STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Certiorari to Georgetown County

Honorable William H. Seals, Circuit Court Judge

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DENNIS CUMBEE, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000966

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# BRIEF OF PETITIONER

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## ISSUES PRESENTED

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2. Whether the PCR court erred in denying relief, where the court reasoned that the plea judge's colloquy cured any misunderstanding as to Issue I, where plea counsel therefore should have realized he provided incorrect advice, and where counsel failed to act or move to withdraw Petitioner's guilty plea?

## STATEMENT

In May of 2015, the Georgetown County Grand Jury indicted Petitioner, Dennis Cumbee, Jr., for murder, and possession of a weapon during the commission of a violent crime. indictments #2015-GS-22—00427, 00428[1]. (App. pp. 130 – 133). On December 12, 2016, Petitioner appeared before the Honorable Benjamin H. Culbertson and pled guilty to murder. John M. Hilliard, III, represented Petitioner at the plea. Richard D. Todd, Jr. appeared on behalf of the State. Pursuant to negotiations with the State, Judge Culbertson sentenced Petitioner to thirty-five (35) years in prison. Petitioner did not appeal his sentence or conviction.

On December 11, 2017, Petitioner filed an application for post-conviction relief [PCR]. (App. 19 – 24). The State filed a return on February 9, 2018. (App. 28 – 35). On February 27, 2019, PCR counsel, Tricia Blanchette, filed an amended application. (App. pp. 25-27). On March 25, 2019, an evidentiary hearing was held before the Honorable William H. Seals, Jr. (App. pp 36-90). Tricia Blanchette represented Petitioner, and Johnny James, Jr. appeared on behalf of the State. On February 14, 2020, Judge Seals, in a written order, denied relief and dismissed the application. (App. pp. 117-129). On February 4, 2020, PCR counsel filed a motion to alter or amend pursuant to Rule 59(a) and (e). (App. pp. 100 – 109). The State filed a return on March 23, 2020. (App. pp. 110 – 113). Judge Seals denied the motion to alter or amend in a written order signed May 29, 2020. (App. pp. 114-116). A timely notice of intent to appeal was served on July 3, 2020.

The petition for writ of certiorari was filed with the South Carolina Supreme Court on February 22, 2021. The return was filed on June 14, 2021. On July 26, 2021, pursuant to Rule 243(1), SCACR, the South Carolina Supreme Court transferred the case to the South Carolina

[1] It is unclear who testified before the Grand Jury and the indictment lists the witnesses as the Georgetown Police Department.

Court of Appeals. On September 19, 2022, the South Carolina Court of Appeals granted the petition for writ of certiorari and ordered briefing as provided by Rule 243(j), SCACR. This brief of petitioner follows.

## STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013) ). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014) )." Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018).

## ARGUMENTS

1. **The PCR court erred in denying relief, where deficient performance was found following a plea where Petitioner was misadvised about the percentage of time he would have to serve for a murder charge, where testimony from Petitioner and his two attorneys confirmed that a written letter sent by plea counsel to Petitioner advised him that he would only have to serve eighty-five percent of his sentence and established it was the opinion of all involved that Petitioner would not have to serve his sentence day-for-day, and where Petitioner proved prejudice by testifying that he relied on the advice and would have acted differently but for the erroneous information provided by his attorneys?**

Petitioner pled guilty to murder for a negotiated thirty-five year sentence. Petitioner had no prior criminal record. (App. p. 16, lines 20-23). Prior to the guilty plea Petitioner was incorrectly advised, verbally and via written correspondence, by both of his lawyers, that he would only have to serve eighty-five percent of his sentence. (App. p. 62 lines 8 – 15). S.C. Code Ann. § 16-3-20, the statute addressing punishment for murder, clearly provides, "**No person sentenced to a mandatory minimum term of imprisonment for thirty years to life pursuant to this section is eligible for parole or any early release program**, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years to life required by this section." (emphasis added).

When Petitioner was transferred to the South Carolina Department of Corrections, he discovered that he would have to serve the entirety of his sentence, a different understanding than had been presented by counsel. (App. p. 68 line 13 – p. 69 lines 1- 15). After realizing that he was misadvised, Petitioner filed an application for post-conviction relief. The PCR judge found deficient performance based on the erroneous advice given by the attorneys with regard to amount of time to be served on the sentence for murder. The PCR judge, however, found no

resulting prejudice. The PCR judge erred in refusing to find prejudice from the deficient performance.

**Deficient Performance**

The PCR judge correctly found that, "Applicant's Counsels affirmatively misadvised him regarding the potential for parole or other early release, and such affirmative misadvice constituted deficient performance under Strickland and Hill." (App. pp. 122-123). The PCR judge erred in refusing to find prejudice resulting from the deficient performance. There is a reasonable probability that, but for counsels' deficient performance, Petitioner would not have pled guilty and instead would have insisted on going to trial.

