IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

KEVIN ALEXANDER MOSS,	*	
Petitioner	*	
v.	*	**Civil No. S-95-2884**
		(Mag. Judge Gauvey)
LLOYD E. WATERS, et al.,	*	
Respondents	*	

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MEMORANDUM IN SUPPORT OF
PETITIONER'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Petitioner, Kevin Alexander Moss, through counsel, James K. Bredar, Federal Public Defender for the District of Maryland, and Kathryn R. Frey, Assistant Federal Public Defender, submits this memorandum in support of his proposed findings of fact and conclusions of law.

I. OVERVIEW

On September 27, 1995, Petitioner Moss filed a petition under 28 U.S.C. § 2254 claiming, among other things, that his attorney, Paul J. Feeley, Jr., gave him gross misadvice concerning parole eligibility which induced his guilty plea and rendered it involuntary thus denying him his Sixth Amendment right to effective assistance of counsel. On April 3, 1996, U.S. District Judge Frederick N. Smalkin referred this case for a hearing and appropriate recommendation on the claim of ineffective assistance of counsel pursuant to 28 U.S.C. § 636 and Rule 8(b), Rules Governing Section 2254 Cases. On August 29, an evidentiary hearing was held, The Honorable Susan K. Gauvey presiding. At the hearing the Court heard testimony from Kevin Moss, Earvin Moss, Lisa Moss, and Paul J. Feeley, Jr., Esq.

A. Summary of the Claim

On July 9, 1984, Petitioner Moss pleaded guilty to two counts of a two count indictment charging him with first degree murder and use of a handgun in the commission of a felony. He was represented by Paul J. Feeley, Jr.

The guilty plea was entered pursuant to a plea agreement with the State. The plea agreement provided that in exchange for Moss's plea of guilty, the Court would impose a sentence of life, suspend all but 25 years on the first count, five years concurrent on the second count, and the State would not oppose defendant's request to be placed in Patuxent.

Petitioner claims his attorney rendered ineffective assistance of counsel by erroneously advising that under the negotiated sentence he would be eligible for parole after serving 6-8 years, where the statute provided that he was not eligible until after serving 15 years less allowances and receiving the governor's approval. Moss detrimentally relied on this erroneous advice in deciding to plead guilty and forego his right to a jury trial.

II. DISCUSSION IN SUPPORT OF FINDINGS OF FACT

Resolution of the question of whether Feeley gave gross misadvice requires the Court to make credibility determinations. For the following reasons, it should conclude that Moss is more credible.[1]

A. Introduction

Moss and Feeley testified consistently with respect to the advice Feeley gave Moss concerning possible outcomes of the case. The outcomes included convictions for first degree

[1] In reaching the conclusion that Moss is more credible, the Court need not find that Feeley intentionally distorted the truth, rather it may find he had faulty recollection of events which occurred more than twelve years ago.

murder, which carried a maximum sentence of life, the handgun, which carried a maximum of twenty years, and based on "some mitigating factors" which included intoxication and provocation, second degree murder which carried only 30 years. Manslaughter was not an option.

They both testified that Feeley explained that if Moss was accepted at Patuxent, he could be released upon a finding by the Patuxent board that he was rehabilitated. His release could occur as early as 5 years or as late as 25. Feeley failed to advise Moss that under the actual plea bargained sentence release from Patuxent required the governor's approval.

Feeley was familiar with the workings of parole eligibility. He testified that on a life sentence, parole eligibility arose after service of 11 1/2 or 15 years, that on a 30 year sentence it arose after service of 1/3 or 1/4 of the term, or 7-9 years, and that life, suspend all but 25 was treated the same as life. Moss likewise testified that during the course of the representation, in addition to explaining the parole eligibility effect of the plea bargain as 6-8 years, Feeley explained the above parole eligibility terms on a life and 30 year sentence.

Moss and Feeley dispute other matters. Moss testified Feeley advised that under the plea bargained sentence of 25 years, he would be eligible for parole in 6-8 years. Further, Feeley raised the issue of pleading guilty early in the course of their relationship and that he told Moss he would try to get him a plea bargained sentence of 25 years which would be advantageous because it assured him a lower sentence than if he were convicted of second degree murder. Moss recalled Feeley showing him a newspaper article reporting that someone else had received the sentence Feeley sought to get for Moss.

