THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY

Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case Number: 2015-00636

Tommy Weathers, Jr. Petitioner,

v.

State of South Carolina Respondent.

Petition for Writ of Certiorari

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II.

Did Tommy Weathers, Jr. receive ineffective assistance of counsel, in degradation of the Sixth Amendment of the United States Constitution and Article I, §§ 3 and 14 for the South Carolina Constitution, because his guilty plea counsel failed to advise him that kidnapping is a "no parole" offense that requires service of eighty-five percent of the sentence imposed followed by up to two years in the Community Supervision Program?

STATEMENT OF CASE

In March and November 2011, the Berkeley County Grand Jury indicted the petitioner, Tommie Weathers, Jr., for armed robbery, kidnapping, first-degree assault and battery, and possession of a weapon during the commission of a violent crime. Appendix (hereinafter "A.") 41-47. The Court of General Sessions appointed Steve C. Davis to represent Weathers on these charges. Ashleigh B. Cornwell represented the State. On January 14, 2013, Weathers pleaded guilty before the Honorable Kristie Lee Harrington to strong arm robbery, kidnapping, and first-degree assault and battery. A. 1-22. The State dismissed the charge for possession of a weapon during the commission of a violent crime. A. 48. On February 11, 2013, Judge Harrington sentenced Weathers to ten years imprisonment for each offense. The sentences are concurrent. A. 23-40, 49-51.

On October 1, 2013, Weathers filed an application for post-conviction relief. A 52-58. On July 14, 2014, the State served its return. A. 59-64. Weathers amended his application on February 11 and 17, 2015, A. 65-70. On February 18, 2015, the Honorable Eugene C. Griffith, Jr. convened an evidentiary hearing. Lance S. Boozer represented Weathers. Ashleigh R. Wilson represented the State. A. 68-127. By written order dated June 3, 2015, Judge Griffith dismissed Weathers application. A. 128-43. By written order dated July 10, 2015, Judge Griffith denied Weathers Rule 59(e), SCRCP motion. A. 144-46.

Weathers timely filed a notice of appeal, and this petition for writ of *certiorari* follows.

STATEMENT OF FACTS

During the post-conviction hearing, everyone agreed that, up to the morning of trial, Weathers planned to exercise his right to a jury trial and present an alibi defense. A. 13, 29, 83, 109, 117. At the last moment, Weathers' defense counsel convinced him to plead guilty and seek a Youthful Offender Act (hereinafter "YOA") sentence, even though Weathers did not meet the definition of a "youthful offender."[1] A. 80.

A. Guilty Plea.[2]

The Solicitor announced Weathers would plead guilty to strong arm robbery, kidnapping, and first-degree assault and battery. A. 4-5.

The guilty plea judge informed Weathers he could be sentenced "up to 15 years" for strong armed robbery, "up to 30" years for kidnapping, and "up to ten years" for first-degree assault and battery. The plea judge also informed Weathers he was facing "55 years in the department of corrections" if she "were to impose the maximum sentence upon [him] and run each of these indictments consecutively." The plea judge advised Weathers he should "assume that whatever sentence that I give you, you will do day for day" even though that was technically not accurate. A. 5-10.

The plea judge interrupted the guilty plea for trial counsel to explain to Weathers the meaning of a "most serious" offense. The plea judge never determined that Weathers understood the meaning or consequences of a violent offense. A. 6-8.

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[1] S.C. Code Ann. § 24-19-10, *et. seq.*

[2] Prior to Weather's guilty plea, the State jointly tried co-defendants Ryan Newman and Jessica Clark. Because the jurors had "a problem finding the gun" involved in the offense, they convicted them of strong arm robbery as a lesser-included offense of armed robbery and acquitted them of possession of a handgun during the commission of a violent crime. The jurors convicted of kidnapping and first-degree assault and battery.

