STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO DARLINGTON COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2017-000881

Eugene A. Gardner, III,.....Respondent,

v.

State of South Carolina,.....Petitioner.

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General
SC Bar #102524

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

QUESTIONS PRESENTED

I. **Did the PCR judge commit an error of law in granting post-conviction relief based on a conversation between Gardner and an individual that was not Gardner's trial attorney about pleading guilty?**

II. **Did the PCR judge err in granting post-conviction relief based on Counsel discovering Gardner engaged in a consensual conversation with another individual about pleading guilty, advising Gardner to plead guilty, and not informing the plea judge of the prior conversation?**

STATEMENT OF THE CASE

Gardner is presently confined in the South Carolina Department of Corrections ("SCDC") pursuant to orders of commitment of the Darlington County Clerk of Court. In February 2013, the Darlington County Grand Jury indicted Gardner for murder (2005-GS-16-0452). Julie R. Swilley ("Counsel"), Esquire, represented Gardner and J. Richard Jones ("Co-Counsel"), Esquire, assisted as co-counsel. On December 2, 2013, Gardner proceeded to trial before the Honorable J. Michael Baxley and a jury. On December 3, 2013, after the State's first witness, Gardner changed his plea to guilty to the lesser-included offense of voluntary manslaughter. Judge Baxley sentenced Gardner to twenty (20) years' imprisonment. Gardner did not appeal his plea or sentence.

Trial Proceedings

After jury selection, Counsel made a motion to suppress Gardner's statement given to law enforcement. (App. p. 46, ll. 21 – 24). Counsel argued that because of a 15 hour lapse between Gardner's arrest and his interview and alleged "threats" made by law enforcement, his statement was not voluntary. (App. p. 47, ll. 16 – 25). Investigator Mark Luce testified *in camera* that he was assigned to work Gardner's murder case. (App. p. 50, ll. 11-12). Luce arrested Gardner in North Carolina where he then took Gardner to the Ashe County Jail and recorded his statement. (App. p. 50, ll. 13 – 21).

Luce had sought the help of the U.S. Marshals Service and North Carolina Law Enforcement in arresting Gardner. (App. p. 58, ll. 1 – 6). Luce and Sergeant Peavy left Darlington early in the morning and arrived in North Carolina at "9:30 or so." (App. p. 58, ll. 7 – 9). Luce obtained a search warrant to search Gardner's home and finished the search at about 11:30 am. (App. p. 58, ll. 13 – 18). Luce then secured a search warrant for Gardner's vehicle

which took until about 4:00pm. (App. p. 58, ll. 19 – 22). While executing the search of Gardner's vehicle, Gardner made a call from the jail to his home and he was overheard by jail personnel telling the person on the other end of the phone to make sure the police did not find the blue bag and to hide the blue bag behind the chimney. (App. p. 58, ll. 23 – p. 59, ll. 7). It took another few hours to obtain a second search warrant to locate the blue bag. (App. p. 59, ll. 4 – 13).

At this point, it was about 7:30 and Luce had to stop to eat. (App. p. 59, ll. 14 – 15). Luce wanted to await the results of the second search warrant before interviewing Gardner, to see if they could in fact find the blue bag. (App. p. 59, ll. 16 – 22). Luce returned to Gardner's home, over an hour away from where he was, to find out a gun had been found. (App. p. 59, ll. 23 – p. 60, ll. 7). They finished up at Gardner's home at about 11:30pm. (App. p. 60, l. 19). After an hour drive back to the jail in which Gardner was detained, Luce arrived to the jail a little after 12:00am and proceeded to video interview Gardner starting around 12:30am. Luce interviewed him immediately because he knew there would be conversation during the long ride back to South Carolina in the morning. (App. p. 60, ll. 19 – p. 62, ll. 10). During the video interview, Gardner first told Luce he did not know where the gun was, but eventually told Luce where he had hidden the gun. (App. p. 63, ll. 1 – p. 64, ll. 5).

On cross examination, Luce testified he had suspicions Gardner's wife was involved in the murder. (App. p. 64, ll. 20 – 23). Luce admitted he told Gardner during the interview that he may have to put more people in jail, referring to Gardner's friends and family members that may have been involved in the murder. (App. p. 65, ll. 6 – 13). Also on the recorded interview, Luce explained to Gardner that if anyone helped cover up the crime, they would be guilty of accessory after the fact. (App. p. 65, ll. 16 – 19). Counsel continued to question Luce on certain remarks

made during Gardner's interview. (App. pp. 65 – 67). Luce clarified on re-direct examination that none of his statements were veiled threats to lock up Gardner's wife and daughter. (App. p. 68, ll. 3 – 6).