Feeley testified that he did not give Moss parole eligibility advice; however, he eventually conceded he may have. Feeley testified that Moss initiated the idea of a plea and that the idea grew

out of another inmate's plea deal which was in the newspaper. However, Feeley's letter of August 28, 1984, see Pet. Ex. 5, implies that Feeley initiated the discussion based on the newspaper article ("I showed you the deal . . . and you said to me you would be happy with that deal.").[2] Though he believed Moss initiated the idea that he receive a sentence of life, suspend all but 25, Feeley also testified that they likely discussed a plea bargain before the date of the newspaper article. Similarly, Feeley testified that Patuxent was Moss's idea and not his.[3]

On July 9, 1984, Moss pleaded guilty to both counts of the two-count indictment pursuant to a plea agreement with the State. That morning, just before the hearing, Feeley advised Moss that the plea agreement was solidified. With respect to the plea agreement, Feeley explained the State and the Judge had agreed to a definite before the plea agreement. Although the agreement provides that "the State will ask the Court to sentence the Defendant to a substantial period of incarceration," see Pet. Ex. 1 at 1, Feeley confirmed that the agreement was in fact for a specified period of time. Moss testified that Feeley explained that the agreement contemplated the terms Moss and Feeley had previously discussed: a sentence of twenty five years, on which he would be eligible for parole in 6-8 years, no opposition to a request for Patuxent.

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[2] On cross-examination, Feeley was shown a newspaper article from October 1984 which Petitioner's counsel proffered referred to the earlier plea offer of 25 years made to the person in the detention center. Despite his recollection of this event, he testified he did not know whether the article referred to the same case. Pet. Ex. 11 (marked only for identification).

[3] It is unlikely that Moss initiated discussions about a specific plea bargain and Patuxent as Feeley claims. Moss was not savvy to the criminal justice system. He had never served a term of incarceration. He had never been represented by private defense counsel. He looked to Feeley to make competent judgment calls and provide advice and options.

Feeley and Moss testified that Feeley also told Moss there was a written plea agreement. Moss was first provided a copy of the written agreement inside the courtroom after commencement of the guilty plea hearing. See Pet. Ex. 2. 2:20-21 (referring to the written plea agreement, Feeley advised the Court that Moss "is reading it now."). Moss signed the plea agreement during the guilty plea proceeding, understanding it embodied the terms Feeley had described. After the court pronounced sentence Moss understood he received the deal Feeley had described.[4]

After the July 9, 1984 guilty plea/sentencing, Moss met with a caseworker at MRDCC who advised Moss that since his sentence was termed "life, suspend all but 25 years" he was treated as if he received a life sentence for purposes of parole eligibility. Therefore he would not be eligible for parole until service of 11 1/2 years and would need the governor's approval before he could be paroled. Moss testified he was confused and thought the caseworker was wrong.

Immediately after this meeting, Moss returned to his cell and wrote letters to Judge Buchanan and Paul Feeley, requesting clarification and explaining the conflicting information. Pet. Ex. 3. Judge Buchanan's reply letter did not clarify the confusion. Resp. Ex. 5. Nor did Feeley's reply letter. See Pet. Ex. 5. Moss finally received a letter from Thomas Saunders of the State Public Defender's office who clarified the matter explaining that the case worker in MRDCC was correct. See Pet. Ex. 6.

To date, the issue has not been resolved. This Court must make the determination as to

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[4] Respondents' suggest that Moss's statements made at the guilty plea hearing are significant because they somehow negate his claim by proving a voluntary and knowing decision. When Moss signed the plea agreement and answered the Court's questions he answered the questions truthfully, based on what Feeley had explained. Thus, these statements have no bearing on this claim, which is based on information he learned after the guilty plea.

whether Feeley erroneously told Moss that he would be eligible for parole in 6-8 years and whether Moss detrimentally relied on that misadvice.

B. Analysis of Performance Prong

The most telling evidence is contained in Moss's letter seeking clarification written to Judge Buchanan in August 1984 in which he first disclosed communications between himself and Feeley. Pet. Ex. 3. He succinctly explained that, "I agreed to the plea bargain being informed by my attorney Paul Feelhey [sic] Jr. that the sentence I received meant twenty-five (25) yrs. in which I would go before the parole board in 6-8 years." Id.

The letter to Judge Buchanan seeking clarification not only documents Moss's understanding of his circumstance in 1984, but also supports his credibility twelve years later. It was written reflexively, with no time to fabricate, before exposure to jail- house lawyers, and access to law books in MCI-Hagarstown. Written in full candor, Moss's statements in that letter are profoundly reliable.[5] Furthermore, at the time Moss wrote the letter he had not yet received Judge Buchanan's letter denying his request for modification and he had not yet been denied admittance to Patuxent. The letter was written to clarify the preeminent parole concern.

Moreover, Moss's account of Feeley's advice has been consistent in all of Moss's letters and pleading since he discovered Feeley may have given erroneous advice. See Pet. Ex. 3, 7; Resp. Ex. 6, 7, 9, 10, 12, 14, 16, 18, 22, and 31. His testimony was likewise in conformity.

