

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Spartanburg County

Honorable Grace Gilchrist Knie, Circuit Court Judge

---

SCOTTY M. BROWN,

**ORIGINAL**  
**RECEIVED**  
FEB 20 2020  
S.C. SUPREME COURT  
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000770

---

PETITION FOR WRIT OF CERTIORARI

---

WANDA H. CARTER  
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

**INDEX**

INDEX ..... i

ISSUE PRESENTED .....1

STATEMENT .....2

ARGUMENT

Although counsel did not advise petitioner of the date on which he would become parole eligible; nonetheless, counsel erred in advising petitioner that his parole eligibility dates on all sentences received would match identically and fall due on the same date because this was incorrect advice regarding parole eligibility. ....3

CONCLUSION .....6

## **ISSUE PRESENTED**

Although counsel did not advise petitioner of the date on which he would become parole eligible; nonetheless, counsel erred in advising petitioner that his parole eligibility dates on all sentences received would match identically and fall due on the same date because this was incorrect advice regarding parole eligibility.

## STATEMENT OF FACTS

Petitioner Scotty M. Brown pled guilty to two counts of distribution of heroin, second offense, during the April 2015 term of the Spartanburg County General Sessions Court before Judge J. Derham Cole and received two concurrent ten-year prison terms on both counts. App. 1-22. Also, petitioner pled guilty to the lesser offense of distribution of heroin (downgraded from a trafficking charge), third offense, during the August 2015 term of the Spartanburg County General Sessions Court before Judge J. Derham Cole, and was sentenced to seventeen years imprisonment to be served concurrently with his prior two ten-year current sentences received. App. 25-36. Petitioner pled guilty to possession of cocaine, third offense, during the November 2015 term of the Spartanburg County General Sessions Court before Judge Roger L. Couch and was sentenced to imprisonment for a period of ten years to be served concurrently with his prior sentences. App. 38-59.

Petitioner was represented by Attorneys Fletcher N. Smith and John Clifford Strickland during all three plea proceedings, and Assistant Solicitor George Matthew Kendall appeared on behalf of the state for all three plea proceedings. Petitioner did not appeal any of his convictions and/or sentences from his three plea proceedings.

On March 16, 2017, petitioner filed a PCR application with the Spartanburg County Office of the Clerk of Court. App. 61-92. The respondent filed a Return dated September 7, 2017, requesting that a hearing be held in response to petitioner's PCR action. App. 93-101.

A PCR hearing was convened on June 22, 2018, at the Spartanburg County Courthouse before Judge Grace Gilchrist Knie. App. 103-206. Petitioner was present at the hearing and represented by Richard Vieth, and Assistant Attorney General Jordan A. Cox was represented by

the state. On August 20, 2018, Judge Knie signed an Order of Dismissal, which was filed on August 26, 2018, denying and dismissing petitioner's PCR action.

On October 3, 2018, PCR counsel filed a Rule 59(e), SCRPC motion in the case, which was followed by a Return filed by the state. App 226; App. 230 – 234. A reconsideration hearing was convened on March 20, 2019, at the Spartanburg County Courthouse before Judge Knie. Petitioner was present at the reconsideration hearing and represented by PCR counsel Richard W. Vieth. and Assistant Attorney General Jacob Eisenberg appeared on behalf of the state. App. 236-277. On May 3, 2019, Judge Knie issued an Order Denying the Motion for Reconsideration. App. 282-283.

Petitioner appealed Judge Knie's Order. This petition follows.

### **ARGUMENT**

Although counsel did not advise petitioner of the date on which he would become parole eligible; nonetheless, counsel erred in advising petitioner that his parole eligibility dates on all sentences received would match identically and fall due on the same date because this was incorrect advice regarding parole eligibility.

During the PCR hearing, petitioner testified that during his August 25, 2015 trial on his trafficking in heroin charge, he faced life without parole due to his prior convictions received on April 1, 2015, during which time he pled guilty to two counts of distribution of heroin and received two ten-year concurrent sentences. Petitioner stated that during the August 25, 2015 trial, however, trial counsel advised that a plea offer was on the table wherein he could plead to distribution of heroin, rather than trafficking in heroin, and remain parole eligible. As a result, petitioner testified that he pled to distribution of heroin, third offense, and received a seventeen-

year sentence to run concurrently with his prior two concurrent ten-year sentences. Petitioner stated that he was told by counsel in effect that his parole eligibility date to max out on his seventeen year sentence would be identical to the same as his parole eligibility date attached to his prior two concurrent ten-year sentences. When petitioner pled guilty to the prior two distribution of heroin charges for which he received two concurrent ten-year sentences, his max out projected parole year was 2023, but his max out projected parole date changed to 2030 after he received his seventeen-year sentence from the heroin distribution (third offense) conviction. App. 112, l.17-p. 134, l.17; App. 143, l.21-24. Petitioner stated that he was being tried on the trafficking in heroin charge until he interrupted the trial to take a plea on the lesser charge of distribution of heroin; but added that had he known that the seventeen-year sentence plea offer would not result in the same parole date as the parole date attached to his prior two concurrent ten-year sentences per counsel's advice, then he would have continued with his trial on the trafficking charge and not pled guilty to distribution of heroin in exchange for the seventeen-year sentence. App. 134, l.22-p. 142, l.18.

