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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Appeal from Spartanburg County
The Honorable Brian M. Gibbons, Post-Conviction Relief Court Judge
Supreme Court Appellate Case No. 2023-000384

DERRICK BURNSIDE (#382831),

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUE I

I. Did the PCR Court err in denying Petitioner an opportunity to have his individual PCR allegations adjudicated by an independent judicial officer in violation of the separation of powers doctrine when the Court did not provide any specific findings of fact or conclusions of law other than delegating the responsibility to the State and adopting the State's adversarial order of dismissal?

RESPONDENT'S COUNTER-STATEMENT OF ISSUE I

I. Judge Gibbons did not abdicate his duties as an independent judicial officer by issuing the State's proposed order, which he reviewed and expressly indicated was correct on both the facts and the law.

PETITIONER'S STATEMENT OF ISSUE II

II. Did the PCR Court err in finding Plea Counsel provided effective assistance of counsel by failing to present relevant mitigation evidence and by failing to file a motion for reconsideration on that basis?

RESPONDENT'S COUNTER-STATEMENT OF ISSUE II

II. The record amply supports Judge Gibbons's findings that plea counsel employed a reasonable strategy regarding presentation of mitigation evidence for sentencing purposes at the plea hearing, the mitigation issues raised in the PCR application and Petitioner's testimony at the PCR hearing were presented at the plea hearing.

PETITIONER'S STATEMENT OF ISSUE III

III. Did the PCR Court err in finding Petitioner knowingly and voluntarily pled guilty based on its finding that Plea Counsel provided effective assistance of counsel when Counsel failed to properly advise Petitioner regarding the sentencing consequences of his guilty plea?

REPONDENT'S COUNTER-STATEMENT OF ISSUE III

III. The record amply supports Judge Gibbons' finding that plea counsel discussed the charges and possible sentences with Petitioner prior to the plea hearing, and Petitioner freely, knowingly, intelligently and voluntarily pled guilty.

STATEMENT OF THE CASE

Procedural History

Respondent concurs with Petitioner's procedural Statement of the Case as set forth on pages 2-4 of the Petitioner for Writ of Certiorari. On November 19, 2019, Petitioner pled guilty to one count of murder and one count of possession of a firearm during the commission of a violent crime arising from the shooting death of Petitioner's ex-girlfriend (Murder Victim), and was sentence to life imprisonment on the murder conviction. After Petitioner's direct appeal was dismissed, Petitioner filed a post-conviction relief (PCR) application on August 3, 2020, which was amended on June 7, 2022.

Post-Conviction Relief Hearing

Petitioner's PCR case was called for an evidentiary hearing on October 20, 2022, before the Honorable Brian M. Gibbons, Circuit Court Judge. Dayne C. Phillips, Esquire, represented Petitioner, and Assistant Attorney General Chelsey Marto represented the State. Petitioner, trial counsel Ryan Beasley (Beasley) and Annemarie Odom (Odom), Solicitor Barry Barnette (Barnette), and Michelle Anene (Petitioner's sister) testified at the hearing.

Petitioner testified Beasley only met with him four times and they did not discuss "too much of anything" during the meetings. He stated Beasley "wasn't too much interested" in Petitioner's case, kept telling him "it was a slam-dunk case," and told Petitioner he would lose if the case went to trial. Petitioner stated Beasley and Odom never reviewed or discussed the case discovery with him, but admitted he chose not to review the surveillance video of the murder because "it was traumatic for me." (Appendix, pp. 103-105).

Petitioner also testified he "got a law book" and talked to Beasley about a guilty but mentally ill plea, but Beasley "just basically patted the book, gave it back to me, and told me that

we could not pursue that," but never explained why. He stated Beasley told him the State was offering a plea of any sort, and never told him what the maximum sentence for murder was or that it was a day-for-day sentence. (Appendix, pp. 103-106).

As to mitigation of sentence, Petitioner testified Beasley failed to tell the court that Petitioner had been molested in the Boy Scouts, that Petitioner had been injured in a car accident, or that as a child, Petitioner had witnessed people being murdered. He also testified Beasley failed to tell the court that Petitioner's son said he did not feel comfortable around the Murder Victim's boyfriend, and the Murder Victim had an abortion that "messed with my brain," and as a result, he "lost control" the day of the murder. Petitioner admitted Beasley hired Dr. Donna Maddox to conduct a private evaluation of Petitioner's mental status, and Petitioner told Dr. Maddox about all the things he contended Beasley failed to tell the court. (Appendix, pp. 106-114).