Petitioner was given incorrect sentencing advice by both of his lawyers. Cezar McKnight was Petitioner's first attorney. McKnight was retained by Petitioner's parents. (App. p. 41 lines 22 – p. 42 lines 1-10). Counsel McKnight received a written plea offer from the State that was entered as Applicant's exhibit #1 at the PCR hearing. (App. p. 43, lines 17-18; p. 91). Approximately two months after receiving the offer, Counsel McKnight wrote Petitioner a letter in reference to the plea offer by the State. (App. 91 – 92. The letter contained the following admittedly incorrect information about Petitioner's sentence:

> Enclosed within, please find a copy of the offer made by the Solicitor's Office in your case. They are offering you a Guilty Plea to the charge of murder, and they are offering you a sentence of 35 years. Murder is a most serious offense and it is a violent offense for the purposes of sentencing. **This means that you have to do a mandatory 85% of the sentence**, and that if you are convicted of 2 most serious offenses like murder during your life, you could face life in prison without probation or parole.

App. 92 (emphasis added). When asked on cross-examination if his in-person advice mirrored the information contained in the letter, Counsel McKnight testified, " . . . I'm almost certain that

I probably told him it was 85 percent that he'd have to do." (App. p. 46, lines 10-11). Counsel McKnight testified that he did not recall advising Petitioner that he would serve anything other than eighty-five percent, and he admitted that was error on his part. (App. p. 46, lines 14-20).

Shortly after Counsel McKnight sent the letter about the plea offer, he was relieved and attorney John Hilliard assumed the representation. (App. p. 45 lines 10-14). Counsel Hilliard gave Petitioner the same incorrect sentencing advice as given by Counsel McKnight. Hilliard testified:

> I believed, and I told [Petitioner], that it was an 85 percent no parole offense. Experience had told me that there are no parole offenses, and this is a no parole offense. And I believed at the time that no parole offenses require the service of 85 percent. I believed that to be true at the time.

(App. p. 52 lines. 2 – 7). Hilliard admitted his mistake and testified, "You know, no parole is no parole, I get that part, but I believed at the time, and I was mistaken, but I believed at the time that 85 percent and day for day meant the same thing and they don't." (App. p. 55, lines 3-6). The PCR judge correctly found deficient performance.

Petitioner testified at the PCR hearing and recalled receiving the letter from Counsel McKnight containing the incorrect information. (App. p. 61 lines 5 – 12). Petitioner believed, both as a result of receiving the letter and based on an in-person conversation with Counsel McKnight, that he would only be required to serve eighty-five percent of his sentence, or approximately twenty-nine years and seven months. (App. p. 62 lines 1 – 15).

Petitioner confirmed that Counsel Hilliard's advice matched what he had been told by Counsel McKnight, as previously testified to by both attorneys. (App. p. 64 lines 1 – 25). Petitioner had a detailed recollection of the conversations he had with Counsel Hilliard, including a memory of counsel using his calculator to determine eighty-five percent of thirty-five years, or 29.75 years. (App. p. 65 lines 1 – 16).

Petitioner testified that the advice he received regarding only being required to serve eighty-five percent of his sentence was a deciding factor in his decision to plead guilty. (App. p.65 lines 1 – 16; App. p. 70 lines 3 – 7). Additional conversations took place between Petitioner, his family, and Counsel Hilliard on the morning of the plea and the same erroneous advice was given. (App. p. 66 lines 8 – 21).

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, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012). "Before deciding whether to

plead guilty, a defendant is entitled to the effective assistance of competent counsel." Padilla v. Kentucky, 130 S.Ct. 1473, 1480-81 (2010) (internal quotations omitted). The Supreme Court has "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under Strickland." Id. at 1481 (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984).

A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "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, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

South Carolina courts have found deficient performance where attorneys provided erroneous advice that induced a guilty plea. In Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989), the defendant's trial attorney told him he would be eligible for parole after serving a ten year sentence for "common law" murder when, in reality, defendant would have to serve twenty years. Id. at 457-58, 377 S.E.2d at 339. The Court found such advice deficient and reversed the PCR court. Id.; see also Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991) (reversing guilty plea on PCR

where attorney misadvised defendant on maximum exposure at sentencing). As was the case here, the Court in Hinson held that "[c]ounsel's advice ... misstated the law." Id. at 458, 377 S.E.2d at 339.

