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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Clarendon County

William Jeffrey Young, Circuit Court Judge  
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JEREMY SWEAT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002624

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PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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## ISSUES PRESENTED

- I. Whether the PCR court erred in finding plea counsel effective where he coerced the plea by advising Petitioner that he would receive a sentence of life imprisonment if he went to trial despite the fact that none of the offenses for which Petitioner was charged were punishable by more than thirty years?
  
- II. Whether the PCR court erred in finding plea counsel effective where he offered uncorroborated information to the court that was inconsistent with his own theory of mitigation and Petitioner was prejudiced in that he received an aggregate sentence of eighty years, which was double the State's forty year recommendation?

## STATEMENT OF THE CASE

On October 4, 2007, Petitioner Jeremy Sweat and co-defendant Dustin Evans<sup>1</sup> were indicted by the Clarendon County grand jury for two counts of kidnapping, two counts of first degree criminal sexual conduct, and one count of assault and battery with intent to kill for offenses alleged to have occurred on June 20, 2006 and July 3, 2006 against two separate victims. App. 198 – 201 (Indictments).

On March 10, 2008, Sweat pled guilty to the above offenses before the Honorable George C. James, Jr. Sweat was represented by Harry Devoe, and the State was represented by assistant solicitor Amy Land. App. 1. The State recommended a cap of forty years incarceration. App. 2, 1. 12. However, Judge James instead sentenced Sweat to consecutive sentences of thirty years for one count of kidnapping, thirty years for one count of criminal sexual conduct, and twenty years for one count of assault and battery with intent to kill. He sentenced Sweat to thirty years for the second count of kidnapping and thirty years for the second count of criminal sexual conduct, to run concurrent to the other sentences. Thus, Sweat received an aggregate sentence of eighty years. App. 45, 1. 7 – 46, 1. 17. Counsel Devoe made a motion to withdraw the guilty plea after the sentence was issued, which the court denied. App. 46, 1. 20 – 47, 1. 2.

On March 19, 2008, counsel Devoe filed a Motion for Reconsideration. App. 49 – 51. Following a hearing, the court issued an Order denying the motion on October 6, 2008.<sup>2</sup> App. 52 – 53.

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<sup>1</sup> Dustin Evans was referred to as “Justin” throughout the plea transcript in error.

<sup>2</sup> In the Order of denial, the plea judge noted that following Sweat’s guilty plea, his co-defendant, Dustin Evans, pled guilty to the same offenses with a negotiated plea for forty-seven years incarceration. App. 52 – 53. This court can take judicial notice of the Department of Corrections’ inmate records, which indicate that Evans began his sentence on July 6, 2006 and will be released on June 15, 2046, long before Sweat’s projected release date of June 15, 2074.

Counsel Devoe filed a Notice of Appeal, which was dismissed by the South Carolina Court of Appeals on June 10, 2009 for failure to provide a written explanation of the issue for appellate review. The Remittitur was issued on July 6, 2009. App. 54 – 55.

On February 10, 2010, Sweat filed an application for post-conviction relief. App. 56 – 68. The State filed its Return on August 23, 2010. App. 69 – 75. On March 21, 2012, Sweat filed an Amended Application for Post-Conviction Relief. App. 76 – 78. On March 22, 2012, an evidentiary hearing was held before the Honorable W. Jeffrey Young. Sweat was represented by Christina D. Parnell, and the State was represented by Assistant Attorney General Mary Williams. App. 79. The witnesses at the PCR hearing included former assistant solicitor Land, plea counsel Devoe, Petitioner Sweat, and Petitioner's mother Karen Corley. App. 79 – 157. On April 25, 2012, PCR counsel filed a Memorandum in Support of PCR Application. App. 163 – 177.

On October 25, 2012, Judge Young issued an Order of Dismissal denying Sweat's application. App. 178 – 187. On November 5, 2012, PCR counsel filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRPC. App. 188 – 193. The Motion was denied by an Order filed November 6, 2014. App. 194 – 196.

The petition for writ of certiorari follows.

