ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable Robert E. Hood, Circuit Court Judge

RAPHAEL WOODEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-000001

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the post-conviction relief judge err in finding defense counsel did not give petitioner erroneous advice regarding parole eligibility that induced petitioner's guilty plea?

STATEMENT

Petitioner was indicted for murder, two counts of armed robbery, and possession of a weapon during a violent crime at the February 3, 2014, term of Aiken County Grand Jury. App. 126 – 131. Petitioner's family retained Tanya Jeffords since petitioner, although working, was only nineteen at the time of the alleged offenses. As will be seen infra, Jeffords was licensed to practice in Georgia and South Carolina, and Georgia's parole laws were much more liberal.

On November 10, 2014, petitioner appeared with Jeffords before the Honorable R. Knox McMahon to enter a guilty plea. Strom Thurmond, Jr., was the solicitor. App. 1.

Solicitor Thurmond told Judge McMahon that petitioner had been indicted for murder, two counts of armed robbery, and possession of a firearm during a violent crime. A negotiated sentence of concurrent twenty-five year terms had been reached wherein petitioner would plead guilty to voluntary manslaughter, and armed robbery. The state would dismiss another armed robbery, and a possession of a weapon during a violent crime indictment. The solicitor told the judge that petitioner had "no adult prior criminal history." App. 3, l. 9 – 4, l. 6.

Judge McMahon sentenced petitioner to concurrent twenty-five year terms for voluntary manslaughter and armed robbery. App. 23, l. 25 – 24, l. 5.

Jeffords later testified that petitioner was a "nineteen-year-old kid facing a murder charge. The biggest problem in those cases is that's their life. It could be life. It could be life, it could be life without parole. In South Carolina, you have to do every day on a murder sentence and the judge could give you life without parole."[1] App. 84, l. 20 – 85, l. 4.

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[1] The PCR hearing was held on September 23, 2016 before the Honorable Robert Hood. Aimee Zmroczek represented petitioner. Julie Coleman was the Assistant Attorney General. App. 43. Petitioner had alleged in his amended application for post-conviction relief that counsel failed to properly explain parole to him. App. 39.

Jeffords explained what she meant when she talked to petitioner about a "parole-able offense":

> And when I went to talk to him about it, *I think where the confusion may have come in because I knew it was -- that for South Carolina it's a no parole-able offense. We talked about that. But* you have to do 85 percent. And there's another statute that said you have to do 85 percent. **To me that is parole-able.**
>
> And in Georgia, **if you say it's no parole that means you have to do day-for-day.** So and me saying parole I'm going over 85 percent. I never indicated it would be a one-third or that sort of thing. And as discussed that you would have to do at least 85 percent of that charge because that was my understanding of the law.
>
> And, when he wrote me afterwards I was concerned that I had made a mistake that, you know, absolutely he would have to do every day of 25 years. *And, you know, just confirmed that, no, still you have to do at least 85 percent. I did explain to him that you could do every day* or they could let you out earlier.

App. 90, l. 15 – 91, l. 10. (emphasis added).

On cross-examination, Jeffords *admitted that parole was a large consideration* for petitioner when he agreed to plead guilty to voluntary manslaughter. App. 99, ll. 25 – 100, l. 6. The following occurred on cross-examination of Jeffords at the PCR hearing:

> Q. And so in Georgia you have parole-able offenses and then you have no-parole offense and in Georgia no parole equals day-for-day?
>
> A. That's right.
>
> Q. But in here no parole under these circumstances equals 85 percent?
>
> A. Right.
>
> Q. **But the letter that you wrote to him when you said parole versus no parole, you didn't say 85 percent.** *You just said parole* -- it's eligible for parole, but you didn't explain that that meant 85 percent, right?

A. No, I did not in that letter say anything.

Q. So his confusion about the parole even though you understood it to be 85 percent, ***it's certainly possible that he didn't understand that it was 85 percent until he wrote you again after he was sentenced?***

A. I most certainly understand that because that language that I would have been using is that you would not have to do all of that time. *And he, you know -- that's what I understood. That's what I told him. Now, that you would have to do a third -- I never said that, but you would never have to do all that time. For me and particularly I know why it came up too is because there was a -- you know, you just would have to do every day in Georgia. And I did not -- to me, he would still be out on a 25-year sentence before he was my age and that was for me very important.*

Q. We consider that young, correct?

A. Yes.

Q. And Georgia is -- are they eligible for parole after -- if they have to do seven years of their sentence; is that correct? Or they have to do -- do they have to do a percent? Like, a third of their time before they're considered for parole in Georgia?

A. If you have a no-parole offense, like, say, armed robbery, no. You get sentenced to 25, you're going to do every day of 25.