The guilty plea in the present case did not represent a voluntary and intelligent choice for Petitioner when two separate lawyers provided him with erroneous advice about the sentence. The PCR judge correctly found deficient performance. As discussed below, Petitioner demonstrated prejudice resulting from the deficient performance.

**Prejudice**

While the PCR judge correctly found deficient performance in counsels' advice that Petitioner would only have to serve eighty-five percent of his sentence for murder, the PCR judge erred in refusing to find that the ineffective performance affected the outcome of the plea process. In Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018), the South Carolina Supreme Court wrote:

> In order to establish prejudice when challenging a guilty plea, a defendant must prove "there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have gone to trial." 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. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). As the United States Supreme Court stated in Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), "[I]n order to satisfy the 'prejudice' requirement, the defendant must show there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial."

In the present case there is a reasonable probability that, but for counsel's errors, Petitioner would not have pled guilty and would have insisted on going to trial.

In the order of dismissal the PCR judge wrote:

> The Court finds Applicant has failed to meet his burden of showing that but for Counsels' advice he would not have pled guilty but would have proceeded to trial. First, the plea court's statements that Applicant was not eligible for parole and would have to serve the entire thirty-five year sentence could scarcely be clearer." Applicant expressed no confusion during the plea proceeding, and communicated no concerns on the record to the plea court. The pleas court's colloquy cured any misapprehension, and Applicant knew that he was going to serve the entirety of the negotiated thirty-five year sentence, and he proceeded with pleading guilty anyway.

(App. p. 124). The PCR judge erred. Petitioner met his burden of showing a reasonable probability that, but for counsels' deficient performance, Petitioner would not have pled guilty and instead would have insisted on going to trial.

The colloquy with the plea judge did not cure the error. In Robinson v. State, 422 S.C. 78, 88, 810 S.E.2d 32, 38 (2018), the South Carolina Supreme Court wrote:

> For a plea hearing to cure deficient advice, the plea hearing must unambiguously address and resolve the incorrect advice—namely, that the Constitution forbade the State from proceeding to trial under the amended sentencing scheme. *See* United States v. Akinsade, 686 F.3d 248, 255 (4th Cir. 2012) (recognizing, "in order for a district court's admonishment to be curative, it should address the particular issue underlying the affirmative misadvice"). That did not occur here.

The colloquy at the plea hearing that discussed no parole and the thirty-five year sentence did not unambiguously address the advice Petitioner and his family received from two different lawyers that he would only have to serve eighty-five percent of his thirty-five year sentence for murder. The order of dismissal stating that there was no confusion during the plea ignores Petitioner's testimony at the PCR hearing that he looked to his lawyer during the plea because he was confused by the statements made by the judge about sentencing. The plea judge asked Petitioner, "You understand that for this crime you would not be eligible for parole. So if I impose the 35- year sentence you're going to have to serve the 35-year sentence. Do you understand that?" (App. p. 8, lines 12-15). When asked about the comment from the plea judge

Petitioner testified, "After – during the time after he said it, I stopped and looked at Hilliard and he shaked his head yes. When we got – after the plea deal, I asked Mr. Hilliard in the back if – what did he mean by that? And Mr. Hilliard told me that he had to say that in case the laws change." (App. p. 67, lines 10-20).

The plea court's colloquy did not speak specifically to the day-for-day requirement and therefore did not cure counsel's deficient performance. "[E]ven where counsel offers misinformation, this deficiency can be cured where the trial court properly informs the defendant about the sentencing range." Bennett v. State, 371 S.C. 198, 205 n. 6, 638 S.E.2d 673, 676 n. 6 (2006). In Bennett, this Court reversed the PCR court's grant of relief based upon a finding that "[b]oth the plea transcript and [Bennett's] testimony at the PCR hearing clearly indicate that counsel did consult with respondent and advised him that he should enter a guilty plea." Id. at 204-05, 638 S.E.2d 673, 676. This Court held that counsel's advice regarding sentencing was "not technically incorrect." Id. Because there was "no probative evidence in the record that counsel deficiently advised respondent to plead guilty," this Court reversed the grant of a new trial. Id. at 206, 638 S.E.2d at 677. Petitioner's case contained evidence from four witnesses in addition to written correspondence which was enough for the PCR court to find deficient performance. Notably, the letter from Counsel McKnight does not clarify the avenue by which Petitioner would be released after the service of eighty-five percent of his sentence. (App. p. 92). The letter does not reference parole, education/work credits, or any other early release mechanism. Therefore, the plea judge's remarks regarding murder being a no-parole offense did not cause any concern for Petitioner.

