

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Colleton County

**S.C. Supreme Court**

James R. Barber, III, Circuit Court Judge  
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MICHAEL T. SANDERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000955  
\_\_\_\_\_

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

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ATTORNEY FOR PETITIONER

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## ISSUE PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made where plea counsel met with Petitioner for the first time in the courtroom immediately prior to his guilty plea, entirely failed to review with Petitioner the state's evidence against him, and failed to adequately advise Petitioner of his possible defenses if he were to proceed to trial, specifically mere presence, where the solicitor conceded Petitioner never entered the burglarized home, plea counsel said this was a "triable case," and the record revealed plea counsel did not take the case seriously because it involved a concurrent sentence?

## STATEMENT

A Colleton County Grand Jury indicted Petitioner at the August 25, 2011 term of General Sessions for first degree burglary. App. 92-93. On February 27, 2012, Petitioner pled guilty before the Honorable Perry M. Buckner, III. App. 1. Assistant Solicitor Steven H. Knight represented the state, and David S. Mathews represented Petitioner. App. 1. Judge Buckner sentenced Petitioner to twenty years imprisonment. The judge ordered Petitioner's sentence to run concurrent with a twenty year sentence Petitioner had received in Dorchester County on January 9, 2012 for two other first degree burglary indictments. App. 16, ll. 5-12. Petitioner did not appeal.

On November 21, 2012, Petitioner filed an Application for Post-Conviction Relief (PCR) raising the issue argued in this petition. App. 19-25. The state filed a return to this application dated July 11, 2013. App. 26-30. The matter proceeded to an evidentiary hearing on February 19, 2014 before the Honorable James R. Barber, III. App. 31. Assistant Attorney General Ashleigh R. Wilson represented the state and Tommy A. Thomas represented Petitioner. App. 31. By order dated April 2, 2014, Judge Barber denied Petitioner relief. App. 79-91.

This petition for writ of certiorari follows.

## ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where plea counsel met with Petitioner for the first time in the courtroom immediately prior to his guilty plea, entirely failed to review with Petitioner the state's evidence against him, and failed to adequately advise Petitioner of his possible defenses if he were to proceed to trial, specifically mere presence, where the solicitor conceded Petitioner never entered the burglarized home, plea counsel said this was a "triable case," and the record revealed plea counsel did not take the case seriously because it involved a concurrent sentence.

### **Guilty Plea**

The solicitor informed the court at the beginning of the guilty plea proceeding that Petitioner was pleading guilty to first degree burglary and that the state and plea counsel had "negotiated a sentence for 20 years." The solicitor explained that the recommended twenty year sentence was to run concurrent with a twenty year sentence Petitioner was serving for convictions out of Dorchester County and that he was to receive credit for time served since March 20, 2011.<sup>1</sup> App. 3, ll. 1-12.

After a standard plea colloquy where the court advised Petitioner of his constitutional rights, the direct consequences of pleading guilty, and the sentencing range for first degree burglary, Petitioner told the court he wished to plead guilty. App. 6, l. 12 – 9, l. 10. The solicitor then told the court about the facts of the case. He maintained that three people were involved in the burglary: Petitioner, Sonny Rourk, and Travis Braddock. However, the solicitor said, "The only person that [sic] entered the house was Sonny Rourk, okay? We got his fingerprints, got his DNA, and Ms. Smoak [the homeowner] picked Mr. Rourk out of a photo lineup. This defendant [Petitioner] and

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<sup>1</sup> Upon information and belief, Petitioner also has a pending post-conviction relief case pertaining to his Dorchester County convictions and sentence.

Mr. Braddock were in the car outside. So our theory of this case is the hand of one is the hand of all.” App. 11, l. 23 – 12, l. 6. The solicitor maintained that when the three were arrested, “Mr. Braddock and Mr. Rourk rolled over, as I call it, on Mr. Sanders [Petitioner].” He further emphasized, “[N]o, he [Petitioner] did not enter the house. I can’t tell the Court he did. The only one that [sic] actually entered the house was Mr. Rourk.” App. 12, ll. 11-19.