In contrast, Feeley's recollection with respect to whether he rendered advice about parole

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[5] The letter is akin to an "excited utterance" or a "presence sense impression," two hearsay exceptions to Rule 803 of the Federal Rules of Evidence which attribute high indicia of reliability to similarly relflexive statements. See FRE 803(1), (2).

eligibility to Moss has evolved since 1984 and during the course of his testimony. In his 1984 letter to Moss, he stated that he did not know how the Parole Board worked, failed to clarify eligibility, thus distancing himself from the issue of parole eligibility. However at the 1996 hearing he demonstrated an understanding of the parole eligibility requirements. On direct, he testified that he never gave parole eligibility advice to anyone and that he certainly did not give it to Moss. However, under cross examination and questioning by the Court, he conceded that he "possibly" gave Moss parole eligibility advice. This concession alone should resolve the issue of credibility and the question of whether Feeley gave parole eligibility advice. Regardless, there are additional reasons why Moss is more credible.

Feeley's statement that he never gave parole eligibility advice was incredible and unfeasible. Though he claimed he knew the fundamentals of parole eligibility, he maintained he would not share it with his clients. It is incredible that a criminal defense practitioner would not discuss parole eligibility with clients as parole affects almost every facet of criminal defense practice including plea bargaining, sentencing, and convincing clients to accept a plea offer. Where it exists, parole is as fundamental a part of the criminal justice system as are guilty pleas, thus an unavoidable element of the practice; to practice predominantly in criminal defense and say otherwise does not ring true.

It is also unbelievable that he would not render parole eligibility advice because the law is straightforward. Thus, there is no risk of giving erroneous advice. Md. Code. Ann. art. 41 §122. In contrast, Patuxent's system, which is tied directly to issues of parole, is considerably less predictable than parole eligibility. Yet, Feeley acknowledged engaging in specific conversations about Patuxent while maintaining he did not discuss parole eligibility otherwise. It is illogical that

he would explain a parole related matter which carries a risk and not explain one which carries none. In short, his testimony in this respect was unbelievable.

Feeley's advice about Patuxent was erroneous insofar as he failed to tell Moss that his parole from Patuxent required the governor's signature. This error further diminished Feeley's credibility because it underscored either his lack of knowledge, thus his unreliability, or the likelihood he believed for parole purposes the sentence had the effect of 25 year sentence and not a life sentence. Though Feeley claimed he understood the parole eligibility rules (specifically, that life parole guidelines applied to a life with a suspended portion sentence), it is evident that he did not so advice Moss with respect to Patuxent. Feeley cannot have it both ways: Either he knew the life parole guidelines applied to Moss or he did not. It appears that since he did not advise Moss about the governor's signature requirement with respect to Patuxent, he thought the Moss's sentence was treated as a determinative 25 year sentence for parole eligibility purposes, and not like a life sentence. Therefore, his error is consistent with Moss's testimony about the erroneous parole advice: both errors are derived from Feeley's misunderstanding that life, suspend all but 25 was treated as a 25 year sentence for purposes of parole eligibility.

In this vein, there is additional objective evidence supporting Moss's testimony. First, in his August 28, 1996 letter to Moss Feeley used the two interchangeably, referring to the sentence he

received three times as 25 years,[6] and once referring to it as life with a suspended portion.[7] This was not the only occasion on which Feeley termed the sentence 25 years. At the sentencing hearing, Feeley asked the judge to impose a sentence of 25 years. See Pet. Ex. 2 at 12:10-16 ("We would ask that you consider reducing the time that he is to serve, 25 years, I think that is what the guidelines call for in this case, the maximum is life and the minimum 25"). Feeley did not ask the court to impose a sentence of life and suspend all but 25 years nor did he ask the court to suspend any of the time. Furthermore, when imposing the sentence of "life, suspend all but 25 years," the Court contemporaneously described the sentence as "25 years to the Department of Corrections." Id. at 14:18.[8]

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[6] He wrote: "I explained to you that you would be getting 25 year sentence and that is what you received"; "It has been my understanding all along that you knew you were going to get 25 years and you wanted to take you chances with that rather tan go to trial and possibly get life imprisonment"; and "You were given 25 years in prison." See Pet. Ex. 5.

[7] Referring to the newspaper article defendant, "his sentence was life, all but 25 years suspended, and you said to me you would be happy with that deal." Pet. Ex. 5

[8] The Court announced the following when it pronounced the sentence:

COURT: The sentence on the first count will be life, for the period of his natural life in the Department of correction on the first count, five years to the DOC on the second count, which I will make concurrent with the first count, and I am suspending all but 25 years, and I will recommend Patuxent Institution. Waive costs. Do you understand the sentence?

MOSS: Yes, sir.

COURT: I gave you life, and suspended all but 25 years; do you understand that?

MOSS: Yes, sir.

