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STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM MARION COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2014-001631

Letron S. Davis, ...Respondent,

v.

State of South Carolina, ...Petitioner.

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

ARGUMENT 3

I. The post-conviction relief judge erred by finding that plea counsel erroneously advised Respondent regarding parole eligibility where plea counsel reasonably interpreted a change in the law and misapplication of the law by an administrative agency resulting in a temporary change to Respondent's parole classification is not attributable to counsel. 5

A. Respondent is in fact parole eligible 6

B. Plea counsel's advice regarding parole was correct 7

C. DOC's misinterpretation of the amendment is attributable to plea counsel 8

D. Without establishing deficient performance, this Court does not reach prejudice to Respondent 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Bolin v. S.C. Dep't of Corrections, 415 S.C. 276, 781 S.E.2d 914 (2015) 3, 4, 6, 7

Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) 4

Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) 8

Cannon v. S.C. Dep't of Prob., Parole & Pardon Servs.,
371 S.C. 581, 641 S.E.2d 429 (2007) 7

Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) 4, 5, 9

Edwards v. LaMarque, 475 F.3d 1121 (9th Cir. 2007) 5

Gentry v. Sinclair, 576 F.Supp.2d 1130 (W.D. Wash. 2008) 5

Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994) 8

Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983) 4

Hair v. State, 305 S.C. 77, 406 S.E.2d 332 (1991) 7

Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992) 7

Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996), ...5

Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998), ...5

Larrea v. Bennett, 368 F.3d 179 (2d Cir. 2004) 8

McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995) 5

Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992) 8

Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997) 5

Stone v. State, 313 S.C. 533, 443 S.E.2d 544 (1994), ...7

Strickland v. Washington, 466 U.S. 668 (1984), ...4, 5, 9

Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993) 8

Vernon v. Harleysville Mut. Cas. Co., 244 S.C. 152, 135 S.E.2d 841 (1964) 7

Weaver v. Palmateer, 455 F.3d 958 (9th Cir. 2006) 8

Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997) 4

Wright v. Hopper, 169 F.3d 695 (11th Cir. 1999) 5

Statutes

S.C. Code Ann. § 16-1-90(A) (Supp. 2001) 3

Omnibus Crime Reduction and Sentencing Reform Act, 2010 S.C. Acts No. 273 .... 3, 7

S.C. Code Ann. §§ 24-13-100 (Supp. 2000); 3

S.C. Code Ann. § 24-13-150 (a) (Supp. 2000) 3

S.C. Code Ann. § 44-53-375(B) (Supp. 2012) 3, 4, 7

STATEMENT OF ISSUE ON APPEAL

I. The post-conviction relief judge erred by finding that plea counsel erroneously advised Respondent regarding parole eligibility where plea counsel reasonably interpreted a change in the law and misapplication of the law by an administrative agency resulting in a temporary change to Respondent's parole classification is not attributable to counsel.

STATEMENT OF THE CASE

In August 2011, the Marion County Grand Jury indicted Respondent for two counts of distribution of cocaine base. (App. pp. 81–82). William V. Meetze, Esquire, ("plea counsel") represented Respondent. (App. p. 1.). On December 6, 2011, Respondent entered a negotiated plea of guilty as indicted before the Honorable William H. Seals, Jr. (App. p. 4, line 25–p.5, line 2). Judge Seals accepted the negotiation and sentenced Respondent to concurrent terms of seven years' imprisonment. (App. pp. 83–84).

Respondent filed an application for post-conviction relief on June 1, 2012. (App. pp. 11–18). Petitioner filed a return on or about February 22, 2013. (App. p. 19–23). The Honorable Michael G. Nettles ("the post-conviction relief judge") convened an evidentiary hearing on the application at the Florence County Courthouse on February 11, 2014. (App. p. 24). Respondent was present and represented by Marcus L. Woodson, Esquire. (App. p. 24). The post-conviction relief judge granted relief in two separate orders. The first order was dated March 3, 2014. (App. p. 80).[1] The second order was dated April 14, 2014, and filed April 23, 2014. (App. pp. 64–71). Petitioner filed a motion for reconsideration on or about April 30, 2014. (App. p. 72–76). The post-conviction relief judge denied the motion by order filed May 9, 2014. (App. p. 77–78) On June 27, 2014, the post-conviction relief judge issued an order rescinding the March 3, 2014 order and clarifying the timeliness of Petitioner's motion for reconsideration. (App. p. 79–80).

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[1] No copy of this first order is included in the appendix because Petitioner never received a copy of the order, as outlined in the post-conviction relief judge's order rescinding this first order. (App. p. 79–80). Upon information and belief, the order was identical to the order included in the appendix.

ARGUMENT

This case involves correct advice from plea counsel about parole eligibility based on a reasonable interpretation of a change in law where that law was temporarily misapplied by an administrative agency.

