

RECEIVED
OCT 13 2017

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2014-002285

Terrance McCall,Petitioner,

v.

State of South Carolina,Respondent.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General
SC Bar #102524

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES3

QUESTION PRESENTED4

STATEMENT OF THE CASE.....5

STATEMENT OF THE FACTS7

STANDARD OF REVIEW17

ARGUMENT

 I. The record contains evidence of probative value to support the PCR court's finding that Petitioner failed to satisfy his burden of proving Counsel was ineffective where Petitioner freely and voluntarily pleaded guilty for a negotiated sentence of twenty years with a full understanding that any early release was not guaranteed after being advised by Counsel to be prepared to serve a day-for-day sentence and to avoid a potential one-hundred-and-ten year sentence at trial.....19

CONCLUSION.....27

TABLE OF AUTHORITIES

Cases

<u>Anderson v. State,</u> 342 S.C. 54, 535 S.E.2d 649 (2000).....	18
<u>Brown v. State,</u> 306 S.C. 381, 412 S.E.2d 399 (1991).....	26
<u>Butler v. State,</u> 286 S.C. 441, 334 S.E.2d 813 (1985).....	17
<u>Cherry v. State,</u> 300 S.C. 115, 386 S.E.2d 624 (1989).....	17, 18
<u>Crawford v. United States,</u> 519 F.2d 347 (4th Cir.1975).....	18
<u>Dempsey v. State,</u> 363 S.C. 365, 610 S.E.2d 812 (2005).....	17
<u>Drayton v. Evatt,</u> 312 S.C. 4, 430 S.E.2d 517 (1993).....	19, 23
<u>Edmonds v. Lewis,</u> 546 F.2d 566 (4th Cir. 1976).....	18
<u>Ford v. State,</u> 314 S.C. 245, 442 S.E.2d 604 (1994).....	24
<u>Geter v. State,</u> 305 S.C. 365, 409 S.E.2d 344 (1991).....	25
<u>Griffin v. Martin,</u> 278 S.C. 620, 300 S.E.2d 482 (1983).....	20, 21
<u>Harres v. Leeke,</u> 282 S.C. 131, 318 S.E.2d 360 (1984).....	18, 19
<u>Hinson v. State,</u> 297 S.C. 456, 377 S.E.2d 338 (1989).....	25
<u>Holden v. State,</u> 393 S.C. 565, 713 S.E.2d 611 (2011).....	18
<u>Humbert v. State,</u> 345 S.C. 332, 548 S.E.2d 862 (2001).....	25
<u>Hunter v. State,</u> 316 S.C. 105, 447 S.E.2d 203 (1994).....	20, 21, 26
<u>Johnson v. State,</u> 294 S.C. 310, 364 S.E.2d 201 (1988).....	7
<u>Kolle v. State,</u> 386 S.C. 578, 690 S.E.2d 73 (2010).....	17

<u>Moorehead v. State,</u>	
329 S.C. 329, 496 S.E.2d 415 (1999).....	18
<u>Rolen v. Sate,</u>	
384 S.C. 409, 683 S.E.2d 471 (2009).....	18
<u>Roscoe v. State,</u>	
345 S.C. 16, 546 S.E.2d 417 (2001).....	15, 21, 22, 25
<u>S.C. Dept. of Social Services v. Forrester,</u>	
282 S.C. 512, 320 S.E.2d 39 (Ct. App. 1984).....	19
<u>Strader v. Garrison,</u>	
611 F.2d 61 (4th Cir. 1979).....	26, 27
<u>Strickland v. Washington,</u>	
466 U.S. 668 (1984).....	17
<u>Wolfe v. State,</u>	
326 S.C. 158, 485 S.E.2d 367 (1999).....	18
Statutes	
S.C. Code Ann. § 16-11-330(A)	19
S.C. Code Ann. § 16-3-910.....	19
S.C. Code Ann. § 24-13-100	19
S.C. Code Ann. § 24-13-150(A)	20
Rules	
Rule 203 (d)(1)(B)(iv), SCACR	6

QUESTION PRESENTED

- I. Does the record contains evidence of probative value to support the PCR court's finding that Petitioner failed to satisfy his burden of proving Counsel was ineffective where Petitioner freely and voluntarily pleaded guilty for a negotiated sentence of twenty years with a full understanding that any early release was not guaranteed after being advised by Counsel to be prepared to serve a day-for-day sentence and to avoid a potential one-hundred-and-ten year sentence at trial?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the May 2010 term of the Spartanburg County Grand Jury for armed robbery and possession of a firearm during the commission of a violent crime (2010-GS-42-2093, counts one and two), two counts of assault and battery of a high and aggravated nature ("ABHAN") (2010-GS-42-2090, -2092), pointing and presenting a firearm at persons (2010-GS-42-2089), and resisting arrest with a deadly weapon (2010-GS-42-2090). Petitioner was later indicted at the October 2010 term of the Spartanburg County Grand Jury for kidnapping and possession of a firearm during the commission of a violent crime (2010-GS-42-5791, counts one and two). Petitioner was represented by Andrea Price, Esquire. Solicitor Barry Joe Barnette prosecuted the case.

