STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Darlington County

Honorable G. Thomas Cooper, Circuit Court Judge

EUGENE GARDNER,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO 2017-000881

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF 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?

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether there is any evidence in the record to support the PCR court's ruling that Respondent's guilty plea was not knowingly, intelligently, and voluntarily entered such that he is entitled to have the plea and sentence vacated and his case remanded for a new trial?

II. Whether there is any evidence in the record to support the PCR court's ruling that Respondent's plea attorney rendered ineffective assistance of counsel such that he is entitled to have the plea and sentence vacated and his case remanded for a new trial?

STATEMENT OF THE CASE

On February 21, 2013, the Darlington County Grand Jury returned an indictment against Respondent Eugene "Tripp" Gardner for murder. App. 368.

On December 2-3, 2013, Gardner appeared for trial before the Honorable J. Michael Baxley and a jury. Gardner was represented by Julie Rochester (formerly known as Julie Wooten and Julie Swilley) and J. Richard "Rick" Jones. The State was represented by assistant solicitors John Holt and Patti Parker. App. 1. Following selection of the jury, pre-trial motions, opening statements, and presentation of the State's first witness, Judge Baxley accepted Gardner's guilty plea to the lesser offense of voluntary manslaughter and sentenced him to twenty years incarceration. App. 177, l. 10 – 186, l. 25; App. 193, l. 2 – 209, l. 3; App. 367.

Gardner filed his application for post-conviction relief ("PCR") on August 12, 2014. App. 211. The State filed its Return on June 11, 2015. App. 238. On January 10, 2017, an evidentiary hearing was held before the Honorable G. Thomas Cooper, Jr. Gardner was represented by Lance Boozer, and the State was represented by assistant attorney general Valerie Giovanoli. App. 244. On February 24, 2017, Judge Cooper filed an Order granting Gardner's PCR application. App. 347. The State filed a motion to alter or amend on March 1, 2017, to which Gardner filed a return on March 2, 2017. App. 356; App. 364. On March 13, 2017, Judge Cooper filed an Order denying the State's motion. App. 365.

The State appealed and filed its petition for writ of certiorari on August 14, 2017. This return follows.

STATEMENT OF FACTS

Partial Trial and Guilty Plea

Gardner was charged with murdering his younger brother, Richard "Todd" Gardner (hereinafter "Decedent"). App. 368. Gardner's trial began on December 2, 2013, with jury selection and pre-trial motions. App. 1 – 121. On December 3, 2013, the trial judge made his preliminary remarks to the jury, which were immediately followed by opening statements. App. 121 – 144. The State began its case by calling Susan Gardner Davis, ex-wife of Decedent, to testify. App. 144 – 156. The trial court then took a twenty-minute morning recess.[1] When the parties returned, the trial judge said he would "discuss the acceptance of a plea, the waiver of rights that make a plea possible, [and] the admission of guilt." at which point the guilty plea would become irrevocable. After that, he would dismiss the jury, who remained in the jury room during the plea proceedings. App. 176, l. 19 – 177, l. 19. The solicitor said that Gardner would be pleading guilty to voluntary manslaughter and confirmed that Decedent's family was satisfied with the resolution. App. 177, l. 22 – 178, l. 9.

During the plea colloquy, Judge Baxley noted that the plea was "somewhat quickly arranged this morning between the parties." App. 179, ll. 15-17. Nonetheless, plea counsel Rochester indicated her belief that the plea was in Gardner's best interests and that he understood everything she had explained to him. App. 179, l. 6 – 180, l. 10. The trial judge next addressed Gardner. Gardner answered "yes, sir" to the trial judge's questions of whether he was "guilty of voluntary manslaughter, meaning that you killed your brother in the sudden heat of passion" and whether he admitted that he did that. App. 180, ll. 12-21. After discussing whether Gardner was

[1] The trial/plea transcript reflects that the recess began at 11:27 a.m. App. 176, l. 25 – 177, l. 6. Following the entry of the guilty plea, the jury was brought in and dismissed at 12:15 p.m. App. 186, l. 23 – 187, l. 10.

under the influence of any medications, drugs or alcohol and understood the potential penalty, the trial court said:

> Now, Mr. Gardner, we're right here in the middle of a trial, and obviously you're aware of your trial rights. Tell me why you've made this decision to stop the trial and enter a plea of guilty to a lesser offense. Now, I want you to tell me, sir, not someone else.

App. 180, l. 22 – 182, l. 4. Gardner spoke with his attorney off of the record. App. 182, l. 5. He then told the judge: "I didn't mean for any of this to happen.... And I don't want my family going through this anymore, both sides." App. 182, ll. 6-9.

Post-Conviction Relief

In Gardner's post-conviction relief ("PCR") application, he alleged that his guilty plea was not knowingly intelligently and voluntarily entered and that plea counsel rendered ineffective assistance of counsel. At the PCR hearing, Judge Cooper heard testimony from Gardner; Gardner's daughter, Taylor Baker; Darlington County Clerk of Court Scott Suggs; and both plea attorneys, Julie Rochester and Rick Jones.