The court then found a factual basis for the plea and that Petitioner’s decision to plead guilty was freely, voluntarily, knowingly, and intelligently made. App. 14, ll. 3-6.

After the court accepted Petitioner’s guilty plea, plea counsel told Judge Buckner, “I’ve talked to him [Petitioner], *not extensively*, but I’ve talk to him enough. He understands what is going on. *I’ve talked to him, basically, in here* [the courtroom], but I’ve answered any questions that he’s had and he understands the process. I’ve talked to him about the hand of one is the hand of all.” App. 14, ll. 12-17 (emphasis added). He explained further, “I told him [Petitioner] that the Court would ask him if he is pleading guilty because you are guilty, and if he felt like he wanted a trial on the issue of mere presence, he could have one. He indicated he wanted to go forward, but I wanted the Court to be aware that this is something we had discussed . . . I’m confident that Mr. Sanders understands his rights and this is what he has chosen to do. I told him I’d be happy to try the case if he would like, and he indicated he wanted to go forward [with the plea].” App. 15, ll. 14-23.

The court ultimately went along with the solicitor’s sentence recommendation and sentenced Petitioner to twenty years imprisonment to run concurrent with his Dorchester County convictions. App. 16, ll. 4-12.

## **PCR Hearing**

Petitioner testified at the PCR hearing that he pled guilty to first degree burglary in Dorchester County on January 9, 2012 and received a twenty year sentence. After pleading guilty in Dorchester County, Petitioner explained that he entered a guilty plea in Colleton County on February 27, 2012 also to first degree burglary. He likewise received a twenty year sentence for the Colleton County conviction. That sentence was ordered to run concurrent to the twenty year sentence he had received in Dorchester County. App. 34, l. 6 – 35, l. 22. Petitioner testified that he also has a pending post-conviction relief case challenging his Dorchester County convictions. App. 34, ll. 15-17.

Petitioner explained that he was arrested on March 20, 2011 and charged with three counts of first degree burglary in Dorchester County and one count of first degree burglary in Colleton County. While these charges were pending, Petitioner was housed at the Dorchester County Jail. Petitioner testified that he was held at the Dorchester County Jail for eleven months until he ultimately pled guilty in Dorchester County on January 9, 2012. Once he pled guilty in Dorchester, Petitioner was moved to the Department of Corrections. App. 36, l. 12 – 37, l. 7.

While he was housed at the Dorchester County Jail, Petitioner maintained he was only brought over to Colleton County once and it was for a preliminary hearing. App. 37, ll. 2-3. When he was ultimately transported to Colleton County for his guilty plea on February 27, 2012, he was already in the custody of the Department of Corrections. App. 37, ll. 4-7.

Petitioner testified that he had separate attorneys in Dorchester County and Colleton County. In Colleton County, Petitioner was represented by plea counsel, David S. Mathews. Petitioner explained that the first time he met with plea counsel was the day of his guilty plea. He testified, “He [plea counsel] walked up to the jury box [the day of the guilty plea] and told me he was my

attorney. I knew he was my attorney because they sent me the paperwork that he was my attorney . . . when I was in the Dorchester County Jail.” App. 37, ll. 8-25. Petitioner maintained that plea counsel never came to visit him while he was held at the Dorchester County Jail nor when he was eventually moved to the Department of Corrections after his guilty plea in Dorchester on January 9, 2012. App. 38, ll. 3-7.

Petitioner testified that he never received any of the discovery materials from plea counsel nor did plea counsel ever review the discovery materials with him. He said he had no idea what evidence the state had against him before his plea. Specifically, he testified, “I didn’t have no knowledge of what they had.” Petitioner maintained that he first learned what the state’s evidence was against him during his guilty plea when the solicitor told the court the facts of the case. App. 38, ll. 8-25; App. 40, ll. 13-16. He said the solicitor told the court that Petitioner never entered the burglarized house. Instead, the solicitor maintained that Petitioner’s co-defendant, Sonny Lynn Rourk, was the only person who entered the house, that the state found Rourk’s fingerprints and DNA inside the house, and that the homeowner identified Rourk in a photographic lineup. However, Petitioner explained that this was in contrary to what his warrant alleged, which was that Petitioner had entered the house and stolen a pocketbook. App. 43, ll. 11-21; App. 42, ll. 18-23.

