STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO DARLINGTON COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge



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Appellate Case No. 2017-000881

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Eugene A. Gardner, III,

Respondent,

v.

State of South Carolina,

Petitioner.

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# BRIEF OF PETITIONER

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ATTORNEYS FOR RESPONDENT

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## RESPONDENT'S ISSUES PRESENTED

I. Did the PCR Court err finding Gardner's plea was involuntarily entered where his friend advised that he would get a life sentence if he didn't seek a plea, where Gardner's daughter advised him of the same, where the trial judge fully explained Gardner's rights, the offenses alleged, and his sentencing exposure, and where there is no law to categorically prohibit the communications relied upon in granting relief?

II. Did the PCR Court err in finding Gardner's counsels ineffective for failing to inform the Court of every conversation Gardner had regarding the subject of whether or not to plea, and for failing to inform the court that Gardner still maintained his innocence and was only pleading to obtain the benefit of the plea bargain?

## STATEMENT OF THE CASE

Eugene A. Gardner, III, (Gardner) is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. Gardner was indicted at the February 2013 term of the Darlington County Grand Jury for murder (2013-GS-16-00452). Julie Rochester, Esq. (Rochester)[1] and J. Richard Jones, Esq. (Jones) represented Gardner at trial. Patti M. Parker, Esq., and John W. Holt, IV, Esq., each of the Fourth Circuit Solicitor's Office, prosecuted the case.

On December 2, 2013, Gardner proceeded to trial before the Honorable J. Michael Baxley and a jury. On December 3, 2013, after pre-trial motions, opening statements, and the testimony of the first witness, Gardner pled guilty to the lesser-included offense of voluntary manslaughter. Judge Baxley sentenced Gardner to imprisonment for a term of 20 years. Gardner did not appeal his plea or sentence.

Gardner filed his application for post-conviction relief on August 12, 2014 (2014-CP-16-00672). He alleged the following grounds for relief in his application:

1. "Applicant was denied the right to effective assistance of counsel [. . .] during the preparation phase of his trial."
    a. "Trial Counsel's performance during the preparation phase of trial was both unreasonable and prejudicial"
        i. "The defendant has a history of transient ischemic attacks (TIA's)."
        ii. "The county psychological nurse's statement, 'I know you would not hurt anyone, your actions were normal (panic, scared, confusion) you didn't handle the situation right – your brother had just died in front of you – you were in 'shock.'"
        iii. "Counsel told the defendant she was arranging an appointment with a neurologist, which was never done."

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[1] The trial transcript indicates attorney Rochester as "Julie Wooten." The transcript of the PCR hearing indicates attorney Rochester as "Julie Swilley"

iv. "The defendant was actually on sick leave for the 2 weeks prior to the accident."

b. "Loud v. Whitney, 977 F.2d 149, 156 (5th Cir. 1992) (citing Strickland v. Washington supra))."

i. "The defendant and his brother had never been in a physical altercation."

c. "Tisdale v. State, 662 S.E.2d 514 (S.C. 2008) – Counsel found ineffective in murder case for failing to request charges of involuntary manslaughter and accident."

2. "Applicant was denied the right to effective assistance of counsel. . . during the guilt-innocence phase of his trial."

a. "Supporting facts: trial counsel's performance during the questioning of the trial was both unreasonable and prejudicial."

3. "Applicant was denied the right to effective assistance of counsel during the preparation phase of trial."

a. "Counsel allowed Darlington County Corrections Officer, Purvis, to sit in and assist with defendant's trial preparations and discussions."

4. "Applicant was denied the right to effective assistance by counsel during the guilt-innocence phase of trial was both unreasonable and prejudicial."

a. "Supporting facts: Trial counsel's performance during the guilt-innocence phase of trial was both unreasonable and prejudicial."

i. "Counsel allowed a court officer (Scott B. Suggs – clerk of court), who had summoned the defendant into a room in the courtroom to discuss his case, advise counsel and the defendant."

ii. "There were 2 witnesses that heard a shot between 3:00-3:30 PM and Hardee (coroner) said Todd Gardner dies at the same time."

iii. "The defendant never had any intention of a plea at all – he has said over and over 'I know I made a mistake by not calling for help. I was scared out of my mind but I am innocent, I would never hurt my brother. We talked every day; sometimes 3 times. He was coming to live with us after I got dad settled. I loved my brother."

iv. "The defendant asked counsel 'when will we go over the details of my case?' She said 'during trial.'"

5. "Applicant was denied the right to effective assistance of counsel during the guilt-innocence phase of his trial."

a. "Supporting facts: Trial counsel's performance during the preparation phase of trial was both unreasonable and prejudicial."

i. "After clerk of court had left and counsel was discussing, again the room was chaos."

ii. "Counsel did not represent her client in a just and processional way."

