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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Certiorari to Greenville County Court of Common Pleas

The Honorable Edward W. Miller, Plea Judge
The Honorable J. Mark Hayes, II, Post-Conviction Relief Judge

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OSHAUN ROBINSON,

RESPONDENT,

v.

THE STATE

PETITIONER

Appellate Case No. 2020-001361

BRIEF OF PETITIONER

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STATEMENT OF THE ISSUE

Whether the PCR court erred in granting relief by conflating the deficiency and prejudice prongs of *Strickland*, failing to apply the required presumption of competence, and relying entirely on hindsight to find counsel constitutionally ineffective for failing to advise Robinson prior to pleading guilty that a concurrent sentence on the plea convictions did not mean his trial convictions—which were pending on appeal at the time—were "merged" such that if his trial convictions were eventually overturned on direct appeal or collateral review, the plea convictions would not be simultaneously overturned, where counsel never indicated or otherwise suggested to Robinson that an appeal on convictions from the jury trial would somehow also apply to his later guilty plea, and where the voluntariness of the plea did not depend on whether Robinson understood what *might happen* in the future if he were successful in a *different case* because Robinson pleaded guilty based on the twenty-five year sentence, avoiding LWOP.

STATEMENT OF THE CASE

This appeal references two distinct sets of charges; the first set was resolved initially by a jury trial in January of 2009 and the second set was resolved by guilty plea in March of 2009. The second set gives rise to the instant appeal.

A. Trial Charges

In August 2008, a Greenville County grand jury indicted Robinson for armed robbery (2008-GS-23-5382) possession of a weapon during commission of a violent crime (2008-GS-23-5382), conspiracy (2008-GS-23-5383), and assault and battery of a high and aggravated nature (ABHAN) (2008-GS-23-5384) (**trial charges**). (App. 439 – 443). The trial charges arose out of a December 10, 2007, incident where Robinson and co-defendants approached the victim's Jeep, pointed a firearm at him, and demanded his money and phone. The victim complied after Robinson punched him in the face. (App. 34; 73 – 77; 243 - 253).

On January 14–15, 2009,[1] Robinson and his co-defendant, Kenneth Workman, proceeded to a joint trial before the Honorable C. Victor Pyle, Jr. Andrew Burke Moorman (defense counsel) represented Robinson. (App. 169). The jury convicted both Robinson and Workman of the lesser-included offense of assault and battery and as indicted on the remaining offenses. (App. 426). Judge Pyle sentenced Robinson to concurrent terms of twenty-five years for armed robbery, five years for conspiracy, five years for possession of a weapon during commission of a violent crime, and thirty days for assault and battery. (App. 432-433 and 445-448).

Robinson, through counsel, filed a timely notice of appeal of his trial convictions and sentences. (App. 463). Appellate Defender Robert Pachak represented Robinson on appeal. Following briefing and oral argument, the Court of Appeals affirmed Robinson's convictions and

[1] Robinson and Workman initially proceeded to trial on December 1–2, 2008, which resulted in a mistrial with a hung jury. (App. 1–168).

sentences in an unpublished *per curiam* opinion. *State v. Robinson*, Op. No. 12-UP-042 (S.C. Ct. App. filed Jan. 25, 2012). (App. 499 – 502). The case was remitted back to the circuit court on February 14, 2012. (App. 503).

On December 5, 2012, Robinson timely commenced a post-conviction relief action challenging his trial convictions. (App. 504 – 512). The State requested an evidentiary hearing through its return on June 21, 2013. (App. 514 – 519). On February 18, 2014, the PCR court convened an evidentiary hearing before the Honorable G. Edward Welmaker. Robinson and defense counsel both testified at the hearing. (App. 521 – 546). On March 25, 2014, Judge Welmaker issued an order denying the application on all grounds and dismissing with prejudice. (App. 547 – 554). Robinson appealed. (App. 556).

Appellate Defender Wanda H. Carter represented Robinson on his PCR appeal. On April 15, 2015, this Court reversed the denial of relief and remanded the case for a new trial, finding the *Allen* charge given by the trial judge unconstitutionally coercive. *Robinson v. State*, Op. No. 2015-MO-018 (S.C. Sup. Ct. filed April 15, 2015). (App. 579 – 580). The case was remitted back to the lower court on April 27, 2015. (App. 581).

On remand, Robinson pleaded guilty to the trial charges before the Honorable Letitia H. Verdin on May 16, 2016. No negotiations or recommendations were made as to sentencing. Judge Verdin sentenced Robinson to concurrent terms of fifteen years' imprisonment for armed robbery, five years for criminal conspiracy, five years for the weapons charge, and thirty days for simple assault. (App. 582 – 585).

B. Plea Charges

In August 2008, the same Greenville County grand jury also indicted Robinson for criminal conspiracy (2008-GS-23-5385), assault and battery with intent to kill (2008-GS-23-5386), armed robbery, and possession of a weapon during the commission of a violent crime (2008-GS-23-5387). (**plea charges**). (App. 681 – 682, 687 – 688, and 692– 693). These charges from events on or about December 14, 2007 – a separate incident than the one for the trial charges. Robinson and two co-defendants robbed the victim and shot him in the abdomen with a .38 caliber handgun before stealing his money, wallet, and watch. (*See generally* App. 682).

