STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Kershaw County

G. Thomas Cooper, Circuit Court Judge

BRIAN EVANS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001596

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Was Petitioner's guilty plea rendered involuntary due to plea counsel's ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution where plea counsel advised Petitioner the solicitor would file a motion to reduce his sentence within one year of his guilty plea based on substantial assistance provided by Petitioner to a corrections officer, which occurred while Petitioner awaited disposition of his case?

STATEMENT

On February 16, 2011, a Kershaw County grand jury indicted Petitioner for two counts of murder (2011-GS-28-0110; -0111). App. 170-171; App. 173-174. Brett Perry represented the state. App. 1. However, Petitioner was represented by several different attorneys over the course of three years before his charges were resolved. App. 50, ll. 8-24; App. 95, ll. 4-16; App. 100, l. 20 – App. 101, l. 3. In March or April of 2013, Brian Shealey was appointed to represent Appellant. App. 99, ll. 21-25. Shealey enlisted the help of two other attorneys, Tivis Sutherland and Luke Shealey. App. 101, ll. 13-15. The defense began preparing for trial, including hiring a DNA expert, a false confession expert, a forensic pathologist, and a private investigator. App. 101, ll. 4-12; App. 102, ll. 8-21.

Aid to Correctional Officer

While Petitioner was awaiting disposition of his charges, he assisted a correctional officer at the Kershaw County Detention Center when members of rival gangs fought. App. 52, l. 23 – App. 54, l. 3; App. 66, l. 17 – App. 67, l. 5. Specifically, when the officer directed an inmate to exit a room, the inmate refused. App. 53, ll. 6-11. Petitioner grabbed the inmate and removed him from the room, which permitted the officer to shut the cell door. App. 53, ll. 11-13. Petitioner's involvement allowed the officers to diffuse the situation. App. 54, ll. 3-9. When he mentioned the incident to his lawyers, he was assured that his assistance would help with his sentence. App. 51, ll. 8-16; App. 72, ll. 22-24.

Plea Negotiations – Protective Custody

In September 2013, the state offered a negotiated sentence of thirty years' imprisonment on both charges. App. 102, ll. 22-25; App. 106, ll. 15-19. However, Petitioner was unwilling to accept the offer without assurance that he would be placed into protective custody. App. 103, ll.

1-4; App. 52, ll. 13-22. To this end, plea counsel contacted Chris Florian, a lawyer with the South Carolina Department of Corrections (SCDC). App. 103, ll. 20-22. Florian explained that it was "irregular" to discuss placement within SCDC prior to sentencing, but agreed that Petitioner could be prescreened. App. 104, ll. 4-9. The solicitor was a part of these conversations as well. App. 90, ll. 6-20; App. 104, ll. 10-13. On behalf of SCDC, Florian wrote a letter to the solicitor stating Petitioner was a "good candidate" for placement in protective custody. App. 89, l. 16 – App. 90, l. 5; App. 151. While Florian could not guarantee such placement, he stated Petitioner was "likely to be placed in protective custody upon his incarceration at the Department." App. 151. According to plea counsel, the Florian letter "was essential" to the terms of the plea negotiations. App. 105, ll. 16-17. Plea counsel gave Petitioner a copy of the letter, referring to it as "the Golden Ticket." App. 106, ll. 3-5. The letter gave Petitioner "a level of comfort," which enabled him to accept the state's plea offer. App. 106, ll. 7-8.

Plea Negotiations – Aid to Corrections Officer

During plea negotiations, plea counsel assured Petitioner that the solicitor would file a motion for a reduced sentence based on substantial assistance within one year of his guilty plea. App. 70, ll. 2-8; App. 118, ll. 2-14. This motion would be based upon Petitioner's assistance to the correctional officer during the gang fight, which occurred while Petitioner was in the detention center awaiting disposition of his charges. App. 70, ll. 9-12. Petitioner understood there was no guarantee that he would receive a reduced sentence because the judge would have complete discretion, but he understood that he would have an opportunity to make a case to a judge for a reduced sentence based upon his assistance to the corrections officer. App. 73, ll. 9-19.

