THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Diane S. Goodstein, Circuit Court Judge

Case No. 2006-CP-38-00273
Appellate Case No. 2013-00637

Levi Bing, Jr., Petitioner,

vs.

State of South Carolina, Respondent.

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Can an allegation of ineffective assistance of trial counsel be raised to the circuit court for the first time by a motion under Rule 60(b) of the South Carolina Rules of Civil Procedure, or must such an allegation be raised by filing a new application for Post-Conviction Relief?

II. Whether the lower court erred in finding that Petitioner's motion pursuant to Rule 60(b) of the South Carolina Rules of Procedure was improper, untimely and meritless.

STANDARD OF REVIEW

The reviewing court will uphold the findings of the PCR court if there is any evidence of probative value to support those findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, if no probative evidence supports those findings, the reviewing court will not uphold the findings of the PCR court. Jackson v. State, 355 S.C. 568, 570, 586 S.E.2d 562, 563 (2003). Furthermore, the reviewing court will reverse the PCR court's decision when it is controlled by an error of law. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

STATEMENT OF THE CASE

During the March 2004 term of the Orangeburg County Grand Jury, Petitioner was indicted for Murder (2003-GS-38-2411), Grand Larceny (2003-GS-38-2412), and Possession of a Weapon during the Commission of a Violent Crime (2003-GS-38-2413). App. p. 187. Petitioner was represented by John Delgado, Esquire, and Michael R. Culler, Jr., Esquire.On March 14, 2005, Petitioner pled guilty and was sentenced by the Honorable Deadra L. Jefferson to concurrent periods of forty (40) years for Murder, ten (10) years for Grand Larceny and five (5) years for Possession of a Weapon. App. p. 22. Petitioner did not appeal his conviction or sentence.

On March 7, 2006, Petitioner filed an Application for Post-Conviction Relief in Orangeburg County. App. p. 25. On June 25, 2007, an evidentiary hearing was conducted at the Dorchester County Courthouse in front of the Honorable Diane S. Goodstein. App. p. 37. Petitioner was represented by Belinda Davis-Branch, Esquire, and the State was represented by Lance S. Boozer, Esquire. On September 7, 2007, the Honorable Diane S. Goodstein issued an Order of Dismissal with Prejudice.[1] App. p. 178.

A timely appeal was filed and a Johnson Petition for Writ of Certiorari was submitted by Wanda H. Carter, of the South Carolina Office of Appellate Defense. App. p. 193. Petitioner submitted an "Initial Pro Se Brief of Petitioner" on January 27, 2009, which raised the following issue: "Whether the PCR judge erred by failing to find

[1] The Order of Dismissal was issued prior to the South Carolina Supreme Court's ruling in Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007) (Holding that Applicant did not make a Rule 59(e) motion asking the PCR court to make specific findings of fact and conclusions of law on his allegations; therefore, the issues were not preserved for appellate review, and the Court of Appeals erred in addressing the merits of the issues and remanding the matter to the PCR judge.). Here, Petitioner's PCR counsel did not file a Motion Pursuant to Rule 59(e), SCRCP.

defense counsel ineffective for advising petitioner with incorrect parole eligibility that induced involuntary plea." App. p. 203. On June 10, 2009, the South Carolina Supreme Court entered an Order denying the Petition for Writ of Certiorari. App. p. 216. The Remittitur was issued on June 29, 2009. App. p. 217.

On July 1, 2009, Petitioner filed a *pro-se* Petition for Writ of Habeas Corpus and later retained Tara D. Shurling, Esquire. App. p. 218. On May 28, 2010, the Honorable R. Bryan Harwell, United States District Judge, issued an Order granting the Respondent's Motion for Summary Judgment. App. p. 327. In adopting the Magistrates Judge's Report and Recommendation, the court addressed Petitioner's claim that plea counsel admitted at the evidentiary hearing that he misadvised Petitioner on parole eligibility and Petitioner's testimony that he was misadvised that he would serve eighty-five percent (85%) and be parole eligible, and the court acknowledged the State's assertion that the issue was not properly preserved or exhausted.

