STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Petition for Writ of Certiorari to Spartanburg County Court of Common Pleas

The Honorable Grace Gilchrist Knie, Plea Judge
The Honorable William A. McKinnon, PCR Judge

Appellate Case No. 2021-001450

DARIAN HILL ..... Petitioner.

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

CHELSEY F. MARTO
Assistant Attorney General
S.C. Bar # 104191

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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Petitioner's Statement of Issue on Certiorari

Petitioner's guilty pleas were given involuntarily because the pleas were based on his believe that there was an informal arrangement established wherein his sentences would be reduced subsequently in exchange for his testimony against the co-defendants in the case.

Respondent's Counterstatement of Issue on Certiorari

Did the post-conviction relief court properly determine that Petitioner failed to establish that his plea was involuntary when all conversations concerning a potential sentencing reduction occurred months after the plea was entered and, accordingly, had no impact on the plea itself?

STATEMENT OF THE CASE

Darian Hill (hereafter "Petitioner") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. During its February 2017 term, the Spartanburg County Grand Jury indicted Petitioner for assault and battery of a high and aggravated nature (2017-GS-42-00611), first-degree burglary (2017-GS-42-00612), armed robbery (count one), and possession of a weapon during the commission of a violent crime (count two) (2017-GS-42-00613). Petitioner was represented by Richard W. Vieth, Esquire (hereafter "Counsel"). Assistant Solicitor Spenser Smith, Esquire, from the Seventh Circuit Solicitor's Office, represented the State. On March 28, 2018, Petitioner pled pursuant to *Alford*[1] and to a negotiated range of ten to twenty years' imprisonment before the Honorable Grace Gilchrist Knie. He pled to the lesser-included offense of second-degree burglary, violent, and as indicted on all other charges. Judge Knie sentenced Petitioner to twenty years for ABHAN, provided that upon service of fifteen years the balance would be suspended upon five years of probation, fifteen years for burglary, fifteen years for armed robbery, and five years for the weapons charge, sentences running concurrently.

Petitioner filed a PCR application on June 10, 2019. Respondent made its return on November 5, 2019. The evidentiary hearing occurred on September 14, 2021, before the Honorable William A. McKinnon. Susannah Ross, Esquire represented Petitioner. Assistant Attorney General William H. Ray, Esquire, represented Respondent. At the evidentiary hearing Petitioner, through counsel, stated that he was proceeding forward on a claim that his plea was not knowingly and voluntarily made because he thought he could come back and receive less time after providing substantial assistance to the State.

[1] *North Carolina v. Alford*, 400 U.S. 25 (1970).

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 November 24, 2021. Specifically, the Court found that Petitioner was never promised a sentencing reduction, that all discussions about a sentencing reduction occurred after the plea was entered, that the State's unwillingness to offer the reduction is within the realm of prosecutorial discretion, and that Petitioner offered no evidence suggesting that the State's failure to extend a reduction rendered the plea invalid. Petitioner appeals from the denial of relief based upon this allegation.

STATEMENT OF FACTS

On September 11, 2015, officers responded to an apartment complex based upon a reference of a home invasion. (App. 15). The victim's roommate found her severely beaten in her bedroom. (App. 15). The victim's four-year-old son was present and witnessed the beating. (App. 15). The victim and her son told the police that two black males had done the beating. (App. 15). The victim was in and out of consciousness, stating she did not want to die. (App. 15). The victim stated she awoke with a man on top of her, pinning her down and beating her while the other man screamed for money. (App. 16). She states she was beaten with a pistol and that the men obtained her ATM card. (App. 16). The victim knew Petitioner because Petitioner's co-defendant was previously in a relationship with the victim's roommate. (App. 16). The State's position was the men were looking for money from a settlement the victim had just obtained from being involved in a felony DUI where the victim's fiancée passed away and the victim broke her femur bone. (App. 16-17). The police obtained still shots from surveillance footage at the ATM machine and showed the photographs to the victim. (App. 17). The victim identified the men in the photographs as Petitioner and his co-defendant. (App. 17). After the victim's roommate, Kesha Johnson, was arrested for shoplifting, she disclosed to law enforcement that Petitioner admitted to her he committed the robbery and provided corroborating facts. (App. 19-20).

