

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Anderson County

Honorable Letitia H. Verdin, Circuit Court Judge

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RANDALL M. SIMPSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2021-000350

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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### **ISSUE PRESENTED**

Did the PCR court err in ruling petitioner was not ineffectively represented where counsel failed to move for a continuance prior to trial where it was undisputed the defense was not timely receiving discovery, and where petitioner had moved to relieve counsel for lack of diligence since these deficiencies resulted in the judge ruling that petitioner's trial was starting that day regardless of whether petitioner had counsel, and petitioner's guilty plea under these circumstances was not knowingly and voluntarily tendered?

## STATEMENT

Petitioner was indicted at the February 21, 2017, term of the Anderson County grand jury for the murder of Justin Ray Williams, and the murder of his accomplice Casey Allen Waddell who was shot and killed by the victim, Justin Williams, during the robbery. He was also indicted for attempted armed robbery and possession of a weapon during the commission of a violent crime. App. 103-108. Petitioner was appointed attorney Gregory Cole from the Rule 608 list in Anderson County.

Petitioner later testified at the PCR hearing that he was in jail seventeen to eighteen months, and he was never able to post bond. He only saw Counsel Cole two or three times before his trial date. App. 49, ll. 4-24.

It was undisputed that the state's discovery did not arrive to Defense Counsel Cole in a timely fashion. App. 62, ll. 3-19; app. 73, l. 16 – 76, l. 24. Petitioner never received any discovery until just before his trial. App. 50, l. 4 – 51, l. 14. Petitioner was frustrated with Cole being his lawyer, and when Cole finally came to see him, "I told him I was trying to get a paid lawyer [Scott Robinson], but the paid lawyer never went through. So I just put in a motion to relieve my counsel." App. 51, ll. 15-20.

In his *pro se* motion to dismiss counsel filed on May 2, 2017, petitioner wrote: "I would like to dismiss my counsel Gregory Lee Cole, Jr., Esq. [be]cause [in] the sixteen months I have been here I have only seen my lawyer twice. I received my motion of discovery two months after my lawyer received it. I have asked for legal mail I have never received. He does not reply to my mail. I feel my counsel does not have my best interest[s] in mind." App. 55, ll. 13-19.

Petitioner also told the PCR judge that he sent letters to Cole about his case, and he never received a response. When the trial judge told petitioner that he was going to trial that day with

or without a lawyer, petitioner related that he was not prepared to go to trial, and he was forced to plead guilty because “I felt like I had no other choice.” App. 53, l. 22 – 56, l.13.

Defense Counsel Cole admitted at PCR that there were problems with receiving discovery from the state. “[T]here was a delay from the normal practice of the solicitor’s office in getting us discovery, and we filed -- because of that [we] filed a motion for bond and a motion to dismiss on Mr. Simpson’s behalf. And then the State -- after filing that, the State did provide discovery.” Cole claimed “[t]he initial discovery provided by the State was far enough in advance of trial that I did not believe that it would be prejudicial.” App. 62, ll. 7-19.

Cole also maintained that he thoroughly discussed with petitioner the prospect or possibility of pleading guilty. “He was interested in pleading guilty, to the best of my memory, the entire time.” App. 63, ll. 12-13. Petitioner allegedly was also made aware by Cole that his co-defendants were ready to testify against him if he went to trial. App. 62, l. 3 – 64, l. 17.

In addition, Cole said he thought if petitioner went to trial and was found guilty, he would receive a sentence of life without parole. Cole thought, “[I]f we did a straight-up plea . . . we could avoid a life sentence.” App. 65, ll. 11-25.

Cole never made a formal motion for a continuance on behalf of petitioner when he learned petitioner was in the process of retaining attorney Scott Robinson and wanted him relieved regardless or because of late discovery. Instead, Cole said he only asked Judge Sprouse on the telephone if he could have a continuance. Since the continuance was discussed on the telephone, and not during a hearing, it is unclear what Cole “argued” to the judge as the grounds for the continuance. All the record reveals is that “Judge Sprouse denied that request for a continuance.” App. 67, ll. 11-22.

Cole agreed that petitioner was in no position to represent himself, he simply was not competent to represent himself, and petitioner would have needed an attorney to represent him at trial if Cole was relieved. App. 71, ll. 2-7.

The record showed that when petitioner appeared on May 15, 2017, before the Honorable R. Scott Sprouse, he was represented by counsel Cole. Lucas C. Marchant was the assistant solicitor. App. 1.

Solicitor Marchant said they were set to pick a jury at 2:30 that afternoon but that Defense Counsel Cole had a motion he wanted to make. Cole then said, “[M]y client has indicated to me that he wishes to move to relieve me as his attorney. And there was some conversation about he may have another attorney. But I don’t know what the status of that is right now. But he wants to move to relieve me. So I want to let -- I wanted to let him make his motion.” App. 3, ll. 11-19.

Petitioner then confirmed for the judge that he wished to relieve Cole. He had been in jail for seventeen months, and he had only seen Cole twice. Further, he had written Cole, and he did not get answers to his inquiries. “I found out . . . on TV that I was going to trial.” App. 4, ll. 2-14.