On January 31, 2011, Petitioner pleaded guilty before the Honorable J. Derham Cole to armed robbery, both counts of ABHAN, possession of a weapon during the commission of a violent crime, and pointing and presenting a firearm. In exchange for Petitioner's guilty plea, the charges for resisting arrest with a deadly weapon as well as kidnapping and the corresponding possession of a weapon during the commission of a violent crime were *nolle prossed*. Pursuant to a negotiated sentence, the judge sentenced Petitioner to imprisonment for 20 years for armed robbery, five years for the corresponding possession of a weapon during the commission of a violent crime, 10 years for each of the two ABHAN charges, and five years for pointing and presenting a firearm, all to be served concurrently.

Direct Appeal

A timely notice of appeal was filed on behalf of Petitioner. Pursuant to Rule 203 (d)(1)(B)(iv), SCACR, the South Carolina Court of Appeals dismissed the appeal for failure to

provide a sufficient explanation. The written order was filed April 18, 2011. The remittitur was issued May 18, 2011.

Post-Conviction Relief

Petitioner filed an application for post-conviction relief (“PCR”) on December 12, 2011. (App. p. 41). An evidentiary hearing into the matter was convened at the Spartanburg County Courthouse on January 22, 2014, before the Honorable Roger L. Couch. (App. p. 77). Petitioner was present at the hearing and was represented by Leah B. Moody, Esquire (“PCR counsel”). Assistant Attorney General Suzanne H. White represented Respondent. At the hearing, Petitioner testified on his own behalf. Andrea Price, Esquire (“Plea Counsel”) also testified.

Appeal from PCR court

On June 11, 2015, Appellate Defender Tiffany L. Butler, Esquire, filed a petition for writ of certiorari on behalf of Petitioner pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). By order filed September 21, 2015, the Supreme Court of South Carolina denied the motion to be relieved as counsel and directed the parties to address the following question:

Was plea counsel ineffective in advising Petitioner regarding the minimum amount of time he would be required to serve before becoming eligible for parole?

Petitioner filed a petition for writ of certiorari on October 21, 2015. Respondent made its return on February 19, 2016. This Court granted the petition for a writ of certiorari by order filed June 16, 2017. Petitioner filed his brief of petitioner on July 17, 2017. This brief follows in return.

STATEMENT OF THE FACTS

Factual Basis for Guilty Plea

Petitioner’s charges resulted from an incident on February 19, 2010. (App. p. 28, l. 25). Officers from the Spartanburg County Sheriff’s Department were on patrol when they received a

complaint of drug-related activity occurring at a house on Williams Street. (App. p. 29, ll. 1-5). While the officers were watching the house, they saw a Toyota Celica drive up to the house. Officers lost that car on Wofford Street. (App. p. 29, l. 7). Officer Wilbanks, who was observing the house from another unmarked police car, later saw the same Toyota Celica return to the house that same day. (App. p. 29, ll. 7-17). When the car left the house, Officer Harold followed it and noticed the car had a tinted tag as well as a tag violation. Officer Harold initiated a traffic stop of the car while Officer Strickland pulled up behind him. (App. p. 29, ll. 18-24). Kenneth Woodruff was driving the vehicle, and Petitioner was in the passenger seat. While Officer Harold went to the driver side of the car to speak with Mr. Woodruff, Officer Strickland went to the passenger side to speak with Petitioner. (App. p. 29, l. 25 – p. 30, ll. 1-2). Mr. Woodruff seemed very nervous and was shaking when he handed Officer Harold his driver's license. Officer Harold proceeded to pat down Mr. Woodruff at which point he felt something in his pocket. (App. p. 30, ll. 4-10). Mr. Woodruff consented to a search of the car. Officer Harold then walked around to the passenger side of the car and asked Petitioner to come out. (App. p. 30, ll. 10-14).

Officer Harold then went back to Mr. Woodruff and found marijuana in his pocket. Mr. Woodruff ran. (App. p. 30, ll. 17-21). Officer Edwards from the City of Spartanburg and Officer Harold both gave chase. Officer Strickland initially gave chase, but decided to go back to Petitioner. (App. p. 31, ll. 3-6). Officer Strickland decided to put Petitioner in investigative detention. (App. p. 31, ll. 11-12). He put one handcuff on Petitioner's wrist and went to get another set of handcuffs due to Petitioner's large size. Then, as he was trying to handcuff Petitioner, a fight ensued. (App. p. 31, ll. 14-17). Petitioner pulled a .380 caliber Bersa handgun from his right ankle and held it up to the Officer Strickland's neck area. Petitioner pulled the

hammer back and told Officer Strickland, "I want your gun or I'm going to kill you." Officer Strickland eventually relented and gave Petitioner his gun. (App. p. 31, ll. 22-25 – p. 32, ll. 1-6). Petitioner pointed Officer Strickland's gun at another officer inside a vehicle. (App. p. 32, ll. 9-10). Officer Strickland went to get his rifle or shotgun from the police car, and Petitioner ran. (App. p. 32, ll. 11-13). Officer Wilbanks approached Petitioner in an unmarked police car and drew his weapon on Petitioner. At this point, Petitioner nodded his head and "went down." (App. p. 32, ll. 15-19). Petitioner was then placed under arrest as he continued to struggle. (App. p. 32, ll. 20-21).

