STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Georgetown County

Honorable William H. Seals, Circuit Court Judge

RECEIVED

Feb 22 2021

S.C. SUPREME COURT

DENNIS CUMBEE, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000966

PETITION FOR WRIT OF CERTIORARI

TAYLOR D GILLIAM
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

ISSUES PRESENTED

I. Whether the PCR court erred in denying relief, where deficient performance was found following a plea wherein Petitioner was misadvised about the percentage of time he would have to serve to a murder charge, where testimony from Petitioner and his two attorneys confirmed that a written letter sent by plea counsel to Petitioner advised him that he would only have to serve eighty-five percent of his sentence and established it was the opinion of all involved that Petitioner would not have to serve his sentence day-for-day, and where Petitioner proved prejudice by testifying that he relied on the advice and would have acted different but for the erroneous information provided by his attorneys?

II. Whether the PCR court erred in denying relief, where the court reasoned that the plea judge's colloquy cured any misunderstanding as to Issue I, where plea counsel therefore should have realized he provided incorrect advice, and where counsel failed to act or move to withdraw Petitioner's guilty plea?

STATEMENT

Petitioner was indicted by a Georgetown County grand jury in May 2015 for murder. App. 130 – 131. He appeared before the Honorable Benjamin H. Culbertson on December 12, 2016 for a plea. App. 1. Petitioner was represented at that time by John M. Hilliard, III, the second attorney to represent Petitioner. Richard D. Todd, Jr. appeared on behalf of the state.

At the outset of the plea, the solicitor notified the plea court that the plea was subject to a negotiated sentence of thirty-five years. App. 3 ll. 7 – 11. Additional charges were dropped as part of the plea as well. App. 3 ll. 16 – 18. Petitioner pled guilty subject to the negotiation. App. 8 ll. 17 – 25. The facts giving rise to Petitioner's arrest as alleged by the state were that Petitioner shot and killed Tory Thomas on or about April 7, 2015. App. 9 l. 18 – App. 11 Petitioner did not have a criminal record, according to the solicitor. App. 16 ll. 20 – 23. Judge Culbertson found that Petitioner's plea was made knowingly and voluntarily and that a factual basis existed to support it. App. 17 ll. 5 – 14. Petitioner was sentenced to thirty-five years' incarceration. Id.

Petitioner was advised, verbally and via written correspondence, that he would only have to serve eighty-five percent of his sentence. App. 62 ll. 8 – 15. When Petitioner was transferred to the South Carolina Department of Corrections, he discovered that he would be forced to serve the entirety of his sentence, a different understanding than had been presented by counsel. App. 68 l. 13 – App. 69 l. 15. After realizing that he was misadvised, Petitioner filed an application for post-conviction relief, on or about December 11, 2017. App. 19 – 24. It contained allegations of ineffective assistance of counsel. App. 21.

The state made its Return on or about February 9, 2018. App. 28 – 35. Through PCR counsel Tricia Blanchette, Petitioner amended his application to include the following allegations, both the subject of this petition:

> 1. Ineffective assistance of counsel that rendered Applicant's guilty plea involuntary due to counsel advising Applicant incorrectly about the service of his sentence prior to the entry of his guilty plea.
>
> 2. Ineffective assistance of counsel for failure to interject and/or move to withdraw Applicant's guilty plea after the court addressed the service of Applicant's sentence.

App. 25 (internal citation omitted).

An evidentiary hearing was convened on March 25, 2019 before the Honorable William H. Seals, Jr. App. 36. Tricia Blanchette represented Petitioner, and Johnny James, Jr. appeared on behalf of the state. The PCR court heard from both of Petitioner's attorneys—Cezar McKnight, his original counsel, and John Hilliard, subsequent counsel who appeared at the plea—as well as Petitioner and Petitioner's mother, Denise Giles. Three exhibits were presented to the PCR court by Petitioner: a plea offer, a letter from Counsel McKnight to Petitioner advising him that he would have to serve 85% of his sentence; and a memorandum of law prepared by PCR Counsel Blanchette.