Guilty Plea

On October 14, 2013, four days after Florian's letter, Petitioner accepted the state's plea offer: a negotiated sentence of thirty years' imprisonment in statewide protective custody with a promise that the state to file a motion for a reduced sentence due to substantial assistance within one year. App. 1; App. 59, ll. 12-18. When Petitioner entered his guilty pleas before the Honorable DeAndrea G. Benjamin, the sentence sheets noted that Petitioner would be placed in protective custody and that the solicitor would file for a "downward departure." App. 172; App. 175. These notations were made by plea counsel, Brian Shealey. App. 88, ll. 1-15; App. 107, ll. 10-13. During the guilty plea hearing, Shealey asked the court "to follow the negotiations in th[e] case" and explained that Petitioner had "relied specifically on negotiations outlined in the sentencing sheet." App. 22, ll. 18-22. In sentencing Petitioner, the judge stated she was following "the negotiations and recommendations." App. 23, ll. 8-9.

Service of Sentence

After Petitioner entered his guilty pleas, he entered protective custody at SCDC. App. 57, ll. 8-11; App. 86, ll. 3-5; App. 122; App. 123; App. 149; App. 150. According to Joette Scarborough, the Division Director of the Division of Classification and Inmate Records, who chaired the Statewide Protective Custody Committee, Petitioner's placement into protective custody was based upon the judge's order on the sentence sheet. App. 78, ll. 15-17; App. 78, l. 33 – App. 79, l. 5; App. 80, ll. 1-8.

Post-Conviction Relief Application

When the one-year anniversary of his guilty plea approached, Petitioner learned that the solicitor had not filed a motion to reduce his sentence. App. 59, ll. 14-20; App. 114, ll. 6-19. As a result, Petitioner filed an application for post-conviction relief (PCR) on October 9, 2014,

pursuant to the advice of Sutherland, one of the attorneys who represented Petitioner during the guilty plea proceeding. App. 25-34; App. 63, l. 17 – App. 64, l. 2.

In April 2015, SCDC placed Petitioner in general population. App. 57, ll. 12-18; App. 149. Scarborough claimed Petitioner was removed from protective custody because Petitioner did not provide "enough information to verify the threat" to the investigator from the police services division. App. 80, l. 14 – App. 81, l. 3; App. 86, ll. 6-13. However, the memorandum regarding his ouster stated it was "due to court order not sufficient enough to remain" in statewide protective custody. App. 149. Scarborough claimed that a notation on a sentence sheet for protective custody would be considered a "recommendation" that would not bind SCDC. App. 81, ll. 7-12; App. 82, ll. 16-23; App. 85, ll. 10-17. SCDC maintained that a judge exercised no control over where SCDC placed inmates. App. 85, ll. 18-23. Immediately, Petitioner requested a return to protective custody, but the request was denied. App. 150. In a memorandum dated October 16, 2015, Scarborough stated that Petitioner's request was denied "due to Police Services inability to substantiate any threats on his life and due to the inmate's failure to give specific information about his gang related concerns." App. 150.

After Kristy Goldberg was appointed to represent him, Petitioner filed an amended PCR application on March 7, 2016. App. 42. The amended application alleged (1) plea counsel provided ineffective assistance for advising Petitioner to accept a plea offer conditioned on (a) statewide protective custody and (b) downward departure; (2) plea counsel provided ineffective assistance for failing to ensure the conditions were met and failing to file a motion to withdraw the guilty plea when the conditions were not met; and (3) the guilty plea was involuntary because Petitioner relied on representations by plea counsel that he would be guaranteed statewide protective custody and downward departure after pleading guilty. App. 42.