6. "Counsel failed to communicate with and effectively represent Applicant."
7. "Applicant denied opportunity to fully discuss plea offers with counsel."
8. "Counsel failed to object to lack of factual basis for guilty plea."

Petitioner made its return on June 11, 2015, and an evidentiary hearing into the matter was convened on January 10, 2017, before the Honorable G. Thomas Cooper, Jr. Gardner was present at the hearing and represented by Lance S. Boozer, Esq. Valerie Garcia Giovanoli, Esq., of the South Carolina Attorney General's Office, represented Petitioner. By written order dated February 17, 2017, and filed February 24, 2017, Judge Cooper granted the application, vacated the conviction and sentence, and directed a new trial.

This appeal follows.

## STATEMENT OF THE FACTS

Gardner was indicted for the shooting murder of his brother, Richard "Todd" Gardner (Victim) on or about June 21, 2011. (Appx. 368-69). Gardner proceeded to trial and, after jury selection, Rochester moved to suppress Gardner's statement given to law enforcement. (Appx. 46, ll. 21-24). Rochester 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. (Appx. 47, ll. 16-25). Investigator Mark Luce testified *in camera* that he was assigned to work Gardner's murder case. (Appx. 50, ll. 11-12). Luce arrested Gardner in North Carolina where he then took Gardner to the Ashe County Jail and recorded a statement. (Appx. 50, ll. 13-21).

Luce enlisted the help of the U.S. Marshals Service and North Carolina Law Enforcement in arresting Gardner. (Appx. 58, ll. 1-6). Luce and Sergeant Brandon Peavy left Darlington early in the morning and arrived in North Carolina at "9:30 or so." (Appx. 58, ll. 7-9). Luce obtained a search warrant to search Gardner's home and finished the search at about 11:30 am. (Appx. 58, ll. 13-18). Luce then secured a search warrant for Gardner's vehicle which took until about 4:00 P.M. (Appx. 58, ll. 19-22). While searching Gardner's vehicle, Gardner called his home from jail and 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. (Appx. 58-59). After a few hours of effort, Luce obtained a second search warrant to locate the blue bag and agents on scene executed it. (Appx. p. 59, ll. 4-22). As indicated by Gardner's overheard conversation, the stolen gun was found in a blue bag behind the chimney. (Appx. 59-60).

Unable to keep a phone signal, Luce drove an hour to Garnder's home, learned of the discovery, and then an hour back to the jail in which Gardner was detained, arriving at the

detention center just after midnight. (Appx. 59-61). Luce recorded an interview of Gardner starting around 12:30 A.M., as Luce was concerned there would be conversation during the long ride back to South Carolina in the morning. (Appx. p. 60-62). 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. (Appx. 63-64).

On cross-examination, Luce testified he had suspicions Gardner's wife was involved in the murder. (Appx. 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. (Appx. 65, ll. 6-13). Luce explained to Gardner that if anyone helped cover up the crime, they would be guilty of accessory after the fact. (Appx. 65, ll. 16-19). Upon questioning by Rochester about certain remarks made during Gardner's interview, Luce clarified that none of his statements were veiled threats to lock up Gardner's wife and daughter. (Appx. 65-66).

Officer Josh Hodges also testified *in camera.* (Appx 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." (Appx. 76, ll. 13-22). After arguments from both parties, Judge Baxley found Gardner's statement was voluntary and admissible. (Appx. 81-94).

Rochester then moved to suppress the murder weapon. (Appx. p. 95-100). The State 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. (Appx. 100-03). Judge Baxley again denied Gardner's motion to suppress. (Appx.112-14). Rochester thereafter confirmed there would be no objection to *three*

other video recorded statements made by Gardner to law enforcement being admitted at trial. (Appx. 114-15).

Trial proceeded to opening statements the following day. 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 ever more damning evidence, culminating in a confession that Gardner shot his brother "by accident." (Appx. 130-40).

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.[2] Prior to his murder, Victim was the care taker of his and Gardner's father. Victim lived with their father, took care of him, and his name was on their father's checking account. After Victim's murder, Gardner secured power of attorney to access his father's money and rapidly spent in excess of $125,000 over four months. (Appx. 130-40; Appx. 194-95).

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[2] 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).

