STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable John C. Hayes, Circuit Court Judge

JEREMY CORDERA MOBLEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000843

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. The successor PCR Judge erred in finding that plea counsel provided effective assistance of counsel where plea counsel misled Petitioner, based on plea counsel's objectively unreasonable mistake as to the difference between a negotiated sentence and a sentencing recommendation, to believe that the State had agreed to a negotiated guilty plea with a maximum sentence of five years imprisonment and that the trial court was obligated to either accept or reject the entire guilty plea; when plea counsel actually only secured a recommended five year imprisonment sentencing "cap" from the State that the trial court was free to accept or ignore without negating Petitioner's underlying guilty plea.

II. The successor PCR Judge's denial of Petitioner's application for post-conviction relief violated this Court's holding in *Floyd v. State*, 303 S.C. 298, 400 S.E.2d 145 (1991), where the successor PCR Judge, who assigned himself Petitioner's PCR case following the death of the original PCR Judge, was the same judge who accepted Petitioner's guilty plea and sentenced Petitioner to the maximum term of imprisonment, and where the successor PCR Judge did not secure an on-the-record, knowing, and voluntary waiver of Petitioner's right to have different judges preside over his guilty plea and post-conviction relief proceeding.

II. The successor PCR Judge committed a reversible error of law by making findings in the order of dismissal as to the credibility of witnesses at the PCR hearing when the successor PCR Judge did not preside over or attend the PCR hearing and did not, prior to making the credibility findings, seek Petitioner's consent to allow the successor PCR judge make such findings based solely on the existing record.

STATEMENT

On November 19, 2013, Petitioner pled guilty to one count of hit and run resulting in great bodily injury before the Honorable J. Mark Hayes, II. Michael Mathews represented Petitioner. Assistant Solicitor Ryan R. Newkirk represented the State. Prior to the guilty plea, Petitioner waived presentment to the Grand Jury. App. 3, ll. 2-11.

Relevant Facts

Petitioner's charges stemmed from a collision in York County on the night of May 8, 2013 between Petitioner's car and a motorcycle driven by Joshua Reynolds. App. 6, l. 14 – 8, l. 17. Reynolds was seriously injured in the collision. Witnesses to the collision reported that a black sedan struck Reynolds' motorcycle. *Id.*

Immediately after the collision, the sedan stopped and a "light-skinned African-American male [got] out of the driver's seat of the vehicle and switch[ed] placed with a dark-skinned African-American male who drove the car away." App. 7, ll. 4-12. Based on car parts left at the scene of the accident, police were able to determine that the car involved was an Infiniti I30 sedan. App. 6, l. 23 – 7, l. 3. Police issued a "BOLO" for the vehicle.

A Rock Hill police officer on patrol the next morning purportedly followed a pair of "fresh tire tracks" to the backyard of a house in Rock Hill. App. 7, l. 13 – 8, l. 17. In the backyard, he found Petitioner's Infiniti I30 with extensive front passenger side damage. *Id.* Police interrogated the homeowner, Christopher Franklin, who would also be charged as a co-defendant, who claimed that Petitioner was driving the car at the time of the accident. *Id.*

When arrested Petitioner told police that Franklin had been driving the vehicle at the time of the accident. *Id.* At the time of the accident, Petitioner was on probation for DUI, second offense, and his license was suspended. App. 19, ll. 10-23.

Guilty Plea

The State agreed to allow Petitioner to plead guilty with "a cap of five years" on the sentence. App. 8, ll. 12-17. At the guilty plea hearing, the trial court explained to Petitioner that, while the State agreed to cap its requested sentence at five years, the court was not bound to that agreement and could impose a sentence of up to ten years. App. 9, ll. 4-11. Petitioner stated that he still wished to plead guilty. *Id.*

At the guilty plea hearing, the State only paid "lip-service" to the five year imprisonment cap. App. 15, l. 10 – 19, l. 2. Rather than arguing why five years of imprisonment was the proper penalty, the State focused on the aggravating factors surrounding the case. *Id.* The State went so far as to play a video illustrating how debilitating Reynolds' injuries were. *Id.* In concluding its request for the "maximum of five years with the cap," the State stressed:

> I would also like to briefly say that Ms. Reynolds touched upon the hardship to their family. I'm not going to read this to the Court. I think you are kind of gathering the picture of how serious his injuries were, but I asked Ms. Reynolds: You think you could put a timeline together of all of the things your family had to do for Josh including surgery, physical therapy, driving him to and from the doctor, and everything that you had to get him in the courtroom today, and it's nine pages long. I'm not going to read that to the Court, but do know it was extensive and included surgery up until two weeks ago when he had a tube removed from his stomach.
>
> So it's a -- I can't say enough that it's a miracle that he was here today, and I will say briefly on the defendant in his own statement to law enforcement, he admits to drinking and smoking marijuana prior to getting into the car. And he -- up until the plea today even when speaking to law enforcement during their investigation, he never admits to driving and tried to place the blame on a codefendant even after there was eyewitness testimony that placed him as the driver.
>
> He was driving under suspension and operating an uninsured vehicle. He was operating a vehicle with suspended tag, all charges which he's pled to in city court. And so it's just a terrible situation, and all those things led to him not stopping the car and doing the

