

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

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SANTOS A. AGUILERA,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-001376

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

Joanna K. Delany  
Appellate Defender

South Carolina Commission on Indigent Defense  
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ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

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### **ISSUE PRESENTED**

Whether the PCR court erred in finding counsel provided effective representation where counsel failed to object when the solicitor asked for a sentence of ten years' imprisonment, where the State had agreed to recommend a "cap" or range of up to ten years in exchange for Petitioner's plea, since the solicitor's sentence request "breached the plea agreement," and resulted in a plea that was not knowingly, voluntarily, and intelligently tendered?

## STATEMENT

On June 17, 2015, a Richland County Grand Jury indicted Petitioner for the offense of attempted murder. App. 89 – 90. On January 31, 2017, after Petitioner had been in jail for seven hundred and ninety-three days, he appeared before the Honorable Clifton B. Newman for a plea hearing. App. 1; App. 14, ll. 19-20. Petitioner was represented by Luke Shealey and the State was represented by Vance Eaton. App. 1.

At the plea hearing, Petitioner entered a plea to attempted murder pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), under an agreement that the State would recommend a sentencing cap of ten years. App. 3, l. 6 – 4, l. 6. However, in addition to merely reciting the agreed-upon “cap” of ten years, the solicitor asked that the court actually impose a sentence of ten years of imprisonment, rather than merely consider it as a high end of the recommended sentencing range. App. 3, ll. 11-14. The solicitor said, “Your Honor, I agreed to recommend a sentence of a cap of ten years of incarceration and I would ask the Court for that ten years.” App. 3, ll. 11-14.

Petitioner was sentenced to ten years in prison and no direct appeal was taken. App. 17, l. 21-22; App. 39, l. 25. On June 20, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 20 – 27. The State made its return on February 16, 2017. App. 28 – 33. On March 15, 2018, Petitioner filed an amended PCR application, in which he alleged, inter alia, that counsel “was ineffective for failing to object to the Assistant Solicitor breaching the plea agreement.” App. 34.

On July 18, 2018, a hearing was held on the matter before the Honorable DeAndrea G. Benjamin. App. 36. Petitioner was represented by Jonathan Waller and the State was represented by Lindsey McAllister. App. 36. At the hearing, PCR counsel argued that defense counsel was

ineffective for failing to object to the solicitor “breaching the plea agreement.” App. 40, ll. 15-18.

Petitioner, who was from Honduras, explained that he did not want to plead guilty pursuant to *Alford*, but that he did “not know anything about American law,” and defense counsel convinced him to do so. App. 7, l. 1; App. 44, ll. 14-18; App. 47, ll. 13-18. Interpreters were needed for Petitioner at both his plea hearing and his PCR hearing. App. 3, ll. 18-23; App. 39, ll. 9-10. Interpreters were also needed during meetings between Petitioner and defense counsel where legal rather than factual matters were discussed. App. 64, l. 15 – 65, l. 6.

Defense counsel claimed that he advised Petitioner of the sentencing range he faced and advised Petitioner that the judge could sentence him above the cap of ten years since it was “just a recommendation.” App. 59, l. 19 – 60, l. 8. Defense counsel admitted that the offer conveyed to him by the solicitor was “a cap of 10, a recommendation.” App. 54, ll. 7-19.

Importantly, defense counsel offered no strategy or justification for his failure to object to the solicitor’s sudden stance during the plea hearing that he was asking for ten years’ incarceration and was no longer merely standing on the previously conveyed recommendation of a cap of ten years.

In summation, PCR counsel correctly argued that the solicitor had been “recommending a cap of 10 years and then turns around and asks for 10 years. At that point, it’s not a recommendation of a cap, it’s a recommendation of 10 years.” App. 70, l. 23 – 71, l. 1. PCR counsel continued that at “that point” the solicitor had “breached the . . . plea agreement, and it [was] up to [defense counsel] to object to that, to inform the Court of what the plea agreement actually was.” App. 71, ll. 1-5.

On August 8, 2019, the PCR court issued an order of dismissal which addressed Petitioner's claim that counsel was "ineffective for failing to object when the State breached the plea agreement by recommending a ten-year sentence." App. 83. However, the PCR court found that "the record clearly establishes [Petitioner] pleaded guilty freely and voluntarily, and the State did not violate its agreement with [Petitioner]." App. 83. The order stated that the record reflected that "the solicitor informed the plea court he had agreed to a cap of ten years, and he was asking for the ten-year sentence." App. 83. The order continued that, "Petitioner "never testified he would not have pleaded guilty if he had known the State would request the maximum under the cap, nor did [Petitioner] object during the plea colloquy when the judge asked him if the solicitor had correctly explained the plea negotiations." App. 84.

The order of dismissal concluded that counsel "was not deficient because there was no basis for an objection because the solicitor's request was within the agreed upon ten-year cap, nor was [Petitioner] prejudiced because he never testified he did not know the State would recommend ten years or that he would have refused to enter a guilty plea had he known." App. 85.

This petition for writ of certiorari follows.

## ARGUMENT

The PCR court erred in finding counsel provided effective representation where counsel failed to object when the solicitor asked for a sentence of ten years' imprisonment, where the State had agreed to recommend a "cap" or range of up to ten years in exchange for Petitioner's plea, since the solicitor's sentence request "breached the plea agreement" and resulted in a plea that was not knowingly, voluntarily, and intelligently tendered.