Officer Josh Hodges also testified *in camera.* (App. pp. 75 – 80). Hodges was sitting next to Gardner on a bench while Gardner was on the telephone call and overheard Gardner aggressively saying, "just do it, put it in the chimney or something" and "they can't find the blue bag." (App. p. 76, ll. 13 – 22). After hearing from the State and Counsel, Judge Baxley found Gardner's statement was voluntary and admissible. (App. pp. 81 – 94).

Counsel then argued for suppression of the gun that killed the victim. (App. p. 95, ll. 15 – p. 100, ll. 1). The State responded and explained how the second search warrant was obtained and how, when it was executed, the gun was found where they suspected, behind paneling that had been pulled out of the side of the fireplace in a hidden area. (App. p. 100, ll. 11 – p. 103, ll. 23). After further argument from Counsel and the State, Judge Baxley again denied Gardner's motion to suppress. (App. pp. 112 – 114). The State further confirmed without contradiction or qualification by Counsel there would be no objection to *three* other video recorded statements made by Gardner to law enforcement being admitted at trial. (App. p. 114, ll. 15 – p. 115, ll. 24).

Following the pre-trial motion hearings, the trial began the following day with opening statements. In the State's opening argument, reference was made to the volume of evidence the State was prepared to present. Gardner's brother was found dead in his home with a gunshot wound to the *back* of the head. There was no sign of forced entry to the victim's home. Gardner denied even being in the county, but cell phone records showed he was in Darlington County the day before and the day of his brother's murder. Gardner gave four statements to law enforcement over the course of a nine month investigation. The statements changed as law

enforcement confronted him with more and more damning evidence, the last one resulting in a confession that he shot his brother "by accident." (App. p. 130 – 140).

The victim was shot with his own 9 mm handgun. Gardner had reported the firearm missing. As mentioned above, the gun was later found in a hidden compartment behind a chimney in Gardner's residence, after Gardner was overheard on the phone post-arrest telling someone to hide it and make sure it is not found. The State intended to prove Gardner's motive for killing his brother was greed.[1] Prior to his murder, the victim was the care taker of his and Gardner's father. The victim lived with their father, took care of him, and his name was on their father's checking account. After his brother's murder and after Gardner obtained a power of attorney to access his father's money, large amounts of that money were then spent by Gardner. (App. pp. 130 – 140).

Following opening statements, the State called the victim's ex-wife, Susan Gardner Davis, to testify. Ms. Davis was married to the victim, Gardner's brother, and they lived on family land near Gardner and their parents. (App. pp. 145 – 146). Ms. Davis testified the victim and Gardner's relationship was "very up and down." (App. p. 146, l. 10). She testified that shortly after she married the victim, they purchased a 9 mm Ruger gun. (App. p. 151, ll. 24 – 25). She stated that after she and the victim divorced, the victim kept the gun. (App. p. 152, ll. 1 – 2). Ms. Davis found the victim after he had been shot to death in the restaurant where he lived with his father. (App. p. 155, ll. 1 – 10). The following day, Gardner asked for a key to the restaurant to see if anything was missing. (App. p. 15, l. 24 – p. 157, l. 3).

[1] After the victim's death, Gardner received a power of attorney that gave him authority over his father's finances – authority the victim had before his death. The State was prepared to introduce bank records, through a Wells Fargo records custodian, to show an amount spent exceeding $125,000 in a span of approximately four months. The State also had evidence that Gardner continued the spending even after his father's death and cashed in one of his annuities using the power of attorney. (App. p. 194, l. 5 – p. 195, l. 15).

Ms. Davis testified that following the murder, Gardner persistently tried to spend time with her children, specifically her son. (App. p. 157, l. 4 – p. 158, l. 16). Two weeks after the victim's murder, Gardner asked for Ms. Davis's children's social security number and claimed they could probably get a lot more than she ever got from the victim. (App. p. 158, ll. 17 – 24). Ms. Davis testified that when she arrived at the scene of the shooting, both the front and back doors were locked. (App. p. 159, l. 18 – p. 160, l. 11).

On cross-examination, Ms. Davis testified the victim and the father both lived in a small apartment built off of a closed restaurant, but at the time of the murder, the father was in rehab. (App. p. 162, ll. 17 – 24). Ms. Davis admitted giving a statement to law enforcement that mentioned the victim's bouts of depression, but, she did not say when he had bouts of depression in her statement. (App. p. 167, l. 2 – p. 168, l. 1; p. 174, l. 15 – 25; p. 175, l. 24 – p. 176, l. 11). Ms. Davis testified the depression had subsided six to eight months before his murder. (App. p. 176, ll. 5 – 8).