COURT: So the sentence is 25 years to the Department of

Finally, Feeley did not have significant experience handling first degree murder cases. Without thoroughly researching the issues, he easily may have concluded that life, suspend all but 25 was the same as 25 for parole eligibility purposes, since the statute so provides for non-life offenders. For example, a sentence of five years, suspend all but 1 is treated as a one year sentence for both parole eligibility and MR purposes, whereas a life, suspend all but a portion is treated differently for parole purpose but the same for MR. For these reasons, Feeley likely made this error.

Petitioner Moss had a vivid recall of the events which occurred during the course of his relationship with Mr. Feeley. In contrast, when asked to explain specific events, Feeley had vague recollection and often paused or gave ambiguous answers. This case was a central focus for Moss's since 1984, whereas Feeley has had hundreds of other cases. In addition, Feeley apparently lost his file containing critical information about the representation.

Feeley's vague recollection of conversations with Moss and with family members, stands in contrast not only to Petitioner Moss, but also to Earvin Moss's, and Lisa Moss's recollections. Earvin Moss, a 68 years old, retired from Bethlehem Steel after 44 years of employment, with no criminal record, testified that on the day of the guilty plea/sentencing Feeley told him the plea bargain was for 25 years and he'd be eligible for parole after serving 6-8 years. Earvin Moss paid Feeley $5000.00 for his services. Earvin Moss likely recalled this conversation as it was the tangible result

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          Correction.  Is that clear to you?
MOSS:     Yes, sir.
COURT:    And five years on the handgun violation, which I am
          making concurrent to the first count, they run
          together.  Do you understand that?
MOSS:     Yes, sir.
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Pet. Ex. 2 at 14:7-24 (emphasis added). This highlights the ease with which the terms are used interchangeably and that Moss understood he received the sentence Feeley had explained to him.

of the $5000.00 fee and his son's future.

Lisa Moss testified that she met with Feeley at his office to discuss the case. Feeley recalled speaking with her but did not recall when or where. Lisa Moss recalled that Feeley told her he was trying to get a plea bargain for 25 years and her brother would be eligible for parole in 6-8. Feeley didn't recall whether they spoke about the plea but denied talking about parole eligibility. Further, not only did Feeley's concession that he "possibly" did discuss parole eligibility with Moss support Petitioner Moss's credibility, but it also bolstered Earvin and Lisa Moss's credibility.

In summary, Moss is more credible. His version of the advice as detailed immediately after learning of the potential error has not wavered in 12 1/2 years. Feeley's credibility is diminished by his errors with respect to Patuxent, as they bear on his understanding of parole eligibility, his 1984 letter to Moss, statements made during the guilty plea hearing, and most significantly, by his concession that he may have given Moss parole eligibility advice. Moss's recollection was corroborated by Earvin and Lisa Moss. Thus, Petitioner has shown that Feeley did impart gross misadvice concerning parole eligibility.

C. Analysis of Prejudice Prong

Feeley gave Moss erroneous advice not just about parole eligibility, but also about the possible consequences of his case. Feeley erroneously advised that provocation reduced first degree murder to second degree murder, which carries 30 years, when in fact provocation reduces murder to manslaughter, which carries only ten years.[9] Both Feeley and Moss testified that Feeley gave this

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[9] The State asked Moss to review his 1990 testimony and determine whether he had testified about manslaughter. He reviewed the transcript and answered that he had not. Moss was not asked about manslaughter at that hearing, as manslaughter was not an issue in 1984, thus the absence of his testimony is

advice. This grave error further affected Moss's ability to make an informed decision about the value of the guilty plea. Moreover, it distorted the advantages of the guilty plea. Moss thought the plea offer sentence was safer than even the best result at trial. However, the plea offer was significantly worse than the best result: eligibility under the plea arose in 11 1/2 years with the governor's signature whereas under a manslaughter conviction it arose after 2 1/2 years without the governor's signature. The distortion caused by this erroneous advice further warped Moss's ability to make an educated decision.

Feeley opined that the State had a strong case and the plea offered significant advantages. His opinion and judgment are seriously diminished by his admitted lack of knowledge concerning the homicide law. It raises questions including whether he knew the elements of the different degrees of murder and of provocation, and his general competency to represent a person on a case of this magnitude. He had not represented persons on first degree murder charges before Moss and had not taken necessary steps to prepare himself to adequately represent Moss.

The underlying facts were recited by Moss at the 1996 hearing. At the sentencing hearing in 1984, Feeley and the State's Attorney, John Tennis, spoke in mitigation. Feeley advised the Court:

> [T]o explain the situation as it occurred that day, he came home from work. He lives in Turner Station with his mother and two sisters. His one sister, Lisa, at the time was eight months pregnant. Her boyfriend was Charles Banks, the victim in this case. Kevin was upstairs. They had an argument downstairs, throwing chairs. He came down, and got in a fight with the victim, and spilled that into the grass outside. His other sister came home, broke up the fight. When he came back in, he explained to me his sister said Chuck was beating her up. He just got all outraged. He had been drinking heavily, had about a half a pint of vodka and two 16-ounce or large

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meaningless. At the 1990 hearing neither Petitioner nor Respondents delved as deeply or as broadly into the issues as they did at the 1996 hearing, particularly with respect to the prejudice analysis.

