ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Marion County
Honorable Michael G. Nettles, Circuit Court Judge

LETRON DAVIS,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2014-001631

BRIEF OF RESPONDENT

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

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STATEMENT OF ISSUE PRESENTED

I. [Whether] 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?

COUNTER-STATEMENT OF ISSUE PRESENTED

I. Whether the PCR court's finding that Respondent satisfied his burden for relief by establishing ineffective assistance of counsel, where plea counsel was deficient in providing Respondent incorrect advice concerning the collateral consequences of his plea and Respondent was prejudiced because it was uncontroverted that, but for counsel's advice, he would not have accepted the negotiated sentence and pled guilty, was supported by "any evidence" presented at the PCR hearing?

II. Whether pursuant to Rule 220, SCACR, this Court should alternatively affirm the PCR court's grant of relief based upon a violation of Respondent's Fifth and Fourteenth Amendment rights to due process, where Respondent's plea was induced by the representation that he would not be subject to the eighty-five percent service requirement but the Department of Corrections' erroneous statutory interpretation resulted in Respondent being subject to the eighty-five percent requirement of his sentence unless earlier granted parole?

STATEMENT OF THE CASE

On August 18, 2011, the Marion County grand jury indicted Respondent Letron Davis for two counts of distribution of cocaine base. App. 8 1- 82 (Indictments). Davis waived presentment on one count of second-degree burglary. App. 3, ll. 6-10; App. 4, ll. 19-24.

On December 6, 2011, Davis appeared before the Honorable William H. Seals, Jr., and entered a guilty plea to the above offenses pursuant to a plea agreement for a negotiated sentence of seven years, concurrent. Davis was represented by Vick Meetze and the State was represented by assistant solicitor John Jepertinger. The State *nol prossed* a separate charge for possession of cocaine base. App. 1 – 5. The plea judge accepted the negotiated sentence and sentenced Davis to seven years for each offense, all to run concurrent. App. 8, ll. 23-25.

On June 1, 2012, Davis filed an application for post-conviction relief ("PCR"), wherein he alleged that plea counsel was ineffective and that his right to due process was violated. App. 11 – 18. The State filed its Return on February 22, 2013. App. 19 – 23. On February 11, 2014, an evidentiary hearing was held before the Honorable Michael Nettles. Davis was represented by Marcus Woodson, and the State was represented by assistant attorney general Joshua Thomas. App. 24. The witnesses at the hearing included Respondent Davis and plea counsel, Vick Meetze. App. 25.

On April 23, 2014, Judge Nettles issued an Order granting Davis' PCR application, vacating his convictions, and ordering a new trial.[1] App. 64. Judge Nettles ruled that plea counsel was

[1] The PCR court signed an Order granting the PCR application on March 3, 2014, which was never received by the State. The court issued an identical, second Order on April 14, 2014. For clarification of the timeliness of the Rule 59(e) motion, Judge Nettles signed an order on June 27, 2014, noting the timeline of the case, rescinding the March Order, and finding that the Motion to Alter or Amend was timely made. App. 79.

ineffective because he was deficient in providing incorrect advice concerning the collateral consequences of Davis' guilty plea, and Davis was prejudiced because "but for counsel's advice, Davis would not have accepted this negotiated sentence and pled guilty." App. 70. On April 30, 2014, the State filed a Motion to Alter or Amend, which was denied. App. 72; App. 77.

Petitioner filed its petition for writ of certiorari on January 9, 2015, followed by a motion to dismiss the appeal and remand the case for "an entry of judgment in Petitioner's favor." The motion to dismiss was denied on July 6, 2015. Davis filed his Return to the petition for writ of certiorari on August 5, 2015. This Court granted the petition for writ of certiorari on May 6, 2016, and ordered further briefing.

Petitioner filed its brief of petitioner on October 4, 2016. This brief of respondent follows.

