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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2007-CP-22-0476

ROBERT TROY TAYLOR, #315084,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

BRIEF OF PETITIONER

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Whether defense counsel's failure to conduct a sufficient investigation into the criminal sexual conduct charge constitutes ineffective assistance of counsel?

STATEMENT OF THE CASE

The Petitioner, Robert Troy Taylor, was indicted in Georgetown County for one count of criminal sexual conduct with a minor in the second degree and two counts of committing lewd act upon a minor. All three charges involved different victims. On April 20, 2006, the Petitioner pleaded guilty as charged to the offenses. He was represented at this proceeding by R. Scott Joye, Esquire, and Delton W. Powers, Esquire. The Honorable Edward B. Cottingham, presiding circuit judge, sentenced the Petitioner to eight years' imprisonment, suspended to five years' imprisonment and a three-year term of probation. The Petitioner did not appeal his convictions or sentences.

At the time of his plea, the Petitioner was also charged with criminal sexual conduct with a minor in the second degree in Williamsburg County. The Petitioner subsequently proceeded to trial on that charge and was found guilty. The Honorable George C. James, presiding circuit judge, sentenced the Petitioner to life without parole pursuant to S.C. Code Ann. §17-25-45 due to his conviction for criminal sexual conduct in Georgetown County. See State v. Taylor, Op. No. 4920 (S.C. Ct. App. filed Dec. 21, 2011) (Davis Adv. Sh. No. 46 at 107).

On April 3, 2007, the Petitioner filed an Application for Post-Conviction Relief with the Georgetown County Clerk of Court's Office. The State made its Return on July 27, 2007. An evidentiary hearing into the matter was convened on November 20-21, 2008, before the Honorable Michael G. Nettles, presiding circuit judge. On January 27, 2009, the PCR court filed an Order of Dismissal denying the Petitioner's application on all issues. A timely Rule 59(e), SCRCP, motion was filed on February 9, 2009. This motion was denied by Form 4 order filed March 30, 2009. On April 15, 2009, the Petitioner timely served a Notice of Appeal indicating

his intent to appeal the orders issued by Judge Nettles in this case. The Notice of Appeal was filed with this Court on April 16, 2009.

The Petitioner filed a Petition for a Writ of Certiorari with this Court on March 28, 2010, and an Amended Petition for a Writ of Certiorari on June 8, 2010. The State served its Return on August 9, 2010. By order dated October 6, 2011, this Court granted the certiorari petition. The Petitioner now submits this Brief in support of his argument that the PCR court improperly denied his Application for Post-Conviction Relief.

ARGUMENT

Standard of Review

The Sixth and Fourteenth Amendments to the United States Constitution guarantee every criminal defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The right to the effective assistance of counsel includes the assistance of counsel before, during, and after a guilty plea. Hill v. Lockhart, 474 U.S. 52 (1985). In order to demonstrate ineffective assistance of counsel during a guilty plea, the moving party must show that but for counsel's errors and omissions, he would have exercised his right to trial. Id. "Plea counsel is ineffective within the meaning of the Sixth Amendment only when the applicant satisfies both requirements." Stalk v. State, 383 S.C. 559, 561, 681 S.E.2d 592, 593 (2009). Further, the moving party must show that there is a reasonable probability that he would have insisted on proceeding to trial on the matter instead of pleading guilty. Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009).

On appeal, a PCR court's findings will be upheld if there is any evidence of probative value supporting them. Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2009). However, the PCR court's decision will be reversed "when it is controlled by an error of law." Id. at 589, 690 S.E.2d at 79.

I. The PCR court's finding that defense counsel was not ineffective for failing to advise the Petitioner that his plea to criminal sexual conduct with a minor in the second degree would be considered a "most serious" strike pursuant to S.C. Code Ann. §17-25-45 cannot be upheld because (1) the recidivist consequence was a direct consequence of the plea; or (2) if the consequence was collateral, defense counsel's performance was deficient in light of Padilla v. Kentucky, 130 S.Ct. 1473 (2010).

A. How the Issue Arose Below

The Petitioner was charged in Georgetown County for one count of criminal sexual conduct with a minor in the second degree and two counts of lewd act upon a minor. While these charges were pending, the Petitioner was charged with another count of criminal sexual conduct in Williamsburg County.[1] Defense counsel represented the Petitioner on all of these charges. Defense counsel was also well aware of the fact that the Petitioner intended to proceed to trial on the Williamsburg County charges. See App. p. 103, lines 16-18 ("Troy had told me, on numerous occasions, that he absolutely would not plea on the Williamsburg County counts"). The Petitioner ultimately proceeded to trial on the Williamsburg County charges and was found guilty. See State v. Taylor, Op. No. 4920 (S.C. Ct. App. filed Dec. 21, 2011) (Davis Adv. Sh. No. 46 at 107). In accordance with S.C. Code Ann. §17-25-45, the Williamsburg County judge imposed a life sentence on the Petitioner. Id. at 108-109.[2]

Prior to the Petitioner's plea in Georgetown County, defense counsel never advised the Petitioner that his plea to criminal sexual conduct in Georgetown County would elevate the Petitioner's possible sentence in Williamsburg County to a mandatory life without parole sentence. See App. p. 111, line 23-p. 113, line 5. Defense counsel explained during the PCR

[1] The criminal sexual conduct charges in both counties involved the same victim: Victim 3.

