

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Cherokee County

Honorable Michael G. Nettles, Circuit Court Judge

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MARCUS WILLIS THAMES

PETITIONER

RECEIVED  
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S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001384

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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### **ISSUE PRESENTED**

Whether Petitioner pled guilty involuntarily because plea counsel failed to advise Petitioner that the video evidence recorded by the cameras at one of the burglary locations was too distorted to be used against him, where Petitioner would not have pled guilty had plea counsel properly explained the weaknesses in the state's evidence?

## STATEMENT

During the August 2016 term, the Cherokee County Grand Jury indicted Petitioner for two counts of grand larceny and two counts of burglary, of a building, in the second degree. App. 87 – 94.

On October 10, 2016, Petitioner pled guilty in front of the Honorable Roger L. Couch. App. 1. Tracy Racine represented Petitioner. Id. Kim Leskanic represented the state. Id.

Judge Couch accepted Petitioner's guilty plea as freely, voluntarily, and knowingly made. App. 20, ll. 16 – 25. Judge Couch also accepted the negotiated sentence between Petitioner and the state. App. 22, ll. 24 – 25. Pursuant to the negotiated sentence, Petitioner was sentenced to ten years' imprisonment for grand larceny and fifteen years' imprisonment for second degree burglary. App. 23, ll. 1 – 8.

On December 1, 2016, Petitioner filed an application for post-conviction relief (PCR). App. 26 – 34. Petitioner alleged his plea was involuntary because plea counsel failed to explain to Petitioner that the video evidence against him was not as conclusive as Petitioner believed. Id. That failure on plea counsel's part constituted deficient representation and induced Petitioner to plead guilty when he would have otherwise proceeded to trial. The state filed its Return on May 16, 2017. App. 35 – 38.

Petitioner's PCR hearing was held on February 21, 2018, in front of the Honorable Michael G. Nettles. App. 41. Rodney W. Richey represented Petitioner. Id. Valerie Giovanoli represented the state. Id.

In an order filed on June 13, 2018, Judge Nettles dismissed Petitioner's PCR allegations. App. 77 – 86. Judge Nettles found the record showed Petitioner's plea was knowing and voluntary, and that Petitioner failed to meet his burden of proof that plea counsel was deficient or that Petitioner was prejudiced by such deficiencies. App. 84 – 85.

## ARGUMENT

Petitioner pled guilty involuntarily because plea counsel failed to advise Petitioner that the video evidence recorded by the cameras at one of the burglary locations was too distorted to be used against him, where Petitioner would not have pled guilty had plea counsel properly explained the weaknesses in the state's evidence.

### **Relevant Facts**

The facts alleged by the state are as follows. A burglary occurred at a Michael Kors store in a mall in Cherokee County on September 1, 2015. App. 15, ll. 17 – 19. The surveillance cameras in the store showed two individuals breaking into the store and taking merchandise. App. 15, ll. 20 – 25.

On September 11, 2015, a burglary occurred at a Bose outlet store in Cherokee County. App. 16, ll. 3 – 6. The surveillance cameras at the Bose outlet showed at least one individual, who the state claimed was Petitioner, but as the solicitor stated at the plea hearing, “the investigators still were not sure who these people were,” because of the poor quality of the surveillance video. App. 16, ll. 7 – 11.

On September 22, 2015, a Michael Kors outlet store was burglarized in Mebane, North Carolina. App. 16, ll. 12 – 16. Petitioner pled guilty to the North Carolina charges. App. 16, ll. 16 – 22. Petitioner's guilty plea in this case came after the Petitioner pled to the North Carolina charges.

At the guilty plea hearing, the solicitor opined at the guilty plea hearing that the, “Bose video is not very good quality.” App. 18, l. 21. He also stated that, “hopefully Bose has improved by now. I think they learned.” App. 19, ll. 1 – 2.

Judge Couch found Petitioner's plea was voluntarily, knowingly, and freely made. App. 20, ll. 16 - 25. Petitioner was sentenced to ten years' imprisonment for grand larceny and fifteen years' imprisonment for second degree burglary. App. 23, ll. 1 - 8.

On December 1, 2016, Petitioner filed a PCR application. App. 26 - 34. Petitioner alleged that his plea was involuntary because plea attorney misadvised or mischaracterized the evidence against him in this case. App. 43, l. 1 - 44, l. 8.

Petitioner testified at the PCR hearing that he wanted to go to trial. App. 48, ll. 17 - 18. He also stated that plea counsel did not properly advise him of the evidence against him. App. 50, l. 1 - 51, l. 14. Petitioner was left unaware that the cameras at one of the burglary locations did not work properly. Id. Petitioner stated plea counsel did not go over with discovery documents that would have showed Petitioner that the state's evidence against him in the Bose burglary was insufficient to convict him. App. 53, ll. 11 - 20. Petitioner testified that he, "did not receive anything that was promised." App. 54, l. 23.

During cross examination, Petitioner testified that his answers during the colloquy were coached by plea counsel and that he did not understand the consequences of his statements. App. 58, l. 23 - 59, l. 9. Petitioner only pled guilty because he feared he would lose at trial and receive a life sentence. App. 61, ll. 1 - 4. Plea counsel's failure to explain the weaknesses in the state's case heightened Petitioner's fear and induced him to plead guilty. Id.

Plea counsel testified at the PCR hearing as well. App. 62, l. 15. Plea counsel stated that even if the surveillance footage was not clear enough, in his opinion the rest of the evidence was sufficient to convict Petitioner. App. 66, l. 17 - 67, l. 15.