STATEMENT OF FACTS

The PCR court found both Davis' and Meetze's testimony equally credible and made the following relevant findings of fact in its Order granting relief:

> [T]he Court heard testimony that the State offered a plea deal of seven (7) years and Applicant, upon the advice of counsel acquiesced. It is this advice during negotiations that Davis avers was deficient. Specifically, Applicant testified that his attorney instructed him that due to a recent change in the law regarding the distribution of cocaine base (second offense) he would no longer be required to serve eighty-five percent (85%) of that seven-year negotiated sentence. Davis testified that had Meetze told him otherwise, he would have rejected the plea offer from the State.
>
> Additionally, Mr. Meetze testified that Davis' recollection of his advice was accurate. Mr. Meetze affirmed that he communicated this interpretation of the new language in the statute regarding distribution charges to Davis.
>
> ...
>
> Trial counsel took the affirmative position that Davis' offense was no longer a typical "A" felony, and as such, it was not subject to the service of eighty-five percent of the actual term of imprisonment imposed. *See* S.C. Code Ann. § 24-13-100; *State v. Miller,* 404 S.C. 29, 744 S.E.2d 532 (2013). Of particular importance, trial counsel believes that there is "no question [Davis] relied on that advice" in agreeing to accept the plea offer of a seven-year sentence for each charge.

App. 67 – 68. These findings are all supported by the testimony presented at the PCR hearing.

Davis testified that the plea negotiations in his case occurred over "a couple of days," which began with an offer of ten years and decreased to an offer of eight years, both of which Davis rejected. He was then offered seven years. App. 28, ll. 9-24. He was told by his attorney and the solicitor that he would only have to serve sixty-five percent (65%) of the seven-year sentence under "the new law." [2] App. 28, l. 24 – 29, l. 13; App. 34, l. 19 – 35, l. 2. He understood that he would only serve approximately three and one-half years with other credits and would be released by the

[2] The "new law" referenced in the PCR transcript is the 2010 Omnibus Crime Reduction and Sentencing Reform Act. See App. 40, l. 13 – 41, l. 7.

time his three year old daughter was six years old. App. 35, ll. 13-25; App. 36, ll. 14-20. However, after accepting the offer and entering the guilty plea, Davis was advised at the Department of Corrections ("DOC") that he would instead have to serve eighty-five percent of his sentence. App. 29, ll. 14-20. Davis testified that if he had known that he would have to serve eighty-five percent of the sentence, he would not have accepted the plea offer. App. 29, ll. 21-23.

Meetze testified that part of the negotiations in Davis' case was that he would be pleading to an offense that would **not** require him to do eighty-five of the sentence. App. 44, ll. 17-20. "The intent of the sentence was that he be able to be sentenced to a seven-year sentence that would be both parole eligible and non 85 percent, and was – and that is not how it has turned out. I think that's wrong." App. 52, ll. 12-16; see also App. 55, l. 22 – 56, l. 18; App. 58, l. 8-19. Notably, at the beginning of the plea hearing, the solicitor said:

> The other case we're dealing with is 2011-228 that is two counts of distribution of cocaine base second, Your Honor. Your Honor, even though the charges happened prior to the change in the law, he [Davis] wasn't arrested until after the change in the law. Therefore, the action would be under or the case would be under the new law where technically he's eligible for all sorts of things including a probationary sentence on that.

App. 3, ll. 17-23.

Meetze's only correction to Davis' testimony at the PCR hearing was that he did not believe that he would have told him that he would serve sixty-five percent (65%) exactly. Rather, and more interestingly, Meetze believed that it would be ***even less than sixty-five percent (65%)*** that Davis would have to serve. App. 42, l. 22 – 43, l. 6. Regardless, Meetze testified that "there's no question that I advised him" that he was "not going to have to do 85 percent." App. 43, ll. 6-10. He further stated that "there's no question that he relied on that advice when he entered his plea." App. 43, ll. 11-12; App. 43, ll. 20-22.

Meetze recalled that prior to the 2010 Omnibus Crime Bill, Davis' drug charges would have carried potential sentences of five to thirty years, were not eligible for any suspended sentence or parole, and required service of at least of eighty-five percent of the sentence prior to release. App. 40, ll. 8-22. The new law changed it so that a distribution second offense was considered a non-violent, parole eligible offense. He understood the new language to provide that persons convicted under that provision were eligible for work credits, education credits, good-time credits and no longer had to serve eighty-five percent of their sentence. App. 40, l. 23 – 42, l. 21.