On June 28, 2010, Petitioner, *pro-se*, filed an appeal of the Judgment to the United States Court of Appeals for the Fourth Circuit. App. p. 341. On January 13, 2011, the United States Court of Appeals issued an Order of Denial. App. p. 347. Petitioner filed a timely Petition for Rehearing, which was denied on February 23, 2011. App. p. 353, 363. On March 3, 2011, the United States Court of Appeals for the Fourth Circuit issued a Mandate by which the Order entered on January 13, 2011 took effect. App. p. 364.

On February 13, 2012, Petitioner filed a Motion for Relief from Order of Dismissal with Prejudice Pursuant to Rule 60(b), SCRCP, in Orangeburg County. App. p. 366. On May 21, 2012, the State submitted a Return to Rule 60(b) Motion for Relief

from Order of Dismissal. App. p. 371. On September 6, 2012, a motion hearing was conducted in front of the Honorable Diane S. Goodstein at the Orangeburg County Courthouse. App. p. 378. Petitioner was present and represented by Tricia A. Blanchette, Esquire. The State was represented by Megan Harrigan, Assistant Attorney General. At the conclusion of the hearing, the court requested that both parties submit proposed Orders.

On November 6, 2012, an Order Denying Rule 60(b), SCRCP, Motion For Relief From Order of Dismissal With Prejudice was issued and later filed on November 13, 2013. App. p. 394. On November 28, 2013, Petitioner, through counsel, filed a timely Motion for Rehearing Pursuant to Rule 59(a), SCRCP, and Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP. App. p. 401. On January 2, 2013, the State filed a Return asking that the Motion be denied. App. p. 416. On February 8, 2013, an Order Dismissing Applicant's Motion For Rehearing Pursuant to Rule 59(a), SCRCP, and Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP was issued and later filed on February 27, 2013. App. p. 418. On March 27, 2013, Petitioner, through counsel, filed a Notice of Intent to Appeal. On April 3, 2013, this Court issued an Order instructing Petitioner to address the following issue in addition to any issues that may be raised in the Petition for Writ of Certiorari:

> Can an allegation of ineffective assistance of trial counsel be raised to the circuit court for the first time by a motion under Rule 60(b) of the South Carolina Rules of Civil Procedure, or must such an allegation be raised by filing a new application for post-conviction relief?

On September 9, 2013, the evidentiary hearing transcript was received, from which this Petition for Writ of Certiorari follows.

ARGUMENT

I. An allegation of ineffective assistance of trial counsel cannot be raised to the circuit court for the first time by a motion under Rule 60(b) of the South Carolina Rules of Civil Procedure, such an allegation must be raised by filing a new application for Post-Conviction Relief.

By way of this Court's Order, Petitioner has been instructed to address whether an allegation of ineffective assistance of trial counsel can be raised to the circuit court **for the first time** by a motion under Rule 60(b) of the South Carolina Rules of Civil Procedure, or must such an allegation be raised by filing a new application for Post-Conviction Relief (emphasis added). As the parties' attention was directed to in this Court's Order dated April 3, 2013, in Hendricks v. State, 387 S.C. 221, 692 S.E.2d 892 (2010), this Court took the opportunity to address the interplay between Rule 60(b), SCRCP, and S.C. Code Ann. § 17-25-45 (B) (Supp. 2009). This Court held: "Where, as here, the General Assembly has provided a specific procedure to be followed in PCR cases, ant that method is inconsistent with the more general procedure of SCRCP, the statutory procedure must be followed." Id. at 223, 692 S.E.2d at 893. Therefore, the notice of appeal was dismissed and the matter was remanded to the circuit court with instructions to consider the Rule 60(b), SCRCP, Motion as a Post-Conviction Relief Application. Id.

Similarly to Hendricks, a careful review of the statutory language of S.C. Code § 17-25-45(c), provides a clear answer to whether an issue of ineffective assistance of counsel should be raised for the first time via a PCR Application or Rule 60(b), SCRCP, Motion. S.C. Code § 17-25-45(c) provides:

> If the applicant contends that there is evidence of material facts **not previously presented and heard** that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual

> discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of due diligence (emphasis added).

As in Hendricks, the General Assembly has provided a specific procedure to follow when there is evidence of material facts, such as a claim of ineffective assistance of trial counsel, that was not previously presented and heard or is being raised for the first time. Therefore, Petitioner concludes that an issue being raised for the first time, which is after discovered, is properly brought under S.C. Code § 17-25-45(c).[2]

In contrast, Rule 60(b), SCRCP, does not directly address "evidence of material facts not previously heard or presented" and provides, in part:

> Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud, misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.
>
> The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken.