## STATEMENT OF FACTS

### **Guilty Plea Hearing and Sentencing**

At the guilty plea hearing, Sweat spoke with his attorney for clarification several times and expressed his disagreement with the State's recitation of the facts. App. 11, l. 21 – 12, l. 7; App. 16, ll. 3-10; App. 24, l. 21 – 25, l. 1; App. 26, ll. 8-11; App. 30, l. 22 – 31, l. 12. However, after consultation with his attorney he eventually agreed that both victims were tied up with rope and that he had sexual intercourse with them against their will. He also admitted to stabbing the second victim with a pocket knife. App. 31, l. 13 – 34, l. 22.

The solicitor asked the court to sentence Sweat "at least up to the forty cap." App. 41, ll. 19-20. This statement was arguably in violation of the plea negotiation, whereby the State agreed to recommend a cap of forty years, not "at least" forty years. However, plea counsel did not object to that statement for the purposes of direct appeal and the failure to object was not raised at the PCR hearing.

The court then heard from plea counsel, who described Sweat as being from Louisiana and finishing his education only through the sixth grade. He had psychological problems growing up, and was ultimately diagnosed with a major depressive disorder with severe psychotic features. Plea counsel also noted that Sweat's family is supportive of him. App. 38, l. 17 – 40, l. 2.

Inexplicably, plea counsel went on to discuss Sweat's pre-trial detention at a correctional institution for approximately twenty months rather than at a local facility. App. 40, ll. 2-18. The court asked why Sweat was being held there, to which plea counsel responded: "They took him out of Clarendon County on an Order to separate him from the Codefendant. They were both in the jail and he was the one at one point who was more verbally abusive." App. 40, ll. 19-23.

Despite having just told the court that Sweat had to be separated from the co-defendant because he was being verbally abusive, counsel Devoe then argued that Sweat acted under the control of Evans at the time of the offense. He referred the court to the forensic interview of one of the victims, in which she indicated that “[D]ustin would give all the orders and Jeremy [Sweat] would carry them out, carry out [D]ustin’s orders, so he was [D]ustin’s henchman.” She also said that Sweat was the only one that seemed to be bothered by what they had done. App. 41, l. 13 – 42, l. 4. Though Sweat was the party who actually stabbed her, plea counsel said that he did not do it as deeply as he was ordered to by Evans because he did not want to harm her beyond repair. Plea counsel further noted that though Sweat was three years older than Evans, Sweat was much younger psychologically. App. 42, l. 12-22.

Plea counsel asked the court to sentence Sweat below the forty-year cap, in the twenty to thirty year range so that he would “have a chance... to make a life for himself.” App. 43, ll. 1-18. Sweat then addressed the court, saying that he was very sorry and wished that none of it had happened. He said that he regretted ever meeting Evans. App. 43, ll. 21-25.

The trial judge said that “it has been indicated that the other Defendant was the leader in this whole thing. From the other proceedings in this case, I have heard otherwise.”<sup>3</sup> App. 44, ll. 11-14. The solicitor responded that law enforcement seems to believe that Sweat was the aggressor and “truly has the evil mind of the two” but that the second victim, who was the only one that was truly there, believed that Sweat was acting under the control of Evans. App. 44, l. 15 – 45, l. 3. Plea counsel responded that, with respect to the second victim, there is no question

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<sup>3</sup> Plea counsel did not object to or make further inquiry regarding the sentencing judge’s consideration of information learned outside of the plea and sentencing hearing and his failure to do so was not raised at the PCR hearing.

that Evans was driving the truck and picked up the victim while Sweat was passed out in the back seat. App. 45, ll. 1-6.

The plea judge indicated that he was taking into account the State's request for a forty year sentence, but that he was not bound to follow that recommendation. App. 45, ll. 14-16. He then sentenced Sweat to consecutive sentences of thirty years for one count of kidnapping, thirty years for one count of criminal sexual conduct, and twenty years for one count of assault and battery with intent to kill and concurrent sentences of thirty years for the second count of kidnapping and thirty years for the second count of criminal sexual conduct. App. 45, l. 17 – 46, l. 6. Judge James explained that he could not in good conscience follow the State's recommendation based on the circumstances of the case. App. 46, ll. 7-15.

