STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Certiorari to Chesterfield County
Court of Common Pleas

The Honorable Paul M. Burch, Trial Judge
The Honorable Roger E. Henderson, PCR Judge

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Appellate Case No. 2017-002353

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DAMEION J. RIVERS. ..... Petitioner.

v.

STATE OF SOUTH CAROLINA. ..... Respondent.

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**BRIEF OF RESPONDENT**

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## STATEMENTS OF ISSUES ON CERTIORARI

### Petitioner's Statement of Issues on Certiorari

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?

### Respondent's Counterstatement of Issues on Certiorari

I. Did the post-conviction relief court properly determine that Petitioner failed to establish counsel was ineffective for failing to investigate and interview a witness who gave a favorable statement to the State and whose contradictory statement at the evidentiary hearing was incredible and, thus, not prejudicial?

II. Did the post-conviction relief court properly determine that Petitioner failed to establish he entered his plea involuntarily, unknowingly, and unintelligently under the belief he would only have to serve sixty-five percent of his sentence when Counsel credibly testified he told Petitioner he would have to serve eighty-five percent and when the plea court told Petitioner he could expect to serve every day of his sentence?

## STATEMENT OF THE CASE

Dameion Rivers (hereafter "Petitioner") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Chesterfield County Clerk of Court. During its November 2007 term, the Chesterfield County Grand Jury indicted Petitioner for murder (2007-GS-13-00814). During its December 2007 term, the Chesterfield County Grand Jury indicted Petitioner for possession of a weapon during commission of a violent crime (2007-GS-13-00897). Petitioner was represented by Paul Cannarella, Esquire (hereafter "Counsel"). Deputy Assistant Solicitors Kernard Redmond and Adam Ford from the Fourth Circuit Solicitor's Office represented the State. On August 31, 2010, Petitioner pled to the lesser-included offense of voluntary manslaughter and as indicted to the possession of a weapon during commission of a violent crime before the Honorable Paul M. Burch. Judge Burch sentenced Petitioner to nineteen years' imprisonment for voluntary manslaughter and five years' imprisonment on the possession of a weapon during commission of a violent crime charge, sentences running concurrently. Applicant did not appeal his conviction or sentence.

Petitioner timely filed a PCR application on June 9, 2011, alleging:

1. "Ineffective assistance of counsel."
    a. "Trial Counsel failed to conduct an adequate pre-trial investigation to prepare for a trial defense."
2. "Involuntary plea."
    a. "Plea was not voluntary[ily], knowingly made."

Petitioner, through PCR Counsel Andrew F. McLeod, filed an amendment to the PCR application, dated January 11, 2013, alleging:

1. "Ineffective assistance of counsel and counsel's failure to quash the indictment for murder."
    a. "The indictment was invalid based on the fact that it states that the victim died in Chesterfield County when in fact the record clearly indicates that the victim was airlifted to Charlotte, North Carolina where surgery was performed and

that ultimately the victim expired in Charlotte, North Carolina at the hospital and not in Chesterfield County."

2. "Ineffective assistance of counsel in failing to advise the applicant of the mandatory minimum penalty of the guilty plea involved."
    a. "Counsel was ineffective in failing to advise the applicant concerning the mandatory minimum penalty for the guilty plea."

Through PCR Counsel McLeod, Petitioner filed his second amendment to the PCR application dated May 29, 2013, alleging:

1. Ineffective assistance of counsel for:
    a. "failure to discover exculpatory evidence."
    b. "failure to advise the plea court to give applicant all of his time served."
    c. "failure to clarify plea court's erroneous language pertaining to the murder indictment."
    d. "failure to advise the applicant of the mandatory minimum penalty based on the plea."
    e. "Failure to quash indictment for murder."

Through PCR Counsel McLeod, Petitioner filed his third amendment to the PCR application dated December 23, 2015, alleging:

1. "Trial counsel was ineffective in not obtaining a continuance due to the fact that the State did not comply with the Brady request in it did not provide the recorded statement of Kenneth Louallen. Said statement was clearly referenced in the incident report and was not produced."
2. "Trial counsel was ineffective in not advising the PCR applicant concerning the fact that he would have to serve 85% of any sentence and the trial counsel advised that PCR application would only have to serve 65% of any sentence. Had PCR applicant known this then, he would have gone to trial."
3. "Trial counsel was ineffective in failing to raise all the issues possible concerning the validity of the indictment. The incident was not signed by the grand jury foreman, and it incorrectly stated the location where the victim died."
4. "The police officer who was investigating this case for the town of pageland is currently on administrative leave and being investigated for improper conduct, and the PCR applicant believes that the police officer intentionally withheld evidence and did not investigate this case."
5. "There is a witness, Billy Lee Lisenby, Jr., who is prepared to testify that he informed Chief Brown, the investigating officer, after the shooting that he saw the victim with a gun prior to the shooting at the scene, but the investigating officer did not get a statement from Billy Lee Lisenby, Jr. or bring this information to light during the investigation."

