

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable William H. Seals, Circuit Court Judge

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ANTAVIUS GADSDEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002294

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PETITION FOR WRIT OF CERTIORARI

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## **ISSUE PRESENTED**

Whether plea counsel provided ineffective assistance of counsel when he guaranteed Petitioner that if he pled guilty to strong arm robbery and assault and battery in the second degree he would receive probation, and where Petitioner, who relied on plea counsel's guarantee, received a ten year sentence for strong arm robbery and three year sentence for assault and battery in the second degree?

## STATEMENT

On March 10, 2014, Petitioner was indicted by the Charleston County Grand Jury for Assault and Battery in the first degree and Strong-Arm Robbery. App. 84 – 88. On May 5, 2014, in front of the Honorable R. Markley Dennis, Petitioner, under the impression he would receive probation, pled guilty to strong-arm robbery and assault and battery in the second degree. App. 1. Lindsey McClair represented the state and Robert Howe represented Petitioner. Id.

The court accepted Petitioner's guilty plea and sentenced him to ten years' imprisonment for strong arm robbery and three years' imprisonment for assault and battery in the second degree. App. 18, ll. 3 – 8; 19, ll. 1 – 5. Petitioner's three year sentence was suspended on five years' probation. App. 19, ll. 1 – 5.

Petitioner filed an application for post-conviction relief on January 9, 2015, which alleged ineffective assistance of counsel and involuntary guilty plea. App. 22 – 28. The state filed its return on July 28, 2015, and an evidentiary hearing was held on January 12, 2017. App. 29 – 33; App. 35.

Petitioner's PCR hearing was held in front of the Honorable William Seals. App. 35. Rodney Davis represented Petitioner and Alicia Olive represented the state. Id. Judge Seals filed an order of dismissal on September 14, 2017 that stated Petitioner failed to carry his burden of proof regarding any of his allegations of ineffective assistance of counsel. App. 74 – 82.

This Petition follows.

## ARGUMENT

Plea counsel provided ineffective assistance of counsel when he guaranteed that if Petitioner pled guilty to strong arm robbery and assault and battery in the second degree he would receive probation, and where Petitioner, who relied on plea counsel's guarantee, received a ten year sentence for strong arm robbery and three year sentence for assault and battery in the second degree.

### **Relevant Facts**

On November 16, 2013 Petitioner allegedly struck a woman and robbed her at a storage unit facility. App. 5, l. 20 – 7, l. 23. Petitioner pled guilty to strong-arm robbery and assault and battery in the second degree. App. 2, l. 8 – 3, l. 10. At the guilty plea, plea counsel argued extensively for mitigation of Petitioner's sentence. It is important to note that plea counsel specifically and repeatedly requested that Judge Seals give Petitioner probation. App. 12, l. 25 – 13, l. 2; App. 14, ll. 4 – 10. Judge Seals sentenced Petitioner to ten years for strong arm robbery and a three year sentence for assault and battery in the second degree, suspended on five years' probation. App. 18, ll. 3 – 8; 19, ll. 1 – 5.

Petitioner filed a PCR application that alleged ineffective assistance of counsel and an involuntary guilty plea because Petitioner would not have pled guilty but for plea counsel's assurance that he would only receive probation if he did plead guilty. App. 22 – 28.

Petitioner's plea hearing was held on May 5, 2014, four months later, on September 5, 2014, this Court put plea counsel on incapacitated inactive status. In re Howe, 409 S.C. 639, 763 S.E.2d 639 (2014). Moreover, plea counsel was not called at to testify Petitioner's PCR hearing, therefore it is likely is testimony would not have helped the state.

At the PCR hearing, Petitioner testified that plea counsel never showed him any evidence the state had against him in his case. App. 44, ll. 16 – 20. Petitioner also informed the court that plea counsel never discussed the elements of either of the charges against him and never discussed what the state would have to prove. App. 45, l. 20 – 46, l. 19. Petitioner’s recollection and the credibility of his testimony at PCR in regard to his guilty plea hearing was reinforced when Petitioner testified at PCR that plea counsel told him, “if they judge asked you if you want to say anything, just say you apologize, you are sorry for what happened,” and that matched Petitioner’s apology at the plea hearing. App. 60, ll. 11 – 15; App. 15, ll. 22 – 25. It is important to note, that even though Petitioner’s PCR application was denied, the Court did not make an adverse credibility finding.

Moreover, Plea counsel *guaranteed* Petitioner that he would get probation if he pled guilty. During direct examination at PCR, Petitioner was specifically asked about the word guaranteed, “[t]hat was the language he used, guaranteed probation?” Petitioner confirmed that was plea counsel’s exact language. App. 48, ll. 17 – 23; 49, ll. 1 – 6. Petitioner repeatedly testified during his PCR hearing that plea counsel promised him that if he pled guilty he would get probation and go home. App. 45, ll. 12 – 14; App. 48, ll. 17 – 23; App. 49, ll. 1 – 3; App. 52, ll. 12 – 16; App. 52, ll. 20 – 22; App. 56, ll. 4 – 7; App. 57, ll. 5 – 11. Plea counsel told Petitioner that he would get probation because plea counsel was “good friends” with the solicitor, “so he guaranteed she will go with what he said.” App. 49, ll. 10 – 14. Petitioner, who insisted on going to trial, only pled guilty because he followed his attorney’s advice. App. 56, ll. 1 – 3; 49, ll. 21 – 24.

