

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Beaufort County

Honorable Roger L. Couch, Circuit Court Judge

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LUCIUS SIMUEL,

PETITIONER,

V.

THE STATE,

RESPONDENT

APPELLATE CASE NO 2016-001607

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PETITION FOR WRIT OF CERTIORARI

\_\_\_\_\_  
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S.C. SUPREME COURT

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**ISSUE PRESENTED**

The PCR court erred in finding that defense counsel provided effective assistance of counsel where trial counsel erroneously advised Petitioner that he would not be eligible for a mandatory life without parole sentence under S.C. Code Ann. § 17-25-45 if convicted at trial because defense counsel erroneously advised Petitioner that his prior conviction for false imprisonment in Georgia would not qualify as a predicate violent crime in South Carolina.

## STATEMENT

Petitioner was convicted of an incident alleged to have occurred on July 28, 2008 where two drug dealers in Bluffton, South Carolina, were shot. Petitioner and his co-defendant were tried for the crimes together. Defense counsel did not make a motion for a severance. Both drug dealers identified Petitioner's co-defendant, Demetrius Price, as being the shooter on that day.

According to the drug dealers' version of events, they were at their apartment in Plantation Point Apartments, playing video games with their brother, when two men approached the door of the apartment. These men asked if the drug dealers were interested in purchasing pills and cocaine from them.

The dealers claimed that they were not interested. At some point, the two men were shot by the men who arrived at the apartment. Both survived, but one victim is now paralyzed. The drug dealers have never been charged with any crimes in connection with these events, although significant amounts of drugs, and four guns, were found in the apartment. App. 310- 404; 426- 520; 563- 618; 622- 662.

On September 25, 2008, the Beaufort County Grand Jury indicted Petitioner for burglary, first degree; two counts of assault and battery with intent to kill; possession of a weapon by felon; and possession of a weapon during the commission of a crime of violence. App. 1090 – 1097. Prior to trial the State offered to allow Petitioner to plead guilty and receive a negotiated sentence of twenty years imprisonment in exchange for testifying against his co-defendant, the undisputed shooter during the incident. On the advice of counsel, Petitioner refused the offer. App. 1048 – 1050.

On November 16-20, 2009, Appellant stood trial before the Honorable Thomas W. Cooper, Jr. and a jury. Appellant was represented by Ian Deysach. Assistant Solicitors R. Alexander Robinson and Robert Ferguson represented the State.

During trial, the State introduced certified copies of Petitioner's prior out-of-state convictions. App. 455 – 546; App. 960 – 961. Petitioner had previously pled guilty to the crimes of wearing a mask to conceal identity, robbery, and false imprisonment. *Id.*

Jurors found Petitioner guilty on all charges. App. 948 – 950. At sentencing, the State argued that Petitioner's prior false imprisonment conviction in Georgia was equivalent to South Carolina's kidnapping offense. Defense counsel countered that false imprisonment could not act as a predicate violent offense under South Carolina's recidivist offender statute. App. 963 – 967. Counsel noted that that elements for the two crimes did not match. Moreover, false imprisonment was only punishable by ten years and South Carolina's kidnapping statute exempted parental kidnapping while Georgia's false imprisonment statute did not. *Id.*

The trial court disagreed with defense counsel and determined that the Georgia false imprisonment conviction could be used to enhance Petitioner's sentence as the equivalent South Carolina offense, kidnapping, was a "most serious offense." The court did note that Georgia's false imprisonment statute was more narrowly drawn than South Carolina's kidnapping statute, which covered a wider range of conduct. App. 970 – 972.

Based on this ruling, Petitioner was sentenced to life in prison pursuant to S.C. Code Ann. §17-25-45. App. 972 – 973; App. 984. Petitioner's co-defendant was also sentenced to life imprisonment.

