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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Georgetown County
Honorable William H. Seals, Circuit Court Judge

Opinion No. 2024-UP-321 (S.C. Ct. App. Filed October 2, 2024)

Lower Court Case No. 2017-CP-22-01051

DENNIS CUMBEE, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000966

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on November 21, 2024.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in refusing to find prejudice and grant relief when the PCR court and the Court of Appeals both found deficient performance following a guilty plea to murder where both of Petitioner's attorneys misadvised him that he would only have to serve eighty-five percent of his sentence and 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 and the colloquy with the plea court could not have cured the erroneous advice about sentencing provided by the two lawyers?

2. Did the Court of Appeals err in refusing to find prejudice and grant relief when the Court of Appeals found plea counsel was deficient for failing to move to withdraw the plea and Petitioner proved prejudice by testifying that he would have asked plea counsel to withdraw the plea had he known about the day-for-day requirement?

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. 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 August 18, 2023, the South Carolina Court of Appeals granted the petition for writ of certiorari and ordered briefing as provided by Rule 243(j), SCACR. The brief of petitioner was filed on September 14, 2023. The brief of respondent was filed on February 28, 2024. On October 2, 2024, the Court of Appeals affirmed as modified the order of the PCR court denying relief. Dennis Cumbee Jr. v. State, No. 2024-UP-321 (S.C. Ct. App. Oct. 2, 2024). A timely petition for rehearing was filed and denied on November 21, 2021. The petition for writ of certiorari 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).

REASON WHY CERTIORARI SHOULD BE GRANTED

This Court should grant the petition for writ of certiorari to clarify the showing needed to prove prejudice resulting from a guilty plea based on plea counsel's erroneous advice about sentencing.

ARGUMENT

I. The Court of Appeals erred in refusing to find prejudice and grant relief when the PCR court and the Court of Appeals both found deficient performance following a guilty plea to murder where both of Petitioner's attorneys misadvised him that he would only have to serve eighty-five percent of his sentence and 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 and the colloquy with the plea court could not have cured the erroneous advice about sentencing provided by the two lawyers.

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). See S.C. Code Ann. § 16-3-20.

A. Deficient Performance Found by the PCR Court

The PCR court correctly found deficient performance. 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 of Petitioner. (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).

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). The PCR judge correctly found deficient performance.

B. Deficient Performance Found by the Court of Appeals

The Court of Appeals wrote, "We hold there was probative evidence in the record to support the PCR court's finding that plea counsel was not ineffective in misadvising Cumbee regarding his sentence. Plea counsel was deficient in misinforming Petitioner that he would be eligible for early release." Cumbee v. State, No. 2020-000966, 2024 WL 4403972, at *1 (S.C. Ct. App. Oct. 2, 2024). While the Court of Appeals correctly found deficient performance, the Court incorrectly found that the deficiency was in in misinforming Petitioner that he would be eligible for early release. Neither counsel misinformed Petitioner that he would be eligible for parole or early release. In the letter to Petitioner, McKnight did not mention parole or early release. (App. p. 92). Hilliard testified that he advised Petitioner that murder was a no parole offense. (App. p. 52, lines 2-7). Both lawyers, however, misadvised Petitioner about the sentence he would actually serve, eighty-five percent of the thirty-five year sentence, a direct consequence of the plea. Petitioner showed deficient performance, not in misinforming Petitioner that he would be eligible for early release, but in misinforming Petitioner about the actual sentence he would serve.

C. Prejudice – PCR Court

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. The plea court's colloquy did not cure the misinformation about sentencing and Petitioner's undisputed testimony established prejudice.

1. Plea court's colloquy did not cure the misinformation about sentencing

During the guilty plea the judge asked, "Do you also understand that this crime carries a mandatory minimum sentence, which means the absolute minimum sentence that must be imposed is 30 years in prison. Do you understand that?" (App. p. 7, lines 14-17). The judge later asked, "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).

The plea court did not cure the error in counsels advice about the actual sentence Petitioner would serve. The plea judge did not advise Petitioner that he would be required to serve the "entirety" of his sentence. 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. When asked at the PCR hearing about the judge's comment during the plea, "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" 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. Hilliard testified that he advised Petitioner that murder was a no parole offense. (App. p. 52, lines 2-7). 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.

2. Petitioner's undisputed testimony is sufficient to show prejudice

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).