### **PCR Hearing**

At the PCR hearing, Sweat testified that his decision to plead guilty was based on counsel Devoe's advice to him that if he instead chose to go to trial, he would receive a life sentence. Counsel Devoe told him that if he pled guilty he would be able to go home at some point. App. 137, l. 19 – 139, l. 6; App. 140, l. 11-14; App. 143, ll. 12-14. Counsel Devoe could not recall what he and Sweat discussed during the breaks in the plea hearing. App. 102, l. 17 – 103, l. 3; App. 104, ll. 6-10; App. 111, l. 11 – 112, l. 1. However, he advised Sweat to plead guilty because: "I thought at that point that morning that he would be better plea off pleading because of the facts of the case. There was a cap of forty years. Obviously, I didn't think the Judge was going to be going over that cap for eighty years." App. 112, ll. 2-15.

The PCR court also heard testimony related to counsel Devoe's statements to the plea court regarding Sweat's transfer from the county jail to the Department of Corrections. Sweat understood that he was moved because he was being mistreated by a correctional officer in the

county jail. App. 140, ll. 19-24. According to counsel Devoe, Sweat was moved on July 12, 2008, because of racial problems at the jail, Sweat's "mouthing off," and threats made by Sweat to his co-defendant, Dustin Evans. Counsel Devoe received this information from correctional officers in the county, and admitted that the information differed from what was contained in the affidavit prepared by Shelton L. Hughes, Jr., the Director of Detention for Clarendon County, in support of Sweat's transfer to the Department of Corrections. The affidavit itself did not mention Sweat being "verbally abusive" at all. Rather, it indicated that the publicity surrounding the potential racial motivation of the crimes created serious concern for Sweat's safety in the county jail, where the population was 75-90% minority. Due to limited space, the county was only able to segregate one of the detainees, Sweat or his co-defendant, from the general population. Thus, they needed the Department of Corrections to take the one of them. App. 116, l. 23 – 125, l. 22; see also App. 162 (Applicant's Ex. 3, Affidavit).

When asked what his strategy was for telling the judge that Sweat was moved to separate him from his co-defendant because he was "more verbally abusive," counsel Devoe responded "I'm not sure, when did I say that?" After reviewing the relevant portion of the plea transcript, counsel Devoe said "I was telling the judge that I guess that he had been at Lee Correctional since he had been telling the Judge of the conditions at Lee County." App. 123, l. 10-20. However, the plea transcript reflects that it is counsel Devoe who brought up the conditions in which Sweat was being kept, not anyone else. App. 40, ll. 2 – 41, l. 7. Counsel Devoe did not comprehend the conflict between his indication to the plea court that Sweat was verbally abusive to his co-defendant in jail, based only on the word of some correctional officer, with his argument that Sweat was manipulated and controlled by his co-defendant at the time of the offenses. App. 124, l. 4 – 125, l. 22.

## **Order of Dismissal**

The PCR court addressed plea counsel's advice to Petitioner regarding sentencing in its discussion of the motion to withdraw plea. The PCR court found that plea counsel "did not recall exactly what was discussed in the break in the proceedings." It also cited Sweat's testimony that "he decided to plead guilty when Counsel informed him before the plea that he faced life imprisonment if convicted," which counsel told him again during the break in proceedings. The PCR court found that this advice did not affect the voluntariness of Sweat's plea because he "did in fact face life imprisonment if convicted." App. 184.

The Order of Dismissal also states "Applicant further asserts that Counsel was ineffective in failing to provide the Court with information as to why he was removed from the local detention center." The court referenced both the affidavit admitted into evidence and plea counsel's alleged testimony that he raised the issue of Sweat's pre-trial detention at Lee County to garner sympathy. The court found that the affidavit as a whole was a negative portrayal of Sweat and that "it appears that Applicant would not have gained any benefit from additional information presented on the subject." The court further found that Sweat failed to show that he would not have pled guilty but for plea counsel's "failure to present" additional information regarding his removal. App. 185.

## **Rule 59(e) Motion to Alter or Amend**

PCR counsel filed a timely motion to alter or amend, in which she noted the inaccuracy in the PCR court's finding that Sweat was informed that "he faced life imprisonment." Rather, Sweat testified that counsel Devoe advised him "that he **would** receive life imprisonment if convicted at trial." App. 191 (emphasis in original). She also noted error in the PCR court's finding that Sweat asserted that plea counsel "was ineffective in **failing to provide the Court with information** as to why he was removed from the local detention center." App. 191 (emphasis in original). The

allegation was instead that plea counsel was “ineffective in **offering information** to the court regarding his removal that was not only highly prejudicial, but distinct from the credible information that defense counsel had received on this subject.” App. 191 – 192 (emphasis in original). PCR counsel argued that the information provided contradicted defense counsel’s own argument for mitigation, was not enumerated in the affidavit that supported Sweat’s removal, and was based merely on “something mentioned to him by a correctional officer.” App. 192.