Victim's ex-wife, Susan Gardner Davis, testified first. Davis and Victim had lived on family land near Gardner and their parents. (Appx. 145-46). Davis testified the relationship between Victim and Gardner was "very up and down." (Appx. 146, l. 10). Shortly after she married Victim, they purchased a 9 mm Ruger gun, and Victim kept the gun after their divorce. (Appx. 151-52). Davis discovered Victim after he had been shot to death in the restaurant-apartment where he lived with his father. (Appx. 155, ll. 1 – 10; Appx. 162, ll. 17-24). Davis testified that when she arrived at the scene of the shooting, both the front and back doors were locked. (Appx. 159-60). The following day, Gardner asked for a key to the restaurant to see if anything was missing. (Appx. 156-57).

Following the murder, Gardner persistently tried to spend time with Davis' children, specifically her son. (Appx. 157-58). Two weeks after the murder, Gardner asked for Davis' children's social security numbers and claimed they could probably get a lot more than she ever got from Victim. (Appx. 158, ll. 17-24).

Davis informed law enforcement that Victim suffered from bouts of depression, but, she did not say when he had bouts of depression in her statement. (Appx. 167-68; Appx. 174-76). Davis testified the depression had subsided six to eight months before his murder. (App. p. 176, ll. 5 – 8).

### *SUGGS' CONVERSATION AND GUILTY PLEA*

The Court briefly recessed following Davis' testimony. (Appx. 176, ll. 19-21). The Honorable Scott B. Suggs, Clerk of Court for Darlington County, felt the jury would definitely convict Gardner of murder and Judge Baxley would sentence Gardner to life in prison. (Appx. 295-96). Suggs recalled speaking with Gardner's wife, daughter, and ex-sister-in-law, and reported they would be fine without a trial and only wanted Gardner to admit his guilt. (Appx.

296, ll. 6-13). Suggs felt sorry for Gardner and considered him a friend because of their lifelong history of playing sports together, as well as frequent cookouts, card games, and other social gatherings. (Appx. 294, ll. 11-22; Appx. 296, ll. 13-19). Suggs noted with concern that Judge Baxley indicated[3] his inclination to sentence Garnder to life imprisonment if convicted, and expressed he did not wish for that outcome. (Appx. 296-97). Suggs recalled communicating Gardner's family's indifference to sentencing to Judge Baxley. (Appx. 297, ll. 15-21). Suggs testified he was trying to work out a deal for Gardner with the Solicitor, the family and the judge to accept. (Appx. 305, ll. 4-8).

Suggs spoke to Gardner alone in a room[4] behind the courtroom during the brief recess after Davis' testimony, cited to his experience in watching hundreds of trials in Darlington, and told Gardner:

> 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.
>
> [. . .]
>
> I think I told him, probably, if I was in his situation knowing that I was going to be sitting, potentially, sitting in prison for the rest of my life or I have the option of whatever the judge may do fifteen (15), twenty (20), twenty-five (25) years you're going to serve eighty-five percent (85%) of that. He had already been in jail for however long the record said he was, two and a half, three years, he's

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[3] This isn't reflected anywhere on the trial record and thus presumably occurred in chambers.
[4] The witnesses differ on precisely how Suggs and Gardner came to be in the room together. Gardner testified Suggs summoned him to the back during the recess. (Appx. 262, ll. 6-9). Suggs could not recall details but roughly indicated Gardner was already in the back when he went to him, as Suggs had been talking to the family. (Appx. 298, ll. 3-5). Gardner was definitely still in custody, as he never availed himself of bond.

> already that far into it. And the fact, as I said, all the evidence in the case whether it's circumstantial evidence, factual evidence, is just not in his favor. Everything stacked up against him.

(Appx. 297, ll. 1-11; Appx. 299, ll. 15-25; Appx. 300-01). Suggs asserted he spoke to Gardner as a friend, not in his professional capacity as Clerk of Court, and that he does not typically intercede in trials. (Appx. 300-01).

While Suggs spoke to Gardner, Rochester sought to speak with her client before returning to the courtroom only to be informed by the transport guard that Gardner was not in the holding cell, but rather was in the adjacent room speaking with Suggs. (Appx. 321, ll. 9-20). Rochester demanded to know why anybody was permitted to speak to her client but received no answer. (Appx. 322, ll. 1-5). Rochester entered the room and found Suggs, who paid her little attention, telling her worried-looking client "that as a friend" that Gardner should plead guilty. (Appx. 322, ll. 8-16). Suggs at some point departed the room, permitting Rochester a private conference[5] with her client. (Appx. 322-23). Gardner told Rochester that Suggs advised taking a plea, to which Rochester responded that "it was [Gardner's] choice as to what he wanted to do." (Appx. 323, ll. 12-16). Gardner remained unsure of whether to proceed and Rochester told him she would inquire about what deal could be had, and departed to speak to the solicitor. (Appx. 323, ll. 18-21).