There was never any basis for plea counsel to guarantee Petitioner would receive probation if he pled guilty. At the PCR hearing, the solicitor from Petitioner’s plea hearing,

Lindsay Byrd, stated that she did not tell plea counsel that Petitioner would receive probation, however she did agree to not making a sentence recommendation. App. 65, l. 21 – 66, l. 11.

Petitioner testified that plea counsel never discussed with him that if there was an issue with the plea, he could stop the plea and go to trial. App. 60, ll. 16 – 22. Therefore, it is of no consequence that Petitioner did not stop Judge Dennis during the plea colloquy when Judge Dennis told Petitioner that he could receive up to eighteen years in prison because Petitioner did not know that he had the power to stop it. Id.

Judge Seals denied Petitioner’s PCR application because Petitioner did not present evidence that he wanted plea counsel to appeal the plea. App. 80. Judge Seals found that Petitioner’s claim that he was surprised by his sentence was refuted by the plea colloquy where Petitioner said he understood he could receive a sentence up to eighteen years. App. 81.

That denial was an error, and that error prejudiced Petitioner.

## **Discussion**

The difference, “between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea.” Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). The longstanding test for determining the validity of a 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) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984) to claims of the same against plea counsel).

First, “the voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases.” Id. On the other hand, the prejudice requirement focuses on whether “there is a reasonable probability that, but for counsel’s

errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” Id. at 59, 106 S.Ct. at 370. “[T]he 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.” Holden v. State, 393 S.C. 565, 572-74, 713 S.E.2d 611, 615-12 (2011).

“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984). To prove ineffective assistance of counsel, “the defendant must show that counsel’s performance was deficient” and “that the deficient performance prejudiced the defense.” Id. “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” Id. at 687-688, 104 S.Ct. at 2064. Concerning prejudice, “a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Rather, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694, 104 S.Ct. at 2068.

In Missouri v. Frye, 566 U.S. 134, 132 S.Ct. 1399 (2012), the United States Supreme Court noted that the, “Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings[, which] . . . include arraignments, postindictment interrogations, postindictment line ups, and the entry of a guilty plea.” Id. at 141, 132 S.Ct. at 1405 (citations and internal quotation omitted). The Court further emphasized that “[i]n today’s criminal

*justice system, . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.”* *Id.* (emphasis added). Accordingly, “[a]nything less [than effective counsel during plea negotiations]... might deny a defendant ‘effective representation by counsel at the only stage when legal aid and advice would help him.’” *Id.* at 1408 (citing Massiah v. United States, 377 U.S. 201 (1964) (quotation citation omitted)).

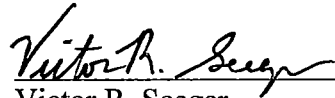
“The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland, 466 U.S. at 685, 104 S.Ct. at 2063 (quoting Adams v. United States ex. rel. McCann, 317 U.S. 269, 275, 63 S.Ct. 236, 240 (1942)). Additionally, a guilty plea that was entered by one fully aware of the direct consequences “must stand *unless* induced by . . . misrepresentation.” Brady v. United States, 397 U.S. 742, 755, 90 S.Ct. 1463, 1472 (1970) (emphasis added) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (1957)).

In the instant case Petitioner’s guilty plea was induced by misrepresentation. Plea counsel guaranteed Petitioner that if he pled guilty he would receive probation. App. 48, ll. 17 – 23; 49, ll. 1 – 6. At the PCR hearing, the solicitor from Petitioner’s plea hearing, Lindsay Byrd, stated that she did not tell plea counsel that Petitioner would receive probation. However she did agree to not making a sentence recommendation, and plea counsel specifically asked the judge to give Petitioner probation. App. 65, l. 21 – 66, l. 11; App. 14, ll. 7 – 10. Petitioner would not have pled had he not been under the misguided belief, induced by plea counsel’s “guarantee,” that he would only receive probation if he pled guilty. Therefore, plea counsel provided ineffective assistance where his misrepresentation wrongfully induced Petitioner to plead guilty, and that deficient performance

prejudiced Petitioner because he would not have pled guilty if plea counsel had not guaranteed he would get probation.

**CONCLUSION**

By reason of the foregoing arguments, Petitioner respectfully requests that this Court grant his application for post-conviction relief, reverse the charges against him, and remand the case for a new trial.

  
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Victor R. Seeger  
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of May, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable William H. Seals, Circuit Court Judge

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ANTAVIUS GADSDEN,

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V.

STATE OF SOUTH CAROLINA,

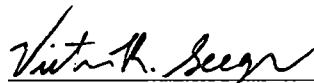
RESPONDENT

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CERTIFICATE OF SERVICE

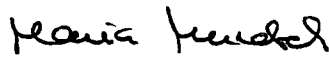
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Rasheeda Cleveland, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Antavius Gadsden, #253537, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 18th day of May, 2018.



\_\_\_\_\_  
Victor R. Seeger  
Appellate Defender

SUBSCRIBED AND SWORN TO before me    ATTORNEY FOR PETITIONER  
this 18th day of May, 2018.

 (L.S)

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Notary Public for South Carolina  
My Commission Expires: July 3, 2023