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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

APPENDIX

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ISSUES PRESENTED

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

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

STATEMENT

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

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

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

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

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

STANDARD OF REVIEW

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

ARGUMENTS

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

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

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

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

Deficient Performance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' " Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

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

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

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

Prejudice

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

> In order to establish prejudice when challenging a guilty plea, a defendant must prove "there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have gone to trial." Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). As the United States Supreme Court stated in Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), "[I]n order to satisfy the 'prejudice' requirement, the defendant must show there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial."

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

In the order of dismissal the PCR judge wrote:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A: True. Yes.

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of September, 2023.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Georgetown County

Honorable William H. Seals, Circuit Court Judge

DENNIS CUMBEE, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000966

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Brief of Petitioner in the above-referenced case has been served upon Donald J. Zelenka, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Dennis Cumbee, #370848, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 14th day of September, 2023.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

RECEIVED
Feb 28 2024
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.

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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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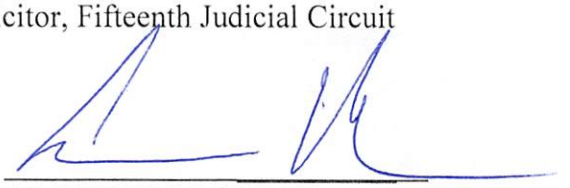
By: 
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February 28, 2024

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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.

PROOF OF SERVICE

I, Grace Sommer, certify that I have served the within Brief of Respondent on Kathrine H. Hudgins, Esquire, counsel of record for the Petitioner by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 28th day of February 2023.

Grace Sommer

Grace Sommer
Legal Assistant

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Dennis Cumbee, Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2020-000966

Appeal From Georgetown County
William H. Seals, Jr., Circuit Court Judge

Unpublished Opinion No. 2024-UP-321
Submitted September 1, 2024 – Filed October 2, 2024

AFFIRMED AS MODIFIED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Ambree Michele Muller, both of Columbia, for Respondent.

PER CURIAM: This court granted certiorari to review the post-conviction relief (PCR) court's finding that Petitioner Dennis Cumbee, Jr. failed to prove his plea counsel was ineffective in (1) misadvising him that he would be required to serve every day of his thirty-five-year sentence, and (2) failing to move to withdraw

Cumbee's guilty plea after the plea court asserted he would not be eligible for any type of early release. We affirm pursuant to Rule 220(b), SCACR.

1. 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. *See* S.C. Code Ann. § 16-3-20(A) (2015) (explaining that a person sentenced to a mandatory minimum term ranging from thirty years to life for murder is not eligible for parole, any early release program, or any other credits which would reduce his sentence); *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (holding that plea counsel is deficient if he "actively misinforms" a defendant about parole eligibility). 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. *See Burnett v. State*, 352 S.C. 589, 592, 546 S.E.2d 144, 145 (2003) ("When considering an allegation . . . that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether information conveyed by the plea judge cured any possible error made by counsel."). 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.").

2. 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. *See Jordan v. State*, 297 S.C. 52, 54, 374 S.E.2d 683, 685 (1988) (finding counsel deficient for failing to draw the plea court's attention to the

terms of a plea agreement and subsequently move to withdraw his client's plea after the State breached the terms of the agreement).

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).

AFFIRMED AS MODIFIED.[1]

WILLIAMS, C.J., and MCDONALD and TURNER, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

RECEIVED
Oct 17 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Georgetown County

Honorable William H. Seals, Circuit Court Judge

Opinion No. 2024-UP-321

DENNIS CUMBEE, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000966

Petition for Rehearing

Pursuant to Rule 221(a), SCACR, counsel for Petitioner, Dennis Cumbee, respectfully requests that this Court grant rehearing. On October 2, 2024, this Court 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). As to the first issue, this Court found that, "Plea counsel was deficient in misinforming Petitioner that he would be eligible for early release." This Court then, however, found that the plea court "correctly advised Cumbee he would have to serve the entirety of his thirty-five year sentence." This Court additionally found that Petitioner failed to demonstrate that but for counsel's erroneous advice, he would have proceeded to trial.

