STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE SUPREME COURT

Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2015-000410

Jason Sanford, #340276, ... Petitioner,

v.

State of South Carolina, ... Respondent.

BRIEF OF RESPONDENT

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ISSUE PRESENTED

1. Is there any probative evidence to support the PCR Court's finding that Petitioner's guilty plea was voluntary where the plea colloquy sufficiently apprised Petitioner of his constitutional rights, the mandatory minimum and maximum sentences, and the nature of the offense to which he was pleading guilty, and where Petitioner did not need to be specifically advised of parole eligibility because it was a collateral consequence of his guilty plea?

STATEMENT OF THE CASE

Petitioner was indicted at the April 2012 term of the Court of General Sessions for Anderson County for murder (2012-GS-04-0986). App. pp. 31-32. He was represented by Scott Robinson, Esquire, on that charge. App. p. 1. On December 4, 2012, Petitioner pleaded guilty as indicted and pursuant to the State's recommendation for the mandatory minimum thirty-year term of imprisonment. App. pp. 1-30. The Honorable J. Cordell Maddox, Jr., accepted Petitioner's plea and sentenced him pursuant to the State's recommendation. App. p. 19, 28. Petitioner did not appeal his sentence or conviction. App. 97. Petitioner then filed an application for post-conviction relief (PCR) on June 12, 2013, alleging, among other things, that his plea counsel was ineffective for failing to advise him he would be ineligible for parole. App. p. 34-42. An evidentiary hearing into the matter was convened on December 1, 2014, at the Anderson County Courthouse before the Honorable Carmen T. Mullen. App. pp. 52-96. Petitioner was present and was represented by Hugh W. Welborn, Esquire. App. p. 52. Respondent was represented by Walt Whitmire, Esquire. App. p. 52. Judge Mullen subsequently issued an order denying Petitioner's application on all grounds. App. pp. 97-107. Petitioner filed a Petition for Writ of Certiorari on the issue of whether counsel was ineffective for failing to advise Petitioner he was ineligible for parole, and the Petition was granted on December 2, 2016.

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

There is probative evidence to support the PCR Court's finding that Plea Counsel rendered effective assistance because Plea Counsel's performance was not deficient and Petitioner did not establish he was prejudiced by any alleged deficiency. Petitioner's guilty plea was entered knowingly and voluntarily following a plea colloquy that sufficiently apprised Petitioner of his constitutional rights, the mandatory minimum and maximum sentences, and the nature of the offense to which he was pleading guilty, and Petitioner did not need to be specifically advised of parole eligibility because it was a collateral consequence of his guilty plea.

Petitioner contends the PCR court erred in finding Petitioner's guilty plea was entered knowingly and voluntarily because both plea counsel and plea judge did not advise Petitioner that the mandatory minimum sentence of thirty years would have to be served day-for-day, and Petitioner would be ineligible for parole. Petitioner argues plea counsel's failure to discuss parole *ineligibility* is distinguishable from the long-established rule that parole *eligibility* is a collateral consequence of which a criminal defendant need not be advised before pleading guilty. See Brown v. State, 306 S.C. 381, 382, 412 S.E.2d 399, 401 (1991). Respondent submits the distinction Petitioner attempts to draw is specious, and the decision of the PCR Court should not be disturbed.

A. Petitioner's guilty plea was knowing and voluntary because Petitioner was sufficiently apprised of his constitutional rights, the mandatory minimum and maximum sentences, and the nature of the offense to which he was pleading guilty.

The PCR court correctly denied and dismissed Petitioner's argument regarding his lack of awareness of "day-to-day" nature of his sentence, and the record fully supports the knowing and voluntary nature of Petitioner's guilty plea. "To find a guilty plea is voluntary and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Boykin v. Alabama, 395 U.S. 238, 242 (1969). "[A] defendant must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d

418, 421 (2000) (citing Boykin, 395 U.S. at 243). Furthermore, "a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999).