The judge told petitioner, “You understand your trial starts today? . . . And relieving your attorney is not grounds for a continuance of your trial. . . . I’m not going to put your case off because you want to fire your attorney.” App. 4, l. 6 – 5, l. 2. The judge then allowed Defense Counsel Cole and petitioner to converse.

When they went back on the record after a break, the solicitor announced that petitioner was entering a guilty plea to the charges of murder and to voluntary manslaughter for the second

count of murder, attempted armed robbery, and possession of a weapon during a violent crime. App. 5, l. 16 – 6, l. 3.

The solicitor informed the judge that the crime occurred a little after midnight and that “the victim, Justin Ray Williams, was set up [by a woman co-defendant] to be the victim of an armed robbery.” Another co-defendant, Casey Waddell, was going to Williams’ trailer to rob him of drugs and money. Co-defendant Waddell “had a bandanna around his face, and was armed with an AK-47. Waddell made entry into the camper, demanded something to the effect of, You know what time it is. Give it up.” Justin Williams, the owner of the trailer, was able to shoot and kill Waddell on the spot. App. 12, l. 11 – 13, l. 2. Then, the state contended, “Randy Simpson unloaded four to five shots into Mr. Williams. And those were the fatal shots coming from a 40-caliber that caused his life to end.” App. 13, l. 23 – 14, l. 14.

The solicitor told the judge that the three living, remaining co-defendants had each pled guilty to two counts of voluntary manslaughter and one count of armed robbery. Sentencing was deferred until after petitioner’s case. They were prepared to testify against petitioner if he exercised his right to trial. App. 13, l. 23 – 14, l. 14. Petitioner agreed that the solicitor’s recitation of the facts was accurate. App. 15, ll. 17-19.

Judge Sprouse sentenced petitioner to thirty years’ imprisonment for murder, twenty years’ imprisonment for voluntary manslaughter, fifteen years’ imprisonment for armed robbery, and five years’ imprisonment for possession of a weapon during the commission of a violent crime. All of the sentences were concurrent with the exception of the twenty-year sentence for voluntary manslaughter. In sum, petitioner received a sentence of fifty years in prison. App. 22, l. 14 – 23, l. 3.

Petitioner filed an application for post-conviction relief on December 3, 2019. App. 25-31. Petitioner alleged, inter alia, that the ineffective assistance of his counsel resulted in his guilty plea not being voluntary. App. 27. To this application, the state filed a return and motion for a more definite statement dated February 26, 2020. App. 32-41.

The evidentiary hearing was convened on February 2, 2021, before the Honorable Letitia H. Verdin. Don Thompson represented petitioner, and Taylor Smith was the Assistant Attorney General. App. 43.

An Order of Dismissal was filed on March 19, 2021. App. 87-101. In this order denying petitioner relief, the court wrote:

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that he would have proceeded to trial absent some deficiency in plea counsel's performance. Applicant speculates that, had he been heard on his motion to relieve counsel earlier than May 15, Judge Sprouse may have continued the trial so that Applicant could hire another attorney or be prepared to go to trial as a pro se defendant. Applicant has not proven that his dissatisfaction with plea counsel – regardless of the apparent baselessness of that dissatisfaction – would have required Judge Sprouse to relieve plea counsel and continue the trial so that Applicant could hire another attorney. See State v. Jones, 270 S.C. 587, 588-89, 243 S.E.2d 461,462 (1978) (holding that, “at least after the trial has begun, a mere disagreement between a defendant and his counsel as to a matter of trial tactics is not sufficient cause, in itself, to require the trial court to replace or to offer to replace court appointed counsel with another attorney at that time) (citations omitted). Plea counsel credibly testified that Judge Sprouse declined to continue the trial when plea counsel requested a continuance around the same time as when Applicant filed his motion. The fact that Judge Sprouse denied plea counsel's continuance request is evidence that Judge Sprouse would not have been inclined to continue the trial even if Judge Sprouse would have been notified about Applicant's motion by plea counsel a few days earlier. As Judge Sprouse informed Applicant at the hearing on May 15, Applicant's “relieving [his] attorney [was] not grounds for a continuance of [the] trial,” and Judge Sprouse was “not going to put [his] case off because [he] want[ed] to fire” plea counsel. Plea Tran. 4-5. Applicant has not proved that Judge Sprouse's

ruling would have been any different if plea counsel notified Judge Sprouse of the motion on May 3.

This Court finds that Applicant has failed to prove that he did not knowingly and voluntarily plead guilty....

App. 99.

The PCR court also noted that petitioner told the judge during his guilty plea that he was satisfied with his attorney, and that his testimony during the PCR hearing and the guilty plea could not both have been truthful.

This petition for writ of certiorari follows.

