

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Greenville County  
Robin B. Stilwell, Circuit Court Judge  
\_\_\_\_\_

**RECEIVED**

APR 28 2014

**S.C. Supreme Court**

MICHAEL ELLIS EVANS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002466  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

LARA M. CAUDY  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX ..... 1

ISSUE PRESENTED ..... 2

STATEMENT ..... 3

ARGUMENT ..... 4

CONCLUSION ..... 11

PETITION TO BE RELIEVED AS COUNSEL ..... 12

## ISSUE PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made where he pled guilty due to plea counsel's promise that Petitioner would be sentenced to ten years house arrest if he pled guilty instead of proceeding to trial, and where Petitioner's guilty plea resulted in a fifteen year prison sentence instead?

## STATEMENT

A Greenville County Grand Jury indicted Petitioner at the June 22, 2010 term of General Sessions for four counts of armed robbery and conspiracy. App. 84-93. Petitioner pled guilty to all five indictments on May 17, 2011 before the Honorable G. Edward Welmaker. App. 1. Assistant Solicitor L. Mark Moyer appeared on behalf of the prosecution, and Max B. Singleton represented Petitioner. App. 1. Petitioner was sentenced by Judge Welmaker to one hundred and eighty-five months (fifteen years and five months) imprisonment on each count of armed robbery to be served concurrently and five years concurrent for conspiracy. App. 42, l. 22 – 43, l. 4. Petitioner did not appeal.

On October 20, 2011, Petitioner filed an application for post-conviction relief (PCR). App. 45-51. The state filed a return to this application dated January 30, 2012. App. 52-56. The matter proceeded to an evidentiary hearing on August 28, 2013 before the Honorable Robin B. Stilwell. App. 57. Assistant Attorney General Karen C. Ratigan represented the state, and Rodney Richey represented Petitioner. App. 57. By order dated March 4, 2013, Judge Stilwell denied Petitioner relief. App. 77-82.

This petition for writ of certiorari follows.

## ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where he pled guilty due to plea counsel's promise that Petitioner would be sentenced to ten years house arrest if he pled guilty instead of proceeding to trial, and where Petitioner's guilty plea resulted in a fifteen year prison sentence instead.

### **Guilty Plea**

Petitioner pled guilty at the same time as his co-defendant, Rakeem Johnson. App. 1. The facts established on the record were that Petitioner and Johnson robbed four convenience stores while allegedly armed with a pistol during the months of January and February 2010. App. 13, l. 9 – 14, l. 14. During the fourth robbery, a law enforcement officer with the Greenville County Sheriff's Office happened to pull into the parking lot of the convenience store as Petitioner and Johnson were fleeing from the scene. The officer saw Petitioner and Johnson run behind the convenience store and then go down some very steep steps. He followed them through several yards without them knowing he was behind them. The officer then saw Petitioner and Johnson get into a car that was parked in a dark area in a neighborhood behind the convenience store. The officer approached the driver's side of the vehicle where Petitioner was seated and demanded Petitioner and Johnson "show their hands." Petitioner allegedly "made some movements that the deputy interpreted as threatening." As a result, the officer fired three shots into the vehicle striking Petitioner twice and leaving him paralyzed from the waist down. App. 14, l. 15 – 16, l. 18. After the two were apprehended, Johnson gave a written statement to law enforcement admitting his guilt and implicating Petitioner in the robberies. App. 16, l. 19 – 17, l. 6.

During the guilty plea hearing, Judge Welmaker advised Petitioner that he could be sentenced to up to thirty years on each count of armed robbery and up to five years on the conspiracy charge. Since Petitioner was pleading guilty to four counts of armed robbery, the judge informed Petitioner that he could be sentenced to “well over one hundred years.” Petitioner told the judge that he understood this and still wished to plead guilty. App. 22, l. 4 – 23, l. 2. Plea counsel also told the judge that he had discussed with Petitioner the charges pending against him, the possible punishment he could receive, and his constitutional rights. App. 5, ll. 6-11.

Judge Welmaker accepted Petitioner’s guilty plea after he found a substantial factual basis for the plea and that it was freely, voluntarily, knowingly, and intelligently made “with the advice of competent legal counsel.” App. 23, ll. 11-19.

Before Petitioner was sentenced, plea counsel explained to Judge Welmaker that Petitioner was twenty-two years old and had no adult record before these charges. App. 23, l. 23 – 24, l. 6. Plea counsel also told the judge that during the fourth robbery, Petitioner was shot twice—once in the left arm and once in the back—which caused him to be paralyzed from the waist down. App. 24, ll. 7-13. After he was shot, Petitioner spent two months in the hospital and, even after he was released, had been in and out of the hospital for various medical procedures, including surgery to “help take care of bedsores.”

