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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Michael G. Nettles, Circuit Court Judge

ANTONIO O. SIMMONS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001091

PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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ISSUE PRESENTED

Did the PCR judge err in refusing to find that the guilty plea was rendered involuntary by plea counsel's failure to object and move to withdraw the plea when the plea judge refused to sentence in accordance with the negotiated sentencing range and instead sentenced Petitioner to an increased but suspended sentence?

STATEMENT

In December of 2014, the Charleston County Grand Jury indicted Petitioner, Antonio Orlando Simmons, for five counts of armed robbery, indictments #2014-GS-10-0711, 07123, 07142, 07145, 07147. (App. pp. 42-51). On March 20, 2018, Petitioner appeared before the Honorable R. Markley Dennis and pled guilty pursuant to a negotiated sentencing range between seventeen (17) and twenty-eight (28) years. Michael Apicella represented Petitioner. David Osborne prosecuted the case. On the lead indictment, #2014-GS-10-0711, Judge Dennis sentenced Petitioner to thirty (30) years, provided upon the service of eighteen (18) years the balance was suspended. (App. p. 52). Judge Dennis sentenced Petitioner to eighteen (18) years concurrent on the remaining indictments. (App. pp. 53-56). Petitioner did not file a notice of intent to appeal.

On September 18, 2018, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 57- 63). The State filed a return and motion for more definite statement on January 10, 2019. (App. pp.64-70). On July 23, 2019, an evidentiary hearing was held before the Honorable Michael G. Nettles. Christopher L. Murphy represented Petitioner. Jacob A. Isenberg represented the State. In a written order filed October 1, 2019, Judge Nettles granted relief in part and dismissed in part. (App. pp. 129 – 141). Judge Nettles found that the suspended sentence for the lead indictment was illegal and remanded for re-sentencing. PCR counsel did not file a notice of intent to appeal.

On December 10, 2019, Petitioner filed a second PCR application requesting an "Austin hearing." (App. pp. 168-175). On January 10, 2020, prior to the State filing the return to the second PCR application, Petitioner appeared before Judge Dennis for re-sentencing pursuant to Judge Nettles' order. (App. pp. 142-165). Christopher R. Geel represented Petitioner. David L.

Osborne represented the State. Instead of re-sentencing only on the lead indictment where the sentence was found to be illegal, Judge Dennis re-sentenced Petitioner to twenty-eight (28) years concurrent for all five indictments. (App. p. 166). A timely notice of intent to appeal was filed. On October 22, 2021, however, Petitioner signed an affidavit asking to drop the direct appeal. On February 9, 2022, the South Carolina Court of Appeals dismissed the appeal.

On February 22, 2021, over a year after Petitioner filed the second PCR application, the State filed a return and motion to dismiss. (App. pp. 176-182). On November 3, 2022, an evidentiary hearing was held before the Honorable Diane S. Goodstein. James K. Falk represented Petitioner. Samantha J. Weidauer represented the State. This second PCR hearing was limited to the belated appeal and did not address re-sentencing[1]. In a written order signed April 10, 2023, Judge Goodstein granted a belated PCR appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) (App. pp. 230-233). A timely notice of intent to appeal was served on July 10, 2023. This petition for writ of certiorari pursuant to Austin and a separately filed petition for writ of certiorari follow.

[1] This Court should vacate the re-sentencing order on all five counts because the guilty plea was rendered involuntary by plea counsel's failure to object and move to withdraw the guilty plea when the judge refused to sentence in accordance with the negotiation entered with the State and instead sentenced Petitioner to an increased but suspended sentence.

ARGUMENT

The PCR judge erred in refusing to find that the guilty plea was rendered involuntary by plea counsel's failure to object and move to withdraw the plea when the plea judge refused to sentence in accordance with the negotiated sentencing range and instead sentenced Petitioner to an increased but suspended sentence.

Pursuant to negotiations with the State for a sentencing range of seventeen (17) to twenty-eight (28) years, Petitioner pled guilty to five counts of armed robbery. At the plea the prosecutor told the judge, "The offer is a negotiated range to plead to five armed robberies, dismiss everything else, and the range will be 17 to 28 years." (App. p. 4, lines 12-14). The sentencing sheets reflect that the sentence was negotiated rather than recommended by the State. (App. pp. 52-56). The prosecutor also told the judge that Petitioner confessed to two of the armed robberies but the others individually might have been difficult to prosecute. (App. p. 22, lines 2-21).

