STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

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Certiorari to Sumter County

Brooks P. Goldsmith, Circuit Court Judge



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KADEEM JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-000028

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# PETITION FOR WRIT OF CERTIORARI

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SUSAN B. HACKETT
Appellate Defender

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

ATTORNEY FOR PETITIONER

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## ISSUE PRESENTED

Was Petitioner's guilty plea involuntary where plea counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the Constitution by inducing Petitioner to pled guilty by advising him that pursuant to information plea counsel obtained during a chambers conference, the judge would impose a sentence between sixteen and twenty years, but the judge imposed a twenty-five year sentence and where plea counsel failed to place this information on the record during the guilty plea or in the motion for reconsideration?

## STATEMENT

On March 31, 2011, a Sumter County grand jury indicted seventeen-year old Petitioner for armed robbery, possession of a weapon during a violent crime, (2011-GS-43-0469), attempted murder, attempted armed robbery, and possession of a weapon during the commission of a violent crime, (2011-GS-0481). App. 55, ll. 6-7; App. 332-333; App. 336-337. On July 21, 2011, a Sumter County grand jury indicted Petitioner for armed robbery (2011-GS-43-0939). App. 341-342.

**Guilty plea proceedings**

The state, represented by John Meadors, called the case to trial before the Honorable R. Jeffrey Young and a jury on April 16, 2012. App. 1. Charles Brooks represented nineteen-year old Petitioner. App. 1; App. 54, l. 8. The parties selected a jury. App. 13, l. 8 – App. 18, l. 23. The jury was excused for the remainder of the day while the judge entertained pre-trial motions. App. 19, l. 19 – App. 20, l. 25.

Brooks indicated his "first motion" was "basically" "the inventory motion of discovery" to make sure he had received all discovery. App. 21, ll. 10-12. He indicated he was "confident" the state had "complied with Rule 5," but he wanted "to make sure." App. 21, ll. 12-15. Thereafter, Brooks explained what he had received in discovery: "the incident reports from the various officers involved in the case," and "a statement from, it's a report from I believe officer Tripp Mays, [who] was the detective in this case." App. 21, ll. 16-19. Then, Brooks informed the judge that "as of late Friday afternoon," he "got a statement from Mike," "a video and some pictures." App. 21, ll. 19-23. Brooks explained that he "need[ed] to take a break" so that he could "look at that video because [he] wasn't able to look at it." App. 21, ll. 23-24. In response, the solicitor assured the judge that during the afternoon break, he would "go over everything

with" Brooks. App. 22, ll. 3-4. "As far as the two statements last Friday they came into [his] possession then and [he] turned them over as quickly as [he] could." App. 22, ll. 11-13. When the judge asked if the police withheld the statements, the solicitor responded, "It was nothing intentional, Judge." App. 22, ll. 14-15. The solicitor claimed "[t]here was some other stuff submitted by SLED, which [he] gave [Brooks]." App. 23, ll. 15-16. On this point, the solicitor said, "No testing was done." App. 23, ll. 16-17.

Brooks then turned to the issue of the statements, which were provided to him "basically 4:30-5:00 Friday." App. 23, ll. 21-25. He noted the "addresses [were] blacked out" so he could not "actually investigate those guys" to determine credibility or "be prepared." App. 23, l. 25 – App. 24, l. 3. Although the statements were taken on October 5, 2011, the state failed to provide them to Brooks until April 2012 – just days before the start of trial, which was set by the solicitor. App. 24, ll. 9-10. Brooks moved to exclude (1) the witnesses from testifying and (2) admission of the statements. App. 24, ll. 12-14. Denying Brooks' motion, Judge Young told him, "[Y]ou'll have this afternoon." App. 24, ll. 19-20.

Brooks requested the state disclose any deals. App. 26, ll. 21-22. He explained he "was unaware that there was a co-defendant testifying" until that "morning." App. 26, ll. 22-23. In response, the state explained the co-defendant had been offered and had accepted a plea offer to all charges for a negotiated sentence of fifteen years. App. 27, ll. 3-7. The state also explained its anticipation the co-defendant would enter his guilty plea that afternoon. App. 27, ll. 3-17. Thereafter, Brooks mentioned he would have a motion regarding the police using an anonymous tip, but then he backed off the motion when the state indicated it would not present evidence of the tip. App. 27, l. 19 – App. 28, l. 14.