> right thing, and it left Josh in that horrible state that you saw on the video screen.
>
> The absolute last thing that I'll say, Your Honor, before I conclude the state's request for a higher sentence is that when we were speaking – assistant solicitor Matthew Shelton and I had met the Reynolds several times in their home. When we were talking about what kind of result would you like to see out of this? What kind of justice can the state provide you? Obviously there is no justice that we could provide them. They firmly believe that we're doing the best we can, but they wanted more. And when we talked about probationary sentences and things like that and restitution orders, they said, "We don't care about money, or anything like that. We want him to go to jail for the maximum amount of time allowed. We're even not going to consider restitution. We -- if it's going to help him not go to jail, that's not what we want." And that was hard for them, and they stuck with that even today when I met with them.
>
> So that's all I'll say, Your Honor. I would ask Your Honor respectfully Honor respectfully that you impose the maximum of five years with the cap. Thank you, Your Honor.

App. 17, l. 4 – 19, l. 2

Unsurprisingly given the State's presentation, the trial court declined to follow the agreed upon cap of five years imprisonment:

> This is one of those rare occasions where I disagree with everyone in the courtroom. Based upon what's been presented to me, he was already on probation, not once, but twice. So he had been given two opportunities by other judges to conform his conduct.
>
> At the time of the accident, he should not have been driving. He did not have a driver's license, he was driving under suspension and then there's also an allegation or statement made to the Court that he was -- also had been consuming illegal substances at the time -- prior to the accident in clear violation of not only of law but also both of his prior probationary cases that he was on. Regardless of the issue of fault in the accident is that he should not have been driving, period. A clear violation of his probation cases, at least.
>
> I'm willing to accept the defense's recommendation to run the probation cases concurrent with this case, but given his prior history, the facts that are around how this accident happened, his

> prior two probationary cases, I have to impose the ten-year sentence. And I will give him credit for the 189 days. Good luck to you, sir.

App. 24, l. 11 – 25, l. 18.

PCR Application

On October 6, 2014, Petitioner filed an application for post-conviction relief ("PCR") alleging that plea counsel was ineffective for advising Petitioner that the State agreeing to a sentencing cap of five years that did not bind the trial court. App. 27 – 34. The State filed a return on January 14, 2015. App. 35 – 39.

PCR Evidentiary Hearing

On April 15, 2015, an evidentiary hearing was held before the Honorable J. Ernst Kinard, Jr. App. 40 – 69. Leah B. Moody represented Petitioner. Assistant Attorney General J. Rutledge Johnson represented the State. Petitioner and plea counsel testified at the hearing.

Petitioner's Testimony

Petitioner stated that his family retained plea counsel and that he was able to meet with plea counsel approximately four times prior to entering his guilty plea. App. 44, ll. 1-14. At the last meeting prior to the guilty plea, plea counsel informed Petitioner that the State's final guilty plea offer was "the cap of zero to five [years imprisonment] which [plea counsel] told me that he and the solicitor had negotiated over the course of six and half months." App. 44, ll. 10-14.

Based on the State's commitment to seeking a maximum term of imprisonment of five years, Petitioner decided to plead guilty. *Id.* at ll. 15-20. Petitioner confirmed that, had the State not agreed to the five year cap on imprisonment, he would have gone to trial. App. 44, l. 23 – 45, l. 3. Petitioner relied on plea counsel's representations that "the last offer was a cap," when agreeing to plead guilty. *Id.*

Petitioner signed the sentencing sheets and pled guilty on the same day that he received the offer of the fiver year cap. App. 45, ll. 4-16. Petitioner was adamant that plea counsel promised him he would only be sentenced to five years imprisonment. *Id.* Petitioner recalled that he was shocked after Judge Hayes sentenced him to ten years. App. 46, l. 3 – 47, l. 23. After the guilty plea, Petitioner met with plea counsel who assured him that he would appeal the sentence. *Id.*

Plea Counsel's Testimony

Plea counsel's testimony largely corroborated Petitioner's testimony. Like Petitioner, plea counsel expected Petitioner to receive a maximum sentence of five years of imprisonment. App. 55, l. 3 – 57, l. 19. Plea counsel recalled that he believed that the parties had agreed to a negotiated guilty plea with a sentencing cap that the trial court was obligated to follow, not merely a recommendation:

> Q: Can you explain to the court was it a negotiated plea or was it just a recommendation?
>
> A: The best way to explain it is this way. In the 20 some odd years I've been practicing law in this area, when we take a cap of -- a sentence with a cap -- in front of our judges, they generally treat it as a -- not generally they almost always treat it as a negotiated plea. **Whether it says negotiated or recommendation on the sentencing sheet, they treat it as okay y'all agreed not to go above five --not for me to go above five, and you can argue for whatever less than that. Now, that was the whole purpose of that sentencing. So whenever I discussed that with him I did tell him, here's what typically happens. We go in and we say cap of five years. Here's the definition of the cap. And I gave him the same definition I just gave you about that scenario.** Okay. And again, in the back of my head I was thinking, you know, my local -- you know, historically in front of my local judges not an issue. Didn't think it was going to be an issue with Judge Mark Hayes because historically he's been sentencing lightly. And the present -- and he was told at the very beginning that there was a cap of five years. . . .