Post-Conviction Relief Hearing

The matter proceeded to an evidentiary hearing on March 29, 2016, before the Honorable G. Thomas Cooper, Jr. App. 44. Goldberg represented Petitioner, and Clay Mitchell represented the state. App. 44. During the hearing, the solicitor acknowledged that Petitioner assisted a correctional officer at the jail and that he was aware of Petitioner's assistance at the time of the guilty plea negotiations. App. 94, ll. 2-6; App. 96, ll. 12-14; App. 98, ll. 20-23. Unfortunately, the jail had no actual documentation regarding the fight; rather, the jail's "institutional knowledge" was dependent upon "inmates who [were] regularly there." App. 93, ll. 13-16. One such inmate, Lucius Green, was present when the fight took place. App. 93, ll. 17-22. According to Green as relayed by the solicitor, "really all that had happened was that ... during the course of the scrum Sergeant Robinson had asked [Petitioner] to grab ahold of Frank Singleton, which he did, and pretty much the fight ... was broken up after that." App. 93, l. 22 – App. 94, l. 1. The solicitor downplayed Petitioner's conduct while awaiting trial, stating that it was "not like they were holding a knife to the CO's throat or anything." App. 96, ll. 16-17.

The solicitor insisted that he took Petitioner's assistance into consideration "with respect to the negotiations." App. 94, ll. 2-6. He did not file a motion for a reduced sentence pursuant to section 17-25-65 of the South Carolina Code. App. 94, ll. 7-9. He claimed his failure to do so was because Petitioner did not provide any assistance "after his sentence as is required by the statute" and that "any sentence less than 30 years would be an illegal sentence as the legislature has promulgated that murder is punishable by 30 years to life." App. 94, ll. 9-18; App. 97, ll. 12-19; App. 98, ll. 4-23.

Plea counsel explained there "certainly was a downward departure negotiation" to which the solicitor agreed. App. 107, ll. 8-10; App. 109, ll. 6-8 (stating "it was certainly negotiated that

Mr. Perry would file a downward departure within one year for the correctional officer assistance"). "[I]t was known to all parties including Brett Perry that it was - - he was going to file a motion within a year." App. 107, ll. 15-17. This motion was to reward Petitioner for assisting the officer at the detention center. App. 108, ll. 13-15. According to Shealey, the solicitor was "in complete agreement." App. 108, l. 8; App. 108, l. 21. Realizing that any "downward departure" or reduced sentence would place Petitioner's sentence below the statutory minimum, Shealey contacted Florian regarding this matter as well. App. 109, l. 21 – App. 110, l. 2. Florian assured Shealey that SCDC would "honor a downward departure even if it [went] below the statutory minimum." App. 110, ll. 1-4; see also, App. 110, ll. 13-19; App. 118, ll. 15-23.

Thereafter, plea counsel assured Petitioner that SCDC would honor a sentence less than the statutory minimum if ordered by a judge. App. 73, l. 20 – App. 74, l. 7; see also App. 107, l. 18 (Shealey shared this information with Petitioner, who relied upon it in deciding to accept the state's plea offer). Plea counsel explained to Petitioner there was no guarantee regarding "any kind of downward departure that a judge would give. It could be nothing. It could be one day. It could be six months." App. 110, ll. 20-23. Nevertheless, plea counsel assured Petitioner that a motion for a reduced sentence based on his assistance to the corrections officer would be filed. App. 111, ll. 4-8. Additionally, according to Shealey, the parties talked to the plea judge about the specific negotiations, including protective custody and the motion for a reduced sentence, in chambers prior to the guilty plea proceeding. App. 108, l. 23 – App. 109, l. 1; App. 118, l. 24 – App. 119, l. 2.

Petitioner accepted the state's plea offer only when the offer included that Petitioner's sentence would be served in protective custody and that the state would file a motion for a

reduced sentence within one year. App. 55, ll. 4-6; App. 106, l. 24 – App. 107, l. 3; App. 114, ll. 4-5. Had the state's plea offer not included within it a guarantee that Petitioner would enter protective custody at SCDC, then Petitioner would have gone to trial on the charges. App. 55, ll. 4-11; App. 76, ll. 7-16. Had the state's plea offer not included within it a guarantee that the solicitor would file a motion to reduce sentence within one year of sentencing, then Petitioner would have gone to trial on the charges. App. 74, ll. 13-25; App. 76, ll. 7-16.