Counsel provided deficient representation where he failed to object when the solicitor unilaterally changed the terms of the plea bargain during the plea hearing, by asking for a ten-year sentence rather than simply stating the previously agreed upon recommendation of a "cap" of ten years. Because Petitioner incorrectly believed that he was pleading pursuant to a recommended range of zero to ten years, rather than a recommended sentence of ten years, his plea was not knowingly, voluntarily, and intelligently entered.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

"In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case." *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (citing *Strickland*, 466 U.S. at 687). "[T]he

two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.” *Hill*, 474 U.S. at 58.

A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing (1) that counsel’s representation fell below an objective standard of reasonableness and (2) that there is a reasonable probability that but for counsel’s errors, the defendant would not have pleaded guilty but would have insisted on going to trial.

*Wolfe v. State*, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997).

“To prove counsel ineffective when a guilty plea is challenged, petitioner must show that counsel’s performance was deficient and that, but for counsel’s errors, there is a reasonable probability a guilty plea would not have been entered.” *Custodio v. State*, 373 S.C. 4, 12, 644 S.E.2d 36, 40 (2007). To establish prejudice when challenging a guilty plea, a PCR applicant 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.” *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). “The crux of the inquiry is whether counsel’s ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial.” *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018).

Here, Petitioner testified that he was unfamiliar with American law, and that he only pleaded guilty because defense counsel convinced him to do so. An interpreter was needed at his plea and PCR hearings and was needed when discussing legal concepts with defense counsel. The PCR court’s reasoning that Petitioner should have spoken up to correct the solicitor at the plea hearing ignores this reality. App. 84. In fact, it was defense counsel who should have spoken up, objected, and corrected the plea court as to the plea offer’s terms, and counsel should have asked to they be allowed to step down or withdraw the plea if necessary.

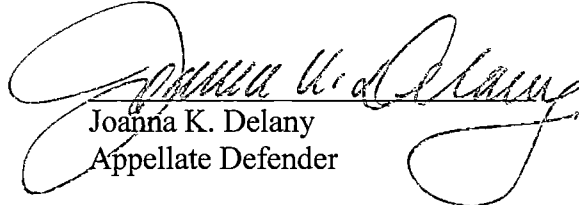
“The State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by defendant or any other change of position by him constituting detrimental reliance upon the arrangement.” *Custodio v. State*, 373 S.C. at 11, 644 S.E.2d at 39. “Once a defendant enters a guilty plea and the plea is accepted by the court, due process requires the plea bargain be honored.” *Reed v. Becka*, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999) (citing *Santobello v. New York*, 404 U.S. 257 (1971)). Here, the State attempted to withdraw or change the terms of the plea bargain at the plea hearing, and therefore a valid objection existed. PCR counsel correctly argued that defense counsel’s failure to object under these circumstances, when the solicitor breached the plea offer, was deficient performance.

Petitioner was prejudiced because he relied upon the plea offer of a recommended range or “cap” of ten years in making his decision to forego a trial, and he only accepted the plea at the behest of defense counsel. *Strickland*, 466 U.S. at 687. Prejudice was therefore established, because had Petitioner known the terms of the plea offer would be materially altered by the solicitor during the plea hearing, he likely would have proceeded to trial. *Frierson v. State*, 423 S.C. at 262, 815 S.E.2d at 436.

This Court should reverse.

**CONCLUSION**

By reason of the foregoing argument, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.

A handwritten signature in cursive script, appearing to read "Joanna K. Delany". The signature is written in black ink and is positioned above the printed name and title.

Joanna K. Delany  
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of April, 2020.

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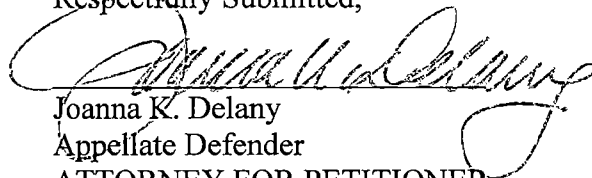
RESPONDENT

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PETITION TO BE RELIEVED AS COUNSEL  
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Counsel for Santos A. Aguilera states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
  2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge DeAndrea G. Benjamin, which was held on July 18, 2018, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
  3. She 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 her as counsel for Santos A. Aguilera.

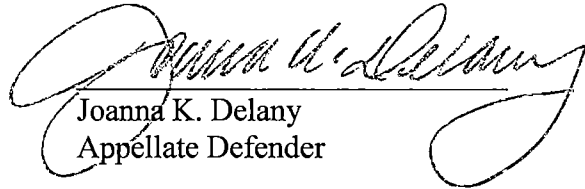
Respectfully Submitted,

  
Joanna K. Delany  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 3rd day of April, 2020.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of her 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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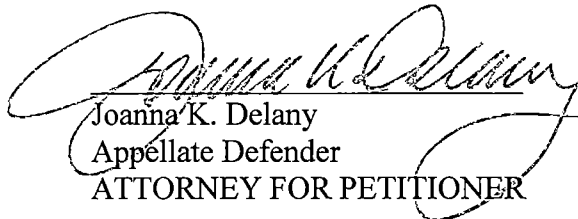
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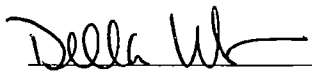
CERTIFICATE OF SERVICE

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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 Lindsey McAllister, Esquire, of the South Carolina Attorney General's Office, located at 1000 Assembly Street, Room 519, Columbia, SC 29201, by email; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Santos A. Aguilera, #371270, at Kershaw Correctional Institution, 4848 Goldmine Highway, Kershaw, SC 29067, this 3rd day of April, 2020.

  
Joanna K. Delany  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 3rd day of April, 2020.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: March 10, 2025