

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable Doyet A. Early, Circuit Court Judge

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FRANK MIDDLETON,

PETITIONER  
S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001524

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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Taylor D Gilliam  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether the PCR Court erred in denying Petitioner relief where plea counsel provided ineffective assistance by leading Petitioner to believe, based on the Solicitor's comments, that he may receive no jail time if he pled guilty, and Petitioner in fact received fourteen years' imprisonment?

## STATEMENT

After being indicted for armed robbery by a Charleston County grand jury during its October 2012 term, Petitioner pled guilty to strong armed robbery before the Honorable Thomas L. Hughston, Jr. on April 9, 2014. App. 1; 62 - 63. Beattie Butler represented Petitioner, but due to health concerns, Rhett Dunaway handled the plea. App. 6 lines 14 - 16; App. 28 lines 13 - 15. Greg Voigt, Assistant Solicitor, appeared on behalf of the State. The facts presented by the prosecution were as follows:

On April 29, 2012, a man with a bandana over his face entered the Five Guys restaurant on Savannah Highway in West Ashley. App. 4 lines 18 - 20. This individual was armed with a firearm and requested that the cashier put money in a bag. App. 4 lines 20 - 21. He left the restaurant with approximately \$680. App. 4 lines 21 - 22. As this man was leaving, local children from Petitioner's nearby neighborhood were entering the restaurant and recognized the gunman as Petitioner. App. 4 line 23 - App. 5. line 6. Petitioner was subsequently apprehended. App. 5 lines 5 - 6.

Prior to his guilty plea but after being apprehended, Petitioner cooperated in a high-profile murder case; he testified on behalf of the State with nothing to gain and nothing promised.. App. 5 lines 12 - 21. According to the Assistant Solicitor, Petitioner was "a big help to [the State] in the Marley Lion trial." App. 47 lines 11 - 24. The plea judge was not advised in great detail regarding Petitioner's assistance in that trial. According to plea counsel, the prosecution *nolle prossed* Petitioner's two weapon charges and reduced the indicted offense of armed robbery to strong armed robbery as a result of Petitioner's testimony. App. 47 line 16 - App. 48 line 7. Additionally, the Assistant Solicitor told plea counsel "I don't really care if [Petitioner] gets time." App. 48, lines 2 - 7.

However, during Petitioner's guilty plea, the Assistant Solicitor did not mention the recommendation of time served. All that was said regarding the sentencing offer was:

The reason for the offer from a - - and after you hear this record you'll wonder why I'm offering what I'm offering, but the reason for the offer was partially due to Mr. Middleton's cooperation in a recent high-end-profile murder case.

Following that statement, the Assistant Solicitor *never actually advised the court what his offer was*. Counsel Dunaway sought time served and probation as a sentence:

So, Judge, it's a tall order to ask for but if I'm wrong the solicitor can correct me, I don't believe the solicitor is asking for active time. I think the time that he's done is sufficient, according to the solicitor, but if a period of probation might be granted I don't think we'll be seeing Mr. Middleton back.<sup>1</sup>

App. 11 lines 5 – 10.

The plea judge sentenced Petitioner to a term of 14 years' imprisonment due in large part to Petitioner's prior record. App. 11 line 21 – App. 12 line 3. Petitioner did not appeal his sentence.

He filed a timely application for post-conviction relief on August 20, 2014. App. 14 – 19. Petitioner's application contained allegations of ineffective assistance of counsel, including the failure to advise him of the consequences of the guilty plea. App. 16.

The State made its Return on or about June 2, 2015. App. 21 – 24. An evidentiary hearing was conducted on April 20, 2016 before the Honorable Doyet Early. App. 26. James K. Falk represented Petitioner, and J. Rutledge Johnson represented the State. Petitioner and plea counsel testified during the hearing.

On July 5, 2016, Judge Early issued his order denying Petitioner relief. App. 54 – 60. He ruled that counsel provided effective assistance of counsel in negotiating with the State in Petitioner's best interest. App. 59. However, "the plea judge, in his proper discretion, decided

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<sup>1</sup> At the time of the plea, Petitioner had been in jail for 709 days. App. 5 line 22 – App. 6 line 2.

that based on [Petitioner's] prior criminal history, he would serve an active prison sentence.”

App. 59. This Petition follows.

## ARGUMENT

**The PCR Court erred in denying Petitioner relief where plea counsel provided ineffective assistance by leading Petitioner to believe, based on the Solicitor's comments, that he may receive no jail time if he pled guilty, and Petitioner in fact received fourteen years' imprisonment.**

Throughout the evidentiary hearing, Judge Early remarked that he could see how Petitioner was confused: "I can certainly see where there was a little confusion. I can see why he is. I have looked at the transcript." App. 44 lines 14 – 16. He continued,

Let me put this on the record. On page 5 of the transcript the solicitor is talking, Mr. Voigt; is that correct?

...

He advises the court that the Defendant has a fairly extensive record, but ... Mr. Dunaway and [Voight] have talked about this a bit on the phone... And the reason for the offer, after you hear this record you'll wonder why [Voight] [offered] what [he offered], the reason for the offer was partially due to Mr. Middleton's cooperation in a recent high end murder case.

But I don't ever see what the offer was. From the plea sentencing sheet says it was without recommendation of offer. But then on page 11 of the transcript Mr. Dunaway says so, judge, it's a tall order I am asking for, but if I am wrong the solicitor can correct me. I don't believe the solicitor is asking for active time. I think the time he has done is sufficient. According to the solicitor it's sufficient. And then the judge gives him a 14-year sentence.