A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977). Therefore, statements made during a guilty plea should be considered conclusive and carry a presumption of accuracy unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Edmonds v. Lewis, 546 F.2d 566, 568 (4th Cir.1976); Dalton v. State, 376 S.C. 130, 137-138, 654 S.E.2d 870, 874 (Ct. App. 2007). A PCR applicant may attack the voluntary, knowing, and intelligent character of a guilty plea entered on the advice of counsel by demonstrating that counsel's representation was below an objective standard of reasonableness. Porter v. State, 368 S.C. 378, 383-84, 629 S.E.2d 353, 356 (2006); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). An applicant must also prove prejudice by showing that, but for counsel's inadequacy, there is a reasonable probability he would not have pleaded guilty and, instead, would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985); Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

"A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both." Pittman, 337 S.C. at 600, 524 S.E.2d at 625. "[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the

time of the entry of the guilty plea and the record of the post-conviction hearing." Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). "When determining issues relating to guilty pleas, this Court will consider the entire record, including the transcript of the guilty pleas and the evidence presented at the PCR hearing." Roddy, 339 S.C. at 33, 528 S.E.2d at 420.

The plea court's colloquy during Petitioner's guilty plea met all of the above-listed requirements. First, Petitioner unequivocally responded in the affirmative when asked by the judge if Petitioner was waving his right to a jury trial, right to remain silent, right to put up a defense, and right to confront any of his accusers' testimony. App. pp. 8-9. The record clearly establishes Petitioner knew the constitutional rights he was waiving. Additionally, Plea Counsel indicated to the court that Petitioner understood the elements of the charge, and Petitioner clearly stated he was pleading guilty to murder and the decision to do so was made of his own free will. App. pp. 9-11. Importantly, Petitioner also testified no one had him any promises to induce him to plead guilty. App. p. 9, lines 6-8. Finally, the plea judge explicitly stated the minimum sentence was thirty years and the maximum sentence was life. App. p. 9, lines 9-18. At the PCR evidentiary hearing, Petitioner affirmed multiple times he knew the minimum sentence for murder was thirty years' imprisonment and the maximum sentence was life without parole. App. pp. 57-58.

The specific requirements for a knowing and voluntary guilty plea are clearly laid out above, and Petitioner's plea colloquy and testimony during the evidentiary PCR hearing support the PCR Court's finding all of the above requirements were satisfied in Petitioner's case.

B. Petitioner's guilty plea is not rendered involuntary where he was not informed his sentence would have to be served "day for day" with no eligibility for parole because neither Plea Counsel nor the plea court is under any obligation to advise Petitioner regarding parole.

The PCR Court correctly denied and dismissed Petitioner's allegation that Plea Counsel was ineffective for failing to advise Petitioner he was ineligible for parole and that such failure rendered the guilty plea involuntary. Petitioner argues the failure to give advice regarding parole *eligibility* is distinct from a failure to advise a defendant that he is totally parole *ineligible*, and because Petitioner was pleading to an offense for which there is no possibility of parole, Plea Counsel had an obligation to inform Petitioner of that fact. Petitioner relies mainly on non-binding federal court opinions from the Fourth Circuit to support his argument that because Petitioner was automatically excluded from consideration for parole by statute, it is therefore a direct consequence of his plea, and Plea Counsel was required to advise him of such. Brief of Petitioner 5-9. This argument is without merit, as neither the law of this state nor the United States Supreme Court makes such distinction.

Cuthrell v. Director, Patuxent Institution does opine that "when a defendant pleads guilty to an offense under which he is not eligible for parole, he should be made aware of that fact before acceptance of his plea." 475 F.2d 1364, 1366 (4th Cir. 1973) (citing Paige v. United States, 443 F.2d 781, 782-783 (4th Cir. 1971). However, this is an overstatement of the rule from Paige, and in any event, Petitioner's case is distinguishable in that the plea judge in Paige actively misinformed the defendant regarding his parole eligibility. Paige pleaded guilty to federal narcotics charges and was not informed that, because the conviction was a second offense, he would be ineligible for parole. Paige, 443 F.2d at 782. At the time the plea was

