

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Chesterfield County

Honorable Roger E. Henderson, Circuit Court Judge

DAMEION J. RIVERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002353

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

INDEX

INDEX i

ISSUES PRESENTED.....1

STATEMENT2

ARGUMENT4

CONCLUSION.....17

ISSUES PRESENTED

I. Did the PCR judge err in denying Petitioner relief, where plea counsel failed to perform an adequate pre-trial investigation, where counsel failed to interview two witnesses who provided statements to law enforcement, where information obtained through the interviews would have altered the advice given by counsel to plead guilty, and where counsel failed to obtain one of the witness statements and thereby provided ineffective assistance of counsel?

II. Did the PCR judge err in failing to order a new trial for Petitioner where the testimony of Billy Lee Lisenby, supporting a claim of self-defense, satisfied the threshold requirements of after-discovered evidence in light of the fact that Lisenby never provided a formal statement to law enforcement?

III. Did the PCR judge err in denying Petitioner relief, where Petitioner's plea was entered involuntarily, unknowingly, and unintelligently, where counsel advised him that he would only be required to serve 65% of his sentence, where the actual requirement was 85%, a difference of approximately four years on Petitioner's nineteen year sentence?

STATEMENT

Petitioner was indicted for murder in November 2007 and possession of a weapon during the commission of a crime in December 2007 by a Chesterfield County grand jury App. 300 – 303.

He proceeded to trial on August 30, 2010 before the Honorable Paul M. Burch and a jury. App.1. Kernard E. Redmond and Adam Foard appeared on behalf of the State, and Paul Cannarella represented Petitioner. Following a pre-trial hearing and the denial of both a suppression motion and a motion for a continuance, Petitioner pled guilty to voluntary manslaughter the following day. App. 78; App. 80 l. 21 – App. 81 l. 3. Judge Burch accepted the plea. App. 86 ll. 13 – 16.

Petitioner was sentenced to nineteen years' incarceration on the voluntary manslaughter charge and five years concurrent on the weapons charge. App. 124 ll. 17 – 19.

Petitioner did not pursue a direct appeal. He filed an application for post-conviction relief on or about June 9, 2011. App. 127. It contained allegations of ineffective assistance of counsel and involuntary guilty plea, including a claim that counsel “failed to conduct an adequate pre-trial investigation to prepare for a trial defense.” App. 129. A handwritten Motion for Abeyance and Request for Transcript and Memorandum in Support for Motion for Abeyance and Request for Transcript accompanied the application. App. 133 – App. 139. An Amendment to the PCR application was filed on or about January 11, 2013 through counsel. App. 140 – 141. A Second Amendment to the PCR application was filed on or about May 29, 2013. App. 142 – 143. A Second Amended PCR Application was filed on December 23, 2015. App. 144 – 145. On January 4, 2016, a Supplement to Second Amended PCR Application was filed. App. 146 – 147.

The State made its Return on or about August 19, 2011. App. 148 – 154. An evidentiary hearing was held before the Honorable Roger E. Henderson on January 11, 2016. App. 155. Andrew F. McLeod represented Petitioner, and Jessica E. Kinard appeared on behalf of the State. Petitioner, counsel, and two fact witnesses testified at the hearing.

Judge Henderson issued an Order of Dismissal on or about July 8, 2016. App. 260 – 270. He found, in very broad terms, that Petitioner failed to prove that he received ineffective assistance of counsel. App. 267 – 268.

Counsel for Petitioner filed a Motion under Rule 59(e), SCRPC, on September 9, 2016. The written motion referenced an Exhibit A which was attached to the Motion. App. 272 – 274.

A hearing on the Motion was held on July 24, 2017 before the Honorable Roger E. Henderson. App. 276. The same counsel was present. The parties and the PCR court discussed the after-discovered evidence standard. Judge Henderson issued a Form 4 Order denying the Motion. App. 286. An Order Denying Motion Pursuant to 59(e) was filed on October 19, 2017. App. 288. An Amended Order Denying Motion Pursuant to 59(e) was filed on November 2, 2017. App. 294.