The following day, Petitioner entered a guilty plea to the charges. App. 30; App. 32, ll. 3-13; App. 34, l. 17 – App. 37, l. 17; App. 43, l. 15 – App. 45, l. 3; App. 49, l. 17 – App. 50, l. 18. When the judge questioned Brooks about Petitioner's decision to plead guilty and whether Brooks agreed with that decision, Brooks answered, "In light of the facts of the case changing, yes sir." App. 33, ll. 16-19. Brooks' comments in this vein continued with further questioning.

> The Court: And based upon your understanding of everything going on, do you think if he were to go to trial that there would be a substantial likelihood that he would be found guilty beyond a reasonable doubt?
>
> Mr. Brooks: In light of the fact that the facts have changed in this case, we've talked about it, yes, sir.

App. 33, ll. 20-25. During the plea colloquy, Judge Young told Petitioner the maximum sentences for each offense. App. 45, l. 4 – App. 46, l. 3. Further, Judge Young explained that the co-defendant had pled guilty and there was "a negotiated sentence of fifteen (15) years for him." App. 46, l. 25 – App. 47, l. 2. Petitioner's only criminal history was a juvenile adjudication for "burglary second non-violent." App. 50, l. 24 – App. 51, l. 1.

During the sentencing portion, Brooks noted Petitioner was seventeen-years old at the time of the crimes and nineteen at the time of the guilty plea. App. 54, l. 8; App. 55, ll. 6-7. Brooks also told the court that Petitioner and his co-defendant were equally culpable. App. 54, ll. 10-16. Thereafter, Brooks asked the court to "show as much leniency and mercy for" Petitioner. App. 54, ll. 21-22. Then, Brooks said,

> And, Judge, obviously we would just ask you to consider, even though you're not bound by the deal that [the co-defendant] is getting, obviously I want to ask the court to use that as a barometer when you're issuing a sentence to Mr. Johnson understanding that there is a difference between [the co-defendant] and Mr. Johnson after the fact but actually during the commission of the crime because there really was no difference.

App. 55, ll. 15-22.

Judge Young responded, "[H]e's certainly not going to get what I gave his cousin." App. 58, l. 1. Judge Young then sentenced him to twenty-five years' imprisonment for two counts of armed robbery, five years' imprisonment for two counts of possession of a weapon, and twenty years' imprisonment for attempted murder and attempted armed robbery. App. 58, ll. 22; App. 334-335; App. 338-340; App. 343. He ordered the sentences to be served concurrently, resulting in Petitioner serving a twenty-five year sentence. App. 58, l. 5; App. 58, ll. 22-23; App. 334-335; App. 338-340; App. 343.

**Motion for reconsideration**

On April 27, 2012, Petitioner, through plea counsel, filed a motion for reconsideration of sentence. App. 61. In the motion, Brooks explained that Petitioner received an aggregate sentence of twenty-five years' imprisonment following his guilty plea, and that his co-defendant received a fifteen-year sentence. App. 61. After noting the disparity in sentencing, Brooks explained both were "equally culpable" of the offenses and "contended that the disparity in sentence [was] unfair between the two co-defendants." App. 61. The motion provided no other explanation for why Petitioner's sentence should be altered. App. 61. Thereafter, Judge Young denied the motion for reconsideration without a hearing. App. 63.

**Direct appeal**

On May 18, 2012, Petitioner served and filed his notice of appeal. App. 64. Robert M. Pachak represented Petitioner in his direct appeal. App. 65. A brief pursuant to Anders v. California, 386 U.S. 738 (1967), was filed, asking whether his guilty plea complied with the mandates set forth in Boykin v. Alabama, 395 U.S. 238 (1969). App. 65-76. On July 31, 2013, the Court of Appeals dismissed the appeal. App. 77-78. On August 23, 2013, remittitur was issued. App. 79.

**Post-conviction relief proceedings**

Petitioner filed an application for post-conviction relief (PCR) on April 25, 2014. App. 80-86. The state filed its return on August 28, 2014. App. 87-93. On February 10, 2016, Petitioner filed an amended application. App. 94-96. In his amendment to his application, Petitioner alleged plea counsel provided ineffective assistance by inducing Petitioner's guilty plea on advice that the court would sentence him close to a fifteen-year sentence, which was the sentence his co-defendant was receiving. App. 94-95. The claim included that plea counsel failed to put such information on the record during the plea or in the motion for reconsideration, which was decided without a hearing. App. 94-95.

