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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Certiorari to Aiken County

Honorable R. Lawton McIntosh, Plea Judge  
Honorable J. Cordell Maddox, PCR Judge

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JALEN T. BADGER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2019-001183

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BRIEF OF RESPONDENT

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ALAN WILSON  
Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General  
S.C. Bar No. 100108

DANIELLE DIXON  
Assistant Attorney General  
S.C. Bar No. 73999

Post Office Box 11549  
Columbia, SC 29211  
803-734-2875

ATTORNEYS FOR RESPONDENT

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## **ISSUE PRESENTED**

### **Petitioner's Issue**

The PCR judge erred in denying petitioner's allegation that he pled guilty involuntarily at age sixteen because he was coerced into pleading guilty to avoid a possible mandatory LWOP sentence due to trial counsel's failure to explain the law on juvenile sentencing.

### **Respondent's Counterstatement of Issue**

Probative evidence supports the PCR court's finding that Petitioner did not prove plea counsel's sentencing advice was constitutionally ineffective when (1) Petitioner faced a *de facto* life sentence and the solicitor expressed an intent to seek a life sentence, rendering counsel's advice reasonable under prevailing professional norms, and (2) Petitioner never testified he would have gone to trial had counsel properly explained the potential sentence and thus failed to prove prejudice.

## **STATEMENT OF THE CASE**

Petitioner is incarcerated with the South Carolina Department of Corrections serving a seventeen-year sentence. In September 2016, the Aiken County Grand Jury indicted Petitioner for two counts of first-degree burglary (2016-GS-02-01895, -01892), carjacking (2016-GS-02-01886), armed robbery (2016-GS-02-01885), first-degree assault and battery (2016-GS-02-01888), and possession of a firearm during the commission of a violent crime (2016-GS-02-01887). On November 14, 2016, Petitioner pled guilty before the Honorable R. Lawton McIntosh to two counts of first-degree burglary, carjacking, and armed robbery. David Hayes, Esquire, represented Petitioner, and Assistant Solicitor Robert Wilder Harte represented the State. Judge McIntosh sentenced Petitioner to concurrent terms of seventeen years on each charge pursuant to a negotiated sentencing agreement between Petitioner and the State.

Petitioner filed a timely notice of appeal. On January 27, 2017, the South Carolina Court of Appeals dismissed the appeal for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. The remittitur issued on February 16, 2017.

On October 30, 2017, Petitioner filed a timely application for post-conviction relief (PCR). The State filed a return on July 6, 2018. An evidentiary hearing convened on May 14, 2019, before the Honorable J. Cordell Maddox. Arthur K. Aiken, Esquire, represented Petitioner. In an order of dismissal filed June 17, 2019, Judge Maddox denied relief. Petitioner filed and served a timely notice of appeal of the decision denying relief.

## **STATEMENT OF THE FACTS**

### *First-Degree Burglaries*

On March 29, 2016, officers responded to a call about a burglary on Stone Pass Drive in the Sage Creek Subdivision. (App. 11). When the homeowner returned from work, he discovered the back door to his house was open and the doorframe had been kicked in and shattered. (App. 11). Footprints were visible in the backyard, but investigators were unable to locate any fingerprint or DNA evidence. (App. 11-12). The homeowner reported numerous items missing, including electronics, a 40-caliber Taurus firearm, and a .22 LR short-barreled revolver. (App. 11, 58).

On April 14, 2016, officers responded to another call about a burglary on Stone Pass Drive where, again, forced entry was made through the back door. (App. 12). The homeowner reported numerous items missing including cash and a 20-gauge shotgun. (App. 12, 58). As before, no fingerprints or DNA were found at the scene, and the investigation stalled. (App. 12).

The first burglary was partially captured by a neighbor's video surveillance system, which helped investigators identify Petitioner as a potential person of interest. (App. 58). Petitioner was eventually connected to both burglaries because he was wearing a GPS ankle monitor as a condition of his Department of Juvenile Justice probation. (App. 13, 58-59). The GPS location data showed Petitioner inside both homes when the burglaries occurred. (App. 13, 59).

