

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Jasper County  
Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2012-212550  
Lower Court Case Number 2007-CP-27-0143

RECEIVED

MAY - 1 2013

S.C. Supreme Court

MARCUS PARKER,  
Petitioner,

v.

STATE OF SOUTH CAROLINA,  
Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

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## **QUESTION PRESENTED**

Did the lower court properly find the Petitioner failed to carry his burden of proving counsel was ineffective for providing erroneous information to the Applicant about his potential parole eligibility for possession of a weapon during the commission of a violent crime?

## **STATEMENT OF THE CASE**

For purposes of this Return, the Respondent adopts the Statement of the Petitioner.

## ARGUMENT

**There is probative evidence to support the lower court's finding that counsel did not actively misadvise the Petitioner about parole eligibility for his possession of weapon during the commission of a violent crime charge.**

Petitioner asserts that the post-conviction relief court erred by finding the Petitioner failed to carry his burden of proving counsel actively misadvised him as to his parole eligibility for the possession of a firearm charge. Respondent submits probative evidence exists to support the post-conviction relief court's findings. The petition should be denied and the appeal dismissed.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such 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, 386 S.E.2d at 625. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

At the evidentiary hearing, plea counsel testified that he remembered the facts of the case. (App. 174). Plea counsel also testified he did not have a specific recollection of meetings with the Petitioner because the case was 12 years old. (App. 175). Counsel also testified he has been practicing law for 22 years and has extensive experience defending against serious criminal charges. (App. 174, 177). Counsel testified he was aware that the weapons charge carries a five-year mandatory sentence without parole and it is his general practice to advise his clients of such prior to plea or trial. (App. 178).

At the evidentiary hearing, the Petitioner testified that counsel advised him that he could receive up to a maximum of five years with the possibility of parole for possession of a firearm. (App. 181). Petitioner testified that he later learned that he was serving a five year mandatory sentence without the possibility of parole for the possession of a firearm charge. (App. 182). Petitioner testified he would not have pled guilty had he been correctly informed about parole eligibility (App. 191).

At the evidentiary hearing, the Petitioner's co-defendant Kenneth Jones also testified. He testified that he overheard a conversation between the Petitioner and his attorney about his crimes and his charges. Jones testified he heard them say the Petitioner would be eligible for parole. (App. 194).

The Respondent submits the Applicant's guilty plea was freely and voluntarily entered. A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of his plea and of the charges against him. Simpson v. State, 317 S.C. 506, 455 S.E.2d 175 (1995). The record reflects the Petitioner was advised of the following: the potential sentence he was facing (App. 4), his right to a jury trial, his right to remain silent, and his right to confront his accusers (App. 5). The Court also advised the Petitioner of his parole eligibility. The Court told the Petitioner "the kidnapping, the armed robbery, and the assault and battery with intent to kill require service of eighty-five percent of whatever sentence I give". (App. 4). The Applicant indicated he understood the Court's statement. (App. 4). The record also reflects the Petitioner stated he was not promised anything to plead guilty and was not under the influence of drugs or alcohol and did not suffer from any mental illness at the time of plea. (App. 3,4,7). The Petitioner pled guilty with a full understanding of the consequences of his plea included parole eligibility for the charges he was facing.

The Respondent submits the Petitioner failed to carry his burden of proving counsel misadvised him about parole eligibility for the possession of a weapon charge. Parole eligibility has been held to be a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea. Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983). However, if the defendant's attorney undertakes to advise the defendant about parole eligibility and gives erroneous advice, then the plea may be collaterally attacked. Smith v. State, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997). From the Court's advice that the applicant would be required to serve 85 percent of his sentences for all charges other than possession of a

weapon, the Petitioner could have logically concluded that he was not eligible for parole for the possession of a weapon. Also, plea counsel provided credible testimony that he was aware that the weapons charge carried a five year mandatory sentence without parole. (App. 178). Counsel also provided credible testimony that it is his general practice to advise his clients of the potential sentence and lack of parole eligibility prior to pleading guilty. (App. 178).

