

STATE OF SOUTH CAROLINA  
In The Supreme Court

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**S.C. Supreme Court**

APPEAL FROM MARION COUNTY  
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2014-001631

Letron S. Davis, .....Respondent,

v.

State of South Carolina, .....Petitioner.

**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Is certiorari warranted to review the post-conviction relief judge's finding that plea counsel erroneously advised Respondent regarding parole eligibility where plea counsel reasonably interpreted a change in the law?

## STATEMENT OF THE CASE

In August 2011, the Marion County Grand Jury indicted Respondent for two (2) counts of distribution of cocaine base. (App. pp. 81-82). William V. Meetze, Esquire (“plea counsel”), represented Respondent. (App. p. 1.). On December 6, 2011, Respondent entered a negotiated plea of guilty as indicted before the Honorable William H. Seals Jr. (App. p. 4, line 25-p.5, line 2). Judge Seals accepted the negotiation and sentenced Respondent to concurrent terms of seven (7) years imprisonment. (App. pp. 83-84).

Respondent filed an application for post-conviction relief on June 1, 2012. (App. pp. 11-18). Petitioner filed a return on or about February 22, 2013. (App. p. 19-23) The Honorable Michael G. Nettles (“the post-conviction relief judge”) convened an evidentiary hearing on the application at the Florence County Courthouse on February 11, 2014. (App. p. 24). Respondent was present and represented by Marcus L. Woodson, Esquire. (App. p. 24). The post-conviction relief judge granted relief in two separate orders. The first order was dated March 3, 2014. (App. p. 80).<sup>1</sup> The second order was dated April 14, 2014, and filed April 23, 2014. (App. pp. 64-71). Petitioner filed a motion for reconsideration on or about April 30, 2014. (App. p. 72-76). The post-conviction relief judge denied the motion by order filed May 9, 2014. (App. p. 77-78) On June 27, 2014, the post-conviction relief judge issued an order rescinding the March 3, 2014, order and clarifying the timeliness of Petitioner’s motion for reconsideration. (App. p. 79-80) This Petition for a Writ of Certiorari follows.

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<sup>1</sup> No copy of this first order is included in the appendix because Petitioner never received a copy of the order, as outlined in the post-conviction relief judge’s order rescinding this first order. (App. p. 79-80). Upon information and belief, the order was identical to the order included in the appendix.

## ARGUMENT

### **I. The post-conviction relief judge erred in finding plea counsel ineffective for advising Respondent regarding parole eligibility.**

This Court has consistently held mis-advice about parole eligibility invalidates an otherwise voluntary guilty plea. See, e.g., Hinson v. State, 297 S.C. 456, 458, 377 S.E.2d 338, 339 (1989). However, this case involves potentially correct advice about parole eligibility based on a reasonable interpretation of a change in law. Because this Court has also consistently held an otherwise effective attorney is not required to be clairvoyant, Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (citations omitted), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999), certiorari is warranted to review the post-conviction relief judge's erroneous finding of ineffectiveness.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Regarding allegation of ineffective assistance of counsel, the proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984); Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes plea counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove

plea counsel's performance was deficient. Id. Under this prong, the Court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, plea 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.

On appeal, this Court must affirm the post-conviction relief judge's grant of post-conviction relief only if there is probative evidence to support his findings. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624) (1989)). However, the Court must overturn the post-conviction relief judge if there is no probative evidence to support his findings. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998) (citing Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996)).

Certiorari (and reversal) is necessary in this case because the post-conviction judge's finding plea counsel mis-advised Respondent about his parole eligibility ignores the constitutional mandate to evaluate counsel's advice in light of the circumstances at the time the advice is given. Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). The post-conviction relief judge properly found plea counsel advised Respondent he would be eligible for parole and his plea would not subject him to the "85% rule." See S.C. Code Ann. § 24-13-150(a) (persons sentenced for no parole offenses must serve eighty-five percent of the

actual term of imprisonment). Plea counsel did testify he advised Respondent his sentence was parole eligible based on changes in the law. (App. p. 43, lines 6-10; p. 58, lines 16-22). However, plea counsel further testified he never actually promised Respondent a specific amount of time he would have to serve, merely that it would be less than 85%. (App. p. 42, line 23-p. 43, line 6). Although Respondent maintained plea counsel informed him he would serve 65% of his sentence (App. p. 29, lines 8-13), plea counsel testified that he would have expected Respondent to serve less time. (App. p. 43, lines 4-6).

Plea counsel also testified he later discussed a similar case with the Department of Corrections (“SCDC”). (App. p. 45, line 13-p. 46, line 22). Plea counsel testified SCDC informed him Respondent would serve 85% of his sentence unless granted parole. (App. p. 46, lines 3-16). Respondent’s SCDC records indicate he received a parole hearing on November 30, 2012. (App. p. 85; p. 86) Because plea counsel advised Respondent he would be parole eligible, and Respondent actually is parole eligible, plea counsel did not perform deficiently. Inmates are denied parole and continue to serve their sentence until their next parole hearing on a regular basis. Respondent’s allegations against plea counsel are simply his attempt to receive a benefit – release from confinement – denied to him by appropriate authority. The post-conviction relief judge erred in finding plea counsel ineffective simply because Respondent had not been paroled yet.

