

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

Jocelyn J. Newman, Circuit Court Judge

RICHARD B. MOCK,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000916

JOHNSON PETITION FOR WRIT OF CERTIORARI

Joanna K. Delany
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South Carolina Commission on Indigent Defense
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ATTORNEY FOR PETITIONER

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Jan 13 2021

S.C. SUPREME COURT

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ISSUE PRESENTED

Whether the court erred where it denied post-conviction relief despite evidence Petitioner pleaded guilty because he believed he had “no choice” but to do so based on erroneous advice from his counsel, since Petitioner’s pleas were not knowingly, voluntarily, and intelligently tendered?

STATEMENT

During the August term of 2014, a Richland County Grand Jury indicted Richard Mock, Petitioner, for two counts of lewd act on a minor. App. 139 – 142. During the July term of 2016, a Richland County Grand Jury indicted Petitioner for five counts of sexual exploitation of a minor in the third degree. App. 143 – 152. The State alleged that Petitioner committed lewd acts against his five-year-old daughter (Minor) and possessed five explicit photographs of Minor. App. 9, l. 3 – 13, l. 11. Petitioner was charged with seven additional offenses that included criminal sexual conduct with a minor and lewd act on a minor. App. 126; App. 16, ll. 15-19.

On July 28, 2016, Petitioner appeared before the Honorable William P. Keesley for a plea hearing. Petitioner was represented by Tracy Pinnock. The State was represented by Margaret Bodman. App. 1. Pursuant to a written plea agreement,¹ Petitioner pleaded guilty to two counts of lewd act on a minor and five counts of sexual exploitation of a minor. The remaining seven charges were dismissed by *nolle prosequi* as part of the plea bargain. App. 3, l. 7 – 6, l. 9; App. 16, ll. 15-19.

In accordance with the plea negotiations, Petitioner was sentenced to a total of forty years in prison: consecutive fifteen year terms for two counts of lewd act on a minor; a consecutive ten year term for one count of third-degree sexual exploitation of a minor; and concurrent ten year terms for the remaining four counts of third-degree sexual exploitation of a minor. App. 36, l. 22 – 38, l. 24; App. 153 – 159.

No direct appeal was taken, and on December 8, 2016, Petitioner filed an application for post-conviction relief (PCR). App. 41 – 47. Petitioner filed an amended application on March 16, 2017. App. 48 – 50. On August 9, 2017, the State made its return. App. 51 – 57. On December 4,

¹ The written plea agreement is located at pages 126 – 129 of the Appendix.

2018, a hearing was held on the matter before the Honorable Jocelyn J. Newman. Jonathan Waller represented Petitioner. Lindsey McAllister represented the State. App. 58.

Petitioner explained that he wanted to go to trial, but he pleaded guilty because his trial was scheduled to begin shortly and he “was terrified” because his counsel was unprepared. App. 76, ll. 2-15; App. 86, l. 5 – 87, l. 6. Moreover, Petitioner was not advised about how a trial worked. App. 78, ll. 12-17. Additionally, Petitioner explained counsel erroneously advised him that Minor, his accuser, would not have to testify at trial. App. 79, ll. 3-25.

Petitioner said counsel told him that he had no choice but to plead guilty—if he did not accept the plea offer, then he would be imprisoned for life. “The conversation was that if I didn’t do this that I was gonna get life . . . I was told I really had no other choice or option.” App. 76, ll. 7-11. Petitioner also explained that counsel directed him to answer “yes” to the judge’s questions during the plea colloquy. App. 85, ll. 5-6.

Counsel testified and claimed that Petitioner did not want a trial, but she was prepared for trial regardless. App. 96, ll. 14-15; App. 98, ll. 18-22. According to counsel, Petitioner wanted to accept the plea offer. App. 101, ll. 14-19. Counsel claimed she did not direct Petitioner how to respond to the court’s questions during the colloquy. App. 103, ll. 7-17. Counsel did not dispute (in fact, she did not even address) the allegation that she told Petitioner his accuser would not have to testify.