[2] Petitioner is not addressing S.C. Code Ann. § 17-25-45 (a), which addresses the filing of a first PCR Application since this Court's question and the facts of the case point to the filing of a second PCR Application.

It is also instructive that Rule 60(b)(2), SCRCP, refers to Rule 59(b), SCRCP. Unlike Rule 60(b), SCRCP, this Court has set forth a clear line of cases interpreting the role of a Rule 59(b), SCRCP, Motion in the area of Post-Conviction Relief.

Here, Petitioner is not arguing that he has newly discovered evidence on an issue of ineffective assistance of counsel and is thus raising the issue for the first time, but Petitioner has argued that he has newly discovered evidence under Rule 60(b)(1)&(2), SCRCP, that his previously raised issue of ineffective assistance of plea counsel was not properly ruled upon by the lower court. As was argued to the lower court, Petitioner submits that the instant case is directly in line with Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992). In Pruitt, this Court vacated the Post-Conviction Relief court's order and remanded for a ruling on an issue **that was properly raised at the evidentiary hearing** but not addresses in the order (emphasis added). Id. This Court noted that it was not abandoning the general rule that issues must be raised and ruled on by the lower court to be preserved for appellate review but took the opportunity to remind the lower court, as follows:

> We take this opportunity to express our concern with the increasing number of orders in PCR proceedings that fail to address the merits of the issues raised by the applicant. Not only does this deprive the parties of rulings on the issues raised, but it makes review by the appellate court more difficult and ultimately increases the work load of all involved where, as in this case, a new hearing is required to secure the rulings which should have been made initially.

Pruitt, 310 S.C. at 255-6, 423 S.E.2d at 128.

Following Pruitt, this Court further developed the case law in this area with Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007). In Marlar, this Court held that failure to specifically rule on issues presented at an evidentiary hearing precluded

appellate review of those issues. This Court further explained that the Applicant's failure to file a Motion pursuant to Rule 59(e), SCRCP, asking the PCR court to make specific findings of fact and conclusions of law precluded those issues from being properly preserved for appellate review. Id. at 410, 653 S.E.2d at 267. It must be noted that Petitioner argued to the lower court that the Final Order of Dismissal was filed prior to this Court's ruling in Marlar and noted that PCR counsel did not file a Rule 59, SCRCP, Motion.

In Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010), this Court addressed whether it was proper to raise issues for the first time in a Rule 59, SCRCP, Motion, and whether such issues were preserved for appellate review. This Court found that "the State's argument regarding Kolle's lack of standing was not preserved for this Court's consideration." Id. at 589, 690 S.E.2d at 79. This Court reasoned as follows:

> Based upon our review of the record, the State did not raise this claim at the PCR hearing but did so only in its motion for reconsideration. Therefore, this argument is not properly before this Court. See Palacio v. State, 333 S.C. 506, 514 n.7, 511 S.E.2d 62, 66 n.7 (1999) (concluding issue that was neither raised to nor ruled upon by the PCR court was not preserved for appellate review); see also Johnson v. Sonoco Prods. Co., 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) (recognizing that an issue may not be raised for the first time in a motion to reconsider).

Id. As a result of this Court's reasoning in Kolle, it seems natural to conclude that the limits placed on a Rule 59, SCRCP, Motion would also be applied to a Rule 60 (b), SCRCP, Motion.

Based upon the clear statutory language of S.C. Code § 17-25-45(c) and the instructive case law dealing with Rule 59(e), SCRCP, Petitioner concludes an allegation of ineffective assistance of trial counsel cannot be raised to the circuit court for the first

time by a motion under Rule 60(b), SCRCP, such an allegation must be raised by filing a new application for PCR. As a result, Petitioner submits that only issues that were raised to the lower court at the evidentiary hearing are proper to address via a Rule 60(b), SCRCP, Motion, which is the reason that Petitioner brought his claim under Rule 60(b), SCRCP, as is further discussed below.

II. The lower court erred in finding that Petitioner's motion Pursuant to Rule 60(b) of the South Carolina Rules of Procedure was improper, untimely and meritless.