Guilty Plea

Petitioner testified at his guilty plea hearing that he had enough time to speak with his counsel about his charges and the consequences of being found guilty of them. (App. p. 7, ll. 19-23). The plea judge advised Petitioner of his right to a trial, and Petitioner affirmed he wanted to waive that right. (App. p. 13, ll. 14-15). Petitioner testified he had not been promised anything to induce him to plead guilty. (App. p. 14, ll. 17-19). The plea judge then clarified that Petitioner was pleading guilty pursuant to a negotiated sentence. The plea judge asked Petitioner whether he was going to plead guilty even if they had not agreed to an outcome or sentence and Petitioner replied he was not. (App. p. 14, ll. 20-15 – p. 15, ll. 1-4). Petitioner said the promise made to him was a twenty year sentence. He added, "[B]y law, something that passed last summer, I will only have to do sixteen years or something." (App. p. 15, ll. 13-15). The plea judge immediately informed Petitioner they could not promise him he would only have to serve sixteen years. The plea judge continued to explain it would actually be the parole board's decision whether Petitioner would be released on parole. (App. p. 15, ll. 16-24).

In an effort to further clarify the concept of parole and the role of the parole board, the plea judge gave Petitioner the following instruction:

In other words, if you receive a twenty year sentence and the law provides that you are eligible for parole after having served eighty percent of that sentence, that doesn't mean you'll be released after eighty percent. That means the parole board will decide whether or not you should be released.

(App. p. 15, l. 25 – p. 16, ll. 1-5).

Petitioner replied, “My understanding when I came up here it was going to be sixteen years.”

(App. p. 17, l. 2). During this discussion, Plea Counsel referred to an “eighty percent max-out,” prompting the plea judge to ask, “Are you all in agreement that the state of the law is that once you do the eighty percent you're automatically [?]” (App. p. 16, l. 12). The discussion about parole continued as the plea judge advised Petitioner of the following:

In other words, that's what you have to do. You've got to serve at least that. If I give you a twenty year sentence, you have to serve at least sixteen, but you may have to serve twenty. The parole board is what I'm trying to tell you is the body that makes a determination as to whether or not you are to be released after serving the percentage of the sentence that the law requires you to serve.

In the case of armed robbery, you have to serve eighty percent of any sentence that is imposed before you are eligible to be released early. So if I give you twenty years you've got to do at least sixteen. The parole board still decides if you are to be released.

(App. p. 17, ll. 6-12; ll. 14-18).

Petitioner asked the plea judge whether he would still get parole with a violent crime.

(App. p. 17, l. 19). The plea judge once again explained:

[The negotiated sentence] is twenty years. In the case of armed robbery, the law requires a person who is convicted of a no-parole sentence who receives a twenty year

sentence to do eighty percent of it ... Eighty percent of twenty is sixteen, so you have to do that much. Then the law provides that you are eligible to be released from custody. In other words, you're being released early because you're receiving a twenty year sentence, but I don't get to decide if you're released earlier than twenty years.

(App. p. 18, ll. 7-10; ll. 12-17).

Petitioner affirmed he understood and wished to go forward with his guilty plea. (App. p. 19, ll. 11-14). The plea judge again instructed Petitioner he would have to serve at least eighty percent of his twenty year sentence before he would be eligible for early release. (App. p. 22, l. 25). Petitioner then proceeded to affirm he wished to knowingly and voluntarily waive his rights and plead guilty (App. p. 23, ll. 2-20; p. 27, ll. 12-14). Moreover, Petitioner testified he was pleading guilty to the charges because he was in fact guilty of the charges. (App. p. 24, ll. 13-15; p. 25, ll. 8-10; p. 25, ll. 21-23; p. 26, ll. 13-15).

Petitioner's Testimony from PCR Hearing

Petitioner testified Plea Counsel advised him that if he did not plead guilty he would get a life sentence. (App. p. 84, l. 17-20). The State first offered Petitioner a plea deal with a negotiated sentence of twenty years, but Petitioner turned it down. Petitioner recalled this was approximately eight months before he was indicted for kidnapping. (App. p. 84, ll. 21-23).