The PCR court denied the Motion to Alter or Amend without hearing further argument. App. 194 – 196.

## ARGUMENT

- I. The PCR court erred in finding plea counsel effective where he coerced the plea by advising Petitioner that he would receive a sentence of life imprisonment if he went to trial despite the fact that none of the offenses for which Petitioner was charged were punishable by more than thirty years.**

Plea counsel Devoe coerced Sweat into pleading guilty by advising him, both before and during the plea hearing, that if he proceeded to trial he **would** receive a life sentence.<sup>4</sup> App. 137, 1.19 – 138, l. 10 (“He [Devoe] said if I went to trial I’d get a life sentence.” “He [Devoe] told me that if I didn’t plea if I went to trial I’d get a life sentence”); App. 143, ll. 12-14 (“There was no potential sentence. Like I said, he [Devoe] basically told me if I didn’t plea that I would get a life sentence if I went to trial.”). Contrary to what plea counsel’s advice implied, none of the indicted offenses carried a potential penalty greater than thirty years and the State was not seeking life imprisonment without parole based on any prior offenses. Rather, if convicted and sentenced to maximum, consecutive sentences for all five charged offenses, Sweat was facing a potential aggregate sentence of one-hundred forty (140) years. See App. 198 – 201 (Indictments). Because there was no mandatory minimum sentence for any of the offenses, a sentencing judge would have had wide discretion in sentencing following a guilty plea or trial. Sweat’s decision to plead guilty was based upon counsel Devoe’s misadvice that he would

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<sup>4</sup> Sweat is not arguing that his plea should be vacated because the plea judge sentenced him in excess of the State’s forty year recommendation. See State v. Riddle, 278 S.C. 148, 292 S.E.2d 795(1982) (holding that because a judge is under no duty to accept a recommended sentence, the fact that the judge does not accept the recommendation does not affect the validity of the plea); State v. Cantrell, 250 S.C. 376, 379, 158 S.E.2d 189, 191-92 (1967) (“An accused is not permitted to speculate on the supposed clemency of the judge and enter a plea of guilty with the right to retract it if he finds that his expectation was not realized.”). Rather, Sweat’s plea should be vacated because he was misadvised by plea counsel that he would receive a life sentence if he proceeded to trial.

receive a life sentence if he went to trial. App. 137, l. 25 – 138, l. 3. Had he received accurate advice, Sweat would have instead proceeded to trial. App. 139, ll. 2-6.

### **Right to Effective Assistance of Counsel**

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 (1984). “Where allegations of ineffective assistance of counsel are made, the question becomes, ‘whether 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.’ ” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). 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).

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. “Under this prong, ‘[t]he proper 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). 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

The United States Supreme Court has held that “[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results.” Brady v. United States, 397 U.S. 742, 758 (1970). An “unsound result” occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238

(1969). Therefore, in the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); see also Hill v. Lockhart, 474 U.S. 52, 56 (1985) (“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.’ ” (quoting North Carolina v. Alford, 400 U.S. 25, 31(1970))). “The second, or ‘prejudice,’ requirement ... focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. 52 at 59. In other words,

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the 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.

Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (quoting Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); see also Hill, 474 U.S. at 59 (footnote omitted).

### **Erroneous Sentencing Advice**

Reversal is required where counsel provides erroneous sentencing advice that induces the client’s guilty plea. Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 486 (1991). In order to enter a voluntary guilty plea, “a defendant must know the direct consequences of his plea, including the actual value of any commitments made to him.” Hammond v. United States, 528 F.2d 15, 19 (4<sup>th</sup> Cir. 1975). In Hammond, the defendant was misinformed about the consequences if he were to be convicted after a trial. Id. at 17. Hammond believed that he was trading a maximum possible sentence of ninety or ninety-five years for a sentence of twenty-five years, when in fact the maximum possible sentence was fifty-five years. Id. The Court found that Hammond’s lawyer grossly misadvised him regarding the benefit that he would receive by

pleading guilty, constituting ineffective assistance of counsel and resulting in a lack of voluntariness in the plea. Id. at 18-19.