### **Direct Appeal**

On direct appeal Petitioner challenged the trial court's application of S.C. Code Ann. § 17-25-45 to his prior Georgia conviction for false imprisonment. Elizabeth Franklin-Best and Dayne Phillips represented Petitioner on appeal. Assistant Attorney General Mark Farthing represented the State. The South Carolina of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. *State v. Simuel*, 2012-MO-031 (S.C. Ct. App. Filed July 25, 2012),

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

On February 4, 2013, Petitioner filed an application for post-conviction relief alleging that, among other grounds for ineffectiveness, trial counsel was ineffective in advising Petitioner that his prior conviction in Georgia for false imprisonment would not trigger a mandatory life sentence under § 17-25-45. App. 986 - 991. On May 29, 2014, the State filed a Return. App. 992 - 995.

On October 20, 2015, an evidentiary hearing was held before the Honorable Roger L. Crouch. App. 996 – 1074. Scott W. Lee represented Petitioner. Assistant Attorney General J. Rutledge Johnson represented the State. Defense counsel and Petitioner both testified at the hearing.

Petitioner testified that when he received notice that the State intended to seek a sentence of life without parole, he was confused. Petitioner recalled that defense counsel did not advise him as to whether or not the State had the ability, based on Petitioner's criminal record, to seek a mandatory sentence of life without parole. "I just had the letter from the State." App. 1012 – 1013.

Defense counsel testified that there was no evidence that Petitioner knew in advance or had reason to believe that his co-defendant was planning on shooting the drug dealers. App. 1027 – 1029. With respect to the State's desire to seek a sentence of life without parole, defense

counsel recalled that “I didn’t believe that it should under the law . . . . That a false imprisonment from Georgia would trigger, would count as a most serious offense and therefore trigger the life without parole mandatory sentencing.” App. 1046.

Counsel believed, based on his research, that the elements of false imprisonment did not match those of kidnapping. App. 1046 – 1049. Counsel shared this conclusion with Petitioner when advising him about the risks of standing trial. *Id.*

Counsel stated that he first received notice of the State’s intent to seek mandatory life without parole about two months before trial, but that he never attempted to have the court clarify in advance whether or not Appellant qualified for the enhancement prior to going to trial. *Id.*

Counsel conceded that getting a ruling on whether or not the enhancement applied would have been very helpful for Petitioner as he considered whether or not to plead guilty. App. 1049. Counsel confirmed that Petitioner received an offer for a twenty year sentence in exchange for pleading guilty. *Id.*

### **Order of Dismissal**

The PCR court denied Petitioner’s application for PCR relief in a written order of dismissal filed on February 8, 2016. App. 1075 - 1083. The court found defense counsel’s testimony at the hearing credible. App. 1076 – 1077. The court rejected Petitioner’s claim that counsel was ineffective for not properly advising him on the applicability of § 17-25-45’s mandatory life without parole sentence. App. 1079 – 1080.

Rather, the court concluded that Petitioner was “fully aware that he was facing life without parole if he was convicted.” *Id.* Contrary to the credible testimony of defense counsel, the court determined that “Applicant provided no testimony that he relied on Counsel’s advice in

rejecting the plea offer from the State. This is simply a case of buyer's remorse. As such, Counsel fulfilled his duty" to render effective representation. App. 1010.

On February 11, 2016, Petitioner filed a Rule 59(e) motion to alter or amend the order of dismissal. Petitioner alleged that the court incorrectly found that counsel had properly advised Petitioner as to the mandatory applicability of the life without parole sentencing enhancement. App. 1084 – 1085. On June 29, 2016, the PCR court issued an order denying Petitioner's Rule 59(e) motion. App. 1088 – 1089.

## ARGUMENT

The PCR court erred in finding that defense counsel provided effective assistance of counsel where trial counsel erroneously advised Petitioner that he would not be eligible for a mandatory life without parole sentence under S.C. Code Ann. § 17-25-45 if convicted at trial because defense counsel erroneously advised Petitioner that his prior conviction for false imprisonment in Georgia would not qualify as a predicate violent crime in South Carolina.

Defense counsel testified that he advised Petitioner that his prior convictions in Georgia, specifically his conviction for false imprisonment, would not trigger the recidivist mandatory life without parole provisions in § 17-25-45:

I didn't think that it -- you know, under my understanding of the law at the time, that out of state conviction -- and the way that I analyzed the elements of the offense I didn't think that it should trigger life without parole. . . . **I shared with him my, my belief that the law didn't support the triggering of the life without parole statute.**"

App. 1045 – 1047 (*emphasis added*).