Respondent Gardner's Testimony

Gardner maintained that the shooting death of his brother was accidental and that he did not call for help and left the scene because he was in a state of shock.[2] App. 253, l. 12 – 255, l. 16. During a recess on the second day of trial, Scott Suggs called Gardner called him to a back room "behind the bench." He told Gardner that based on his experience, "it wasn't going good

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[2] Respondent claims that Gardner's testimony at the PCR hearing, that he eventually told the police where he hid the gun, is "clearly" contradicted by the record. App. 274, ll. 12-25; App. 288, l. 19 – 289, l. 16; Cert. Pet., p. 11 n. 2. While the gun was found pursuant to a search warrant obtained prior to Gardner's interrogation, Gardner was unaware of its retrieval when he told officers that they could find the gun behind his chimney. That was the basis of the prosecution's inevitable discovery argument at trial. App. 59, l. 14 – 60, l. 21; App. 63, ll. 1-4; App. 104, ll. 9-22. Thus, Gardner's testimony that he told the police where to find the gun was not untrue.

in his opinion." App. 261, l. 23 – 262, l. 21; App. 264, l. 22 – 265, l. 4; App. 282, ll. 5-14. Specifically, Suggs said that "he had seen five hundred trials in his career. This isn't going good. You can get life." App. 263, ll. 2-9. Gardner was older than Suggs but knew of Suggs and his family through sports and the community, since both grew up in Darlington. App. 263, ll. 16-24. Gardner understood Suggs' advice to be that Gardner should plead guilty but said: "And then Julie would make the decision, I guess, that's how it's supposed to work." App. 263, l. 25 – 264, l. 7. Gardner told Suggs "you know I wouldn't do this," i.e. intentionally kill his brother. He said that even though he and Suggs were "acquaintances" and "not friends," Suggs knew his reputation and that Gardner and his brother loved each other. App. 264, ll. 8-21; App. 282, ll. 15-22.

Plea counsel Rochester came in several minutes later and Suggs told her what they were discussing. App. 262, ll. 22-25; App. 263, ll. 10-15; App. 265, ll. 5-23. Gardner said that Rochester should not have let Suggs speak with him and that his plea was not entered voluntarily. App. 266, ll. 13-18. While Gardner believed that Suggs had "[Gardner's] best interest at heart," his discussions with Suggs influenced his decision to plead guilty rather than continue with the trial. App. 267, l. 21 – 269, l. 1; App. 278, ll. 6-10. He found Suggs' advice confusing and overwhelming because it was "totally different" than the advice he had been getting from Rochester. App. 272, ll. 1-13; App. 284, l. 16 – 286, l. 12. Gardner recalled one time that Rochester visited him at the jail and said: "I just came see how you were doing and . . . it's just good to have a client that I know is innocent." App. 275, l. 19 – 276, l. 5.

Once Suggs left the room, plea counsel Rochester, plea counsel Jones, Gardner's daughter Taylor Baker, and prosecutor Holt were all in the room discussing a plea agreement. Gardner was candid that another factor that influenced his plea decision was how emotional his

daughter was and his desire to see his grandchildren again one day. Once the conversation settled down, Gardner asked "do you mean to tell me that you want me to go back in that courtroom and lie to something I didn't do?" He could not recall his attorneys' exact response, but said that it was essentially "yes." App. 266, l. 19 – 267, l. 12; App. 271, ll. 6-11; App. 283, l. 15 – 286, l. 12; App. 287, ll. 12-21; App. 292, ll. 9-14. There was no formal plea offer extended prior to his trial, but Gardner was "very adamant" in his pre-trial discussions with Rochester that he would not accept a plea offer, telling her: "I'm not going to plead anything I didn't do." App. 267, ll. 12-20.

Suggs returned to the back room and told them to "hurry up" because the judge was ready to continue with the trial. App. 269, ll. 1-4. Gardner asked Rochester what he should do. She wrote something on a yellow piece of paper and told him "say this" to the judge and to just "go along with . . . what's going on." She further instructed him that she would touch him if he was saying "too much." App. 269, ll. 3-13. Gardner made the admission of guilt during the plea hearing because that was what he was told to do – to go along with whatever was said. App. 269, l. 14 – 270, l. 2. Similarly, he told the judge that no one had forced him to plead guilty because he did not want the judge to change his mind, which he had been warned the judge may do. App. 270, l. 21 – 271, l. 5. Gardner did not understand why, if they were prepared for trial and Rochester knew the shooting was an accident, she would advise him to "go with the flow" and accept the plea based upon Suggs advice. App. 279, ll. 8-12; App. 292, l. 18 – 293, l. 2. Had he never spoken with Suggs during the recess in the trial, Gardner said that he would not have pled guilty but instead continued with his trial. App. 279, ll. 16-21.