First, while this Court correctly found deficient performance, counsel respectfully submits that this Court misapprehended the erroneous advice provided by two different lawyers as advice about parole eligibility or eligibility for early release. The erroneous advice was **not** about parole eligibility or eligibility for early release. Instead, both lawyers misadvised Petitioner about the sentence he would serve, a direct consequence of the plea. Second, counsel respectfully submits that this Court overlooked the fact that the plea court did not specifically advise Petitioner that he would have to serve "the entirety" of his thirty-five year sentence. The plea court did not mention day-for-day or "the entirety" of the thirty-five year sentence. The information conveyed by the plea judge could not have cured the erroneous advice about sentencing provided by two lawyers. Third, counsel respectfully submits that this Court overlooked Petitioner's undisputed testimony that he would not have pled guilty but for the erroneous sentencing advice from two different lawyers.

As to issue two, this Court correctly found that plea counsel was deficient in failing to move to withdraw the guilty plea. This Court 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." While counsel for Petitioner agrees with the finding of deficient performance, counsel respectfully submits that this Court misapprehended the nature of plea counsel's misunderstanding. The misunderstanding was **not** about eligibility for early release. Instead, the misunderstanding was about the sentence itself, a direct consequence of the plea. 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 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. This Court correctly found deficient performance.

This Court, however, 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." Again, the misunderstanding was not about collateral consequences of sentencing. The misunderstanding was about the sentence itself.

As discussed above, in finding Petitioner failed to show prejudice, counsel respectfully submits that this Court overlooked Petitioner's undisputed testimony that he would not have pled guilty but for the erroneous sentencing advice from two different lawyers. If the lawyer had realized his mistake about sentencing during the guilty plea and he correctly advised Petitioner, Petitioner would not have proceeded with the guilty plea.

Counsel respectfully submits that in citing language from Lee v. United States, 582 U.S. 357 (2017), for the proposition that Petitioner failed to show prejudice in both issues, this Court overlooked the clear language from Lee, 582 U.S. at 358:

> The Government makes two errors in urging the adoption of a *per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial. First, it forgets that categorical rules are ill suited to an inquiry that 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 (internal quotation marks omitted); Strickland, 466 U.S., at 695, 104 S.Ct. 2052. More fundamentally, it overlooks that the Hill v. Lockhart inquiry focuses on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial.

Counsel respectfully seeks rehearing, a grant of relief, and a remand for a trial.

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

Petitioner pled guilty to murder for a negotiated thirty-five year sentence. Petitioner had no prior criminal record. (App. p. 16, lines 20-23). Prior to the guilty plea Petitioner was incorrectly advised, verbally and via written correspondence, by both of his lawyers, that he would only have to serve eighty-five percent of his sentence. (App. p. 62 lines 8 – 15). 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. (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 this Court

This Court 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." While this Court correctly found deficient performance, 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 senfencing

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. 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 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 – this Court

With regard to prejudice, this Court 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." Counsel respectfully submits that this Court overlooked the fact that the plea court 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). 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 serve eighty-five percent of the thirty-five year sentence.

This Court additionally 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." Counsel respectfully submits that this Court 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, this Court's reliance on Frasier is misplaced as the erroneous advice from counsel was not about parole eligibility, but the sentence itself.

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

A. Deficient Performance Found by this Court

This Court correctly found that plea counsel was ineffective in failing to move to withdraw the guilty plea. This Court 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." Counsel for Petitioner agrees with the finding of deficient performance. Counsel for Petitioner, however, respectfully submits that this Court misapprehended the nature of plea counsel's misunderstanding. The misunderstanding was **not** about **eligibility** for early release. Instead, 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. (App. p. 52, lines 2-7).

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, not 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. This Court correctly found deficient performance.

B. Prejudice – this Court

This Court 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." 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 counsel respectfully submits that this Court 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). 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. Counsel respectfully seeks rehearing, a grant of relief, and remand for trial.