Petitioner finally accepted a plea deal the day his trial was set to begin. Petitioner recalled Plea Counsel advising him to take the plea to avoid what would effectively be a life sentence. Petitioner testified he then decided to plead guilty because he did not want to take any chances risking the rest of his life in prison. (App. p. 85, ll. 7-12). Later in the hearing, Petitioner testified he pleaded guilty because he was told by Plea Counsel that he was facing life in prison for kidnapping. (App. p. 85, ll. 7-9).

Petitioner testified all he and Plea Counsel discussed about the charges was the amount of time he would have to serve of the sentence. Petitioner claimed Plea Counsel told him that he would only have to serve sixteen years of a twenty year sentence, if that. (App. p. 85, ll. 19-23). Moreover, Petitioner recalled the judge telling him that he would only have to serve eighty percent of his sentence. (App. p. 87, ll. 1-4). Petitioner testified his Plea Counsel noted the “eighty percent max-out” to the court. (App. p. 91, l. 4). Petitioner complained Plea Counsel never objected to the judge’s instructions that Petitioner would only have to serve eighty percent of his sentence before he would be eligible for parole. (App. p. 93, ll. 23-25). During direct examination, PCR counsel asked Petitioner if his understanding was that the most time he would be serving was to be sixteen years. Petitioner responded, “Well, there was a possibility I [could] get out before sixteen years, but I would do no more than sixteen years.” (App. p. 94, ll. 6-9). This matter was revisited later in the direct examination where Petitioner again testified the plea judge and Plea Counsel advised him he would only have to serve eighty percent (or sixteen years) of his sentence. (App. p. 101, ll. 10-12, 15-19).

PCR counsel asked Petitioner about his responses to some of the plea judge’s questions during his guilty plea. The plea judge explained to Petitioner that his sentence for armed robbery would be twenty years, and in the case of an armed robbery, the law requires a person convicted of a non-parole offense to receive a twenty year sentence and serve eighty percent of it. Petitioner admitted that his response to this at the plea was, “Ok.” Then, PCR counsel directed Petitioner to the next question asked of him in the plea transcript. The plea judge asked Petitioner whether he understood what a non-parole offense meant. Petitioner admitted he told the plea judge, “Yes sir.” (App. p. 95, ll. 6-14). PCR counsel asked Petitioner why he would

respond in the affirmative when he did not actually understand these charges. Petitioner replied, “Yeah, I know, I was just answering yes. I’m sorry.” (App. p. 95, ll. 15-18).

Petitioner testified he talked with his Plea Counsel about the risks and possible consequences of a trial, including the range of sentences he could receive. (App. p. 97, ll. 18-23). Petitioner recalled Plea Counsel having told him if he did not take the plea, he could *possibly* get life in prison. (App. p. 98, ll. 1-2). However, Petitioner testified he was erroneously advised kidnapping carried a life sentence and he would have proceeded to trial if he knew it only carried a maximum sentence of thirty years. (App. p. 98, ll. 22-24 – p. 99, ll. 1-7). PCR counsel reminded Petitioner he testified during his guilty plea hearing that no one had pressured him to plead guilty, to which Petitioner admitted he was not telling the truth at that time. (App. p. 99, ll. 11-14).

On cross-examination, Petitioner conceded the plea judge informed him that he could not guarantee Petitioner would even get parole. (App. p. 115, ll. 4-9). Petitioner asserted that parole is never a guarantee. (App. p. 115, l. 21). Once again, Petitioner testified he would have gone to trial if he knew the maximum for kidnapping was only thirty years, along with thirty years for robbery. (App. p. 120, ll. 24-25 – p. 121, ll. 1-11).

The aforementioned discussions prompted the PCR judge to set aside a moment to clarify the charges and possible sentences Petitioner would have faced if he had gone to trial. The PCR judge recounted that Petitioner was facing charges of armed robbery, possession of a weapon during the commission of a violent crime, two counts of assault and battery of a high and aggravated nature, kidnapping, another possession of a firearm, and resisting arrest with a deadly weapon. (App. p. 121, ll. 18-25 – p. 122, ll. 1-17). The PCR judge and Plea Counsel then

calculated that Petitioner would have faced a potential sentence of one-hundred-and-ten years of imprisonment had Petitioner gone to trial. (App. p. 123, ll. 12-13).

Plea Counsel's Testimony from PCR Hearing

On direct examination, Plea Counsel rebutted Petitioner's claim that Plea Counsel advised him that kidnapping carried a life sentence. Plea Counsel testified she merely told him if the case went to trial and Petitioner received consecutive sentences, the sentences could amount to life in prison given his age at the time of the plea. (App. p. 126, ll. 21-25). Plea Counsel also testified she felt the twenty-year negotiated sentence was an excellent option for Petitioner given the circumstances. (App. p. 130, ll. 19-21). Plea Counsel explained her practice is to review and explain everything on the sentencing sheets to her clients. (App. p. 128, ll. 19-23). Moreover, when asked whether she discusses parole eligibility with her clients, Plea Counsel testified, "I do. And what I always leave them with is ultimately it is up to the parole board." (App. p. 129, ll. 7-8).