Contrary to Meetze's advice to Davis, the only change that the DOC made based on the new law was to allow the inmate to be eligible for parole. However, if an inmate was denied parole then he or she was still required to serve eighty-five percent of their sentence. App. 43, ll. 15-18; App. 46, ll. 10-16. Meetze conceded that the application of the statute was for the DOC to determine and not him. He then reiterated: "I gave him [Davis] wrong advice, and I'm certain he [Davis] relied on that advice when he entered his plea." App. 43, ll. 19-22.

Judge Nettles asked Meetze whether Davis would receive more than one parole hearing before the DOC required him to serve eighty-five percent of his sentence. App. 59, ll. 21-23. Meetze responded that he was not sure how many times Davis would come up for parole, but "maybe one would have been all" because the sentence was only for seven years. App. 59, l. 24 – 60, l. 7. Thus, the PCR court understood that Davis would be parole eligible at least once, if not more, during his incarceration, potentially resulting in his release on parole prior to serving eighty-five percent of his sentence. Parole is, of course, not the equivalent of release, in light of its stringent requirements and costs and the potential of revocation. See S.C. CODE ANN. § 24-21-680.

Judge Nettles asked AAG Thomas how a plea can be valid if the defendant was told something that was wrong. App. 47, ll. 17-23. Thomas responded that the State's position is that Meetze advised his client "as best he could at the time" "based upon a reasonable reading of the statute, and based on the general consensus of everybody else in the Bar." App. 47, l. 24 – 48, l. 2. Thomas further contended that the DOC's interpretation was different, not necessarily "right or wrong." App. 48, ll. 5-12. Judge Nettles responded that the DOC is treating the sentence "as an 85 percent" and Meetze told him that it not be subject to the "85 percent rule," presenting "a very real problem" since Davis relied on Meetze's advice. App. 48, ll. 13-21.

Judge Nettles noted that an attorney does not have to advise a client with regard to how much time he will serve or collateral consequences. However, when an attorney gives incorrect advice regarding collateral consequences and the client depends upon that advice, "that poses a problem." App. 49, ll. 15-20. Thomas ***conceded that such is the state of the law***, but pointed to Meetze's testimony that he did not specifically say that it would be sixty-five percent but rather less than eighty-five percent. App. 49, ll. 21-25. Judge Nettles responded "and that's wrong." App. 50, l. 1.

At the conclusion of the PCR hearing, Judge Nettles ruled that he would grant the requested relief and prepare the written Order. App. 62, ll. 10-13. In its written Order, the PCR court found that in accepting the State's plea offer, Davis relied on the advice of trial counsel regarding how his sentence would be handled by the DOC. App. 68. He found that "[i]t is uncontroverted that Meetze advised Davis that he was eligible for parole and that this plea would not be subject to the '85% rule.'" App. 69. He further found that it is "uncontroverted that the Department of Corrections is subjecting Davis to service of eighty-five percent of his seven-year sentence." App. 69 – 70.

Judge Nettles ruled that "even though counsel need not inform a defendant of a plea's collateral consequences, if counsel affirmatively guarantees those collateral consequences, that attorney has an obligation to be correct." Therefore, he found that Meetze "was deficient by providing incorrect advice concerning the collateral consequences of Davis' guilty plea." But for this deficient advice, the court found that Davis would not have accepted the negotiated sentence and guilty plea. App. 70. Accordingly, Davis' application for post-conviction relief was granted, his convictions were vacated, and his case was remanded for a new trial. App. 71. Because the PCR court granted Davis the requested relief based on his first allegation, it did not determine the validity of the remaining claims for relief, which included a due process violation. App. 70.

ARGUMENT

I. The PCR court's finding that Respondent satisfied his burden for relief by establishing ineffective assistance of counsel where plea counsel was deficient in providing Respondent incorrect advice concerning the collateral consequences of his plea and Respondent was prejudiced because it was uncontroverted that, but for counsel's advice, he would not have accepted the negotiated sentence and pled guilty, was supported by "any evidence" presented at the PCR hearing.