This Petition follows.

ARGUMENT

I. The PCR judge erred in denying Petitioner relief, where plea counsel failed to perform an adequate pre-trial investigation, where counsel failed to interview two witnesses who provided statements to law enforcement, where information obtained through the interviews would have altered the advice given by counsel to plead guilty, and where counsel failed to obtain one of the witness statements and thereby provided ineffective assistance of counsel.

Relevant facts

At Petitioner's guilty plea, the State indicated that Petitioner was arrested following an incident on August 27, 2007 in or near Pageland, South Carolina. App. 87 l. 16 – App. 89 l. 10. Law enforcement arrived following reports of a shooting at a place called Pop's Game Room. Id. The decedent, Tavish Dunlap, suffered a gunshot wound to his abdomen. He was airlifted to a medical center in North Carolina but passed away. Id. According to the State, witnesses at the scene reported seeing Petitioner fire at the decedent. Petitioner was then arrested. Id.

There were multiple witnesses at Pop's in August 2007. Counsel for Petitioner, however, did not interview many of them. One of those witnesses, Kory Little, provided a statement to law enforcement. Little advised law enforcement that he saw Petitioner step out of a car with a gun. App. 202 ll. 4 – 18. At the evidentiary hearing in Petitioner's matter, however, Little explained:

That was a coerced statement because the Pageland Police Department forced me to do it. They made my write what they wanted me to write. They wouldn't let me go to the restroom. They wouldn't let me ... get [] food ... and they held me in there forever until I wrote ... what they wanted me to write. But everything that I wrote in that statement was not true. It was false.

App. 202 l. 19 – App. 203 l. 2.

Little testified that law enforcement forced him to suggest that Petitioner was the one who shot the decedent. App. 203 ll. 20 – 24. He recanted his statement and clarified that he was unaware that Petitioner was at Pop's. App. 203 l. 25 – App. 204 l. 9. Petitioner learned of this fact after he entered his guilty plea. App. 179 l. 14 – App. 180 l. 2.

Little stated that Petitioner's trial-turned-plea counsel never interviewed him. App. 204 l. 10 – App. 205 l. 13. Had anyone contacted him about his statement, Little would have explained fully what the police forced him to do, including the coercion and threats issued by the law enforcement officers. Id.

A second witness, Billy Lee Lisenby Jr., was at Pop's on the night of August 27, 2007. App. 209 ll. 5 – 11. He offered evidence that the decedent was armed at the time of the shooting. App. 209 l. 12 – App. 211 l. 21. Lisenby spoke with Larry Brown, an officer with the Pageland Police Department in January 2008. App. 212 l. 2 – App. 213 l. 12. Because Lisenby was arrested and incarcerated, he never heard back from Brown. Id. As a result, Lisenby never provided a statement and was never contacted. App. 213 ll. 13 – 21.

Lisenby and Petitioner were housed together at Lee Correctional. App. 214 l. 9 – App. 215 l. 21. Lisenby realized that Petitioner was incarcerated for allegedly shooting the decedent, and Petitioner asked if Lisenby would testify on his behalf. Id. Lisenby reiterated that the decedent was armed the night of the shooting. App. 215 l. 16 – 21; App. 218 ll. 2 – 8.

Petitioner hired counsel after he was arrested, and the two met approximately three times. App. 165 ll. 7 – 14. Counsel admitted that he did not speak with Little. App. 224 ll. 9 – 10. He attempted to justify this decision by assuming that Little would have recited his exact testimony from the statement:

Well, I probably wouldn't get anything but a regurgitation of what he already had given in a statement. I mean, I don't necessarily try to interview people who I know are going to be against me, are going to testify against me in court for the State.

App. 224 ll. 11 – 17.

Counsel admitted that if he had known that Little was willing to recant, he would have advised Petitioner differently, a determination he could have made only after interviewing Little.

App. 225 ll. 5 – 15.