On cross-examination, Plea Counsel testified she could not recall why she did not correct the plea judge about the eighty percent statement and the discrepancy between the plea judge's eighty percent instruction and the eighty-five percent actually required did not click with her at the time. (App. p. 131, ll. 19-22; p. 132, ll. 2-4). Plea Counsel testified she advises her clients to be prepared to serve an entire sentence with regard to parole as opposed to specifically eighty-five percent and the amount of time they will serve is ultimately a decision of the Department of Corrections. (App. p. 133, ll. 3-8). Plea Counsel also rebutted Petitioner's testimony when she testified she specifically told Petitioner kidnapping carried a sentence of up to 30 years. (App. p. 142, ll. 1-2; App. p. 120, ll. 24-25 – p. 121, ll. 1-11). Plea Counsel also testified she informed

Petitioner after research that she did not believe there were any defenses in his case. (App. p. 146, ll. 6-9).

Closing Arguments from PCR Hearing

The PCR court heard closing arguments from PCR counsel and the State. PCR counsel restated the fact that Petitioner was mistakenly told he would be eligible for parole after serving eighty of his sentence when he would actually have to serve at least eighty-five percent. (App. p. 151, ll. 1-6). PCR counsel also referenced Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001), which requires a challenger of a guilty plea on the grounds of erroneous advice to show both error and prejudice. PCR counsel then argued Petitioner was prejudiced by the error because he would have gone to trial if not for the misinformation. (App. p. 151, ll. 7-25 – p. 152, ll. 1-2).

The State argued Petitioner's application should be denied for failing to meet his burden of proof. (App. p. 155, ll. 16-18). The State noted concerns about Petitioner's credibility given the contradictions between Petitioner's testimony and documents in the record. (App. p. 155, ll. 19-25 – p. 156, ll. 1-5). Furthermore, the State also referenced Roscoe, echoing the opinion's reasoning that given the potentially very long sentences, it is not very credible that Petitioner would have proceeded to trial based on a mere 1.8¹ year longer sentence before being considered for parole. (App. p. 156, ll. 6-9).

Order of Dismissal

The PCR judge issued an order of dismissal on October 1, 2014. The PCR judge found Petitioner failed to meet his burden of proof as to all allegations of ineffective assistance of

¹ This was likely a miscalculation as 5% of a 20 year sentence actually only amounts to a one year difference rather than 1.8.

counsel. (App. p. 167). The PCR court noted the conflicting testimony about whether Petitioner was properly advised on the kidnapping charge and found Plea Counsel's testimony to be more credible. (App. p. 168).

As to the eighty percent versus eighty-five percent instruction, the PCR court noted that the plea judge informed Petitioner that parole eligibility is determined by state law and the parole board decides if an inmate will receive early release. (App. p. 168). Ultimately, the PCR judge found the 80% versus 85% issue to be a merely collateral matter that would not constitute an error such that a PCR should be granted. (App. p. 168). The court also found Petitioner's testimony that he would have proceeded to trial but for Counsel's advice regarding sentencing not credible. The court found Plea Counsel properly advised Petitioner to take the plea offer in light of the "serious charges" and "substantial time" resulting from Petitioner's altercation with the police, as well as the fact that the victimized police officers were present at the plea and prepared to testify against Petitioner. (App. pp. 168-169).

STANDARD OF REVIEW

This Court must affirm the post-conviction relief (“PCR”) court’s factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, this Court “gives great deference to the [PCR] court’s findings of fact and conclusions of law.” Id. (quoting Dempsey, 363 S.C. at 368, 610 S.E.2d at 814).

In a PCR action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant 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 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry, 300 S.C. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel’s performance was deficient. Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at

690). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, a defendant who pleads guilty on advice of counsel may collaterally attack his plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, he would not have pleaded guilty. Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (citing Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997)).

Statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976). In determining guilty plea issues, the court should consider the guilty plea transcript as well as evidence at the PCR hearing. Holden v. State, 393 S.C. 565, 713 S.E.2d 611 (2011); Rolen v. Sate, 384 S.C. 409, 683 S.E.2d 471 (2009); Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000); Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

ARGUMENT

- I. **The record contains evidence of probative value to support the PCR court's finding that Petitioner failed to satisfy his burden of proving Counsel was ineffective where Petitioner freely and voluntarily pleaded guilty for a negotiated sentence of twenty years with a full understanding that any early release was not guaranteed after being advised by Counsel to be prepared to serve a day-for-day sentence and to avoid a potential one-hundred-and-ten year sentence at trial.**

This Court should affirm the PCR court's ruling because there is ample evidence of probative value in the record to support the PCR Court's finding that Petitioner failed to meet his burden of proof of ineffective assistance of counsel. To satisfy the "prejudice" prong of Strickland, Petitioner must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty. Id.