Introduction

The PCR court properly found that plea counsel Meetze rendered ineffective assistance of counsel where he provided Respondent Davis with inaccurate advice regarding the percentage of his seven-year sentence that he would have to serve to be released. App. 68 – 70. Meetze advised Davis that pursuant to a revision to S.C. CODE ANN. § 44-53-375(B), his offenses were parole eligible such that he would not be subject to the "85% percent rule." App. 43, ll. 6-10; App. 44, ll. 17-20; App. 52, ll. 12-16; App. 58, l. 8-19; see S.C. CODE ANN. § 24-13-150(A) (requiring an inmate convicted of a no-parole offense to serve at least eighty-five percent of his sentence before he is eligible for early release, discharge, or community supervision). Though Meetze had consulted other members of the bar about his interpretation, he did not consult the DOC about how they interpreted and were implementing the statutory changes prior to Davis' plea. Meetze later learned that the DOC was still requiring service of eighty-five percent of the inmate's sentence unless the inmate was granted parole at an earlier date. He advised Davis to institute the PCR action. App. 30, ll. 8-20; App. 43, ll. 15-18; App. 45, l. 13 – 47, l. 16.

Both Davis and Meetze agreed that the actual amount of time that Davis would have to serve was integral to his decision to plead guilty. In fact, Davis had rejected two of the solicitor's prior plea offers. App. 29, ll. 21-23; App. 43, ll. 11-12; App. 43, ll. 19-22. Thus, the PCR court properly determined that plea counsel "was deficient by providing incorrect advice concerning the collateral consequences of Davis' guilty plea" and that Davis was prejudiced because "but for

counsel's advice, Davis would not have accepted th[e] negotiated sentence and guilty plea." App. 70.

Discussion

Strickland Test and Standard of Review

To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Strickland v. Washington, 466 U.S. 668 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Strickland, 466 U.S. at 694. The United States Supreme Court specifically ruled that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. Moreover, the Court ruled that: "**The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.** In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." Id. at 696 (emphasis added).

The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results." Brady v. United States, 397 U.S. 742, 758, 90 S.Ct. 1463 (1970). An "unsound result" occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969). Therefore, in the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Anderson v.

State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); see also Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366 (1985) ("The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" (quoting North Carolina v. Alford, 400 U.S. 25, 31(1970)). "The second, or 'prejudice,' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. 52 at 59. In other words,

> A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.

Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (quoting Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); see also Hill, 474 U.S. at 59 (footnote omitted).

Upon appellate review, this Court gives great deference to the PCR court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). This court also "gives great deference to a PCR court's findings where matters of credibility are involved." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). It is well settled that "[i]n reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision." Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009); Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Accordingly, the Court will affirm if ***any evidence*** of probative value in the record exists to support the finding of the PCR court. Cherry, 300 S.C. at 119, 386 S.E.2d at 626. In the present case, there was far more evidence supporting the PCR court's findings than the minimal amount required for this Court to affirm.

Plea Counsel's Deficiency

The evidence at the PCR hearing reflected that Meetze advised Davis that he would serve less than eighty-five percent of his sentence. App. 43, ll. 6-10; App. 44, ll. 17-20; App. 52, ll. 12-16; App. 58, l. 8-19. The PCR court found both Davis' and Meetze's testimony "equally credible." App. 68. Meetze's advice was inaccurate because the DOC, which implemented the statutory changes following the passing of the omnibus bill, still required service of eighty-five percent of the sentence unless the offender was released earlier on parole. App. 43, ll. 15-18; App. 46, ll. 10-16. Davis and Meetze both testified that Davis' decision to plead guilty was induced by the erroneous advice that he would serve less than eighty-five percent of his sentence. App. 29, ll. 21-23; App. 43, ll. 11-12; App. 43, ll. 19-22.

The PCR court properly determined "that even though counsel need not inform a defendant of a plea's collateral consequences, if counsel affirmatively guarantees those collateral consequences, that attorney has an obligation to be correct." App. 70. In Strader v. Garrison, 611 F.2d 61, 65 (4th Cir. 1979), the Fourth Circuit Court of Appeals held:

> [T]hough parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, **when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel.** When the erroneous advice induces the plea, permitting him to start over again is the imperative remedy for the constitutional deprivation.