While Robinson's appeal was pending on his trial convictions, he pleaded guilty as indicted to these charges before the Honorable Edward W. Miller on March 4, 2009. No negotiations or recommendations were made as to sentencing. Robinson was again represented by Moorman. Judge Miller accepted Robinson's plea and sentenced him to concurrent terms of twenty-five years for armed robbery, twenty years for assault and battery with intent to kill (ABWIK), five years for criminal conspiracy, and five years for possession of a weapon during commission of a violent crime. (App. 683 and 689-690). Judge Miller further ordered the new sentences to run concurrently with the jury trial sentences. Robinson did not appeal.

Robinson commenced the underlying post-conviction relief action on April 25, 2017, challenging his March 2009 guilty plea.[2] The State made its return and motion to dismiss on November 2, 2018, requesting the application be summarily dismissed as time-barred. Pursuant to this request, the Honorable Perry H. Gravely, acting in his capacity as Chief Administrative Judge, issued a conditional order of dismissal on November 9, 2018, provisionally denying and dismissing

[2] Because Robinson failed to pursue any type of challenge whatsoever or otherwise attempt to preserve the record by ordering the transcript, the transcript of the March 4, 2009, guilty plea is unavailable because this action was commenced eight years after the plea took place. *See* Rule 607(i), SCACR.

the application as untimely under S.C. Code Ann. § 17-27-45(A) (requiring filing an application within one year of judgment or completion of appeal), but allowing Robinson twenty days to respond to the conditional order. (App. 767 – 805). Robinson, through PCR counsel, timely responded to the conditional order of dismissal. On December 27, 2018, Judge Gravely issued a Form 4 ordering the matter to be set for a hearing. (App. 815 – 823).

A hearing on the State's motion to dismiss convened before the Honorable Alex Kinlaw, Jr., on April 15 and 17, 2019. (App. 612 – 676). Robinson was present and represented by Tara Dawn Shurling, Robinson and defense counsel both testified. Judge Kinlaw subsequently took the matter under advisement and requested proposed orders from both parties. (App. 797 – 814). On April 22, 2019, Judge Kinlaw issued an order vacating the conditional order of dismissal and granting leave to proceed with a full evidentiary hearing. (App. 815 – 823).

On January 22, 2020, an evidentiary hearing convened before the Honorable J. Mark Hayes, II. (App. 824 – 861). Robinson was present and again represented by Tara Dawn Shurling, Esquire. Robinson and defense counsel both testified again. Judge Hayes took the matter under advisement and requested proposed orders from both parties. (App. 862 – 892). On May 19, 2020, Judge Hayes issued an order granting post-conviction relief. (App. 893 – 909). In response, on June 3, 2020, the State filed a motion to alter, amend, and reconsider pursuant to Rule 59(e), SCRCP. (App. 910 – 916). Robinson filed a response and a supplemental response. (App. 917 – 922 and 923 – 925). On July 28, 2020, Judge Hayes issued a Form 4 order denying the State's motion. (App. 926 – 929). He subsequently issued a formal order on September 9, 2020. (App. 930). The State timely appealed.

The State filed its petition with appendix on March 5, 2021. On November 17, 2021, this Court accepted Robinson's amended return. By Order dated October 19, 2023, this Court granted the State's petition and ordered additional briefing. This brief follows.

STANDARD OF REVIEW

Appellate courts will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). In particular, appellate courts "afford great deference to a PCR court's credibility findings." *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 435–36 (2018) (citing *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012)). However, "[i]f no probative evidence exists to support the PCR court's findings," the appellate "[c]ourt will reverse." *Lowry v. State*, 376 S.C. 499, 504, 657 S.E.2d 760, 763 (2008) (citing *Pierce v. State,* 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000))

As to the PCR court's conclusions, appellate courts will "review questions of law de novo, with no deference to trial courts," *Smalls,* at 180-181, 819 S.E.2d at 839, and "will reverse the PCR court if its decision is controlled by an error of law," *Frierson*, 423 S.C. at 262, 815 S.E.2d at 435–36.

Review of Ineffective Assistance of Counsel Claims

To establish counsel was ineffective, a PCR applicant must show "that counsel's representation fell below an objective standard of reasonableness," and "but for counsel's unprofessional errors," there is a reasonable probability that the outcome "of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-88 and 694 (1984); *Simpson v. Moore*, 367 S.C. 587, 595–96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" in the outcome. *Strickland*, at 694. This test similarly applies to matters resolved by a guilty but varies slightly. *See Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

"A defendant who enters a plea on the advice of counsel may only attack the voluntary

and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009) (citing *Hill*).