This testimony is in direct contradiction to the PCR Court's subsequent finding: "it was Counsel's testimony that Applicant was offered 20 years and rejected that offer. **Applicant provided no testimony that he relied on Counsel's advice in rejecting the plea off from the State.**" App. 1079 – 1080 (*emphasis added*).

Accordingly, the PCR court erred in finding plea counsel provided effective assistance of counsel. App. 307 – 317. *See Lafler v. Cooper*, 566 U.S. 156, 132 S.Ct. 1376 (2012) (holding the Sixth Amendment right to effective assistance of counsel extends to situations where "inadequate assistance of counsel caused non-acceptance of a plea and further proceedings led to a less favorable outcome"); *see also Missouri v. Frye*, 566 U.S. 133 132 S.Ct. 1399 (2012) (holding the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected, and reaffirming *Hill v. Lockhart*, 474 U.S. 52 (1985) (applying the ineffective

assistance of counsel standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) to guilty pleas).

In *Frye*, the “case [arose] in the context of claimed ineffective assistance that led to the lapse of a prosecution offer of a plea bargain, a proposal that offered terms more lenient than the terms of the guilty plea entered later.” *Frye*, 132 S.Ct. at 1404. There were two questions before the United States Supreme Court in *Frye*: (1) “whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected[;]” and (2) “If there is a right to effective assistance with respect to those offers, . . . what a defendant must demonstrate in order to show that prejudice resulted from counsel’s deficient performance.” *Id.*

The United States Supreme Court noted that the “Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings[, which] . . . include arraignments, postindictment interrogations, postindictment line ups, and the entry of a guilty plea.” *Id.* at 1405 (citations and internal quotation omitted). Ultimately, the Court held that the right to effective assistance of counsel extends not only to those situations in which a criminal defendant accepts a plea bargain and waives his right to trial,<sup>1</sup> but also to situations where plea offers are rejected or allowed to lapse. *Id.* at 1410-11.

In support of its holding, the Court found:

The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the

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<sup>1</sup> See *Hill v. Lockhart*, 474 U.S. 52 (1985) (finding ineffective assistance of counsel from a guilty plea (1) where counsel’s advice was not within the range of competence demanded of attorneys in criminal cases and (2) where “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”); see also *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010) (finding an attorney renders ineffective assistance of counsel by failing to advise a defendant that a guilty plea may subject the defendant to automatic deportation).

Sixth Amendment requires in the criminal process at critical stages. Because ours 'is for the most part a system of pleas, not a system of trials,' *Lafler*, post, at 11, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.

*Id.* at 1407 (emphasis added). The Court further emphasized that "[i]n today's criminal justice system, . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Id.* (emphasis added). Accordingly, "[a]nything less [than effective counsel during plea negotiations] . . . might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'" *Id.* at 1408 (citing *Massiah v. United States*, 377 U.S. 201 (1964) (quotation citation omitted)).

As the companion case to *Frye*, the Court in *Lafler* addressed when "the favorable plea offer was reported to the client but, on advice of counsel, was rejected, there was a full and fair trial before a jury. After a guilty verdict, the defendant received a sentence harsher than that offered in the rejected plea bargain." *Lafler*, 132 S.Ct. at 1383. However, in *Lafler* both parties agreed that counsel's performance was deficient based on his erroneous advice to reject the plea offer. *Id.* at 1384.

Therefore, the main inquiry was how to apply *Strickland's* prejudice prong where a defendant had rejected a plea offer based on ineffective assistance of counsel but was convicted after a full and fair trial. The prejudice analysis for this situation follows:

In contrast to *Hill*, here the ineffective advice led not to an offer's acceptance but to its rejection. Having to stand trial, not choosing to waive it, is the prejudice alleged. In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the

judgment and sentence that in fact were imposed.

*Id.* at 1385; *See Glover v. United States*, 531 U.S. 198, 203 (2001) (finding “any amount of [additional] jail time has Sixth Amendment significance”).

The *Lafler* Court noted, “The fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney’s deficient performance during plea bargaining.” *Id.* at 1388. As for the remedy applied by the Court:

The specific injury suffered by defendants who decline a plea offer as a result of ineffective assistance of counsel and then receive a greater sentence as a result of trial can come in at least one of two forms. In some cases, the sole advantage a defendant would have received under the plea is a lesser sentence . . . [and] [i]n some situations it may be that resentencing alone will not be full redress for the constitutional injury.

*Id.* at 1389. In the first set of cases, this occurs “when the charges that would have been admitted as part of the plea bargain are the same as the charges the defendant was convicted of after trial.”

*Id.*

“In this situation the court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel’s errors he would have accepted the plea. If the showing is made, the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between.” *Id.*

In the second set of cases, this occurs when “an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial, or if a mandatory sentence confines a judge’s sentencing discretion after trial, a resentencing based on the conviction at trial may not suffice.” *Id.* (citations omitted). “In these circumstances, the

proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.” *Id.*

The *Lafler* Court noted, “In implementing a remedy in both of these situations, the trial court must weigh various factors; and the boundaries of proper discretion need not be defined here. . . . At this point, however, it suffices to note two considerations that are of relevance.” *Id.* “First, a court may take account of a defendant’s earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, it is not necessary here to decide as a constitutional rule that a judge is required to prescind (that is to say disregard) any information concerning the crime that was discovered after the plea offer was made.” *Id.*

The *Lafler* Court ultimately held that “[t]he correct remedy in these circumstances . . . is to order the State to reoffer the plea agreement.” *Id.* at 1391. The *Lafler* Court noted, “Presuming respondent accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed.” *Id.*

### **Deficient Performance**

In this case, defense counsel’s performance was deficient, as it fell below “an objective standard of reasonableness” when counsel erroneously advised Petitioner that he would not be eligible for a mandatory sentence of life without parole under the recidivist sentencing enhancements found in S.C. Code Ann. § 17-25-45. App. 1079.

Obviously, Petitioner relied on defense counsel's professional judgment when deciding whether to accept or reject the State's twenty year offer. App. 1045 – 1047. Sentencing advice is an integral part of a defense attorney's representation, one that is understandably important to clients. *Thompson v. State*, 340 S.C. 112, 531 S.E.2d 294 (2000) (holding that plea counsel was ineffective for failing to object when solicitor violated plea agreement and sought maximum sentence/

This is especially true where, as in Petitioner's case, there is the very real possibility of a mandatory sentence of life without parole if convicted. *See Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473. By contrast, had the recidivism penalties not applied, Petitioner would have been eligible for a sentence as short as fifteen years.

Defense counsel confirmed that he incorrectly believed that Petitioner's false imprisonment conviction in Georgia would not qualify as a predicate violent offense because it contained superficially different elements than South Carolina's kidnapping statute. This was not an objectively reasonable conclusion. S.C. Code Ann. § 17-25-45 states:

Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has either:

(1) one or more prior convictions for:

(a) a most serious offense; or

(b) a federal or out-of-state conviction for an offense that would be classified as a most serious offense under this section . . . .

Georgia defines false imprisonment as:

A person commits the offense of false imprisonment when, in violation of the personal liberty of another, **he arrests, confines, or detains such person without legal authority.**

**Any person convicted under this Code section wherein the victim is not the child of the defendant** and the victim is less than 14 years of age shall, in addition, be subject to the sentencing and punishment provisions of Code § 17-10-6.2.

Ga. Code Ann. § 16-5-41 (*emphasis added*). False imprisonment is punishable by up to ten years imprisonment. *Id.* South Carolina defines kidnapping as:

**Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed 30 years**

S.C. Code Ann. § 16-3-910 (*emphasis added*). From a substantive element standpoint, Georgia's false imprisonment statute and South Carolina kidnapping statute are virtually identical.