By way of a Motion for Relief from Order of Dismissal with Prejudice Pursuant to Rule 60(b), SCRCP, Petitioner argued that the lower court failed to address in her original Order of Dismissal whether plea counsel was ineffective for misadvising Petitioner that he would be eligible for parole and serve eighty-five percent of his forty (40) year sentence. As a threshold matter, Petitioner submits that the lower court's order is clearly erroneous in finding: "This issue was not before the post-conviction relief court, as Applicant asserted this issue for the first time in his *pro-se* "Initial *Pro Se* Brief of Petitioner." App. p. 398. Petitioner concedes that the issue would not have been properly before the lower court if it had not been raised at the evidentiary hearing as detailed below.

As was explained at the motion hearing, the lower court noted at the beginning of the evidentiary hearing held in June 2007 that the Application alleged "ineffective assistance of counsel which yielded an involuntary guilty plea" but failed to provide specific supporting grounds. App. p. 39. Thereafter, both parties indicated that they were ready to proceed, and Petitioner was called to the stand. App. pp. 39-40.

While on the stand, Petitioner recalled having a conversation with his family after his plea about his understanding that he would have a parole date but he did not have one. App. p. 48. Petitioner explained the advice he received from counsel prior to the entry of his plea, as follows:

> Q: Mr. Bing, what is your sentence for the murder of the gentleman we've been talking about today? What is your sentence? What did the Court sentence you?
>
> A: Forty years day-for-day, mandatory.

Q: What was your understanding before you received that sentence from your attorneys?

A: That I would be eligible for a parole date.

Q: And have you been told differently?

A: Yes, ma'am.

Q: What have you been told now?

A: That I will have to do 40 years day-for-day.

Q: Okay. And—

A: One hundred percent.

Q: Had you known that at an earlier time, at the time you took your plea, would that have made a difference?

A: Yes, ma'am.

Q: Do you feel your attorneys misled you, as far as that statement's concerned.

A: Yes, ma'am.

Q: Okay. And have you been harmed by those statements?

A: Yes, ma'am.

App. pp. 156-157, lns. 22-25, 1-23. After being questioned by the court, Petitioner further explained that Mr. Delgado told him after his plea that he would only have to serve 85% of his sentence. App. p. 159, lns. 17-25. Petitioner also made it clear that he did not voluntarily plead guilty and he was pushed into the plea by his attorneys. App. pp. 59-60.

When John Delgado, Esquire, took the stand, he was asked whether Petitioner requested that he file an appeal. In his response, he stated: "He will be eligible for parole

one day and he will walk out of jail on day with that sentence. I thought it would be contrary to his best interest to have appealed." App. p. 97, lns. 7-11. He further testified as follows:

> Q: Okay. Are you aware of the fact that he's not eligible for parole?
>
> A: No, ma'am.
>
> Q: I'm sorry?
>
> A: I thought 40 years he is eligible for parole, ma'am. Is he not?
>
> Q: Mr. Bing doesn't think he's eligible for parole?
>
> A: I think he is eligible for parole if you get a numerical sentence, ma'am, 85 percent of that 40 years, he is eligible for parole.

App. pp. 98-99, lns. 16-25, 1-2.

Petitioner submits that the issue of counsel's misadvice was clearly raised at the evidentiary hearing and before the lower court pursuant to Rule 15(b), SCRCP, which provides:

> **Amendments to Conform to the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall upon motion grant a continuance reasonably necessary to enable the objecting party to meet such evidence. Upon allowing any such amendment or evidence the Court shall state in the record the reason or reasons for allowing the amendment or evidence. In the event the Court should try issues not raised by the pleadings, it shall state in the record all such issues tried and the reason therefor.

Furthermore, the lower court focused her questions at the close of the hearing on this issue that she has now found was first presented by Petitioner in his *pro-se* appellate pleading. App. pp. 158-160. Petitioner submits that this finding is clearly erroneous and not supported by the record.

