THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Honorable Judge Eugene C. Griffith, Jr., Common Pleas Court Judge

2012-CP-04-02369

The State, Respondent

v.

John Bradley Turner, Appellant

APPELLANTS' INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

1. Did Appellant state facts sufficient to alter his sentence?
2. Did Appellant state facts sufficient to grant a Writ of Mandamus?
3. Did the Court err in denying the imposition of eighty-five percent (85%) of the sentence that was ordered in Circuit Court and declining to withdraw the Appellant's guilty plea and grant a new trial?

STATEMENT OF CASE

Appellant John Bradley Turner is currently incarcerated at Tyger River Correctional Institution. On February 3, 2003, represented by Richard Warder, Appellant appeared in Anderson County Court of General Sessions before Honorable J.C. Nicholson for his plea hearing for charges of murder, trafficking methamphetamine, manufacturing methamphetamine and possession of a firearm during the commission of a violent crime. Before the plea hearing, Appellant's counsel advised him that he would serve 85% of any sentence he would receive (Post Conviction Relief Appl. p. 6, September 4, 2003). Furthermore, at the plea hearing before Appellant pled guilty, Judge Nicholson advised him three separate times that Appellant will have to serve 85% of whatever sentence he would receive, excluding the maximum life sentence for murder. (Plea Hr'g Tr. p. 11:18-25, p. 12:9-10). Having been so advised, Appellant pled guilty knowing that he would serve 85% of the sentence he received based on Judge Nicholson's assertions. However, when Appellant was processed by the Department of Corrections, Appellant was sentenced to 30 years to be served "day for day." Appellant contacted Judge Nicholson personally in July 2007 in order to acknowledge Judge Nicholson's order to impose 85% of his sentence, to which Judge Nicholson responded that the 85% sentence was a misstatement.[1]

Appellant applied for post-conviction relief alleging ineffective counsel and an involuntary guilty plea on September 4, 2003, which was dismissed on March 24, 2006. Appellant moved for reconsideration under Rule 59(e), which was also denied on December 19, 2006. Appellant timely petitioned for writ of certiorari to the South

[1] See Exhibit A, a letter from Judge Nicholson's law clerk on his behalf.

Carolina Supreme Court, which was denied on October 18, 2007. On November 16, 2007, Appellant filed another application for post conviction relief alleging ineffective counsel, a due process violation resulting from Judge Nicholson's incorrect sentencing, and newly discovered evidence or prosecutorial misconduct, which was denied on March 17, 2008. Appellant then petitioned for writ of certiorari to the South Carolina Supreme Court, which was dismissed on October 7, 2009. On December 2, 2009, Appellant filed a third application for post conviction relief alleging essentially the same claims as his second application, which was denied on June 17, 2010. Appellant then petitioned for writ of certiorari to the South Carolina Supreme Court, but was denied on August 11, 2010. Appellant then filed a petition for writ of habeas corpus on September 14, 2010 alleging ineffective counsel, prosecutorial misconduct and an involuntary guilty plea to which the District Court of South Carolina granted Respondent's motion for summary judgment because of the petition's untimeliness.

On July 3, 2012, Appellant filed a petition for writ of mandamus, requesting the Anderson Court of Common Pleas to compel Judge Nicholson to issue and order the correction of his term of imprisonment to 85% of his sentence, the sentence Judge Nicholson had ordered that induced Appellant to plead guilty. (Order Den. Pet. for Writ of Mandamus p. 3-4). In the alternative, Appellant sought to have his guilty plea withdrawn, his sentence vacated in order to proceed to trial. (Mandamus p. 4). The court denied his petition for writ of mandamus because the court contended that the petition was the incorrect vehicle for a remedy, and suggested that post conviction relief was appropriate instead. (Mandamus p. 5). The court also held that dismissal was warranted because Appellant's allegations did not state a claim for relief because he alleged facts

insufficient for sentence alteration and for the grant of a writ of mandamus. (Mandamus 6-7). The court misunderstood Appellant's petition for writ of mandamus as an effort to circumvent procedures like post conviction relief or a direct appeal. (Mandamus 6). Additionally, in the order denying Appellant's petition for writ of mandamus, the court did not acknowledge or forthrightly deny Appellant's request for the withdrawal of his guilty plea in order to proceed to a new trial.