Petitioner stated he told Beasley he wanted to appeal after his sentence. He testified he did not understand the difference between an appeal and a motion for reconsideration, and his intent was to challenge the life sentence imposed. (Appendix, pp. 114-115).

On cross-examination, Petitioner testified he was afraid of being sentenced to death if he did not plead guilty, and acknowledged he told the court he understood regarding what crime he was pleading guilty to (murder) and what sentence he could receive (thirty years to life imprisonment), but stated he was "confused" at the plea hearing. He also acknowledged Beasley told the court Petitioner was exposed to things in his childhood, Petitioner had witnessed a murder, and had seen people do bad things with drugs. He further acknowledged Dr. Maddox spoke at the plea hearing and told the court about Petitioner's history of trauma, depression and an alcohol problem with some cognitive impairment. (Appendix, pp. 117-130).

Beasley testified the surveillance video of the murder was "probably one of the worst things I've ever seen," and the chances at trial were not good. As a matter of strategy, they let the court see the video prior to the plea hearing, and also gave Dr. Maddox's report to the court prior to the hearing to avoid making it "such a circus" during the plea, which would have been a worse situation for Petitioner. He stated they "absolutely" reviewed the case discovery with Petitioner. (Appendix, pp. 133-137).

Beasley's mitigation strategy was to present Dr. Maddox's report, which detailed some of the trauma Petitioner endured over his life, and he and Dr. Maddox would present everything to the court with the goal of getting a lesser sentence. Beasley testified one of the reasons they gave Dr. Maddox's report to the court before the hearing was because Petitioner "didn't want all that to be brought out in court," and he did not go into detail at the hearing about Petitioner's past trauma "because I knew the Court had already seen the report." (Appendix, pp. 137-139, Supplemental Appendix, pp. 12-15).

Beasley testified he discussed the charges and sentencing ranges with Petitioner, and Petitioner understood both the charges and the sentencing ranges prior to the plea hearing. Based on Dr. Maddox's report, Beasley did not believe there was a basis for a guilty but mentally ill plea. As to filing an appeal or a motion to reconsider the sentence, Beasley testified they did file an appeal at Petitioner's request, but they never discussed a motion for reconsideration. He further testified he did not believe a motion for reconsideration would have been successful because there was nothing to justify it. (Appendix, pp. 139-140).

On cross-examination, Beasley testified he, Odom and their investigator met with Petitioner "a bunch" of times over the course of the case. During those meetings, they went over all the discovery, and discussed the possibility of a plea as well as "what a trial would look like."

He stated they sent a letter to Petitioner "where we outlined everything we discussed and [Petitioner's] options." Beasley reiterated that Dr. Maddox's report was given to the court as much as a week before the plea hearing because Petitioner "did not want to go into all the details in front of the judge and the people in the courtroom" and "so it wouldn't have to be brought out in excruciating detail because it was embarrassing to [Petitioner]," and Petitioner "didn't want his family to know all that at the time." Beasley testified Petitioner never told him anything about Petitioner's son being uncomfortable around the Murder Victim's boyfriend or the Murder Victim having an abortion. (Appendix, pp. 141-149).

Odom testified she, Beasley and/or their investigator met with Petitioner at least ten times, "if not more than 15," times over the course of the case. They discussed with Petitioner the case discovery, the charges and sentencing ranges, the State's intent to seek the death penalty, and the plea negotiations ultimately leading to an offer to let Petitioner plead "straight up" to the murder charge without a sentencing recommendation, which Petitioner ultimately agreed to do. (Appendix, pp. 151-154).

Odom further testified that the mitigation strategy for the plea hearing was to present Dr. Maddox's evaluation, as well as an evaluation done by the State Department of Mental Health. Odom stated she did not think anything in those reports rose to the level of a guilty but mentally ill plea, but there were some mitigation factors, and the goal was to present Petitioner in the best light possible given the facts of the murder. (Appendix, pp. 154-157, Supplemental Appendix, pp. 1-11).