Rochester spoke to Gardner's daughter, Taylor Baker, and informed her Gardner was considering a plea but that Rochester was uncertain if he would take the offer. (Appx. 309, ll. 6-14; Appx. 325, ll. 6-8). Baker requested to speak with Gardner, to which Rochester consented, acknowledging Gardner's love for his daughter. (Appx. 309, ll. 14-15; Appx. 325, ll. 9-10).

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[5] The witnesses differ as to whether attorney Jones was also present and at what times. (Appx. 311, ll. 11-18; Appx. 323, ll. 2-10; Appx. 342, ll. 19-22).

Rochester asked Gardner if he wished to see his daughter; he said yes, and a distraught Baker entered the room and advised Gardner to take a plea offer. (Appx. 309-10; 325-26). Baker told Gardner "if he did not take the plea that he would never be able to see [Baker] get married. He would never be able to meet his grandchildren and things like that[. . . .] I told him if you don't do this I don't think you're ever going to be able to be a part of my life again as far as weddings, and children, and birthday parties, and family functions, and things like that." (Appx. 309, ll. 20-25; Appx. 312, ll. 15-18). Gardner interrupted Baker's entreaties and asked Rochester "so you want me to go out there and lie?" (Appx. 311, ll. 20-24; Appx. 326, ll. 326, ll. 12-14). Rochester told him she never wanted him to lie, to always tell the truth, but that an Alford plea would not be accepted and that Gardner would have to admit to killing his brother. (Appx. 326-27; contra Appx. 267, ll. 1-6; Appx. 286, ll. 20-22; Appx. 312, ll. 18-20).[6] At the evidentiary hearing, Gardner claimed Rochester wrote instructions on a yellow pad to just follow her lead through the plea proceeding, but Rochester denied doing so. (Appx. 269, ll. 4-8; Appx. 327, ll. 2-4).

Court reconvened, Gardner changed his plea to guilty, and a colloquy ensued between Judge Baxley, Gardner, the attorneys, and the victims. When Rochester 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." (Appx. 179, ll. 6-14). Counsel confirmed she believed it was in Gardner's best interest to enter a guilty plea to voluntary manslaughter. (Appx. 180, ll. 5-7).

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[6] The PCR Court did not find any one recollection of the outburst more accurate than any other, but instead found all of the witnesses credible and that Rochester "should have been aware that [Gardner] intended to falsely testify when he inquired whether he should like to the court prior to the plea." (Appx. 354-55).

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." (Appx. 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." (Appx. 181-82). Gardner also testified he believed a guilty plea was in his best interest. (Appx. 182, ll. 10-13). Gardner testified it was his decision to plead guilty, not someone else's. (Appx. 184-85). 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.*

(Appx. 185, ll. 3-25). (emphasis added). Gardner again admitted to killing his brother in the heat of passion after sufficient legal provocation. (Appx. 186, ll. 1-7). In mitigation, Rochester 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. (Appx. 202, ll. 15-21). The Court did not inquire about, and Gardner did not volunteer with whom he discussed his decision to plead guilty; Gardner only noted his family as the impetus for his plea.

At the evidentiary hearing, Gardner admitted telling the court he was neither coerced or forced into pleading guilty, and explained he said as much 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 – and after seeing my daughter the way she was upset, I mean, I needed some relief from that because that's what happened. Ever [since] 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 ---

(Appx. 271, ll. 3-11). Gardner indicated he had been incarcerated since his arrest despite receiving bond terms "because I just didn't want to put the financial burden on my family[,]" even after achieving a bond reduction. (Appx. 271, ll. 12-25). Baker asserted at the evidentiary hearing that Gardner hadn't wanted to plead guilty, but that "things that were said to him in that room by myself and other people made him want to do it." (Appx. 311, ll. 7-10).

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. (Appx. 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 additionally testified he never received any plea offers prior to the one he ultimately accepted. (Appx. 267, ll. 12-14). However, Rochester testified she informed Gardner of every offer, of which she believed there were three, because she was ethically obligated to do so. Rochester recalled the offer was a twenty year recommendation upon a guilty plea to voluntary manslaughter. (Appx. 317, ll. 4-11). Rochester 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 prior to Suggs' conversation. (Appx. 317-18; Appx. 324, l. 4-25). Rochester indicated her opinion was it was in Gardner's best interest to accept a plea offer, and explained his case would be difficult to win because: 1) Gardner 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;[7] and 5) Gardner's theory that the killing was accidental was contradicted by all of the evidence. (Appx. 317-18; Appx. 324, ll. 17-25). In summary, the State's evidence was very strong.

[7] Notably, Gardner implied the murder weapon was found because he told law enforcement where it was. (Appx. 274, ll. 19-25). However, the record clearly indicates it was found before Gardner informed law enforcement of its hidden location.

## STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review, but there must be "any evidence of probative value" in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

## ARGUMENT

### I. THE PCR COURT'S FINDING THAT GARDNER DID NOT VOLUNTARILY PLEAD GUILTY IS DEVOID OF LEGAL OR FACTUAL SUPPORT, REQUIRES COUNSELS TO SERVE AN UNTENABLE GATEKEEPING FUNCTION FOR THEIR CLIENTS, AND IGNORES BOTH GARDNER'S COMPLETE UNDERSTANDING OF HIS RIGHTS AND THE INTERVENING ADVICE OF GARDNER'S DAUGHTER TO ALSO PLEAD GUILTY.

This Court should vacate the grant of post-conviction relief because there is no law to support the PCR Court's conclusion that *any* outside influence renders a guilty plea involuntary, no evidence to show an error on the part of counsel Rochester in responding to the discovery of Suggs' conversing with Gardner, and no evidence to show that Gardner's plea was anything but knowing, intelligent, and voluntary.

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse

sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Id. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the pleading defendant had a full understanding of the consequences of his plea and the charges against him. See Boykin v. Alabama, 395 U.S. 238, 243 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). In determining guilty plea issues, it is proper to consider the

guilty plea transcript as well as evidence presented at the PCR hearing. See Harris v. Leeke, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984).

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) (finding a prisoner "may not ordinarily repudiate statements made to the sentencing judge," but that while the plea record is an imposing obstacle to relief, it is not invariably insurmountable). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975) (overruled on other grounds by United States v. Whitley, 759 F.2d 327 (4th Cir.1985)).

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 pled guilty, but would have insisted on going to trial instead. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Hill v. Lockhart, 474 U.S. 52 (1985)).

**a. No law in any jurisdiction supports the PCR Court's conclusion that outside influence from any source whatsoever renders a guilty plea involuntary.**

In granting relief, the PCR court found that, as Gardner was represented by counsel, he "should not have been subjected to outside influence from any source whatsoever regarding his trial or related decisions." (Appx. 354). The PCR Court further emphasized that its grant of relief 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." (Appx. 355, n.1).

There is no authority to support the PCR court's proposition. As an initial matter, it runs explicitly contrary to long-established law that a plea is knowing and voluntary if it is made with a full understanding of the consequences of the plea and the charges against him. See Boykin, 395 U.S. at 243; see also Hill v. Lockhart, 474 U.S. 52, 56 (1985) ("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."). In the PCR court's conception a plea may be involuntary irrespective of the defendant's fully-fleshed understanding and intent, simply because the defendant talked to somebody without his attorney's permission.

Second, the absolutist empowerment of defense counsel's discretion over who a defendant may or may not converse with in determining whether to plead guilty fundamentally deprives a defendant of control over his own case. "To gain assistance, a defendant need not surrender control entirely to counsel. For the Sixth Amendment, in granting to the accused personally the right to make his defense, speaks of the assistance of counsel and an assistant, however expert, is still an assistant." McCoy v. Louisiana, ___ U.S. ___, 138 S.Ct. 1500, 1508 (2018) (quoting Faretta v. California, 422 U.S. 806, 819-820 (1975). Trial management is defense counsel's province, but determining the objective of the defense is wholly the decision of the defendant, and the courts cannot restrict a defendant's free association and condemn him to make those decisions only with the ear of counsel, or else in isolation. See Id. (citing Gonzales v. United States, 553 U.S. 242, 248 (2008); Weaver v. Massachusetts, 137 S.Ct. 1899, 1908 (2017)) ("Trial management is the lawyer's province. . ."). Defendants have a right to determine their goals in consultation with friends, family, neighbors, co-defendants, or any other

third-party, constrained only by those restraints that may fall not on the defendant, but on the third-parties.

**b. No law provides for vacation of a knowingly, intelligently entered plea based on advice of court staff in absence of some other factor.**

The above stated, Gardner appears to recognize as much, shifts from the actual ruling on appeal in his Return to the Petition for Writ of Certiorari, and instead argues the court *could have* considered the fact that Suggs was the Clerk of Court, even if it affirmatively rejected doing so. See RPWC at 15 (citing 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)). Accordingly, the question becomes whether Suggs' capacity as Clerk of Court requires vacation of the knowingly, intelligently entered guilty plea.