On cross-examination, Gardner said that Suggs did not threaten him but rather "just gave his advice, legal advice, which it's not right from the clerk of court anyway." App. 282, ll. 24-

25. Because Suggs based his advice on his experience as the Clerk of Court, Gardner understood him to be there in his capacity as Clerk, not as a friend. He clarified that though they had played golf before, Suggs was not his "golfing buddy." App. 282, l. 15 – 283, l. 6. While Suggs made him no promises, he advised Gardner that, based on Suggs' experience seeing five hundred trials, if Gardner did not "do something now" he "probably could get life." App. 283, ll. 7-14.

Taylor Baker's Testimony

Gardner's daughter, Taylor Baker, recalled that plea counsel Rochester came to her during the recess after the first witness and said that the State had extended a plea offer. Rochester indicated that she did not think that Gardner was going to accept the offer, so Baker asked to go speak with her father, with the intention of trying to convince him to plead guilty. Baker told Gardner that if he did not accept the plea he would never see her get married and never meet his grandchildren. When she was speaking with Gardner, her mother, Rochester, and Jones were all present. She did not believe that Gardner wanted to plead guilty but said that what she and others said to him convinced him to do so. Baker recalled seeing Suggs in the courtroom during Gardner's trial but did not know him personally. Baker further recalled Gardner interrupting her to ask "so you want me to go out there and lie?" and Rochester responding "yes." App. 309, l. 3 – 312, l. 20. Rochester then asked Baker and her mother to speak on Gardner's behalf at sentencing. Rochester declined because she was afraid it would prevent any chance at a relationship with her aunt and cousins. App. 312, l. 20 – 313, l. 5.

Honorable Scott Suggs' Testimony

Scott Suggs has been the Clerk of Court for Darlington County for over twenty years and was employed in that capacity on December 2, 2013. App. 293, l. 23 – 294, l. 6. Suggs said he and Gardner were in school together, played organized and recreational sports together, and had

played golf and other events through mutual friends "a couple times a month." Suggs said that while Gardner may consider it differently, he considered Gardner a friend. App. 294, ll. 10-22; App. 303, l. 24 – 304, l. 4. Suggs was aware of the criminal case against Suggs, as "it was news throughout the community." App. 295, ll. 2-11. Suggs said that he had never missed a trial that was held in courtroom in Darlington and was present at Gardner's trial in his capacity as the Clerk of Court. App. 295, ll. 12-21. Suggs provided the following explanation of what happened during the break in Gardner's trial:

> Well, I guess, the best thing you can say is I saw someone that was going down a path that was probably going to put him in prison for the rest of their life.
> . . .
> And, basically, all the evidence that I had looked at and the things that happened, prior to the trial and talking with his family, his family from his wife to his daughter to Susan, his ex-sister-in-law, none of them wanted a trial and they, basically, just said, you know, we would be fine with not a trial, we just want to hear him say he did it and they would be fine with it. And, I guess, I did something that I felt was more helping a friend than trying to hurt him or penalize him because I wouldn't want to see him in this position. I feel sorry for him. I'm sad that he finds himself where he is today. Even here, not to mention sitting in prison, I couldn't imagine that. I've known him my whole life. I couldn't imagine that. But with that being said in talking with the family they said they were happy with him pleading, **talking with the judge, Judge Baxley which I think most people would consider was one of the, I guess, harsher sentencing judges, he flat out said, if what-- the parts that he's heard comes out like it is, he's going to put him in prison for the rest of his life without parole** and I didn't want to see that for Tripp.
>
> And I went and told him I said, Tripp based upon what is in front of you whether you meant to do it, didn't mean to do it, it was an accident, whatever happened, all the evidence stacks up against you. It's unfortunate. It's just you find yourself in a very bad position that the evidence is totally against you. There's no way twelve (12) people is going to sit in that room back there, listen to that testimony and then say you go free son, you're free, just go ahead go about your business on your everyday life. That wasn't going to happen. Anybody that's been involved in court knows that. The attorneys knew it. He knew it. He should have known it, if he didn't know it, then, he probably did end up knowing it and that's what I tried to tell him. They wanted it. And I went back to the family and I told them I said, the judge—he's not going-- we don't know what the sentence is going to be, first of all, we didn't know, if he took a plea.

> **And they said, we're not worried about what the sentence is if he'll just say he didn't [sic], we'll be fine with whatever the judge sentences him. I told Judge Baxley that.** Well, after talking with his attorneys, all that part he said is true. Julie was in there. Rick was in there. His daughter was in there. I don't remember who else was in there, but whatever was said, he agreed to go out and do a plea.
> ...
> I mean, I really don't remember exactly what led me in there. I know he was in the holding room. I walked in there, like I said, I had been talking to the family. They didn't want to see the pictures of their loved one as it was, they were very gruesome pictures. They didn't want to have to endure it. They didn't want to have to get on the stand, sit in front of twelve (12) people, sit in front of Tripp, sit in front of people and talk and talk about what happened or what Tripp says happened, they were not wanting to go through a trial.