After the Order of Dismissal was issued on September 7, 2007, PCR counsel did not file a motion under Rule 59, SCRCP, asking the lower court to rule on the issue of counsel's misadvice regarding the service of his sentence and parole eligibility. It must be noted that the Order was issued prior to this Court's ruling in Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007) (Holding that Applicant did not make a Rule 59(e) motion asking the PCR court to make specific findings of fact and conclusions of law on his allegations; therefore, the issues were not preserved for appellate review, and the Court of Appeals erred in addressing the merits of the issues and remanding the matter to the PCR judge.). Since counsel did not file a motion, the case proceeded to appeal. Appellate counsel submitted a Johnson Petition for Writ of Certiorari, which raised the following issue: "The PCR court erred in denying petitioner's allegation that he did not voluntarily and intelligently waive his right to a direct appeal in the case." App. p. 195.

Even after Petitioner submitted his *pro-se* Petition that raised the following issue: "Whether the PCR judge erred by failing to find defense counsel ineffective for advising petitioner with incorrect parole eligibility that induced involuntary plea," appellate counsel did not request leave of the Court to file a Motion Pursuant to Rule 60(b), SCRCP. App. p. 206. On June 10, 2009, this Court entered an Order denying the Petition for Writ of Certiorari. App. p. 216. Petitioner submits that this Court's denial of certiorari does not amount to a ruling on the merits of issue raised in his *pro-se* Petition and is

merely the denial of a discretionary review without precedential value or collateral effect. See Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989) (Reasoning that a denial of Writ of Certiorari carries no precedential value and opinions accompanying the denial of certiorari cannot have the same effect of a decision on the merits of the case); State v. Rucker, 321 S.C. 552, 471 S.E.2d 145 (1996) (Holding that a denial of a Petition for Writ of Certiorari does not dismiss or deny the underlying appeal, it simply determines that the court does not desire to review the decision of the lower court.).

As is detailed in the Statement of the Case, Petitioner filed a Petition for Habeas Corpus following the dismissal of his PCR appeal. App. p. 218. On March 3, 2011, the United States Court of Appeals for the Fourth Circuit issued a Mandate by which the Order entered on January 13, 2011 took effect; thus concluding Petitioner's Habeas Corpus Petition. App. p. 364.

At the motion hearing and in his proposed Order, Petitioner acknowledged that his motion may be considered untimely under a strict reading of Rule 60(b)(1)&(2) SCRCP, but he asked the lower court to find that the instant motion was filed within one year of the conclusion of his federal filings on the Order of Dismissal, which he claimed was the time when he discovered that the issue needed to be properly addressed by the lower court. Additionally, Petitioner urged the lower court and urges this Court to find that he has proven himself to be a diligent in his filings and as a matter of equity this issue must be addressed. See Pelzer v. State, 378 S.C. 516, 662 S.E.2d 618 (2008) (Finding equitable tolling is available if such tolling is necessary to prevent unfairness to a diligent plaintiff.).

At the motion hearing, the lower court was not concerned with the propriety or timeliness of Petitioner's Motion, and she summarized Petitioner's position as follows:

> I've got it, and the reason as I understand it, he doesn't – it is his position that he needed a specific findings with regards to the parole and it is his position that Mr. Delgado did not explain adequately the failure to be eligible for parole; that this was a negotiated forty years with a death sentence off the table for the forty years – to serve forty years. That he believed based on the information that he obtained from Mr. Delgado that he would be eligible for parole, and there is not a specific finding of that – there was not a specific finding as to the parole or with regard to the parole issue. That he has found himself on appeal, that he has found himself in Federal Court, and would like for the Courts to address the issue. What he is hearing time and again is that wasn't preserved because there is not any specific findings regarding the issue of parole.

PCR pp. 386-7. Even though the court acknowledged the problem at the motion hearing, the subsequent Order errantly found that the issue was not properly before the lower court and essentially was not her problem to fix. Petitioner's submits that the failure to rule on the issue of counsel's misadvice must be addressed by the lower court and would ask this Court to remand for such to be done.

In Pruitt, this Court vacated the Post Conviction Relief court's order and remanded for a ruling on an issue that was properly raised at the evidentiary hearing but not addresses in the order. Id. This Court noted that it was not abandoning the general rule that issues must be raised and ruled on by the lower court to be preserved for appellate review but took the opportunity to remind the lower court, as follows:

> We take this opportunity to express our concern with the increasing number of orders in PCR proceedings that fail to address the merits of the issues raised by the applicant. Not only does this deprive the parties of rulings on the issues raised, but it makes review by the appellate court more difficult and ultimately increases the work load of all involved where, as in this case, a new hearing is required to secure the rulings which should have been made initially.

