STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

BRIEF OF PETITIONER

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ISSUE 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 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), SCRCP, 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.

Petitioner filed a notice of appeal, and the undersigned filed a petition for writ of certiorari on July 23, 2018. The state made its Return on December 7, 2018. After the case was transferred to this Court, certiorari was granted as to Issues I and III (now Issue II) on October 14, 2020. This Brief of Petitioner follows.

STANDARD OF REVIEW

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 an appellate court will reverse when the PCR court's decision is controlled by an error of law. Jordan, supra.

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.

Officers with the Pageland Police Department, including Mikkos Newman and embattled chief Larry Brown, used coercive and intimidating tactics while displaying a pattern of questionable behavior when they threatened to charge the family of Petitioner and witness Kory Little in order to get what they wanted: statements that incriminated Petitioner.

Newman, alone in an interview room with Petitioner during an unrecorded conversation, told Petitioner that he would charge Petitioner's family with accessory unless Petitioner wrote a self-incriminating statement. App. 50 l. 13 – 51 l. 9. An identical approach was employed by Newman when questioning Kory Little, a witness to the incident giving rise to Petitioner's arrest. App. 202 l. 4 – 205 l. 13. As will be discussed further below, Newman threatened to charge Little with accessory to murder unless Little gave a statement implicating Petitioner. Id. Petitioner's counsel failed to interview Little and elicit helpful testimony that would have removed an important piece of evidence in the state's case against Petitioner.

Relevant facts

Petitioner was arrested following an incident on August 27, 2007 in or near Pageland, South Carolina. App. 87 l. 16 – 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 PCR, 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 – 203 l. 2. Little further elaborated as to why he provided law enforcement a statement that contained falsities:

> [T]hey told me that they [were] going to charge me with accessory after the fact of murder because I didn't call, they said I didn't call the police but I did but they said I didn't and I didn't report it and they … [threw] all kinds of things at me and I just went ahead and complied with them so I could get out of there so I could get something to eat and use the bathroom.

App. 204 ll. 19 – 25.

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 at the PCR hearing and

clarified that he was unaware that Petitioner was at Pop's. App. 203 l. 25 – App. 204 l. 9. Petitioner learned of Little's treatment at the hands of the police only after he entered his guilty plea. App. 179 l. 14 – 180 l. 2.

Little stated that Petitioner's trial-turned-plea counsel never interviewed him. App. 204 l. 10 – 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.

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.

Although the Order of Dismissal contained a summary of Little's testimony, there was little-to-no discussion relating his remarks at the PCR hearing to Petitioner's claims of ineffective assistance of counsel. App. 264; App. 266 – 268. Under the "Ineffective Assistance of Counsel" section within the Order of Dismissal, there existed approximately seven sentences sandwiched between recitations of the law. App. 267.

The Amended Order denying Petitioner's Rule 59(e) motion discussed this issue under the guise of a newly-discovered evidence claim. App. 297 – 298. Petitioner did not raise this

issue, particularly regarding Little's statement, under a theory that it was newly-discovered evidence, however. In his initial post-conviction relief application, Petitioner claimed he received ineffective assistance of counsel because "[t]rial counsel failed to conduct an adequate pre-trial investigation to prepare for a trial defense," an allegation under which Little's statement would fit squarely. App. 129. The newly-discovered evidence claim was raised solely in the context of Billy Lee Lisenby, Jr.'s testimony. App. 146. Although the numerous supplemental and amended PCR applications were perhaps unwieldy, there can be no mistake: Petitioner raised this matter under an ineffective assistance of counsel theory. Kory Little gave a statement to law enforcement and recanted it at the PCR hearing. Had counsel interviewed Little during the investigation stage of his representation, Little would have recanted his previous statement and provided favorable testimony to the defense.

Discussion

"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.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691, 104 S.Ct. 2052. One component of that duty is to investigate witnesses in a case.

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.