App. 295, l. 24 – 298, l. 12 (emphasis added); see also App. 298, l. 17 – 299, l. 7; App. 304, ll. 5-15. **Suggs said that Judge Baxley was "worried" about the family and did not want any "any backlash" if the family wanted a higher sentence.** App. 298, l. 17 – 299, l. 7. Suggs characterized his purpose in speaking with Gardner: "All I was trying to do was, in lack of a better word, negotiate between solicitor and the family and the judge a plea that everybody could live with." App. 305, ll. 5-8. Suggs recalled that he and Gardner were alone for some length of time and had no reason to believe that Gardner's version of who else came in was inaccurate. App. 298, lL. 17-21.

Gardner's initial response to Suggs, while they were alone in the room, was to explain and demonstrate how the shooting happened. App. 300, ll. 1-17. Suggs responded:

> Tripp all that's good and well but we're passed that point now. We're not at that point now of you trying to tell me. You don't have to convince me. That's not what we're here to do. Now, we're at the phase of trying to help you to where you're not spending the rest of your life in prison that maybe you be able to get out and have a life after that.

App. 300, ll. 18-24. Suggs contended that when he went in the backroom to speak with Gardner, he did so as a friend and not as Clerk. He opined that Gardner was "delusional," was not thinking rationally, and did not want to "face the facts." App. 300, l. 24 – 302, l. 11; App. 305,

ll. 13-24. It was Suggs opinion, based on what he knew about the case, the evidence against Gardner was "overwhelming." App. 305, l. 22 – 307, l. 9. Suggs did recall a discussion of Alford[3] plea while Rochester and Jones were in the room, but the family and Judge Baxley were only amenable to a plea if Gardner admitted his guilt. App. 301, ll. 12-24. Suggs admitted that his conversation influenced Gardner's decision to enter a plea and that had he not spoken with him, Gardner probably would have proceeded with the trial. App. 302, l. 25 – 303, l. 6.

Plea Counsel Rochester's Testimony

Rochester was the second public defender assigned to Gardner's case. App. 315, ll. 5-14. She testified that "Mr. Gardner up until trial never wanted to plead guilty. He only wanted to have a trial." App. 317, ll. 1-4. He rejected all pre-trial offers, which included a plea to voluntary manslaughter with a twenty year cap. Rochester never thought that Gardner would accept a plea offer, but communicated them to him as she was required to do. App. 317, ll. 4-21; App. 329, l. 23 – 330, l. 16.

Rochester recalled that approximately ten minutes into the recess on the second day of trial, she went to meet with Gardner in the holding cell. The transport officer informed her that Gardner was not in there, but rather in the next room speaking with Scott Suggs. App. 320, l. 4 – 321, l. 20; App. 330, ll. 17-25. She was shocked to find Suggs speaking to Gardner without her present when she went into the room. App. 322, ll. 1-6; App. 331, ll. 1-12; App. 337, ll. 17-23. Suggs did not stop speaking when Rochester entered. She overheard Suggs "essentially, telling him [Gardner] it would be in his best interest to plead guilty and he was telling him that as a friend that he should plea." App. 322, ll. 7-19; App. 332, ll. 1-12. It was her understanding that Suggs and Gardner knew each other growing up but she did not get the impression that it was a

[3] North Carolina v. Alford, 400 U.S. 25 (1970).

close friendship. App. 333, ll. 10-15. While Rochester believed Suggs thought he was acting in Gardner's best interest, had the conversation not taken placed she did not believe that Gardner would have ever pled guilty but instead proceeded to trial. App. 334, l. 23 – 335, l. 14.

Gardner was scared and worried because of the advice that Suggs had given him. Rochester said she was prepared for trial, but told Gardner that it was his choice and went to ask the prosecutor what sort of offer they would make. App. 323, l. 11 – 324, l. 16; App. 331, ll. 13-25; App. 332, l. 19 – 333, l. 9; App. 333, l. 24 – 334, l. 13. With Gardner's consent, Rochester brought Gardner's back to speak with him also. App. 325, l. 1 – 326, l. 11; App. 337, l. 24 – 339, l. 6. Rochester said that it was "probably" in Gardner's best interest to plead guilty – if the jury believed it was an accident he would go home, but if they did not believe it he would go to prison. App. 324, ll. 17-25. Had they proceeded to trial, it was their intention that Gardner would testify that the shooting was accidental. They also planned to demonstrate how the incident occurred, with Rochester acting in the role of Decedent, to show how the bullet wound was consistent with Gardner's testimony. App. 336, l. 19 – 337, l. 7.

Rochester recalled Gardner asking if he should lie. She told him that Judge Baxley was not amenable to an Alford plea but that the State was offering voluntary manslaughter. Thus, she advised Gardner that he should not lie, but "you do have to say that you killed him not murdered him if you want [the plea] to be accepted." App. 326, l. 12 – 327, l. 11; App. 336, ll. 13-18.

