communicate with and advise Petitioner of the state's evidence against him. Trial counsel failed to provide Applicant with a full copy of the Rule 5 materials received from the Richland County Solicitor's Office until after Petitioner pled guilty on March 20th, 2017. The Applicant was not properly advised concerning the prosecution's evidence against the Petitioner or potential defenses he had waived by pleading guilty.

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made when plea counsel pressured Petitioner's mother to convince Petitioner to plead guilty out of fear of potentially losing her son for thirty years.

STATEMENT OF THE CASE

On July 29, 2015 the victim, who lived in the house with his parents, was in his bedroom lying down and watching television when he heard a knock. He looked through the blinds out of the window and allegedly saw the Petitioner. The victim allegedly saw the Petitioner raise a shotgun and shoot him in the face. He then screamed for help and his parents found him on the floor of the home. They called nine one one (911) and he was rushed to the hospital with life threatening injuries. App. 15, l. 25, 16, l. 1-6.

A Richland County grand jury indicted Petitioner on April 13, 2016 for attempted murder and discharging firearms into a dwelling. App. 170-173. On March 20, 2017, Petitioner pled guilty to attempted murder before the Honorable R. Knox McMahon, where he pleaded guilty as indicted pursuant to Alford v. North Carolina, 400 U.S. 25 (1970). Assistant Solicitor M. Walker represented the state. Rhodes Bailey represented Petitioner. Petitioner was sentenced to ten years. Petitioner did not appeal his conviction or sentence. App. 3-19.

On August 18, 2015 the victim's mother, Mozell Jones, signed a City of Columbia Police Department photo line-up sheet. She identified Venable Mitchell as the shooter. App. 52. This is despite the fact that the Supplemental Incident Report approved by Officer Christopher Morris states:

> Mr. Jones stated that while himself, wife and son were asleep he heard several loud bangs and looked out the front window thinking it was a power pole transporter that blew-up at that time Mr. Udensi (victim) opened his bedroom door and yelled for help then falling to the ground Mr. Jones called 911.

App. 48.

A few paragraphs later the report states:

> Mr. Jones stated that he did not see or hear anyone prior or after the shooting, Mr. Jones is unaware of any unusual or suspicious activity from Mr. Udensi recently, but stated that there have been several fights involving Mr. Udensi and others in the past at or near this location with one prior incident involving a gun and shots being fired.

App. 48.

At the hearing plea counsel stated that the State never was contending that anyone other than the victim actually saw the shooting and could identify Mr. Mitchell. App. 44, l. 2-4. Although clearing that up helped one potential issue, it still leaves the issues of the victim's writing being illegible and how or why the victim's mother decided on the Petitioner as the perpetrator. Plea counsel stated a potential defense was the fact that victim's overzealous mother may have coached him and led him to picking the wrong person. App. 97 l. 12-15. The victim's mother had motive to suggest the Petitioner. Plea counsel admits himself that:

> I felt like he (victim) could have been susceptible to coaching, absolutely, but that isn't really about ID practices.

App. 134 l. 15-18.

Therefore, Petitioner believes the evidence the police used to arrest Petitioner was insufficient and therefore his arrest was unconstitutional.

The Petitioner has been incarcerated since the time he was arrested on August 19, 2015. Therefore, all discovery needed to be mailed or delivered to Petitioner at the Richland County Detention Center for Petitioner to review it. This was not done prior to Petitioner pleading guilty. Plea counsel mailed Petitioner a letter dated May 4, 2017. App. 32. Within the letter, plea counsel stated that he mailed Petitioner the discovery on March 29, 2017. App. 32. This was nine (9) days after the Petitioner pled guilty. Therefore, there was evidence that Petitioner did not see until after he pled guilty. The Petitioner was not properly advised concerning the

prosecution's evidence against the Petitioner or potential defenses he had waived by pleading guilty.

