STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
Deandrea G. Benjamin, Plea Judge
Courtney Clyburn Pope, PCR Judge

Appellate Case No. 2023-000035

WILLIAM OLIVER AGUILAR PINEDA,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does probative evidence support the PCR court's finding that plea counsel allowed Respondent to present testimony to the plea court that "she knew was false" and "encouraged him to present false testimony to the court"?

II. Did the PCR court err as a matter in law in finding pela counsel was ineffective for advising Respondent that his codefendants would testify against him when that finding was based on hindsight?

STATEMENT OF THE CASE

Respondent is confined in the South Carolina Department of Corrections serving a twenty-three-year sentence. In August 2017, the Richland County Grand Jury indicated Respondent for murder. This charge arose from the fatal shooting of Pierre Wilson at a nightclub on March 22, 2017. (App. 6-7, 25-26).

On November 5, 2020, Respondent appeared before the Honorable Deandrea G. Benjamin and entered a negotiated plea to the lesser-included offense of voluntary manslaughter. Assistant Public Defender Megan Eigenbrot represented Respondent, and Assistant Solicitor Lamar Fyall represented the State. Pursuant to negotiations, Respondent would be permitted to spend the weekend with his family before reporting to the detention center the following Monday. If Respondent reported as required, he would be sentenced to twenty-three years. If Respondent did not report, he would be sentenced to thirty years. (App. 3-4, 14-16). The court accepted the plea and sentenced Respondent to twenty-three years, contingent upon him reporting. (App. 12, 15).

Respondent did not file a direct appeal. On October 26, 2017, he filed an application for post-conviction relief (PCR) alleging ineffective assistance of plea counsel. Specifically, he averred he would have proceeded to trial but for counsel's erroneous advice. (App. 29-35). The State filed a return and a motion for a more definite statement. (App. 26-42). Prior to the plea, Respondent filed an amended application raising four grounds of ineffective assistance of counsel.

On September 26, 2022, an evidentiary hearing convened before the Honorable Courtney Clyburn Pope. At the hearing, Respondent testified he was appointed multiple public defenders before Megan Eigenbrot (plea counsel) was appointed to represent him in January 2020. He explained his prior attorney left the office in March 2019, and he did not learn who his new attorney was until January 2020. (App. 51-55). Respondent stated plea counsel did not meet with him until

the middle of 2020. (App. 57-58).

Respondent testified he wanted to go to trial but plea counsel pressured him to plead guilty. (App. 57-58). According to Respondent, plea counsel said, "[I]f you don't plead guilty, you know, a judge is going to pretty much give you the maximum sentence due to the severity of the crime and you're probably looking at a life sentence." (App. 59).

Respondent testified his prior attorney reviewed discovery with him, which included statements from his codefendants. (App. 56). Additionally, plea counsel informed him that two or three of his codefendants had provided statements and would testify against him. (App. 60). During his testimony, the following exchange occurred:

> Q So as to the codefendants, . . . she told you that they would be testifying against you; is that correct?
>
> A Yes, sir.
>
> Q If she had told you—was that one of the reasons you pled guilty?
>
> A No, sir.
>
> Q I mean, would you have gone to trial if you had known they were not going to testify?
>
> A Of course. I wanted to go to trial, regardless.

(App. 60). Respondent stated the codefendants ultimately did not testify against his other codefendants, and no one other than him was serving time for this murder. (App. 60-61).

Regarding the plea, Respondent testified,

> I was told that I would be asked a series of questions by the judge and that I would have to answer them. One of the questions that was going to be asked was I, in fact, guilty. And I, you know, raised the question to my attorney that what if I said no, that I'm not guilty. I was told that if I did answer the question in that matter that the judge would probably like to throw out my plea deal and force me into trial.

(App. 61). Respondent testified plea counsel told him that if he "didn't answer the questions according to how [he] was supposed to that [he] would not probably get the deal." (App. 61-62).

Respondent also testified the State was initially not going to call his case before his codefendants' case. (App. 62). He testified,

> And it seemed to me that when my lawyers got swapped around that the solicitor swapped around tactics, as well, and decided to try me first. And that caught me off guard because I was told that I wasn't going to be tried first, that the other people who were giving statements who were admitting guilt or admitting participating would be going to trial first and that I would be going to trial last.