Plea counsel informed the judge that Petitioner is “basically bedridden” and has to use catheters to go to the bathroom, which must be changed every two to four hours. Plea counsel also explained that Petitioner takes four medications to help control his bowel movements and has to wear adult diapers. Moreover, Petitioner takes pain medication, such as Loratabs, to help control pain in his back and additional medication to prevent urinary tract infections. A nurse

comes to Petitioner's home for three hours every day to help take care of him. Additionally, plea counsel explained that Petitioner needs surgery on his hips to help prevent bone growth and can no longer have children. App. 24, l. 14 – 29, l. 16.

Plea counsel maintained that Petitioner had already received "a lifetime sentence" since "he's going to be paralyzed for the rest of his life." App. 29, ll. 20-24; App. 30, ll. 6-13. He pleaded with the judge to "give [Petitioner] some sort of sentence that will allow him to stay in his home and be on home detention." App. 29, ll. 5-8; App, 30, ll. 16-21. Moreover, plea counsel argued that Petitioner's medical condition will only get worse if he is sent to the Department of Corrections. App. 31, ll. 12-14.

Despite the extensive mitigation evidence presented, Judge Welmaker sentenced Petitioner to fifteen years and five months imprisonment. App. 42, l. 16 – 43, l. 13.

### **PCR Hearing**

Petitioner's mother, Sharon Evans, explained at the PCR hearing that she hired Max B. Singleton to represent Petitioner. She testified that based on conversations she had with Singleton and Petitioner, she believed Petitioner "was going to get ten years house arrest." Evans testified, "[Singleton] said that he had talked to the Judge and the Solicitor and this is what [Petitioner] was going to get, ten years house arrest." She claimed that Singleton never said that the judge could sentence Petitioner to more than ten years. App. 60, l. 4 – 63, l. 11.

Singleton testified that he met with Petitioner at his home approximately four times before his guilty plea. He maintained that he discussed with Petitioner the minimum and maximum sentence he could receive, specifically that he could be sentenced to up to thirty years on each robbery. App. 65, ll. 3-24. Singleton said, "I told [Petitioner] my goal was to try to get house arrest because of his condition, that he was paralyzed. And he had a lot of health

problems.” App. 66, ll. 1-5. However, Singleton testified that he did not promise Petitioner anything “because there was no negotiated plea.” Singleton also explained, “I told him I was going to argue as best I could, that given his health condition and I think lack of prior record, that hopefully that he would get home detention or whatever.” App. 66, ll. 14-21. However, Singleton stated that he told Petitioner and his family “there was no promise, there was no guarantee of what he would get. Unless there’s a negotiated settlements, there’s no guarantee to what he would get. A negotiated sentence.” App. 68, l. 22 – 69, l. 11.

Petitioner testified that Singleton repeatedly told him, “I’m going to get you ten years house arrest.” Petitioner explained that when he signed the sentencing sheets before pleading guilty, Singleton “was like, You’re going to get ten years house arrest, sign these papers. And that’s what I did.” App. 70, ll. 12-24. When asked if Singleton had told him that “there were no promises, that the Judge could sentence you to what - - basically what’s within the range,” Petitioner responded, “No, sir, he ain’t tell us that. He ain’t say anything about the Judge saying you can get anywhere from ten or more years, none of that. He just said, ten years house arrest. And then he asked about my medical condition, situation and stuff. And he said he was going to put that in there but I was going to get ten years house arrest.” App. 70, l. 25 – 71, l. 10.

Petitioner also explained that he pled guilty under the assumption that he was going to be sentenced to ten years house arrest and, had he known he was not going to receive ten years house arrest, he “would have went to trial like I wanted to.” Petitioner testified, “I asked could I go to trial about it. And he was like, no need, I’ll get you ten years house arrest.” App. 71, ll. 11-22.

## **Order of Dismissal**

The PCR court found Petitioner failed to meet his burden of proving plea counsel misadvised him about the sentence he would receive if he pled guilty. The court found plea counsel's testimony that he did not make any promises or representations about the sentence Petitioner would receive if he pled guilty credible and that his testimony was supported by the record. Furthermore, the PCR court found Petitioner testimony was not credible. App. 80.

The PCR court noted that the guilty plea judge informed Petitioner of the maximum sentence he could receive during the plea hearing and that Petitioner told the judge that no promises had been made to him to entice him to plead guilty. App. 80-81. Therefore, the court found Petitioner failed to meet his burden of proving counsel failed to render reasonably effective assistance and that his guilty plea was not knowing and voluntary. App. 81.