Petitioner maintained that the only reason he pled guilty was because the solicitor approached him in the courtroom before his guilty plea and told him if he did not plead guilty the state was going to seek a sentence of life without parole (LWOP). App. 39, l. 21 – 40, l. 12. Petitioner said the solicitor told him the day of his guilty plea that his co-defendants were “rolling on you, so if you don’t accept this plea, I’m goin’ put you on trial and give you a life sentence.” App. 40, l. 24 – 41, l. 7. He also testified, “They told me if I didn’t plea[d guilty], because I had the two [burglary convictions] in St. George [Dorchester County] against me, if I didn’t plead, they

[were] goin' [to] give me a life sentence on this one right here [the Colleton County charge] . . .”  
App. 44, ll. 3-10.

On cross-examination, Petitioner testified that he thinks plea counsel attended his preliminary hearing, but he never spoke to counsel at the hearing. He maintained that the only time he spoke to plea counsel was on the day of his guilty plea. He testified that the only thing he and plea counsel talked about that day was the fact that the solicitor was going to seek a sentence of life without parole if Petitioner did not accept the twenty year offer and plead guilty. He denied that plea counsel had ever discussed possible defenses with him. App. 52, l. 19 – 53, l. 23. Specifically, Petitioner testified that plea counsel never discussed with him mere presence. However, Petitioner did recall plea counsel mentioning the hand of one is the hand of all, but testified plea counsel did not explain the concept in any detail. App. 55, l. 20 – 56, l. 1.

Plea counsel, David Mathews, testified that he first spoke with Petitioner “for a few minutes about his situation” on July 25, 2011 at a bond hearing. App. 60, ll. 12-19. He said he was aware that Petitioner had pending burglary charges in both Dorchester County and Georgia and that he was being held at the Dorchester County Jail. App. 60, l. 20 – 61, l. 6. Mathews explained that he negotiated a guilty plea on Petitioner’s behalf that was consistent with the sentence Petitioner had received when he pled guilty in Dorchester County the month before. App. 60, l. 14 – 61, l. 24.

Mathews admitted that he never reviewed the discovery materials with Petitioner. However, he claimed that Petitioner was present during the preliminary hearing and that “the nature and the specifics of the allegations” were “all discussed at the [hearing].” He maintained, “I received no information later that was any different from what was discussed at the prelim[inary hearing].” App. 62, l. 23 – 63, l. 13.

Mathews explained that both of Petitioner's co-defendants gave statements to the police. He said that he thought Rourk's statement was videotaped and that Rourk had alleged Petitioner entered the home. However, Mathews said that there was no physical evidence indicating Petitioner had entered the house and "the only thing that put him in the home was somebody [Rourk] who had something to gain by saying he [Petitioner] went into the home." App. 63, l. 14 – 64, l. 2.

Mathews testified that he could not recall whether there was any discussion on the possibility of a sentence of life without parole if Petitioner chose not to plead guilty.<sup>2</sup> He also could not remember if he discussed with Petitioner the principle of the hand of one is the hand of all. However, he claimed that if he did discuss the hand of one is the hand of all then he would have also discussed mere presence because "that's what I always do." App. 64, l. 13 – 65, l. 4.

Furthermore, Mathews testified that "[t]his was a triable case" and that "if [Petitioner] hadn't already gotten a 20-year sentence in Dorchester, I would not have recommended a negotiated 20 on this one." App. 65, ll. 5-12; App. 66, l. 25.