ARGUMENT

The PCR court erred as a matter of law in granting relief by conflating the deficiency and prejudice prongs of *Strickland*, failing to apply the required presumption of competence, and relying entirely on hindsight to find counsel constitutionally ineffective for failing to advise Robinson prior to pleading guilty that a concurrent sentence on the plea convictions did not mean his trial convictions—which were pending on appeal at the time—were "merged" such that if his trial convictions were eventually overturned on direct appeal or collateral review, the plea convictions would not be simultaneously overturned, where counsel never indicated or otherwise suggested to Robinson that an appeal on convictions from the jury trial would somehow also apply to his later guilty plea, and where the voluntariness of the plea did not depend on whether Robinson understood what *might happen* in the future if he were successful in a *different case* because Robinson pleaded guilty based on the twenty-five year sentence, avoiding LWOP.

Strickland requires an applicant to carry his burden on both prongs. Here, relying only on hindsight and Robinson's self-serving and contradictory testimony that had no legal significance in a *Strickland* inquiry, the PCR court appears to have conflated the prongs, equated deficiency with prejudice, and did so without a legally sufficient factual basis for either. The PCR court erred in law and fact.

Essentially, the PCR court found defense counsel constitutionally ineffective for not adequately "advis[ing] that the two sets of charges would remain separate legally" thus not warning Robinson against a false belief that Robinson "was not ever going to have to worry about getting more time for those charges than he had already gotten." (App. 899). Applicant wanted, in hindsight, assurance that his "pleas would never result in him getting more time for them than he received for the charges he had been found guilty of at his jury trial." (App. 899). Counsel testified that he never indicated to Robinson that the separate convictions were "merged," and testified he "would never have said that because that's not a correct statement of the law." (App. 857). Nor did Robinson testify that counsel gave incorrect advice on "merger" of some sort or he had an agreement of that type. (*See* App. 626, 842, 845, and 848-850). Even so, the PCR court, failing to apply the *Strickland*

presumption of competence or expressing a basis for a violation under professional norms, determined deficient performance in non-advice "left" Robinson with a misunderstanding that "the two sets of charges, and the sentences he received, were effectively *merged*" such that "any changes to the judgments and sentences imposed at his jury trial would have the same impact upon the [plea] judgments and concurrent sentences." (App. 898). Robinson only apparently realized the two sets of charges were not "merged" at approximately the same time he *received a fifteen-year plea offer* on remand of the trial charges years later. (App. 627 and 631). Instead of considering the advice and the circumstances Robinson was facing *at the time of the plea*—a life sentence, (*see* App. 625)—the PCR court relied entirely on *post hoc* assertions from Robinson that he would not have taken *the plea offer* while assigning no importance to the fact that Robinson never testified or otherwise indicated he would have risked LWOP and gone to trial on these charges *at the time of the plea*. *See Strickland,* 466 U.S. at 669 ("Judicial scrutiny of counsel's performance must be highly deferential, and 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 693 ("not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding").

But critically, Robinson failed to show deficiency in counsel's representation under *Strickland* test, the first step to relief. Nor did he show but for counsel's error – defined under objective criteria of reasonableness – he would not have pled but gone to trial, *i.e.*, *Strickland* prejudice. (*See* App. 906). The grant of relief must be reversed.

Post-Conviction Relief Testimony

At the outset of the April 2019 hearing before Judge Kinlaw, PCR counsel clarified Robinson's allegation of ineffective assistance of counsel regarding the plea charges was "that in

[Robinson's] mind, based on the advice of Counsel," Robinson "believed [the charges] had effectively been merged…. (App. 617–18). Robinson testified that he was convicted of the trial charges in January 2009, and that he received an aggregate twenty-five year sentence. (App. 624). He testified that his attorney told him in February about a plea offer where he would receive a twenty-five year sentence that would run concurrent to the sentence he received at trial. (App. 624). Robinson ultimately accepted this offer. Robinson testified he pleaded guilty because he already had a twenty-five year sentence from the jury conviction, and if he did not plead guilty to these charges, the State was going to seek LWOP. (App. 625). Robinson testified he took the twenty-five year offer because it "ran in with the [twenty-five] years [he] was already serving." (App. 625).

Robinson explained that he understood concurrent meant that his sentences from the two sets of charges would be run together. (App. 625). When asked if the term "concurrent" was used with regard to sentencing, Robinson responded, "Just the sentencing. That's all I'm - -." (App. 625). He was then interrupted by PCR counsel, who asked what else "they" talked about. (App. 625–27). He then clarified that his "whole reason for pleading" was based on his understanding that, as a result of the plea, he would never have to worry about receiving more time for those charges than he had already received on the trial charges. (App. 626).

Robinson further testified that "serving twenty-five years was the purpose of me pleading" (App. 637), but later testified he "would have never pled" (to the deal as he expressly testified later) had he known the charges were not "legally merged." (App. 664 and 842). Robinson then testified he did not recall whether plea counsel discussed this with him before the plea hearing in March 2009. (App. 664). Finally, to the statement by PCR counsel that "nothing in the legal advice given to [him] by [his] attorney led [him] to understand that the only thing overlapping about these cases was the sentences," Robinson responded "[a]bsolutely not." (App. 666, l. 23- 667, l.).