Restrictions on participation by the judiciary in the plea negotiation process are not impelled by the Due Process Clause or any other constitutional requirement, such that automatic vacatur of a plea is required in response to such participation, but rather serve as prophylactic measures. United States v. Davila, 569 U.S. 597, 610 (2013). Indeed, judicial participation in negotiations was historically common practice, and rules have since been adopted in state and federal courts in an effort to get out ahead of potential inducements to plead guilty. Id. at 605 (citations omitted). In South Carolina, judicial participation in the plea process is explicitly permitted, if not encouraged, subject to guidelines adopted by the Supreme Court. Medlin v. State, 276 S.C. 540, 540-43, 280 S.E.2d 648, 648-649 (1981) (quoting Harden v. State, 276 S.C. 249, 277 S.E.2d 692 (1981)). In Harden, the Court specifically disavowed the total disengagement of the judiciary from the plea bargaining process in federal court rules and instead adopted standards provided by the American Bar Association with a mind to preventing only "the exercise of actual coercive power on the part of the judge to force the defendant to accept a plea bargain." Harden, 276 S.C. at 251, 277 S.E.2d at 692. As is potentially relevant to

the instant case, the Harden standards provide, in part: "Except as otherwise provided in this standard, the judge should never through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered." Id. at 255, 277 S.E.2d at 694-95.

Perhaps as a pleasant surprise, despite the frequently amiable nature of court staff, including clerks, bailiffs, and court reporters, the question of how to apply the above to court staff is unanswered in this state and appears infrequently in other jurisdictions. In Vaughn v. State, 18 S.E. 550 (Ga. 1893), the Supreme Court of Georgia affirmed the conviction of a man for "disturbing a congregation assembled for divine worship" after he followed the advice of a court bailiff and proceeded to trial without a jury, without an attorney, and without any witnesses for his defense. More recently, in Duffy v. State, 120 P.3d 398 (Mont. 2013), the Supreme Court of Montana affirmed the assault conviction of a man who pled after the clerk of court advised him he did not have a case. Montana found:

> Even if taken as true, the clerk of court's alleged comment does not constitute grounds to withdraw a guilty plea. The statement cannot be classified as a threat, misrepresentation, or improper promise under Brady. The clerk did not induce or coerce Duffy into pleading guilty. The District Court found, and we agree, that Judge Egeland had explained the contents of the waiver before Duffy entered his guilty plea. Furthermore, the statement itself, if actually made, represented merely an opinion of the clerk of court, who had no authority over Duffy and did not speak for the court.

Duffy at 401; cf. 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.). Montana thereafter justifiably condemned and admonished court officers to never dispense legal advice or opinions to criminal defendants. Id.

The most severe sanction for opinions by court staff appears to have been handed down in Potter v. Mohn, 256 S.E.2d 763 (W.Va. 1979). In Potter, two co-defendant brothers charged with armed robbery learned at the start of trial that a key prosecution witness not expected to appear had, in fact, appeared. The lone attorney representing both brothers advised they would be wise to seize upon a ten-year plea offer, as they were otherwise facing up to life. The brothers were then told by a bailiff that, in his opinion, if the case were tried and the brothers convicted, the judge would impose a much longer sentence than ten years. Shaken, one brother immediately pled, but the other remained reluctant. Defense counsel then told the holdout brother that either both had to plea or neither at all. Both pled, and the reluctant brother later sought to vacate his plea. The Supreme Court of West Virginia granted habeas corpus, first noting the "unitary nature of the pela bargain proposal" and second the bailiff's remarks: "While we do not suggest that the bailiff was an emissary of the judge, he was nonetheless an agent of the State whose remarks, to the effect that a substantially heavier sentence would be imposed upon conviction after a jury trial, added a further coercive influence." Potter at 767.

These cases considered, the approach in Montana and Duffy is most closely analogous to the present circumstance. Only in Potter did another state high court grant habeas for the sentencing opinion of court staff, and there it only did so with the added and severe detail that defense counsel shackled the fates of his clients together. Though Suggs is clearly a judicial official,[8] there is no sign that he acted in a manner to "exercise the actual coercive power" on behalf of the bench, but instead was acting of his own accord *in spite of* his position, with a

[8] The office of Clerk of Court is established under Article V of the Constitution of the State of South Carolina, which provides for the judicial department. See also S.C. Code ann. § 14-17-50 (must take constitutional oath); McCormick Cty. Council v. Butler, 361 S.C. 92, 603 S.E.2d 586 (2004).

compassionate mind to the fate of a person he considered a friend.[9] He was not empowered to speak on behalf of the judge.[10] To the extent that any new law needs be established to address this unique circumstance in the future, this Court should follow the lead of Montana and Duffy: the plea should be affirmed and court staff firmly admonished.