At the conclusion of the evidentiary hearing, the PCR court took the matter under advisement. App. 89 ll. 10 – 11. An Order of Dismissal was filed on February 14, 2020. App. 100 – 112. The PCR court found that Petitioner proved deficient performance on the misadvice issue but failed to prove prejudice. App. 104 – 109. As to the second issue, the PCR court found that Petitioner failed to prove deficiency and prejudice.

PCR counsel filed a Rule 59 Motion on behalf of Petitioner on February 4, 2020. App. 113 – 122. In response, the state filed a Return to the motion on March 23, 2020. App. 123 – 126. The PCR court denied the motion to reconsider by way of an Order filed June 5, 2020. App. 127 – 128.

This petition follows.

ARGUMENT

I. The PCR court erred in denying relief, where deficient performance was found following a plea wherein Petitioner was misadvised about the percentage of time he would have to serve to a murder charge, where testimony from Petitioner and his two attorneys confirmed that a written letter sent by plea counsel to Petitioner advised him that he would only have to serve eighty-five percent of his sentence and established it was the opinion of all involved that Petitioner would not have to serve his sentence day-for-day, and where Petitioner proved prejudice by testifying that he relied on the advice and would have acted different but for the erroneous information provided by his attorneys.

Relevant facts

The PCR court correctly found that Petitioner's two attorneys were deficient in advising him that he would only be required to serve eighty-five percent of his thirty-five year murder sentence. Based on Petitioner's uncontroverted testimony that he pled guilty because of the incorrect advice, he also proved prejudice.

Cezar McKnight was Petitioner's first attorney, retained by Petitioner's parents. App. 41 l. 14 – 42 l. 13. Counsel McKnight recalled getting a written plea offer from the solicitor. App. 42 l. 11 – 44 l. 3. The offer, entered as an exhibit at the PCR hearing, contained the negotiated plea of thirty-five years. Id.

Approximately two months after receiving the offer, Counsel McKnight wrote Petitioner a letter. App. 91 – 92. The letter contained the following admittedly incorrect information about Petitioner's sentence:

> Enclosed within, please find a copy of the offer made by the Solicitor's Office in your case. They are offering you a Guilty Plea to the charge of murder, and they are offering you a sentence of 35 years. Murder is a most serious offense and it is a violent offense for the purposes of sentencing. **This means that you have to do a mandatory 85% of the sentence**, and that if you are convicted of 2 most serious offenses like murder during your life, you could face life in prison without probation or parole.

App. 92 (emphasis added). When asked on cross-examination if his in-person advice mirrored the information contained in the letter, Counsel McKnight confirmed that he was "almost certain" that he advised Petitioner that he would only be required to serve eighty-five percent of his sentence for the murder conviction App. 45 l. 23 – 46 l. 20. Notably, Counsel McKnight outright stated that the letter was not the only instance of when he advised petitioner about possible sentence ramifications. Id. Counsel McKnight plainly testified that he did not ever recall advising Petitioner that he would serve anything other than eighty-five percent, and he admitted the error Id.

Shortly after this letter was sent to Petitioner in July 2016, Counsel McKnight was relieved. App. 45 ll. 1 – 14. John Hilliard assumed the representation. App. 47 l. 15 – 48 l. 17. Counsel Hilliard began representing Petitioner on August 8, 2016; Petitioner's plea occurred on December 12, 2016. App. 50 ll. 3 – 12. Counsel Hilliard was unsuccessful in his attempts to get the solicitor to budge on the existing plea offer. App. 51 ll. 13 – 22. Regarding sentence ramifications, Counsel Hilliard's advice was identical to Counsel McKnight's:

> I believed, and I told [Petitioner], that it was an 85 percent no parole offense. Experience had told me that there are no parole offenses, and this is a no parole offense. And I believed at the time that no parole offenses require the service of 85 percent. I believed that to be true at the time.