Discussion

The PCR court's findings of fact are entitled to deference and will be upheld when there is any evidence of probative value to support them. Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013). Reversal is warranted where no evidence of probative value supports the PCR court's decision. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999). Questions of law, are reviewed *de novo*, and this Court will reverse when the PCR court's decision is controlled by an error of law. Jordan, supra.

“In order to establish a claim for ineffective assistance of counsel, the [petitioner] must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the [petitioner's] case.” Speaks v. State, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). The Strickland test requires a petitioner to make a showing on both prongs in order to prove ineffective assistance of counsel. Strickland, 466 U.S. at 687.

Prior to trial, counsel informed Petitioner that the State anticipated using Little to show that Petitioner initiated the situation. App. 174 ll. 17 – 23. Had Petitioner known that law enforcement coerced Little's statement, he would have pleaded not guilty and gone to trial. App.

180 ll. 3 – 23. Had counsel interviewed Little, Petitioner would have been able to “dispute the State’s theory that [he] brought on [the] initial difficulty by stepping out [of] the car with a gun because the only testimony that they plan[ned] to use [to show he] brought [the] initial difficulty ... was Kory Little’s statement.” Id. However, this was foreclosed as a possibility due to counsel’s failure to interview Little. Id.

Another statement was provided by a witness named Kenneth Louallen.¹ App. 175 ll. 4 – 12. Petitioner discovered this witness by reading the incident report. Id. Counsel never spoke with Louallen. Id. Additionally, the State did not provide Louallen’s statement to counsel. App. 175 l. 13 – App. 176 l. 4. Counsel never moved for a Brady² violation or insisted on obtaining a copy of the statement. Id.

Petitioner did not think that counsel ever spoke with Louallen. App. 178 ll. 1 – 17. When asked why he expressed his satisfaction with counsel at his guilty plea, Petitioner explained that he was under the impression that counsel had contacted and/or interviewed everyone. App. 193 ll. 2 – 18. Petitioner was informed that counsel had done that: “He’s suppose[d] to ... contact everybody who ... [would] have been an eyewitness in the case.” Id.

Counsel confirmed that his advice to Petitioner would have been different had he known about Little’s actual testimony. App. 234 ll. 3 – 23. The testimony which would have affected his advice was not ascertained by counsel, even though the names of these witnesses were available to counsel. He provided ineffective assistance in this regard, and the resulting prejudice manifested itself in Petitioner’s guilty plea, entered into without full knowledge of the facts, witness testimony, and sentence specifics.

¹ A scrivener’s error in the pre-trial transcript mistakenly referred to this witness as Kenneth Burrell. App. 176 ll. 5 – 21.

² Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

II. The PCR judge erred in failing to order a new trial for Petitioner where the testimony of Billy Lee Lisenby, supporting a claim of self-defense, satisfied the threshold requirements of after-discovered evidence in light of the fact that Lisenby never provided a formal statement to law enforcement.

Petitioner discovered that Lisenby witnessed the shooting while the duo were in SCDC custody. App. 182 l. 16 – 183 l. 20. Petitioner learned that Lisenby observed the decedent pull out a gun and walk towards Petitioner while yelling aggressively. Id. Petitioner indicated that had he or his attorney known about Lisenby, a self-defense claim could have been established. Id.

Counsel did not want to risk Petitioner receiving a life sentence “unless [he] had somebody put the gun in Tavish Dunlap’s hand,” a task achieved through the testimony of Lisenby. App. 223 ll. 16 – 23. Counsel testified that “I’d [have] gone to trial” if he had a compelling reason to believe that the decedent had a weapon. App. 225 l. 16 – App. 226 l. 9. Counsel confirmed that his advice to Petitioner would have been different had he known about Lisenby’s testimony. App. 234 ll. 3 – 23.

The South Carolina Uniform Post-Conviction Procedure Act (PCR Act) allows an applicant to file an application for relief “[i]f the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence.” S.C.Code Ann. § 17-27-45(C) (2014) (allowing applications to be filed within one year of the date of actual discovery of the facts or from the date when the facts “could have been ascertained by the exercise of reasonable diligence”).