(emphasis added). In Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989), this Court found that counsel was ineffective where Hinson entered his plea in reliance upon his attorney's erroneous advice that he would be parole eligible in ten years rather than twenty years. In Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991), this Court found counsel ineffective where she advised Ray that he *would* be sentenced to life without parole when in reality, he *may* have received a sentence of seventy-five years without parole and *could* have received as little as ten

years and it was uncontroverted that Ray would not have pled guilty absent that advice. In Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991), this Court again found that counsel was ineffective, where he misinformed Alexander that he would face a potential life sentence if he proceeded to trial and Alexander would not have pled guilty but for the erroneous sentencing advice.

There is little advice in the criminal defense realm that can be given with absolute certainty. While an attorney can give advice on a sentencing range, it is rare that he can advise the client what his exact sentence will be absent a judge who agrees to be bound by a negotiated sentence. See Ray, 303 S.C. at 376, 401 S.E.2d at 152-53 (recognizing the distinction between advice as to a potential sentence defendant "may" or "could" receive and advice as to what sentence the defendant "would" receive). Similarly, an attorney can discuss potential defenses with a client, but cannot guarantee that a trial judge will allow presentation of evidence in support of the defense or that the jury would be persuaded by it. Thus, an attorney must be careful to couch advice such that the client understands which advice is unequivocal and which is part of a discussion of potentials and probabilities.

Petitioner argues that the PCR court's decision imposed an unreasonable requirement that plea counsel be "clairvoyant." The cases cited by Petitioner, however, deal with subsequent changes in the law or unanticipated witness testimony. See 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) (finding trial counsel not ineffective in failing to request a King[3] charge at Gilmore's

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3 State v. King, 158 S.C. 251, 155 S.E. 409 (1930). A King instruction requires the jury to resolve any reasonable doubt as to whether defendant was guilty of greater or lesser offense in favor of lesser offense. Gilmore, 314 S.C. at 455-56, 445 S.E.2d at 455. This Court noted in Gilmore that due to revisions in the legal definition of reasonable doubt, the King charge may now be considered "unnecessary and archaic." Id. at 456 n.1, 445 S.E.2d at 456 n.1.

trial for drug offenses where the applicability of King to cases other than murder was not decided until over a year after Gilmore's trial); Robinson v. State, 308 S.C. 74, 78, 417 S.E.2d 88, 91 (1992) (finding trial counsel not ineffective for failing to present battered woman's syndrome in the context of her self-defense claim where trial took place six years before Supreme Court recognized battered woman's syndrome as relevant to claim of self-defense); Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993) (finding trial counsel not ineffective for failing to interview the victim where victim was a witness for the State and whose testimony changed only after the trial); see also Kirkpatrick v. State, 306 S.C. 359, 412 S.E.2d 389 (1991) (finding trial counsel not ineffective for failing to anticipate or discover co-defendant's attorney's erroneous advice regarding parole eligibility).

In Smith v. Williams, 596 S.E.2d 112, 113 (Ga. 2004), the Georgia Supreme Court found plea counsel was deficient where she advised Smith that he would be parole eligible after service of five years of his fifteen year sentence, unaware of new parole board guidelines that required service of 90% of the sentence. The Court found that counsel was deficient in not discovering the 90% rule and consequently misinforming Smith about his parole eligibility. 596 S.E.2d at 113. The case was remanded for consideration of prejudice. Id. Notably, the Court rejected the state's argument that counsel "conducted a diligent search and did not discover the new parole guidelines," finding that the guidelines were "reasonably available to criminal defense attorneys." In Davis v. Murrell, 619 S.E.2d 662, 663-64 (Ga. 2005), the Georgia Supreme Court similarly found plea counsel ineffective where he erroneously told Davis that he would be eligible for sentence review and parole, though his conviction for a violent felony made him ineligible for both and Davis testified that had he known he had to serve the entire sentence, he would have gone to trial. The Court ruled that in both cases, Smith and Davis, plea counsel's

advice to their client was "so inaccurate that it falls outside the permitted range of competence." 619 S.E.2d at 663.