First, it must be noted that the PCR court found Petitioner's testimony that he would not have pled guilty but for Plea Counsel's advice not credible. (App. p. 168). The PCR judge was in the best position to determine credibility and, as such, his findings must be given great deference. Drayton v. Evatt, 312 S.C. 4, 11 430 S.E.2d 517, 521 (1993) (citing S.C. Dept. of Social Services v. Forrester, 282 S.C. 512, 320 S.E.2d 39 (Ct. App. 1984) ("We give great deference to a judge's findings where matters of credibility are involved since we lack the opportunity to directly observe the witnesses.")).

Petitioner's charges of kidnapping and armed robbery were both "no parole" offenses. 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). Kidnapping is punishable by a maximum of thirty years according to S.C. Code Ann. § 16-3-910. Armed robbery is also punishable by a maximum of thirty years according to S.C. Code Ann. § 16-11-

330(A) (1976). Pursuant to S.C. Code Ann. § 24-13-150(A) (1976), 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. During the guilty plea, Petitioner was mistakenly advised by Plea Counsel and by the plea court he would be eligible for early release after serving eighty percent of his sentence.

This Court has recognized that while erroneous parole advice from a judge (or counsel) could conceivably mislead a defendant to his detriment, it would be “wholly impractical” to require the automatic reversal of the guilty plea without “something more.” Hunter v. State, 316 S.C. 105, 109, 447 S.E.2d 203, 205 (1994) *abrogated on unrelated grounds by Simpson v. State*, 329 S.C. 43, 495 S.E.2d 429 (1998). A defendant who is actively misinformed about parole eligibility still must prove that his guilty plea was induced by the misinformation. Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983). In Griffin, this Court affirmed the denial of PCR when counsel advised Griffin he would be eligible for parole in ten years, when in fact he would not be eligible until the service of twenty years. This Court considered counsel’s testimony about the weight of evidence against Griffin and reasoned that Griffin failed to prove he relied on the misinformation. Id. at 621.

In the case at bar, Plea Counsel also testified to the weight of evidence against Petitioner, including Petitioner’s admission that he took the gun from the police officer. (App. p. 134, ll. 12-23). Petitioner has likewise failed to demonstrate that he would have proceeded to trial if not for the erroneous advice, other than his conclusory and incredible testimony that had he known he had to serve one more year before being eligible for early release, he would have proceeded to trial on the original charges. Moreover, the erroneous statements given by Plea Counsel and the

plea judge in this case only amounted to a difference of one year in Petitioner's release eligibility while this Court denied relief in Griffin when the difference amounted to ten years.

In Hunter, *supra*, Hunter pleaded guilty to armed robbery and two counts of assault with intent to kill and was sentenced to twenty-one years and seven years, respectively, to run consecutively. The plea judge correctly explained the minimum criteria to be eligible for parole per statute. However, Hunter was not actually eligible for parole. This Court found the erroneous advice did not render Hunter's guilty plea involuntary or unknowing. This Court recognized that there may be instances where erroneous advice does indeed mislead a defendant to his detriment and require the reversal of a guilty plea. However, as this Court clarified, "It would be wholly impractical to maintain a rule which requires the automatic reversal of a guilty plea without something more." Hunter, 316 S.C. at 109.

Here, Petitioner was only misadvised about the minimum amount of time to be served before parole eligibility by a mere eighty percent of a twenty year sentence. This does not rise to the "something more," element required by Hunter, especially considering Hunter denied relief when Hunter was advised that he would be eligible for parole on a thirty-five year aggregate sentence when he actually was not eligible for parole at all. *Id.* at 108.

In Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001), this Court addressed the issue of whether a defendant's guilty pleas were rendered unknowing and involuntary due the trial court's erroneous advice that the maximum penalty for armed robbery was twenty-five years, when the maximum was actually thirty years. In Roscoe, this Court held the petitioner failed to demonstrate that his guilty plea resulted from the erroneous advice that the maximum sentence for his armed robbery charge was five years less than it actually was. This Court reasoned that it "strains credulity" to suggest that Roscoe would have proceeded to trial rather than pleading

guilty if he knew that he was potentially facing seventy years rather than seventy-five years. Id. at 21.

Roscoe is analogous to the case at bar. In this case, Petitioner was also misadvised about details of his sentence by a proportionally modest amount of time relative to his potential maximum sentence for all his charges. Moreover, Roscoe addressed a misstatement of an actual sentence length while Petitioner's allegations address the misstatement of a mere collateral consequence of his sentence.

Petitioner, like the applicants in Griffin, Hunter, and Roscoe, has failed to demonstrate that he would not have pleaded guilty but for the erroneous regarding parole eligibility. Therefore, this Court should likewise deny relief on Petitioner's allegations. As the PCR Court correctly observed, Petitioner faced serious charges and substantial sentences resulting from his altercation with police officers. (App. p. 168). Petitioner was charged with armed robbery and possession of a weapon during a violent crime, kidnapping and another possession of a weapon during a violent crime, two counts of ABHAN, pointing and presenting a firearm, and resisting arrest with a deadly weapon. As part of the plea agreement, the State agreed to dismiss the charges for kidnapping and resisting arrest with a deadly weapon. (App. pp. 5-6; pp. 173-184). Petitioner was forty-five years old at the time of his guilty plea. (App. p. 118, ll. 2-3). The PCR court observed Petitioner would have faced a potential sentence of one hundred and ten total years had he proceeded to trial, as opposed to his negotiated sentence of twenty years for pleading guilty. (App. pp. 122-123).

Moreover, the PCR court found Petitioner was properly advised to plead guilty, especially in light of the fact that the victims were police officers and present at the plea and were prepared to testify against Petitioner. (App. p. 169). Therefore, the argument that Petitioner

would not have pleaded guilty if he would have been advised that he would not be parole eligible until serving eighty-five percent rather than eighty percent of his sentence is not credible or even persuasive. The discrepancy in the percentage amounts to a mere one year difference – seventeen years rather than sixteen years. It is simply not credible, as the PCR court found, that Petitioner would plead guilty to the same twenty year sentence if he was eligible for early release in sixteen years, but not if he would be eligible for early release in seventeen years when Petitioner otherwise would have risked a one-hundred-and-ten year sentence by going to trial. (App. p. 169). This Court should not disturb the PCR court’s credibility finding. Drayton, 312 S.C. at 11430 S.E.2d at 521. In fact, Petitioner testified at the PCR hearing that he decided to take the plea deal because he did not want to take any chances risking the rest of his life in prison. (App. p. 85, ll. 10-12). Importantly, the PCR court found

Furthermore, Petitioner pleaded guilty with the knowledge that he was not guaranteed parole at any time before the expiration of his twenty year sentence. When the plea judge first asked Petitioner whether he was promised anything in exchange for pleading guilty, Petitioner replied, “A twenty year sentence that, by law, something that passed last summer, I will only have to do sixteen years or something.” (App. p. 15, ll. 11-15). The plea judge promptly and explicitly informed Petitioner the State could not promise him an early release and then went on to explain parole in detail. (App. p. 15, ll. 16-18). The plea judge explained to Petitioner the concept of early release,² as well as the fact that parole is not a guarantee and solely in the discretion of the parole board, at least three times during the plea hearing. (App. p. 15, ll. 19-25 –

² The terms “parole” and “early release” are often used interchangeably even by inmates. For all practical purposes, they are the same.

p. 16, ll. 1-9; p. 17, ll. 6-18; p. 18, ll. 12-25 – p. 19, ll. 1-8). Also, as Plea Counsel testified at the PCR hearing, she always talks with clients about parole eligibility and leaves them with the fact that the determination is up to the parole board. She also warns her clients to be prepared to serve the entire sentence. (App. p. 129, ll. 5-8).

While Plea Counsel conceded to mistakenly advising Petitioner he would be eligible for early release after eighty percent of his sentence, this mistake was nevertheless cured by both Plea Counsel's own advice that early release is never guaranteed and to be prepared to serve the entire sentence as well as the plea judge's repeated instructions to Petitioner that he was in no way guaranteed early release. The plea judge also repeatedly explained to Petitioner his armed robbery charge was a "no-parole" offense. (App. p. 18, ll. 7-11, p. 21 ll. 20-24). Petitioner himself affirmed to the PCR judge, "I got you," after repeated explanations from the plea judge and Plea Counsel. (App. p. 19, l. 11). In fact, at the PCR hearing, Petitioner testified, "parole is never a guarantee." (App. p. 115, ll. 20-21). Therefore, the record demonstrates that Petitioner was well aware of the fact that he would not be guaranteed an early release regardless of the eighty percent misstatement. Petitioner's knowledge that parole after a percentage of his sentence was not even guaranteed is more evidence that the discrepancy between eighty percent and eighty-five percent minimum that he would be required to serve did not induce Petitioner to plead guilty. Also, it further demonstrates the lack of credibility in Petitioner's testimony that his understanding was he would have to serve no more than sixteen years and possibly less. (App. p. 94, ll. 6-9).

It must also be noted that there was a substantial likelihood that Petitioner would have been convicted of his charges had he gone to trial. Where there is overwhelming evidence of guilt, even a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314

S.C. 245, 442 S.E.2d 604 (1994); Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991). At the PCR hearing, Plea Counsel testified that Petitioner admitted to taking the gun from the officer at the traffic stop. (App. p. 134, ll. 12-23). The victimized police officers were present the day of the hearing and prepared to testify. Not only did Petitioner admit to taking the gun from the officer, but Petitioner also testified at his plea hearing that he was not aware of any defenses to his charges. (App. p. 9, ll. 13-16). Plea Counsel also testified at the PCR hearing she did not believe there to be any defenses to the charges after conducting her research and investigation. (App. p. 146, ll. 6-7). Furthermore, Petitioner four times testified at the plea hearing he was pleading guilty because he was guilty. (App. p. 24, ll. 13-14, p. 25, ll. 5-10, ll. 21-23, p. 26, ll. 13-15). The record reveals Petitioner was not prejudiced by the eighty percent misstatement because Petitioner was aware there was a clear probability he would have been convicted of his charges had he proceeded to trial.