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 only conduct a *de novo* review when evaluating questions 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

The post-conviction relief court properly determined that Petitioner failed to establish that his plea was involuntary when all conversations concerning a potential sentencing reduction occurred months after the plea was entered and, accordingly, had no impact on the plea itself.

On appeal, Petitioner argues the PCR court erred in denying him relief because Petitioner's plea was entered involuntarily because the pleas were entered based upon a belief that he could receive a sentencing reduction after the plea. However, the PCR court properly rejected this argument, finding that the plea was entered freely, knowingly, intelligently, and voluntarily and that all conversations concerning a possible sentencing reduction occurred after the plea and, thus, did not impact the pleas validity. This timeline was supported by Counsel's, Prosecutor's, and Petitioner's testimonies. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

When a petitioner asserts ineffective assistance of counsel as a ground for relief, they 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 petitioner 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 petitioner 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); *see Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (noting counsel's strategic decisions are to be afforded "'strong presumption' of reasonableness that the defendant must overcome); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). 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 because 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 petitioner 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). *See also 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)).

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 (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 v. State*, 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).

Petitioner's plea was entered freely, knowingly, intelligently, and voluntarily. Petitioner stated he understood he was pleading pursuant to *Alford* on all four indictments. (App. 6). Petitioner advised his intent to waive all constitutional rights, including the right to a jury trial, to call and confront witnesses, and the right to remain silent. (App. 7). Petitioner further advised that he understood the sentencing ranges, charges, elements, and any negotiations he was pleading to. (App. 8-10). Petitioner understood the violent and serious distinctions associated with charges, if relevant. (App. 8-10). Petitioner stated he understood he was pleading to a negotiated sentencing range between ten and twenty years. (App. 10-11). Petitioner stated he was not promised, threatened, or coerced into pleading. (App. 12). Petitioner stated he did not take any substances prior to the plea hearing that would impair his judgment or his ability to understand the proceedings. (App. 12). Both Counsel and Petitioner stated that they reviewed all evidence and discovery in the case. (App. 13). Petitioner testified his plea was free, knowing, and voluntary. (App. 14). At no point during the hearing did Petitioner indicate he was promised or offered a sentence reduction if he later decided to cooperate with the State. Thus, the plea was entered freely, knowingly, intelligently, and voluntarily without mention of the issue raised at his

PCR hearing.

At the PCR hearing, Petitioner testified that after he plead and was in SCDC custody, he was brought back to Spartanburg to testify against his co-defendant. (App. 75-76). He denied he was told if he testified, he would receive a sentence reduction. (App. 76). Petitioner confirmed that these discussions took place **after** the plea; not before. (App. 83). He also confirmed that he pled not because he was hoping for a sentencing reduction, but because afraid for his life and the potential sentence that would be imposed if he proceeded to trial. (App. 82). Prosecutor confirmed that discussions of testifying against Petitioner's co-defendant were brought up several months after the plea. (App. 88). Prosecutor confirmed that there was no proffer agreement prior to the plea, that Petitioner was permitted to plead to a negotiated range of ten to twenty years, and that he was sentenced to fifteen years of active time. (App. 89-90). Counsel confirmed that a sentencing reduction was not raised as a possibility before the plea itself, that **all discussions of a possible reduction occurred after the plea** and after Petitioner was placed into SCDC custody, and that he never promised Petitioner a sentence reduction before or after the plea. (App. 97-98).

Accordingly, Respondent contends all subsequent discussions concerning a possible sentencing reduction leave the plea itself untouched. Because all discussions about a reduction occurred months after the plea was entered and given the sequence of events, they could not have impacted the plea's validity. Petitioner entered an otherwise knowing, freely, voluntary, and intelligent plea with no knowledge of a potential sentencing reduction and cannot withdraw the plea now that he has since been privy to conversations that have evidently fallen apart. Thus, because probative evidence supports the denial of relief, the petition should be denied.

CONCLUSION

For the reasons stated above, this court should deny certiorari and affirm the PCR Court's findings that Petitioner entered his plea freely, knowingly, and voluntarily. However, if this Court decides to grant the petition of writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

CHELSEY F. MARTO
Assistant Attorney General

BY: /s Chelsey F. Marto
Chelsey F. Marto

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-0386

ATTORNEYS FOR RESPONDENT

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