Order Denying Post-Conviction Relief

By an order filed on May 18, 2016, Judge Cooper denied Petitioner relief from his convictions and sentences. App. 152-162. First, Judge Cooper concluded that Petitioner's "guilty plea was not based on any conditions." App. 155. Next, Judge Cooper stated "[t]he plea was a negotiated sentence with terms regarding placement in statewide protective custody and a motion for sentence reduction." App. 155.

Second, Judge Cooper found plea counsel's testimony that "the plea deal was for [Petitioner] to be placed in statewide protective custody, not that he would serve his entire sentence in protective custody" was "credible and persuasive on the issue." App. 156. Next, Judge Cooper found that "circuit court judges do not have the authority to order, as part of the sentence, that a defendant be placed in protective custody because it infringes on SCDC's statutory authority." App. 157. Judge Cooper held plea counsel "acted reasonably in successfully having [Petitioner] placed in protective custody" and that Petitioner "was never advised or guaranteed that he would remain in protective custody for the duration of his sentence." App. 157.

Next, Judge Cooper determined plea counsel could not be found to be ineffective regarding the solicitor's decision not to file a motion for substantial assistance "because the

language of S.C. Code Ann. § 17-25-65 clearly indicates the State, not defense counsel, is the party who must move for a sentence reduction." App. 158. Thus, Judge Cooper concluded it was "not logical or prudent to find counsel ineffective for failing to do something which he has no statutory authority to do." App. 159. According to the judge, "[s]uch a finding would effectively misconstrue the statute to include defense counsel as a party with an obligation to move for a sentence reduction." App. 159. Additionally, the judge explained, "[s]uch a finding of ineffectiveness and its resulting effect on statutory interpretation would be absurd.' App. 159.

Judge Cooper found Petitioner's "testimony that he would have taken the two separate murder cases to trial if the solicitor did not file a motion for substantial assistance" "not credible." App. 159. Judge Cooper determined Petitioner "was most concerned with his placement in protective custody, not with whether his sentence would be reduced." App. 159. Additionally, Judge Cooper found "that a motion for substantial assistance would not be granted." He based this determination on two factors. First, he explained that the statute required the basis of the motion to be conduct occurring "*after* sentencing." App. 159 (emphasis in original). Petitioner's assistance to the corrections officer at the jail occurred prior to his guilty plea and sentencing; therefore, it would not qualify under the statute. App. 159-160. Second, the judge concluded Judge Benjamin "would not have reduced [Petitioner]'s sentence below the mandatory minimum of thirty (30) years." App. 160. According to the PCR judge, "[t]o go any lower would be to impose an illegal sentence." App. 160. The PCR judge also found that Judge Benjamin would not have reduced the sentence considering the weight of the evidence and the brutality of the crimes. App. 160. As a result, the PCR judge denied relief on this ground. App. 160.

On May 20, 2016, Petitioner moved the court to alter or amend its judgement. App. 163-168. Petitioner argued his guilty plea was involuntary based on the advice of plea counsel, which fell below the range of competence demanded of attorneys in capital cases. App. 164 (citing Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998)). Petitioner pointed to plea counsel's testimony that plea counsel "'guaranteed'" that the state "would file a Motion for a reduced sentence." App. 164. Petitioner requested the PCR court find that Petitioner "reasonably and determinately relied on the advice of counsel regarding the notations or 'terms' written on the sentencing sheet in his decision to plead guilty and forego his right to a jury trial." App. 164. Petitioner argued that plea counsel's advice that the state would file a motion for a reduction of sentence based on substantial assistance under section 17-25-65 of the South Carolina Code was "unreasonable and fell below the range of competence required in criminal cases." App. 164.

In light of the solicitor's testimony that a judge could *not* sentence a defendant for less than thirty years, even pursuant to a section 17-25-65 motion, "the notation on the sentencing sheet was an improper illusory promise and a meaningless inducement to get [Petitioner] to plead guilty based on the false hope of reward." App. 165. Plea counsel's advice to Petitioner to rely on "such an empty sentiment by the state" was unreasonable. App. 165.