The matter proceeded to an evidentiary hearing on March 13, 2016, before the Honorable Brooks P. Goldsmith. App. 97. Tricia Blanchette represented Petitioner, and Jessica Kinard represented the state. App. 97. During the PCR hearing, Petitioner explained his grandmother retained Brooks to represent him concerning the armed robbery and companion charges. App. 107, ll. 18-25. Brooks was retained at least by July 14, 2010. App. 109, ll. 6-18. Thereafter, Brooks met with Petitioner three times. App. 110, l. 21 – App. 111, l. 1. These meetings occurred during bond hearings and concerned matters relevant to his bond. App. 111, ll. 2-17. In fact, on the morning of his trial, Petitioner thought he was going to court for another bond hearing. App. 111, l. 21 – App. 112, l. 8.

When the hearing on the pre-trial motions began and Brooks talked about receiving statements only days before, Petitioner first learned that Brooks was not prepared for trial. App. 113, l. 12 – App. 114, l. 1. Prior to this, Brooks had always assured Petitioner, he was ready for trial and that Petitioner "had nothing to worry about." App. 137, ll. 17-19; App. 142, ll. 5-9. Brooks never advised Petitioner of the contents of the statements Brooks received on the eve of

trial. App. 122, l. 22 – App. 123, l. 2; App. 123, ll. 14-16. Brooks' obvious lack of preparation contributed to Petitioner's decision to enter guilty pleas to the charged offenses. App. 114, l. 11 – App. 115, l. 7; App. 125, ll. 7-15; App. 147, ll. 19-23.

On the day of jury selection, Brooks told Petitioner his codefendant was going to testify against him. App. 136, ll. 1-3. Brooks advised Petitioner to plead guilty. App. 141, ll. 19-22. Brooks said it would be in his "best interest to take a guilty plea." App. 143, ll. 2-4. Brooks informed him that the state did not want to negotiate with him. App. 143, ll. 5-9. Brooks informed Petitioner he "would not get the same amount of time that [his] codefendant got, because that was a negotiated sentence, but [Petitioner] wouldn't get far from it." App. 143, ll. 10-13. Brooks further advised that Petitioner's sentencing range was "between 16/17, no more maybe than 20 - - no more." App. 143, ll. 13-14; App. 160, l. 19 – App. 161, l. 4. This was a major factor in Petitioner's decision to plead guilty. App. 143, ll. 19-23. Unfortunately, Brooks never put his advice regarding the sentencing range on the record during the guilty plea. App. 143, l. 24 – App. 144, l. 4. Despite Petitioner receiving more than Brooks advised he would receive and Brooks filing a post-trial motion for reconsideration, Brooks did not include in the motion that he advised Petitioner he would get a sentence substantially less than the one he received. App. 144, l. 8 – App. 146, l. 4.

Petitioner explained that he would not have entered a guilty plea and would have gone to trial but for Brooks' failure to prepare to properly represent him at trial. App. 148, ll. 4-7; App. 164, ll. 19-22; App. 169, ll. 13-17. Petitioner pled guilty because Brooks told him "it would be in [his] best interest to plead guilty." App. 151, ll. 13-15. Due to Brooks' provision of ineffective assistance, Petitioner's guilty plea was involuntary. App. 148, ll. 8-13.

Brooks recalled Petitioner sat in jail "for a considerable period of time. And there wasn't much evidence against him." App. 172, ll. 3-4. Brooks explained there had been a "regime" change at the solicitor's office between the time Petitioner was arrested and his eventual guilty plea. App. 172, l. 13 – App. 173, l. 3. In Brooks' estimation, the state "did not have much evidence against" Petitioner. App. 173, ll. 7-9. Brooks acknowledged his late receipt of evidence in the case and his failure to communicate with Petitioner about that evidence, but he stated he did not see the evidence "as a problem." App. 174, l. 25 – App. 175, l. 4.