The plea judge asked Weathers, "Have you had discussions with your attorney in which he told you I would sentence you a certain way here today?" Weathers said counsel told him to expect a "[p]otential YOA." Although the plea judge informed Weathers, "[T]here is no one in this room that knows how I'm going to sentence you," she never informed him that he did not meet the definition of a "youthful offender" under S.C. Code Ann. § 24-19-10(d). A. 9-10. Nor did the plea judge inform Weathers that kidnapping is a "no parole" offense that requires service of eighty-five percent of the sentenced followed by community supervision.

The Solicitor recited the factual basis for the guilty plea. Jessica Clark allegedly set up a robbery by meeting the victim "online the night before" and promising him "sex and marijuana." The next day, Clark drove the victim to a "desolate dirt road" where three men wearing "hoodies pulled tight so you could only see a small part of their face"

> put a gun to the back of the victim's head, pulled him out of the car. And proceeded to beat him up. They stripped him naked of all of his clothes, stole $160.00, his wallet, his keys, they also pistol whipped him several times.

Because of light created by Clark sitting in the car the entire time with her foot on the breaks, the victim "was able to make out some facial features of the three suspects." The State identified Ryan Newman by his ankle monitor. The victim's identification of Weathers was based on "his skin color and . . . identifying him by his voice."[3] If the case had proceeded to trial, the prosecution would have relied on the testimony of Jessica Clark, Ryan Newman, and Ryan's brother Shane Newman.[4] A. 14-18.

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[3] The victim, who knows Weathers, identified him in a photograph line up. A. 18.

[4] Shane Newman was initially misidentified "as the third suspect." Later, the State alleged "Little C," Clint Clark, was the third suspect. A. 16-17.

After hearing from the victim, the guilty plea judge accepted the guilty plea and deferred sentencing to obtain a pre-sentence investigation. A. 14-21.

B. Sentencing Hearing.[5]

During the sentencing hearing, the Solicitor acknowledged that the State's case against Weathers was not as strong as its case against co-defendant Ryan Newman because Newman "was actually wearing an electronic monitor when we committed the offense, so [investigators] were definitively able to put him there." A. 28.

Plea counsel mistakenly referred to kidnapping as "a serious offense." He argued that the strong arm robbery offense "puts us in a position that he could get a YOA." A. 29-30. Trial counsel ***did not*** request a time served sentence for kidnapping. Nor did the sentencing judge inform Weathers that he did not meet the definition of a "youthful offender" because of the kidnapping conviction.

The sentencing judge imposed concurrent sentences of ten years for each offense. Because the underlying facts of the kidnapping conviction were not of a "sexual nature," the sentencing judge did not require sex offender registration as provided by S.C. Code Ann. § 23-3-430(C)(15). A. 37-38, 49-51.

C. Post-Conviction Relief Hearing.

At the evidentiary hearing, Weathers testified:

> Since Mr. Davis was appointed my counsel, we never talked about taking a plea. And we planned to go to trial the whole time. And then the day to select my jury, he passed me a note asking if I trust him, and I told him yeah. So then he told me, if I sign a guilty plea, he could – I could get a YOA.

[5] By the time of Weathers' sentencing, Ryan Newman had been sentenced to fourteen years imprisonment. Jessica Clark's sentencing had been deferred until May 2013 because "she [was] supposed to have a baby." A. 27-28.

A. 80.

The possibility of a YOA sentence was "the only incentive [Weathers] had to plead guilty." After the guilty plea, Weathers learned that he was ineligible for a youthful offender act sentence under S.C. Code Ann. § 24-19-10(d). Weathers further testified, "And without that improper advice, I would not have pled guilty." A. 80. *See also* A. 83 ("Mr. Davis told me if I sign the plea, that he would get me a YOA."); A. 91 ("Kidnapping is a no-parole offense. I am not eligible for a YOA, which is actually the only reason I pled guilty from counsel stating – stipulating that I would receive a YOA sentence."); and A. 93-94 (reiterating plea counsel should have known Weathers was ineligible for a YOA, that a YOA sentence was the "only incentive to plead guilty," and he would have proceeded to trial but for the inaccurate advice).