Guilty Plea

Following Ms. Davis's testimony, there was a brief recess. (App. p. 176, ll. 19 – 21). Upon return, Gardner changed his plea to guilty and a colloquy ensued between the judge, Gardner, the attorneys, and the victims. When Counsel was asked whether she had discussed the elements and penalties of the charges and the right to a jury trial with Gardner, she replied, "numerous times, Your Honor, and we are ready and prepared to proceed in trial if that was his option." (App. p. 179, ll. 6 – 14). Counsel confirmed she believed it was in Gardner's best interest to enter a guilty plea to voluntary manslaughter. (App. p. 180, ll. 5 – 7).

Gardner was then examined by the judge to confirm his decision to enter his guilty plea was knowing, intelligent, and voluntary. Specifically, the judge asked Gardner if he was

admitting that he killed his brother in the sudden heat of passion to which applicant responded, "yes, sir." (App. p. 180, ll. 16 – 21). Judge Baxley asked why Gardner had a change of heart in the middle of trial, to which Gardner answered, "I didn't mean for any of this to happen. [...] And I don't want my family going through this anymore, both sides." (App. p. 181, l. 25 – p. 182, l. 9). Gardner also testified he believed a guilty plea was in his best interest. (App. p. 182, ll. 10 – 13). Gardner testified it was his decision to plead guilty, not someone else's. (App. p. 184, l. 25 – p. 185, l. 2). After a colloquy about Gardner's waiver of his rights, the following exchange occurred between Judge Baxley and Gardner:

> **Q. All right, sir. Has anyone tried to force you to do this?**
> **A. No, sir.**
> Q. So you're telling me that, based on where you find yourself, you've made this decision yourself voluntarily to enter this guilty plea[?]
> A. Yes, sir.
> Q. Are you satisfied with Ms. Wooten and Mr. Jones's services?
> A. Very much so.
> Q. Do you think they've done a good job for you?
> A. Yes, sir, I really do.
> Q. Do you have any complaints at all about the way they've represented you?
> A. No, sir.
> Q. **Do you feel that anyone has coerced you this morning in coming forward to enter this decision?**
> A. **No, sir.**
> Q. So tell me again one more time why you're making this decision at this moment already in trial to enter a guilty plea.
> A. I just – I just feel like I want this to end for my family on both sides.

(App. p. 185, ll. 3 – 25). (emphasis added).

And finally, Gardner once again admitted to killing his brother in the heat of passion after sufficient legal provocation. (App. p. 186, ll. 1 – 7). In mitigation, Counsel reiterated Gardner's prior statements, that Gardner was pleading guilty because he no longer wanted his family to suffer any more pain from a trial. (App. p. 202, ll. 15 – 21). Judge Baxley sentenced Gardner to twenty years' imprisonment. (App. p. 208, ll. 15 – 23).

PCR

Thereafter, on August 12, 2014, Gardner filed an application for post-conviction relief ("PCR"). On or about June 11, 2015, the State made its Return, requesting an evidentiary hearing be held. An evidentiary hearing was held on January 10, 2017, at the Marlboro County Courthouse before the Honorable G. Thomas Cooper, Jr. Lance S. Boozer, Esquire, represented Gardner. Valerie Garcia Giovanoli, Esquire, of the South Carolina Office of the Attorney General, represented the State. Gardner testified on his own behalf. Scott B. Suggs, Julie R. Swilley, J. Richard Jones, and Gardner's daughter, Taylor Baker, also testified.

Testimony from PCR Hearing

Gardner testified that the killing of his brother was an accident. Both of Gardner's plea counsel, Swilley and Jones, testified the evidence against Gardner was overwhelming and contradictory to Gardner's claim that the murder was an accident. Counsel also testified although the likelihood of conviction and a life sentence was high and Counsel's opinion was Gardner should accept the plea offer, Gardner refused to entertain any plea offers from the Solicitor and insisted on a jury trial. (App. p. 317, l. 22 – p. 318, l. 7; p. 324, l. 4 – 25).

Gardner testified he never received any plea offers. (App. p. 267, ll. 12 – 14). However, Counsel testified she informed Gardner of every offer, of which she believes there were three, because she was obligated to do so. Counsel recalled the offer from the Solicitor was a twenty year recommendation upon a guilty plea to voluntary manslaughter. (App. p. 317, ll. 4 – 11). Counsel indicated her opinion was it was in Gardner's best interest to accept a plea offer. Counsel explained his case would be difficult to win because: 1) he had given multiple untrue statements to law enforcement; 2) there was evidence of a money trail that indicated the murder was done out of greed; 3) there were no witnesses to the crime; 4) Gardner hid the gun used to

kill his brother[2]; and 5) Gardner's theory that the killing was accidental was contradicted by all of the evidence. (App. p. 317, l. 24 – p. 318, l. 7; p. 324, ll. 17 – 25). In summary, the State's evidence was very strong.