> Judge Mark Hayes was told there was a cap of five years by the prosecutor. The presentation by the Solicitor's Office was for him to give my client the entire five years. My presentation was to get something less, understanding there was probation violation sitting in the background. That probation violation wasn't going to get him -- if I remember correctly -- wasn't going to get him the other five years, so we were going in trying to argue for something less.
>
> **And both presentations were under the guise of the negotiated, in my opinion, the negotiated cap.**

App. 61, l. 9 – 62, l. 22 (*emphasis added*).

Plea counsel candidly recollected that when Petitioner was sentenced to ten years, "[i]mmediately thereafter, I was in complete shock. I had never had that happen to me before. Never. I had had defense attorneys coming up to me saying, 'What just happened?' Because they had never seen it before. I took family outside and my first reaction was to appeal it, do the notice of appeal." App. 64, ll. 4-9.

Counsel believed that the only potential grounds for appeal was the trial court having treated the recommendation of a five year sentencing cap as discretionary as opposed to a negotiated guilty plea to be accepted or rejected. App. 66, ll. 3-9. Counsel admitted that, while he filed a notice of appeal, he never submitted a written statement of appealable issues as required under Rule 203(d)(B)(iv), SCACR.

Counsel rationalized his failure to file the necessary paperwork for an appeal by noting that since he failed to explicitly tell the trial court that the sentencing cap was supposed to be part of a negotiated guilty plea, the trial court had the authority to treat the cap as an optional recommendation:

> . . . The only reason for the notice of appeal was **to appeal Judge Mark Hayes' decision to treat it as a recommendation and do whatever he wants to do. I found out later that -- this happened November 2013 -- a case had come out earlier 2013**, because this issue had been brought up before the appellate court on

> another case that actually said he could do that. So that moment the whole issue to appeal it went up in smoke, because the Court had already ruled **a judge could treat a cap, if it says recommendation, as a recommendation and do whatever else he wanted to do. And that we should have marked it down as negotiated.** But that was after the fact and after all the -- the one document I can't tell you what they were looking for -- I'm telling you what I sent in, if they were looking for the specific reason that didn't get sent. But that specific reason would have been what the judge did at the bench. And it turns out there's a case that indicated he could.

App. 65, l. 23 – 66, l. 16 (*emphasis added*). When questioned about his understanding of the guilty plea terms, plea counsel stated that he understood the guilty plea was to a negotiated sentencing range of between zero and five years of imprisonment and that he informed Petitioner of accordingly, "I did tell him that in a cap situation, **the judge would not go above the five years**." App. 66, ll. 17-24 (*emphasis added*).

Judge Kinard's Death and Judge Hayes' Assignment

Tragically on May 19, 2015 Judge Kinard passed away after a battle with cancer. At the time of his death, Judge Kinard had not issued an order ruling on Petitioner's PCR application. App. 70. Judge Hayes ("successor PCR judge") was the Sixteenth Judicial Circuit administrative judge when Judge Kinard died. *Id.* For reasons not explained in the record, Judge Hayes assigned Petitioner's PCR proceeding to himself despite having presided over Petitioner's guilty plea and sentencing Petitioner to the maximum term of imprisonment for his charges against the recommendation of both the State and the defense. *Id.*

Order of Dismissal

Judge Hayes issued a written order denying Petitioner's application for relief on March 16, 2016. In drafting the order of dismissal, Judge Hayes relied on the following documents: "a copy of the records of the York County Clerk of Court regarding the subject convictions,

Applicant's records from the department of corrections, the Return, the plea transcript, and the transcript from the hearing before Judge Kinard." App. 70.

The order of dismissal does not state that Petitioner and the State consented to Judge Hayes making credibility determinations with respect to PCR hearing witnesses whom he obviously did not observe testify. Further, the order does not state that Petitioner freely, knowingly, and voluntarily waived his right to have a different judge rule on his PCR application than presided over his guilty plea and sentencing.

In denying Petitioner relief, Judge Hayes found plea counsel's testimony "regarding his preparation and advice concerning the case" credible. App. 78. Citing to *Lambert v. State*, 260 S.C. 617, 198 S.E.2d 118 (1973), Judge Hayes concluded that his, Judge Hayes', rejection of the recommended sentencing cap did not affect the voluntariness of Petitioner's guilty plea. App. 79.

