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**S.C. Supreme Court**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Jasper County

Perry M. Buckner, Circuit Court Judge

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ABRAHAM KELTY,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-001113

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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CARMEN V. GANJEHSANI  
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South Carolina Commission on Indigent Defense  
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ATTORNEY FOR PETITIONER

**INDEX**

INDEX ..... 1

ISSUE PRESENTED ..... 2

STATEMENT ..... 3

ARGUMENT ..... 6

Plea counsel provided ineffective assistance of counsel in failing to have a  
ten year plea agreement between Petitioner and the State enforced.

CONCLUSION ..... 9

PETITION TO BE RELIEVED AS COUNSEL ..... 10

**ISSUE PRESENTED**

Whether plea counsel provided ineffective assistance of counsel in failing to have a ten year plea agreement between Petitioner and the State enforced?

## STATEMENT

### **Indictment**

On July 31, 2006, Petitioner Abraham Kelty was indicted by the Jasper County Grand Jury for (1) armed robbery; (2) possession of a firearm during the commission of a violent crime; and (3) failure to stop for a blue light. App. 150-155.

### **Guilty Plea**

Petitioner initially appeared before the Honorable Carmen T. Mullen on February 12, 2007 to plead guilty to the lesser included offense of common law robbery. App. 3, ll. 4-6. Petitioner was represented by Dudley B. Ruffalo, and the State was represented by Assistant Solicitor Darrell T. Johnson, Jr. App. 1.

The State had agreed to allow Petitioner to plead to the offense of common law robbery with the dismissal of the other charges for possession of a firearm and failure to stop for a blue light, and the State had additionally agreed to a cap of ten years imprisonment. App. 5, ll. 11-21.

Judge Mullen, however, did not accept Petitioner's guilty plea when he advised her that he could not recall the incident that day because of medications he was taking on the day of the incident. App. 8, ll. 8-25.

On April 2, 2007, Petitioner appeared before the Honorable Howard P. King to be tried for the three indicted charges. App. 11. Petitioner was again represented by Mr. Ruffalo, and the State was represented by Assistant Solicitor Johnson. App. 11.

Judge King first heard two pre-trial motions, Petitioner's motion to relieve his counsel and Petitioner's motion for a mental evaluation. Judge King denied both. App. 13 - 25.

Before a jury was selected, the State informed Judge King that the only open plea offer was for Petitioner to plead guilty to armed robbery and in exchange the State would dismiss the remaining two charges of possession of a firearm and failure to stop for a blue light. App. 27, ll. 5-21.

Petitioner accepted the State's plea offer and pled guilty to the charge of armed robbery before Judge King. App. 28-45. Judge King sentenced Petitioner to fifteen years imprisonment for armed robbery. App. 45; 156.

On April 26, 2007, Petitioner again appeared before Judge King on a motion for Judge King to reconsider the sentence or allow Petitioner to withdraw his guilty plea. Judge King denied both motions. App. 47-66.

### **Direct Appeal**

Petitioner appealed his guilty plea to the South Carolina Court of Appeals and was represented by Appellate Defender LaNelle C. DuRant. The Court of Appeals affirmed his guilty plea on January 28, 2010, holding Judge King did not err by denying Petitioner's motion for a mental evaluation and then accepting his guilty plea. App. 67-68.

### **Application for PCR and Evidentiary Hearing**

On July 8, 2010, Petitioner filed his application for post-conviction relief ("PCR") arguing, among other things, that his plea counsel failed to move to enforce the ten year plea agreement with the State. App. 69-88. The State filed its Return on October 14, 2010. App. 89-94. Petitioner thereafter filed three amended PCR applications. App. 95-110.

An evidentiary hearing was held before the Honorable Perry M. Buckner on April 2, 2013. App. 115-138. Petitioner was represented by John J. Pinckney, and the State was

represented by Assistant Attorney General Ashleigh R. Wilson. App. 115. Only Petitioner's plea counsel testified at the evidentiary hearing. App. 118-136.

Petitioner asked Judge Buckner if he could speak on his own behalf at the evidentiary hearing following his plea counsel's testimony, but Judge Buckner denied Petitioner's request, stating that the record in his case was closed since Petitioner's PCR attorney had advised the court that he had no further witnesses. App. 136-137.

### **Order of Dismissal**

On April 30, 2013, Judge Buckner issued his order denying Petitioner's PCR application, ruling Petitioner's plea counsel was not ineffective for failing to move to enforce the State's ten year plea agreement with Petitioner. Judge Buckner found the State had withdrawn the ten year plea offer and further found Petitioner failed to show any detrimental reliance upon the State's ten year plea offer. App. 140-149.

This petition for writ of certiorari follows.

