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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Georgetown County
The Honorable William H. Seals, Circuit Court Judge
Appellate Case No. 2020-000966

DENNIS CUMBEE, JR., Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

RESPONDENT'S ISSUES PRESENTED 1

STANDARD OF REVIEW 2

STATEMENT OF THE CASE 3

RELEVANT FACTS... 4

ARGUMENT 10

I. The PCR Court properly found that Petitioner failed to meet his burden of proving his attorneys were ineffective in misadvising him about parole eligibility because he failed to prove he was prejudiced by the advice, since the record shows that petitioner had other motivations beyond parole eligibility for entering his guilty plea and because the plea colloquy cured the inaccurate advice 10

II. The PCR court properly found that Petitioner's plea counsel was not ineffective for failing to move to withdraw the guilty plea because Petitioner never indicated to that he wanted to withdraw the plea, and there is no reasonable probability that such a motion would have been granted 17

CONCLUSION 20

RESPONDENT'S ISSUES PRESENTED

1. The PCR Court properly found that Petitioner failed to meet his burden of proving his attorneys were ineffective in misadvising him about parole eligibility because he failed to prove he was prejudiced by the advice, since the record shows that Petitioner had other motivations beyond parole eligibility for entering his guilty plea and because the plea colloquy cured the inaccurate advice.

2. The PCR court properly found that Petitioner's plea counsel was not ineffective for failing to move to withdraw the guilty plea because Petitioner never indicated to that he wanted to withdraw the plea, and there is no reasonable probability that such a motion would have been granted.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Id. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

STATEMENT OF THE CASE

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. (2015-GS-22-00427, 00428) 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 years in prison. Petitioner did not appeal his sentence or conviction.

On December 11, 2017, Petitioner filed an application for post-conviction relief. The State filed a return on February 9, 2018. On February 27, 2019, PCR Counsel Tricia Blanchette, filed an amended application. On March 25, 2019, an evidentiary hearing was held before the Honorable William H. Seals, Jr. Tricia Blanchette represented Petitioner at the PCR hearing. Johnny James, Jr. represented the State. In a written order filed February 14, 2020, Judge Seals denied relief and dismissed the application. PCR Counsel filed a motion to alter or amend pursuant to Rule 59(a) and (e). The State filed a return to Petitioner's motion to amend on March 23, 2020. Judge Seals denied the motion to alter or amend in a written order signed May 29, 2020. A timely notice of intent to appeal was served on July 3, 2020.

A 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 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. A brief of petitioner was filed on September 14, 2023. This brief of respondent follows.

RELEVANT FACTS

On the night of April 7, 2015, police officers in Georgetown County responded to a call on South Alex Alford Drive. (App. 9, 18-20). Upon arrival, officers discovered Mr. Tory Thomas lying on the ground, face up, in a pool of blood. (App. 9, 20-24). It was determined that Thomas had been attending a party at that location when an altercation broke out. (App. 9, 23 – App. 10, 4). The party had been very peaceful and enjoyable up until the altercation. (App. 10, 6-10). Nevertheless, Petitioner pulled out a gun, aimed it at Thomas, and shot him five times, including four times in the back. (App. 10, 10-14). Thomas was able to flee his attacker despite being seriously wounded and took cover behind a nearby trailer. (App. 10, 14-19). Petitioner followed him and shot him one final time, in the head, at point blank range. (App. 10, 19-21). Forensic evidence indicated that Thomas was likely on his knees or lying flat on his back when the trigger was pulled. (App. 10, 21-25). Thomas was unarmed and witnesses stated that he had just been peacefully grilling and enjoying the party prior to the attack. (App. 11, 3-6). Petitioner then fled the scene of the execution. (App. 11, 7). He turned himself in to authorities after a brief manhunt. (App. 11, 9-12).

The Court informed Petitioner as follows at the plea hearing:

The Court: 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?

Petitioner: Yes, sir.

(App. 8, 12-16).

Petitioner's PCR hearing saw testimony from Petitioner himself, Attorney Cezar McKnight, Attorney John M. Hilliard, III, and Petitioner's Mother Denise Giles. Petitioner proceeded on the allegations raised in both his original and amended applications.