In Martin v. State, 427 S.C. 450, 832 S.E.2d 277 (2019), the South Carolina Supreme Court reversed the PCR court's denial of post-conviction relief and remanded for a new trial. Martin was convicted of armed robbery and criminal conspiracy; he alleged his trial attorneys were ineffective for failing to elicit testimony from his mother regarding the specific timeline of his alibi. Id. at 453, 832 S.E.2d at 278. Martin's mother testified in his defense at trial, but counsel did not question her about a statement she had given to them that would have established an alibi defense. Id. at 453, 832 S.E.2d at 279. Martin's trial counsel admitted they were aware of this information. Id. at 453, 832 S.E.2d at 279. The Supreme Court held "as a matter of law that Petitioner's trial attorneys were deficient for not eliciting the specific alibi timeline testimony from Petitioner's mother." Id. at 456, 832 S.E.2d at 280. Although Little was not an alibi witness, a similar approach can be taken in Petitioner's case. The failure to interview witnesses undermined confidence in the outcome of Petitioner's case. Counsel took the state's theory of the case at face value and failed to perform an adequate investigation of his own. Although Little would not have provided an alibi, his truthful statement that he did not see who got out of the car on the night in question would have served a twofold purpose: to remove a

piece of evidence against Petitioner from the state's case and to bring to light unethical interrogation methods being used by law enforcement in the area. Both results would have greatly aided Petitioner's defense.

In Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014), the Supreme Court reversed the Court of Appeals' holding that the applicant was not prejudiced by trial counsel's failure to interview the defendant's former girlfriend as a potential alibi witness. Walker was accused of kidnapping and sexual assault. 407 S.C. at 403, 756 S.E.2d at 145. The victim reviewed surveillance footage from the gas station where she alleged that she met her assailant, who offered to help her when her car would not start. Id. A gas station employee identified Walker as the man pointed out by the Victim on the video. Id. When interviewed by police, Walker admitted going to the gas station but denied offering any help to anyone there or any involvement with the alleged victim. Id. He said he spent the afternoon and evening at a friend's home and then returned to his girlfriend Robina Reed's home around 9:30 or 10:00 p.m. for the remainder of the night. Id.

Following his conviction, Walker filed for PCR, alleging that his trial counsel was ineffective in failing to conduct an adequate investigation. 407 S.C. at 403, 756 S.E.2d at 146. Walker's trial counsel admitted reviewing video of the police interview and had "Robina Reed" in her notes to interview but never did. Id. Though she said that her investigator spoke with or tried to speak with Reed, trial counsel never followed up with her investigator. Id. at 403-04, 756 S.E.2d at 146. Reed testified that she was never contacted about Walker's case and did not know why he disappeared in May 2002 until his PCR attorney contacted her. Id. at 404, 756 S.E.2d at 146. Though she could not provide specific dates and times, she testified that she and Walker spent every weekend together prior to his arrest. Id. The PCR court granted Walker's

application, but the Court of Appeals reversed, finding that Walker's trial counsel was deficient but that Walker was not prejudiced. Id.

The Supreme Court recognized that Reed's testimony at Walker's PCR hearing vacillated but finally settled on an answer that "prior to Walker's arrest, she and Walker spent every weekend together." 407 S.C. at 406, 756 S.E.2d at 147. Thus, there was evidence to support the PCR court's conclusion that Reed's testimony reasonably could have resulted in a different outcome at trial. Id. "If true and construed as meaning at least that Walker and Reed spent every night together on the weekends prior to his arrest, it would be physically impossible for Walker to have committed the kidnapping and assaults." Id. "In other words, unlike Glover where the testimony of the alibi witnesses could have been true and the petitioner still could have committed the crime, it is not possible for Reed's testimony to be true and for Walker to have committed the crime." Id. at 406-07, 756 S.E.2d at 147. Much like Walker's attorney failed to interview a witness to discover an alibi, counsel in Petitioner's case failed to uncover an abuse of power by law enforcement in Chesterfield County. Interviewing Little prior to Petitioner's plea would have resulted in the discovery of not only the coercive tactics employed by the Pageland Police Department but also would have removed one of the state's main witnesses. Similar to an alibi witness vouching for an individual's whereabouts, Little's truthful testimony would have derailed the state's contention that Petitioner was the shooter.