Suggs, the Darlington County Clerk of Court, testified he, too, felt the jury would definitely convict Gardner of murder and Judge Baxley would sentence Gardner to life in prison. Suggs relayed this commonly-shared belief to Gardner in a brief recess during the beginning of trial. Suggs testified because of his relationship as a life-long friend of Gardner, their history of playing sports together as youths and golf as adults, as well as cookouts, card playing, and other social gatherings, Suggs considered Gardner a personal friend. (App. 294, ll. 11 – 22). Suggs further testified he spoke to Gardner as a friend and not in his professional capacity as Clerk of Court. (App. p. 300, l. 24 – p. 301, l. 10).

Suggs initially spoke to Gardner's family, who informed Suggs they did not want a trial and preferred that Gardner plead guilty. The family expressed to Suggs they wanted Gardner to admit he killed the victim. (App. p. 296, ll. 19 – 20; p. 297, ll. 15 – 20; p. 298, ll. 4 – 12). Suggs spoke to Gardner alone in a holding room behind the courtroom during a brief recess after the State had called their first witness in the trial. Suggs admitted it was because of his friendship with Gardner that he had this conversation with him, as it was not typical for him to intercede in a criminal trial. (App. p. 300, l. 25 – p. 301, l. 10). Shortly thereafter, Counsel entered the room surprised to find Suggs discussing the option of a guilty plea with Gardner. Counsel testified Gardner looked concerned. (App. p. 331, ll. 14 – 16). Gardner admitted he was "scared the day [he] walked into the courtroom." (App. p. 286, ll. 11 – 12). Suggs left the

[2] Notably, Gardner implied the murder weapon was found because he told law enforcement where it was. (App. p. 274, ll. 19 – 25). However, the record clearly contradicts this assertion.

room. Suggs testified he was trying to work out a deal for Gardner with the Solicitor, the family and the judge to accept. (App. p. 305, ll. 4 – 8).

Gardner testified that after Suggs told him that based on his experience of witnessing hundreds of trials, Gardner was most likely going to be convicted and sentenced to life, he lost confidence in his trial and felt pressured. (App. p. 284, ll. 16 – 21). Gardner testified the pressure was from "[e]verything. My attorney[,] what [Suggs] had told me[,] the upset of my family[,] I mean, the whole – the whole – the whole deal." (App. p. 292, ll. 11 – 14).

Gardner's daughter, Taylor Baker, testified she arrived half way through the testimony of the state's first witness. (App. p. 308, ll. 20 – 21). During the following recess, she talked to Gardner after Suggs's conversation with him. Baker indicated her intentions were to get him to take the State's plea offer because she did not want to lose her father forever. She indicated she was very emotional in speaking with her father and encouraged him to plead guilty. (App. p. 309, ll. 1 – 25). Baker also testified she did not know Suggs personally and was not sure if she saw him in the room talking to Gardner. (App. p. 310, l. 14 – p. 311, l. 4). Gardner testified that when he saw his daughter upset, he needed relief. Gardner testified seeing his daughter upset was the last thing he wanted and that he was tired. (App. p. 271, ll. 6 – 11). Gardner indicated these factors also played a role in his decision to end his trial and enter a guilty plea. Counsel testified that after Baker left the room, Baker said she told Gardner what she had to. Counsel understood that to mean Baker "told him what he needed to hear so he would take a plea." (App. p. 338, ll. 4 – 12).

Suggs testified he later left Gardner with Gardner's attorneys. Gardner testified he continued to discuss pleading guilty with Counsel. Gardner testified he asked Counsel what he should do and whether he should lie. Gardner testified Counsel responded in the affirmative and

told him to lie to the court. (App. p. 267, ll. 1 – 11; p. 269, ll. 4 – 5). Counsel testified she would never tell a client to lie and that she specifically told Gardner to always tell the truth. (App. p. 326, l. 12 – p. 327, l. 1). Counsel informed Gardner he would have to admit to voluntary manslaughter if the judge was to accept his guilty plea. Suggs recalled a discussion of an *Alford* plea, but testified Judge Baxley would not accept an *Alford* plea and would require Gardner to accept responsibility. (App. p. 302, ll. 16 – 24). Counsel testified although Gardner had never expressed a desire to plead guilty, she felt it was in his best interest to do so. Counsel always informed Gardner it was ultimately his decision and she would be prepared either way. Counsel further testified she had eighteen (18) months to prepare for trial, they had in fact started a trial, and she was prepared to go forward with the trial. (App. p. 323, l. 22 – p. 324, l. 9).