Counsel testified that "the goal for the guilty plea on current time, the sentences, was to reduce his exposure and eliminate to the largest extent possible the possibility that he'd be sentenced to life without parole." (App. 668, l. 24–70, l. 2). Because counsel no longer had his file and the plea occurred over ten years prior to the April hearing, counsel testified he did not recall the exact conversation he had with Robinson about the concurrent sentences. (App. 668–69). Even so, the following exchange took place during PCR counsel's direct examination:

SHURLING: … Did you ever talk about the fact that, look, this means this 25 and that 25 are going to be served at the exact same time, they're overlapping each other? You told him that?

MOORMAN: I believe I did.

SHURLING: And do -- you do not deny, do you, telling him what he testified to Monday, that you, basically, told him that these new pleas were not going to result in him serving any more time than he would have otherwise served on the jury trial?

MOORMAN: I don't independently remember saying that, but I would have. Because that was the -- the recommendation on the pleas was for the same time that the sentence was for that he received at the jury trial, so.

SHURLING: Thank you.

MOORMAN: Yeah.

SHURLING: But to be fair to Mr. Robinson, you don't have any recollection of telling him that for any other purpose, if he wanted to appeal the jury trial, if he was doing a PCR, whatever, that they still were independent cases and had to be treated independently as far as anything he might file in the future?

ROBINSON: I can't remember telling him that -- I can't remember telling him that. I just don't have any independent recollection.

(App. 671, l. 6- 672, l. 5).

At the January 22, 2020, evidentiary hearing before Judge Hayes, Robinson agreed with PCR counsel that at least part of his motivation in taking the plea deal was to avoid LWOP. (App. 834 and 839). He clarified that his "whole purpose of pleading" to the plea charges was because he already had twenty-five years, he "was expecting it to [run] together," and that he did not expect "to be doing time for different charges." (App. 841). Robinson further testified there would have been any purpose

in taking the deal had he known the two sets of charges were not merged. (App. 842). Robinson testified it was his understanding "that if anything had happened to those judgments and sentences from [his] jury trial that was beneficial to [him] would also apply to the judgment [and sentences for the rest of the charges." (App. 843).

Robinson then testified on re-cross that he pleaded guilty both to avoid LWOP and because he thought his guilty pleas and trial convictions were merged. (App. 848-849). He "did not expect it to not be merged together on down the line." (App. 849). He stated he believed the two cases were "permanently merged" and "that what affected one would affect the other." (App. 849-850).

Defense counsel also testified again. He was asked specifically whether he told Robinson that his guilty plea charges and sentences were merged. (App. 835). He testified:

> MOORMAN: As I testified in the hearing in April, I cannot remember specifically what I said to Mr. Robinson as it related to the relationship between the charges.
>
> **I can tell you -- what I can say is I did not tell him that charges to which he'd pled months after a guilty verdict that his appellate rights for those charges with the guilty pleas and his appellate rights with the -- related to the jury convictions, that somehow they were all lumped in together and that an appeal on conviction from the jury trial somehow would also be an appeal on a guilty plea that he engaged in months later. I did not affirmatively represent that to him in any conversations we had.**

(App. 855, ll. 10-21).

He further testified on cross-examination by Robinson's PCR counsel:

> SHURLING: Do you recall testifying here previously that you had no recollection of ever advising your client of what impact, if any, subsequent appeals from the judgments and sentences entered at the jury trial would have on the judgments and sentences entered on the separate grouping of charges pursuant to the guilty plea? That you had no recollection of having any discussion with him about what consequences, if any, subsequent appeals on the jury trial cases, and sentences and judgments would have on the guilty plea cases and judgments?
>
> MOORMAN: Yes.
>
> SHURLING: But is that still true?

MOORMAN: Yes.

SHURLING: I'm trying to understand if you have no recollection of having any discussion with him about that, then how can you be sure here today that you didn't say something to him that he could have interpreted to mean that the two sets of judgments -- judgments were, in fact, merged as opposed to simply sentences overlapping?

MOORMAN: In my testimony I don't -- my testimony is not that -- I can't speak to how he interpreted what I told him. So I -- any testimony -- I'm not giving an opinion as to how he viewed what I told him. So I don't know if I understand your question.

SHURLING: Well, I guess what I'm saying is if your testimony at the previous proceeding, and the record will speak for itself, is that you have no recollection of giving him any advice concerning what impact subsequent appeals of any sort with regard to the judgments and sentences entered at the jury trial would have on the judgments and sentences entered pursuant to the plea, that you have no recollection of going there with him, of telling him anything concerning that. And taking your former testimony to be truthful, as I do, my question is how can you say now what you do know is that you never told him that the two were merged per se?

MOORMAN: My testimony was that I never told him that -- the reason why is that is not a -- **that thought never occurred to me until today when I was in court that that's an incorrect statement of the law. I would never have said that.**

So that's where it comes from. I would never have said that because that's not a correct statement of the law. The fact that my client was found guilty in a jury trial, that he pled months later, and the appeal related to the convictions for the jury trial somehow would be linked, that notion would have never occurred to me.