Attorney McKnight testified he was retained by Petitioner's parents and met with him several times prior to trial while Petitioner was being held in jail. (App. 42, 2-10). He stated that during the course of representation he wrote Petitioner a letter stating that he would be required to serve a mandatory eighty-five percent of his sentence. (App 45, 5-9). On cross-examination he stated he had discussed parole eligibility with Petitioner at other times but confirmed that he had consistently, and inaccurately, advised Petitioner that he would be eligible for parole after serving eighty-five percent of his sentence. (App. 46, 1-20).

Attorney Hilliard testified he had been contacted by Petitioner's father after Attorney McKnight had been unable to obtain a more favorable plea offer than thirty-five years. (App. 48, 5-9). He took over the case in August 2016, and began looking for possible defenses and considering strategies for plea negotiation. (App. 49, 3-9; App. 50, 10-12). He stated that he "never really believed that [pursuing a trial] was an option in the case" because of the underlying facts giving rise to the charges. (App. 49, 13-20). Despite his efforts, he was unable to secure a more favorable offer than thirty-five years. (App. 51, 18-22).

On the issue of parole eligibility, Attorney Hilliard stated he believed he advised Petitioner that he would be eligible after serving eighty-five percent of his sentence. (App. 52, 2-7). He did so based upon his understanding that "85 percent and day for day meant the same thing." (App. 55, 5-6). Therefore, the court's statement at the plea hearing that Petitioner would not be eligible for parole did not cause him to suspect he had provided Petitioner with inaccurate information. (App. 55, 12-16). He explained that this misunderstanding caused him not to move to withdraw

the guilty plea. (App. 56, 12-20). If Petitioner had informed him that he wanted to withdraw the plea, he would have done so. (App. 56, 21-25). But he did not recall Petitioner asking him any questions during or after the plea hearing. (App. 57, 5-9; App. 58, 3-9). Finally, Attorney Hilliard stated that he felt he had enough time to prepare for trial, and Petitioner never expressed a concern about needing more time. (App. 83, 2-8).

Petitioner testified his parents contacted Attorney McKnight, and McKnight accompanied him to the county jail to turn himself in. (App. 60, 16-22). Attorney Hilliard was subsequently retained after Petitioner and his parents grew displeased with McKnight's plea negotiations. (App. 61, 15-18). Petitioner confirmed McKnight had advised him that he would be eligible for parole after serving eighty-five percent of his sentence. (App. 62, 8-15).

Despite retaining new counsel after growing dissatisfied with the plea negotiations, Petitioner asserted that he always wanted to proceed to trial, even up to the date of the guilty plea. (App. 61, 19-21; App. 63, 1-3). He explained that he was taken to court the Friday before his plea, expecting a bond hearing, but instead was told the prosecutor wanted him to go to trial. (App. 64, 1-10). Nevertheless, the prosecutor extended him a plea offer and told him it would expire at 5:00 p.m. that day. (App. 64, 7-14). Attorney Hilliard explained to him the offer would carry with it the requirement that he serve eighty-five percent of his sentence, or twenty-nine years and seven months, before being eligible for parole. (App. 65, 3-10). This advice, Petitioner claimed, caused him to accept the plea, because it "was less than 35 years or less than 30 years." (App. 65, 12-16).

Petitioner discussed the deal with his family the morning of the plea hearing. (App. 66, 12-17). Again, Attorney Hilliard stated that he would be required to serve approximately 29.75 years, rather than the day-for-day sentence of thirty-five years. (App. 66, 18-21). Petitioner stated that he questioned this advice when the Court informed him otherwise, but rather than asking his attorney

about it during the hearing, Petitioner simply looked at Hilliard. (App. 67, 16-17). His glance was met with an affirmative head nod, and the question was not actually asked until after the hearing, when Hilliard told him that "[the judge] had to say that in case the laws change." (App. 67, 18-24). According to Petitioner, the true nature of his parole eligibility was not made clear to him until he arrived at Kirkland Correctional Institution, and a counselor told him his sentence was "100 percent, day for day." (App. 68, 15-25). He explained that this was baffling and caused him to begin filling out a PCR application. (App. 68, 25 – App. App. 69, 15).[1] Had his attorney given him the correct advice at the plea hearing, Petitioner stated, he would have wanted him to move to withdraw the plea. (App. 70, 14-23).