Plea counsel advised the judge about Petitioner's significant mental issues. (App. p. 33, line 21 – p. 34, lines 1-8). Petitioner had previously been found not competent. (App. p. 5, line 24 – p. 6, lines 1-10). During the judge's colloquy he said, "And basically, so that I understand it, because it will deal with whether I accept it or not, the active time that I would impose would be between 17 and 28 years." (App. p. 13, line 23 – p. 14, line 1). The prosecutor said, "That's correct, Your Honor." (App. p. 14, line 2). When the prosecutor announced the negotiation earlier, however, he did not distinguish between active and suspended time. The judge then told Petitioner:

> But it's important to me that it deals with active time, because I'm accepting this, and I just need to make sure of this because it allows me to do something in structuring the sentence that wouldn't necessarily require him to do more active time, but it will afford the opportunity for that, should something - - and I want to make a part of this community supervision, because as you've been aware, Mr. Simmons, that while these sentences will be concurrent and I will not impose any more active time than 28 years or less than 18 years, you understand that?

(App. p. 14, lines 3-13). Plea counsel did not question the judge about his references to active time. The judge asked Petitioner if he wanted the judge to accept the negotiated sentence. (App. p. 15, lines 20-21). The judge told Petitioner, "And that would be a concurrent sentence of no more than 28, no less than 18 on these seven – 17, excuse me, 17 years on these five; is that right?" (App. p. 15, line 23 – p. 16, line 1). Petitioner answered, "Yes, sir." (App. p. 16, line 2).

The judge refused to sentence Petitioner in accordance with the negotiated sentencing range of between seventeen (17) and twenty-eight (28) years on one of the five charges. Instead, the judge in sentencing stated, "Indictment 2014-1711 will be the controlling one. I'm sentencing you to 30 years but suspending that to 18. Now, what does that mean? It means simply this: As for that charge, you will serve 15.3 years' time, and then you will be released, and part of the community -- I've written in, and I know I can't control it, community supervision program, he must take all meds as prescribed. I'm sure that will be a condition, but I'm writing that in there specifically, and any treatment and counselling that is deemed necessary." (App. p. 37, line 19 – p. 38, lines 1-4). The judge then discussed the consequences of violating the conditions. (App. p. 38, lines 5-14). The judge sentenced Petitioner to eighteen (18) years concurrent on the remaining four indictments. (App. p. 40, lines 8-9).

The judge asked plea counsel if he understood and plea counsel answered, "Yes, Your Honor, but did you mean to say 28 years rather than 30?" (App. p. 38, lines 16-17). The judge answered, "No. That's why I asked you: Active time, I'm giving you what you want, your active time. I didn't exceed 28 years. He only has exposure time now. That's in his control. I don't have anything to do with that. He'll serve 15. That's the only way I'll accept that, because I've got the right to go to the maximum on one, and he's going to serve 18 years." (App. p. 38, lines 18-24). The negotiated sentencing range of between seventeen (17) and twenty-eight (28) years

did not address active time or a suspended sentence. The judge went on to state, "So no, I think I've complied with the negotiated sentence in every respect because all you talked about was how much active time he's going to serve today, and how much time has he served? How much has he already served?" (App. p. 39, lines 17-21). The suspended sentence imposed by the judge on the one indictment did not comply with the negotiated sentencing range. If the judge was not able to accept the negotiated sentencing range, he should have allowed Petitioner to withdraw the guilty plea. Plea counsel failed to object. Plea counsel failed to move to withdraw the guilty plea. Plea counsel was deficient.

At the beginning of the PCR hearing PCR counsel told the judge, "He [Petitioner] is here now claiming to have an involuntary guilty plea as a result of his representation. So that is what we are going to focus on is the involuntariness of the guilty plea and that will be the sole issue that we will address today." (App. p. 74, line 22 – p. 75, line 1). PCR counsel noted that the armed robbery statute does not allow a suspended sentence as imposed by the judge outside the negotiation. (App. p. 75, lines 8-11). The State asserted that if Petitioner was successful on an illegal sentence claim, then he would only be entitled to re-sentencing. (App. p. 78, lines 12-19). PCR counsel disagreed. (App. p. 79, lines 8-17). PCR counsel argued, "I think that he would be entitled to a new sentence but because this was a negotiation and there is some overlap with the sentence and the negotiations whether he is going to plead guilty or not or force the State to prove their burden of proof. Basically, he took a good deal. And I think that they are so intertwined at the State court level that if he is going to get that new sentence it would open up, subject him to all the charges all over again." (App. p. 80, line 24 – p. 81, lines 1-8). The PCR judge disagreed with PCR counsel. (App. p. 81, line 9-10).