Here, plea counsel admitted that his advice to Davis was that he would **not** have to serve eighty-five percent of his seven year sentence. App. 43, ll. 6-10. He and Davis later learned that the advice was incorrect because, unless paroled, the DOC would require him to serve eighty-five percent of his sentence prior to his release. App. 43, ll. 15-18; App. 46, ll. 10-16. While Meetze opined that his interpretation of the law was more in line with the goal of the omnibus bill to alleviate prison overcrowding, he admitted that it was the DOC's "call to make and not [his]." App. 44, l. 21 – 46, l. 22; App. 43, ll. 15-22. Thus, plea counsel recognized that the DOC was free to interpret the new statute differently, unless or until ordered otherwise by the courts. Despite that fact, he assured Davis that he would not be required to serve eighty-five percent of his sentence. App. 43, ll. 6-10. Sometime later, Meetze was contacted by another client of his, who advised him of DOC's contrary interpretation. App. 45, ll. 10-21.

Meetze did say that he had discussed Davis' case with other defense attorneys and prosecutors and that his impression was that they all agreed with his interpretation of the statute. App. 44, l. 9 – 45, l. 9. However, he failed to discuss the interpretation with the relevant agency. It was not until Meetze's other client contacted him that Meetze e-mailed an attorney at the DOC, who confirmed DOC's interpretation of the statutory changes. App. 45, l. 10 – 47, l. 5. Importantly, the amendments from the 2010 Omnibus Bill went into effect on June 2, 2010, a year and a half before Davis' plea in December 2011. S.B. 1154, 2010 S.C. Acts 273. Meetze certainly could have contacted DOC regarding their interpretation of the new law prior to advising Davis about his service requirements, but he did not. Instead, Meetze relied on his own interpretation of the law.

Petitioner focuses on Bolin v. S.C. Dept. of Corrections, 415 S.C. 276, 781 S.E.2d 914 (Ct. App. 2016), in which the Court of Appeals ruled that the DOC's interpretation of S.C. CODE ANN. § 24-13-100 was "unreasonable." Ironically, though Petitioner argues that trial counsel need not anticipate that the DOC would apply "a contrary and incorrect interpretation . . . temporarily," Petitioner cites to a decision rendered years after Davis' plea and the PCR court's order granting relief in its attempt to undermine that PCR court's reasoning. While Bolin substantiates Davis' and Meetze's claims regarding DOC's interpretation, it does not render Meetze's advice to Davis at the time of his plea on December 6, 2011, correct. Despite Meetze's contrary advise, Davis was subjected to the "eighty-five percent rule" unless earlier paroled.

Petitioner's argument that Davis' parole eligibility rendered Meetze's advice reasonable illustrates the state's continued misapprehension of why plea counsel was found deficient. The classification of Davis' convictions as "parole eligible" is only tangentially relevant, in so far as it dictates the amount of time that he was required to serve to be released. **It was not parole that Davis was promised or desired – it was *release* after service of less than eighty-five percent of his sentence.**

The PCR court's findings may have been vastly different had Meetze couched his advice to Davis as merely his interpretation of the new law or told Davis that he should assume that he would have to serve eighty-five percent even though it may turn out to be less. But, based on the advice as it was actually given, the PCR court properly found that Davis had an obligation to be correct and was not.

Prejudice to Respondent

Both Davis and Meetze testified that the advice on when Davis would be released was integral to Davis' decision to accept the plea offer. Davis testified that had he known that he

would be subject to the "eighty-five percent rule," he would not have accepted the plea offer. App. 28, l. 9 – 29, l. 23. Meetze testified: "I think that that law reads that you're not going to have to do 85 percent, and there's no question that I advised him of that. In my opinion, there's no question that he relied on that advice when he entered his plea." App. 43, ll.8-12. Meetze further said: "I gave him wrong advice, and I'm certain he relied on that advice when he entered his plea." App. 43, ll. 20-22. The PCR court found their testimony credible. App. 68 – 70.

In Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989), this Court found that plea counsel was deficient in misadvising Hinson about his parole eligibility. Regarding prejudice, this Court found that "[t]he evidence is uncontroverted that Hinson entered his plea in expectation of receiving the lesser period for parole eligibility." 297 S.C. at 458, 377 S.E.2d at 339. While Hinson's attorney did not remember anything about the case, both Hinson and the attorney for his co-defendant testified to that affect. Id. The court also noted that plea counsel did recall the advice given with regard to parole eligibility and conceded that the advice was incorrect. Id. Thus, this Court found that Hinson had established both prongs of Strickland and was entitled to post-conviction relief. Id. at 459, 377 S.E.2d at 339. Here too, Davis proved both prongs of the Strickland test such that this Court should affirm the grant of PCR relief.