Further, Judge Hayes held that plea counsel was not ineffective as Petitioner was "well informed from counsel, the plea waiver form, and [myself] that he was pleading" to an offense that carried up to ten years imprisonment. App. 76. Despite plea counsel's testimony to the contrary, Judge Hayes determined that Petitioner was "well aware" that he, Judge Hayes, did not have to accept the sentencing recommendation based on the plea colloquy that he, Judge Hayes, conducted at the plea hearing. *Id.* Finally, Judge Hayes ruled that plea counsel was not ineffective because "counsel argued for [Judge Hayes] to accept the State's recommendation." *Id.*

ARGUMENTS

I.

The successor PCR Judge erred in finding that plea counsel provided effective assistance of counsel where plea counsel misled Petitioner, based on plea counsel's objectively unreasonable mistake as to the difference between a negotiated sentence and a sentencing recommendation, to believe that the State had agreed to a negotiated guilty plea with a maximum sentence of five years imprisonment and that the trial court was obligated to either accept or reject the entire guilty plea; when plea counsel actually only secured a recommended five year imprisonment sentencing "cap" from the State that the trial court was free to accept or ignore without negating Petitioner's underlying guilty plea.

Introduction

Plea counsel created an erroneous expectation as to Petitioner's potential sentence by telling Petitioner, who faced up to ten years imprisonment, that the State had agreed to a negotiated sentencing cap of five years imprisonment. App. 60, l. 4 – 65, l. 8. In actuality, plea counsel did not secure a negotiated sentence from the State but, instead only secured a sentencing recommendation of five years imprisonment, which the trial court ignored when it sentenced Petitioner to the maximum possible term of imprisonment, ten years. *Id*; *see Alexander v. State*, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991) (finding ineffective assistance of counsel when plea counsel erroneously advised the defendant about his potential sentence prior to his guilty plea); *see also Ray v. State*, 303 S.C. 374, 376, 401 S.E.2d 151, 153 (1991) (finding defendant's guilty plea was not intelligently and voluntarily made based on plea counsel's erroneous sentencing advice).

During the PCR evidentiary hearing, plea counsel candidly admitted that – at the time of Petitioner's guilty plea – he did not understand or appreciate the difference between a "negotiated sentence" which the trial court must either accept as part of the guilty plea or reject the entire guilty plea and a "sentencing recommendation" where the trial court retains the discretion to sentence a defendant as it deems proper while not invalidating the underlying guilty plea. App. 60, l. 4 – 65, l. 8.

Plea counsel's testimony, found credible by the successor PCR judge in his order of dismissal, clearly established that plea counsel was ineffective and his ineffectiveness prejudiced Petitioner, who received the maximum sentence possible for his charge. Thus, the successor PCR judge erred in denying Petitioner relief. App. 96–104; *See Hill v. Lockhart*, 474 U.S. 52 (1985) (applying the *Strickland v. Washington*, 466 U.S. 668 (1984) standard to guilty plea challenges based on ineffective assistance of counsel).

The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results." *Brady v. United States*, 397 U.S. 742, 758, 90 S.Ct. 1463, 1474 (1970). An "unsound result" occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969) (finding a guilty plea is voluntarily and knowingly entered into when the accused has a full understanding of the consequences of his plea and the charges against him); *see also Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999) (finding a defendant must understand the sentencing consequences of his plea for it to be considered voluntarily given).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." *Suber v. State,* 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Specifically, "the voluntariness of a guilty plea is not determined by an examination of a 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 also from the record of the PCR hearing." *Holden v. State*, 393 S.C. 565, 572-74, 713 S.E.2d 611, 612-15 (2011).

Furthermore, "[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, 683 S.E.2d 471 (2009) (citing *Hill*, 474 U.S. at 57-59; *See Ray*, 303 S.C. 374, 401 S.E.2d 151 (finding defendant's guilty plea was not intelligently and voluntarily made in light of the erroneous advice given by plea counsel).

However, "[t]here is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590, 596 (2007). Accordingly, the applicant must overcome this presumption to receive relief. *See Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989).

Deficient Performance

In this case, plea counsel's advice was not within the range of competence demanded of attorneys in criminal cases. Specifically, plea counsel created a false expectation as to Petitioner's potential sentence when plea counsel told Petitioner that he was pleading guilty in exchange for a maximum sentence of five years imprisonment. *See Alexander*, 303 S.C. at 542, 402 S.E.2d at 485; *Ray*, 303 S.C. at 376, 401 S.E.2d at 153. An "unsound result" subsequently occurred because this unreasonable expectation hindered Petitioner's ability to fully understand the sentencing consequences of his guilty plea. App. 60, l. 4 – 65, l. 8; *See Boykin*, 395 U.S. 238; *see also Pittman*, 337 S.C. 597, 524 S.E.2d 623.