Brooks explained that "all the way on Friday, up until Monday, it was going to be [Petitioner] and [his codefendant]" going to trial. App 178, ll. 3-6. On Monday morning, co-defendant's counsel told Brooks the co-defendant was entering a guilty plea. App. 178, ll. 8-14. Brooks tried to dissuade them by saying, "No. Don't plea. Don't plea. We can win this case. We can win this case." App. 178, ll. 15-16; App. 195, ll. 8-12. Nevertheless, Brooks and Petitioner's "posture was [they] were going to go to trial." App. 178, l. 25 – App. 179, l. 1; App. 188, ll. 10-11; App. 205, ll. 13-20. "And then" Brooks watched the co-defendant enter his guilty plea in front of Judge Young. App. 179, ll. 2-4. According to Brooks, the co-defendant's sentence was deferred and "the minimum he was going to get was 15 years." App. 179, ll. 4-6. This sentence negotiation was based upon the co-defendant "cooperating" against Petitioner. App. 179, ll. 6-7.

The following day, Brooks advised Petitioner of the co-defendant's guilty plea. App. 179, ll. 11-13. Brooks also told Petitioner "the dynamics" of his chase "changed drastically" because the state had "no case" against him, but suddenly the state would have the testimony of his co-defendant, giving the state a "strong case against" him. App. 179, ll. 16-18; App. 189, ll.

7-9. Brooks also informed Petitioner that his co-defendant was "looking at getting 15." App. 179, l. 20.

Brooks then joined the state in a chambers conference with Judge Young. App. 180, ll. 3-7. The state was not interested in offering a plea deal because the state had leverage. App. 180, ll. 10-11. The state knew he had Petitioner "in front of Judge Jeff Young ... [who] is not a very practical person" in front of whom Brooks wanted to have his client enter a guilty plea. App. 180, ll. 12-16. In chambers, Judge Young said, "Hey Brooks, if your guy takes a plea, I ain't going to do him much worse than [the codefendant]. I ain't going to give him 15, but I ain't going to do him much worse than that." App. 180, ll. 16-21. Brooks interpreted this "to be 16-17-18 - - no more than 20." App. 180, ll. 22-23.

After the meeting, Brooks told Petitioner, "'This is what the judge says,' exactly verbatim." App. 180, ll. 24-25. Specifically, "the way that [Brooks] characterized that or equated that was not going to be more than 20: not much worse than that." App. 193, ll. 2-4. "That's what [Brooks] relayed to - - to [Petitioner]." App. 193, ll. 2-5; App. 193, ll. 6-10. Brooks did not guarantee Petitioner a specific amount of time, but he did tell him what was relayed to him. App. 212, ll. 5-8. Brooks was confident Petitioner relied on what Brooks told him. App. 212, ll. 9-10.

After this discussion, Petitioner agreed to enter a guilty plea. App. 180, l. 25 – App. 181, l. 1. Then, Judge Young sentenced Petitioner to twenty-five years. App. 181, l. 13.

Brooks was shocked, and remained in shock until the PCR hearing. App. 181, ll. 14. In his mind, Brooks was thinking about what the judge said in chambers and the inconsistency of the chambers conference and the actual sentence. App. 181, ll. 15-16. "That's why [he] filed the motion for reconsideration." App. 181, ll. 16-17. Brooks did not agree with what the judge had

done because he gave Petitioner "10 more years and he wasn't any more culpable or any less culpable than" the codefendant. App. 181, ll. 22-24. "The only difference [was the codefendant] had pled first." App. 181, ll. 24-25. According to Brooks, "Judge Young gave him what [he] consider[ed] to be a probably - - a - - a little bit more than unfair sentence." App. 182, ll. 10-12. Brooks thought the judge "was going to give him something between 15 to 20 years." App. 182, ll. 13-14.

Despite Brooks' concerns that the judge sentenced Petitioner to a longer term of years than Brooks believed the judge would based on the chambers conference and his concerns that Petitioner had relied on Brooks' interpretation of the judge's statements in the chambers conference, Brooks did not place anything on the record at the plea hearing about the chambers conference or in his motion for reconsideration. App. 189, l. 16 – App. 190, l. 9. He explained he did not get a hearing on the motion for reconsideration and that he did not raise it during the guilty plea because he was "in shock." App. 189, l. 16 – App. 190, l. 9. Brooks elaborated:

> [T]hat was an off-the-record - - as many times as we do as lawyers, sometimes you go and you -- you're having off-the-record discussions on what the judge is feeling. I'm sure you know, Judge knows what I'm talking about. Kind of say, "Hey, this is kind of the situation."
>
> And - - and - - and because - - because, of course, Judge Young, he already knows the facts, because he took the plea from the day before. So he already knows the facts. Okay?
>
> So when we were back there, this is - - this is kind of what he says. But no. That's not on the record in any way, shape, or form. And that's why, you know, I explained that to you just like I explained to Madam Attorney General what happened in this case.