> beers, which I think would have put him in the intoxicated range. He went up, got the gun, and shot him for no reason.

See Pet. Ex. 2 at 11-12. The prosecutor, Mr. Tennis, made similar follow up remarks:

> This case is more of a tragedy, I believe. I believe, in that everybody in this case knows each other for quite some time. . . . And the crime was kind of unusual. It may have been a sudden rage thing. The defendant may have been drinking. But it does fit the facts of first degree murder, . . .

Id. at 12-13.

Under these facts, had Moss been represented by competent counsel he would have known there were five possible outcomes: handgun and first degree murder, second degree murder, or manslaughter, the plea bargain, or an acquittal. With the exception of an acquittal, these outcomes each had merit. See Court exhibit 1. For each of the four meritorious outcomes, there were several consequences including: the statutory maximum sentence, parole eligibility/concurrent handgun, mandatory release, parole eligibility/consecutive handgun, and a sentence below the statutory maximum due to mitigating circumstances and background. Id. Of the four meritorious outcomes, there was a reasonable probability that Moss could have been convicted of the manslaughter or the second degree murder.

Intoxication reduces first degree to second degree murder. Moss could have testified had the case gone to trial since he did not have a record which would have resulted in damaging impeachment. He could have testified concerning the quantities of alcohol that he drank before he shot Banks. An expert could have calculated Moss's blood alcohol content based on his testimony about the quantity he consumed. Thus, there is a reasonable probability that had he been so advised

he would have gone to trial rather than accept the offered plea bargain.[10]

Provocation reduces first degree to manslaughter, which carries ten years. This was not a premeditated murder in the classic sense: there was no lying in wait, no intricate deliberate plan to kill the victim, nor was the killing was motivated by greed, by jealousy, hate, or revenge. Rather, it came on the heels of an explosive situation.

Whether Moss committed a manslaughter is a factual issue for a jury. Jurors would exercise their judgment as formed by their own experiences. The facts are compelling in Moss's favor. The facts involve protecting not only a family member, but a younger sister who was eight months pregnant. They involve a not only a defiant refusal by a houseguest to comply with Moss's verbal request to leave, a request aimed at reducing the commotion, but Banks's physical aggression toward Moss. Further, case involved protecting and maintaining the peace inside the family home. Thus, there is a reasonable probability that twelve jurors would not have unanimously concluded Moss was not adequately provoked under these circumstances and that he had not had reasonable time to cool from the heat of passion before he shot Banks.

Had he known then what he knows now he would fully understand the consequences of each outcome and he would have given the heaviest consideration to parole eligibility on a concurrent sentence. Ct. Ex. 1. With respect to mandatory release ("MR"), Moss acknowledged the advantage between first degree murder and the plea bargain (no MR under life; MR after 17 years under plea). However, the advantage is outweighed by other, more significant considerations. Moss's compliance

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[10] Effective counsel would conclude that a jury trial in this case would require Moss's testimony. This Court evaluated Mr. Moss's demeanor. So too would a jury. This bears on the prejudice analysis insofar as it is a factor in determining reasonable probable outcomes and consequences.

at BCDC and his educational and employment accomplishments gave Moss reason to believe he would be released well before the MR date. Only a small percentage of the most non-compliant offenders serve out sentences until MR. Even if he were convicted of first degree murder, due to the mitigating facts of the case and his background, he stood to receive a sentence exactly like the one received under the plea bargain. Considering MR within the context of the manslaughter outcome further decreased any advantage to either. Thus, though MR at first glance appears to be an advantage to the guilty plea, when put in context, it is not a serious consideration.

For similar reasons, the minimal benefit to the plea when considered in the context of a consecutive handgun sentence, would not have played a large role in deciding whether to take the guilty plea. If he received a consecutive sentence on the handgun, the plea offer was advantageous only as between first degree murder and the plea in that the plea provided for eligibility five years earlier. However, there was much greater likelihood that the handgun would be run concurrent, as the homicide was the primary conviction and the handgun a subsidiary, related conviction. Further, the mitigating factors made it more unlikely that in his case he would receive consecutive time. And finally, in light of the manslaughter considerations, the consecutive "advantage" all but disappeared because the plea offer was a disadvantageous when compared with the consequences of the manslaughter conviction.

