

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas

The Honorable Maite Murphy, Circuit Court Judge

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Appellate Case No. 2016-001449

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Kentrell Liburd, 357498, ..... Appellant,

v.

State of South Carolina, ..... Respondent.

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**REPLY TO RESPONDENT'S BRIEF IN  
OPPOSITION TO WRIT OF CERTIORARI**

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ATTORNEY FOR PETITIONER

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ATTORNEY FOR THE RESPONDENT

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JUN 30 2017

S.C. SUPREME COURT

## ARGUMENT

In its brief in opposition, the Respondent states that the record supports the PCR court's finding that plea counsel sufficiently evaluated and appraised Petitioner of his co-Defendant's lack of competence and its impact on his changes at trial prior to the plea and, since evidence exists to sustain the Judge's finding, this Court should therefore deny certiorari. The Respondent's reason is not persuasive. This Court should grant the writ of certiorari.

The Respondent's Return to Petition for Writ of Certiorari relied on a flawed understanding of the law, both in failing to address whether Petitioner's plea was knowing and voluntary, and in failing to address whether ineffective assistance of plea counsel rendered his guilty plea involuntary. The State's Brief-In-Opposition only highlights that plea counsel advised Petitioner of Foye's lack of competence prior to his guilty plea. However the real issue is that despite knowledge that Foye was incompetent, plea counsel failed to investigate the nature of his incompetency or properly advise Petitioner of the impact of the suppression of this statement coupled with the weaknesses of the State's case against him before he agreed to plead guilty. Petitioner felt under duress to accept a plea because plea counsel did not reveal to him vital information before he signed a plea agreement, and Petitioner felt at that point that his plea counsel was not prepared for trial. Because he had not received accurate information and advice from his plea counsel, Petitioner pled guilty and expressed satisfaction with his plea counsel's representation because he lacked the necessary information to raise any challenge during the plea proceeding.

In *Kolle v. State*, 690 S.E.2d 73, 386 S.C. 578 (S.C., 2010), because plea counsel misadvised Kolle not to plead guilty prior to the suppression hearing, which in turn resulted in the withdrawal of the State's negotiated sentence, the PCR judge found that these facts "undermined the willful and

voluntary nature of Kollé's plea." The PCR judge in that case found plea counsel would have discovered exculpatory evidence regarding the search warrant and radio/dispatch logs had he properly prepared for trial. The PCR judge believed "such discovery would have reversed the outcome." Thus, the judge held that plea counsel's lack of preparation satisfied the standard of deficiency under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Ultimately, the judge concluded that this deficient performance "deprived [Kollé] of adequate representation and that a different verdict from a verdict of guilty could have been a logical conclusion."

In general, a defendant's guilty plea is more than an admission of conduct; rather, it is a conviction that can deprive him of his liberty or other constitutionally protected interests. *Mabry v. Johnson*, 467 U.S. 504, 507, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984); *Boykin*, 395 U.S. at 242, 89 S.Ct. 1709. Therefore, the entry of a guilty plea implicates the protections of the Due Process Clause of the federal and state constitutions. See U.S. Const. amend. XIV (providing that states may not deprive a person of life, liberty, or property without due process of law); S.C. Const. art. I, § 3 (same).

In *Berry v. State*, 675 S.E.2d 425 (S.C., 2009), the Court stated that the Sixth Amendment guarantee of effective assistance of counsel requires that counsel accurately inform a defendant, to the extent possible, of evidence the State has against him and any possible legal challenges he may have, as an accused is entitled to counsel's considered and reasonable judgment. In fact, the Court reasoned, uncertainty concerning a potential legal challenge may well provide a defendant a catalyst in plea negotiations with the State. A decision to waive a viable legal challenge must be made knowingly and voluntarily with the advice of constitutionally competent counsel. The difference in

such circumstances between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea.

Here, counsel never fully informed Petitioner of the potential challenge to the use of his co-defendant's statement implicating him and the challenge he could make to his own statement. Although Petitioner's plea counsel claimed this was immaterial due to Petitioner's own confession after being confronted with his co-defendant's statement implicating him, plea counsel never evaluated the admissibility of Petitioner's statement given his age, which was sixteen at the time, and the assertion by law enforcement that he could be tried as a juvenile to induce Petitioner's confession. The Supreme Court has long recognized that a false promise is a powerful force in overcoming a person's free will. See; *Bram v. United States*, 168 U.S. 532, 542-43 (1897) ("[A] confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.") (quoting 3 H. Smith & A. Keep, *Russell on Crimes and Misdemeanors* 478 (6th ed. 1896)). Consequently, "[a] false promise of lenience is 'an example of forbidden [interrogation] tactics, for it would impede the suspect in making an informed choice as to whether he was better off confessing or clamming up.'" *United States v. Stadfeld*, 689 F.3d 705, 709 (7th Cir. 2012) (quoting *United States v. Baldwin*, 60 F.3d 363, 365 (7th Cir. 1995)).

