STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Supreme Court County

Honorable G. Thomas Cooper, Circuit Court Judge

EUGENE AUSTIN GARDNER, III,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER.

APPELLATE CASE NO. 2017-000881

BRIEF OF RESPONDENT

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PETITIONER'S QUESTIONS PRESENTED

1.

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?

2.

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?

RESPONDENT'S COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1.

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?

2.

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, 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 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 PCR application 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 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. This appeal follows after a grant of certiorari by this Court.

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).

ARGUMENT

1.

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

The standard of review controls the outcome of this appeal. Not only is there evidentiary support for the key facts underlying the PCR court's determination that respondent Eugene Gardner's guilty plea was coerced and involuntary, these key facts are undisputed. It was undisputed that the elected Clerk of Court, Scott Suggs, met privately with Gardner during the middle of trial and told him to plead guilty. App. 295, l. 19 – 305, l. 24. The PCR court found, "It is further undisputed that had this meeting not occurred, Applicant would have proceeded with the trial and would not have pled guilty." App. 354. The PCR court made favorable credibility findings for each of these points, to which a reviewing court owes great deference. App. 354.

With these two facts, the PCR court correctly concluded that Gardner satisfied both prongs necessary to prevail. First, Suggs' actions coerced Gardner and rendered his plea involuntary. 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."). Second, Gardner proved prejudice because he would not have pled guilty but for Suggs' actions. Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 485 (1991) ("In fact, the only evidence in the record on [the prejudice] point is

petitioner's own testimony that had plea counsel not misinformed him . . . he would not have pled guilty. Thus the second part of the test has been met.").

Factual and Procedural Background

The 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. 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

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[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.

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 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.

The PCR Hearing

In Gardner's 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.

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. App. 253, l. 12 – 255, l. 16. During a recess on the second day of trial, Suggs had Gardner brought into a back room "behind the bench." He told Gardner that based on his experience, "it wasn't going good 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 into the room several minutes into the conversation. 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?" 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.

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. 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. 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.

Suggs had been the Clerk of Court for Darlington County for over twenty years. 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 in Darlington's courtroom 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, that the evidence against Gardner was "overwhelming." App. 305, l. 22 – 307, l. 9. Suggs did recall a discussion of an Alford[2] 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.

Rochester testified that "Mr. Gardner **up until trial never wanted to plead guilty. He only wanted to have a trial."** App. 317, ll. 1-4 (emphasis added). 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.

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

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 Suggs. App. 320, l. 4 – 321, l. 20; App. 330, ll. 17-25. She was shocked to find Suggs speaking to Gardner alone. 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 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. 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.

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.

The PCR Court's Order

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 court denied the State's motion to alter or amend. App. 356; App. 364; App. 365.

Discussion

The State agrees that intervention by court staff in plea negotiations is improper, but argues the law provides no remedy for a criminal defendant whose plea is coerced as a result. The State agrees court staff should be "firmly admonished" if this Court renders a published decision. Br. Pet. at 22. However, the preceding pages of the State's brief argue that other than

an admonishment—which necessarily implies court staff acted improperly—no other action is required to redress the wrong in this case. Br. Pet. at 19-22.

The legal concept avoided by the State in its argument is improper coercion of a guilty plea, which is what the PCR court necessarily found rendered Gardner's plea involuntary. In 1994, this Court described a series of cases in the late 1970s and early 1980s as setting "strict limits upon the trial judge's involvement in any negotiations leading to such a plea." State v. Thrift, 312 S.C. 282, 295, 440 S.E.2d 341, 348-49 (1994). These cases begin with State v. Cross, 270 S.C. 44, 240 S.E.2d 514 (1977), which is a coercion case. In Cross, the judge told the solicitor and the defendant's attorney that if the defendant pled guilty, he would sentence the defendant to a fine, but no imprisonment. Cross at 47, 240 S.E.2d at 516. However, if the defendant exercised his right to a jury trial and was convicted, the judge would sentence the defendant to imprisonment. Id. The defendant then pled guilty and the Cross Court found the actions of the judge "unduly coerced" the defendant and reversed. Id. at 50, 240 S.E.2d at 517.

In Cross, the Court favorably cited Rule 11 of the Federal Rules of Criminal Procedure which prohibited judges from participating in plea negotiations.[3] Id. at 48, 240 S.E.2d at 516. One year after Cross, the Court decided Beaver v. State, 271 S.C. 381, 247 S.E.2d 448 (1978), and again reversed a guilty plea because of coercive statements by a trial judge. The timing of the guilty plea in Beaver is similar to the current case. The defendant began his trial on the charge of assault with intent to ravish. Beaver at 382-83, 247 S.E.2d at 448-49. After an overnight recess, the trial judge told defense counsel that if the defendant continued with the trial and refused to plead guilty, he would impose the maximum forty-year sentence. Id. The defendant "within the hour" entered a guilty plea and received a fifteen-year sentence. Id.