App. 52 ll. 2 – 7. Counsel Hilliard therefore confirmed that he was the second attorney to advise Petitioner that he would only be required to serve eighty-five percent of his sentence. App. 52 ll. 8 – 25.

Counsel Hilliard candidly testified that nothing the plea judge said during Petitioner's plea caused him to realize that he had advised Petitioner incorrectly. App. 53 l. 13 – 55 l. 16; App. 58 ll. 16 – 20. As a result of neither Petitioner nor Counsel Hilliard recognizing the mistake, Counsel Hilliard did not move to withdraw the guilty plea. App. 56 l. 12 – 57 l. 9.

Petitioner testified in furtherance of his PCR allegations. He recalled receiving the letter from Counsel McKnight containing the incorrect information. App. 61 ll. 5 – 12. Petitioner believed, both as a result of receiving the letter and based on an in-person conversation with Counsel McKnight, that he would only be required to serve eighty-five percent of his sentence, or approximately twenty-nine years and seven months. App. 62 ll. 1 – 15.

Petitioner confirmed that Counsel Hilliard's advice matched what he had been told by Counsel McKnight, as previously testified to by both attorneys. App. 64 ll. 1 – 25. Petitioner had a detailed recollection of the conversations he had with Counsel Hilliard, including a memory of counsel using his calculator to determine eighty-five percent of thirty-five years, or 29.75 years. App. 65 ll. 1 – 16.

Petitioner testified that the advice he received regarding only being required to serve eighty-five percent of his sentence was a deciding factor in his decision to plead guilty. App. 65 ll. 1 – 16; App. 70 ll. 3 – 7. Additional conversations took place between Petitioner, his family, and Counsel Hilliard on the morning of the plea. App. 66 ll. 8 – 21. The same advice was given at that time. Id.

During the plea, after the judge mentioned the thirty-five negotiated sentence, Petitioner glanced at Counsel Hilliard. App. 67 ll. 10 – 24. Hillard nodded his head to indicate that Petitioner should answer in the affirmative when asked if he understood the terms of the plea deal. Id. Following the plea, Counsel Hilliard advised Petitioner that the judge was only

required to say that Petitioner was required to serve the thirty-five year sentence "in case the laws change." Id. Petitioner's father was present during that conversation. App. 67 l. 10 – 68 l. 2.

Petitioner's testimony about how he discovered the discrepancy in sentencing further proved that he was incorrectly advised. While incarcerated at the Kirkland SCDC facility, Petitioner received his sentence sheet. App. 68 l. 10 – 69 l. 15. He approached a counselor and inquired why his sentence sheet showed him serving the entirety of his sentence. Id. It was at that time that he was told that he would be required to serve one hundred percent of his murder sentence, day for day. Id. He then began preparing his application for post-conviction relief. App. 69 l. 13 – 70 l. 9.

Near the conclusion of his direct examination at the PCR hearing, Petitioner was asked the pivotal question: "[B]ut for your [attorneys'] advice that it was 85 percent, you wouldn't have entered the guilty plea[?]" Petitioner answered in the affirmative. App. 70 ll. 3 – 9.

During cross-examination, Petitioner testified that he did not believe his attorney was prepared for trial. App. 73 ll. 6 – 13. As a result, Petitioner agreed to the terms of the plea deal under the mistaken belief that he would only be required to serve eighty-five percent of his sentence. Id. He reiterated this sentiment on redirect. App. 77 l. 22 – 78 l. 10. Petitioner's testimony was both understandable and logical; he was advised that serving eighty-give percent of a thirty-five year sentence was likely the most ideal outcome:

> After it was said that … this is our - - this is [going to] be our best option and I was explained that, okay, it was 85 percent of 35 [years], that's when I accepted it.

App. 78 ll. 3 – 6.