[2] In addition to imposing a life without parole sentence following the conviction for criminal sexual conduct, the trial court also imposed a life sentence for kidnapping. Id. These sentences were upheld by the Court of Appeals. Id. at 115-117.

hearing that his failure to do so was based on his mistaken belief that the charge in Williamsburg County was for lewd act upon a minor and not for criminal sexual conduct. See App. p. 109, lines 1-7. Defense counsel further explained that had he realized the implications of the plea, he would have advised the Petitioner about the potential application of S.C. Code Ann. §17-25-45:

> Q: Sure. I understand. But as a practical matter, you as a lawyer know that, if your client pleaded to CSC in Georgetown County and were convicted as indicted in Williamsburg, it wouldn't matter what the judge desired to do; ---
> A: That's correct.
> Q. ---it would be an L-WOP case?
> A: That would be correct.
> Q: Okay. And, again, my direct question is, if you had specifically had on your mind at the time of this plea the fact that Williamsburg was a first degree criminal sexual conduct case,---
> A: We clearly would have talked about it.

App. p. 111, line 23-p. 112, line 10. Defense counsel admitted that he had "made a mistake in this case" which was that he "didn't tell him about second strike." App. p. 191, lines 19-21.

The Petitioner confirmed defense counsel's testimony that he was never informed of the recidivist consequences of his plea in Georgetown County. See App. p. 230, line 21-p. 231, line 5. The Petitioner further testified that he would have proceeded to trial in Georgetown County had he known that he faced a mandatory life without parole sentence in Williamsburg County as a consequence of his plea. App. p. 231, lines 6-10.

The PCR court denied relief on this claim, finding that the Petitioner failed to meet his burden of proof with regard to defense counsel's performance and with regard to how he was prejudiced by defense counsel's failure to advise him of the recidivist consequences of his plea. App. pp. 340-347. Specifically, the PCR court found that defense counsel was under no obligation to inform the Petitioner of the recidivist consequences of his plea in Georgetown County because "the effect of the Applicant's Georgetown guilty plea upon the later

Williamsburg sentence was 'collateral' rather than 'direct.'" App. p. 344. The PCR court also found that "[n]either the Applicant, nor the witnesses in his behalf, testified as to specific reasons why knowledge of the life without parole statute would have caused the Applicant to change his plea from guilty to not guilty." App. p. 345. The Petitioner filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, but this motion was denied by a Form 4 order. See App. pp. 356-362; p. 365. The Petitioner now asserts that the PCR court's rulings were erroneous.

B. Discussion

In order for a guilty plea to be knowing and voluntary, a criminal defendant must understand the consequences of the plea, such as the constitutional rights he will be giving up by pleading guilty or the possible sentences that can be imposed by the judge at the plea. Boykin v. Alabama, 395 U.S. 238 (1969). In South Carolina, a substantial body of law has developed as to which consequences of a plea must be explained to a criminal defendant by his attorney prior to the plea. Generally speaking, a defense attorney must only inform the defendant of the direct consequences of his plea, and he has no obligation to inform his client of the collateral consequences of his plea. See Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983). Direct consequences have "a definite, immediate, and largely automatic effect on the range of the defendant's punishment." Cuthrell v. Director, Paxtuent Institution, 475 F.2d 1364, 1366 (4th Cir. 1973). "A consequence is 'collateral' when it is uncertain or beyond the direct control of the court." Meyer v. Branker, 506 F.3d 358, 368 (4th Cir. 2007).

If a criminal defendant does not understand the direct consequences of his plea, then the plea is invalid. State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980). Defense counsel's failure to advise a client of the direct consequences of a guilty plea constitutes ineffective assistance of

counsel. Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999). A defense attorney cannot be ineffective for failing to advise a client of the collateral consequences of a guilty plea; instead, defense counsel's performance is deficient only when incorrect advice about a collateral consequence is given. See Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989). Additionally, the United States Supreme Court has recently held that at least one consequence of a conviction—deportation—is exempt from the direct/collateral dichotomy, and has held that defense attorneys are constitutionally required to advise their clients of the deportation consequences prior to the entry of their guilty pleas. Padilla v. Kentucky, 130 S.Ct. 1473 (2010).

The PCR court found that the Petitioner was unable to meet either of Strickland's prongs. The Petitioner contends that the PCR court's conclusions are unsupported by any probative evidence. In particular, the Petitioner contends that this Court's prior decisions on direct and collateral consequences have been abrogated by Padilla, and that the PCR court's rulings, which were grounded in these abrogated decisions, cannot be upheld in light of Padilla. Assuming, *arguendo*, that Padilla is inapplicable to this case, the Petitioner submits that the PCR court's finding that defense counsel's performance was not deficient was improper under this Court's decisions on direct and collateral consequences. Finally, the Petitioner contends that he has unequivocally demonstrated prejudice in this matter. The Petitioner will address each of these contentions in turn.

