VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 12th day of December, 2024.

Present: All the Justices

JONATHAN DOUGLAS McMULLEN, APPELLANT,

against Record No. 240044
Circuit Court No. CL22-10

HAROLD W. CLARKE, DIRECTOR, APPELLEE.

UPON AN APPEAL FROM A JUDGMENT
RENDERED BY THE CIRCUIT COURT
OF CHARLES CITY COUNTY.

Jonathan Douglas McMullen ("McMullen") appeals from the dismissal of his petition for a writ of habeas corpus by the Charles City County Circuit Court. Upon consideration of the record, briefs, and arguments of counsel, the Court is of the opinion that the circuit court erred in dismissing McMullen's petition. For the reasons below, the Court will reverse the judgment of the circuit court and remand for new sentencing proceedings.

McMullen's habeas petition claimed that his counsel performed deficiently during the sentencing phase of his trial by telling the jury that McMullen likely would not fully serve the sentence it recommended. Asserting that those comments were reasonably likely to have caused him prejudice, he sought a new sentencing hearing.

After a jury trial, McMullen was convicted of two counts of aggravated sexual battery and two counts of object sexual penetration. During defense counsel's sentencing argument, he informed the jury that "the minimum that you can give him is 12 years," and "[t]hat's a long time for him to be away from his children." Defense counsel continued:

> There's no parole in Virginia. It used to be years ago, when I started practicing years ago, that if someone was found guilty of a felony and given 10 years, they would serve about a third of that, because we had good time and parole and all that stuff in Virginia. We don't have that stuff anymore.
> But to be honest with you, what we do have is anybody found guilty of a felony and given time will serve 85 percent of it, roughly 85, 70 percent of it. That's what we have. So that's what will happen to him . . . .

He concluded his argument by saying, "And, so, we would appreciate your consideration of the 12 years. That's a long time, knowing that [McMullen] would serve about 85 or 87 percent of that . . . ."

The jury recommended a sentence of 10 years for each of the two counts of aggravated sexual battery and 23 years for each of the two counts of object sexual penetration. The circuit court ordered that McMullen serve the terms consecutively, for a total of 66 years' active imprisonment.

"Where, as in this case, the habeas court dismissed the petition based upon a review of the pleadings without an evidentiary hearing, we review the decision to dismiss the petition de novo." *Zemene v. Clarke*, 289 Va. 303, 307 (2015). To establish a claim of ineffective assistance of counsel, a petitioner must first demonstrate that counsel performed deficiently by making "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

McMullen's counsel's statements at sentencing were undoubtedly serious errors that constituted deficient performance. This Court has long held that a sentencing jury should not be instructed on the availability of earned sentence credits because the "jury would be required to speculate on the unpredictable conduct thereafter of a particular defendant and the assessment of that conduct by the executive branch of government." *Fishback v. Commonwealth*, 260 Va. 104, 115 (2003). Instructing a sentencing jury that a defendant may not serve his full sentence creates "the potential for jury speculation resulting in a harsher sentence than would otherwise be warranted." *Bell v. Commonwealth*, 264 Va. 172, 207 (2002).

As a result, defense counsel's statements had no clear—or even reasonable—strategy behind them. Paradoxically, defense counsel asked for the lowest possible sentence while also suggesting that McMullen would not fully serve the sentence the jury recommended. In doing so, he incentivized the jury to increase their recommended sentence. Defense counsel's statements therefore fell "outside the wide range of reasonable professional assistance" and into the realm of deficient performance. *See Strickland*, 466 U.S. at 690.

In addition to establishing deficient performance, a habeas petitioner making a *Strickland* claim must also demonstrate prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Id. at 694.[1] Because of the "inviolability and secrecy of jurors' deliberations," we are "unlikely to discover what motivated the jury" in recommending its sentence and thus cannot determine with absolute certainty whether the jury would have recommended a different sentence absent defense counsel's comments. *See McQuinn v. Commonwealth*, 298 Va. 456, 460–61 (2020) (quoting *Reed v. Commonwealth*, 239 Va. 594, 598 (1990)).[2] But a petitioner demonstrates prejudice if the error is "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. That clearly happened here. Defense counsel's comments "invited the jury to speculate" and then presented them with a rationale to recommend a sentence higher than they otherwise would have found warranted. *See Bell*, 264 Va. at 207. "Such speculation is 'inconsistent with a fair trial . . . .'" *Id.* at 207–08 (quoting *Fishback*, 260 Va. at 115)). Because the egregiousness of defense counsel's comments was "sufficient to undermine confidence in the outcome," *Strickland*, 466 U.S. at 694, McMullen has established a reasonable likelihood of prejudice.

For these reasons, this Court concludes that McMullen is entitled to a writ of habeas corpus. Thus, this Court reverses the circuit court's judgment dismissing McMullen's petition, vacates McMullen's sentence, and remands the case for new sentencing proceedings.

This order shall be certified to the Circuit Court of Charles City County.

A Copy,

Teste:

Clerk

[1] "[I]neffective assistance of counsel during a sentencing hearing can result in *Strickland* prejudice because 'any amount of [additional] jail time has Sixth Amendment significance.'" *Lafler v. Cooper*, 566 U.S. 156, 165 (2012) (second alteration in original) (quoting *Glover v. United States*, 531 U.S. 198, 203 (2001)).

[2] *See also* Va. R. Evid. 2:606(b) (declaring that, with some exceptions, jurors are precluded from testifying about their deliberations and that a "court may not receive a juror's affidavit or evidence of a juror's statement" about the jury's deliberations).