### *Carjacking and Armed Robbery*

On May 3, 2016, officers again responded to the Sage Creek subdivision, this time for a report of an assault and potential armed robbery. (App. 12). Upon arrival, officers spoke with two callers who stated they heard screaming outside, and a ten-year-old boy witnessed a woman being dragged out of a red Toyota Corolla. (App. 13). The boy told his mother what he had seen, and they got in their car and drove around the neighborhood. (App. 13). They eventually located the

red Toyota abandoned at the back of the neighborhood and found Megan Williams (Williams) nearby. (App. 13, 58). Williams had a laceration on her head and suffered a “pretty serious beating.” (App. 13). Another witness separately called 911 and reported she had seen a man with a gun in his hand assaulting Williams in the street. (App. 13). This incident was also captured on surveillance video. (App. 58).

Investigators learned, prior to the carjacking and assault, that Williams sent Facebook messages and texts to Petitioner’s older brother to sell him and Petitioner marijuana. (App. 14). During the transaction, Petitioner was armed with a gun and put it to the back of William’s head and said, “Drive or I’ll kill you.” (App. 14). Williams attempted to escape, and Petitioner hit her with the pistol numerous times. (App. 14). Petitioner’s brother then held Williams in the car by her hair as Petitioner drove away. (App. 14). Williams later identified Petitioner’s brother from a photo line-up without hesitation and told investigators she was “70% sure” of her identification of Petitioner as the suspect with the gun. (App. 15). Officers recovered a fingerprint from both Petitioner and his brother inside Williams’s car. (App. 15). Petitioner was still wearing the GPS monitor during this incident, which confirmed he was at the location of the carjacking and assault. (App. 13).

## **STANDARD OF REVIEW**

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

**Probative evidence supports the PCR court’s finding that Petitioner did not prove plea counsel’s sentencing advice was constitutionally ineffective when (1) Petitioner faced a *de facto* life sentence and the solicitor expressed an intent to seek a life sentence, rendering counsel’s advice reasonable under prevailing professional norms, and (2) Petitioner never testified he would have gone to trial had counsel properly explained the potential sentence and thus failed to prove prejudice.**

Petitioner asserts the PCR court erred in denying him relief because plea counsel failed to adequately explain the potential sentence Petitioner faced. However, probative evidence supports the PCR court’s finding that Petitioner failed to prove plea counsel’s alleged deficient sentencing advice induced the guilty plea. Thus, this Court should affirm.

“There is a strong presumption trial counsel provided adequate assistance.” Green v. State, 351 S.C. 184, 192, 569 S.E.2d 318, 322 (2002). To prove ineffective assistance of counsel, an applicant must overcome this presumption and show counsel was deficient, and that deficiency prejudiced the applicant. Strickland v. Washington, 466 U.S. 668, 687 (1984). In other words, “the applicant must show trial counsel’s performance fell below an objective standard of reasonableness and, but for counsel’s errors, there is a reasonable probability the result at trial would have been different.” Green, 351 S.C. at 192, 569 S.E.2d at 322.

When reviewing a guilty plea, the deficiency prong of Strickland remains unchanged—the petitioner must show counsel’s representation fell below the objective standard of reasonableness. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985). To show prejudice, a petitioner must show a reasonable probability that but for counsel’s alleged errors, he would not have pled guilty but would have insisted on going to trial. Id. at 59.

“Surmounting Strickland’s high bar is never an easy task, and the strong societal interest in finality has special force with respect to convictions based on guilty pleas.” Lee v. United States,

582 U.S. \_\_\_, 137 S. Ct. 1958, 1967 (2017) (internal citation and quotation marks omitted). “Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney’s deficiencies.” Id. Rather, courts should “look to contemporaneous evidence to substantiate a defendant’s expressed preferences.” Id.

The Strickland standards do not establish mechanical rules; the ultimate focus must be on the fundamental fairness of the challenged proceeding. Strickland, 466 U.S. at 668. Strickland requires the petitioner to prove “counsel made error so serious that counsel was not functioning as counsel guaranteed by the Sixth Amendment.” Id. at 697.