Within the Rule 5 material the Petitioner received from plea counsel, after his conviction, there was evidence that he had not seen before and had not been made aware of. In a letter to the Petitioner from plea counsel dated May 4, 2017. App. 32. plea counsel states that he "was never provided discs from street cameras on South Ott or Rosewood. I was only showed a few black and white snapshots from the cameras. App. 32. However, in an email dated March 15, 2017 at 3:18 PM, from the Assistant Solicitor, she provides ten (10) attachments that were e-mailed to plea counsel. The camera logs she provides are from cameras on streets near where the incident occurred. App. 35. The court found that no videos ever existed. App. 160. Furthermore, the court found the Petitioner's testimony was not credible, while finding plea counsel's testimony was credible. App. 160. Although the court found that the videos did not exist, the Petitioner did submit an exhibit 1B with this Application for PCR. App. 34-35. The email reflects that either pictures or videos were taken, but Petitioner testified he was not able to see them. If Petitioner been made aware of this evidence, he would not have pled guilty. The Petitioner's plea cannot be considered knowing and voluntary based on his lack of knowledge of the material evidence that was in his attorney's possession and in the prosecutor's possession. Gibson vs. State 334 S.C. 523

Moreover, there were cell phone records within the Rule 5 material that was provided to the Petitioner, after his conviction. The victim received a text message on June 29, 2015 at 8:56 PM that stated:

> "Hey chu be careful out there. ...it's some strange things going on put here... watch your surroundings. ...love ya."

App. 39 (text number 597).

This message was received from someone named Tab whose number was 843.276.0383. Therefore, there was evidence that the person who sent this message to the victim potentially had knowledge of someone who had a motive to shoot the victim. Plea counsel was asked if he was able to follow-up on the text messages that were found. Plea counsel testified that

> A lot of times what you'll do is there were search engines and things that you can – that you can check them. Think I did go through the numbers and try to find if they were registered to anybody anymore... a lot of these numbers were temporary or weren't, you know, weren't attributed to anybody.

App. 119, l. 24-25, 120 l. 1-6.

Plea counsel testified that the numbers may not be attributed to anyone, but the number listed within Exhibit 2 of Applicants Amended PCR Application reflects that there was a name to go along with the number. The name was "tab". App. 39 (text number 597). It is Petitioner's position that this information provides a defense that Petitioner was not aware of and if the Petitioner was made aware of this evidence, he would not have pled guilty. The Petitioner's plea cannot be considered knowing and voluntary based on his lack of knowledge of the material evidence that was in his attorney's possession and in the prosecutor's possession. Gibson vs. State 334 S.C. 523

Furthermore, the Petitioner was not made aware of the progress the hired investigators made throughout the course of their investigations. See App. 40-44. This information was within plea counsel's file. Within the file there was information that reflected investigator's stopped pursuing leads due to lack of funds. Pictures of the crime scene that were not taken due to lack of funds. An alibi witness that was not contacted due to the investigator not being on the clock. Petitioner was unaware of all of this prior to his plea. App. 40-44.

Plea counsel testified that:

> ... every time we got someone, Lee (private investigator) would try and talk to them, and she either couldn't find them or they would say, no, I don't know anything about this; I can't help you. And that was sort of inconsistent.

App. 71 l. 10-14.

Although plea counsel explained what went on to the best of his memory, the issue is that the Petitioner was unaware of the private investigators results and that some of the investigations stopped due to lack of funds or being unable to find someone. Petitioners plea cannot be considered knowing and voluntary based on his lack of knowledge of the material evidence that was in his attorney's possession and in the prosecutor's possession. Gibson vs. State 334 S.C. 523

Finally, Petitioner alleges that plea counsel pressured and scared Petitioner's mother to have her convince her son, the Petitioner, to plead guilty on March 20, 2017. This is despite Petitioner's desire to go to trial up until that point. The Petitioner had always maintained his innocence, including at the plea hearing where he pled guilty under Alford. Petitioner's mother, Grace Mitchell, testified at the hearing and stated:

> Q- So after speaking with his attorney, Mr. Bailey, you felt scared or threatened –
>
> A- Yes. And I begged him to take the plea because I told him, I said, well, you take the plea. When you get out, there won't even be (indiscernible) year, because I was afraid he was going to get the 30 years, because I felt like Mr. Bailey was trying to put this case together within a week.
>
> Q- Do you feel that he would have pled guilty if you did not –
>
> A- No, no.
>
> Q- Do you think that (indiscernible)? I mean, you speaking with him, is that why he pled guilty?
>
> A- Because I begged him – I cried, and I begged him to take the plea because I was afraid for his life.