(App. 62). Respondent asserted he was not guilty but pled guilty due to threats that he would go to prison for the rest of his life and never see his children again. (App. 62, 66).

On cross-examination, Respondent admitted he was at the club the night of the shooting, and his codefendants were going to testify "that pretty much that [he] was the shooter." (App. 68, 71). Respondent stated, "It's six of us involved and I don't know three of them." (App. 69). Later, he stated he did not know four of the codefendants. (App. 70). He testified the State's evidence consisted of "[m]ere testimony about [his] codefendants." (App. 68).

Plea counsel testified she was initially appointed to represent Respondent, but his case was transferred to a different attorney due to her workload. She stated she remained familiar with his case because she was planning to sit second chair. Plea counsel stated Respondent's attorney discovered a conflict in January 2020, so the case was reassigned her. (App. 75-76). Plea counsel stated she was noticed for a status conference in January 2020, and the court gave her additional time to prepare. However, courts closed in March 2020 due to Covid. Plea counsel stated court resumed around the end of September, but she did not feel comfortable "jumping into his case at

that time," so the court continued the trial until November 9.[1] (App. 80-81). Although she could not meet with Respondent in person during that time, plea counsel testified she was able to talk with him pretty regularly on the phone and get the information she needed. (App. 81).

Plea counsel testified witnesses and the victims initially identified Corey Sanders, Benjamin Chestnut, Anthony Brevard, and Barry Reed as individuals involved in the shooting. Thereafter, Sanders and Chestnut "identified [Respondent] as the individual that was firing an assault rifle." (App. 77). Plea counsel stated another individual—Rockmore—was later arrested and also "pointed the finger at" Respondent. (App. 78). She stated that if they had proceeded to trial, she would have impeached the codefendants with their multiple statements. Counsel testified she also obtained transcripts from State grand jury testimony to use for impeachment. (App. 89).

Plea counsel stated law enforcement recovered a bandana from the scene with DNA matching Respondent's DNA. (App. 77-78). Additionally, cell towers placed Respondent's phone in the area at the time of the shooting, and law enforcement extracted text messages from the phones of the codefendants "that suggested he was meeting some of these other individuals there at the club." (App. 78). Specifically, counsel stated the State was focused on a text message in a group chat in Respondent's phone and Reed's phone that said, "Bring your shoes." (App. 94). She explained,

> [Respondent] gave me an explanation for that text. We were trying to figure out a way to present that explanation without him having to testify. We consulted with some other individuals who we believed would have some knowledge of it, what that would mean and their—the information they provided was not positive for us.

Plea counsel clarified she was informed the message "meant to bring your guns." (App. 94).

Plea counsel testified Respondent maintained "he merely was present at the club."

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[1] Respondent pled guilty on November 5, 2020.

However, she agreed the State likely would have used the "Bring your shoes" message to refute a mere presence defense. (App. 94). Plea counsel stated Respondent had "individuals in the vehicle with him" the night of the shooting, but she "was not allowed to speak with" them. (App. 78). When asked who did not allow her to speak with them, counsel replied, "Well, they basically told [Respondent] they did not want to speak. They did not want to get involved. Because there was a parallel investigation going on in the Attorney General's Office against Mr. Barry Reed for drugs." (App. 79). Plea counsel stated she had a witness—Sierra Adams—that told law enforcement she saw Sanders and Chestnut but said no when asked if she saw anyone fitting Respondent's description; plea counsel planned to call Adams as a witness at trial. (App. 80-81).

Plea counsel stated she was concerned about the State raising gang affiliations. She explained the State's theory "was this whole situation surrounded an issue with groups of Bloods and this more small group of Bloods, but called Paid Family that was kind of like a music group pushing drugs and music and stuff like that." (App. 81). She testified, "I know they were going to accuse him of being in a gang, of not only being in a gang, but being an enforcer in a gang based on one of his codefendant's statements." (App. 82). Plea counsel stated she researched this issue and planned to file a pretrial memorandum to exclude gang evidence. (App. 82, 89). However, she informed Respondent that based on her research, the State would probably be able to introduce that evidence. She stated the gang evidence was a big concern for Respondent. (App. 82).

