

No. 19-8635

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH BROWN

PETITIONER

v.

KENTUCKY

RESPONDENT

*ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY*

RESPONDENT'S BRIEF IN OPPOSITION

Respectfully Submitted,

DANIEL CAMERON

Attorney General of Kentucky

/s/ Courtney J. Hightower

COURTNEY J. HIGHTOWER*

Assistant Attorney General

Criminal Appeals Unit

Office of the Solicitor General

1024 Capital Center Drive

Frankfort, KY 40601

Phone: (502)696-5342

Counsel for Respondent

**Counsel of Record*

TABLE OF CONTENTS

Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions	2
Statement of Facts Below.....	3
Reasons to Deny the Petition	5
A unanimous panel of the Kentucky Court of Appeals correctly deter- mined that Petitioner was not denied effective assistance of counsel when he entered his guilty plea on the PFO II charge in Oldham Circuit Court	5
Conclusion.....	10

TABLE OF AUTHORITIES

CASES CITED:

<i>Brown v. Commonwealth</i> , 2018-CA-001180-MR, 2019 WL 3367195 (Ky. App. 2019).....	3, 6
<i>Hill v. Lockhart</i> , 474 U.S. 52 (1985).....	4, 5,8
<i>Padilla v. Kentucky</i> , 559 U.S. 356, 372 (2010).....	5,6,8,9
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	<i>passim</i>

STATUTES

28 U.S.C. § 1257(a)	2
501 Ky. Admin Regs. 1:030 Section 3(1)(c)	7
501 Ky. Admin. Regs. 1:030 Section 3(4)	7
Ky. Rev. Stat. 439.3401(3)(a).....	7
Ky. Rev. Stat. 532.060(2)	3
Ky. Rev. Stat. 532.080(5)	3

OPINIONS BELOW

This case originates from Oldham County, Kentucky, wherein a jury convicted the Petitioner on one count of intimidating a participant in the legal process. Following his conviction on the underlying offense, the Petitioner pleaded guilty to being a second-degree persistent felony offender and agreed to a seven-year sentence. However, the Petitioner later moved to withdraw his plea, claiming that it was involuntary because he received ineffective assistance of counsel during the plea process. The Oldham Circuit Court rejected the Petitioner's claim that his guilty plea was invalid and denied his motion to withdraw his guilty plea to being a second-degree persistent felony offender. On appeal, a unanimous panel of the Kentucky Court of Appeals affirmed the Oldham Circuit Court's order in an unpublished opinion. *Brown v. Commonwealth*, 2018-CA-001180-MR, 2019 WL 3367195 (Ky. App. 2019).¹

¹ The Slip Opinion is attached to the Petition for Writ of Certiorari at Appendix A.

JURISDICTION

The Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). The petition was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions involved are adequately set forth in the certiorari petition.

STATEMENT OF THE FACTS BELOW

The facts of this case have been summarized in the Kentucky Court of Appeals opinion, *Brown v. Commonwealth*, 2018-CA-001180-MR, 2019 WL 3367195 (Ky. App. 2019).

While serving a 24-year sentence for murder, the Petitioner was charged with additional murder-related offenses and, during a pre-trial hearing, threatened to kill the case's prosecutor. *See* Slip Op. at 2. On January 13, 2017, the Petitioner was indicted for intimidating a participant in the legal process and being a second-degree persistent felony offender (PFO II). *Id.*

Petitioner pleaded not guilty to the two-count indictment and the case proceeded to trial on December 1, 2017. *Id.* The jury found the Petitioner guilty of intimidating a participant in the legal process, a Class D felony carrying a sentence of one to five years in the penitentiary. *Id.* The Petitioner was facing a PFO II charge, which would enhance any sentence to a range of five to ten years under Ky. Rev. Stat. 532.080(5).² *Id.* Rather than risk having his one-to-five year sentence enhanced to a possible ten years under the PFO II charge, the Petitioner pleaded guilty. In exchange for his guilty plea, the prosecution agreed to recommend a five-year sentence on the intimidation charge, enhanced to seven years by the PFO II charge. *Id.*

² Ky. Rev. Stat. 532.080(5) states a person who is found to be a persistent felony offender in the second degree shall be sentenced to an indeterminate term of imprisonment pursuant to the sentencing provisions of Ky. Rev. Stat. 532.060(2) for the next highest degree than the offense for which he was convicted.