entered, the plea judge indicated it would not be treated as a second offense, stating, "Well, a second offense carries an additional penalty. . . . But I don't have any second offense before me now." Id. Paige, then, is more in line with this Court's rule that if counsel or the court undertakes to give specific parole advice, it must be correct. See Smith v. State, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997); Hunter v. State, 316 S.C. 105, 109, 447 S.E.2d 203, 205 (1994), abrogated on other grounds by Simpson v. State, 329 S.C. 43, 495 S.E.2d 429 (1998). Additionally, Rule 11 of the Federal Rules of Criminal Procedure, on which the decision in Paige was based, was revised in 1974, and the advisory comments specifically address the issue of whether a plea judge is required by the rule to address parole eligibility or ineligibility during a guilty plea, answering in the negative. ("Under the rule the judge is not required to inform a defendant about these matters, though a judge is free to do so if he feels a consequence of a plea of guilty in a particular case is likely to be of real significance to the defendant."). Fed. R. Crim. Pro. 11.

Further, the more recent habeas case of Bustos v. White has directly addressed Petitioner's situation. 521 F.3d 321 (4th Cir. 2008). In Bustos, the district court granted habeas relief on the basis that because Bustos was ineligible for parole, his attorney was constitutionally ineffective for failing to advise him of that fact before he pleaded guilty, and the State appealed. Id. at 325. As in Petitioner's case, the PCR Court found Bustos's trial counsel did not advise him about parole eligibility, and therefore, the attorney's performance did not fall below professional standards. Id. at 324. Further, the Bustos PCR Court explicitly "rejected Bustos's assertion that he would not have pled guilty but for trial counsel's alleged misadvice." Id. The Court of Appeals for the Fourth Circuit reversed the district court's conditional grant of a habeas writ, stating, "[N]o Supreme Court precedent establishes that parole ineligibility constitutes a

direct, rather than a collateral, consequence of a guilty plea." Id. at 325.

Petitioner cites Padilla v. Kentucky, 559 U.S. 356 (2010), for the proposition that the Supreme Court does not distinguish between direct and collateral consequences, and therefore, even if parole ineligibility is a collateral consequence, Counsel should be required to advise Petitioner on that issue. Brief of Petitioner 10-11. In Padilla, the United States Supreme Court held, for the first time, that criminal defense attorneys render deficient performance under the Strickland standard when they fail to advise noncitizen clients about deportation consequences of a guilty plea. 559 U.S. at 374. However, the plain language of Padilla indicates that the Court did not consider the issue of direct and collateral consequences, but rather based its decision on the unique character of deportation resulting from a criminal conviction and its impact not only on the defendant, but also the defendant's family. Id. at 365, 374 ("Whether that distinction is appropriate is a question that we need not consider in this case because of the unique nature of deportation."). The United States Supreme Court, then, has never answered the question of whether it is appropriate to distinguish between direct and collateral consequences, despite having had several occasions to do so in addition to Padilla. See, e.g., Trujillo v. United States, 377 F.2d 266, 269 (5th Cir. 1967), cert. denied, 389 U.S. 899 (1967) ("We therefore conclude that the judge was not required to inform appellant of ineligibility for parole upon conviction of the offense. . .."); Hill, 474 U.S. at 55-60 (deciding the case on prejudice grounds and declining to pass upon the District Court's determination that "parole eligibility 'is not such a consequence of [petitioner's] guilty plea that such misinformation renders his plea involuntary'").

On the other hand, that distinction has been made by this Court. In Cuthrell, the Fourth Circuit Court of Appeals explained "the distinction between 'direct' and 'collateral' consequences of plea . . . turns on whether the result represents a definite, immediate, and largely

automatic effect on the range of the defendant's punishment." 475 F.2d at 1366 (1973). This Court has adopted the same general rule, stating, for example, in Armstrong v. State, that "[t]he judge is charged with the responsibility of apprising the accused with the direct consequences, that is the direct and immediate results, of a guilty plea." 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975) (citing Cuthrell, 475 F.2d at 1364). Nonetheless, this Court has never held that parole eligibility *or ineligibility* is a direct consequence of a guilty plea.