Plea Counsel Jones' Testimony

Rick Jones was one of the more experienced attorneys in the Fourth Circuit Public Defender's Office at the time of Gardner's trial and assisted Rochester as the case got closer to trial. App. 340, l. 14 – 341, l. 11. Jones followed Rochester into the room where they found Suggs talking to Gardner, after which he was "in and out" trying to coordinate a plea offer. App.

342, l. 11-25. He did not recall overhearing any of the conversation between Suggs and Gardner and said that Rochester was taking the lead. App. 343, ll. 4-22; App. 344, ll. 11-17. Jones got the impression from Suggs that he knew Gardner "very, very well" and they "grew up together." App. 344, ll. 18-23. In the time leading up to and during the trial, Jones said: "[I]t was always our understanding he wouldn't plead guilty to anything. He wanted a trial." App. 344, ll. 3-10.

Order Granting Post-Conviction Relief

The PCR court granted relief on two grounds – that the guilty plea was not entered voluntarily and that plea counsel rendered ineffective assistance of counsel in failing to inform the plea court of the circumstances leading up to the plea. App. 354 – 355. The PCR court found that "[t]he facts and testimony involving this PCR application are unique." App. 354. Gardner and his plea counsel testified that Gardner was intent on exercising his right to trial. He rejected multiple plea offers and was in the second day of trial when the meeting occurred with Suggs. App. 354. The court found:

> It is uncontroverted that Mr. Suggs met with the Applicant during the trial recess, expressed his opinion as to the outcome of the case and strongly advised Applicant to plead guilty. It is further undisputed that had this meeting not occurred, Applicant would have proceeded with the trial and would not have pled guilty. Although this Court believes Mr. Suggs had nothing but good intentions in advising the Applicant to plead guilty, this Court finds the discussion, and setting in which it occurred, to be quite influential over the Applicant's decision on whether to continue to exercise his constitutional right to a jury trial. The Applicant was represented by counsel and should not have been subjected to outside influence from any source whatsoever regarding his trial or related decisions. This Court finds that this meeting between the Applicant and Mr. Suggs rendered his guilty plea involuntary.

App. 354 – 355. The PCR court noted that it was "not concerned with the existence or nonexistence of any social relationship between Mr. Suggs and the Applicant or Mr. Suggs' official position as Clerk of Court but rather that this type of discussion and advice should only

occur between a defendant and counsel or at counsel's request and in her presence." App. 355, n. 1.

Regarding ineffective assistance of counsel, the PCR court further found that Gardner was not truthful in his responses to the plea court and that plea counsel should have been aware that Applicant intended to falsely testify when he inquired whether he should lie to the court prior to the plea. App. 355. The court found that plea counsel should have made the plea court aware of the circumstances leading to the plea and/or requested that the Applicant be allowed to withdraw his plea. App. 355. Accordingly, the court found that plea counsel was ineffective and that her ineffectiveness prejudiced Gardner. App. 355.

The State filed a motion to alter or amend, which was denied. App. 356; App. 364; App. 365.

ARGUMENT

I.

There is evidence in the record to support the PCR court's ruling that Respondent's guilty plea was not knowingly, intelligently, and voluntarily entered such that he is entitled to have the plea and sentence vacated and his case remanded for a new trial.

Introduction

Respondent Gardner had rejected three plea offers and begun his trial when he was taken into a private room to meet with Darlington County Clerk of Court, Scott Suggs, who Gardner knew through the small community but considered an "acquaintance" rather than a friend. Gardner's attorney was not present, though she later discovered the meeting and went inside. App. 261, l. 23 – 265, l. 4; App. 282, l. 5 – 283, l. 14; App. 320, l. 4 – 322, l. 19; App. 330, ll. 17-25; App. 332, ll. 1-12. At that point, the damage was done. Suggs had rattled Gardner so much that the man who had been insistent that the shooting death of his brother was an accident, was suddenly considering making a deal. App. 317, ll. 1-21; App. 323, l. 11 – 324, l. 16; App. 329, l. 23 – 334, l. 13. While Gardner's daughter later also made an emotional request to Gardner to plead guilty to insure a lesser sentence, it was undisputed that had Suggs not initiated his attempt to convince Gardner to plead guilty that Gardner would have continued with his trial. App. 279, ll. 16-21; App. 302, l. 25 – 303, l. 6; App. 311, ll. 7-10; App. 334, l. 23 – 335, l. 14.