Order Granting PCR

On February 17, 2017, Judge Cooper issued an order vacating Gardner's conviction and sentence and granting Gardner a new trial. Judge Cooper found Gardner's guilty plea was involuntary because of the conversation Gardner had with Suggs, without Counsel present and without Counsel's consent. Judge Cooper also found Counsel ineffective because she should have been aware Gardner intended to lie to the plea court and because she should have informed the plea court about Gardner's conversation with Suggs and/or requested Gardner be allowed to withdraw his guilty plea. (App. p. 347). On February 24, 2017, the order was filed with the Darlington County Clerk of Court. The State received the filed Order on February 27, 2017. On or about March 1, 2017, the State filed a Notice of Motion and Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRCP. (App. p. 356). The State filed a Return to the motion on or about March 2, 2017. (App. p. 364). Judge Cooper denied the motion by Order dated

March 9, 2017 and filed March 13, 2017. (App. p. 365). Thereafter, the State filed a Notice of Appeal with this Court. This appeal follows.

STANDARD OF REVIEW

When reviewing questions of fact, this Court may affirm the post-conviction relief judge's grant relief only if there is probative evidence to support his findings. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624) (1989)). However, the reviewing Court will reverse the PCR court where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). "Questions of law are reviewed de novo, and [the Court] will reverse the PCR court's decision when it is controlled by an error of law." Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

ARGUMENT

I. A conversation between a defendant and an individual other than the defendant's trial attorney about pleading guilty does not render a guilty plea involuntary and does not warrant a new trial.

Judge Cooper committed an error of law and this Court should review it *de novo*. Judge Cooper erroneously granted Gardner relief on the basis that Gardner's guilty plea was involuntary because of a conversation between Suggs and Gardner about pleading guilty that Judge Cooper held should only occur between a defendant and his counsel or at counsel's request and in counsel's presence. There is no rule of law or ethics that prevents a defendant from participating in a conversation about pleading guilty with someone other than his attorney.[3] Furthermore, there is no rule of law that renders a guilty plea automatically invalid or warrants a new trial to a defendant that willingly conversed with someone other than his attorney about pleading guilty. This Court should reverse Judge Cooper's erroneous ruling because to hold otherwise would give rise to an overwhelming amount of new trials to any criminal defendant who discussed a guilty plea with someone other than their attorney and outside of their attorney's presence. It is not uncommon for a criminal defendant to discuss his options when facing criminal charges with someone other than one's attorney of record and without their consent, including family, friends, peers, or colleagues.

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238 (1969); Simpson v. State, 317 S.C. 506, 455 S.E.2d 175

[3] Rule 407, SCACR: Rule 4.2, Rules of Professional Conduct, prohibits a **lawyer** from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer, without the consent of the other lawyer or authorization to do so by law or court order. (Emphasis added). Suggs is not a lawyer.

(1995). Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). Statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975). An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pleaded guilty, but would have insisted on going to trial. See Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993).

Suggs is, and was at the time of Gardner's guilty plea, the Darlington County Clerk of Court. While Petitioner finds this to be an important factor in this case, Judge Cooper specifically found that neither Suggs's relationship with Gardner or his official position as Clerk of Court were relevant to his ruling. (App. p. 355, n.1). Suggs and Gardner had known one another "all of [Suggs's] life." (App. p. 282, ll. 20 – 22). The two had played sports and had social gatherings together as adults. (App. p. 263, ll. 16 – 24; p. 294, ll. 9 - 22). This close, personal relationship was the impetus for Suggs's conversation with Gardner.[4] Suggs was familiar with the case and the evidence against Gardner because the case had garnered so much attention in the small town. (App. p. 276, ll. 13 – 15). The conversation began when Suggs went

[4] It is uncontested Suggs was only speaking to Gardner as a friend, not as the Clerk of Court nor as an agent of the prosecution. Suggs is a constitutionally popularly elected officer in the judicial branch. S.C. Code Ann. § 14-7-10, et seq. He is not a law enforcement officer nor a prosecutor in the executive branch. LoConte v. Dugger, 847 F.2d 745 (11th Cir. 1988) (The due process clause of the Fourteenth Amendment is only offended where a plea is *coerced* by conduct fairly attributable to the state.). (Emphasis added).

to the holding room in the courthouse where Gardner was waiting during the brief, twenty-minute recess. (App. p. 298, ll. 1 – 12). His trial attorneys were not present in the room. (App. p. 298, ll. 13 – 16). Suggs initiated conversation and Gardner willingly reciprocated. Although Suggs initiated the conversation, Gardner did not once attempt to end the conversation or in any way demonstrate a desire to end the conversation. Suggs began stating the obvious truth – that Gardner was likely to be convicted and likely to be sentenced to life in prison. (App. p. 296, l. 6 – p. 297, l. 25; p. 299, ll. 13 – 25). This view was shared by both of Gardner's attorneys, as well.