Petitioner admitted he knew he was pleading to murder, and he was told by the Court that he would not be eligible for parole. (App. 71, 13-18). He also acknowledged he told the Court that he was pleading guilty because he was guilty. (App. 72, 17-19). He went further and stated he actually entered his guilty plea because he did not think his attorney had enough time to prepare, and he did not want to gamble with a life sentence on short notice. (App. 72, 22 – App. 73, 5). Petitioner testified if his attorney had more time to prepare, he would have proceeded to trial and asserted "self-defense or stand your ground." (App. 75, 25 – App. 76, 15).

Petitioner further claimed he was lying to the Court when he stated he was guilty of the murder. (App. 20-25). When pressed on this point, Petitioner stated he took issue with some of the facts presented by the solicitor at the plea hearing, noting that "it wasn't a grilling, it was more of

[1] Petitioner's original application for post-conviction relief, filed December 11, 2017, only alleged that his plea counsel did not have adequate time to prepare and thoroughly evaluate his case. The allegation that plea counsel misadvised him regarding parole eligibility was not raised until February 27, 2019, when his PCR counsel filed an amended application on his behalf.

a birthday party." (App. 75, 6-11). On redirect he stated his understanding was that he needed to agree with the facts in order for the Court to accept his plea. (App. 77, 1-4).

Petitioner's mother, Denise Giles, corroborated Petitioner's testimony that she had spoken with plea counsel the Friday before the plea was entered, and she was told that he would be eligible for parole after serving eighty-five percent of his sentence. (App. 79, 9-19). Despite her understanding that Petitioner wanted a trial, she told him that she believed "it would be better to take the plea." (App. 80, 9-14). She testified she was not made aware of the issue with parole eligibility until sometime later, when Petitioner called her from prison and told her he was required to serve one hundred percent of his time. (App. 81, 6-17).

The PCR Court found Petitioner's allegations of ineffective assistance of counsel were without merit and made specific findings regarding alleged misadvice as to the expected terms of incarceration and his plea counsel's failure to move to withdraw his guilty plea. The Court found that both Petitioner's pre-trial and plea counsels provided deficient representation by affirmatively misadvising him that he would be eligible for parole after serving eighty-five percent of his conviction for murder. However, this deficiency was cured by the Court's colloquy, when it specifically informed Petitioner that he would not be eligible for parole and confirmed Petitioner's understanding of this point before accepting his guilty plea. (App. 104 – App. 109). The PCR Court found this colloquy "could scarcely be clearer," and Petitioner's failure to express any concern about his parole eligibility to the plea court precluded him from proving prejudice from the errant advice he was given. *Id.* Furthermore, the PCR Court found Petitioner entered his guilty plea because he was actually guilty, because of the State's compelling evidence against him, and because of the damning forensic evidence indicating he coldly executed Thomas. *Id.* The PCR Court explained that Petitioner "repeatedly acknowledged his complicity in the killing at the heart

of his murder charge and conviction" and gave "multiple conflicting answers as to precisely why he pled guilty." *Id.*

The Court also found Petitioner's alternative argument that his plea counsel was ineffective in failing to move to withdraw his guilty plea unpersuasive. (App. 110 – App. 111). No evidence existed in the record suggesting Petitioner had a desire to withdraw his plea, and therefore nothing would have clued his counsel into the necessity of so moving. *Id.* Finally, even if Petitioner's counsel had moved to withdraw the plea after it was made, the PCR Court found no reason to believe the plea court would have actually permitted him to do so. *Id.*

ARGUMENT

I. The PCR Court properly found that Petitioner failed to meet his burden of proving his attorneys were ineffective in misadvising him about parole eligibility because he failed to prove he was prejudiced by the advice, since evidence shows that Petitioner had other motivations beyond parole eligibility for entering his guilty plea, and because the plea colloquy cured the inaccurate advice.