Pruitt, 310 S.C. at 255-6, 423 S.E.2d at 128. As was held in Pruitt, Petitioner argued to the lower court and respectfully submits to this Court that it is necessary to address this issue that was raised at the evidentiary hearing and not addressed in the Order of Dismissal with Prejudice.

As was previously conceded by Petitioner, the federal court ultimately addressed the issue in question but acknowledged the State's argument that it was procedurally barred. Of concern is that the federal court was bound by the doubly deferential standard of review under which an error must reach rare magnitude before the federal courts will grant relief. This standard was addressed by the 4th Circuit in Scanlon v. Harkleroad, 467 Fed.Appx. 164 (4th Cir. 2012), as follows:

> In the Strickland context, a federal habeas court "must determine what arguments or theories supported or, [if none were stated], could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." Id. Habeas relief is appropriate only if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." Id. The Court reminded lower courts that, even without § 2254's deference, the Strickland standard "is a most deferential one." Id. at 788. Moreover, "[w]hen combined with the extra layer of deference that § 2254 provides, the result is double deference and the question becomes whether 'there is any reasonable argument that counsel satisfied Strickland's deferential standard.'" Johnson v. Sec'y, DOC, 643 F.3d 907, 910-11 (11th Cir. 2011) (quoting Harrington, 131 S.Ct. at 788). "Double deference is doubly difficult for a petitioner to overcome, and it will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding." Id. at 911.

If the issue had been addressed in the first instance by the lower court, then it would have been examined solely under the Strickland standard of review. Therefore, Petitioner submits such review is absolutely necessary since pursuant to the Strickland standard,

counsel's misadvice is clear error and prejudicial under established South Carolina precedent.

In Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985), the Supreme Court of the United States addressed whether Hill's guilty plea was involuntary as a result of ineffective assistance of counsel when his court appointed attorney supplied him with information about parole eligibility that was erroneous. The Court reasoned:

> 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." North Carolina v. Alford, 400 U.S. 25, 31 (1970); see Boykin v. Alabama, 395 U.S. 238, 242 (1969);Machibroda v. United States, 368 U.S. 487, 493 (1962). Here petitioner does not contend that his plea was "involuntary" or "unintelligent" simply because the State through its officials failed to supply him with information about his parole eligibility date. We have never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary, and indeed such a constitutional requirement would be inconsistent with the current rules of procedure governing the entry of guilty pleas in the federal courts. See Fed. Rule Crim. Proc. 11(c); Advisory Committee's Notes on 1974 Amendment to Fed. Rule Crim. Proc. 11, 18 U. S. C. App., p. 22 (federal courts generally are not required to inform defendant about parole eligibility before accepting guilty plea). Instead, petitioner relies entirely on the claim that his plea was "involuntary" as a result of ineffective assistance of counsel because his attorney supplied him with information about parole eligibility that was erroneous. Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. 759, 771 (1970). As we explained in Tollett v. Henderson, 411 U.S. 258 (1973), a defendant who pleads guilty upon the advice of counsel "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann." Id., at 267.
> Id. at 56, 106 S.Ct. at 369.

As was made clear by the Supreme Court of the United States in Hill, the proper analysis is not whether the State or the plea court furnished Applicant with the proper

information regarding his parole eligibility or service of his sentence, but whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. In Hill, the Supreme Court reasoned that the claim of ineffective assistance failed for the following reasons: "Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial. He alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty." 474 U.S. at 60, 106 S.Ct. at 371.

Here, Petitioner clearly alleged that counsel's misadvice made a difference in his decision to forego trial and that he felt pushed into taking a plea. In South Carolina, A guilty plea is not rendered involuntary if the defendant is not informed of the collateral consequences of his sentence. Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991). Typically, parole eligibility is considered a collateral consequence of a sentence. However, if trial counsel actively misinforms the defendant about parole eligibility, the defendant must prove he relied on the misinformation to receive post conviction relief. Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997); Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983); See also Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1988) (An inmate was entitled to post conviction relief because he received ineffective assistance of counsel when his attorney misstated the law with regard to his eligibility for parole and the inmate relied on the advice in pleading guilty to murder.); Coats v. State, 352 S.C. 500, 575 S.E.2d 557 (2003) (Denial of claim for post conviction relief was reversed and remanded for evidentiary hearing as inmate was informed by counsel that he was parole eligible.); Tilley v. State, 334 S.C. 24, 511 S.E.2d 689 (1999) (Application

was not successive because inmate could not raise the issue of the voluntariness of his plea based on his ineligibility for parole where respondent recently learned of his ineligibility.).

