THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

The Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2020-000654

State of South Carolina……Respondent,

v.

Fonnelze T. Delane……Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether trial counsel rendered ineffective assistance of counsel by advising Petitioner to plead guilty to accessory before the fact of murder when Petitioner wanted to exercise his right to a jury trial?

II. Whether trial counsel rendered ineffective assistance of counsel by failing to have its mitigation consultant present during Petitioner's sentencing and failing to introduce any exhibits during the sentencing proceeding.

STATEMENT OF THE CASE

Petitioner was indicted by the Florence County grand jury in July 2012 for two counts of murder, two counts of accessory before the fact to murder, two counts of solicitation to commit murder, and one count of conspiracy. *State of South Carolina v. Fonnelze T. Delane*, 2012-GS-21-0897.

The State served Petitioner and his attorneys with a notice of intent to seek the death penalty on March 5, 2010. On October 8, 2013, after qualifying the jury, the State withdrew the death notice. Petitioner then pleaded guilty to two counts of accessory before the fact to murder and two counts of distribution of cocaine base without any sentencing recommendation. The State dismissed the remaining charges. Petitioner was then sentenced to concurrent terms of life without the possibility of parole for each count of accessory before the fact to murder and 30 years for each count of distribution of cocaine base. Petitioner did not appeal his conviction or sentence.

Petitioner then filed an application for post-conviction relief on February 10, 2014. The State filed its return on June 30l 2014. An evidentiary hearing was held on January 30, 2018 before the Honorable Michael G. Nettles. Petitioner was represented by Justin Kata, Esquire. On October 4, 2018, Judge Nettles denied post-conviction relief. Petitioner did not appeal his application for post-conviction relief.

Petitioner then filed an application for post-conviction relief on February 8, 2019 asking for belated review of the order of dismissal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). An evidentiary hearing was held on December

19l 2019 before the Honorable D. Craig Brown. Judge Brown, with consent of the Attorney General's Office, granted the application on April 1, 2020.

Petitioner now submits this belated petition for a writ of certiorari for the Court's consideration.

ARGUMENTS

I. Trial counsel rendered ineffective assistance of counsel and improperly coerced Petitioner into pleading guilty by advising Petitioner to plead guilty to accessory before the fact of murder when Petitioner wanted to exercise his right to a jury trial.

Petitioner was initially indicted on four counts of distribution of cocaine base, 2009-GS-21-0106 and 2009-GS-21-0707 when he was additionally indicted for his alleged involvement in the deaths of two confidential informants who were related to the drug charges. The State served Petitioner and his attorneys with its notice to seek the death penalty. Petitioner was appointed counsel for his case—W. James Hoffmeyer and Paul Cannarella. As aggravating factors, the State alleged that the murders were committed by another person as Petitioner's agent or employee, the murders were of two people pursuant to one scheme or course of conduct, and the witnesses were killed for the purpose of impeding or deterring the prosecution of a crime.

At Petitioner's plea hearing, Solicitor Clement detailed what he believed the facts of the case to be. He informed the court that Petitioner had been caught on audio and video engaging in a controlled sell of crack cocaine. According to the solicitor, the state believed that Petitioner saw something in the video that was provided to defense counsel as a part of the discovery that led him to identify the confidential informant who made the undercover buy. Tr. 66-67. Petitioner then allegedly said something to his then-girlfriend that led her to believe Petitioner intended to harm the CI and his girlfriend. Tr. 67. Petitioner's then-girlfriend

reached out and told an investigator with the narcotics unit about her concerns. Tr. 68. Soon after her contact with the investigator, the CI and his girlfriend were found dead. Tr. 68.

Law enforcement launched its investigation and reviewed phone records. Eventually the investigation led to the identification of Montez Barker and Laross Graham as participants in the killing of the confidential informant and girlfriend. Graham initially was tasked to kill the CI but he did not want to do it. Instead, he enlisted Barker, who had just been released from prison. Tr. 68-69. Barker wore a leg monitor as part of his conditions of release so he was easily tracked by law enforcement and placed at the scene of the killing and the destruction of one of the victim's cars. Graham ultimately cooperated with law enforcement in its case against Petitioner.

During Petitioner's guilty plea, Solicitor Clement also indicated to the court that the case raised a significant legal issue since the State was pursuing the death penalty against a defendant who was not physically present when the victims were killed. Tr. 71.

During the plea colloquy, plea counsel informed the court that, although Petitioner agreed that he met the elements of the crime, he disagreed with parts of the Solicitor's presentation. Tr. 73. The judge accepted the plea. Tr. 75.

At the PCR hearing, Petitioner testified to the enormous pressure he felt to plead guilty to the crime. He explained that his lawyer appeared angry that he wanted to exercise his right to a jury trial:

> So then when I called him that night later on to discuss with him after I talked with my father that me taking a plea is something that I did not want to do, it seemed like he was upset, like he was angry and he—and I'm sure the phone conversation was recorded by the jail and he said that, like, I was disturbing him, but he gave me the number to call him. It was like, basically, he was angry that I—that I didn't want to plea at that time.

PCR Tran. p. 37, ll. 14-21.

On cross-examination by the Attorney General's Office, Petitioner reiterated that he had intended to exercise his right to a trial. Tr. 40. He explained that he did not feel like he had any choice:

> A: I felt like I had no other choice. I didn't have any money at the time. I didn't felt—I felt if I approach the judge and tell him that I needed new attorneys that it might not happen because I didn't have the funds and we were so tight on schedule. I was scheduled to go to trial. So I felt like I had no other choice.