In Alexander v. State, the defendant pled guilty to one count of trafficking ten or more grams of cocaine and received a sentence of fifteen years. 303 S.C. at 541, 402 S.E.2d at 484. This Court found that Alexander's counsel was deficient in advising him that if he went to trial he faced a potential life sentence. Id. at 542, 402 S.E.2d at 485. The indictments contained overlapping and greater and lesser charges, such that counsel should have concluded that the maximum sentencing exposure would have been seven to twenty-five years incarceration and a fifty-thousand dollar fine for the fifty grams of cocaine found in the automobile and twenty-five years incarceration and a fifty-thousand dollar fine for the one hundred fifty grams of cocaine found in the motel room. Id. at 542-43; 402 S.E.2d at 485. Petitioner further testified 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." Id. at 543; 402 S.E.2d at 485. Thus, this Court found that Petitioner's uncontradicted testimony on this point satisfied the "prejudice" requirement of Strickland and Hill.

Similar to Hammond and Alexander, the present case involves plea counsel's misadvice to Sweat regarding his potential sentence. The potential penalties for the indicted offenses in this case included zero to twenty years for assault and battery with intent to kill,<sup>5</sup> zero to thirty years for both counts of kidnapping, and zero to thirty years for both counts of first degree criminal sexual conduct. S.C. CODE ANN. § 16-3-620 (repealed Act No. 273, 2010 S.C. Acts 1949-50);

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<sup>5</sup> Subsequent to Petitioner's plea and sentencing, S.C. CODE ANN. § 16-3-620 was repealed with an effective date of June 2, 2010. It previously provided that the crime of assault and battery with intent to kill is punishable by imprisonment not to exceed twenty years." See Morris v. State, 371 S.C. 278, 283, 639 S.E.2d 53, 56 (2006).

S.C. CODE ANN. § 16-3-910; S.C. CODE ANN. § 16-3-652. Sweat did not face a life sentence for any of the charged offenses. Thus, both plea counsel's advice that Sweat would be sentenced to life imprisonment if he went to trial and the PCR court's finding that "Applicant did in fact face life imprisonment if convicted" were inaccurate. See App. 184.

Though neither plea counsel nor the PCR court suggested that the reference to a life sentence meant a de facto life sentence, due to the potential 140 year aggregate sentence, even that argument would fail under these circumstances. Sweat faced that potential sentence regardless of whether he pled guilty or went to trial since the State's recommendation was not binding. Thus, the potential for a de facto life sentence would not have been curbed by a decision to pled guilty rather than exercise the right to trial.

Additionally, plea counsel testified that they were preparing to go to trial until the solicitor "made an offer that seemed to be under the circumstances not a bad offer." App. 116, ll. 4-6. The offer was made on March 3, 2008, and conveyed to his client the following Sunday.<sup>6</sup> App. 116, ll. 7-11. The plea was entered on Monday, March 10, 2008. App. 1. This testimony regarding Sweat's original intention to go to trial supports Sweat's testimony that had plea counsel accurately advised him, he would have proceeded to trial and would not have pled guilty. App. 139, ll. 2-6. Instead, Sweat was coerced into pleading guilty by plea counsel's representation, just days before the trial was set to being, that he would receive a life sentence if he proceeded to trial. App. 137, l. 25 – 138, l. 3.

Sweat's guilty pleas on all counts should accordingly be vacated because his trial counsel coerced his plea by inaccurately advising him that he would receive a life sentence if he went to

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<sup>6</sup> This court can take judicial notice that March 3, 2008 was a Monday and March 9, 2008 was the following Sunday.

trial. But for counsel's misadvice, Sweat would not have pled guilty, but would have instead gone to trial.