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[3] The current federal rule retains this blanket prohibition. Fed. R. Crim. P. 11(c)(1) ("The court must not participate in these discussions.").

Three years later, the Court decided Harden v. State, 276 S.C. 249, 277 S.E.2d 692 (1981) and Medlin v. State, 276 S.C. 540, 280 S.E.2d 648 (1981). In Harden and Medlin, the Court decided against imposing the federal rule's complete ban on judges' involvement in plea negotiations, but adopted the ABA's Standard 14-3.3. Id. However, both Harden and Medlin remain very concerned with the prospect of judicial coercion and the ABA's standard contains the rule that "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." Harden at 255, 277 S.E.2d at 694-95; Medlin at 542, 280 S.E.2d at 649. In both cases, the Court reviewed the record and found no evidence of coercion by the trial judges. Id. In 1994, when the Court returned to this subject in Thrift, the Court specifically added a requirement that all disclosures of plea agreements be on the record. Thrift at 295-96, 440 S.E.2d at 348-49.

The federal courts retain the prohibition on judges' participation in plea negotiations, but review violations of the rule to determine whether any error was prejudicial. United States v. Davila, 569 U.S. 597, 610-12 (2013). In Davila, a magistrate judge repeatedly violated the federal rule and advised the defendant to plead guilty, but the Supreme Court found the defendant was not coerced and he flagrantly attempted to manipulate the courts with his plea and subsequent request to withdraw it. Id. The Court pointed out the three-month delay between the magistrate judge's violation of the rule and the defendant's guilty plea before the district judge as an important factor. Id.

In this case, the coercion emanates from a judicial officer who was not the judge. The Seventh Circuit dealt with such a problem in United States v. Kraus, 137 F.3d 447 (1998) as if the coercion came from the judge. In Kraus, the district judge rejected a proposed plea

agreement in open court and, according to the Seventh Circuit, tread too closely to the line prohibiting her from involving herself in plea negotiations. Kraus, 137 F.3d at 449-50, 454-55. The district judge told the parties that she believed the sentencing range of 121 months was too low. Id. The parties left the hearing and continued negotiating. Id.

Unfortunately for the district judge, and unbeknownst to her, the "room clerk" told the prosecutor during a telephone call that she believed the parties' proposed new sentence of 151 months had "credence," but advised "that there was no guarantee as to what the court would do." Id. at 450-51. The prosecutor told this to the defense attorney who then told his client that a third party connected to the court said the judge would not accept a cap of less than 151 months. Id. at 451. After pleading guilty, the defendant appealed on the basis that his plea had been "tainted." Id. at 451-52.

On appeal, the Seventh Circuit analyzed both the judge's comments and the clerk's comments under the federal rule for harmless error and reversed. Id. at 456-58. The clerk's comments were the decisive factor in the court's decision to reverse. Id. The court wrote, "Judicial employees, whether they be law clerks, secretaries, or courtroom deputy clerks, enjoy access to a judge's innermost thoughts; they consequently bear a duty of loyalty and confidentiality that precludes them from opining how the judge will rule." Id. at 456.

> **The conflicts and missteps of a judge's staff are not lightly imputed to the judge herself.** We reiterate that there is no evidence that the district judge herself was even aware of, let alone endorsed, the room clerk's remark that the 151-month cap had "credence." On the contrary, the clerk to her credit admonished the prosecutor that she could not predict what the judge would have to say about that new cap. Nor do we for a moment think that the clerk's own opinion as to the new cap had any impact upon the judge's subsequent evaluation and approval of the plea agreement. **Even so, coming from an employee of the court who occupies a position of enormous trust, any opinion voiced by the clerk was bound to carry far greater weight than the opinion of a mere bystander. Accurately or not, a party and its counsel are quite likely to perceive that the**

> **clerk's opinion as to a matter pending before the court is founded in some measure on the clerk's knowledge of and insight into the judge's thoughts.** Had she lacked the status of an "insider," the clerk's thoughts as to the "credence" of the new sentencing cap would not have merited disclosure to defense counsel and again to the defendant.

Id. at 456, n.9 (internal citations omitted) (emphasis added).

The Seventh Circuit properly focused its inquiry on the perception of the defendant and his reaction to the clerk's statement. Id. at 456-57. The court said that had the judge made the same remark the clerk made, it would have undoubtedly been improper. Id. "From the defendant's point of view, however, there is little practical difference." Id. "A court and an attorney can appreciate the distinction, but the undisputed facts suggest that it appeared to Kraus (and for that matter, to his attorney), that the court itself had given its blessing to the 151-month proposal." Id. "We cannot say with any degree of confidence that Kraus' perception was unreasonable." Id. at 457.