"It is well settled that parole eligibility is a collateral consequence of sentencing, and that trial counsel need not advise a client of his parole eligibility, *or ineligibility*, in order to render effective assistance." Jackson v. State, 349 S.C. 62, 64, 562 S.E.2d 475, 475-476 (2002) (emphasis added). This Court "has repeatedly acknowledged that normally, parole eligibility is a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea." Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) (citing Griffin v. Martin, 278 S.C. 620, 300, S.E.2d 482 (1983)). Further, "[c]ounsel is not ineffective for failing to advise a defendant regarding parole eligibility because it is a collateral consequence of sentencing." Knox v. State, 340 S.C. 81, 86, 530 S.E.2d 887, 889 (2000) (citing Smith v State, 329 S.C. 280, 494 S.E.2d 626 (1997)), overruled on other grounds by State v. Gentry, 363 S.C. 93 (2005). Unless counsel gives erroneous parole advice, parole information is not a ground for collateral attack of a guilty plea. Smith, 329 S.C. at 284-85, 494 S.E.2d at 629-30. "The simple rule . . . is that it is not constitutionally required to give parole advice . . . but if the advice which is given is incorrect, then the plea may not be knowing and voluntary." Hunter, 316 S.C. at 108, 447 S.E.2d at 205. Furthermore, "a guilty plea is not involuntary if there is no reference to a collateral consequence such as parole." Id. As Brown and subsequent cases have reasoned, "this is because parole eligibility is not a matter within the jurisdiction of the trial court, but falls

within the province of the Board of Probation, Parole, and Pardon Services." 306 S.C. at 382, 412 S.E.2d at 401.

At the PCR hearing, both Petitioner and Plea Counsel unequivocally testified parole was not discussed at all prior to Petitioner's guilty plea. App. p. 71, lines 11-17, p. 90, lines 10-17. Petitioner testified he never asked Plea Counsel whether or not he would be eligible for parole, and Plea Counsel testified his practice is that he never discusses parole with his clients. App. p. 71, lines 11-17, p. 90, lines 10-17. Petitioner's Plea Counsel at the PCR evidentiary hearing specifically said that he "[didn't] give advice on parole eligibility," and the plea judge never brought up parole eligibility during the plea. App. pp. 3-29, p. 90, line 13. Petitioner's parole ineligibility is defined by statute and is not a matter "within the jurisdiction of the trial court" but instead is controlled by the legislature. See S.C. Code Ann. § 16-3-20 (2016). See also Trujillo, 377 F.2d at 269 (quoting Smith v. United States, 324 F.2d 436, 441 (D.C. 1963)) ("'[E]ligibility for parole is not a 'consequence' of a plea of guilty, but a matter of legislative grace. It is equally true that noneligibility for parole is not a 'consequence' of a plea of guilty; rather, it is a consequence of the withholding of legislative grace.'"). Furthermore, despite the fact that Petitioner is automatically parole ineligible, the potential sentencing range or potential maximum sentence is not increased beyond that faced by parole-eligible inmates sentenced to the same amount of time because there is no guarantee that any inmate will be granted parole, even if eligible. "Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made." Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997). Because no misinformation concerning parole eligibility

or ineligibility was given to Petitioner throughout his criminal proceedings, the judgment of the PCR court was correct and should be upheld.

C. Even if Plea Counsel's failure to advise Petitioner that he was ineligible for parole constitutes deficient performance, Petitioner has failed to show such lack of advice induced Petitioner's guilty plea, where Petitioner testified at the PCR hearing he decided to plead guilty upon learning a codefendant would testify against him.

