

STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO HORRY COUNTY  
Court of Common Pleas  
The Honorable William H. Seals, Circuit Court Judge

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Appellate Case No. 2018-000150

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DEVANTE SIMMONS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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Attorney General

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ATTORNEYS FOR RESPONDENT

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The post-conviction relief judge properly found Petitioner failed to establish he was prejudiced by Counsel’s erroneous advice concerning parole eligibility because there was no credible evidence Petitioner would have proceeded to trial but for Counsel’s misadvice, and Counsel testified he advised all of his clients they should expect to serve every day of a given sentence, which further eliminated any prejudice to Petitioner.

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## **ISSUE PRESENTED**

The post-conviction relief judge properly found Petitioner failed to establish he was prejudiced by Counsel's erroneous advice concerning parole eligibility because there was no credible evidence Petitioner would have proceeded to trial but for Counsel's misadvice, and Counsel testified he advised all of his clients they should expect to serve every day of a given sentence, which further eliminated any prejudice to Petitioner.

## STATEMENT OF THE CASE

Petitioner was indicted at the September 2014 term of the Horry County Grand Jury for attempted murder (2014-GS-26-03562), and further indicted at the December 2014 term for distribution of cocaine base (2014-GS-26-05087). James C. Galmore, III, Esq. represented Petitioner, and Michael Travis Hyman, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On February 26, 2015, Petitioner pled guilty to distribution of cocaine base, as indicted, and to assault and battery of a high and aggravated nature, as a lesser-included offense of attempted murder. Consistent with the recommendation of the State, the Honorable Larry B. Hyman sentenced Petitioner to imprisonment for concurrent terms of 10 years on each charge. Petitioner did not appeal his plea or sentence.

On February 4, 2016, Petitioner filed an application for post-conviction relief (PCR) alleging he was being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel;
  - a. "Coerced plea agreement."
  - b. "Failure to request motion on self-defense and/or actual innocence."
2. Court error;
  - a. "I was denied my preliminary hearing after requested under SC Code."

The State filed its Return and Partial Motion to Dismiss on June 23, 2017. An evidentiary hearing into the matter was convened on Thursday, September 21, 2017, at the Horry County Courthouse in Conway, South Carolina, before the Honorable William H. Seals. At the evidentiary hearing, Petitioner withdrew the allegation of trial court error and proceeded only upon his allegation that his plea was coerced by the misadvice of counsel.

At the September 21, 2017 evidentiary hearing, Petitioner testified Counsel communicated a plea offer in which he would receive a 10-year, parole eligible sentence. App.

p. 33. In support of his claim, Petitioner produced a letter dated January 5, 2015, signed by Counsel which read, in part: "He said they would reduce the attempted murder charge to assault and battery and drop all the other charges if you plead to one (1) drug charge. Basically, they are making you a ten (10) year *parole eligible* plea, and they are giving you third (30) days to think about it." App. p. 34. See also App. p. 45. Once he was incarcerated, Petitioner realized that he was not eligible for parole and he would be required to serve a minimum of eighty-five percent of his sentence. App. p. 35. Petitioner's PCR counsel asked him during the hearing, "and are you asking for a new trial?" App. p. 37. Petitioner responded, "No. I'm asking for remedy on the - - I'm really asking for the reconsideration on my time as far as the plea agreement that we have." App. p. 37. Petitioner elaborated that he was seeking the court to allow him to accept a plea offer that allowed for parole eligibility. App. p. 37.

Counsel subsequently confirmed sending Petitioner a letter dated January 5, 2015 that informed him the State was making a ten year parole eligible plea. App. pp. 38-39. Counsel testified that he tells every client that they should expect to serve every day of their sentence. App. p. 42. After hearing testimony from Petitioner and Counsel, Judge Seals indicated he would take the matter under advisement and rule later in the week. App. p. 43.

On January 5, 2018, Judge Seals issued an order denying relief. App. pp. 46-52. In the order, Judge Seals found Petitioner met his burden in showing deficiency on the part of Counsel, as it was uncontroverted that he misadvised Petitioner of his parole eligibility. However, Judge Seals found Petitioner failed to meet his burden in showing prejudice because: 1) Counsel testified he advised Petitioner to expect to serve every day of the sentence he would receive, and 2) Petitioner testified he only wished for reconsideration of his sentence. Judge Seals expressly

found Appellant's earlier claim that he would not have pled guilty but for Counsel's incorrect advice not credible, and found Petitioner would have pled guilty regardless.