STANDARD OF REVIEW

Issuance of a writ of mandamus lies within the discretion of the trial court, and an abuse of that discretion warrants reversal on appeal. *Charleston County Sch. Dist. v. County Election Comm'n*, 336 S.C. 174, 179, 519 S.E.2d 567, 570 (1999). An abuse of discretion has been found when there is an error of law by the trial court, or the judge's order was based on factual conclusions that lacked of evidentiary support. *Tri-County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990). An appellate court cannot disturb the factual findings of the trial court on a mandamus petition if the trial court's findings are supported by any reasonable evidence. *Charleston County Sch. Dist.* at 179-180, 519 S.E.2d at 570.

ARGUMENT

I. APPELLANT STATED FACTS SUFFICIENT TO ALTER HIS SENTENCE IN HIS PETITION FOR WRIT OF MANDAMUS.

It is well settled in South Carolina jurisprudence that the entrance of a guilty plea without full understanding of the plea's consequences and the charges against him nullifies the guilty plea. *See e.g., Dover v. State*, 304 S.C. 433, 435, 405 S.E.2d 391, 392 (1991). Furthermore, the South Carolina Supreme Court has affirmed re-sentencing for a plea judge's misstatement very much alike to Judge Nicholson's assertions to Appellant. 345 S.C. 16, 20, 546 S.E.2d 417, 418 (2001). In *Roscoe v. State*, the defendant pled guilty to armed robbery, kidnapping and burglary. 345 S.C. 16, 18, 546 S.E.2d 417, 418 (2001). The post conviction relief court remanded the defendant's armed robbery charge for re-sentencing because the judge had told the defendant he faced 25 years for armed robbery, whereas the actual sentence was 30 years and his counsel did not acknowledge any error in the judge's statements during proceedings. *Id* at 19. The South Carolina Supreme Court also affirmed the PCR court's holding that the judge's misstatement did not render defendant's guilty plea invalid to all of his charges because he failed to demonstrate that the sentencing misstatement to armed robbery affected the guilty plea to kidnapping and burglary charge so much that he would have instead pled not guilty and proceeded to trial. *Id* at 21-22, 419-20.

Pursuant to the framework set forth in *Roscoe*, Appellant stated facts sufficient to alter his sentence because Judge Nicholson, like the plea judge in *Roscoe*, stated the incorrect sentence to Appellant, to which Appellant based his guilty plea. Also similar to *Roscoe*, Appellant's counsel did not correct Judge Nicholson's misstatement or acknowledge that any error had been made during the plea hearing. In fact, Appellant's

predicament is almost identical to the defendant in *Roscoe* because Appellant also pled guilty under the impression he would receive 25.5 years for the charges,[2] when in actuality he was to serve 30 years. Thus, in light of *Roscoe*, Appellant is entitled to re-sentencing.

Furthermore, Appellant is entitled to resentencing on an additional front. Unlike the defendant in *Roscoe*, Judge Nicholson misstated the sentence he would receive for *all* of the charges Appellant pled guilty to, because the sentences for all the charges were to run concurrently, and Judge Nicholson repeatedly told Appellant he would serve 85% of the concurrent sentences. Thus unlike the defendant in *Roscoe*, the misstatement effected Appellant's guilty plea to all of his charges, and if not for the misstatement of all of his charges, he would have pled not guilty and have proceeded to trial. Additionally, even before Judge Nicholson repeatedly told Appellant he would serve 85% of whatever sentence he received, Appellant already wished to plead guilty based on the impression he would serve 85% of his sentence because his counsel had advised him of the same. Therefore, Judge Nicholson confirmed Appellant's expectation of serving 85% of the sentence he received, further demonstrating that Appellant's guilty plea resulted from the incorrect sentencing information.

[2] 85% of the 30 years sentence corresponds to 25.5 years.

II. APPELLANT STATED FACTS SUFFICIENT TO GRANT A WRIT OF MANDAMUS.

A writ of mandamus is the highest judicial writ and is granted when there is a specific right to be enforced, a positive duty to be performed, and no other specific remedy available. *Littlefield v. Williams*, 343 S.C. 212, 222, 540 S.E.2d 81, 87 (2000). Its primary purpose is to enforce an established right and a corresponding duty imposed or created by law. *Id* at 223. If the performance of the duty is discretionary, a writ of mandamus cannot be issued. *In the Interest of Lyde*, 284 S.C. 419, 421 327 S.E.2d 70, 71 (1985).