In Jamison v. State, 410 S.C. 456, 765 S.E.2d 123, (2014), this Court concluded that the traditional five-factor newly discovered test is not the proper test for analyzing whether a PCR

applicant is entitled to relief following a guilty plea. This Court established the following standard:

[W]hen a PCR applicant seeks relief on the basis of newly discovered evidence following a guilty plea, relief is appropriate only where the applicant presents evidence showing that (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the “interest of justice” requires the applicant's guilty plea to be vacated. In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.

Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014)

In State v. South, 310 S.C. 504, 508, 427 S.E.2d 666, 669 (1993), this Court held the 1989 discovery that the defendant had a brain tumor in 1983, at the time of his trial, was not after-discovered evidence that probably would change the result of a new trial. The after-discovered evidence was a tumor located in the pineal gland of the brain. Id., at 506, 427 S.E.2d at 668. South’s expert testified he was legally insane at the time of the crime because he was unable to know right from wrong and to control his actions. The expert testified that intoxication may render a person unable to know the difference between right and wrong. This Court held the expert’s conclusions were “not in accord with South Carolina’s standard” regarding insanity. Id., at 508, 427 S.E.2d at 669.

Additionally, South presented another expert who opined the brain tumor “may” have had additional effects on South, who suffered from post-traumatic stress disorder due to his abusive childhood and diminished mental capacity as a result of substance abuse. In the expert’s opinion, South’s mental condition and substance abuse likely had an adverse effect on his ability to think rationally and act in conformity with the law. This Court noted that South Carolina had rejected the

“irresistible impulse” test as the definition of insanity. Id. Finally, South’s trial counsel testified that insanity may have been a viable defense, but he had never discussed it with South because South claimed he was innocent. Trial counsel further testified that he would have used the presence of the tumor as a mitigating circumstance during South’s capital trial. Id., at 508-509, 427 S.E.2d at 669. Thus, this Court concluded that South failed to show that he was legally insane as a result of the tumor and that evidence of the tumor’s presence probably would change the result of a new trial. Id., at 509, 427 S.E.2d at 669.

In State v. Wells, 249 S.C. 249, 263-264, 153 S.E.2d 904, 911-912 (1967), this Court denied Wells’ motion for new trial where the evidence would not probably change the result if a new trial were had and it was merely cumulative and impeaching. Wells was convicted of conspiracy to commit abortion. Id., at 252, 153 S.E.2d at 905. Wells presented an affidavit from Larry Eitel, an intimate friend of the woman on whom an attempted abortion had been performed. Id., at 262, 153 S.E.2d at 911. According to Eitel, the woman stated she received B-12 shots from Wells, who refunded her money when he learned she wanted an abortion. Further, the woman confided in Eitel that her mother referred her to a doctor for the abortion, not Wells. Id. This Court held Eitel’s testimony would not likely change the result if a new trial were had because Eitel lacked credibility in light of his extensive criminal record. Id., at 263, 153 S.E.2d at 911. Additionally, this Court held the testimony was cumulative and/or impeaching in light of the other evidence presented at trial. The woman testified that she received certain injections from Wells to bring on an abortion. Wells and his staff testified she received B-12 injections. Thus, this Court concluded Eitel’s testimony would be merely impeaching of the woman and cumulative to that of Wells and his staff. Id., at 263-264, 153 S.E.2d at 911-912.

Petitioner is entitled to a new trial based on after-discovered evidence. Lisenby's presence at Pop's was unknown to anyone other than Larry Brown, and the record does not contain any evidence that he divulged this information to anyone. As a result, the first prong is satisfied. Lisenby's presence at the scene and the resulting incidents he witnessed were discovered after the entry of the plea and could not have been discovered prior to the entry of the plea. Lisenby's name was not recorded in the incident report, and Petitioner did not appear to know that Lisenby was there. Even through due diligence, counsel could not have discovered the names and contact information for every individual for everyone who was at Pop's on August 27, 2007. Lisenby did not come forward until after Petitioner was sentenced and incarcerated.