The plea judge's colloquy did not directly reference serving the *entire* sentence or contain a clear statement that Petitioner would be required to serve one hundred percent of the sentence,

day for day. As a result, there was no clear understanding provided to Petitioner which would have overcome the deeply-rooted understanding planted by both of the attorneys who were hired to represent him. As will be discussed in issue two below, if this Court concludes that the plea judge's colloquy was sufficient to convey to Petitioner, a layman, that he would be required to serve the entirety of his sentence, plea counsel should have recognized that he had provided inaccurate advice and immediately moved to withdraw the plea.

In the order of dismissal the PCR judge provided a second reason for refusing to find prejudice writing:

> Second, the Court does not find Applicant's self-serving testimony, his attorney's advice regarding parole eligibility was what induced him to plead guilty, sufficient to establish that he relied on the misinformation in pleading guilty. See Frasier v. State, 351 S.C. 285, 389, 570 S.E.2d 172, 174 (2002) (internal citations omitted). Applicant rightly notes in his memorandum of law that, *depending on the facts of the case*, an applicant's self-serving statements *may* be sufficient to establish prejudice under Hill. Davie v. State, 381 S.C. 601, 613, 675 S.E.2nd 416, 422-23 (2009). The present matter, however, is not an appropriate circumstance to rely upon such a statement. Applicant has now made many alternative and conflicting assertions. Taking them all into consideration, the Court does not find them sufficient to establish that the Applicant, relying on the misinformation by his attorney and wholly disregarding the corrective plea colloquy, would have not pled guilty, but for counsel's misadvice.

(App. p. 125) (n. 3 omitted).

First, the South Carolina Supreme Court has held that a "defendant's undisputed testimony that he would not have pled guilty but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 631 S.E.2d 260 (2006) (citing Jackson v. State, 342 S.C. 95, 97-98, 535 S.E.2d 926, 927 (2000); Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 485-86 (1991)). During the PCR hearing Petitioner testified that the advice he received from his lawyers that he would only have to serve eighty-five percent of his sentence was a factor in his decision to plead guilty. Petitioner testified, "It was the fact that, you know,

I didn't have to do the whole 35 years. And the fact that it was 85 percent, I was really asking for something under that. It was, you know, it was less than 35 years of less than 30 years and I already had some time in." (App. p. 65, lines 11-16). Petitioner testified that both of his lawyers advised him that eighty-five percent of a thirty-five-year sentence would be twenty-nine years and 7 months. (App. p. 62, lines 8-15; p. 65, lines 1-10). When asked, ". . . [I]s your reasoning because but for your attorney's advice that it was 85 percent you wouldn't have entered the guilty plea." (App. p. 70, lines 4-6). Petitioner answered, "That's correct." (App. p. 70, line 7). Petitioner's undisputed testimony that he would not have pled guilty but for trial counsel's advice that he would only have to serve eighty- five percent of his thirty-five year sentence is sufficient.

Additionally, Petitioner's mother, Denise Giles, testified at the PCR hearing that she understood that as a result of the guilty plea Petitioner would be required to serve eighty-five percent of his thirty-five-year sentence. (App. p. 79, lines 9-16). She testified that although Petitioner wanted a trial, she advised him to accept the plea offer as he would only have to serve eighty-five percent. (App. p. 80, lines 9-18). She was not told at any point that Petitioner would be required to serve the entirety of his sentence, day for day. (App. p. 80, line 19 – p. 81, lines 1-21).

Second, the so called alternative and conflicting assertions do not negate the fact that Petitioner entered the guilty plea because he thought he would only have to serve eighty-five percent. Footnote three suggests that Petitioner offered three reasons for pleading guilty: 1) because he was guilty; 2) because he was told he would be eligible for early release after service of 85% of the sentence; and 3) because Hilliard did not have enough time to prepare the case for trial. (App. p. 125). All three reasons could be true at the same time. The law does not require

that a criminal defendant plead guilty for only one reason, especially when multiple reasons are not mutually exclusive.

As to the first assertion listed in the footnote, Petitioner agreed that this was not a case where he would claim that he had an alibi or was not involved. (App. p. 77, lines 15-18). Instead, Petitioner testified that this was a case where a jury could have determined a lower level of culpability with possibly a lesser included offense of voluntary manslaughter or defenses of self-defense and stand your ground. (App. p. 77, lines 13-15). As to the second assertion, Petitioner pled guilty because he was erroneously advised that he would be eligible for early release after service of 85% of the sentence. As to the third assertion, during cross-examination, Petitioner testified that he did not believe his attorney was prepared for trial. (App. p. 73 lines. 6 – 13). On redirect Petitioner testified that while he did not believe his attorney was prepared, he agreed to the terms of the plea deal under the mistaken belief that he would only be required to serve eighty-five percent of his sentence. (App. p. 77 line 22 – p. 78 lines 1-10). Petitioner's testimony was both understandable and logical; he was advised that serving eighty-give percent of a thirty-five year sentence was likely the most ideal outcome:

> After it was said that ... this is our - - this is [going to] be our best option and I was explained that, okay, it was 85 percent of 35 [years], that's when I accepted it.