Petitioner contends 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. Specifically, Petitioner argues that because there was testimony from Petitioner and his two attorneys that confirmed a written letter was sent by plea counsel to Petitioner advising him that he would only have to serve eighty-five percent of his sentence and that it was the opinion of all involved that Petitioner would not have to serve his sentence day for day. Further Petitioner argues that he proved prejudice by testifying that he relied on that advice and would have acted differently but for the erroneous information provided by his attorneys.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive effective assistance of counsel guaranteed by the Sixth Amendment. See generally S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a prima facie violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient

to warrant granting relief. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. *Id.* at 668; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

The second, or "prejudice," prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691-92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." *Id.* at 687.

The performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

With respect to guilty plea counsel, Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52 (1985). The "prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial." *Stalk v. State*, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009). "A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." *Dalton v. State*, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)). "Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea." *Garren v. State*, 423 S.C. 1, 12, 813 S.E.2d 704, 712 (2018); *see Jamison v. State*, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that "guilty plea[s] must be treated as final in the vast majority of cases" and instructing that caution must be exercised so as not to "undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea").

Petitioner relies upon *Hinson v. State*, 297 S.C. 456, 377 S.E.2d 338 (1989) for the proposition that a plea induced by erroneous advice regarding parole eligibility is sufficient to show prejudice under the *Strickland* standard. That case was one in which a criminal defendant was found to be prejudiced by uncontroverted evidence that his plea was induced by erroneous advice regarding parole eligibility. *Id.* 297 S.C. at 458, 377 S.E.2d at 339. The defendant's assertion that erroneous advice induced his plea was supported by the unrefuted testimony of a co-defendant's attorney. *Id.* The Court stated that "[o]rdinarily, a defendant's testimony, several years after a guilty plea, that his plea was induced by erroneous advice of counsel is not persuasive." *Id.* Accordingly, this Court has clarified that there is no error where there is no "evidence that a defendant's plea was induced such that, *but for the erroneous advice*, the defendant would not have pled guilty but would have insisted on going to trial." *Roscoe v. State*, 345 S.C. 16, 546 S.E.2d 417 (2001) (emphasis added). To obtain relief on claims that a plea was allegedly induced by misadvice, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010).

Petitioner argues that the PCR court errantly focused on his statements that he was concerned about how much time his counsel had to prepare for trial, as that statement was made in regards to another claim for relief. However, this is directly refuted by Petitioner's own words at the hearing. The following exchange occurred at the evidentiary hearing on cross-examination:

Q: Isn't it true that you told the Court that you were pleading guilty because you were guilty of the crime?

A: Yes, sir.

Q: All right. And was that true, you were pleading guilty because you were guilty of the crime?

A: I actually was pleading guilty because my lawyer was actually – he actually said in the trial, as you will see in the transcript, that he didn't have enough

time to properly prepare for the case and being that that was better, he felt like if we would have went to trial it would have been a life sentence. And being that he said he wasn't ready, the Judge was willing to give him I think a month to work on the case and I didn't think that was enough time to gamble with a life sentence.

Q: So, you didn't plead guilty over the 85 percent confusion, you plead guilty because you didn't think your lawyer had enough time?

A: No, sir. Well, during – I took the plea after that but the 85 percent – I took the 85 percent after that, that's what I was advised. I plead guilty because he didn't – no, sir. I didn't think he had enough time to properly work on the case.

(App. 72, 17 – App. 73, 13).

This statement is consistent with Petitioner's claims in his initial PCR application. Petitioner's only claims in his original, *pro se* application were that his Sixth and Fourteenth Amendment rights were violated because his attorney did not have enough time to prepare for his trial. However, at the PCR hearing he stated that he filed the application because he found out the truth about his parole eligibility when he arrived at the prison and spoke with a counselor. Why, then, did he not raise the parole issue in the application? The reality is that Petitioner's decision to enter a guilty plea was made independently of any advice regarding parole eligibility. Petitioner admitted that he lied during his plea hearing, and the PCR court properly viewed his testimony with skepticism and found that his testimony was self-serving and lacked credibility. His story is refuted by his own pleadings.

