THE STATE OF SOUTH CAROLINA

In The Supreme Court

CERTIORARI TO SUMTER COUNTY

Honorable Edgar W. Dickson, Circuit Court Judge

APPELLATE CASE NO. 2024-000218

TYRONE JOSEY, ... PETITIONER,

V.

STATE OF SOUTH CAROLINA, ... RESPONDENT.

Pro Se BRIEF OF PETITIONER

TYRONE JOSEY
Petitioner

S.C.D.C. No. 00355699
Turbeville Correctional Institution
Elliott Unit, B-Side, Cell 0184
1578 Clarence Coker Highway
Turbeville, South Carolina 29162

PETITIONER, ***Pro Se***

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2. Whether the PCR Court err in denying the Petitioner's post-conviction relief where the Petitioner presented the testimony of Plea Counsel failing to meet with him and properly explaining the facts of the Petitioner's case?
3. Whether the PCR Court err in denying the Petitioner's post-conviction relief where the Petitioner showed that Plea Counsel failed to give the Petitioner sufficient notice of his trial date?

STATEMENT OF THE CASE

On January 9, 2019, a search warrant was executed at the Petitioner's residence in Sumter. Law Enforcement allegedly found 17.93 grams of heroin and 283 grams of marijuana during the search. App. 192, ll. 3-19. A Sumter County Grand Jury indicted the Petitioner on July 9, 2020 for Trafficking Heroin, 14 grams or more but less than 28 grams, Possession with the Intent to Distribute Marijuana, and Possession with the Intent to Distribute in the Proximity of a School or Park. App. 275-276 (2020-GS-43-00343). Petitioner's case was called to trial on July 22, 2021, before the Honorable George McFaddin, Jr., and a jury. App. 1. Assistant Solicitors Tyler Brown and Jason Corbett represented the state. Jason Bridges represented Petitioner. App. 1.

After Petitioner's pretrial motion to suppress was denied, Petitioner agreed to plead guilty to the lesser included offense of Trafficking Heroin, 4 grams or more but less than 14 grams, and Possession With Intent to Distribute Marijuana in exchange for a sentence recommendation of seventeen years imprisonment. App. 25 – 27, l. 3; App. 32, l. 15 – 33. However, during the plea proceeding, Petitioner decided to withdraw his guilty plea and go forward with his jury trial. App. 35, l. 1 – 36, l. 5. After the state rested, the trial court directed a verdict on the proximity offense. App 181, l. 2 – 183, l. 1. However, Petitioner again agreed to plead guilty at that time to the lesser included offense of Trafficking Heroin, 4 grams or more but less than 14 grams, and Possession With Intent to Distribute Marijuana in exchange for a sentence recommendation of twenty years imprisonment. App. 185, l. 24 – 186, l. 22. Petitioner pled guilty accordingly and was sentenced to twenty years imprisonment on the trafficking offense and ten years concurrent for the distribution charge. App. 193, l. 10 – 194, l. 25. Petitioner did not appeal his conviction or sentence.

On July 12, 2022, Petitioner filed an application for Post-Conviction Relief (PCR). App. 197-206. The Respondent filed a Return to this application on January 12, 2023. App. 207-220. With the assistance of counsel, Petitioner filed an amended application on March 2, 2023, raising the claim argued in this petition. App. 221-223. An evidentiary hearing was convened on March 2, 2023, before the Honorable Edgar W. Dickson. App. 224. Assistant Attorney General T. Cruise Mitchell represented the Respondent. Michael Lifsey represented the Petitioner. App. 224.

During the hearing, Petitioner testified that he met with his trial counsel four times. During these meetings, counsel explained to Petitioner what offenses he was charged with and how much time he was "looking at." Counsel also discussed with Petitioner the state's favorable plea offer. Petitioner testified that counsel told him "every time that I refuse an offer that the offer is going to go up. . . . And I was going to be offered more time." App. 230, l. 5 – 231, l. 2. After Petitioner rejected the state's offer to plead guilty, counsel told Petitioner that the hearing on his "motion to suppress was coming up and [to] be ready for it." It was not until after the trial court denied Petitioner's suppression motion that Petitioner learned he was going to trial that same day. Petitioner testified that counsel first told him after his motion was denied that they were "picking [a jury] that same day." App. 231, l. 9 – 232, l. 10. Petitioner said he only pled guilty because trial counsel "kept telling [him] that the offer was going to be off the table" and "if [he] didn't take the offer that was in front of [him], that [he] would get more time." App. 233, ll. 3–9. He testified that he would have continued with his jury trial had counsel met with him more and told him more about his case and what defenses were available. App. 233, ll. 13–22.