## ARGUMENT

The PCR court erred in ruling petitioner was not ineffectively represented where counsel failed to move for a continuance prior to trial where it was undisputed the defense was not timely receiving discovery, and where petitioner had moved to relieve counsel for lack of diligence since these deficiencies resulted in the judge ruling that petitioner's trial was starting that day regardless of whether petitioner had counsel, and petitioner's guilty plea under these circumstances was not knowingly and voluntarily tendered

Defense counsel was ineffective for failing to make a formal motion for a continuance, and for failing to ensure that petitioner's motion to relieve counsel was timely heard prior to the day of trial. Counsel knew or should have known that motions to relieve counsel on the first day of trial are looked at unfavorably. The untimeliness of counsel making these formal motions, and ensuring they are heard in a timely fashion, was also unfair since this was not a case where petitioner had discharged or had two or three lawyers relieved prior to Cole.

The PCR court cited the dissent in Kolle v. State, 386 S.C. 578, 596-97, 690 S.E.2d 73, 82-83 (2010), for the proposition that an applicant's entry of a guilty plea should not be found to have been involuntary when the applicant falsely testified as to a satisfaction with his defense attorney at the guilty plea hearing.<sup>1</sup>

Three points are in order as to this part of the PCR court's ruling denying relief on this basis. First, the trial judge, soon to be the plea judge, was well aware of petitioner's dissatisfaction with his attorney. Petitioner had made a written motion to relieve counsel. App. 86.

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<sup>1</sup> Abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

Second, the judge also knew that defense counsel wanted a continuance because defense counsel had asked for a continuance over the telephone. While counsel was deficient for not making a formal motion for a continuance in court that could have been the subject to judicial review, the judge nonetheless knew that petitioner had made a motion to relieve counsel and that counsel knew the case should not go to trial in its present posture given his telephonic motion for a continuance.

Finally, the majority in Kolle v. State held that when determining guilty plea issues, it was proper to consider the guilty plea transcript, *as well as* the evidence produced at the PCR hearing. Kolle v. State, 366 S.C. 578, 589, 690 S.E.2d 73, 79 (2010), *citing* Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Similarly in Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000), this Court wrote, “[T]he 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.”

It is apparent from both the guilty plea transcript and the PCR transcript petitioner was dissatisfied with his attorney and that he had made a formal motion to relieve him. To the extent that motion to relieve counsel was heard at all, it was on the morning of trial. When Defense Counsel Cole told the judge that petitioner wanted to relieve him as counsel, the judge simply told petitioner his trial was starting that day “and relieving your attorney is not grounds for a continuance of your trial.” App. 3, l. 14 – 4, l. 20. Petitioner’s motion to relieve counsel received a hearing of barely over one transcript page. There was never a formal motion for a continuance filed or heard in this case.

As seen, it is undisputed in this record that discovery was late, and it was apparent that defense counsel was not prepared for trial, given his telephone motion for a continuance. In Hollins v. State, 422 S.C. 250, 810 S.E.2d 871 (2018), this Court held that defense counsel was not ineffective for failing to move for a continuance where it was apparent from the record that the defendant admitted he had gone over all of his discovery with trial counsel and that the defendant had told trial counsel his version of what actually occurred on the day of his arrest for the crime.

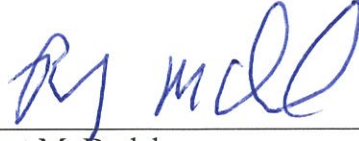
Here, conversely, petitioner had not gone over all of his discovery with trial counsel, and trial counsel failed to make a motion for a continuance or to timely request a hearing on petitioner's motion to relieve him.

Petitioner testified that he felt he had no choice other than to plead guilty, given that his trial attorney was not prepared for trial and given the judge's curtailed ruling that petitioner was going to trial that day with or without an attorney. Petitioner was facing a sentence of life without parole, and the solicitor testified he fully expected to ask for a sentence of life imprisonment without the possibility of parole if petitioner was convicted following a trial. Defense counsel also testified that a sentence of life imprisonment without parole was a very real possibility.

Defense counsel's performance was deficient in failing to assure that petitioner's motion to relieve counsel was heard prior to trial, and in failing to make a formal motion for a continuance where he was not prepared for trial, and where petitioner wanted him relieved. Petitioner suffered prejudice because he was forced to plead guilty under these circumstances. Petitioner's guilty plea did not represent a voluntary and intelligent choice given his lawyer's ineffective representation. See Hill v. Lockhart, 474 U.S. 52, 56 (1985).

**CONCLUSION**

By reason of the foregoing arguments, a writ of certiorari should be granted to allow full briefing on this issue.



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Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of September, 2021.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Sep 24 2021**

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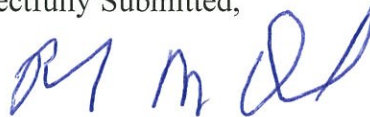
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Counsel for Randall M. Simpson states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Letitia H. Verdin, which was held on February 2, 2021, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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 him as counsel for Randall M. Simpson.

Respectfully Submitted,



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Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of September, 2021.

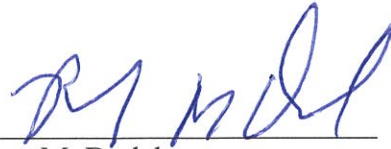
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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of his 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."



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This 24th day of September, 2021.