The PCR court found that because both witnesses were at the scene of the incident, this evidence could have been discovered beforehand with due diligence. The record does not support this contention. There is testimony from Kory Little that some law enforcement officials were either fired or resigned in recent years. There is no evidence that law enforcement provided Lisenby's name to the State or to counsel, and his name does not appear in the incident report.³ App. 257 – 259. Thus, the PCR court's finding that counsel could have discovered the existence of Lisenby as a witness is an erroneous finding of fact.

The evidence presented by Lisenby weighs in favor of a new trial. The interests of justice require that the guilty plea be vacated. The record is replete with evidence that counsel failed to interview witnesses and conduct an adequate pre-trial investigation. Lisenby's testimony would have assisted counsel with the preparation of a self-defense claim. The PCR court found that "Applicant desires vacation of his sentence for the opportunity to be potentially acquitted by a jury." App. 298. Petitioner proved at the evidentiary hearing that had he been aware of Lisenby's

³ The only witness names which appeared in the incident report are Kory Little, Eltoya Blakeney, Kenneth Louallen, and Michael Dunlap.

testimony, he would have gone to trial. As a result, the interests of justice weigh in favor of granting him a new trial, where Lisenby's testimony would have established a self-defense claim. Counsel would have "rolled [the] proverbial dice, if you will, if [the decedent] had a gun." App. 223 ll. 7 – 15.

III. The PCR judge erred in denying Petitioner relief, where Petitioner's plea was entered involuntarily, unknowingly, and unintelligently, where counsel advised him that he would only be required to serve 65% of his sentence, where the actual requirement was 85%, a difference of approximately four years on Petitioner's nineteen year sentence.

The PCR court erred in holding petitioner could not prove deficient performance or prejudice under the two-pronged approach of Strickland v. Washington, 466 U.S. 668 (1984). Petitioner's guilty plea was unknowing and unintelligent because he relied on the erroneous advice of his attorney. "The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985). "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012). "Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel." Padilla v. Kentucky, 130 S.Ct. 1473, 1480-81 (2010) (internal quotations omitted). The Supreme Court has "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under Strickland." Id. at 1481 (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)).

Counsel advised Petitioner that he would only be required to serve 65% of the voluntary manslaughter sentence he received. App. 171 ll. 13 – 22; App. 173 ll. 5 – 8. Petitioner testified that he did not become aware of the actual 85% requirement until he sat down with his SCDC caseworker after being sentenced and incarcerated. App. 171 l. 23 – App. 172 l. 2.

Petitioner pled guilty based upon the understanding that he was only going to be required to serve 65% of his sentence. App. 173 ll. 9 – 13. The difference between 85% and 65% is approximately four years in Petitioner’s case based upon a nineteen year sentence. Petitioner indicated that had he been advised that he would have been required to serve 85% of the voluntary manslaughter charge, he would have gone to trial. App. 173 ll. 14 – 23. He opined that his plea was therefore “involuntarily and unintelligently given because [he] didn’t have a full understanding of the consequences of [the] plea based on that penalty.” App. 174 ll. 1 – 3.

During the plea colloquy, Petitioner answered in the negative when asked whether counsel had explained the “85 Percent Rule or anything like that.” App. 85 ll. 19 – 24. The plea court, rather than clarifying, responded:

I don’t know what y’all discussed. That’s really not any of my concern. I just want you to know that I am in no way advising you on that because I can’t keep up with all the rules and regulations up there. But as far as I’m concerned whatever sentence you get you could actually expect [to] serve the entire amount of it as far as the Court is [] concerned because I would not dare try to advise you as to what the Department of Corrections might or would do[.]

App. 85 l. 25 – App. 86 l. 9. Counsel testified that he did not step in and clarify the actual percentage. App. 233 ll. 1 – 23. He admitted that he should have spoken up. Id.