These conclusions are supported by Moss's testimony that he prioritized the benefits in order of greatest importance: parole eligibility, Patuxent, preventing family trauma of a trial. Since Patuxent may have resulted in incarceration for longer than parole eligibility, it was less important than parole eligibility. Protecting his family from reliving the events at a trial was a side benefit to this or any other plea, but not a determinative factor. Moss's multiple reasons for pleading guilty

does not negate the critical importance of the parole eligibility consideration.

In summary, Feeley's erroneous parole eligibility advice tainted Moss's overall assessment of his case. Feeley's erroneous advice concerning potential outcomes and defenses compounded the problem by distorting all of the relative options. As a result of Feeley's constitutionally deficient performance, Moss was prevented from making an educated, voluntary, and knowing decision.

There is always a risk when a defendant proceeds to trial. In this case, given the viable defenses which likely would have reduced the first degree murder to either second degree or manslaughter. Thus, Moss would have likely rejected the plea offer and proceed to trial.[11]

III. DISCUSSION IN SUPPORT OF CONCLUSIONS OF LAW

This claim is governed by 28 U.S.C. §2241, et. seq. (1966).[12] No presumption of correctness

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[11] His decision to proceed to the 1996 evidentiary hearing is telling with respect to what he would have done had he fully understood his options and their consequences. As Moss explained, his decision to proceed with the 1996 hearing posed the same risks as deciding to go to trial in lieu of the plea in 1984.

[12] Respondents suggest that the recently enacted habeas law applies to this case. Resp. Mem. at 14 n.7. Moss's petition was filed on September 27, 1995, prior to the effective date of the new law which went into effect on April 24, 1996. The majority of courts which have addressed this issue have held that there is no retroactive application of the new law to petitions filed before the effective date. See Cockrum v. Johnson, ___ F.Supp. __ , 96 WL 425563 (E.D. Tx. July 25, 1996); Grady v. Artuz, ___ F.Supp. ___ ,96 WL 346332 (SDNY June 24, 1996; Boria v. Kease, 90 F.3d 36 (2nd Cir. 1996); Reyes-Hernandez, 89 F.3d 490 (7th Cir. 1996); but see Hincapie-Nieto v. INS, ___ F.Supp. ____, 96 WL 4321750 (2nd Cir. August 2, 1996.

Respondents ask the Court to afford a presumption of correctness to Judge Buchanan's letter in reply to Moss's request

attaches to the state proceedings because, under §2254(d)(1), "the merits of the factual dispute were not resolved in the State court hearing." Though the state court held an evidentiary hearing in December of 1990, it made no factual findings, rejecting the claim on procedural grounds. Resp. Ex. 8.

The parties agree that the issue raised in this petition is analyzed under the two-pronged test set forth in Hill v. Lockhart, 474 U.S. 52, 57-58 (1985). Under Hill, Petitioner must establish first, that "counsel's representation fell below an objective standard of reasonableness," Hill at 57, quoting, Strickland v. Washington, 466 U.S. 668, 687-688 (1984), and second that he suffered prejudice because "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." Hill at 59; see also Ostrander v. Green, 46 F.3d

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for a sentencing modification. Resp. Ex. 5. Under either the old or new law, there is no presumption of correctness afforded to the statement in this letter. Under 2254(d) (1966), a presumption of correctness only applies to "a determination after a hearing on the merits of a factual issue" made during a "proceeding to which the applicant for the writ and the State o. . . were parties." This statement was not made within an advocacy context, of an advocacy procedure, the state was not a party, it did not respond to Moss's request or the Judge's denial. In any event, the statement is incorrect: Feeley testified at the hearing that the Judge had agreed in advance to impose a sentence of life, suspend all but 25. Thus, even if a presumption could be afforded, under §2254(d)(8), "the factual determination is not fairly supported by the record."

Even under the new law, no presumption of correctness applies. The new law provides that presumptions attach to "determinations of a factual issue made by the state court." This is not a determination of a factual issue; it is simply a denial of a request for a sentencing modification.

In any event, the letter is not material to the issues in this claim.

347 (4th Cir. 1995). Petitioner Moss bears the burden of satisfying the two-pronged test by a preponderance of the evidence. Sumner v. Mata, 449 U.S. 539, 551 (1981); 2 James S. Liebman, Federal Habeas Corpus Practice and Procedure § 31.2 at 967 (2nd ed. 1994).

A. Performance Prong

To determine whether Petitioner has satisfied prong one, the court must make credibility determinations. Contrary to Respondents' representations, see Resp. Mem. at 3-8, there are no special presumptions or deferential standards which guide the Court's analysis in assessing prong one in this case. Respondents' suggest that the Court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. [Strickland], 466 U.S. at 690." Id. at 4. They propose that the Court give deference to counsel's conduct and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 4-5.