On cross-examination, Mathews admitted that he never saw Petitioner while he was in jail, but he "probably should have." He testified that he only discussed with Petitioner the elements of first degree burglary and what the state was required to prove "in a general way" and that he informed Petitioner of the consequences of pleading guilty "pretty quickly." App. 68, ll. 13 – 69, l. 9. He explained, "I mean, when you talk to somebody at the courthouse, it's not the best time to talk to somebody. You know, I don't think it would have changed anything, but in retrospect I would like to have talked to him at the Dorchester Jail." App. 69, ll. 9-13. Mathews further explained that during court it is "go, go go, and you don't have a lot of time to sit down and talk,

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<sup>2</sup> Mathews testified that he was never served with notice that the state was seeking a sentence of life without parole. App. 67, ll. 2-16.

and I wish I - - if I had it to do again, I would have seen him at the Dorchester Jail.” App. 70, ll. 21-24.

When asked by the assistant attorney general whether he told Petitioner how to answer the trial court’s questions during the plea, Mathews testified, “[W]hat I normally tell my clients, these are the kinds of questions that the Judge is going to ask, he’s going to ask you basically whether or not you understand what you’re doing, whether or not your attorney’s done everything he’s supposed to do and whether or not you did what you’re accused of doing, and you answer those questions, yes, I know what I’m doing, no, my attorney didn’t do anything wrong, if you answer those in a different way, the Judge won’t accept your plea. I never tell somebody you must say this, but I do explain that these are the questions that will be asked, if you want - - if you don’t agree with them, if the Judge asks you, did you do what you’re accused of doing and the honest answer is no, then you need to try this case . . .” App. 71, ll. 4-24.

### **Order of Dismissal**

The PCR court found Petitioner failed to meet his burden of proof as to his claim of ineffective assistance of counsel. The court found that plea counsel “demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina.” App. 85. The court further found that plea counsel properly conferred with Petitioner and “provided thorough representation.” App. 86.

Moreover, the PCR court found Petitioner’s claim that his guilty plea was not entered freely and voluntarily “wholly without merit.” App. 87. The court found Petitioner “was fully advised of all the consequences of pleading guilty prior to and during his guilty plea” and that “[t]he record reflects [Petitioner] was advised of the substance of the negotiated plea agreement with the State.” App. 88.

The court indicated that it did “not find credible [Petitioner’s] testimony that he was told he would receive a life sentence if he did not plead guilty” and that it did find “credible plea counsel’s testimony that he did not recall any discussions with [Petitioner] about the possibility of a sentence of life without parole.” Furthermore, the PCR court stressed that Petitioner told the plea court during “his guilty plea that no one had threatened him in any manner to get him to plead guilty.” App. 89.

The PCR court also found persuasive Petitioner’s statements to the plea court that plea counsel “had done everything he felt like he should or could have done” and that “he had enough time to talk with counsel and he understood all their talks.” App. 89. Thus, the PCR court ultimately found Petitioner “failed to carry his burden of proving he did not have a full understanding of the consequences of his guilty plea.” App. 89.

## **Discussion**

Petitioner’s guilty plea was not knowingly, intelligently, and voluntarily made where plea counsel met with Petitioner for the first time in the courtroom immediately prior to his guilty plea, entirely failed to review with Petitioner the state’s evidence against him, and failed to sufficiently advise Petitioner of his possible defenses if he were to proceed to trial, namely mere presence.

“A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.” Kolle v. State, 386 S.C. 578, 588-89, 690 S.E.2d 73, 78-79 (2010) (quoting Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); see also Strickland v. Washington, 466 U.S. 668 (1984). “A reasonable probability is a probability sufficient to undermine confidence in

the outcome of trial.” Kolle, 386 S.C. at 588-89, 690 S.E.2d at 78-79 (quoting Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997)).

“In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing.” Kolle, 386 S.C. at 588-89, 690 S.E.2d at 78-79 (quoting Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007)). “Specifically, the 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.” Kolle, 386 S.C. at 588-89, 690 S.E.2d at 78-79 (quoting Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000)). “The longstanding test for determining the validity of a guilty 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) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

Additionally, “[t]he 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)).