In 2010, the General Assembly passed the Omnibus Crime Reduction and Sentencing Reform Act. 2010 S.C. Acts No. 273. Prior to the act, second-offense distribution of cocaine base was a Class A felony. S.C. Code Ann. § 16-1-90(A) (Supp. 2001). As such, sentences for this crime were not eligible for parole and required service of eighty-five percent (85%) of the sentence before being eligible for release. S.C. Code Ann. §§ 24-13-100, -150(a) (Supp. 2000). In revising the law, the General Assembly added a provision in the distribution statute that provided:

> Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a first offense or second offense may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits.

S.C. Code Ann. § 44-53-375(B) (Supp. 2012).

Based on a challenge by an inmate that went through the Administrative Law Court (ALC), the Court of Appeals in Bolin v. S.C. Dep't of Corrections, 415 S.C. 276, 781 S.E.2d 914 (Ct. App. 2015), analyzed the new provisions of this statute. In Bolin, the DOC argued that despite the amended language in section 44-53-375(B) making a person eligible for parole, it was still interpreting the offense as no-parole unless the inmate was granted parole. Bolin, 415 S.C. at 283, 781 S.E.2d at 917. Finding that **the plain language** of the statute made it "**unreasonable**" to characterize these parole eligible offenses as non-parole offenses and relying on the "**expressly stated**" legislative intent to find that the DOC "**ignore[d]** the purpose of the

Act," the Court of Appeals reversed the ALC and held that a "second offense under § 44-53-375(B) was no longer a no-parole offense." Bolin, 415 S.C. at 284–86, 781 S.E.2d at 918–19 (emphasis added).

Ironically, the post-conviction relief judge granted relief, finding counsel ineffective because he applied the plain language of the statute to advise Respondent that he would be parole eligible. This was error.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Regarding allegations of ineffective assistance of counsel, the proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984). The Court strongly presumes plea counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, the applicant must prove plea counsel's performance was deficient. Id. Under this prong, the Court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, plea counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117–18, 386 S.E.2d at 625.

On appeal, this Court must affirm the post-conviction relief judge's grant of post-conviction relief only if there is probative evidence to support his findings. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. at 115, 386 S.E.2d at 624). However, the Court must overturn the post-conviction relief judge if there is no probative evidence to support his findings. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998) (citing Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997)); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

I. The post-conviction relief judge erred by finding that plea counsel erroneously advised Respondent regarding parole eligibility where plea counsel reasonably interpreted a change in the law and misapplication of the law by an administrative agency resulting in a temporary change to Respondent's parole classification is not attributable to counsel.

Reversal is necessary in this case because the post-conviction relief judge's finding that plea counsel misadvised Respondent about his parole eligibility ignores the constitutional mandate to evaluate counsel's advice in light of the circumstances at the time the advice is given. Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). The post-conviction relief judge properly found plea counsel advised Respondent he would be eligible for parole and his plea would not subject him to the "85% rule." See S.C. Code Ann. § 24-13-150(a) (persons sentenced for no parole offenses must serve eighty-five percent of the actual term of imprisonment). Plea counsel did testify he advised Respondent his sentence was parole eligible based on changes in the law.[2] (App. p. 43, lines 6–10; p. 58, lines

[2] Plea counsel's willingness to engage in hindsight at the PCR hearing does not amount to evidence of ineffectiveness. See Wright v. Hopper, 169 F.3d 695, 707 (11th Cir. 1999)

16-22). However, plea counsel further testified he never actually promised Respondent a specific amount of time he would have to serve, merely that it would be less than 85%. (App. p. 42, line 23–p. 43, line 6).

Plea counsel also testified he later discussed a similar case with the Department of Corrections ("DOC"). (App. p. 45, line 13–p. 46, line 22). Plea counsel testified the DOC informed him Respondent would serve 85% of his sentence unless granted parole. (App. p. 46, lines 3–16). As outlined in Bolin, prior to the Court of Appeals' decision in November of 2015, the DOC was operating under this misreading of the statute. It was the DOC—**not** plea counsel—that was determined to be misinterpreting the statute.

A. Respondent is in fact parole eligible

As an initial matter, Respondent's DOC records indicate he received a parole hearing on November 30, 2012. (App. p. 85; p. 86) Because plea counsel advised Respondent he would be parole eligible, and Respondent actually is parole eligible, plea counsel's advice was reasonable. Respondent's allegations against plea counsel are simply his attempt to receive a benefit—release from confinement—denied to him by appropriate authority. The post-conviction relief judge erred in finding plea counsel ineffective simply because Respondent had not yet been paroled at the time of the hearing.

("Because ineffectiveness is a question which we must decide, admissions of deficient performance by attorneys are not decisive." (internal citations omitted)); Edwards v. LaMarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc) (a trial court is not obligated to "accept a self-proclaimed assertion of trial counsel"); Gentry v. Sinclair, 576 F.Supp.2d 1130, 1154 n.38 (W.D. Wash. 2008) (finding "counsel's current regret about their performance . . . does not support a claim that trial counsel performed deficiently at the time of trial").

