

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY

Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case Number: 2015-00636

Tommy Weathers, Jr.

Petitioner,

v.

State of South Carolina

Respondent.

Reply to State's Return to Petition for Writ of Certiorari

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SC SUPREME COURT

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In Reply

The petitioner, Tommy Weathers, Jr., replies to the State's return to his petition for a writ of *certiorari* (hereinafter "Petition" or "Return").

Question I

Did Tommy Weathers, Jr. receive ineffective assistance of counsel, in degradation of the Sixth Amendment of the United States Constitution and Article I, §§ 3 and 14 for the South Carolina Constitution, when his criminal defense counsel induced him to plead guilty to kidnaping, strong arm robbery, and first-degree assault and battery by creating the expectation of a Youthful Offender Act sentence, even though Weathers did not meet the definition of a "youthful offender" because of the resulting conviction for kidnaping?

The facts are not in dispute. The State concedes that Weathers pleaded guilty with the expectation of receiving a Youthful Offender Act ("YOA") sentence. The State acknowledges, "Kidnaping is defined as a violent crime under S.C. Code Ann. § 16-1-60 making it ineligible for a Youthful Offender Act Sentence." Return, p. 10. The State, however, argues, "Counsel testified at the PCR hearing that his strategy concerning the YOA sentence and kidnaping was for Petitioner to receive a time-served sentence on kidnaping and a YOA sentence on the strong arm robbery." Return, p. 7. The State then acknowledges, "[T]he plea judge never explicitly disagreed with his theory nor did she inform Petitioner that he would not be eligible for a YOA sentence." Return, pp. 7-8.

As discussed in the petition, at p. 13, if plea counsel's strategy really was to ask for a time-served sentence for kidnaping, then the guilty plea transcript would memorialize counsel making this request. Counsel, however, never requested a time-served sentence for kidnaping. Even if that was his strategy, defense counsel

affirmatively misadvised his client, which is never a valid strategy.¹ See Petition, pp. 13-14 and the authority cited therein.

The State further contends Weathers “did not suffer any prejudice as his sentence prediction was wishful thinking and he failed to show that he would have gone to trial but for Counsel’s advice.”² Return, p. 8. This argument not only ignores Weathers’ testimony that he would have proceeded to trial but for counsel’s incorrect advice,³ A. 80, 83, 93-94, but also the undisputed fact that, up to the morning of trial, Weathers planned to exercise his right to a jury trial and present an alibi defense, A. 13, 29, 80, 83, 109, 117.

Because plea counsel’s objectively unreasonable and erroneous advice about the availability of a YOA sentence induced Weathers to plead guilty, when he otherwise would not have done so, this Court should grant the writ. Weathers has demonstrated deficient performance and prejudice.

Granting the writ would also provide this Court with an opportunity to clarify for the bench and bar the importance of counsel advising the client correctly about the sentencing options and the plea judge accurately correcting any misconceptions before

¹ As discussed in the petition, at pp. 13-14, counsel seemed to believe that reducing the armed robbery charge to strong arm robbery made Weathers eligible for a YOA. Judicial nullification of statutory law seems to be a justification adopted by counsel during the PCR hearing. Regardless, neither misconception of the law constitutes a valid strategy.

² The State also contends, “[T]he PCR Court was correct in characterizing Petitioner’s allegation as a result of wishful thinking.” Return, p. 10. To the extent Weathers engaged in any “wishful thinking,” it resulted from the affirmative misadvice from his lawyer.

³ See *Hill v. Lockhart*, 474 U.S. 52 (1985); *Thompson v. State*, 340 S.C. 112, 531 S.E.2d 294 (2000); *Jordan v. State*, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988).

accepting the plea. Creating unrealistic sentencing expectations through erroneous legal advice is never acceptable, and trial courts should be vigilant and correct these errors whenever they occur.

This Court should grant the writ.

Question II

Did Tommy Weathers, Jr. receive ineffective assistance of counsel, in degradation of the Sixth Amendment of the United States Constitution and Article I, §§ 3 and 14 for the South Carolina Constitution, because his guilty plea counsel failed to advise him that kidnapping is a “no parole” offense that requires service of eighty-five percent of the sentence imposed followed by up to two years in the Community Supervision Program?

The State does not dispute that fact that plea counsel never informed Weathers about the Community Supervision Program.⁴ Return, pp. 10-11. Rather, “Respondent submits that this Court should continue to recognize precedent and hold that Counsel was not ineffective for failing to advise Petitioner that he would have to participate in the Community Supervision Program as a result of his kidnapping conviction.” *Id.* See *Jackson v. State*, 349 S.C. 62, 562 S.E.2d 475 (2002).

For the reasons set for in the petition, at pp. 14-21, this Court should revisit *Jackson* and consider whether trial counsel must advise a client that a conviction of a no parole offenses requires service of eighty-five percent of the sentence followed by up to two years in the Community Supervision Program. The modern criminal justice system demands that defense counsel affirmatively and accurately advise clients on these matters.

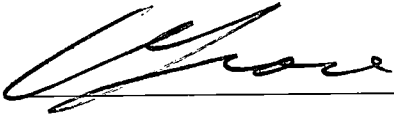
This Court should grant the writ.

⁴ As set forth in in the petition, this issue not only involves participating in the Community Supervision Program but also the mandatory service of 85% of the kidnapping sentence.

CONCLUSION

The questions presented in this petition involve important issues about the quality of representation provided by criminal defense counsel in South Carolina. For the reasons set forth in the petition and this reply, this Court should grant to the writ and consider the merits.

Respectfully Submitted,

By  _____

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July 25, 2016
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKLEY COUNTY

Eugene C. Griffith, Jr., Circuit Court Judge

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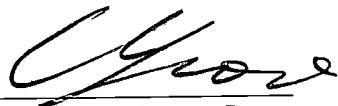
State of South Carolina

Respondent.

Certificate of Service

I certify that I serve a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below.

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July 25, 2016

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SC SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
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Re: *Tommy Weathers, Jr. v. State of South Carolina*
Appellate Case No. 2015-00636

Dear Mr. Shearouse:

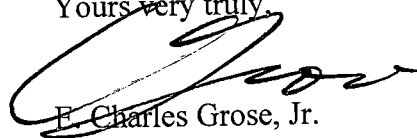
Enclosed please find the original and six copies of Mr. Weathers' Reply to the State Return to his Petition for Writ of *Certiorari*, along with a certificate of service.

Last week, I petitioned for an extension of time to file this reply. I respectfully request the Court accept this filing in lieu of the extension request.

Thank you for your attention to this matter. If you have any questions or require additional information, please do not hesitate to contact me.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: Justin J. Hunter, Esquire