The PCR court noted the unusual circumstances of this case, finding that even though Suggs interfered with good intentions, the discussion and setting in which it occurred were "quite influential" over Gardner and should not have occurred without Gardner's attorney present. App. 354. He concluded that Suggs' interference rendered the guilty plea involuntary. App. 354 – 355. While the PCR court reasoned that its decision was unaffected by the type of social relationship that existed between Suggs and Gardner or by Suggs' position as Clerk of Court, this

Court had the discretion to consider Suggs' capacity as an elected member of the judicial branch and his conversations with the presiding trial judge regarding what sentence would be imposed following a trial. See Rule 220(c), SCACR; I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 417, 526 S.E.2d 716, 722 (2000) ("[I]n raising an additional sustaining ground in an appeal, the party who prevailed in the lower court urges an appellate court to affirm the lower court's ruling for a reason other than one primarily relied upon by the lower court."). In addition to finding that the guilty plea was not voluntarily entered, the PCR court granted relief based on ineffective assistance of counsel because she failed to make the trial court aware of the circumstances surrounding the plea, i.e. the influence asserted by Suggs. App. 355.

The PCR court's findings are supported by the record, such that they must be afforded great deference. See Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). Certiorari should be denied.

Standard of Review

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." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.'" Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " Hill v. Lockhart, 474 U.S. 52, 56 (1985) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

Because a guilty plea is equivalent to a conviction, the trial court's determination of voluntariness must consider that "[i]gnorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." Boykin v. Alabama, 395 U.S. 238, 242-43 (1969).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Roddy, 339 S.C. at 33, 528 S.E.2d at 420.

"This Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). Accordingly, this Court "will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law." Council v. State, 380 S.C. 159, 169, 670 S.E.2d 356, 361 (2008).

Discussion

Petitioner oversimplifies this case by framing the argument as "[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." See Cert Pet., p. 16. Contrary to Petitioner's contention, this case did not involve "a consensual, non-coercive

conversation about pleading guilty." Cert Pet. 20. It was Scott Suggs, the elected Clerk of Court for Darlington County, who was granted unaccompanied access to Gardner in the midst of Gardner's trial with one objective – to convince Gardner to plead guilty. Suggs admitted that he was present during the trial as the Clerk, but claimed that when he went into a private room with Gardner during a recess that he was acting as his "friend." App. 295, ll. 12-21; App. 300, l. 24 – 301, l. 11. The nature of their relationship was disputed by Gardner, Gardner's daughter, and plea counsel Rochester.[4] App. 263, ll. 16-24; App. 264, ll. 10-20; App. 282, ll. 15-22; App. 310, ll. 14-18; App. 333, ll. 10-15. It was only Suggs who held himself out as a "friend" of Gardner. App. 294, ll. 10-22; App. 303, l. 24 – 304, l. 4; App. 344, ll. 18-23.

Suggs believed that it was in Gardner's best interest to plead guilty because of the evidence he had learned about through the media, court filings, and pre-trial motions. App. 295, ll. 2-14; App. 296, ll. 6-7; App. 297, ll. 1-15; App. 305, l. 15 – 307, l. 9. He had also discussed the case with the trial judge, Judge Baxley, who indicated that if the State's case unfolded as it alleged it would, he would sentence Gardner to life without parole. App. 296, ll. 20-25. He also knew that Decedent's family was amenable to a plea. They wanted Gardner to admit his guilt but did not want to go through trial or see the photographs of Decedent, which Suggs described as "gruesome."[5] App. 296, ll. 8-12; App. 296, ll. 19-20; App. 298, ll. 4-12. Armed with this information, Suggs met with Gardner alone and advised him that, based on the over five hundred trials he had observed, Gardner needed to enter a guilty plea and abandon his accident defense. App. 299, l. 13 – 302, l. 11; App. 305, ll. 13-24.

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[4] There is no basis for Petitioner's averment that "[i]t is uncontested Suggs was only speaking to Gardner as a friend, not as the Clerk of Court nor as an agent of the prosecution." Cert Pet., p. 17 n. 4.

[5] It is not clear from the record how or when Suggs viewed the photographs that would be utilized at trial.

After meeting with Gardner, Suggs spoke with family members of Decedent and Judge Baxley again. Suggs communicated the family's desire for a guilty plea to Judge Baxley, who was concerned about potential "backlash" if the family did not think that the sentence was harsh enough. App. 297, ll. 15-21; App. 298, l. 21 – 299, l. 12. Notably, Gardner had rejected all pre-trial plea offers and had in fact begun his trial. App. 317, ll. 4-21; App. 329, l. 23 – 330, l. 16. There was no dispute, even from Suggs, that had he never initiated a conversation with Gardner, the trial would have continued and Gardner would not have pled guilty. App. 279, ll. 16-21; App. 302, l. 25 – 303, l. 6; App. 334, l. 23 – 335, l. 14.

Petitioner's contention that Judge Cooper's reasoning will "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" is simply inaccurate. Of course defendants voluntarily consult with friends and family members regarding how they should proceed when facing criminal charges, both inside and outside of the presence of their attorney. Gardner's plea was not rendered involuntary because he had a consensual discussion about a plea with a close personal friend or family member. Judge Cooper was careful to specify that this case is "unique" and that it was the content and setting of the meeting with Suggs that rendered his influence improper and the plea involuntary. App. 354.