Weathers additionally testified the guilty plea judge never informed him that he was not eligible for a YOA sentence. Although the plea judge said he "could face a potential of 55 years," Weathers still believed he could receive the YOA sentence "that I was under the assumption of, the impression of receiving a YOA." A. 81.

Guilty plea counsel testified, "I wanted to put Tommie in a favorable position, which I thought I did in reference to a possibility for the YOA with the eradication, the removal of the armed robbery" charge. Counsel claimed the goal was for a time served sentence for kidnapping and YOA sentence for strong arm robbery, even though he never asked the sentencing judges to impose a time served sentence for the kidnapping offense. A. 109-10. Counsel acknowledged the plea judge did not inform Weathers, "Mr. Davis is mistaken, you cannot get a YOA based on these charges that you are pleading to." A. 121. Counsel insinuated that the sentencing judge was not required to follow the law

when he testified, "Sometimes I feel with a black robe, you can do a lot of things." A. 123.

At the evidentiary hearing, Weathers also testified that he did not fully understand the "direct continuing consequences" of the kidnapping conviction. He did not understand that he would have to serve eighty-five percent of any sentence followed by the "community supervision program upon the completion of the sentence." He "had the assumption of parole eligibility, but, in effect, had [a] no-parole offense." Weathers testified:

> If I knew that I could not make parole and that I could serve up to two years with a monitoring device after the completion of my sentence on a [community supervision], coupled with the revocation sentences, I would definitely not have voluntarily pleaded guilty."

A. 89-91. *See also* A. 97 (Weathers reiterated he was not "aware of" and "was never informed about" the "direct consequences of the community supervision program.").

Plea counsel acknowledged the expectation that criminal defense lawyers advise clients about the consequences of a conviction such as the percentage of time a person will be required to serve prior to release and whether it is a "serious, most serious" offense. A. 116. Counsel did not recall discussing community supervision program with Weathers. A. 122.[6]

[6] Counsel claimed he convinced the judge not to require sex offender registry for the kidnapping conviction. A. 122-23. The sentencing transcript, however, reflects this decision resulted from a discussion between the judge and Solicitor following an inquiry from the representative assigned to court from the Department of Probation, Parole, and Pardon Services. A. 38.

At the conclusion of the testimony, PCR counsel argued that a YOA sentence for kidnapping "would be an illegal sentence." The post-convicting judge acknowledged that was a strong issue. A. 55.

STANDARD OF REVIEW

Under the first prong of *Strickland v. Washington*, the defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." 466 U.S. 668, 688 (1984). "The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted). Publications of the American Bar Association, the National Legal Aid and Defender Organization, public defender organizations, and state bar associations "are guides to determining what is reasonable." *Id.* at 366-68. "Although they are only guides and not inexorable commands, these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with . . . modern criminal prosecutions." *Id.* at 367.

Once the defendant asserting ineffective assistance of counsel has established counsel's failure to comply with the prevailing professional norms, under the second prong of *Strickland*, he must affirmatively prove that this deficiency has prejudiced him. Specifically:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 694.

"[T]here exists a right to counsel during sentencing in both noncapital and capital cases. Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in *Strickland* prejudice because any amount of [additional] jail time has Sixth Amendment significance." *Lafler v. Cooper*, ___ U.S. ___, 132 S.Ct. 1376, 1385-86 (2015).

"If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy." *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015). *And see Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) ("Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness." (emphasis supplied by court)).

ARGUMENTS

The questions presented in Tommie Weathers, Jr.'s petition for this court to grant a writ of *certiorari* present important issues about the quality of representation provided by criminal defense counsel in South Carolina. The first question involves defense counsel inducing his client to plead guilty based on incorrect and objectively unreasonable legal advice. The second question asks this Court to revisit its prior, arguably incorrect, but now obsolete, case law regarding defense counsel's obligation to make sure the client understands the consequences of a conviction and sentence for a "no parole" sentence.