**II. The PCR court erred in finding plea counsel effective where he offered uncorroborated information to the court that was inconsistent with his own theory of mitigation and Petitioner was prejudiced in that he received an aggregate sentence of eighty years, which was double the State's forty year recommendation.**

Plea counsel presented two inconsistent arguments during the sentencing phase of the plea hearing. There was evidence, including the victim's statement, to support counsel's argument that Sweat was acting under the control of co-defendant Evans. App. 41, l. 13 – 42, l. 22; App. 44, l. 15 – 45, l. 6. Rather just focusing on that argument, counsel Devoe brought up Sweat's incarceration at the department of corrections, and then explained that he was removed from the local detention center due to a need to separate from the his co-defendant because Sweat was being verbally abusive. App. 40, ll. 2-23. Plea counsel could not explain any reason for having brought up the transfer or repeated the uncorroborated statements of a corrections officer, which were contradictory to the other mitigating evidence. App. 123, ll. 2-20; App. 40, l. 2 – 41, l. 7. It is clear from the judge's comments that which of the co-defendants acted as the leader was a part of his sentencing consideration. App. 44, ll. 11-14. Ultimately, Sweat was sentenced to eighty years, a stark contrast to the forty-seven year sentence received by Evans.

As will be more fully discussed below, the PCR court's findings and conclusions are riddled with errors as they relate to Sweat's claim of ineffectiveness of counsel based on plea counsel's statements regarding Sweat's removal from the local jail to the Department of Corrections. The PCR court misstated the actual allegation raised, which was an error in offering prejudicial and inconsistent information, not an error in failing to provide information at the plea hearing. The PCR court also erred in finding that there was any strategic reason for such the presentation of such evidence to the plea court. Lastly, the PCR court applied the incorrect standard for showing resulting prejudice, requiring Sweat to show that he would not have plead guilty but for plea counsel's conduct, when the error affected Sweat's sentence and not the

voluntariness of his plea. PCR counsel filed a Motion to Alter or Amend citing the PCR court's errors, but it was denied. App. 188 – 193 (Motion to Alter or Amend). Compare App. 174 – 176 (Motion in Support of PCR), with App. 184 – 185 (Order of Dismissal).

Initially, the PCR court mischaracterized the allegation, stating that Sweat asserted that “[c]ounsel was ineffective in failing to provide the Court with information as to why he was removed from the local detention center.” App. 185. As PCR counsel pointed out in the Motion to Alter or Amend, the allegation was not related to plea counsel’s failure to present information, but rather his error in presenting prejudicial and uncorroborated information at the plea hearing that was inconsistent with his own theory of mitigation. App. 191 – 192. During the sentencing phase of the plea hearing, plea counsel brought up Sweat’s detention in the Department of Correction and then advised the court that the reason for Sweat’s removal from the local detention center was that he needed to be separated from his co-defendant, Dustin Evans, and that Sweat was the “more verbally abusive” of the two. App. 40, l. 2 – 41, l. 7. Plea counsel testified that the information regarding Sweat being “verbally abusive” came from a correctional officer. App. 123, ll. 2-17.

However, the affidavit that was submitted to the court in support of the transfer in July 2006, indicated that the transfer was needed to protect the safety of Sweat due to rising tension at the local jail surrounding reports that Sweat and Evans’ crimes were racially motivated. The jail wanted to isolate both Sweat and his co-defendant from the general population, as well as from each other, but did not have the means to do so in their facility. App. 162 (Applicant’s Ex. 3, Affidavit). Thus, plea counsel could have honestly responded to the plea court’s inquiry regarding why Sweat was moved without relying on an unreliable statement from a correctional officer that Sweat needed to be separated from and was “verbally abusive” toward Evans. Further, plea counsel should have anticipated that his argument would raise the question of why Sweat was transferred. He should not

have raised where Sweat was incarcerated during sentencing if the response to that question would not be favorable to Sweat and was, in fact, inconsistent with plea counsel's argument that Sweat was manipulated and controlled by Evans in committing the offenses.

Additionally, though there is no basis for its finding in the record, the PCR court found that plea counsel "raised the issue of Applicant's pre-trial detention at Lee County to garner sympathy." App. 185. A review of the PCR hearing testimony reveals that the argument raised to "get the judge to sympathize" was related to Sweat being controlled by Evans. App. 124, l. 4 – 125, l. 2. Plea counsel provided no reason for why the pre-trial detention was raised, initially saying the he was "not sure" and then "guess[ing]" that he raised it because "he [Sweat] had been telling the Judge of the conditions at Lee County." App. 123, ll. 2-20. However, the plea transcript reflects that it was plea counsel, not Sweat, who raised the conditions at the department of corrections. App. 40, l. 2 – 41, l. 7. Thus, plea counsel provided no strategic reason for bringing up Sweat's pre-trial detention or referencing hearsay and prejudicial information regarding the reason for Sweat's transfer. See Council v. State, 380 S.C. 159, 175, 670 S.E.2d 356, 364 (2008) ("Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel."); see also Wiggins v. Smith, 539 U.S. 510, 526-27, 123 S.Ct. 2527, 2538 (2003) (finding the state court's invocation of the "strategic decision" doctrine to justify counsel's failure to pursue mitigating evidence "resembles more a post hoc rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing").