Counsel should not have been surprised by the plea judge's departure. Decades of our case law make clear that a court may either accept or reject a negotiated guilty plea and sentence in whole. If the court rejects a negotiated guilty plea, the parties must be given the opportunity to stand down. By contrast in a guilty plea with a sentencing recommendation, the acceptance of

the guilty plea does not depend on the court following the sentencing recommendation. The court retains discretion to sentence the defendant as it deems proper.

Given his incorrect understanding of the difference in terms, it is usurping that plea counsel credibly testified that he was "in complete shock" following the plea judge's departure from the sentencing recommendation. App. 64, l. 4 – 65, l. 8. Counsel admitted that it was only after Petitioner's guilty plea, while researching in preparation for Petitioner's appeal, that he realized the difference between a negotiated guilty plea and guilty plea with a sentencing recommendation. *Id.*

The brief plea colloquy did not negate the false expectation created by plea counsel's erroneous advice. App. 9, ll. 4-8. Plea counsel explained that he believed that there was no difference between a recommended sentence and a negotiated sentence; in that both required the plea judge to abide by the agreed upon sentencing range. App. 60, l. 4 – 65, l. 8. Plea counsel stated that he relayed his incorrect understanding of the guilty plea terms to Petitioner.

Moreover, plea counsel's PCR hearing testimony reveals that he went over the guilty plea advisement of rights with Petitioner in a summary fashion. App. 57, l. 2 – 59, l. 25. Ultimately, Petitioner's understanding of the terms of his guilty plea could only be as accurate as the advice counsel gave him. Plea counsel's advice was objectively and unreasonably wrong. App. 60, l. 4 – 65, l. 8. A single warning given by the plea judge during the colloquy cannot compensate for plea counsel's erroneous advice given during the culmination of his nearly seven month long representation of Petitioner. App. 9, ll. 4-8.

Accordingly, plea counsel's erroneous advice that the trial judge was obligated to accept the sentencing recommendation of a maximum of five years imprisonment constituted defective performance App. 60, l. 4 – 65, l. 8.*See Hill*, 474 U.S. at 57-59.

Prejudice

Furthermore, Petitioner was prejudiced by plea counsel's deficient performance because Petitioner did not knowingly, intelligently, and voluntarily plead guilty due to plea counsel's incorrect legal advice. *See Boykin*, 395 U.S. 238; *see also Pittman*, 337 S.C. 597, 524 S.E.2d 623. Plea counsel's affirmative misadvice resulted in Petitioner unknowingly bargaining anyway critical constitutional rights in exchange for nothing. App. 60, l. 4 – 65, l. 8. Petitioner could not have received a higher sentence if he simply stood trial and was found guilty. Petitioner and plea counsel both testified that the five year sentencing cap was the "but/for" reason for Petitioner accepting the State's offer. App. 44, ll. 4-20; App. 60, l. 4 – 65, l. 8.

Plea counsel admitted that he was shocked by the trial court's sentence as he erroneously believed that a sentencing recommendation was the same as a negotiated sentence. App. 60, l. 4 – 65, l. 8. Nevertheless plea counsel never filed for a reconsideration of the sentence because – after over twenty years of practicing law – he belatedly discovered the difference between a sentencing recommendation and a negotiated sentence. *Id.* Petitioner was obviously prejudiced by plea counsel alarming ignorance of the law.

Accordingly, the PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty when "there is a reasonable probability that, but for counsel's errors, [Petitioner] would not have pled guilty and would have insisted on going to trial." App. 96–104; *Hill*, 474 U.S. at 57-59.

II.

The successor PCR Judge's denial of Petitioner's application for post-conviction relief violated this Court's holding in *Floyd v. State*, 303 S.C. 298, 400 S.E.2d 145 (1991), where the successor PCR Judge, who assigned himself Petitioner's PCR case following the death of the original PCR Judge, was the same judge who accepted Petitioner's guilty plea and sentenced Petitioner to the maximum term of imprisonment, and where the successor PCR Judge did not secure an on-the-record, knowing, and voluntary waiver of Petitioner's right to have different judges preside over his guilty plea and post-conviction relief proceeding.

Whether the successor PCR judge, who also presided over Petitioner's guilty plea and sentencing, reversibly erred when he ruled on the merits of Petitioner's PCR application following the death of Petitioner's original PCR judge appears to be an issue of first impression. Without question, Petitioner had a right to have a different judge preside over his PCR proceeding than presided over his guilty and sentencing.

However, our courts have never addressed a case where – as here – the judge subject to recusal as a result of having presided over the underlying criminal case was assigned after the post-conviction relief evidentiary hearing. As will be discussed *infra*, this Court should reverse and remand Petitioner's case to the York County Court of Common Pleas for a new PCR hearing.