In Appellant's case, his decision to plead guilty was founded upon Judge Nicholson's multiple assertions that Appellant would serve 85% of his sentence, approximately 25.5 years incarceration. Accordingly, Appellant thought the charges he pled guilty to rendered a 25.5 year sentence, instead of the 30-year sentence to be served "day for day" as set forth by S.C. Code Ann. §§ 24-13-100, 16-1-10(D), 16-3-20(A) and S.C. Code Ann. § 24-13-10(A). In *Boykin v. Alabama*, the United States Supreme Court held that a defendant who wishes to plead guilty must have a full understanding of what the plea connotes and the consequences of his plea; a plea made to the contrary is not made knowingly or voluntarily and is therefore invalid. 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Thus, because Appellant did not fully understand that his plea would render serving 100% of any sentence he received, he did not knowingly plead guilty, thereby nullifying the plea. The trial court's acceptance of the invalid plea and the imposition of a day for day 30-year sentence despite Judge Nicholson's repeated assertions to the contrary, violated Appellant's constitutional due process rights guaranteed by the Fourteenth Amendment. Accordingly, a writ of mandamus is

warranted because Appellant petitions for enforcement of his specific right to either re-sentencing or withdrawal of his void guilty plea in order to enter a not guilty plea, thereby restoring and enforcing his specific constitutional trial rights. The Constitution guarantees protection of these rights, and this guarantee compels courts to perform the non-discretionary duty to protect and rectify any violations, such as Appellant's improper sentencing.

Furthermore, the court in its order denying the petition persisted that post conviction relief was the appropriate legal vehicle for Appellant's claim that Judge Nicholson's assertions induced his guilty plea, thus rendering it invalid. However, a writ of mandamus is the mechanism to a fix a judicial wrong and is the only specific remedy available for his claim. In fact, the South Carolina Supreme Court has held that allegations of trial court errors are not cognizable on PCR. *Wolfe v. State*, 326 S.C. 158, 485 S.E.2d 423 (1999). Furthermore, Appellant has already fought and lost through post conviction relief alleging his immaterial guilty plea multiple times, as well as attempting to resolve the abrogation of his constitutional rights by petitioning for writ of habeas corpus. Because Appellant is ineligible for direct appeal, and has exhausted other options, a writ of mandamus is the only specific remedy available. Therefore, pursuant to the South Carolina Supreme Court in *Littlefield* and *Lyde*, Appellant stated facts sufficient to grant a writ of mandamus.

III. THE COURT ERRED IN DENIAL OF APPELLANT'S PETITION FOR WRIT OF MANDAMUS AS WELL AS DECLINING TO IMPOSE 85% OF THE SENTENCE IMPOSED BY THE CIRCUIT COURT OR GRANT A NEW TRIAL.

As previously discussed, Appellant's guilty plea was not knowingly entered pursuant to the framework set forth in *Boykin v. Alabama*. Thus, Appellant is entitled to resentencing in order for his guilty plea to correspond to the sentence he thought he was pleading guilty to, which is 85% of the sentence he received as ordered by Judge Nicholson.

In the alternative, Appellant is entitled to withdraw his guilty plea and proceed to trial, as Appellant would not have pled guilty if he had known he would have to serve 100% of the sentence he received. South Carolina courts and the Fourth Circuit Court of Appeals have encountered similar constitutional violations involving requests for plea withdrawal based on unknowingly made guilty pleas resulting from misinformation about sentencing by plea hearing judges. *See e.g. Pittman v. State*, 337 S.C. 597, 600, 534 S.E.2d 623, 625 (1999)(held that a guilty plea is not knowingly made when the judge did not inform the defendant of a mandatory sentence); *Dover v. State*, 304 S.C. 433, 435, 405 S.E.2d 391, 392 (1991)(held that a guilty plea is not knowingly made when the defendant is not made aware by the court of the sentence he would receive); *Manley v. United States,* 588 F.2d 79 (4th Cir.1978)(held that at the plea hearing, the defendant must also be advised of the immediate results of his plea, including the maximum sentence he may receive and any mandatory minimum sentence*); United States v. Lias*, 173 F.2d 685 (4th Cir.1978)(held that withdrawal of a guilty plea and remanding for a new trial was the proper remedy because the defendant was misled by his counsel and the

plea judge that he would receive probation, whereas he was sentenced to five years imprisonment).

