STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Supreme Court County

Honorable Roger L. Couch, Circuit Court Judge

TERRANCE MCCALL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002285

BRIEF OF PETITIONER

WANDA H. CARTER
Deputy Chief Appellate Defender

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

TIFFANY L. BUTLER
Duff & Childs
3700 Forest Drive, Suite 404
Columbia, SC 29204

ATTORNEYS FOR PETITIONER

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ISSUE PRESENTED

Plea counsel was ineffective in misadvising petitioner about parole eligibility and in failing to object when the plea judge misadvised petitioner about parole eligibility.

STATEMENT

On March 29, 2010, a Spartanburg County Grand Jury indicted Petitioner for armed robbery, two counts of assault and battery of a high and aggravated nature (ABHAN), possession of a firearm during commission of a violent crime, pointing and presenting a firearm, and resisting arrest with a deadly weapon. App. 173 – 182. On October 22, 2010, Petitioner was also indicted for kidnapping and possession of a firearm during commission of a violent crime, which arose from the same incident. App. 183 – 184.

On January 31, 2011, Petitioner pled guilty to both counts of ABHAN, armed robbery, possession of a weapon during a violent crime, and pointing and presenting a firearm before the Honorable J. Derham Cole. App. 5 – 6. Andrea Price represented Petitioner. Barry Joe Barnette represented the State. App. 1.

According to the State's version of the facts, on February 19, 2010, deputies with the Spartanburg County Sheriff's Officer were on patrol. App. 28, line 25 – App. 29, line 3. The deputies received a complaint about drug activity at a house on Williams Street in Spartanburg County. App. 29, lines 1 – 5. While Officers Harold and Strickland were observing the Williams Street house from different cars, they noticed a Toyota Celica drive up to the house. App. 29, lines 7 – 14. Officer Wilbanks, who was observing the house from another unmarked police car, observed the Toyota drive up to the house for the second time that day. App. 29, lines 15 – 17. After the Toyota drove away from the house, Officer Harold drove behind it and noticed the car had a "tinted tag" and a tag violation. App. 29, lines 18 – 21. Harold initiated a traffic stop of the car, while Officer Strickland pulled up behind him. App. 29, lines 22 – 24. Harold walked over to the driver's side and started talking to the driver. Strickland walked over to the passenger side and started talking to Petitioner. App. 29, line 25 – App. 30, line 2. After arresting the driver for

possession of marijuana, officers "decided to put [Petitioner] in investigative detention." App. 30, line 17 – App. 31, line 12.

According to Officer Strickland, as he put the handcuffs on Petitioner, "they got into a fight." App. 31, lines 14 – 17. Petitioner allegedly had a gun strapped to his ankle, pulled it out, and held it to Strickland's neck. Petitioner demanded the officer's gun, but the officer did not comply. App. 31, lines 22 – 25. Officer Strickland eventually gave Petitioner his gun. App. 32, lines 3 – 6. However, Officer Wilbanks drove up in his unmarked police car, got out of the car, and drew his weapon at Petitioner. Petitioner put his gun down and was placed under arrest. App. 32, lines 17 – 20.

During the guilty plea, the judge asked Petitioner whether the State promised him anything to induce him to plead guilty. Petitioner responded:

> "A 20-year sentence that by, by law, something that passed last summer, I will only have to do 16 years of something."

App. 15, lines 13 – 15.

The judge advised Petitioner:

> "[I]f you receive a 20-year sentence and the law provides that you are eligible for parole after having served 80 percent of that sentence, that doesn't mean that you'll be released after 80 percent. That means the parole board will decide whether or not you should be released."

App. 15, line 25 – App. 16, line 5.

Later in the plea, Petitioner asserted to the judge:

> "My understanding when I came up here it was going to be 16 years."

App. 17, lines 2 – 3.

Defense counsel joined in:

> "That, that would be required under the law."

App. 17, lines 4 – 5.