Plea counsel stated the State initially indicated they were not going to try Respondent before his codefendants. (App. 83). She explained Reed and Brevard did not provide statements, but Sanders and Chestnut did, "so they were going to always be testifying." (App. 83). Plea counsel testified Dick Harpootlian represented Reed and Jack Swerling represented Brevard, and she believed Respondent was tried first because she was a public defender. (App. 83).

Regarding the plea, plea counsel testified she advised Respondent "that if he does not respond to certain questions in certain ways, the judge would not accept his guilty plea and that we would be going to trial." (App. 84). She testified she did not threaten or coerce Respondent, but she explained,

> I know that he was struggling with the idea, though. In fact, I think the night before, maybe two nights before, we had a very long conversation over the phone where he was very emotional and upset. So I know he was struggling with the decision. And I think during the plea, in fact, he asked me to turn to the mother of his youngest children and tell her that I'm sorry you're having to hear me say this. Tell her it's not true, I'm just saying it for the court.

(App. 84). Plea counsel testified it was ultimately Respondent's decision to plead. (App. 84-85). She explained, "I think it's one of those situations where I do what I always do, I advise my client no matter what, no matter how good I do, there's always risks at trial. I don't know what a jury is going to do." (App. 90). She agreed that her advice to plead guilty was based on her belief that the codefendants would testify against Respondent, but she learned after the plea that they did not cooperate. Specifically, she testified that after Respondent's plea, Reed pled guilty to BOPHAN[2] and received probation. She testified the solicitor told her "that the case [against Reed] had, basically, fallen apart. That the victim's brother refused to cooperate anymore. . . . And that the testifying codefendants were all now saying they were no longer going to testify." (App. 91-92). Plea counsel agreed, however, that this was hindsight, and when she advised Respondent about whether he should plead guilty, she did not know the codefendants would later decide not to testify against Reed. (App. 92). She explained, "I reached out to their lawyers on multiple occasions and

[2] Breach of peace, high and aggravated. See State v. Simms, 412 S.C. 590, 774 S.E.2d 445 (2015) (explaining breach of peace is a common-law misdemeanor punishable in magistrate's court, but when "the breach of peace is deemed to be of a high and aggravated nature, the case may be 'waived up' to the Court of General Sessions").

they all indicated they would be testifying." (App. 92).

Following the hearing, the Court issued an Order granting PCR. Pertinently, the Court found counsel was ineffective in incorrectly advising Respondent "that co-defendants would testify against him should he go to trial." (Or 4-5). The Court further found Respondent would not have pled guilty but for this incorrect advice and the pressure counsel placed on Respondent to plead. Additionally, the Court found plea counsel "allowed her client to present testimony to the plea judge that she knew was false," "raised no objection to her client pleading guilty to charges where he maintained his innocence," and "encouraged him to present false testimony to the court." (Or 5). The Court concluded by citing Comment 6 to Rule 3.3, South Carolina Rules of Professional Conduct, Rule 407, SCACR:

> If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective, and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of the witness's testimony will be false the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present testimony that the lawyer knows to be false.

The Court vacated the plea and remanded Respondent to the Court of General Sessions for a new trial.

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

I. Probative evidence does not support the PCR court's finding that counsel allowed Respondent to present testimony to the plea court that "she knew was false" and "encouraged him to present false testimony to the court."

Probative evidence does not support the PCR court's finding that plea counsel allowed Respondent to present testimony to the plea court that "she knew was false" and "encouraged him to present false testimony to the court." Based on the trial transcript and counsel's testimony at the PCR hearing, Respondent has not overcome the presumption that counsel was effective. Thus, the PCR court erred in granting relief.

"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 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. "A reasonable probability is one sufficient to undermine confidence in the trial's outcome." Id.