Relevant Facts

Judge Hayes presided over Petitioner's guilty plea and sentenced Petitioner to the maximum term of ten years imprisonment. App. 24, l. 11 – 25, l. 18. Judge Hayes' sentence was twice as long as the sentence the State requested. App. 16, l. 13 – 19, l. 2. In sentencing Petitioner to ten years, Judge Hayes made a number of specific factual determinations and judgments regarding Petitioner's culpability:

> This is one of those rare occasions where I disagree with everyone in the courtroom. Based upon what's been presented to me, he was already on probation, not once, but twice. So he had been given two opportunities by other judges to conform his conduct.

> At the time of the accident, he should not have been driving. He did not have a driver's license, he was driving under suspension and then there's also an allegation or statement made to the Court that he was -- also had been consuming illegal substances at the time -- prior to the accident in clear violation of not only of law but also both of his prior probationary cases that he was on. Regardless of the issue of fault in the accident is that he should not have been driving, period. A clear violation of his probation cases, at least.
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> I'm willing to accept the defense's recommendation to run the probation cases concurrent with this case, but given his prior history, the facts that are around how this accident happened, his prior two probationary cases, I have to impose the ten-year sentence. And I will give him credit for the 189 days. Good luck to you, sir.

App. 24, l. 23 – 25, l. 18.

Sadly, Judge Kinard passed away prior to ruling on Petitioner's PCR application. In his capacity as circuit administrative judge, Judge Hayes appointed himself to Petitioner's PCR, despite having also presided over Petitioner's guilty plea and sentencing. App. 70.

Argument

Petitioner has the right to have a different judge preside over his PCR proceeding than presided over his guilty plea and sentence. *Floyd v. State*, 303 S.C. 298, 400 S.E.2d 145 (1991). The *per se* rule adopted in *Floyd* sought to "eliminate even the suggestion of partiality." *Id.* at 299, 400 S.E.2d at 146. This Court observed that the suggestion of partiality arises out of the fact that a trial judge who presided over both a defendant's criminal proceeding and subsequent PCR proceeding was, in effect, being asked to review his own conduct in the prior criminal proceeding. *State v. Watkins*, 406 S.C. 360, 752 S.E.2d 261 (2013).

The post-evidentiary hearing assignment of Judge Hayes to Petitioner's case renders it procedurally distinguishable from *Floyd*. In *Floyd*, the trial judge who presided over Floyd's trial was assigned to preside over Floyd's PCR from the start of the collateral proceeding. 303

S.C. at 298, 400 S.E.2d at 145. In Petitioner's case, Judge Kinard presided over the evidentiary hearing on April 15, 2015, a little over a month prior to his death on May 19, 2015.

Judge Hayes was not present for the evidentiary hearing and had to wait until the evidentiary hearing's transcript was produced before he could rule. App. 70. The transcript was produced on March 8, 2016. Judge Hayes issued the order of dismissal eight days later on March 16, 2016. App. 70 – 80. There is no evidence in the record as to when Judge Hayes assigned himself to Petitioner's case.

Having sentenced Petitioner to the maximum possible term of imprisonment against the recommendation of both the State and the defense, Judge Hayes should not have presided over Petitioner's PCR proceeding. As discussed *supra* in Issue I, the primary issue in Petitioner's PCR proceeding is whether plea counsel was ineffective in advising Petitioner that Judge Hayes had accept or reject outright Petitioner's guilty plea with accompanying sentence of between zero and five years imprisonment. App. 74 - 79.

Accordingly, the focus of the evidentiary hearing was to determine whether or not Petitioner freely, voluntarily, and intelligently pled guilty. In ruling on whether or not Petitioner entered into the guilty plea with a "full knowledge" of the consequences of his decision, Judge Hayes had to review his own conduct at the guilty plea hearing. *Anderson v. State*, 342 S.C. 54, 535 S.E.2d 649 (2000) (whether a guilty plea is entered into knowingly, intelligently, and freely is determined based on a review of the entire record).

Given these circumstances of Petitioner's case filing a post-hearing motion under Rule 59, SCRCP, to recuse Judge Hayes could not have addressed Judge Hayes' assignment to Petitioner's PCR proceeding. His assignment did not constitute new evidence that would have

affected the findings of fact or conclusions of law with respect to the issues raised at the evidentiary hearing.

Likewise a motion under either Rule 60(a) or Rule 60(b)(1)-(3), SCRCP, would have been improper. There is no evidence to suggest that Judge Hayes' assignment was a clerical error or a result of "mistake, inadvertence, surprise, or excusable neglect." In addition, Judge Hayes' assignment was not the product of "fraud, misrepresentation, or other misconduct of an adverse party" as required under Rule 60(b)(3).

The only conceivable post-trial motions to address Petitioner's circumstances are post-trial motions pursuant to Rule 60(b)(4), SCRCP, that the order of dismissal was void, or Rule 60(b)(5), SCRCP, arguing that the order of dismissal is not equitable and "that the judgment should have prospective application." *Sanders v. State*, 412 S.C. 611, 773 S.E.2d 580 (2015) (holding that a defendant who waives his right to collateral review is still entitled to challenge whether advice he received in agreeing to that waiver was constitutionally defective).