App. 191, ll. 3-16. He agreed that lawyers had a duty to put things on the record. App. 191, ll. 17-22.

At the conclusion of the hearing, PCR counsel argued Petitioner "relied upon errant advice from [Brooks] regarding the sentence he would receive and that induced his guilty plea." App. 220, ll. 10-13. Brooks "never put that on the record, never raised that in the posttrial motion." App. 220, ll. 16-18. PCR counsel noted that Petitioner received a sentence greater than Brooks told him he would receive and that disparity should inform the PCR court's prejudice analysis. App 220, l. 21 – App. 221, l. 7. PCR counsel argued that Brooks "admitted on the stand ... he took what Judge Young said, he interpreted, he advised him on that." App. 230, ll. 5-9. Brooks told Petitioner he would receive a sentence between sixteen and twenty years. App. 230, ll. 24-25. Brooks was "ineffective in pitching him numbers that the judge didn't give." App. 231, ll. 3-4.

The state argued Brooks provided "competent" and "reasonable" advice because he "relayed information that was provided to him by the judge." App. 225, ll. 9-11. Brooks did not "feel comfortable" placing that information on the record because it was "a conference in chambers." App. 225, ll. 11-14. In the state's estimation, Brooks "never put a finite number on it." App. 225, ll. 19-20. However, the state conceded Brooks "perhaps had a conversation and tried to interpret" what the judge "may have meant." App. 232, ll. 14-18. According to the state, "actively [giving] incorrect advice is ineffective assistance of counsel. But playing a guess game regarding how many years you might get, when you have a - - an offhand statement from a judge" was not "actively incorrect advice." App. 232, l. 24 – App. 233, l. 4.

At Judge Goldsmith's request Petitioner and the state submitted briefs in support of their respective positions. App. 235, ll. 6-10; App. 313-330. In its post-hearing brief, PCR counsel argued Petitioner "wanted a trial and a plea was not even in the picture going into the first day of trial." App. 320. Prejudice was "abundantly clear" because Petitioner "wanted and undertook a

trial, chose to forego trial during the second day due to counsel's errant advice, received a sentence in excess of the amount of time conveyed by counsel, and counsel repeatedly admitted that the state did not have a case against [Petitioner]." App. 320-321. PCR counsel recounted the testimony from the PCR hearing, specifically Petitioner's testimony regarding plea counsel's representations about sentencing. App. 321-322. Additionally, PCR counsel recounted Brooks' testimony regarding his chambers conference with Judge Young about a possible guilty plea. App. 322. "Even though [plea counsel] testified the presiding judge 'is not a very practical person that you want to take a plea in front of,' counsel errantly decided to characterize the sentence the judge would hand down." App. 322. PCR counsel admitted he told Petitioner "his interpretation, which was 16/17/18 – no more than 20." App. 322. PCR counsel also admitted he understood Petitioner was relying on his advice. App. 322-323.

In its brief, the state noted Brooks' testimony regarding his chambers conference with Judge Young and his advice to Petitioner subsequent to that conference. App. 327. The state reiterated Brooks' testimony that he interpreted the plea judge's comments to mean he would sentence Petitioner between 16 and 20 years in prison. App. 327. The state acknowledged plea counsel "never guaranteed" Petitioner he would receive "any specific number of years as a sentence." App. 327-328. According to the state, Petitioner and plea counsel "were of the impression that Judge Young was likely to sentence [Petitioner] to more than fifteen but fewer than twenty years, with both specifically referencing sixteen or seventeen years as a possibility." App. 329. However, the state argued plea counsel "did not misadvise" Petitioner of his understanding of the judge and "[f]or this reason, [plea] counsel [could not] be seen to have erred in his representation of [Petitioner]." App. 329. In short, the state argued, plea counsel's performance was not deficient, "as evidenced by both men testifying to the same understanding

of the fact that existed at the time of the plea." App. 329. According to the state "[b]ecause [Petitioner] understood and acted on trial counsel's credible advice, there is no reason to believe he would have gone to trial rather than plead guilty." App. 329.