Tr. 43, l. 24- 44, l. 4.

Petitioner's guilty plea was involuntary because plea counsel pressured Petitioner to take a guilty plea when he wanted to exercise his right to a trial.

In a PCR proceeding, the burden is on the applicant to prove the allegations in his application. *Bell v. State*, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRCP. If there is any probative evidence to support the finding of the PCR judge, those findings must be upheld. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Likewise, a PCR judge's findings should not be upheld if there is no probative evidence to support them. *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996).

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) the deficient performance prejudiced the applicant's case. *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant who pleads guilty on advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases and there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. *Rayford v. State*, 314 S.C. 46, 443 S.E.2d 805 (1994). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997).

Plea counsel's actions in pressuring Petitioner to plead guilty to these crimes rendered his performance ineffective and resulted in Petitioner's entering an involuntary guilty plea. *Boykin v. Alabama*, 395 U.S. 238 (1969). Petitioner had long insisted that he wanted a trial. It was only when the State eventually extended a plea offer that plea counsel engaged in a pressure campaign to have Petitioner plead guilty. Plea counsel's performance was ineffective, and Petitioner is entitled to a trial. Respectfully, this Court should grant Petitioner certiorari on this claim.

II. Trial counsel rendered ineffective assistance of counsel by failing to have its mitigation consultant present during Petitioner's sentencing and failing to introduce any exhibits during the sentencing proceeding.

Plea counsel rendered ineffective assistance of counsel by failing to call or present any evidence or witnesses at Petitioner's sentencing hearing. Simply because Petitioner no longer was facing the death penalty, counsel still had an affirmative obligation to mitigate Petitioner's legal exposure.

Counsel testified at the PCR hearing that he received funding for, and used the services of a mitigation expert. She was present at the trial when the defense team began picking a jury. As a critical part of the defense team, she would have been present for the entirety of the trial and sentencing. At the PCR hearing, Hoffmeyer testified that their mitigation expert interviewed Petitioner, his family, and reviewed school records. Hoffmeyer testified he was in constant contact with her in person and by phone and that they met approximately 8 to 10 times. Surely Petitioner's mitigation expert would have been available to either testify on his behalf, or advise trial counsel as which potential witnesses to call on Petitioner's behalf.

Hoffmeyer testified that after Petitioner's guilty plea, he did not recall if he contacted any of Petitioner's family to testify on his behalf at sentencing. Hoffmeyer did not dispute Petitioner's testimony at the PCR that did not meet with his attorneys, the mitigation specialist, or the jury consultant between the time of his guilty plea and the sentencing hearing.

In assessing Petitioner's claim, the PCR court found:

> This Court has…reviewed the transcript and finds no issues with Hoffmeyer's presentation of mitigation. Hoffmeyer credibly testified he was in constant contact with the mitigation specialist throughout his preparation of the case, and even Applicant agreed she did extensive work on the case. Hoffmeyer had the benefit of her report during sentencing, and he credibly testified that although the consultant concluded Applicant did not have a great home life growing up, there was nothing in his background to explain the severity of the criminal behavior in this case. Therefore, this Court finds his decision not to call her to testify was reasonable as he was unable to offer anything of value in mitigation. This Court also finds Hoffmeyer also credibly explained the mitigation expert would have been present for sentencing had Applicant continued with trial. Finally, despite Hoffmeyer's testimony as to Applicant's family's lack of involvement in the case, the record reflects Applicant's mother and sister were in fact present for sentencing, and Applicant's mother spoke to the court on his behalf.

Order of Dismissal, p. 10.

The PCR court's order commits a legal error, and this Court should grant Petitioner's petition for a writ of certiorari. In a PCR proceeding, the burden is on the applicant to prove the allegations in his application. *Bell v. State*, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRCP. If there is any probative evidence to support the finding of the PCR judge, those findings must be upheld. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). Likewise, a PCR judge's findings should not be upheld if there is no probative evidence to support them. *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996).

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character of a plea by showing that counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases and there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. *Rayford v. State*, 314 S.C. 46, 443 S.E.2d 805 (1994). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest of case.'" *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (quoting *Strickland*, 466 U.S. at 693).

The PCR court erred because it essentially held that counsel did not have a duty to attempt to mitigate Petitioner's sentence from life to a term of years. Simply because the State withdrew its notice of death did not mean that counsel was then free to ignore his duty to mitigate Petitioner's sentence. Given that counsel had worked for months with a mitigation expert, it makes no sense that he would not have called either her or additional witnesses to try and place this case in context for the court in an effort to have the court sentence Petitioner to a term of years. The same sentencing principles often apply to inmates who are facing natural life sentences as death sentences. *See Haliym v. Mitchell*, 492 F.3d 680, 716 (6th Cir. 2007) (finding that the defendant "had everything to gain and nothing to lose" by introducing certain mitigating evidence during the penalty phase and there was "no

rational trial strategy that would justify the failure of [] counsel to investigate and present [such] evidence" (citations and quotations omitted)). Trial counsel's failure to offer any significant mitigation evidence during Petitioner's sentencing proceeding constituted ineffective assistance of counsel. This Court should grant Petitioner's petition for writ of certiorari and remand for a new sentencing proceeding.

CONCLUSION

This Court should grant the writ.

Respectfully submitted,

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