Petitioner's mother, Denise Giles, offered similar uncontested testimony—that her son was advised that he would be required to serve eighty-five percent of his thirty-five year sentence—which led him to plead guilty. App. 78 l. 25 – 81 l. 20. She was not told at any point that Petitioner would be required to serve the entirety of his sentence, day for day. Id. Much like Counsel Hilliard, none of the remarks by the plea judge triggered any hesitation or belief that Petitioner would receive anything other than the terms that had been explained to him by his attorneys. Id. The state elected not to cross-examine Ms. Giles.

PCR counsel submitted a memorandum of law. App. 82 ll. 9 – 13; App. 93 – 99. Numerous cases were also discussed during closing remarks. App. 84 l. 16 – 87 l. 22. The PCR court took the matter under advisement. App. 89 ll. 10 – 11.

In its Order of Dismissal, the PCR court found that Petitioner's attorneys provided deficient performance but that Petitioner failed to prove prejudice. App. 105 – 109. The Order of Dismissal suggested that the PCR judge "passed upon [the] credibility" of witnesses but contained no credibility findings. App. 102.

Discussion

In its Order of Dismissal, the PCR court found that Petitioner's attorneys "affirmatively misadvised him regarding the potential for parole or other early release, and such affirmative misadvise constituted deficient performance." App. 105 – 106. The Order of Dismissal also contained the following curious language: "The laws governing parole eligibility and community release are labyrinthine, and the calculus for the incarceration of persons convicted of murder is governed by a smorgasbord of overlapping statutes." App. 104. That assertion notwithstanding, the third section under Title 16 (Crimes and Offenses), Chapter 3 (Offenses Against the Person), Article 1 (Homicide) of the South Carolina Code is entitled "Punishment for murder; separate

sentencing proceeding when death penalty sought." S.C. Code Ann. § 16-3-20. It plainly reads sets forth that an individual convicted of murder should not expect to leave prison at any point prior to the service of the entirety of the sentence:

> **No person sentenced to a mandatory minimum term of imprisonment for thirty years to life pursuant to this section is eligible for parole or any early release program**, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years to life required by this section.

S.C. Code Ann. § 16-3-20 (emphasis added). The PCR court therefore correctly found that Petitioner's attorneys rendered deficient performance. However, the PCR court erred in concluding that Petitioner failed to prove prejudice.

"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).

"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).

South Carolina courts have 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 a ten year sentence for "common law" murder 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). As was the case here, the Court in Hinson held that "[c]ounsel's advice … misstated the law." Id. at 458, 377 S.E.2d at 339. Again, similar to the matter *sub judice*, "[t]he advice given Hinson falls below the level of competence reasonably expected of attorneys in criminal cases." Id.

Petitioner also satisfied the prejudice prong; he testified that but for counsel's incorrect advice, he would not have pled guilty. "An applicant seeking relief from a guilty plea must present probative evidence to support the allegations in the PCR application that but for trial counsel's advice, the applicant would not have pled guilty." Smith v. State, 369, 135, 139, 631

S.E.2d 260, 261-62 (2006). Unlike Respondent Smith, Cumbee offered testimony on the stand to validate the allegations raised in his amended application for post-conviction relief.

Petitioner raised additional allegations of ineffective assistance of counsel beyond the two which are the subject of this appeal. Those other claims, including the contention that counsel was unprepared for trial, do not diminish Petitioner's testimony that but for counsel's incorrect advice, he would not have pled guilty. Petitioner pled guilty based on flawed advice and did not receive the deal he was promised. The state never disproved Petitioner's contention that he pled guilty based on the advice of counsel. Concluding that Petitioner is prohibited from receiving relief because he alluded to another potential claim of ineffective assistance of counsel suggests that future applicants should limit their allegations, thereby decreasing the likelihood for success on their collateral attacks while simultaneously omitting potentially meritorious assertions. Petitioner testified multiple times that he was induced to plead based on the advice he received from two attorneys regarding the service of his sentence. That advice was admittedly incorrect, meaning counsel provided deficient performance. Petitioner's testimony that he would have gone to trial, but for the advice of counsel, is enough to satisfy the prejudice requirement. Furthermore, the plea judge's colloquy was not sufficient to overcome the breadth of information Petitioner had received from his two attorneys.