Jason Bridges, Petitioner's trial counsel, testified that he met with Petitioner about five time before Petitioner's case was called to trial. In July or August 2020, the assistant solicitor first offered to allow Petitioner to plead guilty to the lesser included offense of trafficking heroin, 4

grams or more but less than 14 grams, in exchange for a sentence recommendation of ten years imprisonment. According to Bridges, he discussed this offer with Petitioner in September 2020 and reviewed all of the discovery materials with him at that time. However, Petitioner refused the offer.

Bridges testified that in May 2021, Petitioner rejected the state's second plea offer, which was to plead guilty to the lesser included offense in exchanged for a sentence recommendation of fifteen years. Petitioner rejected this offer on the record and was told that "his case was subject to trial in the extremely near future." Bridges explained that Petitioner was not amendable to Pleading guilty until his motion to suppress was heard and ruled upon by the trial court. However, the assistant solicitor refused to "hold open" the plea offer until that time and Bridges advised Petitioner so.

After the trial court denied Petitioner's motion to suppress, Petitioner stated he wished to plead guilty. At that time, the state offered to allow Petitioner to plead to the lesser offense in exchange for a sentence recommendation of seventeen years imprisonment. While Petitioner initially agreed to plead guilty, he withdrew his guilty plea during the plea proceedings and his jury trial trial continued. After the state rested its case, Petitioner again stated he wanted to plead guilty. The state offered to recommend a sentence of twenty years imprisonment at that stage and Petitioner accepted the offer and plea guilty accordingly. Bridges testified that Petitioner's delay in pleading guilty "cost him." However, Bridges believes he 'did everything [he] could" professionally ato assist Petitioner. App. 237, l. 6 – 248, l. 6.

By order filed February 14, 2024, the PCR Court denied Petitioner relief. App. 260-274. The court found Petitioner failed to prove trial counsel was deficient. The court reasoned that counsel credibly testified that he met with Petitioner several times and thoroughly advised

Petitioner of his charges and potential defenses and reviewed all of the discovery materials with him. The court concluded Petitioner failed to present any evidence of how additional preparations or communication would have affected the outcome of this case, including his decision to plead guilty. App. 266-269.

Because Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made due to trial counsel's deficient performance, this Petition for Writ of Certiorari follows.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where trial counsel failed to adequately communicate with Petitioner and advise him of the nature of the charges against him as well as his potential defenses, and where Petitioner only pled guilty because counsel told him if he did not accept the State's favorable offer he would be sentenced to more time.

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made because trial counsel failed to adequately communicate with Petitioner before he pled guilty. Petitioner did not know his case would proceed to trial immediately after the hearing in his motion to suppress pursuant to the Fourth Amendment. Petitioner only found out that morning after the motion was denied that his trial would start that same day. Counsel failed to properly advise Petitioner of the nature of the charges against him and the potential defenses available. Petitioner testified that if counsel had met with him more and told him more about his case, he "would have continued with [his] jury trial." Petitioner only pled guilty because counsel told him if he did not accept the state's favorable offer, he would be sentenced to more time.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668 (1984). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Id.*** at 686; ***Butler v. State***, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided

representation within the range of competence required in criminal cases. ***Strickland***, 466 U.S. at 687-688.

The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. In the context of a guilty plea, a petitioner must show that counsel's performance was deficient, and "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." ***Hill v. Lockhart***, 474 U.S. 52, 58-59 (1985); See ***Jackson v. State***, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000); ***Thompson v. State***, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000); ***Wolfe v. State***, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997); ***Rayford v. State***, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994). This 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 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, 485-486 (1991)).