The PCR judge's reliance on Frasier is misplaced as the erroneous advice from counsel was not about parole eligibility but the sentence itself. 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).

The so called alternative and conflicting assertions noted in the order of dismissal 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 only have to serve eighty-five percent 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-five 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. Petitioner demonstrated prejudice.

D. Prejudice – the Court of Appeals

With regard to prejudice, the Court of Appeals wrote, "However, the plea hearing transcript reflects the plea court correctly advised Cumbee he would have to serve the entirety of his thirty-five-year sentence." Cumbee v. State, No. 2020-000966, 2024 WL 4403972, at *1 (S.C. Ct. App. Oct. 2, 2024). The plea court, however, did not advise Petitioner he would have to serve day-for-day "the entirety" of his thirty-five year sentence. The plea court advised Petitioner about the thirty-five year sentence, advised that murder carried a mandatory minimum sentence of thirty years, and was a no parole offense. (App. pp. 7-8). As discussed above, counsel Hilliard advised Petitioner that murder was a no parole offense but still advised that he would only have to serve eighty-five percent of the sentence. 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 serve the 35-year sentence. Do you understand that?" (App. p. 8, lines 12-15). The judge never used the word "entirety" or "day for day". The information conveyed by the plea judge that discussed no parole and the thirty-five year sentence could not have cured counsel's erroneous advice that Petitioner would only serve eighty-five percent of the thirty-five year sentence.

The Court of Appeals also wrote:

> Additionally, we find Cumbee failed to demonstrate that but for counsel's erroneous advice, he would have proceeded to trial: Cumbee acknowledged the veracity of the State's evidence during both his plea and PCR hearings, he

> testified inconsistently as to what motivated him to accept the State's plea offer, and plea counsel testified he was hired primarily in order to obtain a more favorable plea offer for Cumbee than his prior counsel. See Thompson v. State, 340 S.C. 112, 116, 530 S.E.2d 294, 297 (2000) ("To establish prejudice, the proper analysis is to determine whether there was a reasonable probability that, but for counsel's unprofessional errors, the defendant would not have pled guilty and would have insisted on going to trial."); Lee v. United States, 582 U.S. 357, 367 (2017) ("Where a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the [State] offers one."); Frasier, 351 S.C. at 389, 570 S.E.2d at 174 ("[I]f [plea] counsel actively misinforms the defendant about parole eligibility, the defendant must prove he relied on the misinformation to receive PCR.").

Cumbee v. State, No. 2020-000966, 2024 WL 4403972, at *1 (S.C. Ct. App. Oct. 2, 2024).

The Court of Appeals overlooked Petitioner's undisputed testimony that he would not have pled guilty but for the erroneous sentencing advice from two different lawyers. See Alexander v. State, 303 S.C. 539, 402 S.E.2d 484, (1991). Acknowledging the veracity of the State's case, inconsistent statements, and the reason for hiring a second attorney do not overcome Petitioner's undisputed testimony. Additionally, like the PCR court, the Court of Appeal's reliance on Frasier is misplaced as the erroneous advice from counsel was not about parole eligibility, but the sentence itself.

The reliance on Lee v. United States is also misplaced. In Lee the Court wrote:

> The Government asks that we, like the Court of Appeals below, adopt a *per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial. Brief for United States 26. As a general matter, it makes sense that a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing prejudice from accepting a guilty plea. But in elevating this general proposition to a *per se* rule, the Government makes two errors. First, it forgets that categorical rules are ill suited to an inquiry that we have emphasized demands a "case-by-case examination" of the "totality of the evidence." Williams v. Taylor, 529 U.S. 362, 391, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (internal quotation marks omitted); Strickland, 466 U.S., at 695, 104 S.Ct. 2052. And, more fundamentally, the Government overlooks that the inquiry we prescribed in Hill v. Lockhart focuses

> on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial.

Lee v. United States, 582 U.S. 357, 366–67, 137 S. Ct. 1958, 1966, 198 L. Ed. 2d 476 (2017).

"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)." Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018). 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). Petitioner showed deficient performance.

II. The Court of Appeals erred in refusing to find prejudice and grant relief when the Court of Appeals found plea counsel was deficient for failing to move to withdraw the plea and Petitioner proved prejudice by testifying that he would have asked plea counsel to withdraw the plea had he known about the day-for-day requirement.