1. Padilla Has Abrogated this Court's Precedents on Direct and Collateral Consequences

In Padilla v. Kentucky, 130 S.Ct. 1473 (2010), the United States Supreme Court addressed the application of Strickland to a context it had not evaluated before: the responsibilities of defense attorneys to advise their clients about the deportation consequences of their pleas. The Supreme Court rejected the direct/collateral consequence dichotomy that had

dominated the analysis of lower courts on the issue because it found that "[d]eportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence." Id. at 1482. The Supreme Court also noted that it was not determining whether or not the direct/collateral consequence "distinction is appropriate" for use in further cases "because of the unique nature of deportation." Id. at 1481.

In Padilla, the Supreme Court was also pressed to adopt a standard that relief could only be granted in cases of "affirmative misadvice." 130 S.Ct. at 1484. The Supreme Court rejected this contention, finding that "there is no relevant difference between an act of commission and an act of omission in this context." Id. (internal quotations omitted). The Supreme Court reasoned that a holding limited to affirmative misadvice "would give counsel an incentive to remain silent on matters of great importance." Id.

Since the Supreme Court's decision in Padilla, the state and federal appellate courts have varied significantly in their analysis of two aspects of the decision. First, courts have split on the question of whether or not Padilla is retroactive. Compare United States v. Orocio, 645 F.3d 630 (3rd Cir. 2011) (finding Padilla retroactive); Commonwealth v. Clarke, 460 Mass. 30, 949 N.E.2d 892 (Mass. 2011) (same); Denisyuk v. State, 422 Md. 462, 30 A.3d 914 (Md. 2011) (same) with United States v. Chaidez, 655 F.3d 684 (7th Cir. 2011) (finding Padilla not retroactive); Dennis v. United States, 787 F.Supp.2d 425 (D.S.C. 2011) (same). Second, courts have split on the question of whether or not the decision applies to non-immigration consequences. Compare Taylor v. State, 304 Ga.App. 878, 698 S.E.2d 384 (Ga. Ct. App. 2010) (holding that Padilla requires a defense attorney to advise his client that he will have to register as a sex offender); Commonwealth v. Abraham, 996 A.2d 1090 (Pa. Super. Ct. 2010) (holding

that Padilla requires a defense attorney to advise his client that a plea to indecent assault would result in the loss of his teacher's pension) with Myers v. Warden, Warren Correctional Inst., 2011 WL 7039933 (S.D. Ohio 2011) (holding that Padilla applies only to deportation consequences). The Petitioner urges this Court to agree with the courts that have answered both of these queries in the affirmative. The Petitioner respectfully asserts that if both of these questions are answered affirmatively, then Padilla is applicable in this case and that it has abrogated a significant portion of this Court's jurisprudence regarding direct and collateral consequences.

With regard to the retroactive inquiry, decisions of the United States Supreme Court are generally retroactive unless they announce a new rule of criminal procedure. See Teague v. Lane, 489 U.S. 288 (1989). "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." Id. at 301. However, application of an old legal standard to a new context is not a new rule. Id. at 307 (noting that its decision in Frances v. Franklin, 471 U.S. 307 (1985), was retroactive because it was an application of Sandstrom v. Montana, 442 U.S. 510 (1979)).

In Padilla, the Supreme Court was merely applying an old standard—Strickland—to a new context: deportation consequences of a guilty plea. Therefore, like Frances before it, the decision should be applied retroactively. The Supreme Court appeared to recognize that the decision would be applied retroactively because the Court stated that it was unconcerned that the decision would open the "floodgates" because it "seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains." 130 S.Ct. at 1484-1485. If the decision was not to be applied retroactively, no convictions in place would be affected by the ruling.

Furthermore, the Court identified its decision in Hill v. Lockhart, *supra*, as a case where there were concerns that the "floodgates" would be opened by its decision. 130 S.Ct. at 1484-1485. This Court applied Hill retroactively in Hinson v. State, *supra*. If Hill—an application of Strickland to a new context—was to be applied retroactively, it logically follows that Padilla is to be applied retroactively as well. Consequently, the Petitioner asserts that this Court should find that Padilla is retroactive and that this Court should give the full effect to that opinion in evaluating this case.

The Petitioner respectfully contends that if this Court is to give full effect to Padilla, then it must apply beyond the scope of immigration consequences. While the Supreme Court found that it was not appropriate to pass judgment on the direct/collateral consequence dichotomy, the Supreme Court did find that at least one consequence of a conviction—deportation—was exempt from these traditional considerations. Instead of requiring that criminal defendants need to be informed of all of the specific deportation consequences in all cases—which is required for direct consequences—or not at all—which is usually required for collateral consequences—the Supreme Court applied a sliding scale that looked to the importance of deportation and the likelihood that the defendant will be deported if convicted. See Padilla at 1483. Additionally, the Supreme Court did pass judgment on the affirmative misadvice standard that has been applied by this Court in this context. See Hinson, *supra*. The Supreme Court held that a ruling limited to affirmative misadvice would lead to "absurd results." Padilla at 1484.