**c. The deficiency of counsel relied upon by Gardner and the PCR Court, in that Rochester failed to prevent Suggs from talking to him, is something entirely beyond the control of Rochester or any counsel.**

In addition to the absence of legal authority to support the PCR court's grant of relief, the deficiency finding demands an impossible and unconstitutional degree of control over access to their clients. As previously noted, Gardner alleged Counsel was deficient in allowing Suggs to talk to him, and the Court granted relief in part on grounds that Gardner "was represented by counsel and should not have been subjected to outside influence from any source whatsoever regarding his trial or related decisions." (Appx. 348; Appx. 354). How exactly is defense counsel supposed to achieve this, absent following their client in and out of incarceration every moment? Though counsels may from time to time endeavor to deny certain persons access to their clients, an attorney cannot be held to a standard of exercising complete control and dominion over defendants, and any noble effort by counsels to do so goes well above and beyond the standard of competence generally expected of attorneys. See, e.g. Harper Lee, To Kill a Mockingbird, Chapter 15 (1960) (Atticus Finch guards the door to the Maycomb jail as the lynch mob comes for Tom Robinson, risking his life). Alternately, as argued in Section I.A, above,

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[9] That Gardner self-servingly rejected Suggs' avowed friendship is not relevant to Suggs' motivations for acting, and Suggs affirmation of friendship should be sufficient explanation of why he acted the way he did.

[10] Though there was some testimony that Judge Baxley openly opined a belief that a life sentence may be appropriate, there's nothing in the record to indicate that it was said in open court, or directed to or intended to be heard by Suggs, or declared in the vein of "will no one rid me of this turbulent priest?" The Darlington Courthouse not terribly private, and surprisingly small for a multi-story building.

total denial of access to a defendant by defense counsel, or even access permitted only in defense counsel's discretion, would be unconstitutional.[11] See McCoy, 138 S.Ct. at 1508.

The facts here show that, as is typically the case in a trial, Rochester and Jones were busy, moving about here and there, and could not reasonably constrain themselves to follow Gardner into lockup, follow him back out, and do nothing else in order to prevent the unexpected actions of the Clerk of Court. The record provides that Rochester was present for enough of Suggs' comments to know their substance, advise Gardner on the wisdom of pleading guilty, and thereafter take action to permit him to speak with his daughter, negotiate with the State, and determine the inclination of the trial court.

The PCR court also holds Rochester should have informed the trial court of the circumstances leading to the plea. While counsels may from time to time offer to plea judges explanations of why the decision to plead has been made, they are not obligated to do so. Indeed, in the present case, where Gardner provided that he was pleading to spare his family grief, and where the explanation now demanded would have substantively constituted "he's pleading because he was told he will probably be convicted," disclosure would have undermined Gardner and Rochester's mitigation strategy. Furthermore, where Gardner himself failed to indicate Suggs' conversation as a basis for his pleading guilty to Judge Baxley, despite extended explanations for his decision, he can hardly prevail upon a complaint that his attorney failed to do so for him.

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[11] The thought occurs, from proximity to the literary reference, that one may read this to mean Atticus' conduct was unconstitutional. Suffice it to say, Tom Robinson did not likely wish to speak with the mob, and Atticus had his tacit consent to guard the door from this would-be killers.

**d. There is no evidence to show that Gardner was unaware of his constitutional rights, the nature and crucial elements of the offense charged and the offense pled, or the maximum and minimum mandatory penalty.**

Most simply and most importantly, Gardner knew what he was doing. Rochester's testimony plainly provided that she explained the charges, the weakness of the defense, the sentencing exposure, and Gardner's rights. To whatever extent Rochester missed anything, Judge Baxley affirmed that Gardner understood his rights against self-incrimination, his right to a jury trial (already started), and his right to confront his accusers in a very thorough plea colloquy. See Boykin, 395 U.S. at 243 (listing the rights of concern). The only deviation Gardner actually offers is his motive, which was known to him and, if one takes his testimony at the evidentiary hearing at face value, purposefully withheld by him from the Court in order to facilitate the plea. Accordingly, the plea was entered knowingly, intelligently, and voluntarily, and the PCR Court erred finding otherwise.

**e. There is no evidence that, but for *Rochester's* error, Gardner would not have pled guilty, but would have proceeded to trial.**

In order to establish prejudice when challenging a guilty plea, a defendant must prove "there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have gone to trial." Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018) (quoting Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004).[12] As argued above, the fact that Suggs' talked to Gardner is not an error on the part of trial counsel, but is an entirely unexpected intervening event to which she had to respond. And Gardner did not plead guilty because Richardson failed to mention the Clerk of Court to the trial judge. Gardner pled

[12] To the extent that the Petition for Writ of Certiorari argues that prejudice is categorically foreclosed due to the strength of the evidence against Gardner, that argument is withdrawn, in light of Frierson's holding.

guilty for the reasons he provided in his plea colloquy—the love of his family—and Gardner did not mention Suggs because he was afraid it would scuttle the deal.