SHURLING: I understand. But you do understand that the defendant's state of mind, what he believed you to have meant and what he relied upon in formulating his decision to waive his very valuable right to a jury trial is the operative question, his state of mind at the time of his plea.

MOORMAN: I'm going to let the judge decide what the operative ---

SHURLING: Okay.

MOORMAN: --- question is

SHURLING: If you have no recollection of engaging in that discussion with him, that's consistent with your testimony from before?

MOORMAN: Yes.

SHURLING: My question is -- just a second ago you said until today that underlying issue had never occurred to you. We addressed that issue to a degree in

the previous proceeding, did we not?

MOORMAN: My testimony was not that the underlying issue never occurred to me. The specific -- the specific advice, the possibility of the advice of me affirmatively instructing him that somehow his appeal rights related to a jury verdict of guilty and his appeal rights related to a guilty plea that occurred months later somehow had been linked or the appeal on the jury verdict covered the guilty plea appeal, that was the testimony. So the issue -- I've known about the issue.

(App. 856, l. 5 – 858, l. 22).

Discussion

The Sixth and Fourteenth Amendments to the United States Constitution guarantee all criminal defendants the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). In post-conviction relief actions, the reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. *Id.,* at 687. Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, *Hill v. Lockhart*, 474 U.S. 52 (1985), the Court modified the two-part *Strickland* test to effectively assess ineffective assistance of counsel claims after a guilty plea. *See Jordan v. State*, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988). The analysis of counsel's performance under the first prong is unchanged, but the second prong "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, at 58-59.

Specifically, when an applicant claims counsel's deficient performance caused him to accept a 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." *Id.,* at 59. Additionally, the "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010). This inquiry "focuses on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial."

Lee v. United States, 582 U.S. 357, 367 (citing *Hill*). The question is whether the applicant, if correctly informed of circumstances surrounding the plea, would have pleaded guilty—*not* whether counsel would have still advised him or her to plead guilty. *Turner v. State*, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

"[A] defendant who pleads guilty upon the advice of counsel 'may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel…..' " *Hill*, at 56 (quoting *Tollett v. Henderson,* 411 U.S. 258, 267 (1973)). However, the test for determining the validity of a guilty plea itself is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). The State may properly encourage guilty pleas either by being more lenient to those defendants who enter such pleas, *Brady v. United States*, 397 U.S. 742, 750–53 (1970), or by standing firm on the charge that carries greater punishment on those who do not, *Alford*, at 37 (1970).

A. The PCR Court erred by disregarding the *Strickland* test for deficient performance and the applicability of the presumption of competence.

Despite Robinson's self-serving, and contradictory testimony, the PCR court based its entire ruling on Robinson's purported "understanding" of the March 2009 plea agreement. These factual determinations are not just incorrect; they are directly contradicted by other evidence in the record including Robinson's own testimony. *See Goss v. State*, 425 S.C. 101, 108, 820 S.E.2d 373, 376 (2018) ("When a factfinder evaluates the credibility of witnesses, the mental process employed often requires the credibility evaluations to be based upon a consideration of all the evidence, not simply the parts the factfinder chooses to see and hear first-hand.").

Instead of acknowledging the sentence included in the plea offer—twenty-five years—the PCR court interprets without probative evidentiary support an assurance *by counsel* that Robinson's

"pleas would not result in him getting more time on the charges he was pleading to than he received for the charts he had gone to trial on…." (App. 903). There is no evidence that was the advice, or there was such *a term* of the plea bargain. As demonstrated by his multiple requests for clarification, even counsel did not understand what PCR counsel was attempting bring out by referencing "merger."[3] (App. 670–71). Nothing in the record indicates counsel "assured" or "advised" Robinson that "his pleas would never result in him getting more time for them than he received for the charges he had been found guilty of at his jury trial." (*See* App. 671). Rather, counsel testified that "the goal for the guilty plea on concurrent time, the sentences, was to reduce his exposure and eliminate to the largest extent possible the possibility that he'd be sentenced to life without parole." (App. 668, l. 24-669, l. 2). He agreed with PCR counsel that he told Robinson the plea offer included a twenty-five year sentence recommendation which would run concurrent to the twenty-five year sentence he received at trial. (App. 671).

In fact, Robinson testified several times that he pleaded guilty based on the twenty-five year sentence recommendation and to avoid LWOP—*not* that he "would never receive more time on the charges he was pleading to than he received for the charges he had gone to trial on." During the April hearing, PCR counsel asked Robinson to specifically state his understanding of the plea offer. Robinson replied,

> Basically, I pled based upon me serving 25 years. And if I didn't plea, they were saying they was going to give me a life sentence. So that's what made me take the plea for the 20 -- 25 years ran in with the 25 years I was already serving.

(App. 625, ll. 4-8).

