

IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

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Case No. 2019-CP-08-00354  
Appellate Case 2023-000072

Darius Hamilton,

Petitioner,

vs.

The State of South Carolina,

Respondent.

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**PETITION FOR WRIT OF CERTIORARI**

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**RECEIVED**

**May 09 2023**

**S.C. SUPREME COURT**

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## QUESTIONS PRESENTED

- I. Whether the PCR court erred in concluding that trial counsel was not ineffective for losing Petitioner's proffer agreement with the State?
- II. Whether the PCR court erred in concluding Petitioner's plea was voluntarily made?

## STATEMENT OF THE CASE

Petitioner was indicted for two counts of armed robbery (2017-GS-08-00807 and 2017-GS-08-00809), two counts of kidnapping (2017-GS-08-00808 and 2017-GS-08-00810), and burglary first degree (2017-GS-08-00812). He entered a guilty plea before the Honorable Deadra Jefferson on November 1, 2018 to all indicted charges. App. 1, 14. He was sentenced to fifteen years concurrent on all indictments. App. 47. Petitioner filed a timely notice of appeal on November 15, 2018. He then withdrew his appeal on December 17, 2018.

Petitioner filed a *pro se* application for post-conviction relief (PCR) April 12, 2019, and after retaining counsel, he filed an amended application for PCR through counsel. Petitioner proceeded to an evidentiary hearing before the Honorable Clifton Newman, who ultimately denied and dismissed the application with prejudice by order dated December 19, 2022. Petitioner now submits this petition for writ of certiorari for the Court's consideration.

## ARGUMENT

- I. The PCR court erred in finding that trial counsel was not ineffective by losing Petitioner's proffer agreement with the State.**

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). "The Sixth Amendment right to counsel attaches upon initiation of adversarial judicial proceedings and at all

critical stages of a criminal trial.” *State v. Sterling*, 377 S.C. 475, 479, 661 S.E.2d 99, 101 (2008). In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000).

“In the context of a challenge to a guilty plea, a PCR applicant must establish both that his plea counsel’s representation was deficient and that there is a reasonable probability that but for counsel’s deficient representation, the applicant would not have pled guilty.” *James v. State*, 377 S.C. 81, 83-84, 659 S.E.2d 148, 149 (2008). “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). The appellate court will reverse if there is no probative evidence to support the PCR court’s findings or the decision is controlled by an error of law. *Miller v. State*, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008).

Petitioner was arrested and charged in 2016. App. 98. He retained Steve Davis as his trial counsel and through trial counsel was able to make bond. App. 99. He was out on bond for two years before entering his guilty plea. App. 99-100. Petitioner testified at PCR that during those two years, he met with his trial counsel between three and five times. App. 100. Petitioner also testified they never discussed trial strategy because trial counsel wanted Petitioner to plead guilty and told him if he went to trial, he would receive a 30-year sentence. App. 101.

In November of 2016, trial counsel secured a proffer agreement for Petitioner to tell the State everything he knew about what happened and what he said would not be held against him. App. 104-105. A copy of this signed proffer agreement was entered into evidence during the PCR hearing. App. 104. Petitioner signed the agreement and met with the Solicitor’s office for a debriefing. App. 105. After the first meeting, a problem arose between Petitioner and trial counsel.

App. 106. Petitioner testified that his trial counsel told him not to mention that during the course of the robbery that Petitioner used duct tape to secure the victim's hands. App. 106. Because trial counsel told him not to tell the Solicitor that information, Petitioner did not mention it during the debriefing. App. 106. Later, his DNA was found on the duct tape. App. 107. When confronted about the DNA, his attorney told him, "Well they already got the evidence on us just go ahead and tell them." App. 107. This withholding of information caused an issue between the State and Petitioner, which Petitioner's trial counsel had to resolve for Petitioner in order to keep the proffer agreement in place.

Petitioner's co-defendants proceeded to trial. Their joint trial began and prior to the trial, Petitioner told his trial counsel that he had taken his co-defendant, Sherrod Palmer, home and he was not sure if he had previously told the Solicitor that or not. App. 107. His trial counsel responded and told him he would take care of it. App. 108. After this second issue arose, Petitioner lost his proffer agreement with the State. App. 109. Petitioner testified truthfully during his co-defendants' trial, where three were convicted and one was acquitted. App. 110. After the fourth co-defendant was acquitted, his proffer agreement was withdrawn. App. 110.

When the proffer agreement was in place, Petitioner's expectation for sentencing, based on conversations with his trial counsel, was a sentence of thirty-six months. App. 111. After the proffer agreement was withdrawn, Petitioner's expectation for sentencing, based on conversations with his trial counsel, was a sentence of ten years. App. 111. The night before Petitioner was scheduled to plea guilty, trial counsel called him and told him he was "going to argue for you and try to get fifteen years for you." App. 111.

Petitioner's mother also testified at the PCR hearing. App. 124. She testified that she went to trial counsel's office with Petitioner and met with trial counsel. App. 126. She also testified that when the proffer agreement was in place, trial counsel said Petitioner would receive a sentence of thirty-six months. App. 127. She testified as well that after the proffer agreement was withdrawn that trial counsel was going to try and get him a ten-year sentence. App. 127. She further testified that on the day Petitioner went to court, he came to his mother and father crying because Mr. Davis had him sign a plea agreement, where the plan was for Mr. Davis to argue and ask the Court for a sentence of fifteen years and that was the first time she became aware of the fifteen-year sentence. App. 127.

At the PCR hearing, trial counsel also testified. App. 131. When asked if he ever told Petitioner to withhold information from the Solicitor after he signed his proffer agreement, he testified that he did not. App. 131. However, when he continued to explain himself, he said, "And to be fully honest with you, what that colloquy is all about rapping of the arm, it was like voluntary information that is unnecessary, okay? We was early on in the process. Just like he said, the DNA on certain forensic evidence had not been performed yet, okay? Just think how horrific this sounds. Lady was shot, she was pregnant and actually the individual I'm representing is the one who actually duct tape the hands, takes the gold bracelets off her hands. To suggest all the facts at that point without confirmation or corroboration from the State or the forensic, would have been stupid on his part." App. 131. Through this explanation, it seems trial counsel did know about Petitioner's involvement in duct taping the victim's hands together and thought it would have been "stupid" on his part to "suggest all the facts at that point without confirmation or corroboration from the State or the forensic." App. 131. However, this opinion is contrary to the proffer agreement, which

was to tell the State everything Petitioner knew. That response demonstrates trial counsel believed that information should have been withheld from the Solicitor during that debriefing despite his answer to questioning that he never encouraged Petitioner to withhold any information from the Solicitor. App. 131.

This was the first instance that caused a rift between the State and Petitioner during his proffer agreement. App. 140. Trial counsel was able to smooth things over this time and the State gave Petitioner a second chance. App. 140. However, when Petitioner testified truthfully about taking his co-defendant home after the incident during his co-defendant's trial, and trial counsel had not "taken care of it" like he said he would, the State saw this as strike two against Petitioner and withdrew his proffer agreement. App. 141.

From the PCR transcript, it is clear that trial counsel did secure a proffer agreement for Petitioner, which the PCR court emphasized is very rare in State court. However, it is also clear that the withholding of information through the proffer process caused Petitioner to lose said proffer agreement and that trial counsel encouraged this withholding of information from the very beginning with the issue regarding the duct tape. That issue occurred early on and according to trial counsel he was able to smooth it over. However, when the second issue arose, he did nothing to attempt to smooth it over for Petitioner. Trial counsel's opinion regarding the duct tape was to withhold information to the Solicitor without confirmation or corroboration about that information on their part. He testified to that during the PCR hearing.

Petitioner is not a lawyer. He was an 18-year-old kid, from a well-respected family, with no criminal history at the time he became involved in this situation. He was not trained in the law. He may not have realized that it was an important piece of information that he drove one of the co-

defendants home after the robbery. That, coupled with the fact that his lawyer's opinion was to not offer any information to the Solicitor without "confirmation or corroboration," as trial counsel testified, could have led to this fact not being mentioned until just prior to trial. When Petitioner realized it may be important, he could not remember if he had previously mentioned it before or not. Naturally, he went to the person he trusted through this process, his lawyer. He told him about the oversight and trusted his lawyer when he told him that he would take care of it. Instead, his lawyer did not take care of it, and the proffer agreement was withdrawn.

Trial counsel's encouragement to withhold information from the State during the proffer process caused Petitioner to lose his proffer agreement with the State and was a deficient performance by trial counsel. This deficient performance prejudiced Petitioner by losing his proffer agreement. Without the proffer agreement, he did not have any leverage with the State to secure a better plea deal that he had been anticipating since he entered into the proffer agreement.

The PCR court ruled that Petitioner was not prejudiced because Petitioner did not want a trial and therefore Petitioner could not show that but for trial counsel's deficient performance, he would not have pleaded guilty, but rather, he would have proceeded to trial. App. 182. However, the only person who testified they did not want a trial was Petitioner's mother, and it was not her decision to make. App. 128. She testified that she did not want Petitioner to have a trial. App. 128. Petitioner did not testify that he did not want a trial. He testified that it was never mentioned by trial counsel. He testified that trial counsel told him from the very beginning that he was going to plead guilty and that he was going to get him a good deal.

At the beginning of their relationship, trial counsel seemed to be successful in that strategy. He got Petitioner out of jail and out on bond while his co-defendants remained incarcerated. He

got Petitioner a proffer agreement with the State. He was talking to Petitioner and Petitioner's mother about a sentence of around thirty-six months. Petitioner completed his end of the bargain. He met with the Solicitor's office and he testified at his co-defendants' trial. Then things quickly changed. Petitioner's proffer agreement was gone and all of a sudden, he was left with a guilty plea to all indicted offenses, facing a minimum fifteen-year sentence. At this point, it would have been extremely difficult for Petitioner to proceed to trial because he had already testified in court to his involvement in the illegal activity. Trial counsel's deficient performance essentially eliminated the option of a trial for Petitioner. Petitioner was prejudiced by trial counsel's deficient performance. Trial counsel was ineffective and the PCR court erred in ruling otherwise. Petitioner's Sixth Amendment right to counsel was violated by trial counsel's ineffective assistance.

## **II. The PCR court erred in finding that Petitioner's plea was voluntary.**

An applicant may attack the voluntary, knowing, and intelligent character of a guilty plea entered on the advice of counsel by demonstrating that counsel's representation was below an objective standard of reasonableness. *Porter v. State*, 368 S.C. 378, 383–84, 629 S.E.2d 353, 356 (2006); *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). The “prejudice,” requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). In other words, the applicant must prove prejudice by showing that, but for counsel's inadequacy, there is a reasonable probability he would not have pleaded guilty and, instead, would have insisted on going to trial. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

“[T]he voluntariness of a guilty plea is not determined by an examination of the 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 the record of the post-conviction hearing.” *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). “When determining issues relating to guilty pleas, this Court will consider the entire record, including the transcript of the guilty pleas and the evidence presented at the PCR hearing.” *Roddy v. State*, 339 S.C. at 33, 528 S.E.2d at 420 (2000).

After Petitioner’s proffer agreement was withdrawn, Petitioner had fulfilled his portion of the agreement. He participated in debriefings with the Solicitor, he testified against his co-defendants at trial, all in the hopes of securing a favorable plea deal. At the end of the co-defendants’ trial, after his full sworn testimony was taken in court, including his own involvement in illegal activities, the State withdrew his proffer agreement. App. 141. Petitioner was quickly left without the hope of a more favorable sentencing agreement and left to enter a plea to all indicted offenses, without any negotiations or recommendations by the State. All his trial counsel could do at that point was to beg the Court for the mandatory minimum sentence of fifteen years. Petitioner had no choice but to plead guilty under these much less favorable conditions than he was expecting when the proffer agreement was still in existence. This plea was not voluntarily made by Petitioner, and it came about as the result of trial counsel’s ineffective assistance of counsel when he lost Petitioner’s proffer agreement. Because of that, this plea was involuntary.

Furthermore, at the PCR hearing Petitioner testified he did not understand what he was pleading guilty to or the rights he was giving up when he pleaded guilty. App. 112-113. When looking at the plea transcript, a few things become clear. First, Petitioner was pleading guilty for the first time ever. He had no criminal history prior to this event. App. 4. He came from a good family and was not accustomed to court proceedings and unfamiliar in that atmosphere. Second, when Petitioner pleaded guilty his plea was “lined up” with three other people. *See* App. 1-54. All

of these defendants were addressed together and asked to respond to questions individually, one right after the other. *See* App. 1-54. When looking at the transcript, it's clear that Petitioner answers the exact same way these other defendants do and never deviates from what the person in front of him says. *See* App. 1-54. The other defendants were also pleading to much less serious offenses and only one of them was facing an active sentence like Petitioner.<sup>1</sup> This environment is incredibly intimidating for anyone, much less someone who is pleading guilty for the very first time to something as serious as Petitioner's charges. All questions regarding rights he was giving up, understanding what he was doing, the voluntariness of his plea, and his satisfaction with trial counsel were all asked in this format where the judge posed the question to all defendants and the defendants responded in a line after one another. *See* App. 1-54. Petitioner was third in said line, behind two defendants pleading guilty to time served and a suspended YOA. He answers in the same manner as these two defendants after every group question he is asked. This examination of the plea transcript shows context for why Petitioner may have felt uncomfortable to speak up or a pressure to conform as the other defendants in line did when they pleaded guilty to their much less serious charges, further demonstrating that his plea was not voluntarily made.

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<sup>1</sup> Of the two defendants in line before Petitioner, one defendant was pleading guilty to a recommended sentence of time served and the other to a recommended sentence of a suspended YOA. The defendant in line behind Petitioner pleaded to an active sentence but on much less serious charges and received a sentence of three years.

**CONCLUSION**

Petitioner therefore requests the Court grant the writ.

Respectfully submitted,

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