The Respondent submits the incredible testimony presented by the Petitioner and his co-defendant was not sufficient to establish counsel provided misadvice and that counsel's alleged misadvice affected the Petitioner's decision to plead guilty. Absent testimony from a credible source, a defendant's testimony, several years after a guilty plea that his plea was induced by erroneous advice of counsel is not persuasive. Hinson v. State, 297 S.C. 456, 458, 377 S.E.2d 338, 339 (1989). The only testimony presented by the Petitioner to support his claim was his own and that of his co-defendant Kenneth Jones. The lower court properly found the Petitioner's testimony was not credible. The Petitioner's general lack of credibility is also reflected in the record of his first PCR hearing during which the Court found the Petitioner committed perjury after disavowing the statements he made during his guilty plea. (App. 90).

The Respondent submits the testimony presented by the Petitioner that but for counsel's misadvice he would have proceeded to trial is incredible. It is unlikely the Petitioner's parole eligibility on the possession of a weapons charge had any effect on his decision to plead guilty. Counsel gave credible testimony during the Petitioner's first PCR hearing that the Petitioner "never denied what he did" and always wanted to know "how can we get out of it". (App. 69). He testified that they "discussed the option of a plea as opposed to trial and [Petitioner] agreed with me. He said, let's try to work something out and then I approached the solicitor's office." (App.65). Counsel testified further there was overwhelming evidence of the Petitioner's guilt.

Counsel testified the gunshot victim identified the Petitioner as one of the persons who robbed her, the co-defendant implicated the Petitioner, and the Petitioner confessed to being at the scene and shooting the victim. (App. 60). The Respondent submits the Petitioner alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility for the possession of a firearm charge in deciding whether or not to plead guilty.

The lower court also properly found the testimony of the Petitioner's co-defendant Kenneth Jones incredible. Jones testified he recalled being in a meeting with his attorney, the Petitioner, and the Petitioner's attorney where sentences were discussed. (App. 194). When asked if he recalled any discussion between counsel and the Petitioner regarding the weapons charge, Jones testified "[w]ell, they was going over, by me eavesdropping on his conversation, they were going over his crimes and his charges, and on the gun charge, they would say he would be eligible for parole." (App. 194). His testimony is incredible because it directly conflicts with that of the Petitioner. During the second PCR hearing, the Petitioner testified that when he and counsel initially discussed the weapons charge it was at the detention center and no one else was present. (App. 186). When asked whether Jones was present with him in a room when counsel advised him of his parole eligibility, the Petitioner responded that Jones was present during his plea and sentencing. When asked was any other person in the room with him and counsel during his discussion, he testified "not to my understanding". (App. 187). The evidence presented by the Petitioner in the form of his own testimony and that of his co-defendant Kenneth Jones was not sufficient to establish ineffective assistance counsel.

The Petitioner cites Tilley v. State, 334 S.C. 24, 511 S.E. 2d 689 (1999) in support of his claim. The Respondent submits Tilley is applicable for the proposition that the Petitioner was entitled to raise his claim concerning parole eligibility as it could not have been raised during his

prior PCR. However, the facts present in Tilley warranting relief on the basis of the defendant's involuntary guilty plea can be distinguished from this case. In Tilley, "plea counsel testified at the PCR hearing that he did not know what respondent's sentence meant in terms of parole eligibility and that he was not aware that respondent would not be eligible for parole." Id. at 27. By contrast, Petitioner's counsel testified that he was aware of the parole eligibility for possession of a weapon and it is his general practice to advise his clients that there is no parole for the charge. (App. 178). The Respondent submits there is probative evidence to support the lower court's finding that the Petitioner failed to present any credible, persuasive evidence to prove counsel actively misadvised him on parole eligibility and that counsel's alleged erroneous advise induced his entry of his guilty plea.


### CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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ASHLEIGH R. WILSON  
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BY:   
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ATTORNEYS FOR RESPONDENT

May 1st, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Jasper County

The Honorable Carmen T. Mullen, Circuit Court Judge

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MARCUS PARKER,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

LaNelle C. Durant, Esquire  
SCCID/Appellate Defense  
1330 Lady St. Ste 401  
Columbia, SC 29201

This 1st day of May 2013

  
ANNE R. HENLEY  
LEGAL ASSISTANT



ALAN WILSON  
ATTORNEY GENERAL

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MAY - 1 2013

S.C. Supreme Court

May 1, 2013

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

***RE: Marcus Parker, #269675 v. State of South Carolina***  
***2007-CP-27-0143***  
***Appellate Case No. 2012-212550***

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Ashleigh R. Wilson  
Assistant Attorney General

ARW/arh  
Enclosures

cc: LaNelle C. Durant, Esquire (2 copies)