By an order dated October 18, 2016, Judge Goldsmith denied Petitioner relief from his convictions and sentences. App. 289-306. Judge Goldsmith recounted that Petitioner testified he understood "the fact that his co-defendant pled and would testify against him changed the dynamics of his case." App. 293. The judge recalled Petitioner testified Brooks "told him that he would not be sentenced to the same term of fifteen years as his co-defendant, but he would not get much more than that." App. 294. The judge also explained Petitioner pled guilty because "he did not believe his counsel was prepared to go forward with trial." App. 294.

According to the order, plea counsel testified about "the plea negotiation that occurred in chambers on the first day of trial after [Petitioner] and plea counsel learned that the co-defendant was going to plead and become a state's witness." App. 295. "Plea counsel recalled telling [Petitioner] that, 'The dynamics of your case have changed drastically,' as co-defendant's testimony was the only way [Petitioner] could be linked to the crime." App. 295. "Regarding the chambers conference, plea counsel recalled the plea judge stating that he would not give [Petitioner] the same sentence that he gave his co-defendant, but he would not give him much more." App. 295. According to the order, Brooks "relayed this information to [Petitioner] with the understanding that this meant a 16-18 year range." App. 295-296. "Based on this information, [Petitioner] pled, even though he had never wavered in his desire for a trial until that point due to the lack of evidence against him." App. 296. Brooks and Petitioner were shocked by Petitioner's twenty-five year sentence. App. 296.

Additionally, the order recounted Brooks' testimony about the post-sentencing motion for reconsideration. App. 296. When asked if he should have put the chambers conference about the plea negotiation on the record, Brooks "testified that he did not believe he had an affirmative duty to do that – sometimes it is done and sometimes it is not." App. 296. "In this particular[] case, because he was not given a definite number by the judge, only the information that [Petitioner] would not get the same benefit of pleading early that his co-defendant had received." App. 296.

On this claim, the judge found "plea counsel credibly testified that he did not advise [Petitioner] that he would get fifteen years, but rather that he believed the plea judge was inclined to give him a sentence of 'not much more' than what his co-defendant received fifteen years based on a chambers conference." App. 303. The judge found Petitioner's "claim does not satisfy the burden required to prove ineffective assistance of counsel, nor does it provide any indication that is guilty plea was involuntarily entered." According to the judge, "though the contents of the chambers conference was not put on the record, its recollection by plea counsel to [Petitioner] yielded a mutual understanding of the conversation – they both believed that the plea judge's statement indicated a likely sentence of sixteen or seventeen years." App. 304. The judge found it "clear that plea counsel acted within reason based on his understanding of the situation." App. 304. Further, the judge determined Brooks' "decision not to put this conversation on the record, whether during the sentencing phase or during reconsideration, is a decision made within the bounds of reasonable trial strategy and prevailing professional norms." App. 304. Therefore, the judge found Petitioner "did not meet his burden to prove ineffective assistance of counsel." App. 304.

On November 3, 2016, Petitioner filed a motion pursuant to Rules 59(a) & (e), SCRCP. App. 307-312. PCR counsel re-iterated the arguments presented in her post-hearing brief in her motion. App. 307-312. PCR counsel explained Petitioner relied on Brooks' advice that the plea judge would sentence him to no more than twenty years' imprisonment when he entered his guilty plea. App. 311. Despite Brooks' awareness of the advice he provided, Brooks failed to place this information on the record at the plea hearing or in the motion for reconsideration. App. 311. By an order filed on December 1, 2016, Judge Goldsmith denied the post-trial motion. App. 331.

Petitioner received notice of the entry of the order on December 12, 2016. On January 9, 2017, Petitioner served his notice of appeal. This petition for writ of certiorari follows.

## ARGUMENT

Petitioner's guilty plea was involuntary where plea counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the Constitution by inducing Petitioner to pled guilty by advising him that pursuant to information plea counsel obtained during a chambers conference, the judge would impose a sentence between sixteen and twenty years, but the judge imposed a twenty-five year sentence and where plea counsel failed to place this information on the record during the guilty plea or in the motion for reconsideration.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

In the context of a guilty plea, a petitioner must show that counsel was ineffective and that there is a reasonable probability but for counsel's errors, he would not have pled guilty. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000);

Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000); Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997); Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994).