II. **Pursuant to Rule 220, SCACR, this Court should alternatively affirm the PCR court's grant of relief based upon a violation of Respondent's Fifth and Fourteenth Amendment rights to due process, where Respondent's plea was induced by the representation that he would not be subject to the eighty-five percent service requirement but the Department of Corrections' erroneous statutory interpretation resulted in Respondent being subject to the eighty-five percent requirement of his sentence unless earlier granted parole.**

Assuming *arguendo* that the PCR court erred in finding plea counsel deficient because his advice was based on a reasonable statutory interpretation, Davis is still entitled to relief under his alternative allegation that his due process rights under the Fifth and Fourteenth Amendments were violated. While the PCR court did not rule on this allegation, pursuant to Rule 220(c), SCACR, "an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406,420-21, 526 S.E.2d 716, 723-24 (2000).

A defendant's guilty plea is more than an admission of conduct; rather, it is a conviction that can deprive him of his liberty or other constitutionally protected interests. Mabry v. Johnson, 467 U.S. 504, 507, 104 S.Ct. 2543 (1984); Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1712 (1969). Therefore, the entry of a guilty plea implicates the protections of the Due Process Clause of the federal and state constitutions. See U.S. CONST. AMEND. XIV (providing that states may not deprive a person of life, liberty, or property without due process of law); S.C. CONST. ART. I, § 3 (same). Among these protections, the Due Process Clause requires that a defendant enter his guilty plea voluntarily, knowingly, and intelligently. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000).

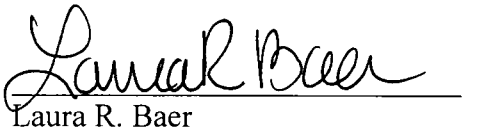
Petitioner admits that the South Carolina Department of Corrections, its sister agency under the executive branch, misapplied the statutory changes from the 2010 Omnibus Crime Reduction and Sentencing Reform Act. See Petitioner's Brief, p. 3-9. In Bolin v. S.C. Dept. of

Corrections, 415 S.C. 276, 781 S.E.2d 914 (Ct. App. 2016), the Court of Appeals ruled that the DOC's interpretation of changes to S.C. CODE ANN. § 44-53-375 following the 2010 Omnibus Crime Bill were unreasonable. The Court looked at both the plain language of the various statutes and the legislative purpose behind the passage of the omnibus bill and ruled that a second offense committed under section 44–53–375(B) is not a "no parole offense." 415 S.C. at 282-86, 781 S.E.2d at 917-19. Because the offenses are not "no parole," they are no longer subject to the "eighty-five percent rule" of S.C. CODE ANN. § 24-13-150(A). Notably, the final decision in Bolin was not filed until **February 24, 2016**.

Here, Davis's **December 2011** guilty plea was induced by representations from plea counsel and the solicitor that he would not be subject to the "eighty-five percent rule." App. 3, ll. 15-23; App. 28, l. 4 – 29, l. 13; App. 44, ll. 9-21. Instead, he, and other similarly situated defendants, were improperly subjected to the "eighty-five percent rule" until its invalidation in 2016. As such, his guilty plea was not made voluntarily, knowingly, and intelligently. He is thus entitled to relief based on the violation of his right to due process. Accordingly, the PCR court's grant of PCR should be affirmed pursuant to Rule 220(c), SCACR.

CONCLUSION

Based on the foregoing, Respondent Letron Davis respectfully requests that this Court dismiss the writ of certiorari or affirm the post-conviction relief court's reversal of his conviction and remand for new trial.



Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT

This 5th day of December, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Marion County
Honorable Michael G. Nettles, Circuit Court Judge

LETRON DAVIS,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2014-001631

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon Johanna C. Valenzuela, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and on Mr. Letron S. Davis, at 600 Bee St., Marion, SC 29571, this 5th day of December, 2016.

Laura R. Baer
Appellate Defender
ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 5th day of December, 2016.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.