During this consensual conversation, Counsel walked in surprised to see Suggs and Gardner conversing. Counsel continued to discuss the option of pleading guilty with Gardner. His attorneys agreed with the points made by Suggs and advised Gardner to plead guilty. Additionally, Gardner's daughter came into the room to talk with him. She was visibly upset, crying, and pleading to Gardner to plead guilty so that he would be able to see his grandchildren one day. (App. p. 310, ll. 1 – 9). Gardner admitted that seeing his daughter upset was a factor that influenced his decision to plead guilty. (App. p. 271, ll. 6 – 8; App. p. 286, l. 20 – p. 287, l. 21). During his guilty plea, Gardner also informed the plea court twice he was changing his plea to spare his family from further suffering. (App. p. 182, ll. 2 – 9; p. 185, ll. 21 – 25). At the PCR hearing, Gardner testified his lawyers' advice and his discussion with Suggs influenced his decision to plead guilty. (App. p. 285, l. 17 – p. 286, l. 3).

Gardner proceeded to plead guilty before Judge Baxley. During the plea colloquy, Judge Baxley asked Gardner if he was pleading guilty to voluntary manslaughter and the charge carried up to 30 years' imprisonment. (App. p. 180, l. 12 – p. 182, l. 24). When asked if the decision to plead guilty was Gardner's, Gardner told Judge Baxley the decision was his. (App. p. 184, l. 25 – p. 185, l. 2). Gardner denied he was forced to plead guilty. (App. p. 185, ll. 3 – 5). Gardner

admitted the decision was voluntarily made by him. (App. p. 185, ll. 6 – 9). Again, Judge Baxley asked, "**Do you feel that anyone has coerced you this morning in coming forward to enter this decision?**" To which Gardner responded again, "**No, sir.**" (App. p.185, ll. 18 – 20). (Emphasis added). At the PCR hearing, when asked to explain why he answered no, Gardner explained,

> **Because I didn't want the judge to change his mind to whatever she told me because that was what was on the yellow piece of paper. The judge might change his mind.** And – after seeing my daughter the way she was upset, I mean, I needed relief from that because that's what happened. Ever sense I went to that back room and it all started that entire time because the last thing in the world I want to do is see my daughter upset and I just – I was tired and –

(App. p. 271, ll. 2 – 11).

Gardner failed to establish a valid reason why he should be allowed to depart from the truth of his statements made at the guilty plea. Crawford at 350. The record is clear that Gardner's guilty plea was intelligent and voluntary with a clear understanding of the charges to which he was pleading, the possible sentence, and the waiver of his constitutional rights. (App. p. 177, l. 22 – p. 209, l. 3).

Furthermore, the conversation between Gardner and Suggs, though beginning outside the presence of Counsel and without her knowledge, was completed in her presence. (App. p. 322, ll. 1 – 16). The undisputed testimony from all parties is that after Suggs left the room, Counsel continued the *same* discussion with Gardner and gave him the *same* advice on pleading guilty. (App. p. 322, l. 20 – p. 323, l. 5). After their conversation, Gardner's daughter entered and continued the *same* discussion and encouraged the *same* guilty plea, albeit in a much more emotional fashion. Lastly, Co-counsel Jones also believed it was in Gardner's best interest to plead guilty.

The PCR judge found Suggs's advice to Gardner to be quite influential in Gardner's decision to plead guilty. However, the PCR judge did not render an opinion with regard to the same advice from his daughter, although Gardner admits she influenced his decision also. The advice and encouragement to plead guilty came from four parties: Suggs, Gardner's daughter, Counsel Swilley, and Co-counsel Jones. Counsel testified she had always thought a guilty plea was in Gardner's best interest and so advised him. (App. p. 317, l. 22 – p. 318, l. 6; p. 324, ll. 17 – 25). The combination of influence from *all* parties in conjunction with the natural stress and fear evoked by a jury trial for murder that had finally begun are reasonable factors in deciding to plead guilty that do not amount to duress or coercion sufficient to render a guilty plea involuntary or invalid. LoConte v. Dugger, 847 F.2d 745, 753 (11th Cir. 1988) ("Simply because the appellant was subjected to pressure from sources not associated with the state or prosecutors does not mean that his plea was necessarily involuntary. It is not an uncommon occurrence that a criminal defendant is pressured to some extent by co-defendants, friends, and relatives. These types of influences are inevitable and unavoidable."); See also Stano v. Dugger, 921 F.2d 1125, 1142 (11th Cir. 1991) ("Unavoidable influence or pressure from sources such as codefendants, friends, or family does not make a plea involuntary[.]")