In *Dassey v. Dittmann* (E.D. Wis., 2016), the Court said this is especially true when the investigators' promises, assurances, and threats of negative consequences are assessed in conjunction with the Petitioner's age, intellectual deficits, lack of experience in dealing with the police, the absence of a parent, and other relevant personal characteristics, the free will of a reasonable person in Petitioner's position would have been overborne. Once considered in this proper light,

Petitioner's plea counsel's assertion that Petitioner's confession amounted to overwhelming evidence which would support his conviction despite inadmissibility of his co-defendant's statement implicating him is unsustainable. Petitioner was only sixteen (16) years old when the alleged confession was made. Consequently, the Petitioner's confession could not have been the basis of overwhelming evidence to support conviction because based on the circumstances under which it was obtained, it was clearly involuntary in a constitutional sense.

As a result, Petitioner's plea counsel's failure to even consider and investigate the implications of his co-defendant's incompetence and inadmissibility of his statement implicating Petitioner at trial, and so inform Petitioner, fell below the standard of objective reasonableness. Petitioner's guilty plea was not knowingly, intelligently and voluntarily made when plea counsel failed to properly investigate the nature of Gregory Foye's incompetency and how it affected Petitioner. Therefore, Petitioner's plea counsel provided constitutionally deficient representation, and petitioner was prejudiced by counsel's deficient performance because if he would have known Foye was found incompetent and that the State's case was weakened by the unavailability of critical witnesses, he would have went to trial. (App. 48, 11.9-14).

"The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593 (1975). The Sixth Amendment guarantees that every criminal defendant shall receive "Assistance of Counsel" in establishing his defense. U.S. Const. amend. VI. On May 14, 1984, the United States Supreme Court handed down two opinions holding that the Sixth Amendment requires that the criminal defendant receive *effective* assistance of counsel. *United States v. Cronin*, 466 U.S. 648, 104

S.Ct. 2039, 80 L.Ed.2d 657 (1984); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

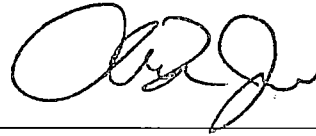
Petitioner submits that trial counsel's conduct, lack of investigation and preparation, and her failure to reveal critical information to Petitioner provided no meaningful adversarial challenge to the prosecution's case.

Applying the *Cronic* "meaningful adversarial challenge" analysis to this case demonstrates the classic example of a judicial process that lost "its character as a confrontation between adversaries." *Cronic*, 466 U.S. at 656-657, 104 S.Ct. at 2045-2046. Thus, Petitioner's constitutional right to effective assistance of counsel has been violated.

A guilty plea may not be accepted where the defendant did not plead of his own volition. *Boykin*, 395 U.S. at 243. As the United States Supreme Court provided in *Boykin*, "a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." *Id.* See *Kercheval v. United States*, 274 U.S. 220, 223 (1927). Aside from incidents where defense counsel simply neglects his client's case or makes negligent fatal errors in the case, ineffective assistance of counsel may include instances where a defendant's attorney misrepresents information regarding the plea to the defendant, thereby inducing him to plead guilty. Similarly, counsel would be defective if defense counsel purposefully lies to the defendant or asks the defendant to lie in court proceedings regarding his plea. *Id.* In such situations, it is likely that the plea could be successfully attacked by the defendant as involuntary. *Id.*

## CONCLUSION

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



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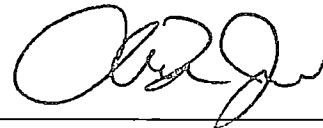
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the Reply to Respondent's Brief in Opposition to Writ of Certiorari in this case has been served on Ruston W. Neely, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, by mailing in an envelope properly addressed with postage prepaid on this 30<sup>th</sup> day of June, 2017.



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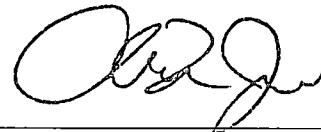
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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari in this case has been served on Kentrell Liburd, #357498 at Broad River Correctional Institution 4460 Broad River Road Columbia, South Carolina 29210 by mailing in an envelope properly addressed with postage prepaid on this 30<sup>th</sup> day of June 2017.



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