Specifically, in *State v. Hazel*, counsel advised that the judge may impose the maximum sentence of life imprisonment, and during the defendant's plea hearing, the judge told her that he "could" impose such a sentence for the kidnapping she was charged with. 275 S.C. 392, 393-94, 271 S.E.2d 602 (1980). In actuality, imposition of the life sentence was mandatory, and the judge lacked discretion to choose whether to impose it, a consequence that the defendant only learned of after pleading guilty based on the judge's assertions and was unable to withdraw her plea. *Id* at 394. The Supreme Court of South Carolina vacated the conviction and sentence, withdrew the guilty plea and remanded for trial because her guilty plea was not knowingly made and was thus invalid, as it was entered without an understanding of the mandatory punishment for the offense to which she was pleading. *Id.*

In the present case like *Hazel*, Appellant's counsel advised him identically to Judge Nicholson's assertions that he would serve 85% of whatever sentence he received. Additionally similar to *Hazel*, Appellant was unaware that there was a mandatory component of his sentencing pursuant to statute. Therefore, Appellant is entitled to withdraw his plea and proceed to trial because his guilty plea was entered without understanding the mandatory punishment for the charges to which he was pleading.

The Fourth Circuit Court of Appeals also confronted a plea judge's misstatement of sentencing and its effect on a plea's validity in *United States v. Caldwell*, No. 08-5154, 2009 WL 1931223, *303, *304 (4th Cir. Ct. App. Jul. 7, 2009). The court held that a judge's misstatement about whether a sentence would run concurrently did not nullify the

defendant's guilty plea because the record demonstrated that the judge later stated the correct sentence, and the defendant had read the written plea agreement containing the correct sentence, thus the defendant could not claim he did not knowingly plead guilty. *Id.*

In the present case, Appellant was not confronted with any information, written or verbal, that he would serve 100% of whatever sentence he received or that by statute, a sentence for a murder charge must be served day for day. Unlike the defendant in *Caldwell*, Appellant never had an opportunity to become aware of the accurate sentence he would serve, and it was completely reasonable for Appellant to rely his counsel's advisements, and on repeated affirmations by the judge who would render his sentence. Therefore in light of *Caldwell*, Appellant's lack of understanding of the guilty plea's connotation and consequence is underscored by his lack of opportunity to be accurately informed, a circumstance he could not control.

CONCLUSION

The court erred in denying Appellant's petition for writ of mandamus because Appellant stated facts sufficient to alter his sentence and for the grant of writ of mandamus because Appellant has specific rights to be enforced and restored because the sentence resulting from his unknowingly made plea violated his constitutional rights. The abrogation of Appellant's constitutional rights imposes a duty to enforce and restore such rights. Moreover, a writ of mandamus is the only specific remedy available because Appellant has already fervently persisted that his guilty plea was rendered a nullity by Judge Nicholson's assertions through various other remedies. The court also erred in declining to impose the 85% sentence that was ordered by Judge Nicholson because precedent by South Carolina courts and the Fourth Circuit Court of Appeals compels re-sentencing or withdrawal of the guilty plea for a new trial because the guilty plea was not knowingly made.

RESPECTFULLY SUBMITTED THIS 17th day of August 2015.

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EXHIBIT A

State of South Carolina
The Circuit Court of the Tenth Judicial Circuit

J. C. "BUDDY" NICHOLSON, JR.
JUDGE

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August 2, 2007

John Turner, #290521
Perry Correctional Institute
Q4 B-203
430 Oaklawn Rd.
Pelzer, SC 29669

Dear Mr. Turner:

Judge Nicholson is in receipt of your letter dated July 6, 2007, in which you state that Judge Nicholson told you, prior to your guilty plea, that you would serve only 85% of your sentence. Pursuant to state law, anyone convicted of murder must serve 100% of the sentence or, in other words, serve the sentence day for day. Anyone who told you that you would serve 85% of your sentence for murder misspoke; as mandated by state law, you must serve 100% of the thirty-year sentence. Should you have any further questions or concerns, please contact your attorney. Good luck.

Sincerely,

Law Clerk
The Honorable J.C. Nicholson, Jr.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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AFFIDAVIT OF SERVICE BY MAILING

I, Traci Trouton-Burr, certify on this date August 17, 2015, I served an Appellant's Initial Brief and an Appendix in this action, dated August 17, 2015 on Alan Wilson, and Jenny Abbott Kitchings by mailing it to them at their work address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

The Honorable Alan Wilson
P.O. Box 11549
Columbia, S.C. 29211

Respectfully submitted,

Traci Trouton-Burr
Paralegal to William G. Yarborough, Esquire

SWORN TO before this 17
Day of August, 2015

Notary Public for South Carolina
My Commission expires: 4/9/24