"A PCR applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial." Dalton v. State, 376 S.C. 130, 136, 654 S.E.2d 870, 873 (Ct. App. 2007). To prove prejudice following a guilty plea, the applicant "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." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

The crux of the PCR court's order granting Respondent a new trial from a guilty plea is premised on the assumption that plea counsel knowingly allowed Respondent to present false testimony to the plea court. In support of this finding, the court relies on testimony that "shortly before the plea, [Respondent] asked [plea counsel] to tell his family that the statements he intended to make in admitting guilt during the plea colloquy were not going to be the truth." However, that statement in and of itself does not mean Respondent was lying to the plea court in admitting his guilt. Likewise—and critically—it does not mean plea counsel believed Respondent was lying to the plea court.[3]

Admittedly, plea counsel acknowledged that Respondent maintained he was "merely present" at the club that night. (App. 94). However, according to plea counsel, the State's evidence did not align with that assertion. Plea counsel testified that although Respondent claimed he was merely present at the scene of the fatal shooting, the State retrieved text messages from his phone showing him corresponding with codefendants. Plea counsel stated she spoke with potential witnesses who were unable to corroborate Respondent's explanation for the text messages. Critically, plea counsel stated those individuals relayed that the phrase "Bring your shoes"—found in text messages in Respondent's phone—really meant "Bring your guns." (App. 94). Plea counsel also testified to her concerns that the State would introduce evidence that Respondent was involved in a gang—where he was "an enforcer." (App. 81-82). Based on this evidence, it is not reasonable to believe plea counsel believed Respondent was lying to the plea court in admitting

[3] Although the PCR court found credible Respondent's testimony that "throughout his representation by the various attorneys with the Public Defender's Office, he always maintained his innocence," and "he told [plea counsel] to tell his family that he was innocent of the charge of Voluntary Manslaughter and was only admitting guilt during the plea colloquy because he wanted the judge to accept his plea," the PCR court did not make a credibility finding regarding Respondent's specific testimony that he was actually innocent.

his guilt.

Likewise, Respondent's statement—"tell my family I am lying"—meant Respondent was lying about *something* at the time of the plea—either to his family or to the plea court. Based on plea counsel's testimony about the State's evidence, it is not reasonable to believe that plea counsel believed Respondent was lying to the plea court in admitting his guilt. Thus, probative evidence does not support the plea court's finding that plea counsel "allowed her client to present testimony to the plea judge that she knew was false " and "encouraged him to present false testimony to the Court." (Or. 6). In the absence of that finding, credible evidence does not support any finding that counsel was ineffective or that Respondent's plea was not knowing or voluntary. Thus, this Court should grant this petition for certiorari and vacate the PCR court's order.

III. The PCR court erred as a matter in law in finding pela counsel was ineffective for advising Respondent that his codefendants would testify against him because that finding was based on hindsight.

In addition to finding counsel allowed Respondent to present false testimony, the PCR court found counsel was ineffective for advising Respondent that his codefendants would testify against him at trial. Specifically, the Order found,

> [Plea counsel] confirmed [Respondent's] account that the case against the co-defendants fell apart *after* [Respondent's] plea and that, *in retrospect*, her advice that co-defendants would testify against him should he go to trial was ultimately incorrect. The Court finds that this incorrect advice and the pressure to plead guilty that [plea counsel] placed on Applicant to plead guilty constituted ineffective assistance of counsel and that, but for counsel's errors, Applicant would not have pled guilty.

(Or. 4-5, emphasis added). However, this finding is based on hindsight and speculation. Thus, the PCR court erred as a matter of law in finding counsel ineffective in this regard.

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). "Judicial scrutiny of counsel's

performance must be highly deferential." Strickland v. Washington, 466 U.S. 668, 689 (1984) "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. "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; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. at 668 (internal quotations omitted). "[A] guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not a reasonably competent attorney and the advice was not within the range of competence demanded of attorneys in criminal cases." Id. at 687 (internal quotations omitted).