Furthermore, Attorney Hilliard testified that he was retained for the express purpose of negotiating a friendlier plea agreement. Petitioner and his parents hired him after becoming unsatisfied with Attorney McKnight's plea negotiations and wanted Hilliard to try to obtain a more favorable deal. Clearly Petitioner intended to enter a guilty plea from the outset, irrespective of what he was told about parole eligibility.

Finally, reason dictates that Petitioner's story that he admitted guilt because he thought he would be eligible for parole must be viewed skeptically given the underlying facts of the case. Several witnesses saw him shoot an unarmed man in the back multiple times, then pursue him down an alleyway, before a final, fatal shot was heard. The PCR court found that fifteen to twenty people were present at the scene and numerous witnesses identified him as both the aggressor and the shooter. The evidence against him was so damning that his counsel did not see any way to take the case to trial. Petitioner himself confirmed these facts at the PCR hearing, only quibbling over whether he executed a man at a "grilling" or a "birthday party." The notion that he would have proceeded to trial on these facts but for errant advice about parole eligibility is refuted by both the record and by common sense.

Petitioner's assertion that the State "never disproved Petitioner's contention that he pled guilty based on the advice of counsel" is misguided. Petitioner bears the burden of proving his claims. The State need not disprove his allegations when he has not proven them in the first instance. Simply put, Petitioner has not made a showing that his plea was induced *but for* the erroneous advice he was given. As such, evidence exists to support the PCR court's findings that petitioner did not suffer prejudice from his counsels' performance. Therefore, this Court should deny certiorari.

A. The PCR court properly found that the plea court's colloquy cured any confusion Petitioner may have had from his plea counsels' erroneous advice because it directly addressed parole eligibility and properly informed him that he would not be eligible.

Petitioner relies heavily on the fact that the PCR court found his plea counsels' performance to be deficient, in the hopes that some of that deficiency will transform itself into prejudice. This cannot be the case, as the PCR court's finding that the plea court's colloquy cured any confusion Petitioner may have had is clearly supported by the record and the law.

A proper guilty plea colloquy may serve to cure the deficiency of plea counsel. *Robinson v. State*, 422 S.C. 78, 88, 810 S.E.2d 32, 37-38 (2018). Brief or inaccurate statements by the court will not suffice; the plea hearing must unambiguously address and resolve the incorrect advice. *Id.*

The court and Petitioner had the following exchange during the plea hearing:

> The Court: 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?
>
> Petitioner: Yes, sir.

(App. 106).

The question is abundantly clear. Nevertheless, Petitioner argues that because this exchange apparently did not trigger his plea counsel to realize his misunderstanding of the law governing parole eligibility, it is therefore unreasonable for Petitioner, a layman in the law, to be expected to express concerns because of this exchange. Of course, his plea counsel was not alerted by the plea court's colloquy, because his plea counsel did not understand the law. Plea counsel was deficient. But this deficiency, standing alone, is not enough to entitle Petitioner to post-conviction relief.

Importantly, Petitioner claims that the court's colloquy *did* set off alarms in his head, yet he remained silent. He says that he looked at his counsel for clarification, and his counsel nodded. He never vocalized his confusion to his plea counsel or the court. Instead, he told the judge he understood and wished to enter his guilty plea. According to Petitioner, he only raised his concerns *after* the plea hearing, after the opportunity for moving to withdraw the plea had passed. Plea counsel stated that he did not recall any such conversation occurring.

Clear evidence shows that the plea court directly addressed the issue of parole eligibility and correctly informed Petitioner that he would not be eligible. Petitioner realized this was

different than the advice his counsel had given him, yet nevertheless he told the court he understood the terms of the sentence and chose to continue forward with his guilty plea. Therefore, the plea colloquy cured counsel's deficient performance by properly informing him of the parole eligibility of his conviction. Whatever Petitioner's motivation for entering the guilty plea may have been, the decision was made with the knowledge that he would not be eligible for parole. As such, the PCR court properly found that his testimony was self-serving and inconsistent.