Robinson mentioned several additional times throughout his testimony that avoiding LWOP

[3] As Mark Twain is reputed to have said, "The more you explain it, the more I don't understand it." *SEC v. Chenery Corp.*, 332 U.S. 194, 214 (1947) (Jackson, J., dissenting).

and serving a twenty-five year sentence was his purpose or "whole" purpose of pleading guilty. (App. 625, 841, and 848-849).

The PCR court nonetheless faults counsel for failing to explain to Robinson that receiving a twenty-five-year sentence to run concurrently with the twenty-five year sentence he was already serving does not mean charges he was convicted of in a separate proceeding would "merge" with the new convictions such that they "would never impact his criminal record and would not result in a longer term of incarceration." (*See* App. 901 and 906). At the April hearing, Robinson was asked if the word "concurrent" was used in his discussions about the plea offer with counsel and the solicitor. (App. 625). He responded that it was, but *just with regard to sentencing*. (App. 625). PCR counsel then interrupted him. Contrary to the PCR court's findings, Robinson clearly understood the terms of the plea offer and expressly the meaning of concurrent sentences.

In *Williams v. Head*, the Eleventh Circuit Court of Appeals explained that, "where the record is incomplete or unclear about [counsel's] actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment," noting that the "district court correctly refused to turn that presumption on its head by giving Williams the benefit of the doubt when it is unclear what [counsel] did or did not do." 185 F.3d 1223, 1227–28 (11th Cir. 1999). *See also Strickland,* at 690 ("the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment").

Here, the PCR court found counsel ineffective despite Robinson's failure to identify anything counsel said or did which led him to believe that "concurrent" applied to anything other than sentencing (which in itself is particularly questionable given his earlier testimony that he understood "concurrent" to apply *only* to sentencing). The PCR court nonetheless found counsel

"created Robinson's misunderstanding by not making it clear that if the jury trial judgments were overturned in any subsequent appeal, the guilty plea judgments and sentences would not be" and further that counsel failed "to explain that the net result could be that Applicant might ultimately get less time on remand for the charges on which he had gone to trial, or even no time if he were acquitted on retrial." (App. 906).

Notably, when asked how counsel knew that he "never told [Robinson] that the two [cases] were merged *per se*," counsel stated he "would never have said that because that's not a correct statement of the law." (App. 857, ll. 15-18). Thus, the only remainder is a finding of negative – counsel failed to advise that concurrent did not mean merger in reversal. That cannot show a deficiency under prevailing norms – at least there is no prevailing norm that is reference. It was Robinson's burden to "identify the acts or omissions of counsel that were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. He failed. The grant of relief should be reversed.

B. Even if the PCR court's deficiency finding was proper, there is no probative testimony of record to support a reasonable probability that Robinson would have proceeded to trial absent counsel's deficient performance.

If deficiency was sufficiently shown on this record (and the State maintains it was not), that counsel failed to advise Robinson that the trial sentences may change on appeal and the plea sentence would not, simply does not logically support a decision not plead and secure a lesser term than life at the time the decision was made. This is so for several reasons. First, the defendant does not have a choice to put off whether plead guilty under the offered terms until years after a prior conviction is litigated. He must make a choice under available avenues. Second, if Robinson rejected the plea and was convicted at a second trial, the sentences still would not be "merged." It makes no logical sense that he would choose trial and the possibility of life without parole. Third, the concept of prejudice

is tied merely to inescapable hindsight reasoning and wishful thinking. Consequently, there is no probative support for finding prejudice.

In fact, the PCR court's prejuidce determination is based solely and erroneously on "*post hoc* assertions from" Robinson about what he would have done rather than "look[ing] to contemporaneous evidence to substantiate [Robinson]'s expressed preferences." *Lee*, 137 S. Ct. at 1966; *cf. Hooper v. Garraghty*, 845 F.2d 471, 475 (4th Cir. 1988) (noting that, while a defendant's self-serving statement after-the-fact that he would have proceeded to trial absent counsel's act or omission "carries some probative value, such a statement suffers from obvious credibility problems ***and must be evaluated in light of the circumstances the defendant would have faced at the time of his decision***") (emphasis added). Although the *Hill* prejudice prong "focuses the inquiry on a subjective question, the answer to ***that question must be reached through an objective analysis***." *Hooper*, 845 F.2d at 475 (emphasis added).

Here, not only was Robinson facing LWOP on the plea charges, he had twenty-three additional pending warrants which were all dismissed in exchange for his guilty plea. Specifically, the State *nolle prossed* three additional armed robbery charges; two additional ABWIK charges; a first-degree burglary charge; an additional ABHAN charge; and multiple conspiracy and weapons charges as part of the plea agreement. The PCR court merely relied on Robinson's testimony that he was "not worried" about being prosecuted on any of the twenty-three charges that were dismissed as part of the March 2009 plea deal because "he was not guilty of those crimes." (App. 905). The PCR court apparently credited Robinson's testimony that he was only charged with these offenses because law enforcement was trying to "clear their books" and that the State wanted him to plead guilty to one set of these charges and dismiss the rest which would "enable them to record that all twenty-seven charges" had been resolved. (App. 906). Additionally, the PCR court merely accepted

