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**Nov 17 2020**

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County

Edward W. Miller, Circuit Court Judge

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LARRY COLEMAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000787

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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Joanna K. Delany  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

**INDEX**

INDEX ..... i

ISSUE PRESENTED .....1

STATEMENT.....2

ARGUMENT

The PCR court erred where it found counsel provided effective representation despite Petitioner’s testimony that counsel advised Petitioner he only faced ten years if he accepted the State’s plea offer, where the State instead recommended a range of thirteen to eighteen years, since counsel’s deficient performance resulted in pleas that were not knowingly, voluntarily, and intelligently entered.....6

CONCLUSION.....8

PETITION TO BE RELIEVED AS COUNSEL .....9

## **ISSUE PRESENTED**

Whether the PCR court erred where it found counsel provided effective representation despite Petitioner's testimony that counsel advised Petitioner he only faced ten years if he accepted the State's plea offer, where the State instead recommended a range of thirteen to eighteen years, since counsel's deficient performance resulted in pleas that were not knowingly, voluntarily, and intelligently entered?

## STATEMENT

During the October term of 2015, a South Carolina State Grand Jury indicted Petitioner for: 1) trafficking methamphetamine, 400 grams or more (conspiracy); 2) trafficking cocaine, 400 grams or more (conspiracy); 3) possession with intent to distribute methamphetamine; 4) trafficking cocaine, 28 – 100 grams; 5) possession of a firearm during the commission of a violent crime; 6) possession of a stolen pistol; 7) possession of methamphetamine; and 8) trafficking methamphetamine, 400 grams or more (conspiracy). App. 294 – 317; App. 327 – 329.

On November 21, 2016, Petitioner appeared before the Honorable Perry H. Gravely in the Greenville County general sessions court for a guilty plea hearing. Petitioner was represented by Elizabeth Wiygul. Joshua Underwood of the South Carolina Attorney General's Office prosecuted the case. App. 1.

The State and Petitioner had reached a plea agreement in which the State agreed to recommend a sentencing range of thirteen to eighteen years' imprisonment in exchange for Petitioner's guilty pleas to partially reduced charges: 1) trafficking methamphetamine, 28 – 100 grams (conspiracy); 2) trafficking cocaine, 28 – 100 grams (conspiracy); 3) possession with intent to distribute methamphetamine; 4) trafficking cocaine, 28 – 100 grams; 5) possession of a firearm during the commission of a violent crime; 6) possession of a stolen pistol; 7) possession of methamphetamine; and 8) trafficking methamphetamine, 28 – 100 grams (conspiracy).<sup>1</sup> App. 2, l. 9 – 4, l. 7.

The State did so recommend, and the court accepted Petitioner's pleas and deferred sentencing. App. 4, ll. 1-7; App. 23, l. 16 – 25, l. 2. On August 25, 2017, the parties reconvened

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<sup>1</sup> At the same plea hearing, Petitioner pleaded guilty to a number of additional charges, for which he was prosecuted by Howard Steinberg of the Thirteenth Circuit Solicitor's Office and upon which he was represented by Chase Harbin. App. 1; App. 4, l. 8 – 5, l. 10. Those charges are not the subject of this petition.

for sentencing before Judge Gravely. App. 27. Petitioner was sentenced to serve concurrent terms of imprisonment of: 1) seventeen years for trafficking methamphetamine, 28 – 100 grams (conspiracy); 2) seventeen years for trafficking cocaine, 28 – 100 grams (conspiracy); 3) fifteen years for possession with intent to distribute methamphetamine; 4) seventeen years for trafficking cocaine, 28 – 100 grams; 5) five years for possession of a firearm during the commission of a violent crime; 6) five years for possession of a stolen pistol; 7) three years for possession of methamphetamine; and 8) seventeen years for trafficking methamphetamine, 28 – 100 grams (conspiracy). Petitioner was given credit for forty-five days of house arrest. App. 46, ll. 4-24; App. 47, l. 21 – 48, l. 1; App. 345 – 352.

On March 9, 2018, Petitioner filed an application for post-conviction relief (PCR). App. 50 – 57. The State filed a return and partial motion to dismiss, arguing that per Petitioner’s plea agreement,<sup>2</sup> he waived his rights to collaterally attack his conviction, except as to counsel’s advice on whether to accept the plea agreement.<sup>3</sup> App. 58 – 65. On November 7, 2018, the motions court, Honorable Alex Kinlaw, Jr., issued an order denying respondent’s partial motion to dismiss and setting the matter for a full evidentiary hearing. App. 66 – 73. Judge Kinlaw reasoned that Petitioner was entitled to a full PCR hearing per *Spoone v. State*, 379 S.C. 138, 143-44, 665 S.E.2d 605, 608 (2008), since the plea judge did not question Petitioner about a

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<sup>2</sup> The plea agreement would later be entered at the PCR hearing as Defendant’s Exhibit #6. When exhibits were requested from the Greenville County Clerk of Court’s Office as part of this appeal, the Clerk’s Office was in possession of only an incomplete copy of the plea agreement although it appeared a full copy of the plea agreement was before the PCR court. Undersigned counsel spoke with PCR counsel Susannah Ross and Assistant Attorney General Lindsey McAllister about the matter and obtained a complete copy of the plea agreement. Petitioner and the State agree the full plea agreement was before the PCR court. Defendant’s Exhibit #6, the full plea agreement, comprises pages 265 – 273 of the Appendix.