During the plea colloquy, there was some confusion about how the Petitioner's plea would affect his parole eligibility (since the Petitioner was in the midst of a 24-year sentence for murder). *Id.* The Petitioner's defense attorney stated his parole eligibility date would remain unchanged at 20 years. *See* Slip Op. 3. When the Petitioner asked the trial court if his plea would affect his parole eligibility, the trial court did not give him a direct answer. *Id.* Defense counsel allegedly told the Petitioner he would ask someone about the parole eligibility before final sentencing. *Id.*

Prior to sentencing, the Petitioner wrote a letter to the trial court asking to withdraw his guilty plea. *Id.* In support, the Petitioner claimed his trial counsel was ineffective for failing to explain how his guilty plea would affect his parole eligibility. *Id.* Following a hearing on the Petitioner's request, the trial court determined that while the Petitioner had received erroneous advice about how his guilty plea would affect his parole eligibility, counsel's error was not so gross or the consequences so dire that it amounted to ineffective assistance of counsel. *See* Slip Op. at 4. The trial court then denied the Petitioner's motion to withdraw his guilty plea on the PFO II charge and sentenced him according to his plea agreement. *Id.*

On appeal, the Kentucky Court of Appeals analyzed the Petitioner's claim of ineffective assistance of counsel using the two prongs of "performance" and "prejudice" set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) and *Hill v. Lockhart*, 474 U.S. 52 (1985). *See* Slip Op. at 5-6. The appellate court affirmed the Oldham Circuit Court's order, concluding that the trial court properly denied the Petitioner's motion to withdraw his plea since any misadvice regarding parole eligibility did not

result in *Strickland* prejudice. *See* Slip Op. at 11. On May 6, 2020, The Petitioner filed this Petition for Writ of Certiorari.

REASON TO DENY THE PETITION

A unanimous panel of the Kentucky Court of Appeals correctly determined the Petitioner was not denied effective assistance of counsel when he entered his guilty plea to the PFO II charge.

To prevail on a Sixth Amendment claim of ineffective assistance of counsel, this Court adopted a two-part test: the defendant must show that counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In *Hill v. Lockhart*, 474 U.S. 52, 59 (1985), this Court modified the *Strickland* analysis for the guilty plea context, holding that in order to satisfy the "prejudice" requirement the defendant 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. To secure relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010).

A. Trial counsel's performance was not deficient.

Petitioner argues that his trial counsel gave him bad advice concerning his parole eligibility and this rendered his guilty plea involuntary. (Petitioner's Pet. at 6.)

The proper measure of attorney performance remains simply reasonableness under prevailing professional norms and judicial scrutiny of counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 688-89. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id* at 689. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Id*.

In *Padilla v. Kentucky*, 559 U.S. at 366, the Court first addressed whether Padilla's counsel performed below the objective standard of reasonableness in failing to advise him that deportation was a possible consequence of his guilty plea. In concluding that Padilla had satisfied the first prong of *Strickland*, the Court determined that the applicable immigration statute was succinct, clear, and explicit, and counsel had a duty to give correct advice regarding deportation. *Id.* at 368-69.

Here, because the Petitioner was convicted of additional offenses while he was incarcerated and serving a separate sentence, the parole eligibility calculation was not clear. In fact, it was so unclear that the trial court, defense counsel, and the

prosecutor were all unsure how the Petitioner's parole eligibility would be effected by his guilty plea. Further, the Petitioner's agreement to plead guilty to the PFO II charge had little effect on when he would actually become eligible for parole:

- At the time of his plea, the Petitioner was serving a 24-year sentence for murder and would be eligible to meet the parole board after serving 20 years of that sentence. Ky. Rev. Stat. 439.3401(3)(a).³
- In this case, a jury convicted the Petitioner on the underlying charge of intimidating a participant in the legal process (a Class D felony), so he was facing a penalty range of five to ten years as a PFO II, and would be eligible for parole after serving one to two years of that sentence. 501 Ky. Admin. Regs. 1:030 Section 3(4).⁴
- The Petitioner's parole eligibility in this case did not begin to accrue until he became eligible for parole on his murder conviction, because he had already been convicted on the underlying charge. Thus, the Petitioner would have to serve at least 21 years before being eligible to meet with the parole board. 501 Ky. Admin. Regs. 1:030 Section 3(4).⁵
- If the Petitioner had received a five-year sentence in this case, then his parole eligibility would have been 21 years. If Petitioner had received a ten-year sentence then his parole eligibility would have been 22 years. 501 Ky Admin. Regs. 1:030 Sections 3(1)(c) and 3(4).
- After Petitioner pleaded guilty to the PFO II charge and agreed to a seven-year sentence in this case, he would be eligible to meet the parole board after a total of 21 years and four months. Ky Admin. Regs. 1:030 Section 3(1)(c).

In concluding that the Petitioner had satisfied the first prong of *Strickland*, the Kentucky Court of Appeals and the Oldham Circuit Court did not take into consideration that the Petitioner had been convicted of intimidating a participant in the

³ Pursuant to Ky. Rev. Stat. 439.3401(3)(a), Petitioner had to serve 85% of 24-year murder sentence, or 20 years, before he was eligible for parole.

⁴ Pursuant to 501 Ky. Admin Regs. 1:030 Section 3(1)(c) Petitioner was required to serve 20% of his sentence for intimidating a participant in the legal process before being eligible for parole.

⁵ Pursuant to 501 Ky. Admin. Regs 1:030 Section 3(4), Petitioner's parole eligibility in this case would not begin to accrue until he became eligible for parole on his murder conviction.

legal process, the underlying offense, and was already facing an additional year of incarceration before being parole eligible. So, while counsel did misadvise the Petitioner that his parole eligibility would be unaffected, it did not amount to gross misadvice. Calculating the Petitioner's parole eligibility was no easy task and his parole eligibility date was delayed only four months. Therefore, it is certainly arguable that defense counsel's incorrect advice did not fall outside the wide range of reasonable professional assistance. The error was not so serious that Petitioner's trial counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment.

B. A decision to reject the plea would not have been rational under the circumstances.

Petitioner argues that, but for his trial counsel's error, he would not have accepted the guilty plea. (Petitioner's Pet. 8.)

To establish prejudice under *Hill*, the defendant must establish "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 59. This Court has specified, furthermore, that the defendant also "must convince the court" that such a decision "would have been rational under the circumstances." *Padilla*, 559 U.S. at 372.

Here, the Petitioner claims that, had counsel correctly informed him about his parole eligibility, he would not have accepted the guilty plea on the PFO II charge. However, the Petitioner must then show that this decision would have been rational. Based upon the facts of this case, the Petitioner cannot convince this Court that a decision to reject the plea bargain would have been rational under the circumstances. *Padilla*, 559 U.S. at 372. The Petitioner was convicted of intimidating a participant

in a legal process for *threatening to kill the prosecutor* and was a persistent felon with a *murder* conviction. The Petitioner was also facing a sentence of five to ten years, which would add a minimum of one year and a maximum of two years to his parole eligibility. Had the Petitioner not reached a plea agreement, he almost certainly would have received the maximum penalty of ten years. Under these circumstances, the Petitioner would not have been eligible for a parole hearing for 22 years, instead of 21 years and four months. Accordingly, the Petitioner has not shown he was denied effective assistance of counsel. The Kentucky Court of Appeals decision was correct and this Court should deny this Petition for Writ of Certiorari.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be
DENIED.

Respectfully Submitted,

DANIEL CAMERON
Attorney General of Kentucky

/s/Courtney J. Hightower
Courtney J. Hightower
Assistant Attorney General
(*Counsel of Record*)
Criminal Appeals Unit
Office of the Solicitor General
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204
(502) 696-5342

Counsel for Respondent