Every witness does agree that *but for* Suggs decision to talk to Gardner, the plea offer and guilty plea would not have come to pass, but the testimony also provides that Suggs' wasn't willing to plead guilty immediately after Suggs' conversation, but rather was unable to determine whether he wished to proceed and, in Rochester's judgment, was not likely to accept a plea. Indeed, it is evident that Gardner was resistant to pleading guilty at least up until he interrupted his daughter and asked if Rochester wanted him to lie. Baker firmly, and accurately, adjudged that it was her extremely emotional, impassioned plea to Gardner to plead guilty that he might be around for her later life achievements that actually turned Gardner's position to pleading guilty. 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. See LoConte, 847 F.2d at 753 ("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[.]")

## II. THE PCR COURT ERRED IN FINDING COUNSEL ROCHESTER INEFFECTIVE BECAUSE HE WAS TRUTHFUL IN THE COURSE OF THE PLEA PROCEEDING, AND COUNSEL ROCHESTER HAD NO RIGHT TO MOVE TO WITHDRAW THE PLEA WITHOUT SOME DIRECTIVE TO DO SO BY GARDNER.

The PCR court erred in finding Counsel failed to inform the plea court of Gardner's intention to lie because there was no demonstrated intention to lie and because the "lie" relied upon in granting relief was no lie, but the honest admission of guilt, and a decision wholly within Gardner's province.

When Gardner asked Rochester if he was supposed to "lie," he did so in the context of still insisting on his innocence. "[A] defendant may voluntarily and knowingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit he participated in the acts constituting the crime." State v. Herndon, 403 S.C. 84, 91, 742 S.E.2d 375, 379 (2013) (citing North Carolina v. Alford, 400 U.S. 25 (1970)). Rochester properly informed Gardner that he shouldn't lie, but that he would have to admit to killing his brother in order to avail himself of the offer, as Judge Baxley would not entertain an explicit Alford plea.[13]

Thereafter the only person who could have known if Gardner was being subjectively honest in his admissions to the court is Gardner himself, and it would have been speculative, defeating, and deficient conduct on the part of Rochester if she were to rise in the course of the proceeding and contest the honest intentions of her own client. Indeed, as provided in the

Much of the PCR court's finding of ineffective assistance of counsel overlaps intimately with the finding that the plea was not voluntarily entered, and the arguments and law set forth above are similarly applicable here, in particular those set forth in Section I.a. The PCR Court finds Rochester defective for not depriving him of his right to himself determine whether to

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[13] Petitioner again acknowledges differing testimony on this point, but notes the PCR Court did not find Rochester instructed Gardner to lie, but only that she should have mentioned his intention to do so to the court.

plead guilty or not guilty. See McCoy, ___ U.S. at ___, 138 S.Ct. at 1508. An attorney cannot be deficient for failing to be deficient. Concordantly, Rochester could not and should not have moved to withdraw the plea unless specifically instructed to do so by Gardner, and no evidence in the record indicates that he so asked.

The sum total is that the PCR court ruled in a summary manner that, once Suggs' spoke to Gardner, Rochester in no way should have permitted him to plead guilty, or should have actively conducted herself in such a way as to actively discourage her client from a decision which, based on her review of the evidence, was in her best interest. Such a summary disposition of a solemn admission of guilty is wholly inappropriate. No evidence or law exists to support the PCR court's finding of deficiency, nor its finding of prejudice, and the order finding Rochester ineffective should be vacated.

## CONCLUSION

For the foregoing reasons, this Court should reverse the grant of post-conviction relief, and remand Gardner to the custody of the South Carolina Department of Corrections to serve the remainder of his sentence.

Respectfully submitted,

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31 Aug., 2018

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Darlington County
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Post-Conviction Relief Judge

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Appellate Case No. 2017-000881

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EUGENE A. GARNDER, III,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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## CERTIFICATE OF SERVICE

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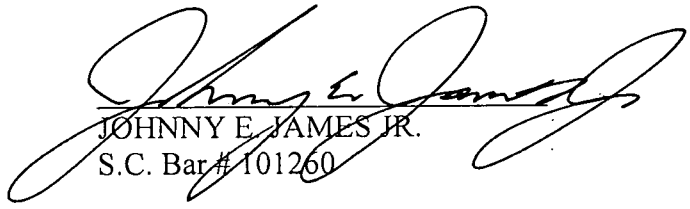
I, Johnny E. James Jr., certify that I have today served the within Petitioner **Brief of Petitioner** upon Respondent- by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

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

I further certify that all parties required by Rule to be served have been served. This 31st day of August, 2018.



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