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)).

Regarding prejudice, the Hinson case is also illustrative. Critically, this Court focused on how Hinson did not receive the sentence he expected based on conversations with the attorney representing him:

> The evidence is uncontroverted that Hinson **entered his plea in expectation of receiving the lesser period for parole eligibility**. His own testimony to that effect at post-conviction was corroborated by that of Willian Runyon, attorney for a codefendant.

297 S.C. at 377 S.E.2d 338, 339 (emphasis added). This Court noted that "Hinson's assertion as to trial counsel's advice was supported by the extensive testimony of trial counsel for the codefendant." Id. Petitioner's PCR evidentiary hearing entailed the testimony of four witnesses—Petitioner, his mother, and his two attorneys—all who corroborated one another.

In Frierson v. State, 423 S.C. 257, 815 S.E.2d 433 (2018), this court reiterated the limited inquiry regarding the prejudice prong in a guilty plea PCR, namely that "whether but for

counsel's deficiency, the defendant would have declined to plead and instead proceeded to trial." Id. at 263, 815 S.E.2d at 436.

In Alexander v. State, this Court held that the petitioner's testimony that he would not have pled guilty if counsel had not misinformed him that he would face a potential life sentence if he proceeded to trial satisfied the prejudice prong. 303 S.C. 539, 402 S.E.2d 484 (1991). Alexander was facing between seven and twenty-five years on one charge and a mandatory twenty-five year sentence on another offense. Id. at 541, 402 S.E.2d at 484. Alexander ultimately pled guilty and was sentenced to fifteen years' imprisonment. Id. He filed an application for post-conviction relief alleging erroneous sentencing advice. Id. at 541, 402 S.E.2d at 485. Based upon counsel's admission that he probably told Alexander that he faced one hundred years in prison, the record in that case supported Petitioner's contention. Id. at 542, 402 S.E.2d at 485. This Court held that "[t]rial counsel's sentencing advice was obviously defective." Id.

This Court set forth how a PCR applicant's testimony is sufficient to prove prejudice:

> In support of the second part of the Strickland and Hill test, the "prejudice" requirement, petitioner submits evidence which conclusively establishes that but for his trial counsel's misadvice as to sentencing, he would not have pled guilty. In fact, the only advice in the record on this point is **petitioner's own testimony that had trial counsel not misinformed him** that he would face a potential life sentence if he proceeded to trial, he would not have pled guilty. Thus, the second part of the test has been met. We find that because trial counsel's improper sentencing advice induced petitioner's guilty plea, this case must be reversed.

Id. at 543, 402 S.E.2d at 485-86 (emphasis added and internal citations omitted). Alexander raised four additional allegations of ineffective assistance of counsel, all of which were found to be meritless. Id. at 543, 402 S.E.2d at 486. This Court did not suggest at that time that any of the remaining allegations diminished the impact of the misadvice or prevented Alexander from receiving relief on that issue.

Because Petitioner's case is so similar, he should likewise receive a new trial. Petitioner testified that had counsel not misinformed him about the eighty-five year service of his sentence, he would have gone to trial. App. 64 l. 20 – 66 l. 21; App. 70 ll. 14 – 22.

The Order of Dismissal contains a finding that the plea court's statements that Petitioner was not eligible for parole and would have to serve the entire thirty-five year sentence "could scarcely be clearer." App. 107. Immediately thereafter, the Order of Dismissal mistakenly suggests that "Applicant expressed no confusion during the plea proceeding." App. 107 – 108. Petitioner's testimony at the evidentiary hearing contradicts this statement. As previously mentioned, Petitioner expressed concern during the plea, looked at counsel for clarification, and immediately began a conversation with Counsel Hilliard, in the presence of his family, after the plea:

> After - - during the time after he said, I stopped and looked at Hilliard and he [shook] his head yes. When we got - - after the plea deal, I asked Mr. Hilliard I the back if - - what did he mean by that? And Mr. Hilliard told me that he had to say that in case the laws change.