Plea counsel testified that Petitioner agreed to the guilty plea for a negotiated sentencing range because there was a possibility of a seventeen (17) year sentence. (App. p. 102, lines 13-20). Plea counsel also testified that Petitioner insisted that he wanted to go to trial prior to receiving the plea offer with a sentencing range of seventeen (17) to twenty-eight (28) years. (App. p. 102, lines 24-25). In closing PCR counsel argued, "But I do think there is some merit to the reversal based on the negotiated plea. I think Mr. Apicella's [plea counsel's] testimony was had he not had that 17 year negotiated plea he would not have pled guilty. That led him to pleading guilty and when he received that suspended sentence that violated the statute. And because it's so intertwined I think he would be entitled to a trial on not only the case he pled to but it would also expose him to the other stuff. I understand the Court disagrees with that but I think that that has the most merit that he's claiming." (App. p. 116, lines 9-19).

At the end of the PCR hearing the PCR judge found, " - - that Mr. Apicella [plea counsel] was indeed effective in his representation of the defendant." (App. p. 119, lines 4-6). The PCR judge also said, "I'm going to ask that the Attorney General set forth in the order the colloquy between Judge Dennis and the defendant which sets forth that the plea was indeed voluntary." (App. p. 120, lines 15 – 18). The PCR judge erred in failing to find that plea counsel's failure to object and move to withdraw the plea when the plea judge went above the negotiated sentencing range constituted deficient performance. The guilty plea was rendered involuntary by counsel's deficient performance.

In the order of dismissal the PCR judge wrote, "At the plea hearing, Applicant entered into a negotiated sentencing range of seventeen to twenty eight years based upon the charge of armed robbery. (Tr. p. 35). However, Applicant was sentenced to thirty years suspended upon the service of eighteen. (Tr. p. p. 37). As a matter of law, Applicant' sentence for armed

robbery cannot be suspended. Accordingly, this Court finds Applicant is serving an illegal sentence. This Court finds the appropriate remedy is to vacate the sentence and afford Applicant a new sentencing hearing." (App. p. 140). Granting Petitioner a new sentencing hearing was not the proper remedy when PCR counsel argued that the guilty plea was rendered involuntary. The PCR judge erred in refusing to find that the guilty plea was rendered involuntary, as argued by PCR counsel. (App. p. 74, line 22 – p. 75, line 1). The PCR judge erred in failing to find ineffective assistance of counsel in plea counsel's failure to object and move to withdraw the plea when the plea judge went above the negotiated sentencing range. The guilty plea was rendered involuntary by counsel's deficient performance. The remedy is a remand for a trial on all five charges, not a remand only for resentencing.

The present case is distinguished from Brooks v. State, 325 S.C. 269, 481 S.E.2d 712, (1997), where the Court found that the guilty plea was not rendered involuntary simply because the judge did not sentence in accordance with a plea agreement. Importantly, in Brooks the judge advised the defendant that he was facing a maximum of twenty-six years. In the present case the judge told Petitioner he was facing " . . . a concurrent sentence of no more than 28, no less than 18 on these seven – 17, excuse me, 17 years of these five; is that right?" (App. p. 15, line 23 – p. 16, line 1). The judge, however, sentenced Petitioner to thirty (30) years suspended on eighteen (18). Earlier the judge referenced active time. (App. p. 14, lines 3-13). The negotiation, however, did not distinguish active time from suspended time.

The present case is also distinguished from Roddy v. State, 339 S.C. 29, 528 S.E.2d 418, (2000), where the Court found that the guilty plea was not rendered involuntary because the judge did not order concurrent sentences in accordance with the plea agreement. In Roddy the Court found that the defendant was aware that he could receive consecutive rather than

concurrent sentences. In the present case the record fails to reflect that Petitioner was aware he could receive a thirty (30) year sentence provided that upon the service of eighteen (18) years with the balance suspended.

In Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000), the Court wrote:

> The Due Process Clause requires guilty pleas be entered into voluntarily, knowingly, and intelligently. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.E.2d 274 (1969). Before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he or she is waiving. In addition to the requirements of Boykin, a defendant entering a guilty plea must be aware of the nature and **crucial elements** of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived. State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980) (emphasis supplied); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991).

Both Petitioner and plea counsel believed that the judge was bound to sentence within the negotiated sentencing range. When the judge went outside the sentencing range, plea counsel questioned the judge. (App. p. 38, lines 16-17). Plea counsel, however, failed to object and failed to move to withdraw the plea. The PCR judge erred in refusing to find that the guilty plea was rendered involuntary by plea counsel's failure to object and move to withdraw the plea when the plea judge refused to sentence in accordance with the negotiated sentencing range and instead sentenced Petitioner to an increased but suspended sentence.

PCR counsel did not file a notice of intent to appeal the PCR judge's order. As a result, on December 10, 2019, Petitioner filed a second PCR application requesting an "Austin hearing." (App. pp. 168-175). On January 10, 2020, while the request for a belated appeal from the PCR order was pending and prior to the State filing the return to the second PCR

application[2], Petitioner appeared before the original sentencing judge, Judge Dennis, for re-sentencing pursuant to the PCR judge's order. (App. pp. 142-165). The case should not have been remanded for re-sentencing when the plea was rendered involuntary by plea counsel's failure to object and move to withdraw the plea based on the plea judge sentencing above the negotiated sentencing range. This Court should vacate the re-sentencing order as a nullity.

Judge Dennis re-sentenced Petitioner to twenty-eight (28) years, the maximum provided by the negotiated range, concurrent for all five indictments. (App. p. 166). While re-sentencing was not the proper remedy for any of the five indictments, re-sentencing was certainly not proper for the four eighteen-year sentences that were not suspended and not in violation of the statute. The new sentence increased the original sentence on these four indictments by ten years. The proper remedy on all five indictments was a remand for a new trial based on ineffective assistance of counsel rendering the guilty plea involuntary.

During the re-sentencing hearing Petitioner requested a jury trial. (App. p. 152, line 13). The re-sentencing judge responded, "All right. So you - - you can't have that option, okay; right now." (App. p. 152, lines 14-15).

In the re-sentencing order Judge Dennis wrote:

> On January 10, 2020 the court convened a re-sentencing hearing. The defendant was present and represented by new counsel. Defense counsel argued that the court was constrained to sentence the defendant to 18 years' incarceration, in light of North Carolina v. Pearce, 395 U.S. 711 (1969). During the hearing, the defendant indicated that he did not want to be re-sentenced, but instead wanted to withdraw his prior guilty plea. Additionally, the defendant requested a jury trial on all of his charges. Defense counsel indicated to the court that he did not believe the court was authorized to grant defendant's request, given the procedural posture of the case. The State agreed.

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[2] The State filed a return and motion to dismiss on February 22, 2021, over a year after Petitioner filed the second PCR application. (App. pp. 176-182).

(App. p. 166). During the PCR hearing the PCR judge asked, "- - - and we all understand that if he elects to go forward with the resentencing that he can get up to 28. Do we all understand that?" (App. p. 126, lines 3-5). PCR counsel and Petitioner both indicated that they understood. (App. p. 126, lines 6-11). Again, resentencing was not the proper remedy for a guilty plea rendered involuntary by ineffective assistance of counsel.

Judge Dennis additionally wrote in the re-sentencing order:

> **The defendant shall serve a term of incarceration of 28 years on each of the above stated warrants, each sentence to be served *concurrently*, with credit for time served.**
>
> The court is mindful of its responsibility pursuant to North Carolina v. Pearce, 395 U.S. 711 (1969), and hereby notes for the purposes of the appellate record that the prior negotiated plea and sentencing range was only accepted *because* the court intended to suspend a portion of the defendant's sentence in order to ensure the defendant's continued supervision after his release from state custody. Because such sentence is not permitted under the law as it stands, the court elects to sentence the defendant to the maximum term allowable under the terms of the negotiated plea.

(App. pp. 166-167).