## ARGUMENT

### **Plea counsel provided ineffective assistance of counsel in failing to have a ten year plea agreement between Petitioner and the State enforced.**

Petitioner was denied effective assistance of counsel where his plea counsel failed to move to enforce the State's ten year plea agreement with Petitioner. On February 12, 2007, Petitioner accepted the State's ten year plea offer to the charge of common law robbery. App. 3. The plea was not entered that day only because Judge Mullen would not accept it where Petitioner had indicated he could not recall the incident. App. 8. At the close of the hearing, in a discussion between Judge Mullen and the Assistant Solicitor on whether the offer was withdrawn by the State, the Assistant Solicitor stated, "I'm not saying that we wouldn't do it later in the week." App. 9, ll. 19-20.

When Petitioner pled guilty before Judge King on April, 2, 2007, his plea counsel did not move to enforce the ten year plea offer by the State which Petitioner had already accepted. Instead, Petitioner's plea counsel permitted Petitioner to plead guilty to the charge of armed robbery, and Petitioner was sentenced to fifteen (15) years. App. 45; 156.

The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985), *cert. denied*, 474 U.S. 1094 (1986). To establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case. Strickland v. Washington, 466 U.S. 668 (1984). On review, a PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Here, Petitioner accepted the State's ten year plea offer by pleading guilty before Judge Mullen. A defendant accepts a State's plea offer by pleading guilty. State v. Miller, 375 S.C. 370, 389, 652 S.E.2d 444, 454 (Ct. App. 2007). While Judge Mullen was unwilling to accept the plea at that time, Petitioner had nevertheless already accepted. Petitioner's plea counsel should have moved to enforce this binding plea agreement when Petitioner again pled guilty before Judge King.

In the alternative, if the plea offer by the State was not already binding upon the parties, Petitioner's plea counsel nonetheless rendered deficient performance where a defendant may enforce a plea agreement upon a showing of detrimental reliance on a prosecutorial promise in plea bargaining. Id.; Custodio v. State, 373 S.C. 4, 10-11, 644 S.E.2d 36, 39 (2007) ("Even if the agreement has not been finalized by the court, a defendant's detrimental reliance on a prosecutorial promise in plea bargaining may make a plea agreement binding.").

In this case, Petitioner relied on the ten year plea offer to his detriment by making admissions of guilt in front of the State at the February 12, 2007 hearing before Judge Mullen. Petitioner asserted before Judge Mullen and the State that he was guilty of armed robbery as charged. App. 5, ll. 3-8. This admission was detrimental to Petitioner. The State's right to withdraw the ten year plea offer evaporated the moment Petitioner made these admissions that were beneficial and favorable to the State. The ten year plea agreement became binding at that point.

Petitioner could have therefore enforced the ten year plea agreement. His plea counsel accordingly rendered ineffective assistance of counsel by not having his ten year plea agreement enforced. To prove counsel ineffective when a guilty plea is challenged,

petitioner must show that counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability a guilty plea would not have been entered. Hill v. Lockhart, 474 U.S. 52 (1985); Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988). A defendant who pleads guilty upon the advice of counsel may attack the voluntary and intelligent character of the guilty plea only by showing the advice he received from counsel was not within the range of competence demanded of attorneys in criminal cases. Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998).

Petitioner could have enforced the plea agreement as either binding because it was already offered and accepted or under the detrimental reliance exception. Because plea counsel failed to take this action, plea counsel failed to render reasonably effective assistance. Accordingly, Petitioner's plea counsel was ineffective in failing to have the ten year plea agreement enforced.

Further, plea counsel's defective performance prejudiced Petitioner. Petitioner would have only received ten years instead of fifteen had the plea agreement been enforced.

The appropriate remedy is the specific performance of the ten year plea agreement. See Sprouse v. State, 355 S.C. 335, 585 S.E.2d 278 (2003) (specific performance of plea agreement is most efficient option because it eliminated need for new trial or plea hearings and granted parties nothing more and nothing less than the benefit for which they had bargained). Accordingly, this Court should reverse the PCR court's denial of relief to Petitioner and order that on remand, the solicitor's office cannot assert anything other than the promised plea agreement of a ten-year cap on Petitioner's sentence.

**CONCLUSION**

Based on the foregoing reasons, Petitioner Abraham Kelty respectfully requests that this Court grant his Petition for Writ of Certiorari and allow full briefing on the issue raised herein.

Respectfully submitted,



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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of February, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Jasper County  
Perry M. Buckner, Circuit Court Judge

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ABRAHAM KELTY,

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Abraham Kelty states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on April 2, 2013. In her opinion seeking certiorari from the order of dismissal is without merit.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Abraham Kelty.

Respectfully submitted,



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Carmen V. Ganjehsani  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 3rd day of February, 2014.

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CERTIFICATE OF SERVICE


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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Abraham Kelty, #321472, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 3rd day of February, 2014.

  
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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day  
of February, 2014.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023.