The Court's finding that counsel gave incorrect advice in advising Respondent that his codefendants would testify against him is based on hindsight and is thus erroneous as a matter of law. See id. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel's perspective *at the time*." (emphasis added)). The PCR Court specifically found the "case against the co-defendants fell apart *after* [Respondent's] plea." (Or. 4-5, emphasis added). Likewise, the Court found that plea counsel confirmed that "in retrospect" her advice that the codefendants would testify against Respondent was incorrect. (Or. 5). However, when evaluating whether counsel's advice is reasonable within prevailing professional norms, courts must consider the

reasonableness of the advice *at the time* it was given—not later. Plea counsel testified that prior to the plea, she spoke to the codefendants' attorneys, and they indicated the codefendants would testify against Respondent. (App. 92). Based on this information, counsel's advice to Respondent that the codefendants would testify against him was reasonable under prevailing professional norms.[4] See Strickland, 466 U.S. at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."); id. at 688 ("[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances."). It is unclear what basis Respondent or the PCR court have for believing plea counsel could have foreseen that Sanders and Chestnut would decide not to cooperate in Reed's case—especially when their attorneys had informed plea counsel they would be testifying against Respondent. The Court's finding that counsel was ineffective in giving incorrect advice is based purely on hindsight and is error as a matter of law.

Further, the Court's finding that this advice was incorrect is based on speculation. Plea counsel explained that of the four codefendants, only Sanders and Chestnut were expected to testify against Respondent. It is speculative to assume Sanders and Chestnut would not have testified at Respondent's trial just because they later decided not to testify against Reed. In short, no one knows what would have happened had Respondent proceeded to trial, and the finding that counsel provided "incorrect advice" in this regard is speculative.

As Respondent's attorney, counsel had a duty to review the State's evidence against Respondent and advise him of it. Plea counsel and Respondent both testified that the evidence included statements by two of Respondent's codefendants. Prior to the plea, counsel testified she

[4] Based on the State's evidence, counsel would have been deficient had she *not* advised Respondent that the codefendants would testify against him.

spoke to the codefendants' attorneys, who advised her that they anticipated them to testify against him. (App. 94). Based on this information, there was no basis for plea counsel to believe the codefendants would not testify against Respondent. Thus, plea counsel had a duty to apprise Respondent of this fact. Had plea counsel *not* advised Respondent of that fact, she would have been ineffective in that regard. It strains credibility to suggest counsel was ineffective for advising Respondent of something she had a duty to advise him of—the State's evidence against him.

Finally, it was Respondent's decision to plead guilty, and a review of the plea colloquy shows his plea was knowing and voluntary. Specifically, plea counsel advised the Court she had explained to Respondent the charges he faced, the solicitor relayed his charges at the plea and what he was pleading to, and Respondent agreed he understood what he was pleading to. (App. 3-4, 7-8). Additionally, the plea court advised Respondent of the constitutional rights he was waiving, and Respondent indicated he understood. (App. 8-9). Likewise, the plea court advised Respondent of the sentence he face, and Respondent relayed he understood. (App. 8, 11). See Boykin v. Alabama, 395 U.S. 238 (1969) ("To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him."). Thus, Respondent knowingly and voluntarily pled guilty.

Further, when asked at the PCR hearing if one of the reasons he pled guilty was because counsel advised him that his codefendants would testify against him, Respondent replied, "No sir." Based on the foregoing, Respondent did not prove he was prejudiced by counsel's advice. (App. 60). See Hill, 474 U.S. at 59 (providing an applicant seeking to prove prejudice following a guilty plea "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"). Finally, even if plea counsel's advice regarding whether the codefendants would testify was ultimately incorrect, such advice

does not render his otherwise voluntary plea involuntary. See United States v. Ruiz, 536 U.S. 622, 628 (2002) ("When a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees."); id. at 629-30 ("[T]the law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply in general in the circumstances—even though the defendant may not know the specific detailed consequences of invoking it. A defendant, for example, may waive his right to remain silent, his right to a jury trial, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide."); id. at 630 ("[T]he Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor."). Ultimately, the PCR court's finding that counsel gave incorrect advice is based on hindsight and is controlled by an error of law. Thus, this Court should grant certiorari and reverse the PCR court's order. See Goins, 397 S.C. at 573, 726 S.E.2d at 3 (providing appellate courts will reverse the decision of a PCR court when it is controlled by an error of law).

CONCLUSION

Based on the foregoing, the PCR court erred in granting post-conviction relief. Thus, this Court should grant certiorari and vacate the PCR court's order.

Respectfully Submitted,

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This 11th day of August, 2023