Suggs's input was hardly an unlawful threat or coercion. At best (or worst), it should be discouraged in the future. However, it does not rise to the level of rendering a knowing and voluntary guilty plea invalid. Because there is no rule of law to support the granting of a new trial where a defendant has a consensual, non-coercive conversation about pleading guilty with someone other than his attorney, outside the presence of his attorney, and without his attorney's consent, Judge Cooper committed an error of law for finding such conduct rendered Gardner's guilty plea involuntary and granting him a new trial.

II. Counsel was not ineffective where she discovered Gardner engaged in a consensual conversation with another individual about pleading guilty, advised Gardner to plead guilty, and did not inform the plea judge of the prior conversation.

Judge Cooper erred in finding Counsel ineffective because "[C]ounsel should have been aware that [Gardner] intended to falsely testify when he inquired whether he should lie to the court prior to the plea" and "[C]ounsel should have made the plea court aware of the circumstances leading to the plea and/or request that [Gardner] be allowed to withdraw his plea." (App. p. 355). There is no probative evidence in the record to support Judge Cooper's ruling. None of these actions by Counsel constitute a deficiency. Assuming that such actions do constitute a deficiency, Gardner suffered no prejudice as a result of those actions.

In a PCR action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process" that the proceedings "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985). The court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. In the context of a guilty plea, an applicant must prove that because of counsel's deficient performance, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985).

Counsel testified she was not aware Suggs was having a conversation with Gardner until she walked in to find them discussing the option of pleading guilty. (App. p. 329, ll. 9 – 20; p. 331, ll. 1 – 8). Suggs left the room and Counsel began to discuss the option of pleading guilty with Gardner. (App. p. 322, l. 20 – p. 323, l. 21). Counsel testified Gardner was scared, but she reminded him she was prepared for trial and they had already started a trial. (App. p. 323, ll. 12 – 25). Counsel testified neither she nor anyone else forced or threatened him to plead guilty and the decision was Gardner's. (App. p. 327, ll. 17 – 23). Gardner admitted the same during his plea colloquy with Judge Baxley. (App. p. 185, ll. 3 – 25). Counsel allowed Gardner's daughter to speak to Gardner, upon Gardner's consent. (App. p. 325, ll. 5 – 14. Gardner's daughter was very emotional and was crying as she encouraged him to plead guilty so that he could one day see his grandchildren. (App. p. 326, ll. 2 – 9; p. 337, l. 24 – p. 338, l. 12; p. 338, l. 23 – p. 339, l. 6). Counsel admitted Gardner asked her if she wanted him to lie to the plea court, to which she

replied he should never lie to the court, but that he would have to admit to the crime of voluntary manslaughter, and not murder, if the plea was to be accepted. (App. p. 326, l. 12 – p. 327, l. 1).

In this case, Gardner failed to overcome the presumption that Counsel was effective. Counsel would have to be clairvoyant to have known Gardner intended to lie to the plea court, despite her advice to the contrary. The testimony from Gardner was he *asked* if he should lie to the plea court and Counsel testified she told him to always tell the truth and further that he would have to admit to the crime. First, her advice to Gardner was to tell the truth and as such, should have expected nothing less from Gardner. Furthermore, based on the overwhelming evidence and in Counsel's view of the case, admitting to the crime would not require Gardner to lie – despite Gardner having convinced himself otherwise. Only Gardner believed he was lying by admitting to the crime of voluntary manslaughter.[5] Counsel could not possibly have been deficient because she "should have been aware" Gardner was going to lie to the plea court.

With regard to Counsel not informing the plea judge of the discussion between Gardner and Suggs, the PCR judge did not specify why that information was relevant to the plea judge. Counsel entered the room while Suggs was speaking to Gardner, did not disagree with the substance of what was being discussed and agreed with Suggs's advice. Further discussions were had in chambers with Judge Baxley about accepting Gardner's plea to voluntary manslaughter, to which Judge Baxley was amenable. (App. p. 297, ll. 15 – 25; p. 298, l. 21 – p. 299, l. 12; p. 305, ll. 5 – 8; App. p. 326, l. 21 – 23; p. 327, ll. 5 – 11; p. 333, l. 24 – p. 334, l. 15). However, these in-chambers discussions between Judge Baxley, Counsel, the Assistant Solicitor, and Suggs were not part of the record. By not relaying that information *on the record* to the plea