Q. Right. If you have a no-parole offense. But if you have a parole offense you do a portion of it and then you're --

A. They can consider you. **I always tell my clients you can do every day or you can do less than that time and so that's the difference.**

Q. But is it possible that he may have gotten that one-third mixed up with some Georgia rules and not South Carolina rules?

A. Of what parole means that you would be considered after one-third, he may have gotten that mixed up, yeah. That's exactly right.

Q. Okay. *Because the letter that you had written him just said a parole offense and it didn't say the 85 percent. That's probably why -- I mean, is that your -- you never told him, like, 85 percent until afterwards, correct*?

A. No. **I believe** we talked about the time and the 85 percent because I had sat down and they had showed it to me on a chart that they put it in. And that you would have to do, you know, the time that you could be considered for early release under that 85.

Q. **But -- and that would be in the letter that you wrote, I think you wrote that to him in February of 2015 [the plea was November 10, 2014]?**

A. Right. When he -- I got a phone call and he had asked about that and I said, well, you would have to do 85 percent. That's kind of what that means.

Q. **And that was after he was sentenced?**

A. Yes.

App. 100, l. 19 – 103, l. 13. (emphasis added).

After redirect testimony, Jeffords again acknowledged that prior to petitioner's guilty plea, "*I had **always** talked to him about it being a parole-able offence.*" Jeffords also said she *thought* she conveyed the actual number of years that would be "parole-able" as she used the term. App. 104, ll. 6-19. (emphasis added).

Petitioner testified before Jeffords during the post-conviction hearing. The following occurred on direct-examination of petitioner regarding parole:

Q. ***Why didn't you go to trial?***

A. Because the whole thing about parole and I had my family screaming take the 25 and it will be parole-able. It's eligible for parole-able.

Q. Okay. Now the whole thing about parole. The judge needs to understand what you're talking about. So you -- instead of going to trial in November you accepted a plea, right?

A. Yes, ma'am.

Q. And you accepted a plea for certain reasons?

A. Yes, ma'am.

Q. **And those reasons were?**

A. Parole, parole, parole-able. That was one of the reasons.

Q. Well, you keep saying parole. Your attorney told you that you were eligible for parole, right?

A. Yes, ma'am. She told me that if I pled to manslaughter I'd be eligible for parole.

Q. And what does that mean to you?

A. That means I cannot get in any trouble, not get in any trouble. Just have a, you know, nice down the road, good behavior, school, credits and things like that for everything, and then I'll be eligible for parole way before it's time for my, way before the 25 years was up.

App. 53, l. 19 – 54, l. 18. (emphasis added).

Petitioner also said he understood it was not guaranteed that he would get parole, but he understood he could get parole with good behavior, school, and other prison credits which would allow parole after a short period of time. App. 54, l. 12 – 55, l. 5.

Petitioner was surprised when he went through orientation in the prison system and was told "I'm not eligible for parole." Petitioner said he was shocked when he then got a letter informing him: "I pled to a non-parole offense." App. 58, l. 17 – 59, l. 9. (emphasis added).

In its order of dismissal, the PCR court found that defense counsel was not ineffective "for failing to properly explain applicant's parole eligibility." The PCR judge found despite the fact that defense counsel admittedly talked to petitioner about being eligible for parole that her sentencing advice was proper. App. 121. Petitioner submits that was legal error.

Undersigned counsel originally briefed this identical issue in a Johnson v. State certiorari petition. This Court correctly ordered this issue re-briefed, it was re-briefed, and certiorari was granted.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue before the Court. This Court will defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). The Court reviews questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

The post-conviction relief judge erred in finding defense counsel did not give petitioner erroneous advice regarding parole eligibility that induced petitioner's guilty plea.

In Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991), petitioner Alexander asserted his attorney was ineffective for giving him erroneous sentencing advice. Alexander maintained that if he had not been given false sentencing information, he would not have pled guilty.

This Court in Alexander v. State held that the record supported Alexander's contention that trial counsel provided him erroneous sentencing advice when he was told he faced a life sentence on his drug charges. This Court found that Alexander was entitled to a new trial under the Strickland v. Washington, 466 U.S. 668 (1984), and Hill v. Lockhart, 474 U.S. 52 (1985), tests.

This Court in Alexander noted that the indictments were vague and overlapping but that Alexander's real sentencing exposure was between seven and twenty-five years. This Court wrote that while trial counsel denied he told Alexander he would spend the rest of his life in prison unless he pled guilty, counsel did tell Alexander he faced "fifty years without question, possibly one hundred if all four indictments stood, which would 'effectively end his life expectancy.'" See Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991).