Kathrine H. Hudgins
Senior Appellate Defender
South Carolina Commission on Indigent Defense
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PO Box 11589
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ATTORNEY FOR PETITIONER

This 17th day of October, 2024.

RECEIVED
Oct 17 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Georgetown County

Honorable William H. Seals, Circuit Court Judge

DENNIS CUMBEE, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000966

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Ambree M. Muller, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Dennis Cumbee, #370848, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 17th day of October, 2024.

Kathrine H. Hudgins
Senior Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

RECEIVED
Oct 25 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Georgetown County
Court of Common Pleas

The Honorable William H. Seals, Circuit Court Judge

Appellate Case No. 2020-000966

Dennis Cumbee, Jr., ... Petitioner,

v.

State of South Carolina, ... Respondent.

Unpublished Opinion No. 2024-UP-321, filed October 2, 2024

RETURN TO PETITION FOR REHEARING

Petitioner Dennis Cumbee, Jr. filed a petition for rehearing in response to this Court's October 2, 2024, opinion affirming as modified the order of the PCR court denying relief on October 17, 2024. This Court requested a return to the petition on October 18, 2024. The State respectfully submits that this Court properly found that PCR relief should be denied.

Petitioner requests a rehearing based on the argument that this Court correctly found that plea counsel was deficient in his advice about parole eligibility, but that it should have also found that plea counsel was deficient in misadvising regarding Petitioner's sentence. Petitioner further argues that this Court overlooked that the plea court did not specifically advise Petitioner that he would have to serve "the entirety" of his thirty-five-year sentence and therefore the information conveyed by the plea judge could not have cured the erroneous advice about sentencing.

This Court correctly found that plea counsel was not ineffective in misadvising Petitioner regarding his sentence because the plea transcript reflects that Petitioner was advised by the plea court that he would have to serve the entirety of his sentence. The Plea 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). The plea court specifically told him he would not be eligible for parole and therefore cured any deficiencies that either attorneys may have caused.

Further, Petitioner argues that this Court overlooked Petitioner's undisputed testimony that he would not have pled guilty but for the erroneous sentencing advice from two different lawyers. This Court properly found that Petitioner failed to demonstrate that but for counsel's erroneous advice, he would have proceeded to trial. This Court properly pointed to multiple instances in the record such as Petitioner 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 Petitioner that his prior counsel.

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 also argues that while this Court properly found that the PCR court erred in finding plea counsel not deficient in failing to move to withdraw the plea, this Court overlooked Petitioner's testimony that he would not have pled but for the erroneous sentencing and therefore showed prejudice. For the reasons listed above, this Court properly found that there was probative evidence to support the PCR court's finding that Petitioner failed to establish he was prejudiced by counsel's deficiency because there was evidence in the record indicating Petitioner'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. Therefore, this Court properly found that the statements were admissible and Cumbee's petition for rehearing should be denied.

CONCLUSION

For all the foregoing reasons, the petition for rehearing should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

AMBREE M. MULLER
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BY: _____
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ATTORNEYS FOR RESPONDENT

October 25, 2024

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Georgetown County
Court of Common Pleas

The Honorable William H. Seals, Circuit Court Judge

Appellate Case No. 2020-000966

Dennis Cumbee, Jr., ... Petitioner,

v.

State of South Carolina, ... Respondent.

Unpublished Opinion No. 2024-UP-321, filed October 2, 2024

PROOF OF SERVICE

I, Grace Sommer, certify that I have served the within Return to Petition for Rehearing on Kathrine H. Hudgins, counsel of record for the Petitioner by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 25th day of October, 2024.

Grace Sommer
Legal Assistant

Office of the Attorney General
Post Office Box 11549
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(803) 734-3727

The South Carolina Court of Appeals

Dennis Cumbee, Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2020-000966

ORDER

After careful consideration of the petition for rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ C.J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Kathrine Haggard Hudgins, Esquire
Ambree Michele Muller, Esquire
Alan McCrory Wilson, Esquire
Dennis Cumbee, 00370848
The Honorable William H. Seals, Jr.

FILED
Nov 21 2024