App. 67 ll. 10 – 24.

The plea court's colloquy did not speak specifically to the day-for-day requirement and therefore did not cure counsel's deficient performance. "[E]ven where counsel offers misinformation, this deficiency can be cured where the trial court properly informs the defendant about the sentencing range." Bennett v. State, 371 S.C. 198, 205 n. 6, 638 S.E.2d 673, 676 n. 6 (2006). In Bennett, this Court reversed the PCR court's grant of relief based upon a finding that "[b]oth the plea transcript and [Bennett's] testimony at the PCR hearing clearly indicate that counsel did consult with respondent and advised him that he should enter a guilty plea." Id. at 204-05, 638 S.E.2d 673, 676. This Court held that counsel's advice regarding sentencing was "not technically incorrect." Id. Because there was "no probative evidence in the record that

counsel deficiently advised respondent to plead guilty," this Court reversed the grant of a new trial. Id. at 206, 638 S.E.2d at 677. Petitioner's case contained evidence from four witnesses in addition to written correspondence which was enough for the PCR court to find deficient performance. Notably, the letter from Counsel McKnight does not clarify the avenue by which Petitioner would be released after the service of eighty-five percent of his sentence. App. 92. The letter does not reference parole, education/work credits, or any other early release mechanism. Therefore, the plea judge's remarks regarding murder being a no-parole offense did not cause any concern for Petitioner.

Because the plea judge's colloquy did not directly reference serving the *entire* sentence or contain a clear statement that Petitioner would be required to serve one hundred percent of the sentence, day for day, there was no clear understanding provided to Petitioner which would have overcome the deeply-rooted understanding planted by both of the attorneys who were hired to represent him. As will be discussed in Issue II, *infra*, if this Court concludes that the plea judge's colloquy was sufficient to convey to Petitioner, a layman, that he would be required to serve the entirety of his sentence, plea counsel should have recognized that he had provided inaccurate advice and immediately moved to withdraw the plea.

Two additional cases wherein this Court reversed the PCR court's granting of relief can easily be distinguished from Petitioner's matter. In Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998), this Court held that the plea court's colloquy with the defendant cured any misconception. Two main differences exist in Moorehead which are not present in Petitioner's case. First, Moorehead testified that he believe he was going to receive probation for a criminal sexual conduct charge. Id. at 332-33, 496 S.E.2d at 416. His plea was not a negotiated one, and the plea judge explained the sentence range; there was no mandatory minimum or discrepancy on

how much time Moorehead would serve based on an agreed-upon negotiated plea. Id. at 333, 496 S.E.2d 416-17. Moorehead claimed his attorney promised he would receive probation, and the plea judge exercised discretion in sentencing. Petitioner Cumbee, based upon the advice of counsel, entered into a plea agreement with the state wherein he was told by two attorneys that he would only be required to serve a fraction of his murder sentence, in contravention to the South Carolina Code. The colloquy in Petitioner's matter was insufficient to overcome the advice given to Petitioner by his attorneys, both verbally and in writing.

The second distinction in Petitioner's case is that both of his attorneys admitted that they advised him that he would only be required to serve eighty-five percent of his sentence. In Moorehead, "[counsel], on the other hand, testified he never promised respondent a straight probationary sentence although they did discuss probation to follow his active jail time as part of the plea negotiations." Id. at 333, 496 S.E.2d at 416. Moorehead therefore failed to prove deficient performance, unlike Petitioner Cumbee. In Petitioner Cumbee's case, he received erroneous advice from two attorneys who were retained to represent him. He rightfully presumed they were providing him with accurate legal advice. Based on the information he received, the plea colloquy did not rise above the advice he had received from his attorneys; there was no mention of day-for-day or one hundred percent. Even when the plea judge stated that Petitioner would not be eligible for parole and would have to serve the thirty-five year sentence, Petitioner was informed by his attorney that the previous advice was still correct. Thus, the deficient performance was not cured.