Respondents' proposed inquiries and presumptions have no relevance to the present case because they only apply in cases where the parties agree that counsel performed a certain task, ie, employ a particular theory of the defense or fail to investigate certain matters, and where the Court's function is to determine whether counsel's conduct was constitutionally sufficient. In this case, the question is not whether counsel's conduct was reasonable; rather, the question is whether Feeley gave gross misadvice. If Feeley gave the claimed parole eligibility advice, then as a matter of law counsel's conduct was constitutionally deficient. Thus, to evaluate performance the Court must simply make credibility determinations.

If the Court finds that Feeley gave Moss gross misadvice petitioner has satisfied prong one of Hill. Strader v. Garrison, 611 F.2d 61 (4th Cir. 1979) (gross misadvice about parole eligibility

constitutes constitutionally deficient performance); see also O'Tuel v. Osborne, 706 F.2d 498 (1983); Ostrander v. Green, 46 F.3d 347, 355 (4th Cir. 1995).[13] Thus, the performance prong of Hill is automatically satisfied upon a showing that counsel gave his client gross misadvice concerning parole eligibility.

B. Prejudice Prong

To determine whether Petitioner has established prejudice under prong two of Hill, the Court must determine whether "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." Hill at 59; see also Ostrander v. Green, 46 F.3d 347 (4th Cir. 1995).[14] A "reasonable probability" is a "probability sufficient to

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[13] Other Circuits have held or acknowledged that counsel's gross misadvice may render a guilty plea invalid. Sparks v. Sowders, 852 F.2d 882, 885 (6th Cir. 1988) (holding that misinformation regarding parole eligibility can amount to ineffective assistance of counsel); Czere v. Butler, 833 F.2d 59, 63 n.6 (5th Cir. 1987) (acknowledging that misadvice has been found to constitute ineffective assistance of counsel); Cepulonis v. Ponte, 699 F.2d 573, 577 (1st Cir. 1983) (commenting that "misadvice may be more vulnerable to constitutional attack than mere lack of information").

[14] In a footnote, Respondents' note the existence of Fretwell v. Lockhart, 506 u.S. 364 (1993) but neglect to explain why it may apply to this case. Resp. Mem. at 5 n.2. Fretwell does not apply to this case. By its own terms, it only applies where a Petitioner attempts to receive a windfall to which the law does not entitle him. See Grady v. Artuz, ___ F.Supp. ___, 1995 WL 346332 (SDNY 1996); Fretwell, 506 U.S. at 373 (O'Connor, J., concurring) ("today's decision will, in the vast majority of cases, have no effect on the prejudice inquiry under Strickland v. Washington (citations omitted). The determinative question -- whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," (citations omitted) -- remains

undermine confidence in the outcome." Ostrander, 46 F.3d at 355, citing, Strickland.

There is a reasonable probability that a defendant would go to trial instead of pleading guilty if the State's case is not overwhelming and if the benefits of the guilty plea are negligible. Esslinger v. Davis, 44 F.3d 1515 (11th Cir. 1995). In Esslinger, Petitioner was charged with first degree rape. Id. at 1516. The state's case included physical evidence that the twelve year old complaining witness had engaged in sexual intercourse. Id. at 1517. She alleged that the Defendant raped her in August 1988, while he was residing at her home. Id.. She did not report the incident until two weeks later, after the defendant had moved out. Id. The girl's mother delayed reporting the incident to the police. Id. at 1529. Thus, the only evidence linking the defendant to the rape was the word of the complaining witness. Counsel gave Petitioner constitutionally deficient advice concerning the effect of his plea. The court imposed a sentence of 99 years under the terms of the plea bargain. Id. at 1518. Had Petitioner gone to trial and lost, he would have been facing the same penalties he faced under the plea bargain: 99 or life. Parole eligibility was the same for 99 and life. Id. 1518.[15] Because of the state's evidence and the lack of a meaningful benefit from the plea, the Eleventh Circuit found prejudice, reversed the district court's denial and granted the writ. See also Ostrander

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unchanged). The Fourth Circuit has not applied Fretwell in a case similar to this one where it granted relief. See Ostrander, supra. Other circuits have done the same. See Esslinger v. Davis, 44 F.3d 1515 (11th Cir. 1995); Risher v. United States, 67 F.3d 308 (9th Cir. 1995) (unpublished).

[15] The case does not mention whether there was a mandatory release consequence. However, if Alabama's system is similar to Maryland's, the plea would have produced one benefit, albeit a small benefit; he would have been mandatorily released from the 99 years sentence whereas he would not be mandatorily released from a life sentence.

v. Green, supra, (state's evidence not significant enough to preclude finding that reasonable probability defendant would have gone to trial had he been properly advised).