Respondent made its return on August 19, 2011. The evidentiary hearing occurred on

January 11, 2016, before the Honorable Roger E. Henderson. Andrew F. McLeod, Esquire was Petitioner's attorney and Assistant Attorney General Jessica E. Kinard represented Respondent.

The Court issued an order of dismissal, denying Petitioner's PCR application and remanding him to the custody of South Carolina Department of Corrections on July 8, 2016, finding:

1. Counsel was not ineffective based upon any of the ground alleged because Petitioner failed to demonstrate deficiency by trial counsel and prejudice caused by trial counsel's actions.
2. Petitioner's allegation that the testimony of Kory Little and Billy lee Lisenby, Jr. constitute newly discovered evidence is without merit because the evidence is not material enough to the issue of guilt or innocence enough that it would have reasonably led a jury to acquit.

Thus, the request for relief was denied. Petitioner filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP on September 9, 2016, which was denied by Judge Henderson on October 18, 2017. Petitioner filed his petition for writ of certiorari was filed July 23, 2018, in which Petitioner alleged:

1. Counsel was ineffective for failing to interview two witnesses with information that would have caused Counsel to alter his advice concerning the plea.
2. The PCR judge erred in failing to order a new trial when the testimony of Billy Lee Lisenby, supporting a claim of self-defense, satisfied the threshold requirements of after-discovered evidence in light of the fact that Lisenby never provided a formal statement to law enforcement.
3. The plea is invalid because Counsel erred in advising Petitioner that he would have to serve sixty-five percent of his sentence as opposed to what is required; namely eighty-five percent of the sentence.

Respondent's return filed December 7, 2018. The case was transferred from the Supreme Court of South Carolina to the South Carolina Court of Appeals on December 18, 2018. On October 14, 2020 the Court of Appeals granted certiorari concerning issues one and three and denied certiorari concerning issue two. The brief of petitioner was filed February 12, 2021. This brief of respondent follows.

## STATEMENT OF FACTS

Law enforcement was called out to Pop's Game Room, where they found Tavish Dunlap (hereafter "Victim") bleeding out from a shotgun wound to the abdomen. (App. 87). Victim was airlifted to Charlotte where he died. (App. 88). Witnesses indicated Petitioner drove up to the scene, stepped out of the car, and shot Victim. (App. 88). Petitioner was arrested and provided a witness statement admitting he shot Victim and volunteered to take law enforcement to Monroe, North Carolina, where he disposed of the weapon. (App. 88). The weapon was retrieved and a shell casing found on scene was matched to the shotgun. (App. 88-89).

In mitigation, Counsel stated that Petitioner shot and killed Victim in a dispute over whether Petitioner had snitched on a third person called "Red Boy." (App. 91-105). Counsel stated that witness Eltoya Blakeney was expected to testify Petitioner stated before the killing "I'm getting the Mossburg and clean that crew out down at Pops." (App. 98, 113). Counsel noted Little's presence at the scene as a witness, but explained that he was facing a murder charge in North Carolina. (App. 99). Counsel expressed his belief that Victim had a weapon someone took from Victim after he was shot along with the contents of his pockets and his shoes and speculated that Little had used the weapon in the commission of his North Carolina crime. (App. 104-05). Petitioner expressed remorse, noted "[t]he shot, it wasn't meant for him[,]" and explained the gun accidentally went off when he backed up and fell onto the car. (App. 105). Petitioner stated that Little ran up to Victim as Petitioner was leaving and agreed that Little took everything off of Victim. (App. 105-06). The State rejected the conjecture. (App. 115-16).

At the plea hearing, Petitioner voiced unfamiliarity with the "85 Percent Rule or anything like that[.]" (App. 85). The Court explained that he "could actually expect [to] serve the entire amount" of the sentence, to which Petitioner confirmed he understood. (App. 86).

## STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts "give[] great deference to the PCR court's findings of fact and conclusions of law", *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a PCR court's findings will be upheld if there is "any evidence of probative value sufficient to support them." *Id.* Reversal of the lower court's findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a *de novo* review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id*. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. S*ee also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed

in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

In the context of a guilty plea, the applicant must show there is a reasonable probability that, but for ineffective assistance of counsel, he or she would not have pled guilty but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Applicant's right to contest the validity of a plea is usually, but not invariably, foreclosed because of the inherent solemnity and truthfulness included in the guilty plea process. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Absent valid reasons why the applicant is entitled to depart from previous judicial admissions

made at the plea hearing, statements made during the original proceeding remain conclusive. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)). Whether Petitioner was prejudiced by Counsel's deficiency is contingent on whether the evidence presented would have led Counsel to change his recommendation regarding the plea. *Stalk v. State*, 383 S.C. 559, 562, 681 S.E.2d 592, 594 (2009).

## I. The post-conviction relief court properly determined that Petitioner failed to establish counsel was ineffective for failing to investigate and interview a witness who gave a favorable statement to the State and whose contradictory statement at the evidentiary hearing was incredible and, thus, not prejudicial.

On appeal, Petitioner argues the PCR court erred in denying him relief because Counsel was purportedly ineffective for failing to investigate a witness, Kory Little, who was allegedly coerced into giving a false statement that was incriminating towards Petitioner. However, the PCR court properly rejected this argument, finding that Counsel reasonably concluded that based upon the witness statement, the statement would not be favorable to Petitioner, and the subsequent testimony offered by Little was not credible and, consequently, non-prejudicial. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny relief.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citing *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). However, "it would be an absurdity to require criminal defense lawyers to interview *every* potential witness when they can articulate reasonable grounds not to." *Id.*, 392 S.C. at 457, 710 S.E.2d at 64-65 (emphasis original). The controlling standard counsel's performance is "reasonableness," and

"[s]o long as a defendant's attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient." *Id.*, 392 S.C. at 457, 710 S.E.2d at 65. For example, this Court has noted with approval that Counsel's performance is not deficient for electing not to interview witnesses where he has read their prior statements, reviewed the state's file in the matter, was experienced in trying similar cases, was familiar with the applicable law, and was not surprised by other evidence. *Id.* (citing *Daniels v. State*, 676 S.E.2d 13, 18 (Ga. Ct. App. 2009)).

The PCR court is entitled to extraordinary deference in determining the credibility of the witnesses before it. *Hyman v. State*, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012) (citing *Solomon v. State*, 313 S.C. 526, 443 S.E.2d 540 (1994)); *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) (citing *Simuel v. State*, 390 S.C. 267, 270, 701 s.E.2d 738, 739 (2010)). "Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial." *State v. Whitener*, 228 S.C. 244, 261, 89 S.E.2d 701, 709 (1955) (citations omitted).

At the evidentiary hearing, Little testified that his statement to law enforcement, which reported that Petitioner stepped out of his car armed with the shotgun, was false and obtained through coercion. (App. 202-03). Instead, Little testified that the car pulled up, and that "somebody got out the car with the long gun," but that he could not identify the person because it was dark outside. (App. 203). Little recalled Victim and the figure arguing, the figure backing up to try and get back in the car, a shot ringing out, and Victim falling. (App. 203). Little testified he ran inside Pop's and called 911. (App. 203). Little claimed he gave the initial, incriminatory statement to law enforcement because they prohibited him from using the restroom, eating, or otherwise leaving until he wrote the incriminatory statement. (App. 202-03). Little denied ever

speaking to Counsel and asserted he would have explained his statement was coerced. (App. 204).

Petitioner recalled Counsel explaining that, based on the witness statement given to the police, Little would testify at trial that Petitioner brought about the initial difficulty by stepping out of the car holding a shotgun. (App. 174). Petitioner testified he later learned Little only wrote his inculpatory statement after they threatened to charge him as an accessory after the fact. (App. 179-80). Petitioner asserted he would not have pled guilty had he known of Little's claim, and that Little's testimony was the only thing establishing Petitioner brought about the initial difficulty. (App. 180).[1]

Here, Counsel conducted a reasonable investigation and, thus, was not deficient. Counsel conceded he never spoke with Little because he believed that he "wouldn't get anything but a regurgitation of what he already had given in a statement." (App. 224). Counsel indicated that he does not "necessarily try to interview people who I know are going to be against me[.]" (App. 224). Counsel cannot be expected to interview what are seemingly hostile witnesses who have given sworn-to, incriminating statements to law enforcement without any indication that incriminating statement was coerced or otherwise fallacious. Instead, Counsel is expected to interview and investigate witnesses *favorable* to the defense; something Little did not unveil himself as being until after trial, at the PCR hearing. *See Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995) (finding that Counsel was not ineffective when the witnesses' testimony at the PCR hearing was not favorable to applicant's defense). Thus, in stating that he did not see a