"Entering a guilty plea results in a waiver of several constitutional rights, therefore, the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently by defendants." ***Pittman v. State***, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (*citing* ***Boykin v. Alabama***, 395 U.S. 238 (1969)). "The United States Supreme Court has held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he or she is waiving. Specifically, a defendant must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers." ***Pittman***, 337 S.C. at 599, 524 S.E.2d at 624 (*citing* ***Boykin***, 395 U.S. 238). Additionally, "a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any

mandatory minimum penalty, and the nature of the constitutional rights being waived." ***Id.*** (*citing* ***Boykin***, 395 U.S. 238).

"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 actions open to the defendant." ***Hill v. Lockhart***, 474 U.S. 52, 56 (1985) (*quoting* ***North Carolina v. Alford***, 400 U.S. 25, 31 (1970)). "The voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing." ***Dalton v. State***, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (*quoting* ***Harres v. Leeke***, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)).

In ***Pittman***, this Court held Pittman's guilty plea was not voluntary, intelligent, and knowing where Pittman did not fully understand the nature of the constitutional rights being waived and the consequences of his plea. ***Id.*** at 601, 524 S.E.2d at 625. It was undisputed that Pittman met with his attorney only twice for approximatelyly twenty minutes each. ***Id.*** at 600, 524 S.E.2d at 625. The trial court did not advise Pittman of the crucial elements of the charged offenses. ***Id.*** Moreover, while the court informed Pittman of the maximum sentences which could be imposed, he failed to advise him that the armed robbery charge carried a mandatory minimum of ten years, seven without the possibility of parole. ***Id.*** (*citing 22 C.J.S.* ***Criminal Law*** § 404 (1989) ("prior to accepting a plea of guilty . . . the court is required to advise accused of the range of punishment attached to the offense charged such as . . . the minimum sentence."). Lastly, the trial court never affirmatively asked Pittman for an admission of guilt. ***Id.***

In the case, Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made because trial counsel failed to adequately communicate with Petitioner before he plea guilty.

Petitioner did not know his case would proceed to trial immediately after the hearing on the motion to suppress pursuant to the Fourth Amendment. Petitioner only found out that morning after the motion was denied that his trial would start that day. Counsel failed to sufficiently advise Petitioner of the nature of the charges against him and the defenses available. Because of counsel's lack of proper communication, Petitioner was left in the dark about key aspects of his case and the best way to proceed.

Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability that he would not have pled guilty but would have proceeded to trial if counsel had properly communicated with him and adequately advised him. Petitioner testified that if counsel had met with him more and told him more about his case he "would have continued with [his] jury trial." Petitioner only pled guilty because counsel told him if he did not accept the state's favorable offer he would be sentenced to more time.

Respectfully, this Court should reverse Petitioner's conviction and sentence and remand for a new trial.

ARGUMENT

Did the PCR Court err in denying the Petitioner's post-conviction relief where the Petitioner presented the testimony of Plea Counsel failing to meet with him and properly explaining the facts of the Petitioner's case?

Petitioner contends that Plea Counsel was ineffective during his representation as counsel failed to communicate with him regarding the facts of his case. Petitioner clearly relied on counsel's advice during his representation to get the full aspects of the consequences surrounding the facts that led to the Petitioner's outlining offenses.

"The Sixth Amendment guarantees the right to effective assistance of counsel in criminal prosecutions." ***Yarborough v. Gentry***, 540 U.S. 1, 5 (2003). The Sixth Amendment further guarantees "a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." ***Montejo v. Louisiana***, 556 U.S. 218, 227-228, 87 S.Ct. 1926 (1967). Critical stages include arraignment, post-indictment interrogations, post-indictment lineups, negotiation, and the entry of a guilty plea. See ***Hamilton v. Alabama***, 368 U.S. 52, 82 S.Ct. 157 (1961) (arraignment); ***Messiah v. United States***, 377 U.S. 201, 84 S.Ct. 1199 (1964) (post-indictment interrogation); ***Wade***, ***supra*** (post-indictment lineup); ***Padilla v. Kentucky***, 559 U.S. 356, 130 S.Ct. 1473 (2010) (guilty plea).

