

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM PICKENS COUNTY  
Court of Common Pleas

**RECEIVED**

NOV 24 2014

The Honorable G. Edward Welmaker, Circuit Court Judge

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**S.C. Supreme Court**

Appellate Case No. 2014-000296

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Rodney D. Young, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

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**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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ALAN WILSON  
Attorney General

KAREN C. RATIGAN  
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ATTORNEYS FOR RESPONDENT

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## QUESTION PRESENTED

1. Whether the PCR court erred in finding that plea counsel provided effective assistance of counsel where Petitioner would have not pled guilty to the charge of distribution of crack cocaine, second offense, and the related proximity charge had he not been misadvised by plea counsel that he would only have had to serve 65% of that sentence when the second offense distribution charge actually requires Petitioner to serve at least 85% of the sentence?

## STATEMENT OF THE CASE

The Pickens County Grand Jury indicted Petitioner at the September 2012 term of General Sessions for distribution of cocaine base (crack cocaine) (2011-GS-39-1794), distribution of marijuana (2011-GS-39-1798), distribution of crack cocaine within 1/2 mile of a park (2011-GS-39-1799), and distribution of marijuana within close proximity of a park (2011-GS-39-1800). (App.pp.78-97). John W. DeJong, Esquire represented Petitioner.

On January 29, 2013, Petitioner pled guilty.<sup>1</sup> The Honorable Edward W. Miller sentenced Petitioner to concurrent terms of 18 years suspended on service of 8 years and 3 years probation for distribution of cocaine base, second offense, 8 years for distribution of marijuana, second offense, 8 years for distribution of crack cocaine within 1/2 mile of a park, and 8 years for distribution of marijuana within close proximity of a park. (App.p.13). Petitioner did not appeal.

Petitioner filed an application for post-conviction relief (PCR) on May 13, 2013 (2013-CP-39-0649). (App.pp.15-25). A hearing was held at the Pickens County Courthouse on December 16, 2013. (App.pp.34-67). Petitioner was present and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable G. Edward Welmaker denied relief in an order filed January 22, 2014. (App.pp.69-77).

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<sup>1</sup> The State not prossed indictments for possession of a pistol by a person convicted of a violent crime (2011-GS-39-1792), two counts of distribution of cocaine base (crack cocaine) (2011-GS-39-1793, -1796), two counts of distribution of cocaine base within 1/2 mile of a park (2011-GS-39-1795, -1797), and possession of contraband in county prison (2012-GS-39-2790).

## STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

## ARGUMENT

**The PCR judge did not err in finding Petitioner failed to meet his burden of proving ineffective assistance of plea counsel.**

Petitioner argues the PCR judge erred in denying his PCR application because plea counsel gave him erroneous advice that he would serve 65% of his sentence and he was prejudiced by that advice. This argument is without merit.

At the PCR hearing, Petitioner argued plea counsel “told me that I’ll be doing sixty-five, and I’ll be eligible for parole and work release.” Petitioner argued he would not have pled guilty if he had known he would serve eighty-five percent of his sentence. (App.p.49). Plea counsel testified “I can’t honestly say that I told him it would be an eighty-five percent.” (App.p.60).

In denying Petitioner’s application for post-conviction relief, the PCR judge found “plea counsel did not err” and noted “an examination of [Petitioner]’s SCDC records indicates the charges are listed as non-violent.” (App.p.75).

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that “counsel’s conduct so undermined the proper functioning of

the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. at 118, 386 S.E.2d at 625.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Id. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel’s deficient performance must have 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.” Id. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citation omitted).

The PCR judge did not err in finding Petitioner failed to meet his burden of proving plea counsel’s performance was deficient. Normally, parole eligibility is a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea. Randall v. State, 356 S.C. 639, 641, 591 S.E.2d

608, 609 (2004). If a defendant is actively misinformed about parole eligibility he must prove he relied on this information in order to receive post-conviction relief. Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983). Petitioner has failed to demonstrate plea counsel actively misinformed him about parole eligibility. Rather, plea counsel testified he could not say that he advised Petitioner about parole eligibility. As parole eligibility is a collateral consequence of his guilty plea, plea counsel cannot be deficient for failing to advise Petitioner of such. See Randall, 356 S.C. at 641, 591 S.E.2d at 609.

Regardless, the PCR judge did not err in finding Petitioner failed to meet his burden of proving he was prejudiced as a result of plea counsel's representation. Even assuming arguendo that plea counsel did misadvise Petitioner about his parole eligibility, Petitioner failed to demonstrate that he relied upon this information in deciding to plead guilty. See Griffin, 278 S.E.2d at 622, 300 S.E.2d at 483. While Petitioner stated at the PCR hearing that he would not have pled guilty if he had been advised about parole eligibility, the PCR judge found Petitioner was not a credible witness. (App.p.73). See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); see also Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved."). It is simply not believable that Petitioner only pled guilty because of alleged misadvice about parole eligibility. The State's case against Petitioner was strong, as the charges resulted from confidential informant cases where the drug

transactions were recorded. (App.pp.7-9; pp.62-63). Further, the State not crossed six indictments in exchange for his guilty pleas to these four charges. (App.p.10; p.65; p.70). Based upon the record in this case, it strains belief to conclude Petitioner pled guilty merely based upon alleged misadvice about parole eligibility. As such, this Court cannot give any credence to Petitioner's self-serving testimony from his PCR hearing.

Further, while Petitioner argues he is not parole eligible, this argument is not supported by the record. Petitioner's records from the South Carolina Department of Corrections indicate his non-violent sentence has a parole eligibility date approximately three years before his max-out date. (Supp.App.pp.1-2).

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance. As Petitioner failed to meet his burden of proving ineffective assistance of counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

**CONCLUSION**

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

ALAN WILSON  
Attorney General

KAREN C. RATIGAN  
Senior Assistant Deputy Attorney General  
S.C. Bar # 68331

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By:   
ATTORNEYS FOR RESPONDENT

November 24, 2014

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM PICKENS COUNTY  
Court of Common Pleas

The Honorable G. Edward Welmaker, Circuit Court Judge

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Appellate Case No. 2014-000296

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Rodney D. Young, .....Petitioner,

v.

State of South Carolina, .....Respondent.

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**CERTIFICATE OF SERVICE**

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I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.  
This 24th day of November, 2014.

  
KAREN C. RATIGAN  
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ATTORNEY FOR RESPONDENT



ALAN WILSON  
ATTORNEY GENERAL

November 24, 2014

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

S.C. Supreme Court

**Re: Rodney D. Young v. State of South Carolina**  
**Appellate Case No: 2014-000296**  
**Lower Court Case No: 2013-CP-39-0649**

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies each of the Return to Petition for Writ of Certiorari and Motion to Supplement Appendix (along with the Supplemental Appendix) in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan  
Senior Assistant Deputy Attorney General  
SC Bar #68331

KCR/jacc  
Enclosures

cc: Carmen V. Ganjehsani, Esquire  
Trisha Allen, Victim Services Counselor