

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Horry County

Honorable John C. Hayes, Circuit Court Judge

---

**RECEIVED**

**May 27 2020**

**S.C. SUPREME COURT**

MALIKAIH TAYLOR,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001466

---

PETITION FOR WRIT OF CERTIORARI

---

SARAH E. SHIPE  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

**INDEX**

INDEX ..... i

ISSUE PRESENTED .....1

STATEMENT.....2

ARGUMENT

The PCR court erred in finding petitioner was not prejudiced by  
plea counsel’s deficient advice regarding parole eligibility where  
petitioner testified he would have accepted the twenty year plea  
offer regardless of parole eligibility.....4

CONCLUSION.....6

**ISSUE PRESENTED**

Did the PCR court err in finding petitioner was not prejudiced by plea counsel's deficient advice regarding parole eligibility where petitioner testified he would have accepted the twenty year plea offer regardless of parole eligibility?

## STATEMENT

On April 20, 2017, a Horry County grand jury indicted petitioner for criminal sexual conduct with a minor, first degree. App. 93. On November 6, 2017, petitioner pled guilty as indicted before the Honorable Steven H. John. App. 1. Thomas Floyd represented petitioner and Leigh Andrew, assistant solicitor, represented the state. App. 1. Judge John sentenced petitioner to twenty-seven years' imprisonment. App. 13.

Thereafter, petitioner filed an application for PCR on September 24, 2018. App. 15-22. On June 18, 2019, an evidentiary hearing was held before the Honorable John C. Hayes, III. App. 30. James Falk represented petitioner and Jacob Isenberg, assistant attorney general, represented the state. App. 30.

At the evidentiary hearing petitioner testified that in July 2017, he received an offer from the state to plead guilty to a lesser charge for a sentence of twenty years. App. 36, l. 8-13. Petitioner tried, multiple times, to call plea counsel to discuss the state's offer but could not reach him. App. 36, ll. 1-3; 42, ll. 21-24. Petitioner needed plea counsel's help understanding the details of the offer. App. 36, ll. 15-20. Specifically, petitioner was interested in how much of the sentence he would be required to serve before he was eligible for parole. App. 36, ll. 23-25. In August 2017, the offer expired. Petitioner testified plea counsel did not contact him until September 2017, when he visited petitioner in jail. App. 37, ll. 22-25. Petitioner said he would have accepted the offer before it expired if he had understood the terms regardless of parole eligibility. App. 39, ll. 6-8; 48, l. 25-49, l. 2.

Plea counsel agreed the state's offer was for a lesser offense with a sentence of twenty years. App. 51, ll. 2-4. Plea counsel claimed that he explained the state's offer to petitioner although he could not recall when they spoke. App. 51, ll. 9-12. However, according to plea

counsel's notes he did not visit petitioner during the time period between when the offer was extended and when the offer expired. Plea counsel had noted in petitioner's file when the offer came in and when the offer was mailed to petitioner on July 24, 2017, but counsel did not have any notes regarding when he might have discussed the offer to petitioner either in person at the jail, via letter, or via phone conversation. App. 57, ll. 4-17. Plea counsel admitted he did not recall petitioner asking about parole eligibility, but counsel recalled at the time of the guilty plea petitioner would have had to serve sixty-five percent of his sentence before he would be eligible for parole. App. 52, ll. 1-3. Plea counsel said if he was unavailable or another attorney from the office was going to the jail another attorney might stand in for him and discuss a plea offer with a client of his. Plea counsel testified it was his custom to visit clients in person to discuss plea offers but in petitioner's case he could not recall whether he, or another attorney from his office, visited petitioner. App. 59, l. 12-60, l. 12; 68, ll. 2-6. Plea counsel no longer had a copy of the state's offer in petitioner's file. App. 55, ll. 19-23.

On August 14, 2019, Judge Hayes signed an order denying PCR. App. 77-92. In the order the judge framed petitioner's allegation of ineffective assistance of counsel to adequately convey twenty-year plea deal before its expiration as "failure to advise consequences of plea." App. 86. Judge Hayes found plea counsel deficiently misadvised petitioner about the initial offer's mandatory incarceration requirement but found the improper advice did not prejudice petitioner because petitioner failed to make a decision before the offer expired. App. 87.

This appeal follows.

## ARGUMENT

The PCR court erred in finding petitioner was not prejudiced by plea counsel's deficient advice regarding parole eligibility where petitioner testified he would have accepted the twenty year plea offer regardless of parole eligibility.

Appellate courts give great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed de novo, and we will reverse the PCR court's decision when it is controlled by an error of law. *Id.*

Counsel has a duty not to misadvise petitioner on collateral consequences. *Coats v. State*, 352 S.C. 500, 503, 575 S.E.2d 557, 558 (2003) (finding plea counsel's advice that made petitioner believe he would be eligible for parole could affect the validity of the plea entered).

To show prejudice under *Strickland*, a defendant must demonstrate a reasonable probability that: (1) he "would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel;" (2) "the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it;" and (3) "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Missouri v. Frye*, 566 U.S. 134, 147(2012); see *Lafler v. Cooper*, 566 U.S. 156, 164 (2012) (stating "a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed").

In this case, the court correctly found counsel deficient for failure to properly advise petitioner regarding the consequences of the state's initial plea offer where plea counsel testified he may have advised petitioner the requirement would be to serve at least sixty-five percent of the initial offer's sentence when in fact petitioner would have been required to serve eighty-five percent. However, the court incorrectly found there was no prejudice where petitioner testified at PCR he would have accepted the state's initial twenty-year offer regardless of parole eligibility. Additionally, petitioner testified, and plea counsel did not refute, that he attempted to contact plea counsel, more than once, to discuss the state's offer but could never reach plea counsel. Plea counsel testified it was customary for himself, or another attorney at his office, to visit clients to discuss plea offers. However, plea counsel admitted his notes did not reflect any contact with petitioner after the plea offer was mailed before the time the offer expired. Nonetheless, even if the Court agrees with PCR court, that plea counsel explained the state's twenty-year offer to petitioner, he misadvised petitioner regarding parole eligibility. Plea counsel testified he told petitioner he would be parole eligible after serving sixty-five percent of his sentence when in fact petitioner would not be eligible until serving eighty-five percent of his sentence.

Plea counsel's deficiency resulted in the expiration of the state's offer of a lesser charge and less severe sentence. Petitioner was prejudiced by plea counsel's deficiency where, had plea counsel correctly explained the state's offer, petitioner would have pled guilty to a lesser charge and received a sentence of twenty years. Instead, petitioner pled guilty as indicted and received a sentence of twenty-seven years.

**CONCLUSION**

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on this issue.

s/ Sarah E. Shipe  
Sarah E. Shipe  
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of May, 2020.