## **Discussion**

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made due to the improper influence of plea counsel's promise that the judge would sentence Petitioner to ten years house arrest if he pled guilty. App. 70, l. 12 – 71, l. 13. Petitioner's reliance on trial counsel's promise was reasonable given that he was paralyzed and would require intense and costly medical attention on a daily basis. Further, Petitioner was prejudiced by plea counsel's influence because, as Petitioner's testimony indicated, he would not have pled guilty but for plea counsel's promise that he would be sentenced to ten years house arrest. App. 71, ll. 14-17.

The difference "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea." Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). The longstanding test for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill

v. Lockhart, 474 U.S. 52, 56 (1985) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington; 466 U.S. 668 (1984) to claims of the same against plea counsel).

First, “the voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases.” Id. On the other hand, the prejudice requirement focuses on whether “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.” Id. at 59. “[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.” Holden v. State, 393 S.C. 565, 572-574, 713 S.E.2d 611, 615 (2011) (citing Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000)).

“The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland, 466 U.S. at 685 (quoting Adams v. United States ex. rel. McCann, 317 U.S. 269, 275-276 (1942)). Additionally, a guilty plea that was “entered by one fully aware of the direct consequences . . . must stand *unless* induced by . . . misrepresentation (including unfulfilled or unfulfillable promises) . . .” Brady v. United States, 397 U.S. 742, 755 (1970) (emphasis added) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (reversed on other grounds, 356 U.S. 26 (1958)). Accordingly, counsel provides ineffective assistance in the adversarial system when he induces the defendant to plead guilty.

In this case, Petitioner was induced into pleading guilty by plea counsel's promise to Petitioner that Judge Welmaker was going to sentence him to ten years house arrest if he pled guilty. See App. 70, l. 12 – 71, l. 13. This promise prevented Petitioner's guilty plea from being knowingly and voluntarily made and, consequently, rendered it invalid. See Berry, 381 S.C. at 635, 675 S.E.2d at 427. A plea is not voluntary when it is induced by misrepresentation including unfulfilled promises. See Brady, 397 U.S. at 755, 90 S.Ct. at 1472. A reasonably competent criminal defense attorney would not have promised Petitioner that he would be sentenced to ten years house arrest when there was no sentence recommendation from the state and when it was not a negotiated plea.

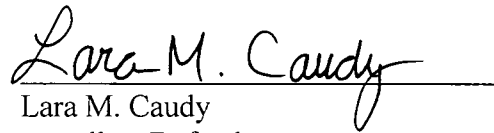
Additionally, there is a reasonable probability that but for plea counsel's promise, Petitioner would not have pled guilty and would have insisted on proceeding to trial. Petitioner testified that he asked plea counsel "could I go to trial" and plea counsel said "no need, I'll get ten years house arrest." See App. 71, ll. 14-22. Thus, Petitioner was prejudiced by plea counsel's promise. Lockhart, 474 U.S. at 59. It was *only* because of this promise that Petitioner decided to plead guilty.

As a result of the invalid plea and the resulting prejudice, Petitioner's convictions should be reversed and he should be granted a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,

  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of April, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

CERTIORARI TO GREENVILLE COUNTY  
ROBIN B. STILWELL, CIRCUIT COURT JUDGE

---

MICHAEL ELLIS EVANS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002466

---

PETITION TO BE RELIEVED AS COUNSEL

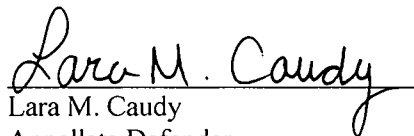
---

Counsel for Michael Ellis Evans 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 August 28, 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 Michael Ellis Evans.

Respectfully submitted,



Lara M. Caudy  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 28th day of April, 2014

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to Greenville County  
Robin B. Stilwell, Circuit Court Judge

---

MICHAEL ELLIS EVANS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

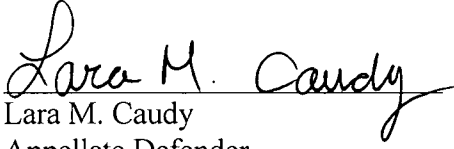
APPELLATE CASE NO. 2013-002466

---

CERTIFICATE OF SERVICE

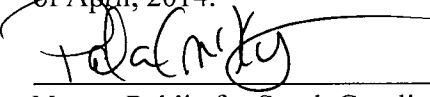
---

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 Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Michael Ellis Evans, #346001, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 28th day of April, 2014.

  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day  
of April, 2014.

  
\_\_\_\_\_(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.