On January 29, 2018, Petitioner timely filed a Notice of Appeal, appealing the PCR court's denial of his application for PCR. Petitioner filed his Petition for Writ of Certiorari and the Appendix on September 20, 2018. This Return on behalf of the State now follows.

## STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

## ARGUMENT

**The post-conviction relief judge properly found Petitioner failed to establish he was prejudiced by Counsel's erroneous advice concerning parole eligibility because there was no credible evidence Petitioner would have proceeded to trial but for Counsel's misadvice, and Counsel testified he advised all of his clients they should expect to serve every day of a given sentence, which further eliminated any prejudice to Petitioner.**

Petitioner contends trial counsel erred in giving sentencing advice regarding parole eligibility. Petitioner contends that, but for Counsel's misadvice, there was a reasonable probability he would not have accepted the plea offer in the case. As was correctly found by the trial judge, Counsel was indeed deficient for improperly advising Petitioner that he would be eligible for parole after serving 25% of his sentence. However, the trial judge was also correct in finding Petitioner was not prejudiced by Counsel's error because Petitioner testified the remedy he was seeking was reconsideration of his sentence and that he only wanted to accept a plea deal that allowed for parole eligibility. Counsel's testimony that he advised every client that they should expect to serve every day of a sentence also eliminated any prejudice from the incorrect advice on parole eligibility.

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; *Caprod v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove

counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). With respect to guilty plea counsel, the applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Parole eligibility is typically a collateral consequence of sentencing. Smith v. State, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). However, an allegation that counsel improperly advised a client regarding parole eligibility is cognizable in a PCR action. Id., see also Coats v. State, 352 S.C. 500, 503, 575 S.E.2d 557, 558 (2003). "[I]f trial counsel actively misinforms the defendant about parole eligibility, the defendant must prove he relied on the misinformation to receive PCR." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174-75 (2002).

In Petitioner's case, it is not contested that trial counsel was deficient for failing to correctly advise Petitioner regarding his parole eligibility. However, Petitioner testified he was not asking for a new trial and only wanted reconsideration of his sentence in light of the State's plea offer. Petitioner stated he wanted the Court to allow him to accept a plea offer that allowed for parole eligibility. While Petitioner earlier asserted he would not have pled guilty if he knew

he was not going to be parole eligible, the trial judge noted that testimony conflicted with his other testimony at the PCR hearing and expressly found that contention by Petitioner not credible. See Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) (PCR judge's findings on matters of credibility are given great deference by the appellate court). Petitioner thus failed to make the requisite showing that, but for Counsel's error, he would have proceeded to trial. As was found by the PCR judge, Petitioner was not prejudiced by Counsel's errors because he would have pled guilty regardless and only hoped for resentencing as a result of his PCR action. Furthermore, Counsel testified he advises every client that they should expect to serve every day of whatever sentence they are given. This further eliminated any potential prejudice to Petitioner, as Counsel advised him he should expect to serve the full ten years of his sentence. This Court should deny certiorari.


**CONCLUSION**

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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Attorney General

V. HENRY GUNTER, JR.  
Assistant Attorney General

By:   
V. Henry Gunter, Jr.  
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ATTORNEYS FOR RESPONDENT

January 4, 2019.

STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO HORRY COUNTY  
Court of Common Pleas  
William H. Seals, Circuit Court Judge

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Appellate Case No. 2018-000150

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DEVANTE SIMMONS,

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**PROOF OF SERVICE**

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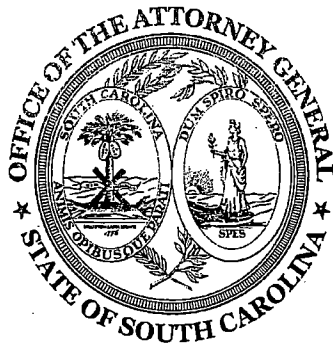
I, V. Henry Gunter, Jr., certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire  
South Carolina Commission on Indigent Defense  
Office of Appellate Defense,  
Post Office Box 11433  
Columbia, South Carolina 29211-1433

I further certify that all parties required by Rule to be served have been served. This 4<sup>th</sup> day of January, 2019.



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RECEIVED  
JAN 04 2019  
S.C. SUPREME COURT

ALAN WILSON  
ATTORNEY GENERAL

January 4, 2019

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**RE: DeVante Simmons v. State of South Carolina**  
**Appellate Case No. 2018-000150**  
**Lower Court Case No. 2016-CP-26-0800**

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

V. Henry Gunter, Jr.  
Assistant Attorney General  
S.C. Bar No. 102259

VHG/mm  
Enclosures

cc: Wanda H. Carter, Esquire