[5] To the extent the "lie" was that Gardner admitted to voluntary manslaughter, when it was in fact murder, the State would concede Gardner "lied." However, pleading to the lesser offense of voluntary manslaughter was the benefit of the bargain Gardner received by voluntarily pleading guilty, for he only received a 20 year sentence – 10 years less than the minimum mandatory for the charge of murder he was facing.

judge, Counsel exercised her professional judgment with regard to the relevancy of the prior discussion to Gardner's knowing and voluntary guilty plea. It is also reasonable not to request permission to withdraw Gardner's guilty plea, when Gardner did not make such a request[6] and when the guilty plea was in Gardner's best interest. Keeping in line with the standard for effective assistance of counsel as set forth in Strickland, Counsel was not deficient and her actions were reasonable in light of the prevailing professional norms.

Second, assuming *arguendo* that counsel's performance was deficient, the second prong of Strickland requires that the deficient performance must have prejudiced Gardner such that, "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59 (1985). Gardner failed to meet his burden of proving prejudice. Had Counsel informed the plea judge Gardner intended to lie to the court and about Suggs's discussion with Gardner or requested permission to withdraw his plea, there is no evidence Gardner would not have pleaded guilty and insisted on going to trial.[7] The plea court may have inquired as to Gardner's intention to falsely testify and, similar to Counsel's advice, reminded him not to lie. There is no evidence in the record that Gardner would not have pleaded guilty had Counsel told the plea court on the record Gardner had a conversation with Suggs, in which Suggs told Gardner things that had been told to Gardner by various other people, including both of Gardner's attorneys. Further, Gardner offers no evidence that had Counsel requested to withdraw his plea, that the plea court would have allowed it or that Gardner would have withdrawn it in that moment.[8] Gardner was also facing a minimum mandatory sentence of 30 years' up to life imprisonment. That risk was eliminated by being

[6] There is nothing in the record to indicate Gardner even requested an appeal after his guilty plea.
[7] Gardner only testified, at the PCR hearing, that had his consensual conversation with Suggs never occurred, he would not have pleaded guilty. (App. p. 279, ll. 16 -21). Gardner never testified that had Counsel done anything differently, he would not have pleaded guilty.
[8] While serving his current twenty year sentence, Gardner has clearly had a change of heart.

afforded the opportunity to plead to a lesser offense with a *maximum* penalty of 30 years' imprisonment.

Lastly, the record is clear the evidence of guilt in this case was overwhelming. The evidence included: Gardner shot his brother in the *back* of the head, left the scene never to call 911 or seek help, reported the murder weapon lost/stolen, did not tell law enforcement about his involvement for almost a year, gave three untrue and inconsistent statements to law enforcement in which he denied even being in the county at the time of the shooting (and a fourth video recorded admission to shooting the victim), law enforcement had cell phone records proving he was in the county the day before and the day of the shooting after he denied being in Darlington at any time close to the shooting, Gardner did not admit to the shooting until law enforcement went to his North Carolina cabin to get him and search his residence, Gardner was overheard in the jail on the phone telling someone to hide the gun and make sure law enforcement did not find it – leading to the execution of a *second* search warrant where the gun was found hidden in a bag in a concealed hiding spot behind his chimney, and after law enforcement had the murder weapon and Gardner finally admitted to the shooting, he *then* explained it as an accident. Additionally, there was evidence of a monetary motive through the execution of a power of attorney and extravagant spending of the father's money. Gardner's entire defense was his own testimony that shooting his brother in the back of the head was the result of an altercation and the gun accidently going off.

Therefore, Gardner failed to meet his burden of proving prejudice under Strickland to show that there is a reasonable probability that, but for counsel's errors, Gardner would not have pleaded guilty. Id. Failing to prove the second prong of Strickland, the PCR judge erred in finding Counsel was ineffective and Gardner was entitled to a new trial. Accordingly, there is no

evidence supporting the PCR judge's finding that Gardner established his burden of proving deficiency or prejudice.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court grant certiorari to review the post-conviction relief judge's error of law and erroneous finding of deficiency and prejudice.

Respectfully submitted,

ALAN WILSON
Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General
S.C. Bar No. 102524

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

By: _____
ATTORNEYS FOR PETITIONER

August 14, 2017.

RECEIVED
AUG 14 2017
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Darlington County
Court of Common Pleas
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

2013-CP-16-0672
Appellate Case No. 2017-000881

EUGENE A. GARDNER, III,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Petition for Writ of Certiorari and Appendix** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Laura R. Baer, Esquire
1330 Lady Street, Ste. 401
Columbia, SC 29201

This 14th day of August, 2017

MALLORY MORRIS
Legal Assistant for Respondent