(App. p. 78 lines 3 – 6). The fact that Petitioner additionally alleged that counsel was not prepared does not preclude a finding of prejudice from the erroneous sentencing advice.

Third, as discussed above, the plea colloquy was not corrective. The plea colloquy did not include the day for day requirement or specify that Petitioner would have to serve his entire sentence. Petitioner met his burden of showing a reasonable probability that, but for counsels'

deficient performance, Petitioner would not have pled guilty and instead would have insisted on going to trial. The PCR judge erred in refusing to find prejudice.

"In the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered." Taylor v. State, 404 S.C. 350, 360, 745 S.E.2d 101, 102 (2013). With regard to a PCR action, "[s]imply put, the first inquiry is whether trial counsel's advice was deficient." Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). If a petitioner successfully proves his or her guilty plea was based on inaccurate sentencing advice from counsel, the deficiency prong has been satisfied. Id. at 542–43, 402 S.E.2d at 485 (finding counsel's sentencing advice was "obviously defective" because it was contrary to the sentencing ranges possible under the indictments and the law). However, "the transcript of the guilty plea hearing will be considered to determine whether information conveyed by the plea [court] cured any possible error made by counsel." Burnett v. State, 352 S.C. 589, 592, 576 S.E.2d 144, 145 (2003); id. at 593–94, 576 S.E.2d 144, 576 S.E.2d at 146 (finding any possible misunderstanding as to the petitioner's sentence was cured by the colloquy during the actual plea hearing).

Petitioner satisfied the prejudice prong; he testified that but for counsel's incorrect advice, he would not have pled guilty. "An applicant seeking relief from a guilty plea must present probative evidence to support the allegations in the PCR application that but for trial counsel's advice, the applicant would not have pled guilty." Smith v. State, 369 S.C. 135, 139, 631 S.E.2d 260, 261-62 (2006). Unlike Respondent Smith, Cumbee offered testimony on the stand to validate the allegations raised in his amended application for post-conviction relief.

Petitioner raised additional allegations of ineffective assistance of counsel beyond the two which are the subject of this appeal. Those other claims, including the contention that

counsel was unprepared for trial, do not diminish Petitioner's testimony that but for counsel's incorrect advice, he would not have pled guilty. Petitioner pled guilty based on flawed advice and did not receive the deal he was promised. The State never disproved Petitioner's contention that he pled guilty based on the advice of counsel. Concluding that Petitioner is prohibited from receiving relief because he alluded to another potential claim of ineffective assistance of counsel suggests that future applicants should limit their allegations, thereby decreasing the likelihood for success on their collateral attacks while simultaneously omitting potentially meritorious assertions. Petitioner testified multiple times that he was induced to plead based on the advice he received from two attorneys regarding the service of his sentence. That advice was admittedly incorrect, meaning counsel provided deficient performance. Petitioner's testimony that he would have gone to trial, but for the advice of counsel, is enough to satisfy the prejudice requirement. Furthermore, the plea judge's colloquy was not sufficient to overcome the breadth of information Petitioner had received from his two attorneys.

Under the second step of the inquiry, the prejudice prong "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). "In other words, in order to satisfy the 'prejudice' requirement, the [petitioner] must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id.

To meet this burden, the petitioner need only testify that had plea counsel not misinformed him of the potential sentence, he would not have pled guilty. Alexander, 303 S.C. at 543, 402 S.E.2d at 485–86 (finding the petitioner's own testimony that he would have proceeded to trial but for counsel's misadvice as to sentencing was "the only evidence in the record on this

point" and was sufficient to satisfy the prejudice prong of the Strickland test); Jackson v. State, 342 S.C. 95, 97–98, 535 S.E.2d 926, 927 (2000) (citing Alexander with approval and finding the petitioner satisfied the prejudice prong by simply providing testimony that he would not have pled guilty, but for trial counsel's misadvice); Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) ("The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." (citing Jackson, 342 S.C. at 97–98, 535 S.E.2d at 927; Alexander, 303 S.C. at 543, 402 S.E.2d at 485–86)).

Regarding prejudice, the Hinson case is also illustrative. Critically, this Court focused on how Hinson did not receive the sentence he expected based on conversations with the attorney representing him:

> The evidence is uncontroverted that Hinson **entered his plea in expectation of receiving the lesser period for parole eligibility**. His own testimony to that effect at post-conviction was corroborated by that of Willian Runyon, attorney for a codefendant.