Question I

Did Tommy Weathers, Jr. receive ineffective assistance of counsel, in degradation of the Sixth Amendment of the United States Constitution and Article I, §§ 3 and 14 for the South Carolina Constitution, when his criminal defense counsel induced him to plead guilty to kidnaping, strong arm robbery, and first-degree assault and battery by creating the expectation of a Youthful Offender Act sentence, even though Weathers did not meet the definition of a "youthful offender" because of the resulting conviction for kidnapping?

> "Youthful offender" means an offender who is seventeen but less than twenty-five years of age at the time of conviction for an offense that is not a violent crime, as defined in Section 16-1-60, and that is a misdemeanor, a Class D, Class E, or Class F felony, or a felony which provides for a maximum term of imprisonment of fifteen years or less;

S.C. Code Ann. § 24-19-10(d)(ii). Kidnapping is a violent crime, S.C. Code Ann. § 16-1-60, and a Class A felony, S.C. Code Ann. § 16-1-90(A).

It is uncontested that plea counsel advised Weathers he could receive a YOA sentence even though he did not meet the definition of a "youthful offender," pursuant to S.C. Code Ann. § 24-19-10(d), because of the kidnapping conviction. As a result, a YOA

sentence was impossible in this case. It is uncontroverted that the possibility of a YOA sentence was the only inducement for Weathers to plead guilty. Weathers would not have pleaded guilty but for the deficient advice. The prosecution's case, after all, was based on co-defendant testimony and eyewitness identification.[7]

Regarding guilty pleas, this Court has observed:

> In *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), the Supreme Court applied the two part standard adopted in *Strickland* to guilty plea challenges bottomed on ineffective assistance of counsel. The Court reiterated that the defendant must show first that counsel's representation fell below the standard of reasonableness; and, that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. 106 S.Ct. at 370. Specifically, the Court stated that the defendant must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 106 S.Ct. at 370.

Jordan v. State, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988). *See also Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000) ("A defendant who pleads guilty on advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases and there is a reasonable probability that, but for counsel's errors, defendant would not have pled guilty and would have insisted on going to trial.").

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[7] Both types of evidence are suspect. "The jury must determine whether the informer's [or co-defendant's] testimony has been affected by interest or by prejudice against a defendant." *United States v. Luck*, 611 F.3d 183, 186-87 (4th Cir. 2010). The Supreme Court of the United States does "not doubt either the importance or the fallibility of eyewitness identifications." *Perry v. New Hampshire*, __U.S. ___, 132 S. Ct. 716, 728 (2012).

Defense counsel affirmatively misadvised his client, which is never a valid strategic decision. *See Freiburger* and *Ingle, supra.* If, as counsel testified at the post-conviction hearing, the strategy really was to ask for a time served sentence for kidnapping, then the sentencing transcript should memorialize counsel making that request. Rather, the transcript indicates counsel believed reducing armed robbery to strong arm robbery "puts us in a position that he could get a YOA" sentence. A. 29. If he did not understand the law, "counsel made no tactical 'choice,' unless a failure to become informed of the law affecting his client can be so considered." *Luchenburg v. Smith*, 79 F.3d 388, 392-93 (4th Cir. 1996). Regardless of whether counsel understood the law, he affirmatively advised Weathers he could receive a YOA sentence. Counsel's advice that affirmatively misstates the law "falls below the level of competence reasonably expected of attorneys in criminal cases." *Hinson v. State*, 297 S.C. 456, 458, 377 S.E.2d 338, 339 (1989) (counsel incorrect advice about parole eligibility warranted granting post-conviction relief). *And see Alexander v. State*, 303 S.C. 539, 402 S.E.2d 484 (1991) (held that petitioner's testimony that he would not have pled guilty if trial counsel had not misinformed him that he would face a potential life sentence if he proceeded to trial satisfied "prejudice" requirement of ineffective assistance of counsel claim) and *Ray v. State*, 303 S.C. 374, 375, 401 S.E.2d 151, 152 (1991) (held defense counsel ineffective for erroneously advising client "he would be subject to a sentence of life without parole . . . if he went to trial and was convicted of the two armed robbery charges").