A. Deficient Performance Found by the Court of Appeals

The Court of Appeals correctly found that plea counsel was ineffective in failing to move to withdraw the guilty plea. The Court of Appeals wrote, "We hold the PCR court erred in finding counsel was not deficient in failing to move to withdraw the plea. Plea counsel testified he did not understand at the time that the plea court's colloquy contradicted his understanding of Cumbee's eligibility for early release, and that misunderstanding was the reason that he did not attempt to withdraw the plea." Cumbee v. State, No. 2020-000966, 2024 WL 4403972, at *1

(S.C. Ct. App. Oct. 2, 2024). The Court of Appeals, misapprehended the nature of plea counsel's misunderstanding. The misunderstanding was **not** about **eligibility** for early release. The misunderstanding was about the amount of time Petitioner would serve. Both counsel advised that he would only have to serve eighty-five percent of the sentence. The misunderstanding was about the sentence itself, a direct consequence of the plea. Plea counsel Hilliard correctly advised Petitioner that murder was a no parole offense.

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). Hilliard incorrectly advised Petitioner about the actual sentence he would serve, eighty-five percent rather than day-for-day. Hilliard's misunderstanding was not about the possibility of parole or early release. While not conceding the argument above that the colloquy could not have cured the error, if 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, then plea counsel should have recognized that he had provided inaccurate advice and immediately moved to withdraw the plea. The Court of Appeals correctly found deficient performance.

B. Prejudice – the Court of Appeals

The Court of Appeals found that Petitioner failed to establish prejudice writing:

> However, we conclude there was probative evidence to support the PCR court's finding that Cumbee failed to establish he was prejudiced by counsel's deficiency: there was evidence in the record indicating Cumbee's misunderstanding of the

> collateral consequences of his sentence were unrelated to his decision to plead, that he agreed with the State's facts, and that he never intended to proceed to trial. See Thompson, 340 S.C. at 116, 530 S.E.2d at 297 ("To establish prejudice, the proper analysis is to determine whether there was a reasonable probability that, but for counsel's unprofessional errors, the defendant would not have pled guilty and would have insisted on going to trial."); Lee, 582 U.S. at 367 ("Where a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the [State] offers one."); *cf.* Jordan, 297 S.C. at 54, 374 S.E.2d at 685 (finding PCR applicant demonstrated he was prejudiced by counsel's failure to withdraw his plea because the record showed his "original vehemence" in pursuing a trial).

Cumbee v. State, No. 2020-000966, 2024 WL 4403972, at *2 (S.C. Ct. App. Oct. 2, 2024)

Again, the misunderstanding was not about collateral consequences of sentencing. The misunderstanding was about the sentence itself, a direct consequence of the plea. In finding that Petitioner failed to show prejudice the Court of Appeals overlooked Petitioner's undisputed testimony. See Alexander v. State, 303 S.C. 539, 402 S.E.2d 484, (1991). 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) . "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)." Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018). As discussed above in issue one, the reliance on Lee v. United States is misplaced. In Lee the Court wrote:

> The Government asks that we, like the Court of Appeals below, adopt a *per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial. Brief for United States 26. As a general matter, it makes sense that a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing prejudice from accepting a guilty plea. But in elevating this general proposition to a *per se* rule, the Government makes two errors. First, it forgets that categorical rules are ill suited to an inquiry that we have emphasized demands a "case-by-case examination" of the "totality of the evidence." Williams v. Taylor, 529 U.S. 362, 391, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (internal quotation marks omitted); Strickland, 466 U.S., at 695, 104 S.Ct. 2052. And, more fundamentally, the Government overlooks that the inquiry we prescribed in Hill v. Lockhart focuses on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial.

Lee v. United States, 582 U.S. 357, 366–67, 137 S. Ct. 1958, 1966, 198 L. Ed. 2d 476 (2017).

The fact that Petitioner may have agreed with the State's facts at the guilty plea does not overcome Petitioner's statement that he would not have entered the plea if he had been advised he would have to serve the sentence day for day. He did not intend to proceed to trial because he was advised he would only have to serve eighty-five percent. Petitioner demonstrated prejudice.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issues.

Respectfully Submitted,

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ATTORNEY FOR PETITIONER

This 23rd day of December, 2024.