297 S.C. at 377 S.E.2d 338, 339 (emphasis added). This Court noted that "Hinson's assertion as to trial counsel's advice was supported by the extensive testimony of trial counsel for the codefendant." Id. Petitioner's PCR evidentiary hearing entailed the testimony of four witnesses—Petitioner, his mother, and his two attorneys—all who corroborated one another.

In Frierson v. State, 423 S.C. 257, 815 S.E.2d 433 (2018), this court reiterated the limited inquiry regarding the prejudice prong in a guilty plea PCR, namely that "whether but for counsel's deficiency, the defendant would have declined to plead and instead proceeded to trial." Id. at 263, 815 S.E.2d at 436.

In Alexander v. State, the Court held that the petitioner's testimony that he would not have pled guilty if counsel had not misinformed him that he would face a potential life sentence

if he proceeded to trial satisfied the prejudice prong. 303 S.C. 539, 402 S.E.2d 484 (1991). Alexander was facing between seven and twenty-five years on one charge and a mandatory twenty-five year sentence on another offense. Id. at 541, 402 S.E.2d at 484. Alexander ultimately pled guilty and was sentenced to fifteen years' imprisonment. Id. He filed an application for post-conviction relief alleging erroneous sentencing advice. Id. at 541, 402 S.E.2d at 485. Based upon counsel's admission that he probably told Alexander that he faced one hundred years in prison, the record in that case supported Petitioner's contention. Id. at 542, 402 S.E.2d at 485. This Court held that "[t]rial counsel's sentencing advice was obviously defective." Id.

The Court set forth how a PCR applicant's testimony is sufficient to prove prejudice:

> In support of the second part of the Strickland and Hill test, the "prejudice" requirement, petitioner submits evidence which conclusively establishes that but for his trial counsel's misadvice as to sentencing, he would not have pled guilty. In fact, the only advice in the record on this point is **petitioner's own testimony that had trial counsel not misinformed him** that he would face a potential life sentence if he proceeded to trial, he would not have pled guilty. Thus, the second part of the test has been met. We find that because trial counsel's improper sentencing advice induced petitioner's guilty plea, this case must be reversed.

Id. at 543, 402 S.E.2d at 485-86 (emphasis added and internal citations omitted). Alexander raised four additional allegations of ineffective assistance of counsel, all of which were found to be meritless. Id. at 543, 402 S.E.2d at 486. The Court did not suggest at that time that any of the remaining allegations diminished the impact of the misadvice or prevented Alexander from receiving relief on that issue.

In Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998), this Court held that the plea court's colloquy with the defendant cured any misconception. Two main differences exist in Moorehead which are not present in Petitioner's case. First, Moorehead testified that he believed he was going to receive probation for a criminal sexual conduct charge. Id. at 332-33, 496

S.E.2d at 416. His plea was not a negotiated one, and the plea judge explained the sentence range; there was no mandatory minimum or discrepancy on how much time Moorehead would serve based on an agreed-upon negotiated plea. Id. at 333, 496 S.E.2d 416-17. Moorehead claimed his attorney promised he would receive probation. In contrast, Petitioner Cumbee, based upon the advice of counsel, entered into a plea agreement with the state wherein he was told by two attorneys that he would only have to serve eighty-five percent of his thirty-five year sentence for murder, in contravention to the South Carolina Code. The colloquy in Petitioner's matter was insufficient to overcome the advice given to Petitioner by his attorneys, both verbally and in writing.

The second distinction in Petitioner's case is that both of his attorneys admitted that they advised him that he would only be required to serve eighty-five percent of his sentence. In Moorehead, "[counsel], on the other hand, testified he never promised respondent a straight probationary sentence although they did discuss probation to follow his active jail time as part of the plea negotiations." Id. at 333, 496 S.E.2d at 416. Moorehead failed to prove deficient performance, unlike Petitioner Cumbee. In Petitioner Cumbee's case, he received erroneous advice from two attorneys who were retained to represent him. He rightfully presumed they were providing him with accurate legal advice. Based on the information he received, the plea colloquy did not rise above the advice he had received from his attorneys; there was no mention of day-for-day or one hundred percent. Even when the plea judge stated that Petitioner would not be eligible for parole and would have to serve the thirty-five year sentence, Petitioner was informed by his attorney that the previous advice was still correct. Thus, the deficient performance was not cured.