App. 88, l. 1-16.

When asked if the Petitioner was adamant about going to trial, Plea counsel testified:

> Yeah, from most of my representation of him, he was adamant about it, and I didn't expect it to be a plea...

App. 122, l. 17-18.

Therefore, Petitioner's plea was not entered into voluntarily due to the pressure plea counsel placed on Petitioner's mother to convince Petitioner to plead guilty out of fear of losing her son for thirty years.

By order filed April 8, 2020, the PCR judge denied Petitioner relief. The judge found that Petitioner did not establish any constitutional violations or deprivations which would require this Court to grant relief. The Petitioner's application for post-conviction relief must be denied and dismissed with prejudice. App. 168-169.

Because Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made since plea counsel failed to adequately communicate with and advise Petitioner of the state's evidence against him this petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made when plea counsel, failed to adequately communicate with and advise Petitioner of the state's evidence against him. Petitioner's guilty plea was not knowing, intelligently, and voluntarily made when plea counsel pressured and scared Petitioner's mother into having her convince her son, the Petitioner, to plead guilty despite the fact that he wanted his case to go to trial. Petitioner's guilty plea was not knowingly, intelligently made when plea counsel failed to object to or challenge the process by which Petitioner was identified and subsequently arrested.

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made since plea counsel failed to adequately advise Petitioner of the state's evidence against him. This is significant because Petitioners plea cannot be considered knowing and voluntary based on his lack of knowledge of the material evidence that was in his attorney's possession and in the prosecutor's possession. Gibson vs. State 334 S.C. 523. Petitioner was prejudiced by this.

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-prong 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 if a reasonable probability that, but for counsel's errors, he would 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 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 advise 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, 485-486 (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 defeat." 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 pled guilty because he was unaware of additional evidence that

he was not made aware of until after his conviction. The evidence that the Petitioner did not have access to was material to his case and Petitioner should have been made aware of this evidence. Moreover, plea counsel made Petitioner's mother feel as though he was not prepared for the Petitioner's trial and that Petitioner would likely be convicted and go to prison for thirty (30) years. At the PCR hearing the Petitioner's mother testified:

> Q You heard him testify that he was forced into pleading guilty based off of conversations with you and his attorney; is that correct?
>
> A Yes, Sir.
>
> Q Any why is that?
>
> A Like I said earlier, I'm not sure if I called Mr. Bailey or Mr. Bailey called me. All I know, we were in a conversation about Venable case, and he did ask me to come to Columbia to talk with Venable to take the plea. He also told me that he felt as though Venable probably didn't have a chance because, with the victim walked in, the jury will look at the victim. App. Transcript Pg 26 lines 8-21
>
> Q Okay. And so getting back to the day before day in court, was it your understanding the week before the guilty plea that your son was going to go to trial?
>
> A Well, before I – before I came here – no, that was the day I came for him to ask him to please take the plea. I sat and I talked with Mr. – Mr. Bailey for quite some time, and my belief and how I felt about our conversation was he wasn't in favor of my son because it was all about the victim. Because, like, I went to the bond hearing twice; the victim changed his story. I mentioned that to Mr. Bailey. But he still made me feel on the inside Venable didn't have a chance.

App. 86, l. 8-25. 87, l. 1-25.

Finally, Petitioner's case was prejudiced by the process the investigators used to identify him. Plea counsel testified himself that "the (victim) could have been susceptible to coaching..." App. 134, l. 16-17. Again, Petitioner believes the evidence the police used to arrest him was insufficient probable cause and therefore his arrest was unconstitutional.

Plea counsel failed to ensure Petitioner was fully aware of the State's case against him, pressured Petitioner's mother into convincing Petitioner to plead guilty and failed to object to or

challenge the process in which the Petitioner was identified. Consequently, Petitioner did not and could not 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.

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 order full briefing on the issue presented. Petitioner ultimately requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully Submitted,

Jason G. Soper
ATTORNEY FOR PETITIONER

This 11th day of November 2020.