In ***Hill v. Lockhart***, 474 U.S. 52, 106 S.Ct. 366 (1985) and ***Padilla v. Kentucky***, 559 U.S. 356, 130 S.Ct. 1473 (2010), the United States Supreme Court explained the role advising a client about a plea offer and ensuring guilty plea as was discussed in ***Missouri v. Frye***, 132 S.Ct. 1399, 1405-06 (2012), as follows:

> ***Hill*** established that claims of ineffective assistance of counsel in the plea hargaining context are governed by the two-part test set forth in ***Strickland***. See

Hill*, *supra, at 57, 106 S.Ct. 366, 88 L.Ed.2d 203. As noted above, in Frye's case, the Missouri Court of Appeals, applying the two-part test of ***Strickland***, determined first that defesse counsel had been ineffective and second that there was resulting prejudice.

In ***Hill***, the decision turned on the second part of the test. There, a defendant who had entered a guilty plea claimed his counsel had misinformed him on the amount of time he would have to serve before he became eligible for parole. But the defendant had not alleged that, even if adequate advice and assistance had been given, he would have elected to plead not guilty and proceed to trial. Thus, the Court found that no prejudice from the inadequate advice had been shown or alleged. ***Hill*, *supra***, at 60, 106 S.Ct. 366, 88 L.Ed.2d 203.

In ***Padilla***, the Court again discussed the duties of counsel in advising a client with respect to a plea offer that lead to a guilty plea. ***Padilla*** held that a guilty plea, based on a plea offer, should be set aside because counsel misinformed the defendant of the immigration consequences of the conviction. The Court made clear that "the negotiation of a plea bargain is a critical phase of litigation for the purposes of the Sixth Amendment right to effective assistance of counsel". 559 U.S. at ___, 130 S.Ct. 1473, 176 L.Ed.2d 284, 298. It also rejected the argument made by petitioner in this case that a knowing and voluntary plea supersedes errors by defense counsel. Cf.. Brief of Respondent in ***Padilla v. Kentucky***, O.T. 2009, No. 08-651, p. 27 (arguing Sixth Amendment's assurance of effective assistance "does not extend to collateral aspects of the prosecution" because "knowledge of the consequences that are collateral to the guilty plea is not prerequisite to the entry of a knowing and intelligent plea".).

The United States Supreme Court issued opinions in ***Frye*** and ***Lafler v. Cooper***, 566 U.S. 156, 132 S.Ct. 1376 (2012) on the same day and addressed the situation of when ineffective assistance of counsel led to the rejection of a plea officer in contrast to the issue of ineffective assistance of counsel in accepting a plea offer which was addressed in ***Hill***. In ***Lafler***, the Court addressed the appropriate remedy "when inadequate assistance of counsel caused non-acceptance of a plea offer and further proceedings led to a less favorable outcome." 566 U.S. at 160, 132 S.Ct. at 1383. The Court explained:

> In contrast to ***Hill***, here the ineffective advice led not to an offer's acceptance but to its rejection. Having to stand trial, not choosing to waive it, is the prejudice alleged. In these circumstances, a defendant must show that hut for the ineffective advice of counsel, there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea

> and prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that were in fact imposed. Here, the Court of Appeals for the Sixth Circuit agreed with that test for ***Strickland*** prejudice in the context of a rejected plea bargain.

Lafler, 566 U.S. at 163-64, 132 S.Ct. at 1385.

Turning to the facts, the court further explained:

> In the instant case, respondent went to trial rather than accept a plea deal, and it is conceded this was the result of ineffective assistance during the plea bargaining process. Respondent received a more severe sentence at trial, one 3 ½ times more severe than he likely would have received by pleading guilty. Far from curing the error, the trial caused the injury from the error. Even if the trial itself is free from constitutional flaw, the defendant was goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence.

Lafler, 566 U.S. at 166, 132 S.Ct. at 1386.

Prior to ***Lafler***, the Supreme Court of South Carolina addressed whether counsel offered ineffective assistance for advice rendered in rejecting a plea offer in ***Judge v. State***, 471 S.E.2d 146 (1996). Similarly, the ***Lafler***, the Supreme Court of South Carolina held: "The Sixth Amendment protects criminal defendants against ineffective assistance of counsel during the plea-bargaining process, even if the plea offer ultimately is rejected." The Court also held that "a petitioner still must prove both ineffective assistance in counsel's advice to reject a plea agreement, as well as prejudice resulting from that ineffectiveness". 321 S.C. 560, 471 S.E.2d at 149. In ***Lafler***, counsel's ineffectiveness was not in dispute, but it was in ***Judge***.