Ultimately, this court should take the opportunity to establish a procedure where, as here, the successor PCR judge is the same judge that presided over a defendant's trial or guilty plea and is assigned to the collateral proceeding after the evidentiary hearing. Therefore, this Court should vacate the order of dismissal in Petitioner's case and remand the case to the York County Court of Common Pleas for a new hearing.

III.

The successor PCR Judge committed a reversible error of law by making findings in the order of dismissal as to the credibility of witnesses at the PCR hearing when the successor PCR Judge did not preside over or attend the PCR hearing and did not, prior to making the credibility findings, seek Petitioner's consent to allow the successor PCR judge make such findings based solely on the existing record.

Relevant Facts

The order of dismissal contains a number of witness credibility findings. Including several findings that were impossible for Judge Hayes to have made given that he was not present at the evidentiary hearing. "This Court has reviewed the testimony presented at the evidentiary hearing, **observed the witnesses presented at the hearing, passed on their credibility, and weighed the testimony accordingly.**" App. 74 (*emphasis added*). Judge Hayes further concluded that, "[a]s a matter of general impression, this Court finds Counsel's testimony to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below." *Id.*

Despite plea counsel's testimony at the evidentiary hearing that he advised Petitioner that Judge Hayes had to accept the sentencing cap and that he summarily explained the plea affidavit to Petitioner, Judge Hayes – presiding in his capacity as the successor PCR judge – dismissed the idea that counsel's affirmative misadvice rendered Petitioner's guilty plea involuntary and unknowingly made:

> This Court finds Counsel's testimony credible that he reviewed the plea affidavit with Applicant and that he argued for mercy on Applicant's behalf. This Court finds that Applicant's desire to receive a sentence of ten years does not change the fact that he was well informed form Counsel, the plea waiver form, and the plea judge that he was pleading to a charged that carried thirty days to ten years.

App. 76. Worth note, this portion of the order of dismissal misstates the sentencing cap as a ten year cap, it was a cap of zero to five years imprisonment. App. 18, l. 7 – 19, l. 2.

Judge Hayes, as successor PCR judge, also weighed the effectiveness of his own explanations when serving as the presiding judge at Petitioner's guilty plea:

> The plea court's thorough colloquy with Applicant demonstrates that he understood the consequences of pleading guilty and the potential sentence he could receive. Applicant presented no credible evidence as to why he should be able to depart from his statements at the plea hearing. This Court finds credible Counsel's testimony regarding his preparation and advice concerning the case.
>
> .... [T]his Court finds the plea judge correctly found Applicant's plea was freely, voluntarily, and intelligently made. Additionally, this Court finds that the plea judge's rejection of the State's recommendation does not affect the voluntariness of Applicant's plea.

App. 78 – 79.

Discussion

The parties' consent is required in order for a successor judge to issue a determinative order when the judge who presided over the underlying hearing was unable, because of disability or death, to file his findings of fact or conclusions of law. *Christy v. Christy*, 347 S.C. 503, 556 S.E.2d 701 (2001) (holding that the consent of the parties is required before a successor judge can make witness credibility findings).

Rule 63, SCRCP, governs the procedure when the presiding judge is unable to continue presiding over the matter:

> If at any time after a trial or hearing has been commenced, but before the final order or judgment has been issued, the judge is unable to proceed, a successor judge shall be assigned. The successor judge may proceed upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. In a hearing or a trial without a

> jury, the successor judge shall, at the request of a party, recall any witness whose testimony is material and disputed and who is available to testify without undue burden. A successor judge may also provide for the recall of any witnesses.

Rule 63, SCRCP. The seminal case addressing the disability of a presiding judge prior to that judge issuing findings of fact and conclusions of law is *Christy v. Christy*. 347 S.C. 503, 556 S.E.2d 701

In *Christy* former spouses were litigating an action seeking to modify alimony. *Id.* at 505, 556 S.E.2d at 702. The former husband sought a reduction or termination in spousal support. *Id.* The former wife sought an increase. The family court bifurcated the two claims. Family Court Judge John Black presided over the termination of support action. *Id.* at 506, 556 S.E.2d at 702. After a hearing, Judge Black did not issue an on the record ruling. *Id.*

Wife's attorney would claim that Judge Black stated at an off-the-record sidebar that he was not going to terminate alimony and asked Wife's attorney to prepare an order. *Id.* Wife's attorney prepared an order and Husband's attorney objected in writing to portions of the proposed order. The revised proposed order was then sent to Judge Black for his approval. Tragically, Judge Black suffered a stroke prior to signing the proposed order. *Id.*

Inexplicably, Husband appealed the unsigned order. *Id.* The Court of Appeals dismissed the appeal because of the lack of a signed order. *Id.* This Court likewise denied the Husband's petition for writ of mandamus to take the action in its original jurisdiction. *Id.*

Family Court Judge Segars-Andrews succeeded Judge Black as the presiding judge. Husband then filed a motion for a new trial pursuant to Rule 63, SCRCP. *Id.* at 507, 556 S.E.2d at702. Judge Segars-Andrews denied the motion for a new trial and refused to review the transcript of the prior hearing presided over by Judge Black. Instead, Judge Segars-Andrews

simply signed the original proposed order which did not contain the edits made as a result of Husband's objections. *Id.*, 556 S.E.2d at 703.