In Turner v. State, 335 S.C. 382, 517 S.E.2d 442 (1999), this Court noted that trial counsel -- along with everyone else -- was under the mistaken impression that Turner had to serve 14 years under the probation revocation which followed his guilty plea. However, in reality Turner had only 7 years remaining under his previous sentence. During guilty plea negotiations, petitioner was offered a 15-year sentence to run concurrently to the probation revocation

sentence. In essence, Turner and trial counsel thought he would then serve only 1 year in addition to the probation revocation sentence, rather than 8 years.

Turner testified he would not have pled guilty to the 15 year concurrent sentence for his most recent charges had he known that he was subjecting himself to an additional 8 years rather than merely 1 year. In denying PCR, the PCR judge relied upon trial counsel's testimony that he would have still advised petitioner to plead guilty under the circumstances. However, the applicable question was whether petitioner -- after being correctly informed -- would still have pled guilty. He testified he would not have pled guilty. Therefore, Turner was entitled to PCR relief.

The facts of this case are not dissimilar. Petitioner wanted a sentence where he was parole eligible because it provided him control over how long he would serve in prison. As seen, his family strongly urged him to take the plea offer because it provided him with the opportunity for parole, and petitioner understood that parole was possible if he behaved in prison: "Good behavior, school, and other prison credits which would allow parole after a short period of time." App. 54, l. 22 -55, l. 5. In reality, petitioner had to serve 85% of his sentence *no matter what.*

In sum, it was undisputed in this case that trial counsel told petitioner that his guilty plea to voluntary manslaughter was a parole-able offence. Counsel admitted that she considered anything not "day for day" to be a parole-able offense. Counsel compared her practice of law in Georgia, where a parole-able offense could be as little as seven years of the sentence or one third of the sentence.

It was not surprising in reality that petitioner and his family were very pleased that he would be eligible for parole as counsel advised. They naturally thought if petitioner had good behavior in prison, and if he worked and got other credits inside the prison system, that his

"parole" date could be considerably better than the twenty-five year sentence he faced. Counsel, as seen, acknowledged that petitioner's reaction to being parole eligible -- even though he in reality was not – was normal.

This Court similarly has held that defense counsel was ineffective where he or she gave erroneous sentencing advice that induced a guilty plea. See Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991); Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989).

Petitioner testified before trial counsel during his PCR hearing. It was apparent from the PCR record that petitioner and his family were very excited by petitioner being eligible for parole, and petitioner was induced to plead guilty, as seen supra, by defense counsel's promise that he would be parole eligible. Coats v. State, 352 S.C. 500, 503, 575 S.E.2d 557, 558 (2003), citing Frasier v. State, 351 S.C. 385, 570 S.E.2d 172 (2002) (PCR court held evidentiary hearing to determine whether applicant was induced to plead guilty based on counsel's parole advice prior to plea; PCR court's decision denying relief because counsel did not give any advice as to parole eligibility affirmed); Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989) (held applicant established attorney's advice regarding parole eligibility constituted ineffective assistance of counsel); Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983) (upheld PCR court's decision that applicant failed to prove his attorney's erroneous advice concerning parole eligibility induced his guilty plea).

Counsel does not have to give advice on parole. However, if he or she chooses to do so their eligibility advice cannot be erroneous or misleading to the applicant's detriment. Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989).

Defense counsel was ineffective for calling a no-parole, eighty-five percent mandatory service, a "parole-able offense." Defense counsel's rationale that any possibility of being

released that was not "day to day" was parole-able was erroneous advice. Similarly, counsel's reasoning that petitioner could be released *earlier than his twenty-five year sentence*, and before *her current age*, only emphasized defense counsel's erroneous reasoning and her bad legal advice about parole in this case.

One former Chief Justice of this Court, Justice Harwell, often emphasized that the one item a criminal defendant wanted to know was how much time he would actually spend in prison if he pled guilty. That is the reason this Court has emphasized the absolute danger of giving advice about parole, and it has held that if defense counsel chooses to enter this dangerous parole eligibility and sentencing venue, that his or her sentencing advice regarding parole must be accurate. Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989).

Petitioner was surprisingly "shocked" when he was told by the Department of Corrections that he was not eligible for parole given counsel's erroneous parole advice. Petitioner testified he would not have pled guilty, and he would have gone to trial if he had been properly advised. App. 68, l. 18 -70, l. 7. The judge erred by finding defense counsel was not ineffective regarding her parole advice in this case. App. 121.

CONCLUSION

By reason of the foregoing argument, the order of the post-conviction relief court denying petitioner relief should be reversed, petitioner's guilty plea vacated, and this case remanded to the Aiken County Court of General Sessions for a new trial.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of January, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Aiken County

Honorable Robert E. Hood, Circuit Court Judge

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V.

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RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Raphael Alexander Wooden, #362178, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 18th day of January, 2019.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 18th day of January, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028