Petitioner's cites to Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989) to in support of his argument. In Hinson, the petitioner was advised by his attorney that he would be eligible for parole after ten years, when in fact he would not be eligible for parole for twenty years. While this Court granted relief in Hinson, Hinson was an anomaly and distinguishable from this case because Hinson actually provided credible evidence, testimony from his co-defendant's trial attorney, that he would not have pleaded guilty but for the erroneous advice which led him to believe he would be parole eligible after **ten** years rather than **twenty**. See Roscoe, 345 S.C. at 22 (distinguishing Hinson). In this case, the only evidence of prejudice was Petitioner's incredible testimony that but for one year, he would have proceeded to trial and faced one-hundred-and-ten years.

Furthermore, Petitioner's reliance on Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991), is misplaced. In Brown, this Court held that a defendant's plea was not made knowingly and voluntarily when the trial judge informed him that he would be eligible for parole after serving only one-third of his eighteen year sentence. However, because the defendant had a prior conviction for a violent crime, he was completely ineligible for parole. In Hunter, this Court limited the holding from Brown by requiring "something more" to demonstrate detriment to the defendant. Hunter, 316 S.C. at 109. Even if the holding in Brown had not been limited by Hunter, Brown would still not be analogous to the case at bar. Here, the advice given to Petitioner about his early release eligibility was only inaccurate by a year, while Brown was advised he would be eligible for parole after serving six years of an eighteen year sentence when, in fact, he was not eligible for parole at all. The limitation of Brown in Hunter, however, attenuates the application of Brown to the present case even further because Petitioner cannot objectively demonstrate he relied on the misinformation.

Petitioner's reliance on Strader v. Garrison, 611 F.2d 61 (4th Cir. 1979), is misplaced. The court in Strader held that when a defendant inquires about parole eligibility, his lawyer *grossly* misinforms him, and the defendant relies on that misinformation, he is deprived of his right to counsel. Id. (Emphasis added). Here, however, Plea Counsel did not *grossly* misadvise Petitioner about his parole eligibility. The case at bar is not analogous to Strader, in which counsel misadvised the defendant that an additional thirty year sentence for armed robbery and five to ten year sentence for conspiracy after escaping from prison would not impact his parole eligibility date from an earlier conviction. However, Strader's parole eligibility date would have to be recalculated at twenty-five percent of his new thirty-five to forty year sentence. Here, Plea Counsel mistakenly advised Petitioner he would be eligible for early release after merely five

percent less than the minimum actually required by statute of his twenty year sentence, a one year discrepancy, when Petitioner stood to face a sentencing total of one-hundred-and-ten years if he had proceeded to trial. The case at bar is a far cry from the gross misinformation in Strader.

Therefore, relevant case law as well as the factual record demonstrates Petitioner was not prejudiced by the misstatement of the law at his plea hearing. Accordingly, the record contains ample evidence of probative value to support the PCR Court's finding that Petitioner has failed to meet the burden of proof because Petitioner cannot prove that he was prejudiced by any alleged deficiencies.

CONCLUSION

The record fully supports the PCR court's finding that Petitioner failed to show Counsel's performance was deficient or he was prejudiced by any alleged deficient conduct. For the foregoing reasons, Respondent respectfully requests that this Court affirm the PCR court's ruling.

Respectfully submitted,

ALAN WILSON
Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General
S.C. Bar No. 102524

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

By: 
ATTORNEYS FOR RESPONDENT

October 13, 2017.

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE SUPREME COURT

The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2014-002285

TERRANCE MCCALL,

Petitioner,

vs.

THE STATE SOUTH CAROLINA,

Respondent.

CERTIFICATE OF COUNSEL

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

ALAN WILSON
Attorney General

VALARIE GARCIA GIOVANOLI
Assistant Attorney General

By: 

Valarie Garcia Giovanoli
SC Bar#102524
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

October 13, 2017

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE SUPREME COURT

The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2014-002285

TERRANCE MCCALL,

Petitioner,

vs.

THE STATE SOUTH CAROLINA,

Respondent.

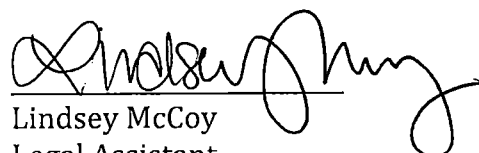
PROOF OF SERVICE

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

**Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211**

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

This 13th day of October, 2017.


Lindsey McCoy
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-2227