Therefore, in light of Padilla, it may no longer be appropriate to simply label consequences as "direct" or "collateral." The Petitioner argues, instead, that when a case presents a lack of advice or incorrect advice about a consequence of a plea, courts should look to the factors considered important by the Supreme Court in Padilla: the consequence's "close

connection to the criminal process," 130 S.Ct. at 1482, and whether or not the law pertaining to the consequence is "succinct and straightforward," 130 S.Ct. at 1483. If the consequence is closely connected to the criminal process and its application is succinct and straightforward, then defense counsel's "duty to give correct advice is ... clear." Id. at 1483.

2. Defense Counsel's Performance Was Deficient Pursuant to Padilla

In this case, it is clear that defense counsel failed to give correct advice regarding a straightforward consequence of the Petitioner's plea and that the consequence is closely connected to the criminal process. Accordingly, the Petitioner asserts, pursuant to Padilla, that defense counsel's conduct was deficient in this case.

The consequence in question is the recidivist nature of the Petitioner's plea, and it is closely related to the criminal process. There are several classes of crimes which carry recidivist consequences, including, but not limited to: (1) serious and most serious crimes—§17-25-45; (2) drug offenses—§§44-53-370, 44-53-375, 44-53-470; (3) property offenses—§16-1-57; and (4) driving under the influence offenses—§56-5-2930. Recidivist consequences are ubiquitous throughout South Carolina's criminal code, and their application is often automatic upon a second or subsequent offense. Since this consequence is closely related to the criminal process, it should be exempt from the direct/collateral consequence dichotomy. Therefore, Padilla requires that defense attorneys advise their clients of the consequence's application when the consequence's application is succinct and straightforward.

It would be difficult to envision a scenario where the application of recidivist consequences would be more straightforward than this case. Criminal sexual conduct with a minor in the second degree is a "most serious" offense. S.C. Code Ann. §17-25-45(C)(1). If a defendant has a prior "most serious" conviction at the time he is convicted for a second "most

serious" offense, the defendant "must be sentenced to a term of imprisonment for life without the possibility of parole." S.C. Code Ann. §17-25-45(A). Consequently, by pleading guilty to criminal sexual conduct in Georgetown County, the penalty for the Petitioner's pending criminal sexual conduct charge in Williamsburg County was immediately elevated to life imprisonment without parole due to the application of S.C. Code Ann. §17-25-45. Additionally, at the time of the Petitioner's plea, the application of §17-25-45 was mandatory and not in the discretion of the court or the solicitor. See S.C. Code Ann. §17-25-45(G) (Supp. 2006).[3] Therefore, the application of §17-25-45 upon conviction in Williamsburg County was "an automatic result" of the Georgetown County plea. Padilla at 1481.

Since recidivist consequences are closely related to the criminal process and the application of §17-25-45 was automatic in this case, Padilla requires that defense counsel give correct advice to the Petitioner regarding the application of §17-25-45. Not only did defense counsel fail to meet this standard—since he gave no advice—but defense counsel did not even realize that the Petitioner was charged with a second "most serious" offense in Williamsburg County. These matters are not in controversy because defense counsel admitted to his failures during his testimony at the PCR hearing. See App. p. 111, line 23-p. 113, line 5. Therefore, defense counsel's performance was deficient pursuant to Padilla and Strickland.

This case exemplifies the need for the reconsideration of direct and collateral consequence law. The Petitioner does not contend that criminal defense attorneys must advise their clients of all possible recidivist consequences in all cases. Such a ruling would be patently absurd because it would be impossible for a criminal defense attorney to foresee that his client will commit another crime that will subject him to a recidivist penalty. However, a case such as

[3] The statute has been recently amended so that the application of §17-25-45 is always at the discretion of the solicitor. This amendment was not in place at the time of the Petitioner's plea or his trial in Williamsburg County.

this, where a conviction automatically elevated another pending charge's sentence to life without parole, is not an everyday occurrence. Given the extreme importance of the recidivist consequences of the Petitioner's plea in Georgetown County, the Sixth and Fourteenth Amendments required that defense counsel advise the Petitioner about these consequences. Stated differently, if the PCR court's rulings are correct as a matter of law, then attorneys are permitted to not know what crimes their clients are charged with committing and are not obligated to inform their clients how their pleas might affect other pending charges they are also representing the client on. The Sixth and Fourteenth Amendments require more of defense counsel. The Petitioner respectfully asserts that this Court should apply Padilla in this case to find that defense counsel's conduct "fell below an objective standard of reasonableness." Strickland, *supra*, at 688. The PCR court's rulings to the contrary are unsupported by any probative evidence and are "controlled by an error of law." Kolle, *supra*, at 589, 690 S.E.2d at 79. This Court should reverse the lower court's decision on this issue.