PCR counsel explained at the closing of the PCR hearing that Petitioner would have gone to trial had he been advised that the camera at the Bose store was not working. App. 72, ll. 9 – 15.

At the end of the PCR hearing, Judge Nettles asked the state to prepare a proposed order of dismissal. App. 73, l. 20 – 75, l. 20. On June 13, 2018, Judge Nettles filed an order dismissing Petitioner’s PCR allegation. App. 77 – 86. Judge Nettles found the record showed Petitioner’s plea was knowing and voluntary, and that Petitioner failed to meet his burden of proof that plea counsel provided deficient representation. Id.

### **Discussion**

Petitioner was not afforded a full and accurate explanation of the evidence against him before he pled guilty, therefore Petitioner’s guilty plea was involuntary. App. 50, l. 1 – 51, l. 14. Had plea counsel properly explained the weaknesses to the state’s evidence Petitioner would have gone to trial. Id.

The difference, “between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea.” Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). The longstanding test for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Hill v. Lockhart, 474 U.S. 52, 56 (1985) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984) to claims of the same against plea counsel).

First, “the voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases.” Hill, at 56. On the other hand, the prejudice requirement focuses on whether “there is a reasonable probability that, but for counsel’s

errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” Id. at 59. “[T]he voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing.” Holden v. State, 393 S.C. 565, 572-74, 713 S.E.2d 611, 615-12 (2011).

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

In Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991), Alexander pled guilty to trafficking in cocaine. Id. at 541, 402 S.E.2d at 484. However, Alexander filed a PCR application alleging that his guilty plea was involuntary because plea counsel provided him erroneous sentencing advice. Id. at 541, 402 S.E.2d at 484-85. This Court agreed with Alexander holding that, “trial counsel’s sentencing advice was obviously defective,” because plea counsel advised Petitioner that he was facing up to one hundred years’ imprisonment if he was found guilty on all charges;

however, Petitioner was actually only facing up to twenty-five years' imprisonment. *Id.* at 542-43, 402 S.E.2d at 485. This Court held that Alexander was prejudiced by plea counsel's wrongful sentencing advice because plea counsel's misinformation induced Petitioner to plead guilty. *Id.* at 543, 402 S.E.2d at 486.

In *Missouri v. Frye*, 566 U.S. 134 (2012), the United States Supreme Court noted that the, "Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings[, which] . . . include arraignments, postindictment interrogations, postindictment line ups, and the entry of a guilty plea." *Id.* at 141 (citations and internal quotation omitted). The Court further emphasized that "[i]n today's criminal justice system, . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Id.* (emphasis added). Accordingly, "[a]nything less [than effective counsel during plea negotiations]... might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'" *Id.* at 1408 (citing *Massiah v. United States*, 377 U.S. 201 (1964) (quotation citation omitted)).

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


In the instant case Petitioner's guilty plea was induced by misrepresentation. Plea counsel failed to advise Petitioner of the weaknesses in the state's case. App. 50, l. 1 – 51, l. 14. Petitioner

stated that plea counsel did not inform him that the Bose Outlet surveillance camera was not working properly and that the video was blurry. Id. The record shows Petitioner's allegation was accurate, regarding the video's low-quality, in that during the guilty plea hearing the solicitor opined that the camera at the Bose store was not working properly and that investigators were still not sure who the people on the video were. App. 16, ll. 7 – 11; App. 18, l. 21; App. 19, ll. 1 – 2.

Petitioner would have proceeded to trial had plea counsel properly advised Petitioner of the poor quality of the surveillance video from the Bose outlet store. App. 72, ll. 9 – 15. Therefore, plea counsel provided ineffective assistance where his failure to advise Petitioner of the state's evidence against him wrongfully induced Petitioner to plead guilty, and that deficient performance prejudiced Petitioner because he would not have pled guilty if plea counsel had explained the weaknesses in state's evidence.

**CONCLUSION**

By reason of the foregoing arguments, Petitioner respectfully requests that this Court vacate his guilty plea and remand his case back to the circuit court, or in the alternative, grant Certiorari and allow for a full briefing on this issue.

  
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Victor R Seeger  
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of February, 2019.

STATE OF SOUTH CAROLINA

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MARCUS WILLIS THAMES

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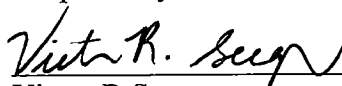
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Marcus Willis Thames states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
  2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Michael G. Nettles, which was held on February 21, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
  3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.
- Therefore, counsel requests that the Court relieve him as counsel for Marcus Willis Thames.

Respectfully Submitted,



Victor R Seeger

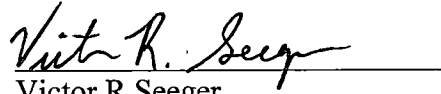
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of February, 2019.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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ATTORNEY FOR PETITIONER

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MARCUS WILLIS THAMES

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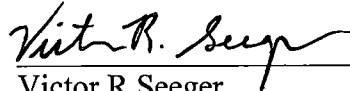
RESPONDENT

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CERTIFICATE OF SERVICE

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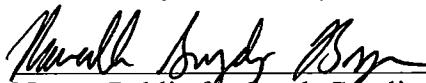
The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Marcus Willis Thames, #223272, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 19th day of February, 2019.



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Victor R Seeger  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 19th day of February, 2019.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 26, 2028