On June 5, 2020, the PCR court issued an order of dismissal in which it addressed Petitioner’s allegation that his guilty pleas were not knowingly, intelligently, and voluntarily entered. App. 130; App. 133. The order stated, “based on the record and the credible testimony offered by [p]lea [c]ounsel, the [c]ourt finds that Applicant had a full understanding of both the charges against him and the consequences of his plea.” App. 135. “To the extent that [p]lea

[c]ounsel may have overlooked some detail, the plea court completely and thoroughly reviewed all aspects of the plea with Applicant.” App. 135. The PCR court also found that counsel thoroughly investigated and prepared for trial,” and “Applicant understood the adversities and options he faced and made an informed, voluntary decision to plead guilty.” App. 136.

The order of dismissal also stated, “while Applicant relies on the alleged threat of a life sentence if he didn’t plead guilty, the [c]ourt finds no credible evidence that that conversation occurred.” App. 136. The order concluded there was “a complete lack of evidence as to any prejudice suffered by Applicant as a result of the actions of [p]lea [c]ounsel.” App. 136.

This petition for writ of certiorari follows.

ARGUMENT

The court erred where it denied post-conviction relief despite evidence Petitioner pleaded guilty because he believed he had “no choice” but to do so based on erroneous advice from his counsel, since Petitioner’s pleas were not knowingly, voluntarily, and intelligently tendered.

Counsel’s erroneous advice to Petitioner—that he had no choice but to plead guilty and that his accuser would not have to testify at a trial—caused Petitioner to enter pleas that were not knowingly, voluntarily, and intelligently made. As Petitioner explained, counsel told him that he had no real choice but to plead guilty. App. 76, ll. 7-11. Petitioner also explained that counsel advised him his accuser would not have to testify at trial. App. 79, ll. 3-25. This was ineffective assistance of counsel.

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.

Here, counsel’s deficient performance left Petitioner with the incorrect understanding that Minor, his accuser, could not be required to testify. This was erroneous advice, since Petitioner had a constitutionally protected right to confront his accuser. “The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution ‘to be confronted with the witnesses against him.’” *Davis v. Alaska*, 415 U.S. 308, 315 (1974); U.S. CONST. amend. VI. “[T]he Sixth Amendment’s right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment.” *Pointer v. Texas*, 380 U.S. 400, 403 (1965). *See also Crawford v. Washington*, 541 U.S. 36, 61 (2004) (Sixth Amendment demands that evidence’s “reliability be assessed in a particular manner: by testing in the crucible of cross-examination”); *California v. Green*, 399 U.S. 149, 179 (1970) (Harlan, J., concurring) (“Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses”).

Counsel’s erroneous advice also left Petitioner with the incorrect understanding that he had no real choice but to plead guilty, when, in fact, he had the right to proceed to trial. “In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . .” U.S. CONST. amend. VI. In *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020), the United States Supreme Court recognized, “This Court has long explained that the Sixth Amendment right to a jury trial is ‘fundamental to the American scheme of justice’ and incorporated against the States under the Fourteenth Amendment.” (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)). “The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.” *Duncan*, 391 U.S. at 155. *See also Hurst v. Florida*, 577 U.S. 92, 97 (2016) (Sixth Amendment right to a jury

trial, “in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt”).

Counsel’s deficient performance left Petitioner without a full understanding of the constitutional rights he was waiving (his rights to trial and to confrontation) and resulted in pleas that were not intelligently, knowingly, and voluntarily tendered. *See Rollison v. State*, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001) (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”).

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).

Here, Petitioner explained that he wanted a trial. It was only due to counsel’s ineffective assistance that he did not exercise his right to a trial. App. 86, l. 5 – 87, l. 6. Petitioner has demonstrated deficiency and prejudice under *Strickland*, and this Court should grant certiorari. *Strickland*, 466 U.S. at 687.

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 13th day of January, 2021.

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Counsel for Richard B. Mock 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 Jocelyn J. Newman, which was held on December 4, 2018, 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 Richard B. Mock.

Respectfully Submitted,

s/ Joanna K. Delany

Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 13th day of January, 2021.

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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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