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 held that a defendant 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)(citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991); State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). A guilty plea is rendered involuntary, unknowing, and unintelligent when a defendant pleads guilty to a crime without knowing the direct consequences of the guilty plea. Hazel, 275 SC at 394, 271 S.E.2d at 603.

**Deficient performance**

Addressing the first prong, Petitioner's counsel provided advice that was not within the range of competence required of attorneys in criminal cases because counsel erroneously advised Petitioner that he would receive a sentence in the range of sixteen to twenty years. Judge Young then sentenced Petitioner to twenty-five years. This Court has held that erroneous advice concerning parole eligibility falls below the level of competence reasonably expected of attorneys in criminal cases. Hinson v. State, 297 S.C. 456, 458, 377 S.E.2d 338, 339 (1989). Hinson's attorney drew a distinction between statutory murder and common law murder. The attorney advised that Hinson would be eligible for parole in ten years if he pled guilty to common law murder. Id. at 457, 377 S.E.2d at 339. The attorney explained that the twenty-year parole eligibility provision found in the statute was applicable to statutory murder only. Id. Hinson then entered his plea based upon this advice. Id. at 458, 377 S.E.2d at 339. Hinson's attorney misstated the law as "[t]here is no distinction between statutory and common law murder: the statute is merely declaratory of the common law." Id. This Court held the "advice given Hinson falls below the level of competence reasonably expected of attorneys in criminal cases." Id.

Similarly, this Court held that a PCR applicant satisfied the first prong where trial counsel erroneously advised that applicant would be sentenced to life without parole if he went to trial and were convicted of two counts of armed robbery. Ray v. State, 303 S.C. 374, 375-76, 401 S.E.2d 151, 152 (1991). In reality, Ray faced a possible maximum sentence of seventy-five years without parole. Id.

In Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991), this Court held a defendant was entitled to a new trial based upon erroneous sentencing advice of defense counsel. According to the testimony presented during the post-conviction relief hearing, defense counsel advised the

defendant that he faced one hundred years on the four indictments. However, this Court determined the defendant actually faced a seven to twenty-five year sentence on one count and a twenty-five year sentence on the other count as the indictments contained overlapping and greater and lesser charges. Id. at 542-543, 402 S.E.2d at 485. Due to this erroneous advice, this Court concluded that counsel provided deficient advice, satisfying the first prong of the test. Id. at 543, 402 S.E.2d at 485-486.

The uncontroverted evidence presented in the lower court proves Petitioner received inaccurate advice from plea counsel concerning the sentence he would receive. Plea counsel advised Petitioner that the judge stated he would not sentence Petitioner "much worse" than the fifteen-year sentence his co-defendant was receiving. Further, plea counsel advised Petitioner that he interpreted the judge's words to mean that Petitioner would be sentenced between sixteen and twenty years. In fact, plea counsel admitted he told Petitioner he would receive no more than twenty years' imprisonment based on plea counsel's interpretation of what Judge Young said during the chambers conference. Despite plea counsel's shock at the twenty-five year sentence imposed by Judge Young, plea counsel neglected to place on the record what took place in chambers or what he advised Petitioner regarding that chambers conference. In light of Judge Young having the ability to sentence Petitioner to a wide range of sentences – up to 120 years – and in light of Judge Young actually sentencing Petitioner to twenty-five years, five years above the maximum sentence advised by Brooks, the inaccurate sentencing advice provided by Brooks was deficient performance.

**Prejudice**

Turning to the second prong, there is a reasonable probability that Petitioner would not have pled guilty had counsel not provided erroneous advice concerning the sentence he would receive. This Court has held that a "defendant's undisputed testimony that he would not have pled guilty but

for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 631 S.E.2d 260 (2006) (citing Jackson v. State, 342 S.C. 95, 97-98, 535 S.E.2d 926, 927 (2000); Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 485-86 (1991)).

In Hinson, the evidence was "uncontroverted that Hinson entered his plea in expectation of receiving the lesser period for parole eligibility." Hinson, 297 S.C. at 458, 377 S.E.2d at 339. This Court held Hinson was entitled to post-conviction relief where Hinson testified that he would not have pled guilty but for counsel's advice, his trial counsel admitted that he could not recall the advice he had given Hinson, and the attorney for Hinson's co-defendant recalled the advice given regarding parole eligibility and conceded it was erroneous. Id.