In Gardner's case, the comments by Suggs are far more serious and extensive than the comment by the clerk about "credence" in Kraus. Suggs was not a "room clerk." He was the elected Clerk of Court with twenty years of experience who knew everyone in the small town. App. 293, l. 23 – 294, l. 5. App. 261, l. 20 – 265, l. 1. He told Gardner he had seen over five hundred trials, the trial was not going well, that he could get life, and that he needed to plead guilty. App. 261, l. 20 – 265, l. 1. Suggs told Gardner that "all the evidence stacks up against you." App. 296, l. 6 – 297, l. 25. Also unlike Kraus, Suggs was in communication with the trial judge and relayed information to the judge about the parties' discussions. App. 296, l. 6 – 297, l. 25. If the clerk in Kraus's mention of "credence" led to a plea being involuntary, the egregious intervention by Suggs in this case can be nothing less than coercion.

The State principally relies on a case from Montana, Duffy v. State, 120 P.3d 398 (Mont. 2005). Duffy has little relevance to the current case because the defendant had already pled guilty before hearing the improper remark from the clerk. Duffy, 120 P.3d at 399-401. The clerk made the remark after the plea and before the defendant signed a waiver of rights. Id. The Montana court examined the case for coercion and found none. Id. The court reasoned, "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." Id. at 401. The court then condemned the clerk's actions. Id. Unlike the defendant in Duffy who had already pled guilty, Gardner was in the middle of his trial when the Suggs told him to plead guilty.

The State argues that because Gardner's attorneys advised him to plead guilty after Suggs' statements ignores that the decision to plead guilty must be the defendant's decision. The court in Kraus viewed his attorneys pressing the issue after the clerk's statements as a further improper influence on Kraus's right to decide for himself whether to plead guilty. Kraus at 457-58. The court said that "the clerk's view was pressed forcefully upon him as a reason to accept the prosecutor's proposal as the most favorable arrangement that the district court was likely to approve." Id. at 457. "It is clear, however, that the clerk's remark helped to convince Kraus to accept a sentence more than a year longer than he and his counsel were intending to propose." Id. Here, as the PCR judge found, it was undisputed that Gardner would not have pled guilty but for Suggs' improper influence.

Petitioner overstates the effect of the PCR court's holding. 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. As the dearth of reported decisions indicates, clerks do not routinely make such mistakes.

The PCR court properly 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. <u>See</u> Rule 220(c), SCACR; <u>I'On, L.L.C. v. Town of Mt. Pleasant</u>, 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."). Even if the PCR court's Order is lacking on this point, the evidence is perfectly clear and requires affirmance.

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 LoConte. Id. at 752-53.

The grant of relief to Gardner was warranted under the highly unusual 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. The PCR court properly focused on Gardner's perception and whether Gardner's plea was

rendered involuntary. Gardner's immediate reversal of course after months of insisting on a trial immediately after Suggs' coercive intervention amply supports the PCR court's conclusion and this Court should affirm.

2.

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 affirm. 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 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.

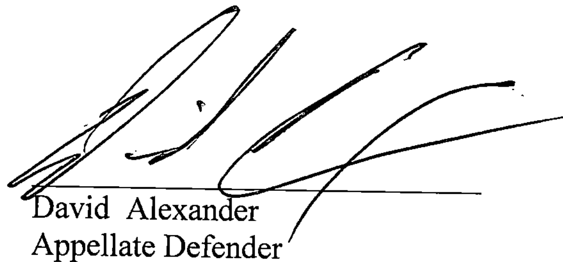
Petitioner provides no support for its contention that the fact that Gardner's defense of accident was premised upon his own testimony renders the evidence against him "overwhelming" such that he should not be granted the relief of a new trial. See Cert. Pet., p. 25. This Court has remanded for a new 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) (granting 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 Gardner's allegation of ineffective assistance of counsel and granted his application and this Court should affirm.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the PCR court granting respondent a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT

This 31st day of December, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
JAN 03 2019
S.C. SUPREME COURT

Appeal from Darlington County

Honorable G. Thomas Cooper, Circuit Court Judge

EUGENE AUSTIN GARDNER, III.

RESPONDENT

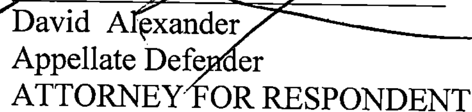
V.

STATE OF SOUTH CAROLINA,

PETITIONER

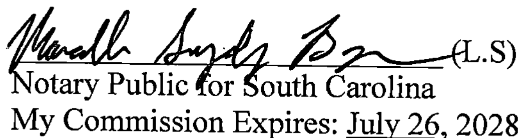
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, by U.S. Mail postage prepaid, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Respondent have been served on Eugene Austin Gardner, #357996, by U.S. Mail, postage prepaid, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 31st day of December, 2018.



David Alexander
Appellate Defender
ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 31st day of December, 2018.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Notary Public for South Carolina
My Commission Expires: July 26, 2028