3. Defense Counsel's Performance Was Deficient Pursuant to this Court's Prior Decisions on Direct and Collateral Consequences of Guilty Pleas

Assuming, *arguendo*, that Padilla is not retroactive or that it did not abrogate any of this Court's prior decisions, the Petitioner contends that the PCR court's finding that defense counsel's performance was not deficient was erroneous as a matter of law. In particular, the Petitioner argues that the application of S.C. Code Ann. §17-25-45 was a direct consequence of the Petitioner's plea in Georgetown County. Accordingly, the Petitioner respectfully submits that defense counsel's performance was deficient pursuant to this Court's well-established decisions on direct and collateral consequences.

The Petitioner agrees with the PCR court that "[t]here are no cases in South Carolina directly addressing whether a 'strike' under the life without parole statute is a collateral

consequence of a guilty plea." App. p. 343. The Petitioner also agrees with the PCR court that, as a general rule, "a consequence of this nature is collateral." App. p. 343; see also Ball v. United States, 470 U.S. 856, 865 (1985) (noting that potential collateral consequences of a conviction include "an increased sentence under a recidivist statute for a future offense"). The Petitioner, however, vehemently disagrees with the PCR court that calling a recidivist consequence "collateral" ends the inquiry in this case because it ignores the unique facts that are present here.

"A consequence is 'collateral' when it is uncertain or beyond the direct control of the court." Meyer, *supra*, at 368. In this case, the application of §17-25-45 was not "uncertain." To the contrary, the penalty for the Petitioner's pending charge in Williamsburg County was automatically elevated to life without parole as a result of his plea in Georgetown County. Furthermore, there was no discretion remaining with any court because the imposition of the life sentence would be mandatory upon conviction in Williamsburg County. See S.C. Code Ann. §17-25-45(G) (Supp. 2006). Accordingly, under these unique circumstances, the recidivist consequences of the Petitioner's Georgetown County plea were direct consequences, not collateral consequences. Defense counsel was required to provide correct advice to the Petitioner regarding this direct consequence, and his failure to do so constituted deficient conduct.

The Petitioner draws additional support for this argument from the fact that defense counsel represented the Petitioner on all of the "most serious" charges at the same time in both Georgetown County and Williamsburg County. Due to this dual representation, defense counsel was under an obligation to provide correct advice to the Petitioner about how to best approach the charges in both counties. This Court does not excuse defense attorneys who owe duties to

multiple clients and who fail in their ability to fully execute those duties due to conflicts of interest. See generally Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). The Petitioner respectfully submits that the same result should be reached where a defense attorney fails to properly represent a client on multiple charges.

The Petitioner also compares the factual scenario in this case to a defense attorney's failure to advise a client that a plea to multiple charges in one county could carry consecutive sentences. In such a case, defense counsel's performance would clearly be deficient because the defense attorney failed to apprise his client of the maximum penalty he faced on multiple charges. See generally Tate v. State, 758 So.2d 1188, 1189 (Fla. 3rd DCA 2000) (finding defense counsel's performance deficient because the attorney failed to advise his client that his "plea of guilty would result in consecutive sentences"). The Petitioner submits that where a plea to one charge affects the potential sentence of another pending charge, the duty to give correct advice regarding the potential sentences of *all* charges is the same regardless of whether there will be one proceeding or multiple proceedings.

Defense counsel recognized he made multiple errors in this case. He admitted that he was "horrified" that he had made this mistake because it was a mistake that represented a breakdown in some of the most fundamental duties of a defense attorney: knowledge of a client's pending charges and proper advice on how to proceed with those pending charges. App. p. 177, line 7. His testimony represents the clearest demonstration of error:

> I'm going to continue to say this: I made a mistake in this case. The mistake is I didn't tell him about second strike. ... I didn't pay attention. I grabbed the warrant. I turned it over to—to my staff. I certainly will never make that mistake again. I used to work—clerk for Sydney Floyd. Judge Floyd said, "You never learn by what you did right; its [sic] what you did wrong."

App. p. 191, line 18-p. 192, line 12.

Defense counsel's representation of the Petitioner in Georgetown County did not exist in a vacuum. This Court's precedents make it clear that defense counsel owed multiple duties to the Petitioner, which included the duty to give correct advice about the direct consequences of the Petitioner's plea in Georgetown County. One of these direct consequences was the elevation of the sentence of the Petitioner's pending charge in Williamsburg to life without parole. The PCR court's decision, which evaluated defense counsel's advice in the context of a vacuum, is unsupported by any probative evidence. Accordingly, the Petitioner respectfully submits that this Court should reverse the PCR court's finding that defense counsel was not deficient on this issue.

4. The Petitioner Was Prejudiced by Defense Counsel's Deficient Performance

Defense counsel was constitutionally required, either through this Court's precedents or through the application of Padilla, to provide correct advice to the Petitioner about the recidivist consequences of his plea in Georgetown County. The PCR court found that even had defense counsel provided this correct advice that the Petitioner had not demonstrated that he would have insisted upon proceeding to trial on the Georgetown County charges. The Petitioner asserts that the PCR court's rulings on this issue are based upon an error of law and are unsupported by any probative evidence.