**So I can see where he is confused a little bit.**

App. 44 line 19 – App. 45 line 17. (emphasis added).

Petitioner testified on behalf of the State in the Marley Lion case, resulting in a conviction. App. 34 line 7 – App. 35 line 13. Petitioner's expectation following his assistance in that matter was that the solicitor was "willing to let [him] plead guilty to strong armed robbery time served with the recommendation of no new sentence." App. 35 line 18 – App. 36 line 8.

He understood that when he pled guilty, he was not supposed to receive an active prison sentence. App. 36 lines 9 – 17.

Prior to the guilty plea, counsel explained to Petitioner that the judge could have sentenced Petitioner to four to five years' probation. App. 36 line 23 – App. 37 line 3. The final recommendation, according to Petitioner, was "strong armed robbery plea with time served with the recommendation of no new time, maybe four or five years probation." App. 37 lines 11 – 14.

When asked why he responded in the negative during the portion of the plea colloquy related to promises or threats, Petitioner testified that he was advised by counsel to answer that way. App. 37 line 17 – App. 38 line 9.

Petitioner's unknowing guilty plea was the result of counsel's failure to zealously advocate on his behalf. More testimony was elicited at the evidentiary hearing than was heard by the plea judge; had counsel gone into greater detail regarding the plea negotiations, the trial judge may have sentenced Petitioner to a lesser span of imprisonment. Petitioner relied on counsel to convey the terms of the plea deal to the judge, and counsel failed in that regard.

Had Petitioner known that he was going to get an active sentence, he would not have pled guilty. App. 42 lines 5 – 13. In fact, he declined a plea deal brought to him by Beattie Butler which contained a sentence of ten years. App. 42 lines 5 – 13.

Petitioner correctly asserted that Counsel was ineffective, because he did not communicate with Petitioner the potential consequences of the guilty plea. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was

deficient, and (2) the deficient performance prejudiced the defendant. Id. at 687. “[T]he court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Strickland at 690).

First, to be entitled to PCR, the applicant must show that counsel's performance was deficient. Payne v. State, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In this regard, Counsel failed to consult with Petitioner regarding sentencing ranges and consequences of the guilty plea. Petitioner’s testimony, as outlined above, indicated that Counsel did not adequately explain the sentencing judge’s discretion. Such conduct falls within the gamut of deficiency.

“The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). As evident from Petitioner’s testimony, the prejudice in his case manifests itself in his plea which was made without full knowledge of the consequences of his guilty plea.

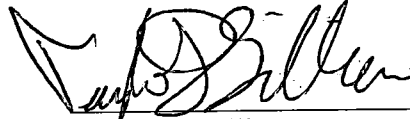
It is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant's self-serving statement may be sufficient to establish actual prejudice. See Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000) (rejecting objective evidence requirement established in Judge and finding Petitioner proved he was prejudiced by counsel's deficient performance in failing to

properly advise the Petitioner that he was pleading to a felony rather than a misdemeanor where Petitioner's uncontradicted testimony established that he would not have pled had he known the charge was a felony), overruling Judge v. State, 321 S.C. 554, 562, 471 S.E.2d 146, 150 (1996) ("The second prong of the ineffective assistance inquiry—prejudice—is shown by demonstrating through objective evidence ... [the existence of] a reasonable probability that, but for counsel's advice, [the defendant] would have accepted the plea. Through his own testimony at the evidentiary hearing, Petitioner testified that he was prejudiced as a result of plea counsel's deficiencies. According to Jackson, supra, Petitioner's self-serving statements prove that he was prejudiced by the lack of information when it came to the sentencing.

By his own admission, plea counsel represented Petitioner for the purposes of the plea only. App. 6 lines 14 - 22. Plea counsel could have discussed in greater detail Petitioner's involvement in the Marley Lyon case or requested that the Assistant Solicitor articulate the offer of no active prison time. As it stands, however, Petitioner was not made aware of possible sentencing ranges which would have affected his choice to plead guilty. Therefore, his plea was not knowingly entered. Had he known that he could have received a sentence exceeding the ten year plea offer brought to him by Butler, Petitioner would have taken that deal. However, counsel failed to convey to the judge the extent of Petitioner's cooperation in the high-end murder case; he also failed to communicate with Petitioner the consequences of Petitioner's guilty plea.

**CONCLUSION**

For the foregoing reasons, Petitioner requests that the Court grant his petition for writ of certiorari to allow full briefing on this issue.



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Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of January, 2017.

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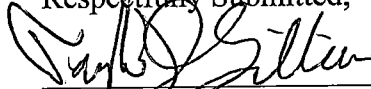
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Frank Middleton states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
  2. He has reviewed the record of petitioner's trial before Judge Doyet A. Early, which was held on April 20, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
  3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.
- Therefore, counsel requests that the Court relieve him as counsel for Frank Middleton.

Respectfully Submitted,



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Taylor D Gilliam

Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of January, 2017.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



Taylor D Gilliam  
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Defense  
Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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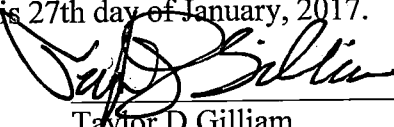
RESPONDENT

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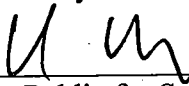
CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Frank Middleton, #284177, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 27th day of January, 2017.

  
\_\_\_\_\_  
Taylor D Gilliam  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 27th day of January, 2017.

  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires:

(L.S)