The judge then responded:

> "Yeah. In other words, that's what you have to do. You've got to serve at least that."

App. 17, lines 6 – 7. Once again, before the State's recitation of its version of the facts, the judge advised Petitioner:

> "You've got to do 80 percent before you're eligible for parole."

App. 21, line 25 – App. 22, line 1.

Defense counsel **did not** object at any time the judge advised Petitioner he would be eligible for parole after serving eighty percent of his sentence. App. 15 – 22. Judge Cole sentenced Petitioner to twenty years' imprisonment, to run concurrently. App. 38 – 39. Petitioner appealed his guilty plea and sentence.

On April 18, 2011, the Court of Appeals dismissed Petitioner's appeal for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. The remittitur was issued on May 18, 2011. App. 72.

Petitioner filed a PCR application on December 12, 2011. App. 41. Respondent filed its return on September 25, 2012, requesting an evidentiary hearing. App. 75. On January 22, 2014, a PCR hearing was held before the Honorable Roger L. Couch. App. 77. Leah B. Moody represented Petitioner. Suzanne H. White represented the State. App. 77.

Petitioner testified during the PCR hearing. App. 78. Petitioner explained that the State made an offer of twenty-years for the armed robbery and ABHAN charges, which he rejected. Eight months

later, the State indicted him for kidnapping for the same set of facts. App. 84, lines 22 – 25. Petitioner and defense counsel prepared for trial.

On the day of trial, while waiting to pick a jury, defense counsel told Petitioner that he needed to accept the plea offer that the state extended to him. App. 85, lines 7 – 8. Counsel informed Petitioner that "[he] was facing life in prison for kidnapping if [he] didn't take the plea." App. 85, lines 7 – 8. Counsel advised Petitioner that, by accepting the plea offer of twenty years, with dismissal of the kidnapping charge, "[he] would serve no more than 16 years if that much." App. 85, lines 21 – 23.

Petitioner recalled that during the guilty plea, the plea judge advised Petitioner that he would have to serve eighty percent of his sentence, and counsel did not "object to that instruction from the Court." App. 94, lines 20 – 22; App. 110, lines 9 – 10. Counsel did not inform Petitioner that he would have to serve eighty-five percent. In fact, Petitioner discovered that he would be ineligible for parole until after serving eighty-five percent when he was moved from Level II custody to Level III custody in the South Carolina Department of Corrections.[1] Petitioner accepted the State's offer of twenty years because he understood that he would only have to serve sixteen years in prison before he became eligible for parole. App. 94, lines 3 – 4; App. 99, lines 21 – 22.

Defense counsel also testified during the PCR hearing. App. 78. Counsel did not recall having discussions with Petitioner that he would only have to serve sixteen years of his sentence. App. 129, lines 3 – 4. Counsel also did not recall what she was thinking when she failed to object to the plea judge advising Petitioner that he would be eligible for parole after serving eighty percent, rather than eighty-five percent. App. 131, line 19 – App. 132, line 4. Counsel agreed that she

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[1] Level II facilities are medium-security institutions. Level III facilities are high-security institutions designed to house violent offenders with longer sentences.

calculated Petitioner's sentence as sixteen years prior to the plea, which was eighty percent of twenty. App. 132, line 24 – App. 133, line 1.

Order of Dismissal

On October 1, 2014, Judge Couch issued an order of dismissal. App. 162. The judge found that Petitioner failed to meet his burden of proof as to all of his allegations of ineffective assistance of counsel. App. 167. The judge considered the issue of whether Petitioner would be eligible for parole after serving eighty percent versus eighty-five "a collateral matter." App. 168. Further, the judge found that defense counsel properly advised Petitioner to accept the State's plea offer. App. 169.

Petitioner appealed the judge's order. This petition for writ of certiorari follows.

ARGUMENT

Plea counsel was ineffective in misadvising petitioner about parole eligibility and in failing to object when the plea judge misadvised petitioner about parole eligibility.