In denying relief based on the Petitioner's failure to demonstrate prejudice pursuant to Strickland and Hill, the PCR court found that

> [C]ounsel would have worked vigorously to secure a lewd act plea in Williamsburg giving the Applicant a sentence concurrent with the Georgetown sentences, and this Court believes that he most likely would have succeeded. This Court also finds that the Applicant was fully advised about this and was strongly urged to accept such an arrangement. Had he agreed to do so, he most likely would not have served any additional time in prison, and he absolutely would not currently be serving a life without parole

> sentence. Therefore, this Court finds that the Applicant knowingly and voluntarily proceeded to trial in Williamsburg with full awareness that he would receive life without parole if convicted, and he alone had the opportunity to completely avoid what might be considered a harsh result. This Court finds that this circumstance supercedes [sic] the failure of counsel to specifically inform the Applicant regarding the two-strike law, such that the Applicant's life without parole sentence is the direct and proximate result of (1) his knowing and voluntary decision to reject the guilty plea to lewd act in Williamsburg; and (2) his ultimate conviction by a jury in Williamsburg.

App. pp. 346-347 (footnote omitted). Stated differently, the PCR court found that the Petitioner could not demonstrate that he would have proceeded to trial in Georgetown County because he proceeded to trial in Williamsburg County regardless of the life without parole consequences. This reasoning pervades the PCR court's rulings on this issue, and it is incorrect as a matter of law.

The Petitioner submits that the PCR court erred because the critical factor the PCR court found to be determinative of this issue—that the Petitioner went to trial in Williamsburg—supports the Petitioner's argument that he would have proceeded to trial on the Georgetown County charges. Since the Petitioner knew he would proceed to trial in Williamsburg County, it logically follows that he would have attempted to minimize his potential sentencing exposure there through not pleading guilty in Georgetown County. The PCR court mistook the fact that the Petitioner went to trial in the face of a life without parole sentence to mean that the Petitioner would have been unconcerned about the penalties in Williamsburg County had he been correctly advised about the Georgetown County plea's consequences by defense counsel. While the Petitioner did feel it necessary to contest his innocence in Williamsburg County in the face of life without parole sentences, the PCR court's conclusion that he did not care about the sentence that he would receive is devoid of reason or fact.

Furthermore, the Petitioner believes that the PCR court placed an undue amount of emphasis on the fact that defense counsel could have obtained a favorable plea deal in Williamsburg County. While the Petitioner has no "constitutional right to plea bargain," the Petitioner does have a constitutional right to a trial. Custodio v. State, 373 S.C. 4, 10, 644 S.E.2d 36, 38-39 (2007). The Petitioner was not required to accept whatever favorable deal defense counsel could obtain in Williamsburg. Additionally, the PCR court should not hold it against the Petitioner that he chose to exercise his constitutional rights. Defense counsel's advice in Georgetown should have been predicated on the presumption that the Petitioner planned on going to trial in Williamsburg, especially given the Petitioner's emphatic insistence on doing so.

By failing to give the proper advice to the Petitioner prior to the Georgetown County plea, defense counsel forever cost the Petitioner his ability to mitigate his sentence in Williamsburg County. Although the charges in Williamsburg County carried a maximum penalty of fifty years' imprisonment, they carried no mandatory minimum term of imprisonment.[4] The Petitioner's testimony is clear, and reason and logic support his testimony, that he would have chosen to keep his sentencing range zero to fifty years as opposed to mandatory life imprisonment had he known he had a choice in the matter. The PCR court's conclusions to the contrary are unsupported by any probative evidence, and the Petitioner respectfully submits that they should be reversed by this Court. Having demonstrated deficient performance by defense counsel and prejudice resulting from that performance, the Petitioner further respectfully asserts that he should receive a new trial on all of the Georgetown County charges.[5] See Strickland, *supra*; Hill, *supra*.

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[4] Criminal sexual conduct with a minor in the second degree carries zero to twenty years' imprisonment. S.C. Code Ann. §16-3-655(C)(3). Kidnapping carries zero to thirty years' imprisonment. S.C. Code Ann. §16-3-910.

[5] While defense counsel's lack of advice pertains to the consequences of the criminal sexual conduct plea, the Petitioner asserts that the entire plea should be vacated because the plea agreement was to resolve all of the

II. The PCR court erred in finding that defense counsel was not ineffective for failing to conduct a sufficient investigation to present a defense on the criminal sexual conduct charge.

A. How the Issue Arose Below

According to defense counsel, prior to the Petitioner's plea, the most definite time period for the criminal sexual conduct offense was set forth in the arrest warrant. See App. p. 149, lines 11-15. The arrest warrant stated that the offense occurred "between the date[s] of June 01, 1999 and July 30, 1999." App. p. 87. During the guilty plea, the State described the events comprising the offense as follows:

> [This offense] was as a result of a sanctioned church event where Troy Taylor was the head pastor. These boys went to the beach. I believe it was at Pawleys Island but they went to the beach in Georgetown County. They were waiting on a shower after coming out of the beach at one of these public showers, and Mr. Taylor kindly offered to not make Mr. – the victim wait in line for a shower. So he invited him to come back to his house where h could shower, and while in the shower Mr. Taylor came into the shower with him and sodomized him and that's the last victim, Your Honor.