Petitioner has the burden of proving counsel's alleged deficiency effected the outcome of the proceeding, and Petitioner has failed to meet his burden. The PCR court properly denied relief because Petitioner failed to show prejudice.

II. The PCR court properly found that Petitioner's plea counsel was not ineffective for failing to move to withdraw the guilty plea because Petitioner never indicated to that he wanted to withdraw the plea, and there is no reasonable probability that such a motion would have been granted.

Petitioner argues that the PCR court's reasoning in denying relief was contradictory, because if the colloquy would have alerted Petitioner to the fact that his counsel provided errant advice, it would have equally alerted his plea counsel, thereby requiring that he move to withdraw the plea.

Withdrawal of a guilty plea is generally within the sound discretion of the trial court. *State v. Riddle,* 278 S.C. 148, 292 S.E.2d 795 (1982). A criminal defendant's failure to assert his innocence militates against withdrawal. *U.S. v. Craig,* 985 F.2d 175, 179 (1993). Plea counsel may be ineffective for failing to move to withdraw a plea when a criminal defendant makes it apparent, or when counsel comes to believe, that he does not want to continue with the plea and instead wishes to proceed to trial. *See e.g. Rolen v. State*, 384 S.C. 409, 683 S.E.2d 471 (2009) (finding that counsel was ineffective for failing to move to withdraw a plea when the defendant requested a jury trial and repeatedly asserted his innocence during the plea hearing); *Thompson v. State*, 340

S.C. 112, 531 S.E.2d 294 (2000) (finding counsel ineffective for failing to move to withdraw a plea after the state reneged on its plea agreement).

As explained above, Petitioner's plea counsel was deficient in misadvising Petitioner of his conviction's parole implications because he believed that "no parole" meant eighty-five percent of the sentence must be served before Petitioner became parole eligible. His misunderstanding of the law ran so deep that he allegedly wrote the court's colloquy off as some precautionary statement made in anticipation of a change in the law. However, Petitioner himself was not so thoroughly confused, as he stated that the court's colloquy did raise questions in his mind. Yet, for some reason, he did not say anything. He did not tell his counsel that he wished to withdraw his plea, nor did he ask for clarification until after the hearing, if at all.

Because Petitioner never raised his concerns to counsel, his counsel cannot be deficient for failing to move to withdraw his guilty plea. Petitioner never asserted his innocence in this case, and the record shows that counsel did not believe any decent defenses against the charges would be available at trial. Petitioner's intention from the very beginning was to enter a guilty plea. He expressly retained plea counsel for that purpose. Nevertheless, plea counsel stated at the PCR hearing that he would have moved to withdraw the plea had Petitioner asked him to do so. Clearly, he was not deficient for failing to move to withdraw the plea, as the record shows that the plea was freely, intelligently, and voluntarily made with full knowledge of the sentence and its parole implications.

Furthermore, Petitioner has not shown prejudice from his counsel's failure to move to withdraw the plea. There is no likelihood that such a motion would have been granted, as Petitioner has never asserted his innocence of these charges. The only argument supporting the motion to withdraw the plea would be Petitioner's confusion about parole eligibility, which the plea court

had clarified with its colloquy. Therefore, even if plea counsel had moved to withdraw the plea, such a motion would not have been granted because the purported reason for the withdrawal had already been remedied.

Ultimately, Petitioner has failed to meet his burden, the PCR court properly found that Petitioner failed to prove his allegations of ineffective assistance of counsel. The post-conviction relief judge's order denying Petitioner's application for post-conviction relief should be affirmed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted the judgment of the lower court be affirmed.

Respectfully submitted,

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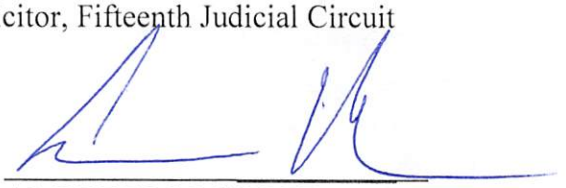

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