Additionally, by stating, "Sometimes I feel with a black robe, you can do a lot of things," A. 53, plea counsel suggested that the sentencing judge did not have to follow

the law. A strategy of advocating for a judge to nullify valid statues enacted by the General Assembly can ***never*** be reasonable. *See Freiburger* and *Ingle, supra.* In addition to violating the law, this strategy violates Rule 501, SCACR Cannon 3(B)(2) of the Code of Judicial Conduct, which provides, "A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism."

Because plea counsel's objectively unreasonable and erroneous advice about the availability of a YOA sentence induced Weathers to plead guilty, this Court should grant the writ.

Question II

Did Tommy Weathers, Jr. receive ineffective assistance of counsel, in degradation of the Sixth Amendment of the United States Constitution and Article I, §§ 3 and 14 for the South Carolina Constitution, because his guilty plea counsel failed to advise him that kidnapping is a "no parole" offense that requires service of eighty-five percent of the sentence imposed followed by up to two years in the Community Supervision Program?

Weathers testified he would not have plead guilty if he knew he had to serve eighty-five percent of his sentence followed by up to two years in the Community Supervision Program. Plea counsel was aware clients expect advice about the consequences of a conviction and sentence, including calculating the amount of time a person might serve, but there is no evidence that he ever advised Weathers that kidnapping is a no parole offense requiring service of eighty-five percent of the sentence followed by the Community Supervision Program.

This Court should revisit its holding in *Jackson v. State*, reasoning "the [Community Supervision] Program serves essentially the same function for persons convicted of "no parole offenses" as parole does for other inmates." 349 S.C. 62, 64, 562

S.E.2d 475, 475 (2002). This Court concluded, "It is well settled that parole eligibility is a collateral consequence of sentencing, and that trial counsel need not advise a client of his parole eligibility. *Id.* As Weathers testified at the post-conviction hearing, the Community Supervision Program is a direct consequence of a conviction and sentence that is distinguishable from parole. A. 89-91, 97. Parole and the Community Supervision Program are not synonymous. An inmate is not required to seek parole. If granted, parole allows for service of the original sentence in the community. S.C. Code Ann. § 24-21-610, *et. seq.* Community Supervision is a mandatory program included in all no parole sentences, S.C. Code Ann. § 24-21-560, making it a direct consequence.

The Supreme Court of the United States, however, has "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland.*" *Padilla*, at 365. "There is some disagreement among the courts over how to distinguish between direct and collateral consequences." *Id.* at fn. 8 (citing Roberts, Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty–Plea Process, 95 Iowa L.Rev. 119, 124, n. 15 (2009)). Other states, in fact, consider community supervision a direct and penal consequence of a sentencing. *See e.g. Ward v. State*, 315 S.W.3d 461 (Tenn. 2010) (mandatory sentence of community supervision for life was a punitive consequence of defendant's guilty plea, and thus trial court had an affirmative duty to ensure that defendant was informed of the lifetime supervision consequence prior to accepting guilty plea); *State v. J.J.*, 397 N.J. Super. 91, 99, 935 A.2d 1252, 1257 (App. Div. 2007) ("Community supervision is considered a direct and penal consequence"); *People v. Catu*, 4 N.Y.3d 242, 245, 825 N.E.2d 1081 (2005) ("Because a defendant

pleading guilty to a determinate sentence must be aware of the postrelease supervision component of that sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action, the failure of a court to advise of postrelease supervision requires reversal of the conviction."); *Palmer v. State*, 118 Nev. 823, 59 P.3d 1192 (2002) (held lifetime supervision is direct consequence of guilty plea to sexual offense of which defendant must be aware); and *State v. Ross*, 129 Wash. 2d 279, 916 P.2d 405 (1996) (held mandatory community placement term constitutes direct consequence of guilty plea, and failure to inform defendant of mandatory imposition of community placement term rendered plea invalid). *And see Carter v. McCarthy*, 806 F.2d 1373, 1374 (9th Cir. 1986) (held guilty plea is not voluntary and intelligent when trial court fails to inform defendant of mandatory parole term concomitant to sentence).