In Burnett v. State, 352 S.C. 589, 576 S.E.2d 144 (2003), Burnett's attorney testified at the PCR hearing that he advised his client about a sentencing range, not an exact sentence. Id. at 593, 576 S.E.2d at 146. Similar to Moorehead and dissimilar to Petitioner Cumbee's case was the lack of a negotiated plea. Burnett's counsel testified that he advised about the sentencing possibilities but steered clear from guaranteeing anything. Id. This Court held:

> In our opinion, the record in this case does not indicate that trial counsel promised Burnett a three-year sentence. Regardless, any possible misconceptions on Burnett's part were cured by the colloquy during the actual plea hearing.

Id. at 593-94, 576 S.E.2d at 146. There was no reference to any extrinsic or supporting evidence in Burnett. In contrast, Petitioner produced a letter containing incorrect advice regarding sentencing and corroborated his own testimony on the matter with that of his two attorneys and his mother.

Petitioner was advised by two attorneys that he would only be required to serve eighty-five percent of his sentence. As a result of that information, he pled guilty. The plea judge's colloquy did not fix the mistaken belief. The PCR court, in a case where Petitioner testified, presented testimony from three other witnesses, and provided a contemporaneous record from before his plea which all conclusively established the incorrect advice, erred in denying relief. Petitioner's testimony at the PCR hearing was sufficient, under South Carolina law, to prove prejudice.

2. **The PCR court erred in denying relief, where the court reasoned that the plea judge's colloquy cured any misunderstanding as to Issue I, where plea counsel therefore should have realized he provided incorrect advice, and where counsel failed to act or move to withdraw Petitioner's guilty plea.**

Alternatively, if this Court finds the plea judge's colloquy was sufficient to cure the incorrect sentencing advice provided by counsel to Petitioner, it would naturally follow that his attorney, trained in the law, would have recognized that he provided incorrect advice. As a result, plea counsel should have clarified that the thirty-five year sentence for murder would have to be served day for day and moved to withdraw the guilty plea.

In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of his plea. Boykin v. Alabama, 395 U.S. 238, 241, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). When determining issues relating to guilty pleas, the Court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the PCR hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 650 (2000).

When there is reason to think that a rational defendant would want to withdraw his plea, or when the defendant reasonably demonstrated an interest in so withdrawing his plea, plea counsel may be constitutionally obliged to move to terminate a plea proceeding or otherwise move to withdraw his client's guilty plea. Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000). Petitioner strongly maintains, as argued above, that the colloquy between Petitioner and the trial judge was insufficient to cure counsel's erroneous advice. Alternatively, however, if the

colloquy was sufficient as to Petitioner, then there was reason for plea counsel to think that Petitioner, a rational defendant, would want to withdraw his plea and insist on a trial.

In the order of dismissal the PCR judge wrote, "The Court finds no merit in Applicant's alternative argument that if the plea court's cure was sufficient, then Hilliard was ineffective for failing to interject and move to withdraw Applicant's guilty plea." (App. p. 127). The PCR judge then wrote, "First, there is nothing in the record to indicate Applicant or anybody on Applicant's behalf ever asked Hilliard to move to withdraw the plea." (App. p. 127). Petitioner and his family did not ask Hilliard to move to withdraw the plea because the colloquy did not cure the erroneous advice. Petitioner and his family believed what two lawyer had told them – that Petitioner would only have to serve eighty-five percent of the thirty-five-year sentence for murder. When the plea judge asked Petitioner if he understood that he would not be eligible for parole, Petitioner looked at plea counsel who nodded his head to indicate that Petitioner should answer in the affirmative. (App. p. 8, lines 12-15; p. 67, lines 10-20). When Petitioner asked plea counsel about the judge's statement after the plea, counsel told Petitioner that the judge "had to say that in case the laws change." (App. p. 67, lines 10-20).

During and even after the plea, Petitioner, his family, and his counsel were all under the mistaken impression that Petitioner would only be required to serve eighty-five percent of his sentence. As a result, Petitioner was transported to the prison and prepared to serve slightly less than thirty years. At the time, there was no reason for Petitioner to ask plea counsel to withdraw the plea. The standard is not solely whether the attorney was asked to move to withdraw the plea but if there was a reason for the attorney to believe that a rational defendant would want to withdraw his plea. If the colloquy was sufficient, then there was reason for plea counsel to think that Petitioner would want to withdraw his plea because counsel had given him erroneous advice.

The PCR judge erred in refusing to find prejudice because Petitioner did not ask counsel to move to withdraw the plea.

In the order of dismissal the PCR judge additionally wrote, "Second, given the alternating reasons for pleading guilty offered by Applicant, it is not clear that Hilliard should have been immediately prompted to action by the plea court's clarification that Applicant would have to serve thirty-five years of the thirty-five year sentence." (App. p. 127). First, the plea judge did not tell Petitioner that he would have to serve thirty-five years of the thirty-five- year sentence. Instead, the plea judge told Petitioner, "You understand that for this crime you would not be eligible for parole. So if I impose the 35- year sentence you're going to have to serve the 35-year sentence. Do you understand that?" (App. p. 8, lines 12-15). There was no indication that the thirty-five- year sentence would have to be served day for day.