Petitioner's situation is similar to those cases wherein a defendant alleges he received incorrect advice regarding parole eligibility, because in both instances, the defendant serves a longer term than he allegedly believed was required under the law without the possibility of release. In those instances where a defendant receives erroneous advice from either Plea Counsel or the plea judge, this Court has held Petitioner "must prove he relied on the misinformation to receive PCR." Fraiser v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002). "Although we have consistently held a defendant must have a full understanding of the consequences of his plea and of the charges against him . . . the defendant must also demonstrate prejudice to be entitled to relief on PCR." Taylor v. State, 404 S.C. 350, 362, 745 S.E.2d 97, 103 (2013) (quoting Roscoe, 345 S.C. at 20 n. 6, 546 S.E.2d at 419 n. 6).

In Frasier, counsel testified it was her practice not to discuss parole with clients, and although she knew two convictions for a violent crime precluded parole, she did not recall specifically contemplating the effect of that law on her client. 351 S.C. at 388, 570 S.E.2d at 174. This Court upheld the PCR Court's decision denying relief, finding Fraiser "was not induced to plead guilty based on parole advice prior to the plea." Id. at 389, 175. Similarly, in Griffin v. Martin, the applicant argued that he was entitled to PCR because his attorney advised him he would be eligible for parole after ten years if he pleaded guilty and was sentenced to life without parole, when in fact, the applicant was not eligible for twenty years. 278 S.C. 620, 621, 300 S.E.2d 482, 482 (1983). Griffin's counsel testified he advised appellant to plead guilty

because the case against him was overwhelming, and the solicitor had agreed not to seek the death penalty if his client pleaded guilty. Id. at 621-622, 483. The PCR Court denied relief, and the decision was upheld on appeal because the applicant "failed to prove his attorney's erroneous advice concerning parole eligibility induced his guilty plea...." Id. at 622, 483.

In Petitioner's case, Plea Counsel testified the evidence against Petitioner was overwhelming, as Petitioner and his codefendant were captured on surveillance video ambushing and shooting the victim, Petitioner was identified by several eyewitnesses, and a third codefendant came forward shortly before trial and admitted to driving Petitioner and the other codefendant to and from the scene. App. 89-91. Plea Counsel stated his belief that it was the potential testimony of the third codefendant who came forward shortly before trial that caused Petitioner to "make a change to a plea of guilty in this case, in front of one of the best judges in Anderson County . . . or this state to do a plea in front of." App. 89, lines 3-17. Although Petitioner initially testified he would have insisted on proceeding to trial had he known he would have to serve the full thirty years of his sentence, he later confirmed the third codefendant's willingness to testify against him was the true catalyst that caused him to plead guilty. Petitioner testified he decided to plead "because [Plea Counsel] was like there was no way if this person testifies against me at trial, [there's] no way I can win at trial, and I was going to get a life sentence." App. p. 58, line 23, p. 69, lines 2-12.

"The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. . . . A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." Jamison v. State,

410 S.C. 456, 471, 765 S.E.2d 123, 130 (2014) (quoting Brady v. United States, 397 U.S. 742, 757 (1970)). See also Blackledge, 431 U.S. at 73-74 ("[F]indings made by the judge accepting the plea constitute a formidable barrier in any subsequent collateral proceedings. . . . The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.") Furthermore, since both Plea Counsel and Petitioner testified that parole eligibility was never discussed, Petitioner cannot have relied on any alleged misinformation from Plea Counsel in deciding whether or not to plead guilty. App. 71, 89-90. Petitioner, therefore, has failed to prove he was prejudiced by any alleged deficiency in Plea Counsel's performance.

CONCLUSION

For the reasons stated above, this Court should affirm the PCR court's ruling that Plea Counsel was not deficient, nor was Petitioner prejudiced by any alleged deficiency, and Plea Counsel did not render ineffective assistance.

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May 5, 2017

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Deonna Rogers, certify that I have served the within Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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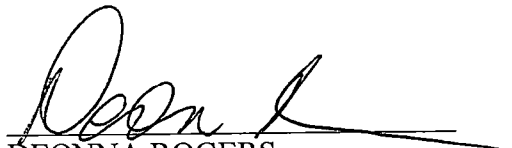
I further certify that all parties required by Rule to be served have been served.

This 5th day of May, 2017.



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