While addressing the standard of attorney competence during plea negotiations, this Court reasoned that "counsel's advice to reject a plea agreement does not fall below the reasonably effective standard simply because, in hindsight, the advice was wrong, or the attorney's trial tactics dackfired." ***Judge***, 321 S.C. 560, 471 S.E.2d 150. In reversing the grant of post-conviction relief,

the South Carolina Supreme Court addressed the facts of the case, which consisted of counsel's failure to wait to receive certain ***Brady*** materials before advising Judge on whether to accept a plea to voluntary manslaughter. The record before the Court established that judge's counsel was not aware of the additional ***Brady*** materials. Therefore, the Court concluded, "[c]ounsel cannot be held incompetent for failing to wait to recceive material theey had no reason to know existed." 321 S.C. at 563, 471 S.E.2d at 151.

Additionally, the South Carolina Supreme Court found that there was not reasonable evidence to establish prejudice since no evidence was presented at the post-conviction hearing about how the additional ***Brady*** materials would have affected counsel's advice concerning the plea offer. 321 S.C. at 562-563, 471 S.E.2d at 151. Following ***Judge***, the South Carolina Supreme Court's ruling was overruled to the extent it could "be read to hold that a petitioner's statement is insufficient evidence to satisfy the prejudice prong." ***Jackson v. State***, 342 S.C. 95, 535 S.E.2d 926, fn. 2 (reversing the denial of post-conviction relief and finding that petitioner's self-serving statement that he would not have pled guilty but for counsel's advice was sufficient to establish prejudice.); see also, ***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.").

Thereafter, in ***Davie v. State***, 381 S.C. 601, 675 S.E.2d 416 (2009), the South Carolina Supreme Court addressed the matter of deficient performance resulting from counsel not communicating a more favorable plea offer. After applying the principles in ***Jackson*** and ***Smith***, the Court concluded "that the difference in t he sentence Petitioner received and the plea offer is proof of prejudice". 381 S.C. at 614, 675 S.E.2d at 423.

One thing is certain, Petitioner was entitled to effective assistance of counsel in the plea-bargaining process, and in determining whether to accept or reject a plea offer. ***Lafler v. Cooper***, 566 U.S. 156, 132 S.Ct. 1376 (2012); *see also* ***McMann v. Richardson***, 397 U.S. 759, 771 (1970) (the Constitution guarantees effective counsel when accepting guilty plea). Similarly, a "defendant has the right to make reasonably informed decision whether to accept a plea offer." ***Turner v. Calderon***, 281 F.3d 851, 880 (9th Cir. 2002) (*quoting* ***United States v. Day***, 969 F.2d 39, 43 (3rd Cir. 1992)).

Petitioner testified that Plea Counsel met with him about four times after his arrest and before his trial and that the basis of those conversations were based on whether the Petitioner was going to enter a plea of guilty. Petitioner contends that Plea Counsel never discussed the elements of the charges the Petitioner was facing in order to prove that Petitioner was guilty and that counsel failed to discuss any defenses the Petitioner may have had for the purposes of the course of trial. Counsel testified that he specifically recalled meeting with the Petitioner on the following occasions: 1st sit down meeting in February 2019 at the bond hearing; 2nd sit down meeting in September 2020; 3rd sit down meeting in November 2020; 4th sit down meeting in May 2021; and during the Petitioner's trial in July 2021 before Petitioner entered a plea of guilty. Counsel testified that his notes fro those meetings were in the possession of the Sumter County Public Defender's Office which he no longer has access to, however, failed to request those notes for the purposes of the hearing.

Therefore, Petitioner clearly presented that counsel rendered inadequate assistance and failed to exercise reasonable professional judgment in making all significant decisions in this case, of which showed the overwhelming presumption set forth in ***Ard v. Catoe***, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Counsel testified that he meet with the Petitioner on several occasions and

thoroughly informed Petitioner of his charges, potential defenses available to the Petitioner, and reviewed discovery material with the Petitioner. However, if the Petitioner did not know that he would be proceeding to trial directly after the motion for suppression, then counsel could not have discussed those consequences with him. Petitioner testified that had counsel communicated with him regarding the suppression, that he would have known what direction he wanted to proceed regarding affirmative defenses available to him during trial. Petitioner demonstrated that any evidence of how additional preparation or communication would have resulted in a different outcome. Counsel could have met with Petitioner an unknown amount of times, that does not mean the conversation was based on preparation for trial.