Assuming, *arguendo*, plea counsel erroneously promised Respondent SCDC would release him prior to serving 85% of his sentence, the post-conviction relief judge still erred in finding plea counsel ineffective. Plea counsel testified he based his advice on a reasonable interpretation of the changes in law. (App. p. 42, lines 11-21). He

discussed the law changes with other members of the bar, all of whom had a similar interpretation. (App. p. 44, lines 13-23).

Plea counsel reasonably based his advice on the fact the law regarding parole eligibility changed prior to Applicant's plea.<sup>2</sup> In 2010, the General Assembly passed the Omnibus Crime Reduction and Sentencing Reform Act. 2010 S.C. Acts No. 273. Prior to the act, second offense distribution of cocaine base was a Class A felony. S.C. Code Ann. § 16-1-90(A) (Supp. 2001). As such, sentences for this crime were not eligible for parole and required service of eighty-five percent (85%) of the sentence before being eligible for release. S.C. Code Ann. §§ 24-13-100; -150(a) (Supp. 2000). In revising the law, the General Assembly added a provision in the distribution statute that provided:

Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a first offense or second offense may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits.

S.C. Code Ann. § 44-53-375(B) (Supp. 2012). Plea counsel interpreted the addition of this paragraph to mean a sentence for second offense distribution was now parole eligible. Plea counsel's interpretation certainly is reasonable in light of the clear change in the law. See Cannon v. S.C. Dep't of Prob., Parole & Pardon Servs., 371 S.C. 581, 584, 641 S.E.2d 429, 430 (2007) ("It is presumed the Legislature, in adopting an amendment to a statute, intended to make some change in the existing law." (citing Vernon v. Harleysville Mut. Cas. Co., 244 S.C. 152, 135 S.E.2d 841 (1964))); Stone v.

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<sup>2</sup> Petitioner notes Respondent committed his crime before enactment of the Omnibus Crime Reduction and Sentencing Reform Act. Thus, he technically was not eligible to be sentenced under the new law. State v. Dawson, 402 S.C. 160, 165, 740 S.E.2d 501, 503 (2013).

State, 313 S.C. 533, 535, 443 S.E.2d 544, 545 (1994) (“When two statutes are in conflict, the more recent and specific statute should prevail so as to repeal the earlier, general statute.” (citing Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992); Hair v. State, 305 S.C. 77, 406 S.E.2d 332 (1991))). Plea counsel’s advice that Petitioner would be parole eligible and serve less than 85% of his sentence was reasonable, and the post-conviction relief judge erred in faulting plea counsel for relaying this reasonable advice to Respondent.

Further assuming SCDC is somehow interpreting the new law incorrectly, plea counsel was not required to be clairvoyant or prophetic in anticipating this contrary interpretation. Gilmore, 314 S.C. at 457, 445 S.E.2d at 456. Plea counsel gave a reasonable interpretation of the changes in the law, which he discussed with other members of the bar. Plea counsel’s advice cannot be deficient where he later discovered SCDC interpreted the law differently, especially where no appellate court has interpreted this new law. In finding plea counsel ineffective, the post-conviction relief judge ignored the constitutional requirement that he must “determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” Strickland, 466 U.S. at 690.

Plea counsel provided advice based on a reasonable interpretation of a change in law. The record indicates plea counsel gave this advice after careful consideration and consultation with other members of the bar. Such performance goes above and beyond the requirements of adequate representation. The post-conviction relief judge abandoned his duty to “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance[.]” Strickland, 466 U.S. at 689. Instead, he placed upon plea counsel a duty to predict the actions of an administrative department of

government over which he has no control. Such hindsight analysis and burden shifting was erroneous. Accordingly, the post-conviction relief judge's order must be reviewed by this Court and ultimately reversed.

**CONCLUSION**

For the foregoing reasons, Petitioner respectfully requests this Court grant certiorari to review the post-conviction relief judge's erroneous finding of ineffectiveness.

Respectfully submitted,

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By:   
ATTORNEYS FOR RESPONDENT

January 9, 2015

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Supreme Court  
The Honorable Michael G. Nettles, Circuit Court Judge

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LETRON S. DAVIS,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Petition for Writ of Certiorari and the Appendix**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Appellate Defender Laura R. Baer  
Division of Appellate Defense  
Post Office Box 11589  
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This 9<sup>th</sup> day of January, 2015

  
NORMA BIGBEE  
LEGAL ASSISTANT



ALAN WILSON  
ATTORNEY GENERAL

January 9, 2015

**VIA HAND DELIVERY**

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

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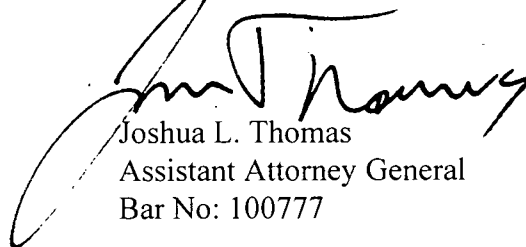
**S.C. Supreme Court**

**RE: Letron S. Davis v. State of South Carolina**  
**Appellate Case No: 2014-001631**

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Petition for Writ of Certiorari and the Original and One Bound Copy of the Appendix** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,



Joshua L. Thomas  
Assistant Attorney General  
Bar No: 100777

JLT/nb  
Enclosures

cc: Appellate Defender Laura R. Baer (2 copies)