B. Plea counsel's advice regarding parole was correct

Plea counsel testified he based his advice on a reasonable interpretation of the changes in law. (App. p. 42, lines 11–21). He discussed the amendment with other members of the bar, all of whom had a similar interpretation. (App. p. 44, lines 13–23). In fact, the Court of Appeals eventually held that the DOC's interpretation was not only incorrect, but "unreasonable," and charges such as those to which Respondent pleaded guilty were in fact "no longer no-parole offenses" regardless of whether Respondent was granted parole. Bolin, 415 S.C. at 285-86, 781 S.E.2d at 918–19.

Plea counsel reasonably based his advice on the plain language of the amendment regarding parole eligibility prior to Applicant's plea. The General Assembly's revision of the law in the Omnibus Crime Reduction and Sentencing Reform Act, 2010 S.C. Acts No. 273, added a provision in the distribution statute that provided:

> Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a first offense or second offense may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits.

S.C. Code Ann. § 44-53-375(B) (Supp. 2012). Plea counsel and the South Carolina Court of Appeals interpreted the plain language of this paragraph to mean a sentence for second-offense distribution was now parole eligible. Plea counsel's interpretation certainly is reasonable in light of Bolin, the expressly stated legislative intent, and the clear change in the law. See Cannon v. S.C. Dep't of Prob., Parole & Pardon Servs., 371 S.C. 581, 584, 641 S.E.2d 429, 430 (2007) ("It is presumed the Legislature, in adopting an amendment to a statute, intended to make some change in the existing law." (citing Vernon v. Harleysville Mut. Cas. Co., 244 S.C. 152, 135 S.E.2d 841 (1964))); Stone v. State, 313 S.C. 533, 535, 443 S.E.2d 544, 545 (1994) ("When two

statutes are in conflict, the more recent and specific statute should prevail so as to repeal the earlier, general statute." (citing Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992); Hair v. State, 305 S.C. 77, 406 S.E.2d 332 (1991)). Plea counsel's advice that Respondent would be parole eligible and serve less than 85% of his sentence was reasonable, and the post-conviction relief judge erred in faulting plea counsel for relaying this reasonable advice to Respondent.

C. DOC's misinterpretation of the amendment is not attributable to plea counsel

Further, plea counsel was not required to be clairvoyant or prophetic in anticipating a contrary and incorrect interpretation would be in place ***temporarily***. Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) ("We have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial."); see also, Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993); see also, Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992) (counsel not ineffective for failing to use a defense that would not receive acceptance until several years after the trial); Weaver v. Palmateer, 455 F.3d 958, 966 (9th Cir. 2006) (clairvoyance is not a required attribute of effective representation); Larrea v. Bennett, 368 F.3d 179 (2d Cir. 2004) (failure to predict state law is not ineffectiveness). Plea counsel gave a reasonable interpretation of the changes in the law, which he discussed with other members of the bar. Plea counsel's advice cannot be deficient where no appellate court had interpreted this new law at the time. In finding plea counsel ineffective, the post-conviction relief judge ignored the constitutional requirement that he must "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690.

Plea counsel provided advice based on a reasonable interpretation of a change in law. The record indicates plea counsel gave this advice after careful consideration and consultation with other members of the bar. Such performance goes above and beyond the requirements of adequate representation.

D. Without establishing deficient performance, this Court does not reach prejudice to Respondent

Finally, this Court should reject arguments that Respondent was prejudiced by the accurate advice of counsel that was misinterpreted by the DOC. The Court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Cherry, 300 S.C. at 115, 386 S.E.2d at 624. **First**, the applicant must prove plea counsel's performance was deficient. Id. Only after determining plea counsel's performance was not reasonable "under prevailing professional norms," id. (citing Strickland, 466 U.S. at 688), does the Court reach the second prong of determining whether plea counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117–18, 386 S.E.2d at 625.

The post-conviction relief judge abandoned his duty to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" Strickland, 466 U.S. at 689. Instead, he placed upon plea counsel a duty to predict the actions of an administrative department of government—an "unreasonable" interpretation of the amendment—over which he has no control. Such hindsight analysis and burden shifting was erroneous. Accordingly, the post-conviction relief judge's order must be reversed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court reverse the post-conviction relief judge's decision to grant relief to Respondent and vacate the order granting relief.

Respectfully submitted,

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By:
ATTORNEYS FOR RESPONDENT

4 Oct., 2016

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The Honorable Michael G. Nettles, Circuit Court Judge

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State of South Carolina, ...Petitioner.

CERTIFICATE OF SERVICE

I, Johanna C. Valenzuela, certify that I have today served the within **Brief of Petitioner** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Laura R. Baer, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 4th day of October, 2016.

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OCT 04 2016

S.C. SUPREME COURT

October 4, 2016

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Letron S. Davis v. State of South Carolina**
Appellate Case No. 2014-001631
Lower Court Case No. 2012-CP-33-379

Dear Mr. Shearouse:

Attached are the original and fifteen (15) copies of the **Brief of Petitioner** in the above referenced case for filing in your office. Also, per Rule 243(j) included are thirteen (13) additional copies of the Appendix.

Sincerely,

Johanna C. Valenzuela
Senior Assistant Deputy Attorney General
SC Bar #79834

JCV/bea

cc: Laura R. Baer, Esquire
Trisha Allen, Victim Services (without enclosure)