Additionally, Petitioner argued plea counsel provided incorrect legal advice by informing him that he would be eligible for a reduced sentence where the basis of the motion would have been Petitioner's assistance to the corrections officer at the jail prior to his sentencing. App. 166. The statute permits a sentence reduction to aid to a Department of Corrections officer *after sentencing*. App. 166. "No provision in this statute allows a court to reduce a sentence based on acts that occurred before sentencing. Therefore, the advice to [Petitioner] by Shealey and

Sutherland that he may be eligible for a time reduction was incorrect, and accordingly, the attempt to make the state promise to file the motion as part of plea negotiations was meaningless." App. 166.

Petitioner argued his "plea was induced by erroneous information and advice and therefore rendered involuntary." App. 166. "But for the erroneous advice [Petitioner] would not have plead guilty and instead would have insisted on going to trial." App. 166. Citing Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001), Petitioner argued his reliance on plea counsel's erroneous advice in deciding to plead guilty justified reversal of his guilty plea. App. 166.

Finally, Petitioner challenged the PCR judge's finding that Petitioner "was not credible in testifying that he would have gone to trial if he was not offered these 'terms.'" App. 166. Petitioner and plea counsel testified "this case was prepared as a trial since the beginning and several experts had been retained and consulted in preparation for trial." App. 166. Additionally, trial counsel testified he had prepared defenses and the discussions for a guilty plea resolution coincided with "conversations about protective custody and sentence reductions." App. 166-167.

Judge Cooper's order denying the motion was filed July 22, 2016. App. 169.

Appeal

Petitioner served and filed his notice of appeal on July 26, 2016. This petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was rendered involuntary due to plea counsel's ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution where plea counsel advised Petitioner the solicitor would file a motion to reduce his sentence within one year of his guilty plea based on substantial assistance provided by Petitioner to a corrections officer, which occurred while Petitioner awaited disposition of his case.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The right to the effective assistance of counsel extends to the plea bargaining process. Lafler v. Cooper, 566 U.S. 156, 162 (2012); Missouri v. Frye, 566 U.S. 133, 141 (2012); Padilla v. Kentucky, 559 U.S. 356 (2010); Hill v. Lockhart, 474 U.S. 52, 57-59 (1985); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), *overruled on other grounds by* Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984).

To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

The two pronged test adopted in Strickland "applies to challenges to guilty pleas based on ineffective assistance of counsel." Hill v. Lockhart, 474 U.S. 52, 58 (1985). "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness 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." Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009). "[I]n the context of determining the voluntariness of a guilty plea that is entered upon the advice of counsel," the deficiency prong of the Strickland test requires "an inquiry into whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Alexander, 303 S.C. at 542, 402 S.E.2d at 485. "The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006).

Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 243-244 (1969); see also Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003). The record must show with certainty that the plea is "an intentional relinquishment or abandonment of a known right or privilege." State v. Patterson, 278 S.C. 319, 322, 295 S.E.2d 264, 265 (1982) *overruled on other grounds* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Judges are

required to give the defendant an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975). In order for a defendant to knowingly and voluntarily plead guilty, the defendant must have a full understanding of the consequences of the plea. Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991)(citing State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). The judge must question the defendant about the possible punishment that could be imposed. Id. at 434-435.

This Court has found deficient performance where attorneys provided erroneous advice that induced a guilty plea. In Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989), the defendant's trial attorney told him he would be eligible for parole after serving ten years when, in reality, defendant would have to serve twenty years. Id. at 457-58, 377 S.E.2d at 339. Hinson found such advice deficient and reversed the PCR court. Id.; see also Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991)(reversing guilty plea on PCR where attorney misadvised defendant on maximum exposure at sentencing).

In Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988), the defendant pled guilty based upon the expectation that the solicitor would neither recommend nor oppose a sentence of probation. Id. at 53, 374 S.E.2d at 684. At the plea, a different solicitor represented the State and vigorously opposed probation. Id. This Court found plea counsel's failure to move to withdraw the sentence constituted ineffective assistance of counsel and reversed. Id. at 54-55, 374 S.E.2d at 684-85.

In Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991), this Court found plea counsel was ineffective for erroneously advising the defendant that he faced a sentence of life without parole. Id. at 375, 401 S.E.2d at 152. The state argued that since the defendant faced a possible seventy-five year sentence, he could not have been prejudiced by the erroneous advice. Id. at 376, 401

S.E.2d at 152-53. The Ray Court dismissed the state's reliance on a "possible" maximum sentence because had the defendant proceeded to trial, he could have faced a much shorter sentence. Id.

Deficient Performance

In 2010, the South Carolina Legislature created a statute that would permit courts to reduce defendant's sentences based upon "substantial assistance" or aid to a corrections officer. S.C. Code Ann. § 17-25-65. According to the statute, the state may move the court to reduce a defendant's sentence within one year of sentencing, if the defendant provided "(1) substantial assistance in investigating or prosecuting another person" or "(2) aid to a Department of Corrections employee or volunteer who was in danger of being seriously injured or killed." S.C. Code Ann. § 17-25-65(A). The motion must be filed by the circuit solicitor in the county where the defendant's case arose. S.C. Code Ann. § 17-25-65(C).

Several facts were not in dispute. First, plea counsel advised Petitioner that the solicitor *would* file a motion for reduced sentence based on substantial assistance within one year of Petitioner's guilty plea and sentence. Second, plea counsel advised Petitioner that the motion would be based upon Petitioner's aid to a detention center officer which occurred *prior* to Petitioner's guilty plea and sentence. Third, Petitioner received thirty years' imprisonment, which is the statutory minimum for murder. Based upon these undisputed facts, a judge would not grant motion for a reduced sentence pursuant to section 17-25-65 of the South Carolina Code because the conduct for which the reduced sentence was sought occurred *prior* to sentencing and any reduced sentence would be below the statutory minimum. See S.C. Code Ann. § 16-3-20(A) (establishing a mandatory minimum term of imprisonment for thirty years to life for murder). Conduct occurring prior to sentencing, whether it be substantial assistance in investigating or

prosecuting another person or for aiding a Department of Corrections' employee, would not serve as a basis for a motion pursuant to section 17-25-65 based on the plain language of the statute. Further, any reduction of Petitioner's sentence would require a court to impose a sentence below the statutory minimum.

Counsel's failure to consult the statute and determine that Petitioner's aid to the detention center officer prior to his guilty plea would not suffice to warrant relief under the statutory scheme was deficient performance. The plain language of the statute indicated Petitioner's conduct at the jail would not support such a motion based on the timing of the conduct or the subject matter, assistance of a detention center officer, not a Department of Corrections' employee. Additionally, despite plea counsel's assurances from SCDC that a sentence below the statutory minimum would have been honored, the likelihood of a judge imposing such a sentence was negligible.

Prejudice

The only evidence before the PCR judge on the specific point of whether Petitioner would have proceeded to trial, but for plea counsel's deficient advice was Petitioner's undisputed and unrefuted testimony. Petitioner unequivocally testified that he would have gone to trial. Even under intense questioning on cross-examination by the state on this subject, Petitioner did not waiver. App. 74, ll. 13-25. Petitioner explained that prior to Shealey's representation, he had been called to trial, but a mistrial had been granted. App. 74, ll. 17-25. There was little doubt that Petitioner would have exercised his right to a jury trial but for counsel's deficient advice. The judge's credibility finding to the contrary has no basis in the record, and is an error of law. See Smith, 369 S.C. at 138, 631 S.E.2d at 261 (2006).

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants the petition but dispenses with further briefing, Petitioner respectfully requests this Court reverse the decision of the PCR judge and grant relief by vacating his guilty pleas and remanding for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of March, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

G. Thomas Cooper, Circuit Court Judge

BRIAN EVANS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Jessica Kinard, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Brian Evans, #111059, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 8th day of March, 2017.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 8th day of March, 2017.

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