Second, as discussed above in issue one, the purported alternating reasons for pleading guilty listed in footnote #3 of the order of dismissal: 1) because he was guilty; 2) because he was told he would be eligible for early release after service of 85% of the sentence; and 3) because Hilliard did not have enough time to prepare the case for trial, do not negate the fact that Petitioner entered the guilty plea because he thought he would only have to serve eighty-five percent. If the plea colloquy alerted Petitioner and plea counsel that the sentence for murder would have to be served day for day, at that point plea counsel should have moved to withdraw the plea, regardless of an admission of guilt and allegation that counsel was not prepared. Plea counsel was deficient in failing to move to withdraw the plea.

Counsel Hilliard testified at the PCR hearing why he did not move to withdraw:

> Q: Now, Mr. Hilliard, by way of his revised or his amendment, Mr. Cumbee has alleged that you were ineffective for misadvising him regarding the service of his sentence being 85 percent. He's also alleging that you were ineffective when you didn't move to withdraw. Did you not move to

withdraw because you didn't realize a that juncture that your advice was incorrect?

A: Yes. I did not move to withdraw because I thought I was - - I still believed I was correct.

Q: Okay. And if you would have known that was incorrect you would have moved to withdraw after having a discussion with Mr. Cumbee if that's what he wanted you to do?

A: If he had wanted me to do that, I would have done it. Yes.

Q: Okay. And so, in your mind the Court's statement did not cure the advice or did not change the advice that you had given Mr. Cumbee. You still believed it was 85 percent.

A: True. Yes.

(App. p. 56 line 12 – p. 57 lines 1- 4). Counsel testified that none of the comments by the judge during the plea raised a question that he may have been incorrect about the eighty-five percent. (App. p. 58 lines 16 – 20). Again, if this Court finds the plea colloquy cured the erroneous advice that Petitioner would only have to serve eighty-five percent of the thirty-five-year sentence for murder, then plea counsel was ineffective in failing to move to withdraw the plea because of the erroneous advice.

Petitioner satisfied the prejudice prong by his uncontroverted testimony that he would have asked Counsel Hilliard to withdraw the plea had he known about the day-for-day requirement:

Q: As the second allegation on your amendment, you have alleged that your attorney was ineffective when he didn't interject or move to withdraw your guilty plea after the Court addressed the service of your sentence. If Mr. Hilliard would have said after the Judge made his comments or you raised a concern, you know what I did misadvise you, it's day for day, would you have wanted him to move to withdraw your guilty plea at that point and not have to wait to go forward with this PCR?

A: Yes ma'am. I would not have gone forward.

(App .p. 70 lines 14- 23) .

This case is similar to Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988). In Jordan, the defendant pled guilty based upon the expectation that the solicitor would neither recommend nor oppose a sentence of probation. Id. at 53, 374 S.E.2d at 684. At the plea, a different solicitor represented the State and vigorously opposed probation. Id. This Court found plea counsel's failure to move to withdraw the sentence constituted ineffective assistance of counsel and reversed. Id. at 54-55, 374 S.E.2d at 684-85. Specifically, this Court held that Jordan's counsel failed to adhere to the prevailing professional norms:

> When the solicitor disregarded the agreement, Jordan's attorney failed to draw Judge Eppes' attention to the plea bargain and then failed to move to withdraw Jordan's guilty plea. We hold that the conduct of Jordan's counsel in not protecting Jordan's right to enforce the plea agreement with the Solicitor's office fell below "prevailing professional norms."

Id. at 54, 374 S.E.2d at 685. (internal citations omitted). Although not identical in that there was no prosecutorial misconduct, plea counsel still failed to act in Petitioner's case in order to preserve the sentence Petitioner believed he was receiving. The divergence may not have originated with the state, but it was counsel's duty to protect the interests of his client. His failure to withdraw the plea constituted deficient performance. Based on Petitioner's testimony that he would have wanted Counsel Hilliard to withdraw the plea—as a reasonable defendant would have requested—Petitioner also satisfied the prejudice prong.

It is impossible to reconcile the PCR court's conclusion that the plea court's explanation regarding parole "could scarcely be clearer" with the suggestion that "it is not clear that Hilliard should have been immediately prompted to action by the plea court's clarification." (App. p. 107; App. 110). The two sentiments cannot exist simultaneously.

## CONCLUSION

Based on the above argument, this Court should reverse the finding of the PCR court, reverse the conviction, and remand the case for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of September, 2023.