[1] Again, Eltoya Blakeney would have testified to Petitioner's declaration of intent prior to the killing. (App. 113). Nordrea McBride was also a witness to the shooting and would have refuted allegations of aggression by the Victim. (App. 114-15). Petitioner racked the shotgun after blowing Victim away. *Id.*

point in interviewing witness favorable to the State who, by association, would inherently be hostile towards Petitioner, Counsel articulated a reasonable strategy on this point.

Even if Counsel was deficient, Petitioner was not prejudiced by the deficiency. Though the standard for relief is whether a petitioner would not have pled guilty but for counsel's alleged error, the validity of a petitioner's claim may be evaluated based upon the credibility of that contention, the witnesses or evidence undiscovered prior to the plea, and evidence of other factors driving Petitioner to plead. *See Goins*, 397 S.C. at 575, 726 S.E.2d at 4 (finding Petitioner was not prejudiced even when he testified that, but for the deficiency, he would have proceeded to trial because there was sufficient evidence to conclude Petitioner entered the plea because the State offered to dismiss two charges and a recommended ten years' imprisonment sentence instead). Here, the PCR court found the record weighed "very heavily against placing credibility on the statements of these men[,]" referring to Little and Lisenby. (App. 297-98). The PCR court's finding that Little lacked credibility is entitled to great deference by this Court, especially because it constitutes an inherently suspect form of recantation.

Not only was Little's testimony not credible, it was also largely unhelpful to the defense. Specifically, Counsel's remarks during the plea proceeding indicate an intent to portray Little as a dishonest actor, who swiped the shoes, gun, and petty possessions from a dying man and thereafter killed an innocent 15-year-old in North Carolina. (App. 104-05). Accordingly, Counsel intended to impeach Little's credibility while explaining why no gun was found on Victim. Thus, even if the case proceeded to trial with Little as a defense witness, identifying Little as a dishonest actor while simultaneously proffering as a credible witness would have rendered the defense chosen less effective at trial. Further, the main difference between Little's statement and Little's testimony pertains Little's ability to identify the shooter—a non-consequential fact,

especially after Petitioner admitted to being the shooter in a sworn-to statement, leaving the only remaining defenses being self-defense or accident. (App. 88).

Accordingly, even if this recantation was available for discovery by Counsel leading up to trial (as opposed to being fabricated thereafter), the information Counsel could have discovered by talking to Little is of no help or value to Petitioner's defense. Petitioner's contention that he would have proceeded to trial had he known of Little's recantation does not, without more, establish prejudice. Thus, because Petitioner has failed to show he was prejudiced by any alleged deficiency, relief should be denied on this ground.

**II. The post-conviction relief court properly determined that Petitioner failed to establish he entered his plea involuntarily, unknowingly, and unintelligently under the belief he would only have to serve sixty-five percent of his sentence when Counsel credibly testified he told Petitioner he would have to serve eighty-five percent and when the plea court told Petitioner he could expect to serve every day of his sentence.**

On appeal, Petitioner argues the PCR court erred in denying him relief because Counsel allegedly told Petitioner that he only had to serve sixty-five, not eighty-five, percent of his sentence and this misunderstanding rendered the plea invalid. However, the PCR court properly rejected this argument, finding that Counsel credibly testified that he told Petitioner he would have to serve eighty-five percent of the sentence and, even if there was a misunderstanding between Petitioner and Counsel, this was cured by course of the plea colloquy, where Petitioner was informed he could be expected to serve up to the entirety of the sentence. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny relief.

For a plea to be valid, the applicant must have been aware of the nature and crucial elements of the offense the maximum and minimum penalties, and the rights he is waiving by accepting the plea. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Roddy v. State*, 339 S.C. 29, 528

S.E.2d 418 (2000). A plea is not knowing or voluntary if a defendant "lacks knowledge of material evidence in the prosecution's possession." *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999).

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." *Roddy*, 339 S.C. at 34, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "'[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing.'" *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874 (quoting *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). Further, "guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including claims of a violation of a constitutional right prior to the plea." *Whetsell v. State*, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981).