In Glover v. State, 318 S.C. 496, 497, 458 S.E.2d 538, 539 (1995), the applicant presented the testimony of the two witnesses who he claimed would have testified that he was in Florida at 8:30 *a.m.* on the day when the crimes were committed. A majority of the South Carolina Supreme Court found that the witnesses' testimony did not foreclose the possibility that Glover could have committed the crimes at 8:30 *p.m.* in light of testimony that Williamsburg

County was only a six and a half hour drive from the witness' home in Florida. 318 S.C. at 498, 458 S.E.2d at 540. Thus, Glover's witnesses did not provide an alibi and he suffered no prejudice. Id. Unlike that situation, Petitioner suffered prejudice. Contained within the state's arsenal of tools with which it intended to convict Petitioner was Little's statement. Had counsel interviewed Little, that statement would have not only been made useless but would have called into question Petitioner's statement provided to law enforcement as well.

In the matter at hand, 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. Petitioner plainly testified that he would have gone to trial had he known Little's original statement was coerced by law enforcement:

> I would've pled not guilty and went to trial because then I would [have] been able to dispute the State's theory that I brought on [the] initial difficulty by stepping out the car with a gun because the only testimony that they plan to use that I brought [on the] initial difficulty [was] by stepping out of the car with the gun [as] was Kory Little's statement.

App. 180 ll. 3 – 12.

Little's situation was unique; no other witness could have testified about both 1) intimidation at the hands of law enforcement, and 2) the facts and circumstances on the night of the shooting. Little's perspective on the night in question was of utmost importance: he was standing with the decedent as a car drove up. App. 203 ll. 6 – 19. Someone in the car got out with a "long gun" and then the decedent began arguing with this individual. Id. Little was

perhaps the most significant witness to the shooting; counsel's failure to interview him constituted deficient performance. Had counsel discovered the nefarious tactics used by law enforcement to pressure both Little and his client to provide statements, he could have established reasonable doubt at a trial.

Counsel should have recognized that Little's statement was taken by the same officer who coerced Petitioner. Even without this fact, Little should have been interviewed. He was a fact witness and described the night in detail. His testimony was undoubtedly going to be used at trial; counsel should have interviewed an adverse witness in order to gain a better understanding of the case and the evidence the state was going to offer at trial. Additionally, however, Little was interrogated by the same officer who forced Petitioner to provide a statement. Facing similar threats—an accessory charge for innocent witnesses—from Newman, Little elected to do as he was told instead of risking getting arrested. Counsel, privy to the knowledge that Newman also threatened to charge members of Petitioner's family with an identical charge, should have interviewed Little about the facts of the case at the very least. He could have also discovered some compelling evidence to support the contention that Petitioner's statement was not freely and voluntarily made.

Because counsel failed to interview Little, none of this was ascertained. Had counsel discover Little's situation and accompanying willingness to recant prior to the plea, he could have taken the case to trial as Petitioner wished. The ability to flip one of the state's key witnesses and advise the jury about the intimidating tactics in which law enforcement engaged would have proved useful at trial. To this end, Petitioner was prejudiced.

II. 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.

Relevant facts

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. When asked about this exchange at the evidentiary hearing, counsel testified that he did not step in and clarify the actual percentage, seemingly admitting that there was a likelihood that Petitioner did not understand how long he would be required to serve App. 233 ll. 1 – 23. He admitted that he should have spoken up. Id.

Discussion

"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 ten years when, in reality, defendant would have to serve twenty years. Id. at 457-58, 377 S.E.2d at 339. The South Carolina Supreme 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. The Supreme 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.

It is worth noting the plea court's failure to correct Petitioner's understanding, especially since that would have been an opportunity for the court to cure the deficiency. "[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). Instead of informing Petitioner about an important part of his guilty plea and the resulting sentence, the plea judge indicated it was "not any of [his] concern." App. 86 ll. 1 – 8. There was no moment at the plea where the judge properly informed Petitioner about the sentencing range.

Petitioner maintained that counsel erroneously informed him before his plea that he would be required to serve only 65% of his sentence, and the contemporaneous record created in 2010 at the plea confirmed that. Petitioner was unaware of the 85% rule, and he answered honestly when asked by the plea judge. 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.

As with Issue I, *supra*, there was minimal in-depth discussion in the initial Order of Dismissal on this topic. Without referencing any specific case citations, the PCR judge found that because trial counsel refuted this allegation, among others, Petitioner failed to demonstrate deficiency and prejudice. App. 267 – 268.

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. App. 173 ll. 5 – 23. As a result, the ineffective assistance he received from counsel prejudiced him, and he is entitled to relief.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court reverse the PCR court and award him a new trial.

s/Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of February, 2021.