<sup>3</sup> It appears a hearing was held on the State’s partial motion to dismiss on October 26, 2018 before the Honorable Alex Kinlaw, Jr. App. 274. However, a transcript of this hearing was not before the PCR court and therefore is not part of the Appendix.

waiver of his PCR rights during the plea hearing. App. 72. On February 12, 2019, Petitioner filed a supplemental PCR application. App. 74 – 75. The State filed an amended return, partial motion to dismiss, and motion for a more definite statement. App. 76 – 90.

On October 22, 2019, an evidentiary hearing was held before the Honorable Edward W. Miller. Susannah Ross represented Petitioner. Lindsey McAllister represented the State. App. 91. At the PCR hearing, Petitioner testified that based on his discussions with counsel, he believed he “was going to get ten years.” App. 103, l. 24 – 104, l. 1. Petitioner explained that counsel advised him that if he accepted the plea offer, he would be sentenced to “[n]o more than ten years,” or ten to twelve years with credit for three years of house arrest. App. 115, l. 24 – 116, l. 20. Petitioner said that had he known his actual sentence exposure under the terms of the plea agreement, he would have exercised his rights to trial. App. 116, ll. 9-25.

In contrast, counsel claimed that she advised Petitioner to plead guilty because “he did not want to go to trial.” App. 131, ll. 14-21. Counsel alleged that Petitioner decided to plead guilty after he reviewed the discovery in his case. Counsel also claimed that Petitioner knew the sentencing range under the plea agreement was thirteen to eighteen years, and she claimed that she never promised Petitioner less than that. App. 135, l. 24 – 136, l. 15.

On May 6, 2020, the PCR court issued an order of dismissal in which addressed, *inter alia*, Petitioner’s claim that his guilty pleas were “involuntary” because he “did not understand the plea agreement he was entering into, specifically as to sentence.” App. 274; App. 287. The order of dismissal stated, “Based on the combined record of the plea transcript, plea agreement, and testimony at the evidentiary hearing, this [c]ourt finds any allegation [Petitioner] entered his guilty plea unknowingly or involuntarily to be without merit . . .” App. 287. The PCR court found counsel’s testimony to be credible that Petitioner understood the sentencing range

recommended by the State and found counsel’s testimony to be credible that Petitioner accepted the plea offer after reviewing discovery.<sup>4</sup> App. 289.

This petition for writ of certiorari follows.

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<sup>4</sup> The PCR court also found Petitioner’s “testimony he did not understand the agreement and believed he would receive a sentence in the range of ten-to-twelve years, based on representations from [c]ounsel, to be not credible.” App. 288 – 289.

## ARGUMENT

The PCR court erred where it found counsel provided effective representation despite Petitioner’s testimony that counsel advised Petitioner he only faced ten years if he accepted the State’s plea offer, where the State instead recommended a range of thirteen to eighteen years, since counsel’s deficient performance resulted in pleas that were not knowingly, voluntarily, and intelligently entered.

Petitioner explained that counsel erroneously advised Petitioner he would receive only a ten-year sentence if he accepted the State’s plea offer. This was deficient performance, since the State was actually recommending a range of thirteen to eighteen years.

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, 686 (1984). 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).

“In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel’s deficient performance prejudiced the applicant’s case.” *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (citing *Strickland*, 466 U.S. at 687). “[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.” *Hill*, 474 U.S. at 58.

Before a guilty plea may be accepted, it is required “that the defendant understand the nature and crucial elements of the charges, **the consequences of the plea**, and the constitutional

rights he is waiving, and that the record reflect a factual basis for the plea.” *Rollison v. State*, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001) (emphasis added). Here, counsel’s performance was deficient, since her advice left Petitioner misinformed about the consequences of his plea—the amount of time recommended by the State, and, thus, the amount of time to which he would likely be sentenced.

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); *Custodio v. State*, 373 S.C. 4, 12, 644 S.E.2d 36, 40 (2007). “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).

Here, Petitioner established prejudice because he explained that he would have proceeded to trial had he known the consequences his pleas. Based on counsel’s erroneous advice, Petitioner mistakenly believed he faced a recommendation of only ten to twelve years. Instead, the State recommended thirteen to eighteen years, and Petitioner was sentenced on his most serious charges to seventeen years’ imprisonment.

Due to counsel’s erroneous advice, Petitioner’s pleas were not knowingly, voluntarily, and intelligently tendered, and the PCR court erred when it found Petitioner was not entitled to post-conviction relief. *Strickland*, 466 U.S. at 686; *Hill v. Lockhart*, 474 U.S. at 56.

**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 17th day of November, 2020.

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Counsel for Larry Eugene Coleman 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 Edward W. Miller, which was held on October 22, 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 Larry Eugene Coleman.

Respectfully Submitted,

*s/ Joanna K. Delany*

Joanna K. Delany  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 17th day of November, 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.”

*s/ Joanna K. Delany*

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Appellate Defender

South Carolina Commission on Indigent  
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Division of Appellate Defense  
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This 17th day of November, 2020.

ATTORNEY FOR PETITIONER