The leading case dealing with the applicability of extra-judicial criminal convictions under S.C. Code Ann. § 17-25-45 to South Carolina law is *Hinton v. S.C. Dept. of Probation, Parole, and Pardon Services*, 357 S.C. 327, 592 S.E.2d 335 (Ct. App. 2004). *Hinton* requires courts to determine whether the out of state offense was committed in a way that does not violate the analogous South Carolina offense. *Id.*

South Carolina's kidnapping statute excludes parental seizure of a minor child, as does Georgia's false imprisonment offense. S.C. Code Ann. § 16-3-910; Ga. Code Ann. § 16-5-41. Appellant's prior Georgia conviction for false imprisonment arose from a guilty plea where Petitioner admitted to committing an armed robbery of a restaurant. App. 963 - 976. Under those circumstances, even assuming *arguendo* that the exceptions for children are different, it would be impossible for Petitioner's false imprisonment conviction to fall within the parental exception of the Carolina's kidnapping statute.

Critically, unlike in *Hinton*, Petitioner pled guilty to false imprisonment and thus admitted to the underlying facts of the State's allegations. By contrast, in *Hinton*, the defendant had gone to

trial on the out-of-state charge and so the Court of Appeals declined to speculate as to what facts the jury found the defendant guilty. 357 S.C. at 340, 592 S.E.2d at 342.

Accordingly, defense counsel's advice to Petitioner that the mandatory life without parole recidivist penalty would not be triggered by his prior guilty plea to false imprisonment in Georgia was not objectively reasonable advice. Counsel simply misread South Carolina precedent. The PCR court erred in finding that "Applicant provided no testimony that he relied on Counsel's advice in rejecting the plea offer from the State." App. 1079; *see also Alexander v. State*, 303 S. C. 539, 402 S. E. 2d 484 (1991); *Ray v. State*, 303 S. C. 374, 401 S. E. 2d 151 (1991).

### **Prejudice**

Here, Petitioner's case is on "all fours" with the facts presented in *Lafler*. Lafler was informed of the correct plea offer, but was given erroneous advice. Petitioner was prejudiced by plea counsel's deficient performance because both prongs of the adapted *Strickland* standard are satisfied, as there is a reasonable probability Petitioner would have pled guilty, "the court would have accepted its terms[.]" and that the sentence "would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler*, 132 S.Ct. at 1385; *See Glover v. United States*, 531 U.S. 198, 203 (2001) (finding "any amount of [additional] jail time has Sixth Amendment significance").

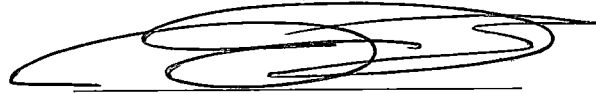
The plea offer was extended to Petitioner during counsel's representation and counsel gave erroneous advice causing Petitioner to reject the plea offer. This is evinced best by counsel's testimony at the evidentiary hearing that he told Petitioner he would not be eligible for mandatory life without parole and that getting a ruling on whether or not the enhancement applied would have been very helpful for Petitioner as he considered whether or not to plead guilty. App. 1047 – 1050.

Accordingly, the PCR court erred in finding that defense counsel provided effective

assistance of counsel. App. 1079 - 1080. *See Lafler*, 132 S.Ct. 1376 (holding the Sixth Amendment right to effective assistance of counsel extends to situations where “inadequate assistance of counsel caused non-acceptance of a plea and further proceedings led to a less favorable outcome”); *see also Frye*, 132 S.Ct. 1399 (holding the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected).

**CONCLUSION**

Based on the foregoing reasons, Petitioner Lucius Simuel's petition for writ of certiorari should be granted to allow full briefing on the issue.



John H. Strom  
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of April, 2017.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his ability this 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."



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ATTORNEY FOR PETITIONER

This 10th day of April, 2017.

STATE OF SOUTH CAROLINA  
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Certiorari to Beaufort County

Honorable Roger L. Couch, Circuit Court Judge

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LUCIUS SIMUEL,

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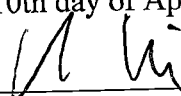
CERTIFICATE OF SERVICE

\_\_\_\_\_

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Ruston Neely, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Lucius Simuel, #338144, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 10th day of April, 2017.

  
\_\_\_\_\_  
John H. Strom  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 10th day of April, 2017.

  
\_\_\_\_\_  
(L.S)  
Notary Public for South Carolina  
My Commission Expires: 5/12/2025