"It is well settled that parole eligibility is a collateral consequence of sentencing, and that trial counsel need not advise a client of his parole eligibility or ineligibility in order to render effective assistance." *Jackson v. State*, 349 S.C. 62, 64, 562 S.E.2d 475, 476-77 (2002) (citations omitted). "When considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether information conveyed by the plea judge cured any possible error made by counsel." *Burnett v. State*, 352 S.C. 589, 592, 576 S.E.2d 144, 145 (2003) (citing *Moorehead v. State*, 329 S.C. 329, 496 S.E.2d 415 (1998)).

At the plea hearing, the following exchange occurred:

> The Court: And you understand that – have you discussed with your attorney the 85 Percent Rule or anything like that? Parole eligibility?
>
> Mr. Rivers: No, sir.
>
> The Court: 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?
>
> Mr. Rivers: Yes, sir, I understand.
>
> The Court: Now, before I accept the plea you got any questions about anything that I've gone over with you?
>
> Mr. Rivers: No, sir, I don't.

(App. 85-86).

However, at the PCR hearing, Petitioner stated that he pled because Counsel allegedly erroneously told him that he only had to serve sixty-five percent of his sentence and, when confronted about what was discussed at the plea colloquy, Petitioner stated he only thought he would serve the entire amount of the sentence if he got in trouble while incarcerated. (App. 173, 200). Conversely, Counsel denied ever telling Petitioner that he would only have to serve sixty-five percent of the sentence and firmly asserted he would serve eighty-five percent. (App. 229-30). Counsel stated he should have said something at the plea colloquy when Petitioner stated he did not understand, but stated that his standard, run-of-the-mill argument concerning mandatory minimums is that he will have to serve eighty-five percent of his sentence. (App. 232-33). The PCR Court found Counsel credible on this ground. (App. 267).

Here, Counsel credibly testified that he told Petitioner he would have to serve eighty-five percent of his sentence, not sixty-five. Additionally, even if this Court finds

Counsel not credible on this ground, the issue was resolved at the plea colloquy. Specifically, when the plea judge stated that Petitioner may have to serve not just eighty-five percent but one hundred percent of his sentence, Petitioner stated he understood this and entered his plea anyway. *See Burnett*, 352 S.C. at 592, 576 S.E.2d at 145 (citing *Moorehead v. State*, 329 S.C. 329, 496 S.E.2d 415 (1998)) (stating that the guilty plea transcript will be considered in determining whether or not statements made by the plea judge cured any possible misadvise given by Counsel.) Thus, any misunderstanding Petitioner may have had based upon conversations with Counsel were resolved through the plea colloquy. Further, beyond Petitioner's testimony, Petitioner is unable to point to anything substantiating his claim. Thus, based upon the above, Respondent contends that probative evidence on the record exists indicating that this allegation is without merit and, accordingly, relief should be denied on this ground.

## CONCLUSION

For the reasons stated above, this court should affirm the decision of PCR Court and deny Petitioner relief requested.

Respectfully submitted,

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Attorney General

CHELSEY F. MARTO
Assistant Attorney General

BY: /s Chelsey F. Marto
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ATTORNEYS FOR RESPONDENT

April 12, 2021

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Apr 12 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Chesterfield County
Court of Common Pleas
The Honorable Paul M. Burch, Circuit Court Judge

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Appellate Case No. 2017-002353

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DAMEION J. RIVERS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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# PROOF OF SERVICE

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Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Brief of Respondent has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

**Taylor D. Gilliam, Esquire**
**tgilliam@sccid.sc.gov**

This 12th Day of April, 2021.

/s Chelsey F. Marto
Chelsey F. Marto
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Columbia, SC 29211
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ATTORNEY FOR RESPONDENT

RECEIVED
Apr 12 2021
SC Court of Appeals

April 12, 2021

The Honorable Jenny A. Kitchings
Clerk of Court — SC Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

***Re:*** **Dameion J. Rivers v. State of South Carolina**
**Appellate Case No. 2017-002353**
**Lower Court Case No. 2011-CP-13-0210**

Dear Ms. Kitchings:

Enclosed for filing is the **Brief of Respondent** in the above referenced case for filing in your office. By copy of this letter we are serving opposing counsel today.

Sincerely,

/s Chelsey F. Marto
Chelsey F. Marto
Assistant Attorney General
SC Bar #104191

CFM/ec

cc: Taylor D. Gilliam, Esquire
Victim Advocacy Division (without enclosure)