App. p. 13, lines 6-15.

Prior to the guilty plea, defense counsel and the Petitioner were provided with an indictment, which had not been presented to a grand jury, that stated that the criminal sexual conduct offense occurred "on or about August 5, 1999 through August 7, 1999." App. p. 86. These dates were also restated by the prosecutor during the guilty plea as the dates the offense could have occurred. App. p. 15, lines 1-12. At no point in time did defense counsel move for a continuance to investigate a possible defense to these new dates, nor did defense counsel object when these dates were presented to the judge during the guilty plea.

Georgetown County charges in one proceeding. Cf., Pelzer v. State, 381 S.C. 217, 224, 672 S.E.2d 790, 793 (Ct. App. 2009) (declining to reach the State's argument that "the PCR court erred in granting Pelzer relief as to the arson charge, only, without vacating the entire plea").

Following the Petitioner's plea, he and his family investigated the Petitioner's activities and the circumstances surrounding the Petitioner's church during the time alleged in the criminal sexual conduct indictment. They realized that the Petitioner was involved with repairing the mobile home of Kimberly Cook as part of a church-sanctioned "World Changers" event during the dates in question. At the PCR hearing, Kimberly Cook's affidavit was introduced which stated that the Petitioner was at her home on August 5, 1999, through August 7, 1999, "from breakfast time until late afternoon [for] each of the dates listed." App. p. 291. Several witnesses—two members of Petitioner's church, the Petitioner's father, and the Petitioner—testified and provided affidavits during the PCR hearing that the Petitioner was present at Ms. Cook's home on the dates and times of the alleged assault. See App. pp. 198-205; p. 209; pp. 212-217; p. 238; pp. 288-296. Two additional witnesses who were youth members at the church testified that the Petitioner did not attend the beach trip in August. See App. pp. 223-229. Finally, two witnesses also testified that the showers at the church were not operational at the time of the offense. See App. pp. 198-202; pp. 212-215.

Defense counsel testified that the State provided defense counsel with the church bulletin in discovery which described the "World Changers" event for the dates in question. App. p. 121, lines 5-15. However, he testified that he didn't "know anything about the significance of the bulletin" because he had not been "provided [with] the proposed indictment" prior to the plea. App. p. 123, lines 11-14. He also never asked the prosecution why the church bulletin was significant. App. p. 190, lines 6-12. The Petitioner testified that had he been provided with the dates of the criminal sexual conduct offense prior to the plea, and had he known how substantial a defense he could have presented to that charge, he would have never pleaded guilty. App. p. 251, lines 13-14.

The PCR court denied relief on this issue, finding that defense counsel was under no duty to investigate because the Petitioner failed in his duty to "provide his attorney with pertinent factual information to enable counsel to determine whether there exist any plausible legal or factual avenues to investigate." App. p. 351. The PCR court also found that "there exists a sharp contrast between the Applicant's unequivocal admission of guilt to the CSC offense on the dates of August 5-7, 1999, and his current allegation that he has an alibi for those very dates." App. p. 349. Finally, the PCR court found that "[c]ounsel performed reasonably considering the investigation he did undertake." App. p. 351. The Petitioner filed a Rule 59(e), SCRCP, motion arguing that the PCR court erred in reaching this decision because the late date of disclosure prevented the Petitioner from forming a defense, but the PCR court denied this motion in a Form 4 order. See App. pp. 356-362; p. 365. The Petitioner now asserts that the PCR court's rulings were erroneous.

B. Discussion

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, *supra*, at 691. In reviewing a claim that defense counsel failed to properly investigate a defense to a crime, a court's "principal concern ... [is] whether the investigation ... *was itself reasonable*." Wiggins v. Smith, 539 U.S. 510, 522-523 (2003) (emphasis in original). Defense counsel's failure to conduct a reasonable investigation "to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State" constitutes deficient performance. McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008).

In this case, the PCR court found that defense counsel's conduct was not deficient because he conducted an investigation and because the Petitioner failed to notify defense counsel

of additional defenses. These rulings are manifestly incorrect. With regard to the sufficiency of defense counsel's investigation into the Petitioner's defense to the criminal sexual conduct charge, defense counsel clearly failed in his duty to conduct a reasonable investigation because he conducted no investigation for the ultimate dates of the offense. Prior to the plea, defense counsel was provided with a two-month time period for which this offense could have occurred. Had this broad period of time been the only time frame provided to the defense, defense counsel's investigation into the charge may have been sufficient. However, defense counsel was provided with distinct dates at the guilty plea that were different, and far narrower, than the two-month period of time given prior to the plea. Since defense counsel had never known about the August 5 through August 7 dates prior to the plea, defense counsel could not have conducted a reasonable investigation for the offense because he could not have conducted any investigation.