- a. *Because Petitioner faced a de facto life sentence and the solicitor expressed an intent to seek a life sentence, plea counsel’s advice did not fall below prevailing professional norms and thus was not deficient.*

Respondent concedes that a juvenile charged with a nonhomicide offense cannot be sentenced to life without parole. See Graham v. Florida, 560 U.S. 48, 82 (2010) (“The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.”). However, Graham does not prohibit a *de facto* life sentence for a juvenile nonhomicide offender. See State v. Slocumb, 426 S.C. 297, 306, 827 S.E.2d 148, 152 (2019) (agreeing “Graham’s explicit holding applies to *de jure* life sentences alone” but declining to extend Graham to prohibit *de facto* life sentences for juvenile non-homicide offenders).

Because Graham does not prohibit a *de facto* life sentence for a nonhomicide juvenile offender, counsel’s advice to Petitioner was reasonable under prevailing professional norms. Based on Petitioner’s charges, Petitioner could have ended up in a situation where he faced a *de facto* life sentence if convicted as indicted. As counsel explained,

The Solicitor’s discussion with me was that—that he’s facing a burg first and that he is facing a life on both of those and it would be a most serious. If he tried him on one, he would then turn around and

try him and his brother on the car-jacking and armed robbery, and he would seek a life sentence.<sup>[1]</sup>

However, I don't believe he'd been able to under the—the Aiken<sup>[2]</sup> case, but he's still subject to a de facto life sentence because both the burglary first carries on—a life potential and there's two of those. And then the armed robbery and car-jacking both carry up to 30 years if he ran them consecutive—

(App. 61). Counsel's advice in that respect was correct: nothing prohibited the court from imposing a *de facto* life sentence if Petitioner had been convicted of several of his charges at trial. See Slocumb, 426 S.C. 297, 314-15, 827 S.E.2d 148, 157 (2019) (“Neither Graham nor the Eighth Amendment, as interpreted by the [United States] Supreme Court, currently prohibits the imposition of aggregate sentences for multiple offenses amounting to a *de facto* life sentence on a juvenile nonhomicide offender.”).

Notably, Petitioner faced a similar situation as the defendant in Slocumb in that, like Slocumb, Petitioner's offenses arose from multiple crimes. See Slocumb, 426 S.C. at 310, 827 S.E.2d at 154-55 (“Slocumb committed multiple crimes at two different points in time . . . . The only reason his aggregate sentence exceeds his life expectancy is because he committed so many crimes, not because a single sentence is disproportionately lengthy.”). Here, Petitioner pled guilty to four charges arising from three separate incidents; thus, had Petitioner rejected the plea offer, he was subject to at least two trials—one for the burglaries and one for the carjacking and assault—on a total of six charges. (App. 10, 61). Because of this, counsel explained his concern that Petitioner would receive an aggregate sentence that would have the same effect as a life sentence.

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<sup>1</sup> Petitioner was noticed for trial on the armed robbery/carjacking charges, not for the burglaries, in accordance with the State's strategy to try him in two separate proceedings. However, the State ultimately agreed to resolve both cases with a single guilty plea.

<sup>2</sup> Miller v. Alabama, 567 U.S. 460 (2012) (holding mandatory life without parole sentences for juvenile offenders violates the Eighth Amendment).

(App. 59-61). Counsel further explained Petitioner did not have any viable defenses to either set of charges due to the video surveillance, the GPS data, and the eyewitnesses. (App. 13, 59). Had Petitioner not accepted the guilty plea, he was subject to a minimum sentence of forty years of violent time just on the four charges to which he pled guilty. Further, because the burglary charges carry up to a life sentence for an adult offender, there would have been no way for counsel to predict a potential maximum sentence—only that Petitioner would be subject to some indeterminate term of years, potentially exceeding his natural life expectancy. See Slocumb, 426 S.C. at 314-15, 827 S.E.2d at 157 (finding the aggregate sentence of one-hundred-thirty years imposed on a juvenile nonhomicide offender did not “categorically violate[] the Eighth Amendment pursuant to the reach of Graham”).