Petitioner stated that his prior sentences were for two concurrent ten-year prison terms on two counts of distribution of heroin (2<sup>nd</sup> offense). App. 146, l.11-21. Petitioner stated further that he relied to his detriment on counsel's advice that he would "keep his parole," date after he pled guilty on the third offense of distribution of heroin charge when ultimately he learned contrary to counsel's advice that his parole date would not remain identical to his parole date for the previous concurrent ten-year sentences. App. 153, l.20-24; App. 160, lines 3-11; App. 161, lines 15-17. Note that petitioner's mother, Annette Brown Dorsey, and petitioner's friend, Debbyette Bush, both testified that the plea deal reached included a promise by counsel that petitioner's parole eligibility date for the seventeen-year sentence would not change from the

parole date attached to the prior two concurrent ten-year sentences given when he pled guilty previously. App. 165, l. 5 – p. 177, l. 14.

Trial counsel testified during the PCR hearing and stated that he told petitioner that his distribution of heroin plea offer for a seventeen-year sentence would classify as an 85% crime, which would have cleared him of a LWOP sentence if convicted on the greater trafficking offense for which he was on trial; and trial counsel added that he made no promises to petitioner about parole because he had no authority to do so. App. 180, l.2- p. 184, l.6.

Co-counsel at the plea proceedings testified at the PCR hearing and stated that he believed facing seventeen years was better than facing a life without parole sentence. App. 190, l.17- p. 191, l.21; App. 195, lines 14-20. Also, co-counsel stated that he gave no recommendation regarding parole in the case because he had no parole authority. App. 191, l.22- p. 192, l.5; App. 193, lines 4-16.

The PCR judge ruled that petitioner's pleas were given voluntarily with an understanding of all rights waived per his pleas and the sentencing consequences of his pleas. App. 222-224.

Although parole eligibility has been defined as a collateral consequence of sentencing about which a defendant may not be specifically advised of before entering pleas; nonetheless, a guilty plea maybe collaterally attacked if the defendant's attorney undertakes to advise the defendant about parole eligibility and gives erroneous advice. Hinson v. State 297 S.C. 456, 377 S.E.2d 338 (1989); Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997).

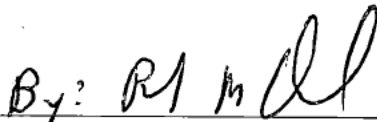
It appeared that counsel knew that LWOP was an unfavorable sentence petitioner would receive if convicted at his trafficking trial, and therefore properly and correctly advised petitioner to plead to the lesser offense and take an 85% service time. However, apparently, while advising and giving the assurance that the absence of LWOP meant parole eligibility would remain and

mistakenly conveyed the sentencing information to petitioner in a manner which led him to believe that his parole eligibility date on the seventeen-year sentence would be identical to the parole eligibility date for the prior two concurrent ten-year sentences. Therefore, although counsel properly and wisely advised petitioner to accept the seventeen-year plea deal on the reduced distribution of heroin charge down from the trafficking charge and thereby avoid an LWOP sentence; nonetheless counsel improperly and erroneously advised petitioner that his escape from LWOP meant that his parole eligible date was a fixed date that would register identical with the parole eligible date assigned to his prior concurrent two-year sentences previously imposed. Clearly, this parole eligibility parole misadvice, either directly or indirectly, constituted deficient representation at the plea proceeding in violation of Hill v. Lockhart, 474 U.S. 52 (1985), and the Sixth Amendment to the United States Constitution.

Although counsel did not advise petitioner of the date on which he would become parole eligible, as that would have been error; nonetheless, however, counsel did err in advising petitioner that his parole eligibility dates on all sentences received would match identically and fall due on the same date.

### **CONCLUSION**

Based on the foregoing argument, counsel for petitioner would request that this Court grant the petition and allow full briefing on the above-raised issue.

By:   
\_\_\_\_\_  
Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of February, 2020.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Spartanburg County

Honorable Grace Gilchrist Knie, Circuit Court Judge

\_\_\_\_\_  
SCOTTY M. BROWN,

PETITIONER

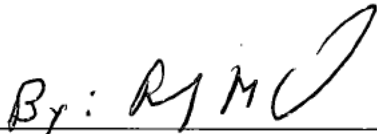
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Scotty M. Brown, #257869, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 20th day of February, 2020.

By:   
\_\_\_\_\_  
Wanda H. Carter  
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me this 20th day of February, 2020. ATTORNEY FOR PETITIONER

 (L.S)

Notary Public for South Carolina

My Commission Expires: September 27, 2028.