“In the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered.” Taylor v. State, 404 S.C. 350, 360, 745 S.E.2d 101, 102 (2013). With regard to a PCR action, “[s]imply put, the first inquiry is whether trial counsel’s advice was deficient.” Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485

(1991). If a petitioner successfully proves his or her guilty plea was based on inaccurate sentencing advice from counsel, the deficiency prong has been satisfied. Id. at 542–43, 402 S.E.2d at 485 (finding counsel's sentencing advice was “obviously defective” because it was contrary to the sentencing ranges possible under the indictments and the law). However, “the transcript of the guilty plea hearing will be considered to determine whether information conveyed by the plea [court] cured any possible error made by counsel.” Burnett v. State, 352 S.C. 589, 592, 576 S.E.2d 144, 145 (2003); id. at 593–94, 576 S.E.2d 144, 576 S.E.2d at 146 (finding any possible misunderstanding as to the petitioner's sentence was cured by the colloquy during the actual plea hearing).

This Court has found deficient performance where attorneys provided erroneous advice that induced a guilty plea. In Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989), the defendant’s trial attorney told him he would be eligible for parole after serving ten years when, in reality, defendant would have to serve twenty years. Id. at 457-58, 377 S.E.2d at 339. This Court found such advice deficient and reversed the PCR court. Id.; see also Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991) (reversing guilty plea on PCR where attorney misadvised defendant on maximum exposure at sentencing).

This case is similar to Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988). In Jordan, the defendant pled guilty based upon the expectation that the solicitor would neither recommend nor oppose a sentence of probation. Id. at 53, 374 S.E.2d at 684. At the plea, a different solicitor represented the State and vigorously opposed probation. Id. This Court found plea counsel’s failure to move to withdraw the sentence constituted ineffective assistance of counsel and reversed. Id. at 54-55, 374 S.E.2d at 684-85.

Petitioner maintained that counsel erroneously informed him before his plea that he would be required to serve only 65% of his sentence. Had plea counsel informed Petitioner that he was required to serve 85% of his sentence, he would have gone to trial instead of pleading guilty. The plea transcript contains a contemporaneous record of Petitioner's surprise upon learning of the previously undisclosed requirement.

Under the second step of the inquiry, the prejudice prong “focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). “In other words, in order to satisfy the ‘prejudice’ requirement, the [petitioner] must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.” Id.

To meet this burden, the petitioner need only testify that had plea counsel not misinformed him of the potential sentence, he would not have pled guilty. Alexander, 303 S.C. at 543, 402 S.E.2d at 485–86 (finding the petitioner's own testimony that he would have proceeded to trial but for counsel's misadvice as to sentencing was “the only evidence in the record on this point” and was sufficient to satisfy the prejudice prong of the Strickland test); Jackson v. State, 342 S.C. 95, 97–98, 535 S.E.2d 926, 927 (2000) (citing Alexander with approval and finding the petitioner satisfied the prejudice prong by simply providing testimony that he would not have pled guilty, but for trial counsel's misadvice); Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (“The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty.” (citing Jackson, 342 S.C. at 97–98, 535 S.E.2d at 927; Alexander, 303 S.C. at 543, 402 S.E.2d at 485–86)).

Petitioner testified that he was unaware that he would be required to serve 85% of his sentence. He indicated that had he known that fact, he would not have pled guilty. As a result, the ineffective assistance he received from counsel prejudiced him, and he is entitled to relief.

CONCLUSION

Based upon the foregoing reasons, Petitioner requests that this Court grant the petition for writ of certiorari to allow full briefing on this issue, vacate his guilty plea, and remand the case.

A handwritten signature in black ink, appearing to read "Taylor D. Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of July, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Chesterfield County

Honorable Roger E. Henderson, Circuit Court Judge

DAMEION J. RIVERS,

PETITIONER

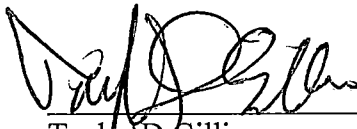
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STATE OF SOUTH CAROLINA,

RESPONDENT

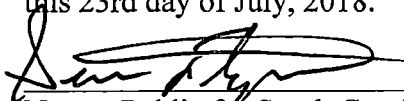
CERTIFICATE OF SERVICE

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 Johnny Ellis James, Jr., 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 Dameion J. Rivers, #342549, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 23rd day of July, 2018.



Taylor D. Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 23rd day of July, 2018.

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