Here, Suggs unilaterally initiated contact with Gardner while the trial was in recess, meeting privately with him in a conference room next the holding cell behind the courtroom. Suggs had access to Gardner there only because of his capacity as a court official. Gardner's attorney was under the impression that Gardner was in the holding cell and was "shocked" when she went to speak with Gardner and found out he was with Suggs. App. 322, ll. 1-6; App. 331, ll. 1-12; App. 337, ll. 17-23. If that were not enough, Suggs unabashedly admitted that he spoke

with Judge Baxley about what sentence would be imposed if Gardner was convicted after trial, the potential of an Alford plea, and Decedent's family member's position regarding a plea. App. 296, ll. 20-25; App. 297, ll. 15- 21; App. 298, ll. 22 – 299, l. 12; App. 302, ll. 20-24. While Suggs may have claimed he was not meeting with Gardner in his capacity as Clerk, he referenced his experience seeing hundreds of trials as the basis for his advice to Gardner that he needed to cut a deal. App. 263, ll. 2-9; App. 282, l. 24 – 283, l. 14; App. 284, ll. 5-13. Petitioner attempts to analogize Gardner's voluntary conversation with his daughter to the earlier conversation with Suggs, but the two are not commiserate. See Cert Pet. p. 20. While Gardner was candid that his daughter's plea had some influence upon him also, had it not been for Suggs' initial, improper contact Gardner would have continued with trial. App. 267, ll. 7-10; App. 279, ll. 16-21; App. 284, l. 16 – 287, 21; App. 292, ll. 9-14.

The fact that Suggs was not a lawyer prohibited from communicating with a represented individual by Rule 4.2, RPC, Rule 407, SCACR, does not make his conduct any less egregious. See Cert. Pet, p. 16, n. 3. While Petitioner cites LoConte v. Dugger, 847 F.2d 745, 753 (11th Cir. 1988), in support of the State's argument. While not binding precedent upon this Court, a full reading of LoConte reveals that it supports the PCR court's decision. In LoConte, the habeas petitioner contended that his guilty plea was rendered involuntary based on a host of allegations, including that he was pressured to accept the plea by his co-defendant, Frank Ignazio. 847 F.2d at 751-52. The Eleventh Circuit Court of Appeals provided the following framework through which to evaluate the claim:

> 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. Short of absolute isolation of a pretrial detainee, the state has no practicable ability to prevent the

> exertion of such pressures upon a criminal defendant by his co-defendants and family members. **It is only where the plea is coerced by conduct fairly attributable to the state that the due process clause of the Fourteenth Amendment is offended. Such private coercion may be said to be fairly attributable to the state if it is procured and sanctioned by prosecutors or the state trial court. Additionally, it is at least arguable that such coercion may be attributable to the state if, at the time a defendant offers his guilty plea, the prosecutors or the trial court either know or reasonably should know the existence of such coercions.**

Id. at 753 (emphasis added). The Court ultimately found no evidence in the record to support the contention that the judge or prosecution was aware of or participated in any pressure or coercion exerted by Ignazio against the LaConte. Id. at 752-53.

Here, the fact that Suggs was not sent back to meet with Gardner at the behest of the prosecutor does not mean that his conduct was not attributable to the State, which encompasses more than the solicitor's office. Suggs himself is an elected member of the judicial branch of government. S.C. CODE ANN. § 14-7-10, et seq.; S.C. CONST Art. V, § 24; see also S.C. CONST. art. I, § 8 ("In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."). Further, there is some evidence that the trial court either knew or should have known about the existence of Suggs' coercion upon Gardner, as Suggs was communicating directly with Judge Baxley before and after his conversation with Gardner. See App. 296, ll. 20-25; App. 297, ll. 15- 21; App. 298, ll. 22 – 299, l. 12; App. 302, ll. 20-24.

The grant of relief to Respondent was warranted under the facts and circumstances of this case and supported by the evidence. Judge Cooper was in the best position to evaluate the witnesses and discern whether the content and context or Suggs' meeting with Gardner

improperly influenced his decision to plead guilty to the point that it was involuntary. He found that it did and there is no reason for this Court to grant certiorari to review that decision.

II.

There is evidence in the record to support the PCR court's ruling that Respondent's plea attorney rendered ineffective assistance of counsel such that he is entitled to have the plea and sentence vacated and his case remanded for a new trial.

In the Order granting post-conviction relief, the PCR court found that Gardner was not truthful in his responses to the plea court. App. 355. Gardner testified at the PCR hearing that he made the admission of guilt during the plea hearing and responded that no one had forced him to plead guilty because that was what he was told to do. App. 269, l. 14 – 270, l. 2; App. 270, l. 21 – 271, l. 5. The PCR court found that plea counsel "should have been aware that Applicant intended to falsely testify when he inquired whether he should lie to the court prior to the plea." App. 355. The court further ruled that plea counsel was ineffective because she failed to make the plea court aware of the circumstances leading to the plea and/or requested that the Applicant be allowed to withdraw his plea. App. 355. Because there is evidence to support the PCR court's findings and conclusions, this Court should not grant certiorari. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005); Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006); Council v. State, 380 S.C. 159, 169, 670 S.E.2d 356, 361 (2008).