The second case involving a reversal of a post-conviction relief grant based upon the plea judge's colloquy is Burnett v. State, 352 S.C. 589, 576 S.E.2d 144 (2003). Likewise distinguishable from Petitioner's case, Burnett's attorney testified at the PCR hearing that he

advised his client about a sentencing range, not an exact sentence. Id. at 593, 576 S.E.2d at 146. Also similar to Moorehead and dissimilar to Petitioner Cumbee's case was the lack of a negotiated plea. Burnett's counsel testified that he advised about the sentencing possibilities but steered clear from guaranteeing anything. Id. This Court held:

> In our opinion, the record in this case does not indicate that trial counsel promised Burnett a three-year sentence. Regardless, any possible misconceptions on Burnett's part were cured by the colloquy during the actual plea hearing.

Id. at 593-94, 576 S.E.2d at 146. There was no reference to any extrinsic or supporting evidence. Petitioner, however, produced a letter containing incorrect advice regarding sentencing and corroborated his own testimony on the matter with that of his two attorneys and his mother.

Petitioner was advised by two attorneys that he would only be required to serve eighty-five percent of his sentence. As a result of that information, he pled guilty. The plea judge's colloquy did not fix the mistaken belief. The PCR court, in a case where Petitioner testified, presented testimony from three other witnesses, and provided a contemporaneous record from before his plea which all conclusively established the incorrect advice, erred in denying relief. Petitioner's testimony at the PCR hearing was sufficient, under South Carolina law, to prove prejudice.

II. The PCR court erred in denying relief, where the court reasoned that the plea judge's colloquy cured any misunderstanding as to Issue I, where plea counsel therefore should have realized he provided incorrect advice, and where counsel failed to act or move to withdraw Petitioner's guilty plea.

If this Court believes the plea judge's colloquy caused Petitioner to realize that his plea would be served in its entirety, Petitioner is entitled to relief. It would naturally follow that if Petitioner was made aware of the day-for-day requirement at the time of his plea, his attorney,

trained in the law, would have also recognized that he provided incorrect advice and therefore moved to withdraw the guilty plea.

In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of his plea. Boykin v. Alabama, 395 U.S. 238, 241, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). When determining issues relating to guilty pleas, the Court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the PCR hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 650 (2000).

When there is reason to think that a rational defendant would want to withdraw his plea, or when the defendant reasonably demonstrated an interest in so withdrawing his plea, plea counsel may be constitutionally obliged to move to terminate a plea proceeding or otherwise move to withdraw his client's guilty plea. Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000).

Plea counsel should have known that Petitioner would have wanted to withdraw his plea if he was going to be required the entirety of the sentence; the difference between eighty-five and one hundred percent of a thirty-five year sentence is over five years. The portion of the Order of Dismissal discussing this issue begins with an unrealistic requirement in this scenario and then delves into an amorphous discussion of how Petitioner's future statements at the PCR

evidentiary hearing would have meant plea counsel knew at the time of the plea not to withdraw the plea.

At the outset, the PCR court correctly concluded that neither Petitioner nor his family asked Counsel Hilliard to move or withdraw the plea, seemingly lending credibility to Petitioner's argument on appeal as to Issue I. App. 110. Because the discrepancy regarding the serving of the sentence was not discovered until Petitioner was incarcerated at the South Carolina Department of Corrections, it would appear the plea colloquy did not cure Petitioner's misunderstanding and he is entitled to relief under Issue I. During and even after the plea, Petitioner, his family, and his counsel were all under the mistaken impression that Petitioner would only be required to serve eighty-five percent of his sentence. As a result, Petitioner was transported to the prison and prepared to serve slightly less than thirty years. At the time, there was no reason to believe Counsel Hilliard should have withdrawn the plea.