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Padilla*, at 365. The holding in *Jackson* traces back to *Griffin v. Martin,* 278 S.C. 620, 300 S.E.2d 482 (1983). Much has changed since 1983. Effective January 1, 1996, 1995 S.C. Act No. 83, § 1 added S.C. Code Ann. § 24-13-100 creating "no parole" offenses. Defendants facing prison time want to know how much of the sentence must be served. The Department of Corrections has a Release Date Calculation function on its website.[8] Professional standards require counsel to be familiar with collateral consequences of convictions and sentences. Professional organizations provide training about collateral consequences.

The National Legal Aid and Defender Association Performance (hereinafter "NLADA") Guidelines for Criminal Defense Representation long ago addressed the

[8] Found at https://public.doc.state.sc.us/releaseDateCalc/disclaimer.do (last viewed March 27, 2016).

obligation of counsel regarding the consequences of sentencing. Guideline 8.2(b)(2) and (3) provides:

> Counsel should be familiar with direct and collateral consequences of the sentence and judgment, including parole eligibility and applicable parole release ranges [and] effect of good-time credits on the client's release date and how those credits are earned and calculated.

NLADA's website points out:

> In May 2001, the U.S. Department [of Justice] distributed to state and local governments, legislative bodies, bar associations, courts and indigent defense systems its comprehensive national Compendium of Standards for Indigent Defense Systems. Prepared by the Institute for Law and Justice with NLADA's assistance, the Compendium contains national, state, and local standards relating to five functions of indigent defense.

(http://www.nlada.org/Defender/Defender_Standards/Defender_Standards_Comp (last viewed March 27, 2016)).

The American Bar Association (hereinafter "ABA") consistently mandates counsel advise clients about the collateral consequences of a conviction and sentence. The ABA Criminal Justice Standards for the Defense Function, Third Edition, 1993, Standard 4- 8.1(a), provided:

> Defense counsel should, at the earliest possible time, be or become familiar with all of the sentencing alternatives available to the court and with community and other facilities which may be of assistance in a plan for meeting the accused's needs. Defense counsel's preparation should also include familiarization with the court's practices in exercising sentencing discretion, the practical consequences of different sentences, and the normal pattern of sentences for the offense involved, including any guidelines applicable at either the sentencing or parole stages. The consequences of the various dispositions available should be explained fully by defense counsel to the accused.

The ABA Standards, therefore, required lawyers to advise clients about the consequences of a conviction, which incudes the amount of time a person must serve before release and any post-release consequences. The ABA Criminal Justice Standards for the Defense Function, Fourth Edition, 2015, Standard 4-8.3(b) now provides:

> Defense counsel's preparation before sentencing should include learning the court's practices in exercising sentencing discretion; the collateral consequences of different sentences; and the normal pattern of sentences for the offense involved, including any guidelines applicable for either sentencing and, where applicable, parole. The consequences (including reasonably foreseeable collateral consequences) of potential dispositions should be explained fully by defense counsel to the client.

Our State has aligned itself with national standards for providing criminal defense. This Court applies the ABA Guidelines for the Appointment and Performance of Counsel In Death Penalty Cases. *See e.g. Council v. State*, 380 S.C. 159, 173, 670 S.E.2d 356, 363 (2008) and *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). The Indigent Defense Act of 2007 vested the Commission on Indigent Defense (hereinafter "Commission") with the authority to develop "standards" regarding "the nature and scope of services to be provided." S.C. Code Ann. § 17-3-310(G)(2). In 2013, the Commission adopted Performance Standards for Public Defenders and Assigned Counsel in Non-Capital Cases,[9] which "**are benchmarks taken from existing national standards**" (emphasis original). Guideline 8.2(b)(2) and (3), identical to the NLADA Standard, provides:

> Counsel should be familiar with direct and collateral consequences of the sentence and judgment, including

[9] Found at https://www.sccid.sc.gov/resources/policies (last viewed March 26, 3016).