Therefore, this Court should reverse Petitioner's conviction and sentence and remand for a new trial.

ARGUMENT

Did the PCR Court err in denying the Petitioner's post-conviction relief where the Petitioner showed that Plea Counsel failed to give the Petitioner sufficient notice of his trial date?

Petitioner contends that Plea Counsel was ineffective in his representation when counsel failed to communicate the status of his case with him. Petitioner testified that plea counsel informed him about the motion to suppress and for him to be prepared for the motion and that he did not know that his trial was going to proceed directly after the conclusion of the motion to suppress. Petitioner stated that he did not know that his trial was going to commence after the trial court ruled on the motion to suppress. Petitioner testified that as soon as the trial court made its ruling on the motion to suppress, counsel informed him that a jury would be selected that same day.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Petitioner, like all other defendants, the right to effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668 (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 allegations 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, 199 S.E.2d 761 (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. 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, 117-18, 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.

Strickland, however, "does not guarantee perfect representation[–]only a 'reasonably competent attorney." ***Harrington v. Richter***, 562 U.S. 86, 110 (2011) (*quoting* ***Strickland***, 466 U.S. at 687). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a pair proceeding. ***Strickland***, 466 U.S. at 686. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." ***Harrington***, 562 U.S. at 110.

At the PCR hearing, Petitioner testified that he did not know anything about the trial until the day of the motion to suppress hearing. Petitioner testified counsel informed him that the

motions hearing was coming up and if the motion is denied, the trial will begin the same day. Petitioner testified nobody informed him of this prior to motions hearing. On cross-examination, Petitioner testified he received no notice of a trial after he rejected his last plea offer.

Counsel testified that Petitioner received his first plea offer for a ten (10) year negotiated sentence for all his charges in early September 2020. Counsel testified that the Solicitor extended the offer through November 2020. Counsel testified he went on leave and when he came back, Petitioner's case was on the trial docket for March or April 2021. Counsel testified that he had phone conversations with the Petitioner informing him that he was on the trial docket. The Solicitor then increased the offer to fifteen (15) years, which the Petitioner rejected. Counsel testified that after the plea offer was rejected, Petitioner was told he was on the trial docket. Counsel testified that Petitioner definitely knew in May 2021 that he was on the trial docket. Counsel testified that he explained to the Petitioner that he would move to suppress beore the trial begun. Counsel testified that after the motion to suppress was denied, Petitioner indicated that he wished to plead guilty to a seventeen (17) year sentence. However, Petitioner changed his mind, withdrew his plea, and the trial commenced.

On cross-examination, counsel reiterated that he explained to the Petitioner that the suppression hearing was a pre-trial motion and the trial would begin immediately afterwards. However, just because counsel may have reiterated that he explained a particular instance to the Petitioner, does not mean the Petitioner understood the proceeding as being a formality. Therefore, he did not understand that his trial started immediately after the decision was made in the pre-trial stage. If counsel advocated the Petitioner's beliefs, counsel would have known that the Petitioner did not understand he was proceeding to trial soon thereafter (i.e., the same day).

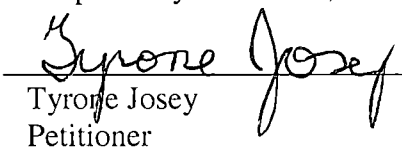
It's not the understanding of what counsel believes to be understood but as to whether or not the Petitioner understood the proceedings, himself.

Respectfully, this Court should reverse Petitioner's conviction and sentence and remand for a new trial.

CONCLUSION

Based on the above, Petitioner respectfully requests that this Honorable Court **GRANT** the Petition for Writ of Certiorari and **ORDER** full briefing on the issues presented. Petitioner ultimately request that this Honorable Court **REVERSE** his convictions and **REMAND** for a New Trial.

Respectfully Submitted,



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