On appeal, Husband argued that Judge Segars-Andrews erred in not granting a new trial and in simply signing the original proposed order. *Id.* at 508, 556 S.E.2d at 703. The Court of Appeals began its analysis by noting that our courts had never before addressed "instances where, as here, the presiding judge becomes disabled before he files his findings of fact and conclusions of law." *Id.* at 509, 556 S.E.2d at 704. The Court of Appeals further noted that Rule 63, SCRCP, did not expressly address circumstances where the presiding judge is disabled after the hearing, but before issuing an order. *Id.*

Relying federal precedent, the Court of Appeals held that because Judge Black did not sign the proposed order prior to his disability, he "remained free to adopt or reject any or all of the findings of fact and conclusions of law." *Id.* at 510, 556 S.E.2d at 704. Therefore, Judge Black did not make findings of fact or conclusions of law "sufficient to allow Judge Segars-Andrews to conclude the case by simply signing a proposed order." *Id.*

Finally, the Court of Appeals identified two exceptions to the operation of Rule 63, SCRCP, one of which allows the parties to consent to having the successor judge make credibility determinations based on the trial transcript. *Id.* at 512, 556 S.E.2d at 705. In *Christy*, the Court of Appeals found that the exceptions were not applicable as the parties did not consent to Judge Segars-Andrews making credibility determinations based on the hearing transcript. *Id.*

Petitioner's case is on "all fours" with *Christy*. Judge Kinard passed away prior to drafting a final order in the case, but after the evidentiary hearing. The only major difference between *Christy* and Petitioner's case is that Judge Kinard directed both parties to prepare

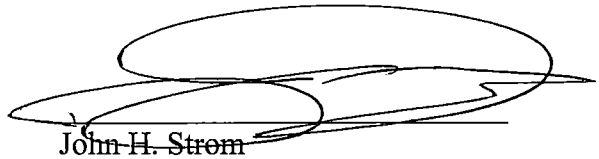
proposed orders at the end of the evidentiary hearing. App. 68, ll. 2-5. There is no evidence in the record as to how Judge Kinard intended to rule.

This difference is immaterial to *Christy's* applicability to Petitioner's case. Consent of the parties is the only mechanism that would have allowed Judge Hayes to make credibility findings based on the hearing transcripts. There is no evidence that the parties consented to Judge Hayes' doing so. Moreover, there is no evidence that Petitioner knowingly and intelligently consented to Judge Hayes, who also presided over Petitioner's guilty plea, ruling on Petitioner's collateral challenge to that conviction. *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1023 (1938) (holding that courts should "indulge every reasonable presumption" against waiver of a critical right); *see also Boykin*, 324 S.C. 552, 478 S.E.2d 689 (finding that a trial judge must determine whether a waiver is the product of a knowing, voluntary, and intelligent decision).

Accordingly, this Court should vacate the order of dismissal and remand Petitioner's case to the York County Clerk of Commons Pleas.

CONCLUSION

By reason of the foregoing arguments, Petitioner Jeremy Mobley respectfully requests this Court grant his petition for writ of certiorari to allow for full briefing on the above raised issues.



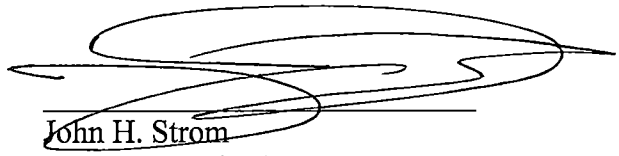
John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of September, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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ATTORNEY FOR PETITIONER

This 25th day of September, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable John C. Hayes, Circuit Court Judge

JEREMY CORDERA MOBLEY,

PETITIONER

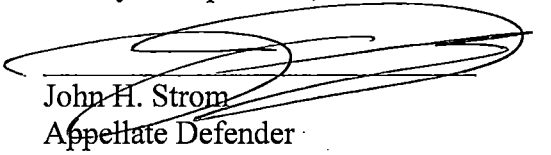
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

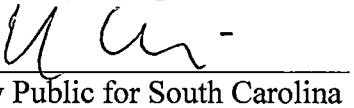
CERTIFICATE OF SERVICE

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 Justin J. Hunter, 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 Jeremy Cordera Mobley, #357960, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 25th day of September, 2017.



John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 25th day of September, 2017.



(L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025