In Ray, this Court held the second prong was satisfied where there was a real distinction between the penalty the defendant faced and the advice he received, the defendant maintained his innocence, and the defendant presented uncontroverted testimony that he would not have pled guilty absent the incorrect advice from counsel. Ray, 303 S.C. at 376, 401 S.E.2d at 153. Ray's trial counsel advised he would be sentenced to life without parole if he went to trial and were convicted of two counts of armed robbery when he really faced a possible maximum of seventy-five years but could receive a sentence as short as ten years. Id. at 376, 401 S.E.2d at 152-53.

In Alexander, this Court concluded the defendant suffered prejudice in light of his testimony that he would not have entered a guilty plea if defense counsel had not misinformed him. Alexander, 303 S.C. at 543, 402 S.E.2d at 485-486.

Petitioner's guilty plea was unknowing and unintelligent because he relied on the erroneous advice of his attorney. "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." Hill v. Lockhart, 474 U.S. 52, 56 (1985). "Defendants have a Sixth

Amendment right to counsel, a right that extends to the plea-bargaining process." Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012). "Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel." Padilla v. Kentucky, 130 S.Ct. 1473, 1480-81 (2010)(internal quotations omitted).

Brooks admitted during the PCR hearing that he advised Petitioner to enter a guilty plea because the judge indicated he would not be sentenced "much worse" than his co-defendant, which Brooks interpreted to mean between sixteen and twenty years' imprisonment. Brooks' advice was flawed because the judge could sentence Petitioner up to 120 years' imprisonment. Brooks interpreted the judge's words erroneously and advised Petitioner accordingly. Brooks provided no caveats with his interpretation. He simply advised Petitioner he would receive no greater sentence than twenty years. Further, Brooks admitted Petitioner relied on his advice when deciding to pled guilty. Without question, Brooks' erroneous sentencing advice which was based entirely upon his mistake, fell below reasonable professional norms resulting in deficient performance and the entering of an unknowing and involuntary guilty plea by Petitioner.

There is a reasonable probability that Petitioner would not have pled guilty had counsel not provided erroneous advice concerning the length of time Petitioner would receive following his guilty plea. Although Petitioner did not testify affirmatively that he would not have pled guilty but for Brooks' erroneous sentencing advice, he made clear that he wanted to go to trial and that he relied on Brooks' advice when deciding whether to waive his right to a trial. Further, Brooks failed to place the chambers conference on the record or advise the court of the erroneous advice he gave to Petitioner concerning the sentence. Even when Brooks had the opportunity to include this evidence in his motion for reconsideration, he failed to do so. Petitioner's case is akin to Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988), in this respect. Jordan 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. Brooks' failure to place his erroneous advice on the record in some fashion was prejudicial to Petitioner, particularly in light of the undisputed evidence that Petitioner relied on the advice in deciding to plead guilty. Finally, the disparity in the sentences is a relevant consideration. Brooks assured Petitioner he would receive no more than twenty years' imprisonment; however, the judge sentenced him to twenty-five years' imprisonment. Five additional years in prison is significant and demonstrates a significant disparity with what Petitioner anticipated.

## 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 writ but dispenses with further briefing, Petitioner respectfully requests this Court reverse the PCR court, find plea counsel provided ineffective assistance, and vacate his guilty plea.

for Laura R. Baer

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of September, 2017.

RECEIVED
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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Sumter County

Brooks P. Goldsmith, Circuit Court Judge

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KADEEM JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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CERTIFICATE OF SERVICE

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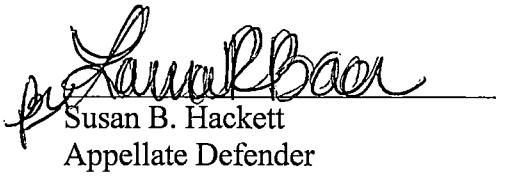
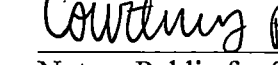
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Jessica Kinard, Esquire, at P.O. Box 11549, Columbia, SC 29211; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Kadeem Johnson, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 5th day of September, 2017.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 5th day of September, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: May 2, 2027.