In this case, plea counsel’s performance was deficient, as it clearly fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-688. On a serious charge where Petitioner was possibly seeking a sentence of life without parole, plea counsel met with Petitioner for the very first time in the courtroom immediately prior to his guilty plea. This rushed meeting was inadequate for plea counsel to sufficiently advise Petitioner of his constitutional rights, the direct consequences of pleading guilty, and his possible defenses if he decided to proceed to trial.

Additionally, it is undisputed that plea counsel never reviewed with Petitioner any of the state's evidence against him. Petitioner testified that he did not know what evidence the state had collected until his guilty plea when the solicitor informed the court of its version of the facts. Specifically, Petitioner testified that he did not know the state would concede that he never entered the burglarized house, especially since his warrant alleged the opposite: that he entered the homeowner's residence and stole a pocketbook.

Plea counsel admitted during the PCR hearing that he should have met with Petitioner at the Dorchester County Jail prior to his guilty plea and that in the courtroom "you don't have a lot of time to sit down and talk." See App. 68, ll. 13-18; see also App. 69, ll. 6-13; see also App. 70, ll. 19-24. Furthermore, plea counsel admitted to the trial court during Petitioner's guilty plea that while he spoke with Petitioner, he did not speak to him at any length. See App. 14, ll. 12-13. Additionally, plea counsel could not recall at the PCR hearing whether he had discussed with Petitioner the hand of one is the hand of all or mere presence. See App. 64, l. 17 – 65, l. 4. This supports Petitioner's contention that plea counsel did not adequately advise him of the consequences of pleading guilty, of his defenses if he proceeded to trial, specifically mere presence, and of the state's evidence against him.

Plea counsel also testified that "[t]his was a triable case" and that "if [Petitioner] hadn't already gotten a 20-year sentence in Dorchester, I would not have recommended a negotiated 20 on this one." App. 65, ll. 5-12; App. 66, l. 25. Based on this testimony it appears plea counsel did not take Petitioner's case seriously because he knew Petitioner was already serving a twenty year sentence out of Dorchester County and that this guilty plea, assuming the plea court accepted the state's sentence recommendation, would not have caused Petitioner to serve any additional prison time.

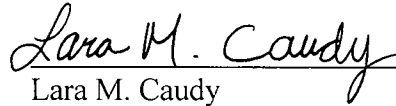
Because of plea counsel's deficient performance, Petitioner was unable to make a "voluntarily and intelligent choice among the alternative courses of action open to [him]." See Hill v. Lockhart, 474 U.S. at 56 (quoting Alford, 400 U.S. at 31) (internal quotation marks omitted). Specifically, Petitioner was unable to properly consider whether he should plead not guilty, proceed to trial, and put the state to its burden of proof. As plea counsel testified, "[t]his was a triable case," given the state's lack of evidence against Petitioner. See App. 66, l. 25. If Petitioner would have known what evidence the state actually had against him and properly understood the defense of mere presence, he would not have pled guilty, but instead would have proceeded to trial.

Because plea counsel's deficient performance rendered Petitioner's guilty plea invalid, this Court should reverse the order of the PCR court and remand for 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 7th day of November, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Colleton County  
James R. Barber, III, Circuit Court Judge

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MICHAEL T. SANDERS,

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STATE OF SOUTH CAROLINA,

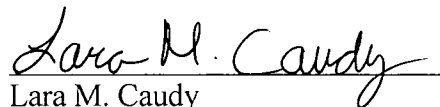
RESPONDENT

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CERTIFICATE OF SERVICE

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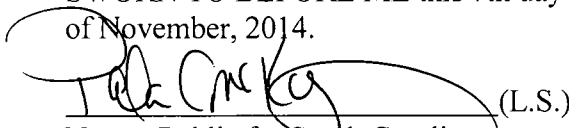
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 7th day of November, 2014.



Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day  
of November, 2014.



(L.S.)  
Notary Public for South Carolina

My Commission Expires: July 24, 2022.