Given the late date of disclosure, it was incumbent upon defense counsel to refuse to go forward with the plea prior to conducting an investigation into the criminal sexual conduct offense. Had defense counsel refused to go forward with the plea, he could have discovered the extensive defense to the criminal sexual conduct charge. This is especially true because the church bulletin provided in discovery described the "World Changers" event, and could have provided the launching point for the investigation. Instead of investigating possible defenses in light of the new dates, defense counsel did nothing. Consequently, it is clear that the PCR court's finding that defense counsel's conduct was not deficient is unsupported by any probative evidence.[6]

[6] The PCR court also found that the Petitioner could not show that the prosecutor could not have prosecuted him in the third of three back-to-back trials. App. p. 353. The Petitioner submits that the disclosure of the dates of the offense at the date of the plea would have been more than a sufficient reason for the trial to not go forward as planned.

The Petitioner was unquestionably prejudiced by defense counsel's deficient performance. The defense that was uncovered by the Petitioner's investigation would have been extremely strong. The Petitioner had witnesses who could testify that he was Kimberly Cook's house on the dates in question, that he did not attend the beach trip, and that the showers at the church were not operable on the dates in question. The prosecution had the victim's testimony. Given such an overwhelming defense, there can be no question that the Petitioner would have proceeded to trial on the criminal sexual conduct charge.[7] Therefore, the PCR court's finding that the Petitioner was not prejudiced by defense counsel's deficient conduct is erroneous as a matter of law.

As a final matter, the Petitioner argues that the PCR court placed an undue amount of emphasis on the fact that the Petitioner actually pleaded guilty to the criminal sexual conduct offense. Defense counsel testified at the PCR hearing that the primary purpose for the guilty plea was "to clean up all cases in Georgetown County." App. p. 126, lines 23-24. While a "guilty plea is a solemn, judicial admission of the truth of the charges against an individual," Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007), this Court has stated that

> [A] defendant, for a host of legitimate reasons, may plead guilty to an offense for which a valid legal challenge may exist. The difference in such circumstances between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea.

[7] In a baffling finding, the PCR court ruled that "even had the Applicant elected to proceed to trial on the CSC charge, he most probably would have been convicted, and would therefore be serving exactly the same sentence he is currently serving." App. p. 354. The PCR court has no factual support for this finding, as the case against the Petitioner remains the same now as it did at the time of the plea: the victim's testimony. The evidence presented at the PCR hearing clearly supports the opposite conclusion that the Petitioner likely would have been acquitted at trial.

Berry v. State, 381 S.C. 630, 635, 576 S.E.2d 425, 427 (2009). It is for this reason that a defendant need not even admit guilt in order to enter a valid guilty plea. See generally North Carolina v. Alford, 400 U.S. 25 (1970); James v. State, 377 S.C. 81, 659 S.E.2d 148 (2008).

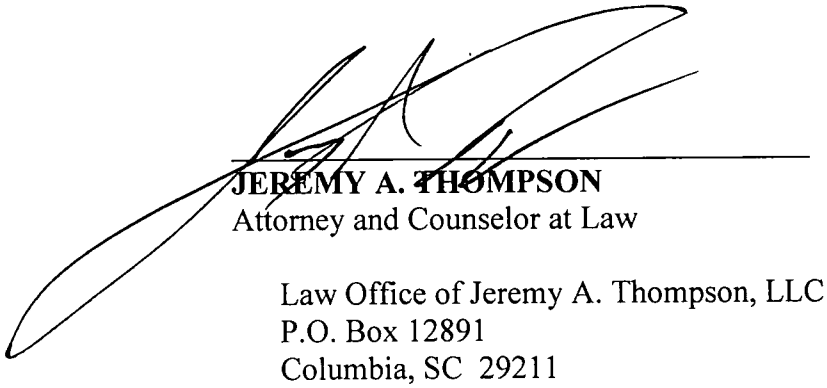
In this case, a valid legal and factual challenge existed for the criminal sexual conduct charge. Due to defense counsel's deficient performance, however, the Petitioner was never permitted to make a "voluntary and intelligent choice among the alternative courses of action" available to him because he was unaware of the potential challenge. Alford, *supra*, at 31. Had the Petitioner been presented with the two alternatives of pleading guilty or presenting a comprehensive defense at trial, it is clear that the Petitioner would have proceeded to trial. Accordingly, the Petitioner respectfully submits that he has satisfied both of Strickland's and Hill's prongs, that the PCR court's rulings to the contrary are unsupported by any probative evidence, and that this Court should grant him a new trial on all charges.[8]

[8] As with the prior issue, the Petitioner submits that all of his convictions should be vacated if the criminal sexual conduct conviction is vacated.

CONCLUSION

The lower court's decision denying Post-Conviction Relief should be reversed. The Petitioner's convictions for criminal sexual conduct with a minor in the second degree and lewd act upon a minor should be vacated, and this case should be remanded to the Georgetown County Court of General Sessions for a new trial.

Respectfully submitted,



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This 6th day of February, 2012.

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2007-CP-22-0476

ROBERT TROY TAYLOR, #315084,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Brief of Petitioner in the above-entitled case has been served upon opposing counsel, Christina J. Catoe, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by hand-delivery, this 6th day of February, 2012.

JEREMY A. THOMPSON
ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 6th day of February, 2012.

(L.S.)
Notary Public for South Carolina
My Commission Expires: 2/16