The second point the PCR court relied on to deny relief as to this issue revolved around the "alternating reasons for pleading guilty offered by [Petitioner]." App. 110. As referenced in the preceding section in the Order of Dismissal, the PCR court suggested that Petitioner pled guilty because 1) he was guilty; 2) he was told he would be eligible for early release; and 3) Counsel Hilliard did not have enough time to prepare the case for trial. Candidly, the latter two reasons were not established until Petitioner filed his post-conviction relief application and therefore had not been articulated at the time of the plea. Counsel Hilliard should have withdrawn the plea if this Court believes the plea court's colloquy cured a glaring misconception Petitioner received from two different attorneys.

Counsel Hilliard's testimony at the PCR hearing established why he did not move to withdraw:

> Q: Now, Mr. Hilliard, by way of his revised or his amendment, Mr. Cumbee has alleged that you were ineffective for misadvising him regarding the service of his sentence being 85 percent. He's also alleging that you were ineffective when you didn't move to withdraw. Did you not move to withdraw because you didn't realize a that juncture that your advice was incorrect?
>
> A: Yes. I did not move to withdraw because I thought I was - - I still believed I was correct.
>
> Q: Okay. And if you would have known that was incorrect you would have moved to withdraw after having a discussion with Mr. Cumbee if that's what he wanted you to do?
>
> A: If he had wanted me to do that, I would have done it. Yes.
>
> Q: Okay. And so, in your mind the Court's statement did not cure the advice or did not change the advice that you had given Mr. Cumbee. You still believed it was 85 percent.
>
> A: True. Yes.

App. 56 l. 12 – 57 l. 4. Counsel further elucidated, without equivocation, that none of the comments by the judge during the plea raised a question that he may have been incorrect about the eighty-five percent. App. 58 ll. 16 – 20.

Petitioner's testimony is equally as straightforward on this issue. When asked at the PCR evidentiary hearing about this allegation, Petitioner satisfied the prejudice prong by his uncontroverted testimony that he would have asked Counsel Hilliard to withdraw the plea had he known about the day-for-day requirement:

> Q: As the second allegation on your amendment, you have alleged that your attorney was ineffective when he didn't interject or move to withdraw your guilty plea after the Court addressed the service of your sentence. If Mr. Hilliard would have said after the Judge made his comments or you raised a concern, you know what I did misadvise you, it's day for day,

would you have wanted him to move to withdraw your guilty plea at that point and not have to wait to go forward with this PCR?

A: Yes ma'am. I would not have gone forward.

App. 70 ll. 14 0 23.

This case is also 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. Specifically, this Court held that Jordan's counsel failed to adhere to the prevailing professional norms:

> When the solicitor disregarded the agreement, Jordan's attorney failed to draw Judge Eppes' attention to the plea bargain and then failed to move to withdraw Jordan's guilty plea. We hold that the conduct of Jordan's counsel in not protecting Jordan's right to enforce the plea agreement with the Solicitor's office fell below "prevailing professional norms."

Id. at 54, 374 S.E.2d at 685. (internal citations omitted). Although not identical in that there was no prosecutorial misconduct, plea counsel still failed to act in Petitioner's case in order to preserve the sentence Petitioner believed he was receiving. The divergence may not have originated with the state, but it was counsel's duty to protect the interests of his client. His failure to withdraw the plea constituted deficient performance. Based on Petitioner's testimony that he would have wanted Counsel Hilliard to withdraw the plea—as a reasonable defendant would have requested—Petitioner also satisfied the prejudice prong.

It is impossible to reconcile the PCR court's conclusion that the plea court's explanation regarding parole "could scarcely be clearer" with the suggestion that "it is not clear that Hilliard should have been immediately prompted to action by the plea court's clarification." App. 107; App. 110. The two sentiments cannot exist simultaneously. Petitioner is entitled to begin anew.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant certiorari to allow further briefing.

s/Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of February, 2021.