Under these circumstances, Petitioner cannot overcome the presumption that plea counsel’s sentencing advice was reasonable under prevailing professional norms.<sup>3</sup> See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (“Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”). Thus, probative evidence supports the PCR court’s finding that Petitioner failed to prove deficiency.

*b. Petitioner never testified he would have gone to trial had counsel properly explained the potential sentence and thus failed to prove prejudice.*

Importantly, Petitioner never testified he would have rejected the plea offer had counsel advised him he could not receive a life without parole sentence. Further, due to the strength of the State’s evidence on all the charges and Petitioner’s prior record, Petitioner did not prove prejudice

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<sup>3</sup> In fact, counsel would have likely been deficient if he had *not* explained to Petitioner he could potentially face a *de facto* life sentence, especially when some of the charges carried a maximum penalty of life—leaving counsel to speculate about how many years a judge would decide to sentence Petitioner if Petitioner had been convicted.

because it is not reasonably likely any alleged deficiency induced Petitioner's plea. Therefore, the PCR court correctly denied relief, and this Court should affirm.

Here, Petitioner knew he faced the possibility of a life sentence, even if he was not certain of the procedure by which that might happen. (App. 53). Although Petitioner indicated he pled because he didn't want to "catch life," his expressed concern at the PCR hearing was that counsel did not explain he would be entitled to a mitigation hearing before receiving a life without parole sentence.<sup>4</sup> (App. 52-53). Crucially, Petitioner never testified he would not have pled guilty had he known he was "only" subject to a *de facto* life sentence rather than a *de jure* life sentence. (App. 47-56). See Hill, 474 U.S. at 59 ("[T]o 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.").

Moreover, it is not rational to believe Petitioner would risk a *de facto* life sentence given the strength of the State's evidence against him, his prior record, and the fact he committed these crimes while wearing a GPS monitor as a condition of juvenile probation. (App. 13-14, 16-17). See Lee, 582 U.S. \_\_\_, 137 S. Ct. at 1965 (denying relief for lack of prejudice where Lee failed to make "an adequate showing that [he], properly advised, would have opted to go to trial"). Notably, Petitioner was connected to both burglaries and the carjacking by GPS monitoring; he was

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<sup>4</sup> Under Miller, as interpreted by the Supreme Court of South Carolina, a mitigation hearing is required when a juvenile homicide offender faces life without parole. See Aiken v. Byars, 410 S.C. 534, 544, 765 S.E.2d 572, 577 (2014) ("[W]hether their sentence is mandatory or permissible, any juvenile offender who receives a sentence of life without the possibility of parole is entitled to the same constitutional protections afforded by the Eighth Amendment's guarantee against cruel and unusual punishment. The petitioners and those similarly situated are accordingly entitled to resentencing to allow the inmates to present evidence specific to their attributes of youth and allow the judge to consider such evidence in the light of its constitutional weight."). Respondent is not aware of any case requiring a mitigation hearing when a juvenile defendant faces a *de facto* life sentence.

captured on video surveillance in the carjacking and one of the burglaries; and there were independent eyewitnesses to the carjacking, in addition to the victim. (App. 12-14, 58-59). Due to the solicitor's expressed intent to seek a life sentence and the strength of the State's evidence, Petitioner very likely faced a *de facto* life sentence—as counsel correctly advised him. It is not rational to conclude a juvenile who was concerned about “catching life” would nevertheless turn down a negotiated 17-year sentence and risk a sentence that could easily exceed his natural life expectancy. See Padilla v. Kentucky, 559 U.S. 356, 372 (2010) (“[T]o obtain 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”). Petitioner has not shown rejecting the plea bargain would have been rational. Due to his lack of testimony on this point the PCR court correctly found Petitioner failed to prove prejudice. Thus, this Court should affirm.

**CONCLUSION**

Based on the foregoing, this Court should affirm the PCR court's denial of Petitioner's application for post-conviction relief.

Respectfully Submitted,

ALAN WILSON  
Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

DANIELLE DIXON  
Assistant Attorney General  
S.C. Bar No. 73999

s/Danielle Dixon  
Assistant Attorney General

ATTORNEYS FOR THE RESPONDENT

This 13 day of January, 2023.