Robinson's contention "that the State did not get indictments on twenty-three of the dismissed charges [as] at least some evidence of that intent by the State" to make the plea a better option. (*See* App. 906-907). However, Robinson's theory does not survive the objective scrutiny necessary for a proper prejudice analysis. Solicitors routinely dismiss unindicted charges in accordance with plea agreements. Moreover, the PCR court's statement that the State did not "get" indictments is inaccurate—the State *never sought* indictments on these warrants. And a very plain point is missed under the strain to marshal some support – that is the charges still existed, Robinson still knew about them, and could calculate the risk of waiting for those indictments and separate trials. The PCR court's further details – even comparing signatures on documents to attribute ill-intent[4] fail to address the fact of the charges and the calculation of waiting. Again, there is no probative evidence to support prejudice.

The State presented Robinson with the reality of his two options—forgoing trial or facing LWOP—on charges of which he was plainly subject to prosecution is not a "threat" despite the PCR court's characterization of it as such. *See Brady*, 397 U.S. at 751 (declining to hold a guilty plea compelled and invalid "whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged"); *cf. Dingle v. Stevenson*, 840 F.3d 171, 175 (4th Cir. 2016) ("Some element of pressure exists in every deal, as the tradeoff between present certainty and future uncertainty is emblematic of the process of plea bargaining.");

[4] Though some references in this portion of the order tend to infer some ill-intent, they are not included in context of an allegation of misconduct by any official, nor do Robinson suppositions show any evidence at all of impropriety. It is worth noting that the referenced warrants were never even *mentioned* at the evidentiary hearing before Judge Hayes, although Judge Kinlaw admonished PCR counsel during the April 2019 hearing for claiming "they" altered dates on certain warrants when she "[doesn't] have a clue who 'they' are," questioned the evidence and accuracy of the challenges, and generally commented the vague references did not explain anything. (*See* App. 650-655). At bottom, though, is that none of these alleged issues with the warrants are probative on Robinson's belief that his two sets of charges were merged.

United States v. Cox, 464 F.2d 937, 942 (6th Cir. 1972) (noting that it is "well established that a guilty plea is not rendered invalid because it represents a compromise by defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment") (citing *Brady*, 397 U.S. 742).

Nonetheless, to the extent Robinson pleaded guilty to avoid LWOP, this decision "did not render his plea involuntary." *Satterwhite v. State*, 325 S.C. 254, 259, 481 S.E.2d 709, 712 (1997). *Wicker v. State*, 310 S.C. 8, 425 S.E.2d 25 (1992) (explaining that "pleading guilty to preclude exposure to the death penalty does not, in and of itself, render an otherwise valid guilty plea defective (citing *Alford*, 400 U.S. at 39 (1970); *cf. Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (pointing out that the difficult choice between going to trial and pleading guilty is an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas).

Further in support of its prejudice determination, the PCR court refers to Robinson's "credible" testimony that the State had "no evidence" he was guilty of the charges he pleaded guilty to in March 2009 and that he was "falsely accused" of the trial charges he pleaded guilty to in 2016.[5] (App. 905-906). As a first matter, this factual determination is at odds with Robinson's "solemn declaration" of guilt made during both plea hearings, which "carries a presumption of truthfulness." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977); *see Fields v. Attorney Gen. of State of Md.*, 956 F.2d 1290, 1299 (4th Cir. 1992) ("Absent clear and convincing evidence to the contrary, a defendant is bound by the representations he makes under oath during a plea colloquy."); *cf. United States v. Smith*, 440 F.2d 521, 528–529 (7th Cir.) (Stevens, J., dissenting) (explaining that voluntariness relates to the trustworthiness of the admission of guilt and binding character of the

[5] The PCR court further found Robinson's decision to proceed forward with the instant PCR action supported its decision to grant relief because Robinson "was confident the State did not and could not have any evidence to convict him on any of these charges." (App. 886). The State has been unable to locate any caselaw suggesting that a PCR applicant's decision to proceed forward with his own PCR action somehow supports the grant of relief.

waiver of the constitutional protections which would be available to the accused if he elected to stand trial). The PCR court did not address or even acknowledge the fact that Robinson previously admitted his guilt in open court.

The PCR court further erred in its prejudice determination because it did not analyze Robinson's claim in the context of whether he would have gone to trial; instead it credits Robinson's testimony that he "never would have taken the plea deal" absent counsel's deficient performance. According to *Hill*, the defendant must show "a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty *and would have insisted on going to trial.*" 474 U.S. at 59 (emphasis added). Further, a mere allegation by the defendant that he would have insisted on going to trial is insufficient to establish prejudice. *See Stalk v. State*, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009) (explaining that "the prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial"). Robinson, however, does not even make that allegation nor did he present any testimony indicating he would have insisted on going to trial. Rather, Robinson claims only that, absent counsel's deficient performance, he would not have entered into the agreement. *See Smith v. State*, 369 S.C. 135, 137, 631 S.E.2d 260, 261 (2006) (finding the PCR applicant failed to show prejudice where he "declined to testify whether he would choose not to plead guilty and face another trial in light of the plea bargain he received"). The constitutional requirement of effective assistance of counsel is intended, however, "to guarantee a fair disposition of defendant's case, not to ensure that he is able to drive the hardest possible plea bargain . . ." *United States v. Horne*, 987 F.2d 833, 836 (D.C. Cir. 1993) (citing *Fields*, 956 F.2d at 1298).