> parole eligibility [and] applicable parole release ranges and effect of good-time credits on the client's release date and how those credits are earned and calculated.

Numerous resources are available to defense counsel. The Department of Corrections has a Release Date Calculation function on its website, allowing judges, lawyers, and the general public to calculate the time to be served under any particular sentence. This Court can take judicial notice of the records of its Commission on Continuing Legal Education and Specialization. For over a decade, the annual Public Defender Conference has featured speakers from the Departments of Corrections and Probation, Parole, and Pardon Services to instruct on how sentences are calculated. The South Carolina Appleseed Legal Justice Center publishes information about the collateral consequences of a criminal conviction.[10]

The guilty plea judge telling Weathers to "assume that whatever sentence that I give you, you will do day for day," A. 5-10, compounds the prejudice. This ambiguous statement implies Weathers is eligible for parole, but he should not count on the Parole Board granting it. More importantly, the statement is not a correct statement of the law. It is common knowledge that the majority of inmates do not serve every day of their sentence. Most sentences are reduced substantially because of good time (S.C. Code Ann. § 24-13-210) and earned work credits (S.C. Code Ann. § 24-13-230). Although granting parole is rare, it still exists in our state. S.C. Code Ann. § 24-21-610. Most "no parole" offenses allow for release after serving eighty-five percent of the sentence. S.C. Code Ann. § 24-13-150. This Court consistently holds inaccurate statements of law by judges are outside the scope of the court's authority to determine whether the guilty plea

[10] Found at http://scjustice.org/brochures-and-manuals/collateral-consequences/ (last viewed March 27, 2016).

is knowingly and voluntarily entered. *See e.g. State v. Crisp*, 362 S.C. 412, 608 S.E.2d 429 (2005) and *State v. Gunter*, 286 S.C. 556, 335 S.E.2d 542 (1985).

Jackson and *Griffin*, furthermore, are inconsistent with the Court's precedent in other contexts requiring counsel and sentencing courts ensure defendants are properly advised about the consequences of a conviction and sentence. "[A] defendant entering a guilty plea must be aware of . . . the maximum and any mandatory minimum penalty." *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999). Counsel must advise a client about the immigration consequences of a conviction. *Lucero v. State*, 414 S.C. 238, 777 S.E.2d 409 (Ct. App. 2015). When defense counsel advises a client about the parole consequences of a sentence, the advice must be correct. *Hinson, Alexander*, and *Ray, supra.*

The Supreme Court of the United States has observed:

> A holding limited to affirmative misadvice . . . . would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement.

Padilla, at 370 (internal quotations omitted).

Defendants in criminal cases want to know the consequences of pleading guilty. Other states consider mandatory community supervision a direct consequence of a guilty plea. Prevailing professional norms mandate counsel to advise the client about even the collateral consequences of a criminal sentence. After *Padilla*, it is not clear whether the Supreme Court of the United States would even recognize a distinction between direct and collateral consequences of a sentence. *Jackson* does not reflect the modern reality of

our state's criminal justice system. This Court should revisit *Jackson* and consider whether trial counsel must advise a client that a conviction of a no parole offenses requires service of eighty-five percent of the sentence followed by up to two years in the Community Supervision Program.

This Court should grant the writ.

CONCLUSION

The questions presented in this petition involve important issues about the quality of representation provided by criminal defense counsel in South Carolina. For the foregoing reasons, this Court should grant to the writ and consider the merits.

Respectfully Submitted,

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April 11, 2016
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY

Eugene C. Griffith, Jr., Circuit Court Judge

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Tommy Weathers, Jr. Petitioner,

v.

State of South Carolina Respondent.

Certificate of Service

I certify that I serve a copy of this petition on the State of South Carolina and prior appointed counsel by placing a copy in the US Mail, postage prepaid, on the date reflected below.

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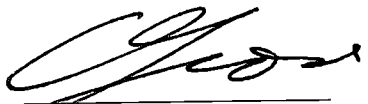

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April 11, 2016
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