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. 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. Strickland, 466 U.S. at 687, 104 S.Ct. 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The two-part test adopted in Strickland also "applies to challenges to guilty pleas based on ineffective assistance of counsel." Hill v. Lockhart, 474 U.S. 52, 58 (1985). "Plea counsel is ineffective within the meaning of the Sixth Amendment only when the applicant satisfies both requirements." Stalk v. State, 383 S.C. 559, 561, 681 S.E.2d 592, 593 (2009).

The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results." Brady v. United States, 397 U.S. 742, 758 (1970). An "unsound result" occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238 (1969); Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003). Thus, in the context of a guilty plea, the PCR court must determine whether 1) counsel's advice was within the range of competence demanded of attorneys in criminal cases—i.e. was counsel's performance deficient, and 2) if there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (citing Hill v. Lockhart, 474 U.S. 52, 56–58, 106 S.Ct. 366 (1985)).

Here, while there is some evidence that Judge Baxley was aware of Clerk of Court Scott Suggs' involvement in the plea negotiation process, it is unclear if he knew the full extent of the coercive affect it had upon Gardner, who had rejected three prior plea offers and begun his trial. See App. 296, ll. 20-25; App. 297, ll. 15- 21; App. 298, ll. 22 – 299, l. 12; App. 302, ll. 20-24. Plea counsel Rochester, however, was aware of the improper influence exerted by Suggs and that Gardner was not being completely truthful at his plea hearing when he said that his decision was driven by familial concerns and because he was in fact guilty. App. 317, ll. 1-21; App. 329, l. 23 – 330, l. 16; App. 334, l. 23 – 335, l. 14. Gardner testified that the reason he was dishonest with

the plea court was because plea counsel advised him that he had to admit his guilt and "go along" with whatever was said or the judge might change his mind about accepting the plea. App. 269, l. 14 – 270, l. 2; App. 270, l. 21 – 271, l. 5. Rochester agreed that she told Gardner that he was required to say that he killed his brother in order for the plea to be accepted, as Judge Baxley was not amenable to an Alford plea. App. 326, l. 12 – 327, l. 11; App. 336, ll. 13-18. Thus, there is evidence in the record to support the PCR court's finding that the result would have been different had trial counsel made the plea court aware of the truth.

Petitioner provides no support for its contention that the fact that Gardner's defense of accident was premised upon his own testimony renders the evidence against him "overwhelming" such that he should not be granted the relief of a new trial. See Cert. Pet., p. 25. This Court has remanded for a new trial in many cases where the defense that would reduce or negate criminal liability was based upon the defendant's testimony. See, e.g., State v. Knoten, 347 S.C. 296, 302-09, 555 S.E.2d 391, 394-98 (2001) (granting new trial where trial court failed to charge voluntary manslaughter where basis for charge was defendant's recanted statement); State v. Light, 378 S.C. 641, 644–46, 649, 664 S.E.2d 465, 466–67, 469 (2008) (gratning new trial where, although defendant "had inconsistent stories," he was entitled jury charges on involuntary manslaughter and self-defense). Though Rochester contended that a plea was "probably" in Gardner's best interest in light of the uncertainty and risk associated with trial, they were prepared to present an accident defense at trial through testimony and a demonstration. App. 324, ll. 17-25; App. 336, l. 19 – 337, l. 7.

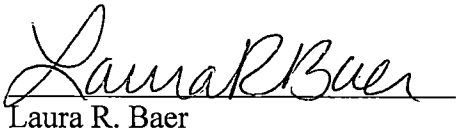
Further, in the context of a guilty plea, the prejudice prong of Strickland "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill v. Lockhart, 474 U.S. 52, 59 (1985). While the strength of the State's evidence may

be considered by the PCR court in determining the credibility of the applicant's averment that he or she would have proceeded to trial; it is not a separate basis for denying post-conviction relief from an otherwise involuntary guilty plea. Notably, here, the PCR court made specific reference to Gardner's rejection of all prior plea offers and was in the midst of trial when the sudden change to a plea occurred. App. 354.

The PCR judge properly applied the Strickland standard to Respondent Gardner's allegation of ineffective assistance of counsel and granted his application. Accordingly, there is no reason for this Court to grant certiorari to review that decision.

CONCLUSION

Based on the foregoing, Respondent Eugene Gardener respectfully requests that this Court deny the State's petition for writ of certiorari.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of December, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Darlington County

Honorable G. Thomas Cooper, Circuit Court Judge

EUGENE GARDNER,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari has been served upon Valerie Garcia Giovanoli, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Eugene Austin Gardner, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 29th day of December, 2017.

Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 29th day of December, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027 .