In *Thrift*, our Supreme Court explained that "a plea bargain rests on contractual principles," and therefore, "each party should receive the benefit of the bargain." *State v. Thrift*, 312 S.C. 282,

292, 440 S.E.2d 341, 347 (1994). *See United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986) (explaining that, in analyzing plea agreements, contract principles will be "wholly dispositive" because "[n]either side should be able . . . unilaterally to renege or seek modification simply because of uninduced mistake or change of mind") (cited with approval in *State v. Compton*, 366 S.C. 671, 678, 623 S.E.2d 661, 665 (Ct. App. 2005)). Robinson cannot deny he received the benefit of the bargain—a twenty-five year sentence—although he now claims his plea was induced by the "promise . . . that he would not have to serve any more time for the crimes he pleaded guilty to than he had to serve for those he had been found guilty of at trial." *See Fields*, 956 F.2d at 1299 (finding the voluntary and intelligent nature of the plea bargain was shown "by the fact that the plea agreement was favorable to him and accepting it was a reasonable and prudent decision" because he would have received a substantially harsher sentence had he been convicted at trial). The only hint of "promise" comes from Robinson's own testimony and is flatly contradicted by the record. Robinson should not be permitted to obtain the benefit on his side of having the State forego prosecuting him for multiple violent crimes only to come back years later and deprive the State of its benefit by forcing it to reassemble its case where witnesses' memories would at best be considerably challenged." *See Premo v. Moore*, 562 U.S. 115, 125 (2011) (cautioning that "failing to accord the latitude *Strickland* mandates" could result in "instability to the very process the inquiry seeks to protect" because "[p]rosecutors must have assurances that a plea will not be undone in court years later").

Despite Robinson's failure to identify anything counsel said or did that led him to this misunderstanding, there is nothing in the record aside from Robinson's own testimony that the plea was induced by anything other than the twenty-five year sentence and avoiding LWOP.[6] The fact that

[6] The State would further note that, although the transcript from Robinson's March 2009 guilty plea is unavailable, on each of the sentencing sheets there is a "checked" box indicating that the plea was

he later received a more favorable sentence on the trial charges does not invalidate his plea—"[p]leading guilty typically entails a deliberate choice to accept the risks and rewards of a deal, and that decision may not be casually set aside on the basis of buyer's remorse." *Dingle*, 840 F.3d at 174; *State v. McGill*, 250 N.C. App. 121, 130, 791 S.E.2d 702, 708 (2016) (finding that a defendant cannot "unilaterally undo the plea agreement because he no longer deems it advantageous based upon collateral matters").

Also, the order reflects the PCR court acknowledged contradictory evidence as to what induced Robinson's plea. First, the PCR court finds the only reason Robinson pleaded guilty was because "he was getting threatened with L[W]OP if he did not plea[d]." (App. 905). Then, it reflects "the only reason [Robinson] pleaded guilty to these charges was his belief that those pleas could not ever result in him getting a longer sentence than he received for the charges originally prosecuted at his jury trial." (App. 906). In conclusion, however, the PCR court references that Robinson "*unambiguously testified* that the only reason he pleaded to these charges was the fact that he believed his charges were being completely merged" with the prior jury trial convictions. (App. 907) (emphasis added). In this instance, the order reflects acknowledged inconsistencies that further show the lack of probative evidence on the point the PCR court considered critical in prejudice.

In sum, the record does not support the critical facts, and the PCR court erred in applying the correct legal framework. The grant of relief should be reversed.

"Without Negotiations or Recommendation." (App. 921–24). Each of the four sentencing sheets from his 2016 guilty plea also indicate they were entered without negotiations or recommendations. (App. 580–84). By signing each of these forms, Robinson "manifested his desire to plead guilty and acknowledged the lack of a sentence recommendation." *Holden v. State*, 393 S.C. 565, 575, 713 S.E.2d 611, 616–17 (2011), *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836. This Court has held that "[t]his indication, that the answers provided in the plea sheet were correct, is the most instructive." *James v. State*, 377 S.C. 81, 85, 659 S.E.2d 148, 150 (2008); *see Roddy v. State*, 339 S.C. 29, 35–36, 528 S.E.2d 418, 422 (2000) (reversing the PCR court's grant of relief because "a plea is not involuntary where the applicant did not receive the concurrent sentence he 'expected' because he was never told he absolutely would get concurrent time").

CONCLUSION

For all the foregoing reasons, this Court should reverse the PCR court.

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[7] Counsel acknowledges the work of former Assistant Attorney General Lillian L. Meadows who previously represented the State in this matter and authored the petition. Much of her work in included in the instant brief.