As the record of the evidentiary and motion hearing reflects, the lower court questioned Petitioner and counsel about the plea court's comments and was concerned with whether the plea court's comments cured any issue of misadvice offered by counsel. App. pp. 160-1. At the plea, the court informed Petitioner that she was making no representations about the amount of time he would have to serve and no one could tell him when he would be eligible for parole prior to sentencing so he needed to assume that he would serve "the entire time in jail that you are sentenced to." App. pp. 7-8. Petitioner submits that the questions and comments provided by the plea court do not trump counsel's incorrect advice nor does it cure the prejudice suffered. Furthermore, an analysis based upon the plea courts statements would be an erroneous application of the mandated Strickland standard. In Hill, the Supreme Court of the United States made it clear that the "voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." 474 U.S. at 57, 106 S.Ct. at 369. Petitioner submits that the reasoning set forth in Hill and detailed above is instructive in establishing that the statements of the plea court did not cure the clear error committed by counsel. See Frasier v. State, 351 S.C. 385, 570 S.E.2d 172 (2002) (Where a plea judge explains the minimum criteria for parole eligibility as contained in the applicable statute, the fact that the defendant is not actually eligible for parole does not render his guilty plea involuntary or unknowing.). Clearly, it is the advice given by

counsel prior to the entry of the plea not the words spoken by the plea court that must be analyzed under Strickland.

Therefore, Petitioner submits that counsel's clear error amounted to ineffective assistance of counsel that was not cured by the plea colloquy when he improperly advised Petitioner that he would not serve his sentence day for day and he would be eligible for parole. Counsel's failure to properly advise Petitioner on the law regarding the service of his sentence was highly prejudicial in light of Petitioner's testimony that he felt pushed into taking the plea and if he had known that his sentence required day for day service without parole it would have made a difference in his ultimate decision to take the plea.

Despite the lower court making it clear on the record that she understood the issue and resulting problem, the lower court failed to rule on the issue in the Order of Dismissal and failed to take the second opportunity offered via Petitioner's Rule 60(b), SCRCP, Motion to properly rule on the issue and grant relief. Petitioner submits that the lower court erred in so doing and would urge this Court to reverse the decision of the lower court and grant a new trial.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant this Petition for Writ of Certiorari and allow the Petitioner to proceed to briefing the requested issues under Rule 243(j), SCACR, or reverse the lower court's standing Order.

Respectfully submitted,

Tricia A. Blanchette
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ATTORNEY FOR PETITIONER

This 6 day of November, 2013.

LAW OFFICE OF TRICIA A. BLANCHETTE

November 6, 2013

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Levi Bing, Jr. v. State; Appellate Case No.: 2013-00637

Dear Sir:

For filing in the above referenced PCR appeal, attached please find:

1) An original and six copies of the Petition for Writ of Certiorari;
2) An unbound original and one copy of the Appendix; and
3) The Certificate of Service.

Thank you for your assistance with this matter. Please contact my office with any questions.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Megan Harrigan, Assistant Attorney General
Levi Bing, Jr.

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Diane S. Goodstein, Circuit Court Judge

Case No. 2006-CP-38-00273
Appellate Case No. 2013-00637

Levi Bing, Jr., Petitioner,

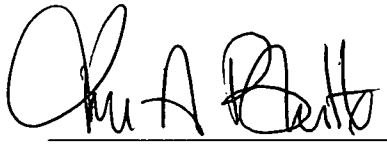
vs.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that I that I hand delivered this 6th day of November 2013, a copy of the Petition for Writ of Certiorari and Appendix to Megan Harrigan of the Attorney General's Office, at:

Office of the Attorney General
ATT: Megan Harrigan, Ast. AG
1000 Assembly Street, Room 519
Columbia, SC 29201



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November 6, 2013