This Court should vacate the re-sentencing order. First, as discussed above, re-sentencing, was not the proper remedy for a guilty plea rendered involuntary by ineffective assistance of counsel. Second, while the re-sentencing judge cites North Carolina v. Pearce, 395 U.S. 711 (1969), in the order, the purported reasons for the harsher sentence fail to overcome the Pearce presumption resulting in a violation of Due Process. Again, if the judge could not accept the negotiated range, he should not have accepted the plea. The reason given for acceptance of the plea but outside the negotiated sentencing range was to ensure continued supervision after release from custody does not withstand scrutiny when the judge was aware Petitioner would be on community supervision upon release from custody. (App. p. 37, line 21 – p. 38, lines 1-4). The reason given does not justify increasing the sentence from thirty (30) years, provided upon

the service of eighteen (18) years with the balance suspended to a twenty-eight (28) year sentence. The reason given does not justify increasing the sentences on the other four indictments from eighteen (18) years to twenty-eight (28) years. Although Petitioner dropped his appeal of the re-sentencing order, as part of the Austin review this Court should vacate the re-sentencing order as a nullity.

On November 3, 2022, after the re-sentencing hearing held on January 10, 2020, an evidentiary hearing was held to address the Austin issue. The second PCR judge correctly granted Austin relief, as discussed in the separately filed petition for writ of certiorari. The first PCR judge erred in refusing to find that the guilty plea was rendered involuntary by plea counsel's failure to object and move to withdraw the plea when the plea judge refused to sentence in accordance with the negotiated sentencing range and instead sentenced Petitioner to an increased but suspended sentence.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable

probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (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." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

In Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999), the South Carolina Supreme Court wrote:

> Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently by defendants. *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The United States Supreme Court has held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he or she is waiving. *Id.* Specifically, a defendant must be aware of the privilege against self incrimination, the right to a jury trial, and the right to confront one's accusers. This Court considered the requirements of a voluntary and knowing guilty plea in *State v. Hazel,* 275 S.C. 392, 271 S.E.2d 602 (1980) and *Dover v. State,* 304 S.C. 433, 405 S.E.2d 391 (1991). In addition to the requirements of *Boykin,* a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived. *Id.*

In Dalton v. State, 376 S.C. 130, 138–39, 654 S.E.2d 870, 874 (Ct. App. 2007), the South Carolina Court of Appeals wrote:

> "[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." Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). "When determining issues relating to guilty pleas, this Court will consider the entire record, including the transcript of the guilty pleas and the evidence presented at the PCR hearing." Roddy, 339 S.C. at 33, 528 S.E.2d at 420. In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997).

Petitioner agreed to plead guilty to five counts of armed robbery based on a negotiated sentencing range of seventeen (17) to twenty-eight (28) years. The judge did not sentence Petitioner within the negotiated range. Instead of the judge advising Petitioner that he could not accept the plea to the negotiated sentencing range, the judge sentenced Petitioner to thirty (30) years, provided upon the service of eighteen (18) years with the balance suspended. Plea counsel failed to object and failed to move to withdraw the guilty plea. The guilty plea was rendered involuntary by plea counsel's failure to object and move to withdraw the plea when the plea judge went above the negotiated sentencing range. Plea counsel was ineffective. The PCR judge erred in failing to find ineffective assistance of counsel and finding that the plea was voluntary. Petitioner was prejudiced by the error.

In Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018), the South Carolina Supreme Court wrote:

> In order to establish prejudice when challenging a guilty plea, a defendant must prove "there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have gone to trial." Harden v.

> State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). As the United States Supreme Court stated in Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), "[I]n order to satisfy the 'prejudice' requirement, the defendant must show there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial."

There is a reasonable probability that, but for counsel's error, Petitioner would not have pled guilty and would have insisted on going to trial. The PCR judge erred in only granting relief as to re-sentencing when the guilty plea was rendered involuntary based on ineffective assistance of counsel. Petitioner is entitled to post-conviction relief.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issues.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of March, 2024.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Michael G. Nettles, Circuit Court Judge

ANTONIO O. SIMMONS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001091

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari pursuant to Austin v. State in the above referenced case has been served upon Danielle E. Dixon, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Petition for Writ of Certiorari pursuant to Austin v. State has been served on Antonio O. Simmons, #279418, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 15th day of March, 2024.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER