

**ORIGINAL**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Richland County

J. Ernest Kinard, Jr., Deceased Circuit Court Judge  
\_\_\_\_\_  
**S.C. Supreme Court**

TERRANCE D. PATTERSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000882  
\_\_\_\_\_

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

JOHN H. STROM  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Did the PCR court err in finding plea counsel provided effective assistance of counsel where Petitioner asserted, and plea counsel agreed, that Petitioner would not have pled guilty and would have gone to trial had plea counsel not told him that he had secured thirty year negotiated sentence with the prosecutor, the deceased's family, and the plea judge?

## STATEMENT

### **Indictment**

On February 9, 2011, Petitioner was indicted by the Richland County Grand Jury for one count of attempted murder and one count of murder. App. 104 - 107.

### **Guilty Plea Hearing**

On December 3, 2012, a hearing was held before the Honorable DeAndrea Benjamin. App. 1 - 29. E. Deon O'Neil represented Petitioner. Deputy Solicitor E. Luck Campbell and Assistant Solicitor Meghan L. Walker represented the State.

Assistant Solicitor Walker stated that Petitioner and four other individuals had participated in an attempted retaliatory shooting of a rival gang member, Edward "Weenie" Miller. App. 6, ll. 2 - 13, ll. 5. The shooters missed Miller and, instead, killed a bystander, Gary Reese, and wounded another. *Id.* The State contended that Petitioner, in addition to participating in the shooting, also provided some of the weapons. *Id.*

The State further alleged after the shooting, Petitioner and the others celebrated despite knowing that the deceased was uninvolved in the gang dispute. *Id.* Petitioner accepted responsibility for his involvement in the shooting, but testified that he did not supply the others with weapons and that he did not celebrate or brag after the shooting. App. 13, ll. 11 - 15, ll. 19.

After confirming that Petitioner acknowledged his culpability in the shooting, the trial court accepted the factual basis for the guilty plea, and ruled that Petitioner was knowingly and intelligently entering into it. App. 15, ll. 20 - 20, ll. 12. Asking for the mercy of the court, *plea counsel requested a thirty-five year sentence.* App. 22, ll. 13-16. While the State did not formally agree to a recommendation, Deputy Solicitor Campbell suggested that the deceased's family "would not oppose a thirty-five year sentence." *Id.* at ll. 17-19.

Before reiterating his request for a thirty five year sentence, plea counsel stressed that Petitioner had confessed to the shooting, accepted his responsibility, and apologized to the family. App. 24, ll. 4 - 25, ll. 24. Judge Benjamin, noting that Petitioner was accepting responsibility, nonetheless sentenced Petitioner to a sentence of forty years imprisonment. App. 28, ll. 8-17.

Plea counsel then immediately filed a motion for reconsideration of Petitioner's sentence. On March 4, 2013, Judge Benjamin granted the motion without a hearing and reduced Petitioner's sentence plea counsel's recommended thirty-five years. App. 30 - 31.

**PCR Application**

Petitioner filed an application for post-conviction relief (PCR) on October 1, 2013. App. 32 - 38. Petitioner alleged that plea counsel had advised him that he would receive a thirty year sentence if he pled guilty. App. 34. On February 25, 2014, the State filed a Return.

On December 10, 2014, an evidentiary hearing was held before the Honorable J. Ernest Kinard, Jr. Tommy Thomas represented the State. Assistant Attorney General J. Clayton Mitchell represented the State. Petitioner and plea counsel both testified at the hearing.

Petitioner's Testimony

Petitioner stated that, prior to being promised a thirty year sentence by plea counsel, he had intended to stand trial. App. 50, ll. 1-25. Petitioner recollected that his co-defendants had received wildly varying sentences ranging from seventeen to fifty years imprisonment. *Id.* Petitioner denied any gang affiliation. *Id.*

Petitioner also testified that some of his co-defendants had been convicted of or pled guilty to voluntary manslaughter. App. 51, ll. 1-24. Petitioner testified that he only pled guilty because he believed that he would receive thirty years. Moreover, Petitioner averred that he should have been allowed to plead guilty to voluntary manslaughter under the facts of the case. *Id.*

Petitioner noted that the shooters had used a variety of weapons and the ballistic evidence was inconclusive as to what kind of round had killed Reece. App. 54, ll. 13 - 58, ll. 9. On cross-examination, Petitioner restated that he had never intended to kill Reece, but conceded that he had acted recklessly by shooting at Miller. App. 62, ll. 7-22. Petitioner then reaffirmed that he only pled guilty because he had been promised a thirty year sentence. App. 68, ll. 4-11.

#### Plea Counsel's Testimony

Agreeing with Petitioner's recollection, plea counsel testified that Petitioner had "wanted a trial" if the state did not agree to a voluntary manslaughter plea. App. 71, ll. 2-15. Counsel stated that while surveillance video of shooting did not reveal any faces, Petitioner had nonetheless confessed to law enforcement about his involvement in the shooting. App. 76, ll. 6-16.

Curiously, plea counsel was adamant that Reece's family had approved a potential sentence of thirty years. App. 77, ll. 20-25. Counsel remembered leaving final discussions with the prosecutor and judge, "with the impression that - - that it would be likely that [Petitioner] would get 30 years, and I relayed that to [Petitioner]." App. 78, ll. 2-6. ***"I left there with the belief that nobody would be in opposition of me asking for a 30 year minimum."*** *Id.* at ll. 9-12 (*emphasis added*).

Plea counsel further stated that, ***"my recollection would be I asked for 30 years at the original sentence hearing."*** *Id.* at ll. 17-22 (*emphasis added*). Plea counsel agreed that Petitioner had wanted to go to trial, particularly if the State was not going to offer a plea deal. App. 82, ll. 13-21. "I would say . . . ***I told [Petitioner] that . . . we can get 30 years if he pled. . .*** . I thought it would probably be good for him to plead guilty and get -- and get thirty years, as opposed to going to trial and get upwards of fifty." App. 83, ll. 9-20 (*emphasis added*).

Plea counsel claimed that he believed forty years was excessive and filed a motion for reconsideration on that basis. App. 84, ll. 6-9. He also believed that Petitioner was less culpable

than his co-defendants and that Petitioner had more readily accepted responsibility than the others. App. 87, ll. 15-21.

#### Direct Examination of Plea Counsel by PCR Court

At the conclusion of the hearing, the PCR court directly examined plea counsel. App. 88, ll. 3 - 89, ll. 18. The court asked plea counsel to read the guilty plea transcript and inquired with obvious bewilderment:

Look at page 22, line 13. *At no point did you ever ask for 30 years.* Just read -- read what it says there.

*Well, you asked for 35. You said the victim said 35.* Now you testified earlier that the victim said 30, but you didn't represent that to the [plea] court at all. And then when you didn't get 35 and she gave him 40, *you made a motion to reconsider and asked for 35 again; and the court gave him 35.*

App. 88, ll. 3-20 (*emphasis added*). Plea counsel could only sheepishly reply that it appeared he never asked for a thirty year sentence. *Id.* Nevertheless, the PCR court denied Petitioner's application, "he didn't put up enough proof for me to set it aside." App. 89, ll. 12-19.

#### **Order of Dismissal**

On February 19, 2015, the PCR Court issued a written order of dismissal denying Petitioner's application. App. 91 - 99. The court specifically found plea counsel's testimony to be "credible and persuasive on all matters." App. 95. Curiously, given plea counsel's testimony at the evidentiary hearing, the court concluded that there was no credible evidence that Petitioner had received a promise of "a particular sentence." App. 96.

On March 2, 2015, Petitioner filed a motion to alter or amend the order of dismissal. App. 100 - 101. On March 31, 2015, the PCR court denied the motion. App. 103.

## ARGUMENT

**The PCR court erred in finding plea counsel provided effective assistance of counsel where Petitioner asserted, and plea counsel agreed, that Petitioner would not have pled guilty and would have gone to trial had plea counsel not told him that he had secured thirty year negotiated sentence with the prosecutor, the deceased's family, and the plea judge.**

Plea counsel "credibly" testified at the evidentiary hearing that he represented to Petitioner that Judge Benjamin would impose a thirty year sentence if Petitioner accepted responsibility and pled guilty because plea counsel had reached an agreement with the prosecutor and victim's family in advance. App. 77, ll. 13 - 78, ll. 22. When confronted by the PCR court with the guilty plea transcript clearly showing that he had asked for a thirty-five sentence at both the sentencing hearing and in his motion for reconsideration, counsel had no explanation for his failure to request the negotiated thirty-year sentence. App. 88, ll. 2-22.

Counsel never disputed that he created in Petitioner the expectation that he would receive the minimum sentence in exchange for pleading guilty and that Petitioner had otherwise wanted to stand trial. App. 71, ll. 2-6; App. 77, ll. 13 - 78, ll. 22. *See Alexander v. State*, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991) (ineffective assistance of counsel when plea counsel erroneously advised petitioner about potential sentence prior to guilty plea). Thus, the PCR court erred in finding that plea counsel provided effective assistance of counsel. App. 91 - 99; *See Hill v. Lockhart*, 474 U.S. 52 (1985) (applying the *Strickland v. Washington*, 466 U.S. 668 (1984) standard to guilty plea challenges based on ineffective assistance of counsel).

To prove ineffective assistance of counsel from a guilty plea, the defendant must show: (1) "the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases" and (2) that "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 57-59; *See Ray v. State*, 303 S.C. 374, 401 S.E.2d 151 (1991)

(defendant's guilty plea was not intelligently and voluntarily made in light of the erroneous advice given by plea counsel). However, "[t]here is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. *See Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

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, 90 S.Ct. 1463, 1474 (1970). An "unsound result" occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969) (guilty plea is voluntarily and knowingly entered into when accused has a full understanding of the consequences of his plea and the charges against him); *see also Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999) (defendant must understand the sentencing consequences of his plea for it to be considered voluntarily given).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." *Roddy v. State*, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000).

## Deficient Performance

In this case, plea counsel's advice and actions were not within the range of competence demanded of attorneys in criminal cases. *See Alexander*, 303 S.C. at 542, 402 S.E.2d at 485. Plea counsel created a false expectation as to Petitioner's potential sentence when he assured him that his request for a thirty year sentence had been agreed to in advance by the State, the deceased's family, and the trial judge. App. 77, ll. 13 - 78, ll. 22. Plea counsel was also deficient for then erroneously requesting a thirty-five year sentence, as opposed to the negotiated thirty-year sentence that he had admittedly promised Petitioner he had secured. App 22, ll. 13-20.

An "unsound result" occurred because counsel's representations regarding sentencing and failure to follow through on those representations precluded Petitioner's from accurately understanding of the sentencing consequences of his guilty plea. App. 80, ll. 5-7; 106, ll. 15-19; *Brady*, 397 U.S. at 758; *See Boykin*, 395 U.S. 238; *see also Pittman*, 337 S.C. 597, 524 S.E.2d 623.

It is irrelevant that the PCR judge found Petitioner's testimony not credible. In all material respects, Petitioner and plea counsel's testimony at the evidentiary hearing is in accord. Plea counsel was found to be "credible on all matters." App. 95. This credible testimony included admitting that he told Petitioner that: (1) he would ask for a thirty-year sentence; (2) that the deceased's family and prosecutors would not oppose that request; and (3) that the trial court had agreed to impose that sentence. App. 77, ll. 13 - 78, ll. 22. When confronted with his request for a thirty-five year sentence, plea counsel had no explanation. App. 88, ll. 2-22.

Petitioner did not base his decision to plead guilty on "wishful thinking;" instead, he based his decision to plead guilty on the expectation created by plea counsel's assurances that he had secured the consent of all the parties to a thirty-year sentence. App. 77, ll. 13 - 78, ll. 12. Therefore,

plea counsel's inexplicable decision to request a thirty-five sentence for Petitioner constituted constitutionally defective performance. *See Hill*, 474 U.S. at 57-59.

### **Prejudice**

Petitioner was prejudiced by plea counsel's deficient performance because it constituted the basis for Petitioner's decision to plead guilty. Plea counsel's "credible" testimony was that Petitioner was in favor of standing trial. App. 71, ll. 2-6; App. 82, ll. 13-21. Plea counsel also recalled that on the week the case was to proceed to trial, he had discussions with Deputy Solicitor Campbell and Judge Benjamin that left him with "***the belief that nobody would be in opposition of me asking for a 30-year sentence.***" App. 78, ll. 9-12 (*emphasis added*).

Prior to this conversation, plea counsel stated that he had "always" advised Petitioner that if the State was not willing to allow Petitioner to plead to voluntary manslaughter that he should stand trial. App. 71, ll. 2-6; App. 82, ll. 13-21. Counsel believed the State's evidence was inconclusive as the ballistic evidence could not say which gun killed the deceased and the surveillance video of the shooting did not show the perpetrators faces. App. 80, ll. 19 - 81, ll. 15. "***I told Mr. Paterson that I believe he --we can get 30 years if he pled guilty.***" App. 83, ll. 9-10 (*emphasis added*).

Plea counsel specifically remembered that his advice on whether to stand trial or plead guilty changed based on his belief that Petitioner would receive a thirty year sentence if he pled guilty. *Id.* at ll. 9-23. By comparison, a co-defendant had been convicted at trial and sentenced to fifty years. *Id.* Likewise, Petitioner testified that he decided to plead guilty only because plea counsel represented that he had secured a thirty year sentence. App. 52, ll. 15-24.

Accordingly, based on the testimony presented at the plea and evidentiary hearings, "there is a reasonable probability that, but for counsel's errors, [Petitioner] would not have pleaded guilty and would have insisted on going to trial." *See Hill*, 474 U.S. at 57-59.

**CONCLUSION**

Based on the foregoing reason, Petitioner Terrance Patterson's petition for writ of certiorari should be granted to allow full briefing on the issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John H. Strom", written over a horizontal line.

John H. Strom  
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of December, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Richland County

J. Ernest Kinard, Jr., Deceased Circuit Court Judge

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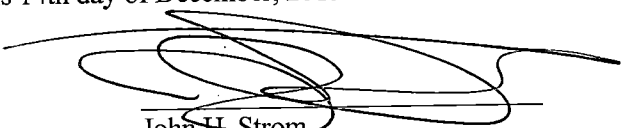
APPELLATE CASE NO. 2015-000882

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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 Clay Mitchell, Esquire this 14th day of December, 2015.

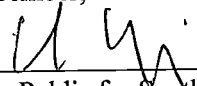


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John H. Strom  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day  
of December, 2015.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina

My Commission Expires: May 12, 2025.