Conversely, where the State has overwhelming evidence and the plea bargain offers significant benefits, there does not exist a reasonable probability that defendant would have gone to trial instead of accepting the plea. Risher v. United States, 67 F.3d 308 (9th Cir. 1995) (unpublished). In Risher, defendant was charged with fifteen counts of bank robbery, several of which were armed bank robbery. Id. at 2. The State's case consisted of surveillance photographs of the defendant, teller identifications, and other eyewitness identification. Id. The defendant confessed to his counsel, thus he would have likely been precluded from testifying. Id. The plea offer was to four unarmed bank robberies, and dismissal of the other charges and included a cooperation term which would have allowed a downward departure. Id.

Risher's attorney gave him constitutionally deficient advice concerning sentencing. However, with respect to prejudice the court found that had Risher proceeded to trial it was highly probable that he would have been convicted and would have faced a substantially higher sentence than that which he received under the plea bargain because of the dismissed counts, the adjustment for acceptance of responsibility and the cooperation term. Thus, the benefits of the plea and the state's overwhelming evidence precluded a finding of prejudice.

Esslinger and Risher highlight the effect of the strength of the state's case, potential defenses, and number and nature of the plea bargain's advantages on the determination of prejudice. Thus, to analyze the prejudice component, the Court must assess the possible outcomes, the consequences of each outcome, and the relative risks associated with each of the outcomes and consequences. Bearing on these considerations are the strength of the State's case and the viability of defenses.

Another important consideration is the defendant's background including his criminal history, education, employment, and family support, as these bear on the consequences insofar as they guide the Court's sentencing determination. Thus, the Court must ask: would it have been reasonable for Moss to reject the plea offer and go to trial?

In assessing prejudice, multiple reasons for pleading guilty do not preclude a finding of prejudice. O'Tuel v. Osbourne, 706 F.2d 498 (4th Cir. 1983). In O'Tuel, the district court refused to grant habeas relief finding that the erroneous parole eligibility advice was merely a "secondary" consideration. Id. at 500. The Fourth Circuit reversed finding that a secondary concern, about which erroneous information is given, and on which a defendant relies in deciding to plead guilty may support an ineffective assistance claim. Thus, prejudice is established in this case because though Moss had multiple reasons for pleading guilty, his main concern was parole eligibility, and, in any event, he relied heavily on Feeley's advice in this respect.

Finally, with respect to prejudice, Respondents' suggest that "absent clear and convincing evidence to the contrary, a defendant is bound by the representations he makes under oath during a plea colloquy." Resp. Mem. at 7; citing Sargent v. Waters, 71 F.3d 158, 162 (4th Cir. 1995); United States v. DeFusco, 949 F.2d 114, 119 (4th Cir. 1991), cert. denied, 503 U.S. 997 (1992). To bind a defendant like Moss to his plea colloquy statements concerning voluntariness is to say gross misadvice can never be a basis for an ineffective assistance claim. This can not be the case. See Strader v. Garrison, 611 F.2d 61 (4th Cir. 1979); Ostrander v. Green, 46 F.3d 347, 355 (4th Cir. 1995); O'Tuel v. Osborne, 706 F.2d 498 (1983); and footnote 19, supra. In Sargent, supra, and DeFusco, supra, the defendants complained about information they knew at the time of the guilty plea. In this case, at the time of the plea, Moss did not know Feeley had given him gross misadvice.

In summary, had Moss known then what he knows now, he would have gone to trial rather than accept the plea bargain Feeley reached with the State. As in Esslinger, supra, and Ostrander, supra, and unlike Risher, supra, the State's case was not so overwhelming that it militated no result other than conviction for first degree murder. It would be reasonable to go to trial where the facts suggested two viable defenses, intoxication and provocation, see Chisley v. State, 202 Md. 87, 95 A.2d 577 (1953) (first degree and second degree murder); Tripp v. State, 36 Md. App 459, 374 A.2d 384 (1977) (manslaughter), and where the advantages to the plea were negligible in light of all of the possible outcomes and consequences. Ct. Ex. 1.

V. REQUESTED RELIEF

Upon finding that Petitioner received ineffective assistance of counsel in violation of the Sixth Amendment of the United States Constitution, the Court should conditionally grant a writ of habeas corpus and direct the State of Maryland, pursuant to 28 U.S.C. §§ 2254 and 2243 to either retry Moss within a specified, reasonable period of time, or to avoid a retrial, negotiate a new plea offer which provides for his immediate release. Strader v. Garrison, 611 F.2d at 65; O'Tuel v. Osborne, 706 F.2d 501.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Findings of Fact and Conclusions of Law and supporting Memorandum In Support was mailed this 9th day of September, 1996, to Ann N. Bosse, Esquire, Office of the Attorney General, 200 St. Paul Place, Baltimore, Maryland 21202.

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KATHRYN R. FREY
Assistant Federal Public Defender