TRIAL COUNSEL'S INCORRECT PAROLE ELIGIBILITY ADVICE

Plea counsel not only actively advised petitioner regarding parole advice, but moreover **conceded to giving erroneous advice** on parole eligibility and defendant testified that his guilty plea was induced by the erroneous advice of counsel) as her calculation that he would serve sixteen years was the equivalent of serving 80% prison time before becoming parole eligible, which was incorrect. If defense counsel **actively** advises a defendant about parole eligibility and gives **erroneous** advice, the guilty plea may be "collaterally attacked." Smith v. State, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997); see Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989) (finding ineffective assistance of counsel where plea counsel advised defendant that he would be eligible for parole for 'common law' murder after serving ten years in prison, there was no distinction between

'common law' murder and statutory murder for purposes of parole eligibility, and the murder statute required serving twenty years in prison before becoming parole eligible. See also Strader v. Garrison, 611 F.2d 61 (1979) ("[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 information, he is deprived of his constitutional right to counsel.").

In South Carolina, a "no parole" offense is an offense "punishable by a **maximum** term of imprisonment for twenty years or more." S.C. Code Ann. § 24-13-100 (1976) (emphasis added). A defendant sentenced to the Department of Corrections after being convicted of a "no parole" offense, is not eligible for early release, discharge, or community supervision, until he has served at least eighty-five percent of the actual term of imprisonment imposed. S.C. Code Ann. § 24-13-150(A) (1976).

According to Section 16-3- 910, a person found guilty of kidnapping "must be imprisoned for a period not to exceed thirty years." Armed robbery, under the S.C. Code, carries a penalty of "not less than ten years or more than thirty years." S.C. Code Ann. §16-11-330(A) (1976). Therefore, kidnapping and armed robbery are both "no parole" offenses under the Code. An inmate convicted of either offense must serve eighty-five percent of his prison sentence before he is eligible for early release. See S.C. Code § 24-13-150(A).

Here, plea counsel was ineffective. Counsel misinformed Petitioner that he would only serve sixteen years in prison if he accepted the State's twenty-year offer for pleading to the armed robbery and ABHAN charges. Counsel also incorrectly advised Petitioner that he was facing life in prison for kidnapping if he proceeded to trial. See Hammond v. United States, 528 F. 2d 15 (4th Cir. 1975) (finding counsel ineffective and defendant's guilty plea involuntary where defendant had

been induced to accept plea offer on erroneous advice from counsel that if he did not plead guilty, he could be subject to a maximum sentence of ninety or ninety-five years when he, in fact, could have received a maximum sentence of fifty-five years). Kidnapping carries a maximum penalty of thirty years' imprisonment. Armed robbery, which also carries a maximum of thirty years' imprisonment, is a "no parole" offense, which requires an inmate to serve eighty-five percent of his sentence before becoming parole eligible, not eighty percent as advised by counsel.

THE PLEA JUDGE'S INCORRECT PAROLE ELIGIBILITY ADVICE

Moreover, the plea judge incorrectly advised Petitioner that he would have to serve eighty percent of his sentence before being parole eligible. This was erroneous advice submitted by the plea judge to which plea counsel did not object. In fact, she never objected during the guilty plea. See Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991) (holding that petitioner's guilty plea was not knowingly and voluntarily made because the trial judge misinformed him that he would be eligible for parole when he was ineligible). However, Brown was **limited** by Hunter v. State, 316 S.C. 105, 447 S.E.2d 203 (1994), where the Court held that erroneous parole advice from the bench could, on certain facts mislead, a defendant to his detriment; however, it would be wholly impractical to maintain a rule that requires the automatic reversal of a guilty plea without "**something more**." In the case at bar, the "**something more**" element would appear. Here, the plea judge's parole eligibility advice was erroneous in violation of Brown and Hunter, to which plea counsel failed to object, and plea counsel's misadvice regarding parole eligibility, which was the "something more" that compounded the judge's errors with respect to the parole misadvice, constituted deficient legal representation, all of which rendered petitioner's pleas involuntarily given in the case.