Further, even had plea counsel claimed a strategic decision, such strategy must be "reviewed under an 'an objective standard of reasonableness.'" Council, 380 S.C. at 175, 670 S.E.2d at 364 (quoting Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)); Stacey v. Solem, 801 F.2d 1048, 1051 (8<sup>th</sup> Cir. 1986) ("We note that labeling counsel's actions as 'trial strategy' does

not 'automatically immunize an attorney's performance from sixth amendment challenges.'"). Here, there was no "sympathy" to be gained from Sweat's pre-trial detention in the department of corrections, allegedly caused by his own aggressive behavior toward his co-defendant. Further, that information was inconsistent with plea counsel's argument, made immediately after his statements regarding Sweat's removal from the local detention center, that Sweat acted as the "henchman" of his co-defendant and was "the follower and not the leader." App. 41, l. 13 – 42, l. 22. Sweat also said that he regretted ever meeting Dustin Evans. App. 43, ll. 24-25. Thus, any strategic reason for plea counsel's statements regarding Sweat's pre-trial detention was not objectively reasonable.

Lastly, the PCR court erred in determining that Sweat "failed to show that [the] failure to present the additional [information] affected his decision such that but for the alleged shortcoming he would not have pled guilty." App. 185. Because counsel's deficient conduct affected Sweat's sentencing, not the voluntariness of his pleas, the PCR court should have applied the traditional prejudice test. Under that test, Sweat needed to show 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. It is clear from the plea transcript that the sentencing judge was concerned with who played the more aggressive role in the commission of these offenses. Judge James stated that he had "heard otherwise" regarding the co-defendant being "the leader in this whole thing." App. 44, ll. 11-14. The doubts that the judge had regarding whether Sweat was manipulated by Evans were certainly not aided by plea counsel stating that Sweat needed to be separated from Evans because he was "more verbally abusive." Rather, the information regarding Sweat's removal was patently inconsistent with plea counsel's argument that Sweat was manipulated by Evans at the time of the crimes. Sweat was prejudiced by plea counsel's conduct in the severe sentence that he received of eighty years. This was double the recommended sentencing cap of forty years proposed by the

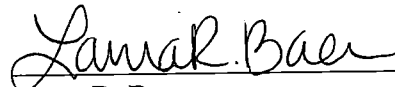
State. The mitigating evidence presented in the sentencing phase of the plea hearing was essential in this case, yet plea counsel undercut his own argument.

Sweat's sentences on all counts should accordingly be vacated where defense counsel presented unreliable information to the PCR court that was inconsistent with the theory of mitigation that Sweat was manipulated and coerced into committing these crimes, prejudicing Sweat at sentencing.

CONCLUSION

For the reasons set forth herein, Petitioner Jeremy Sweat respectfully requests this Court grant certiorari to allow full briefing on these issues.

Respectfully submitted,

A handwritten signature in cursive script that reads "Laura R. Baer". The signature is written in black ink and is positioned above a horizontal line.

Laura R. Baer  
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of June, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Clarendon County

William Jeffrey Young, Circuit Court Judge

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JEREMY SWEAT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

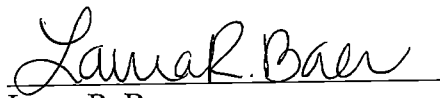
APPELLATE CASE NO. 2014-002624

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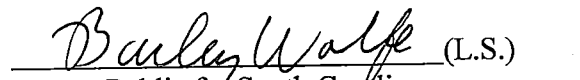
CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Daniel Gourley, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Jeremy Shaw Sweat, Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 26th day of June, 2015.

  
\_\_\_\_\_  
Laura R. Baer  
Appellate Defender  
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day  
of June, 2015.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 24, 2021.