SUMMARY

Petitioner pled guilty because he was **incorrectly** advised by counsel that he would **only** serve sixteen years if he accepted the twenty year sentence the State offered him, but would face life in prison if he was convicted of the kidnapping charge at trial. Petitioner told the plea judge during the guilty plea of counsel advice that he relied on that he would **only** serve sixteen years. App. 15, lines 13 – 15; App. 17, lines 2 – 3. This was ineffective assistance of counsel in violation of the Sixth Amendment and Hill v. Lockhart, 484 U.S. 52 (1985). Although plea counsel could not recall whether she specifically informed Petitioner that he would have to serve sixteen years before becoming parole eligible, she recalled advising him that he would be parole eligible after serving eighty percent. Further, counsel's performance constituted ineffective assistance of counsel when she took no corrective action when the plea judge advised Petitioner about the eighty percent error remark. App. 21, line 25 – App. 22, line 1. Petitioner's decision to plead guilty was not made until it was time to select a jury. If plea counsel had not incorrectly advised Petitioner that he would only serve sixteen years if he accepted the State's plea offer of twenty years, but could get life in prison if he was convicted, Petitioner would not have pled guilty and would have insisted on going to trial. A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution, and the use of a two-prong test under that guarantee would come into to play to test whether defense counsel's assistance was ineffective. Hill v. Lockhart, 474 U.S. 52, 58 (1985) (citing Strickland, 466 U.S. at 688). First, an applicant must show that counsel's performance was deficient, and whether counsel was "deficient" turns on whether the guilty plea was entered voluntarily, knowingly, and intelligently. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994). See Hill, 474 U.S. at 56 (1985). Second, the applicant must show that he was prejudiced by counsel's

deficient performance during the guilty plea process, specifically, the applicant must show 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." Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000); Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997). Here, counsel's deficient legal representation with respect to the misadvice given to petitioner on the issue of parole eligibility coupled with the misadvice regarding parole eligibility given to petitioner by the trial judge, to which counsel failed to object, (which in turn met the "**something more**" requirement per Hinson), resulted in petitioner's pleas not being given voluntarily in the case and but for these numerous errors, petitioner would not have pled guilty.

CONCLUSION

For the reasons argued above, counsel for petitioner would respectfully request that petitioner's case be remanded to the lower court for a new proceeding.

Wanda H. Carter
Deputy Chief Appellate Defender

TIFFANY L. BUTLER
Duff & Childs
3700 Forest Drive, Suite 404
Columbia, SC 29204

ATTORNEYS FOR PETITIONER

This 17th day of July, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable Roger L. Couch, Circuit Court Judge

TERRANCE MCCALL,

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V.

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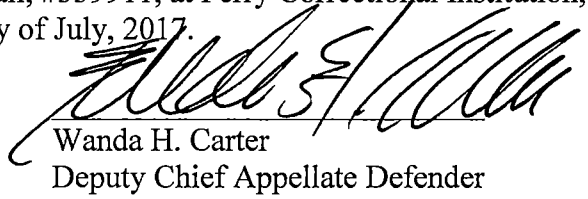
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Valerie Garcia Giovanoli, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Terrance McCall, #339911, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 17th day of July, 2017.

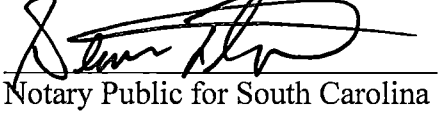


Wanda H. Carter
Deputy Chief Appellate Defender

Tiffany L. Butler
Duff & Childs
3700 Forest Drive, Suite 404
Columbia, SC 29204

ATTORNEYS FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 17th day of July, 2017.



(L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022.