On cross-examination, Odom testified they sent letters to Petitioner summarizing some of the meetings, and they went over all the discovery, the charges and possible sentences, and the ongoing plea negotiations. She did not recall any mention of Petitioner's son being afraid of the

Murder Victim's boyfriend, or any discussion with Petitioner or Petitioner's sister about a motion to reconsider Petitioner's sentence. (Appendix, pp. 157-162).

Solicitor Barnette testified he considered the case to be a death penalty case, but after discussions with the Murder Victim's family and Beasley, he agreed to a "straight up" guilty plea to the murder charge. He stated that based on the mental health evaluations by the Department of Mental Health and Dr. Maddox, he did not believe a guilty but mentally ill plea was appropriate, and while the reports showed Petitioner had "mental illness issues," the video established that was not the reason he committed the murder. (Appendix, pp. 163-164).

Petitioner's sister testified she sent Odom an email after the plea hearing "requesting something for a lighter sentence." She stated Odom definitely knew they thought the life sentence "was extreme." (Appendix, pp. 166-167).

After hearing the testimony and argument of counsel, Judge Gibbons took the matter under advisement. By Order filed on January 26, 2023, Judge Gibbons made findings of fact as to each of Petitioner's ineffective assistance of counsel allegations, concluded Petitioner failed to establish any grounds for relief, and dismissed the PCR application with prejudice. (Appendix, pp. 175, 178-191).

Petitioner moved for reconsideration of the Order of Dismissal. (Appendix, pp. 192-195). Judge Gibbons held a hearing on February 14, 2023. After hearing arguments of counsel, Judge Gibbons stated the Order of Dismissal was correct on both the facts and the law, and denied Petitioner's motion. (Appendix, pp. 196-209).

On or about October 30, 2023, Petitioner filed a Petition for Writ of Certiorari seeking review of Judge Gibbons' orders. The State submits the Petition for Writ of Certiorari should be denied in its entirety.

STANDARD OF REVIEW

The appellate courts defer to the PCR court's factual findings and will uphold them if supported by any evidence in the record, but review questions of law *de novo* and will reverse if the PCR court's decision is controlled by an error of law. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018); Garren v. State, 423 S.C.1, 813 S.E.2d 704, 710 (2018) (same); Jamison v. State, 410 S.C. 456, 765 S.E.2d 123, 127 (2014) (same). The appellate courts afford great deference to the PCR court's credibility findings. Frierson v. State, 423 S.C. 257, 815 S.E.2d 433, 435 (2018); Goins v. State, 397 S.C. 568, 726 S.E.2d 1, 3 (2012) (same).

ARGUMENT

I. Judge Gibbons did not abdicate his duties as an independent judicial officer by issuing the State's proposed order, which he reviewed and expressly indicated was correct on both the facts and the law.

Petitioner asserts Judge Gibbons erred by denying him "an opportunity to have his individual PCR allegations adjudicated by an independent judicial officer in violation of the separation of powers doctrine" because he allowed the State to draft a proposed order which he adopted. This assertion is meritless.

"[I]t is common practice for judges to ask a party to draft a proposed order for the sake of efficiency." Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335, 341 (2004).

> The preparation and finalization of a PCR order is often a collaborative effort. We recognize the prevailing party often prepares a proposed order for the PCR court. . . . When counsel for either side prepares the proposed order, the order must include findings of fact and conclusions of law as to all issues raised by an applicant. A copy of the proposed order should be transmitted to opposing counsel. Opposing counsel should promptly review the proposed order and alert preparing counsel and the PCR court as to any deficiencies in the proposed order. Because the PCR judge will ultimately be signing the order, the PCR judge must carefully review the proposed order to ensure it includes appropriate findings of fact and conclusions of law as to all issues raised. Once a proposed order is finalized, signed by the PCR judge, filed, and served upon the parties, the parties should thoroughly review the final order to make sure all issues raised were adequately addressed as required by section 17-27-80 and Rule 52(a); if they were not, a timely Rule 59(e) motion should be filed, requesting the PCR court to address the appropriate issues.

Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584, 589–90 (2019) (*citing* Hall). *See also* Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127, 128 (1992) (counsel preparing PCR proposed orders should be meticulous in doing so, the opposing counsel should call any omissions to the attention of the PCR judge, and the PCR judge should carefully review the order prior to signing it; after an order is filed, counsel must review the order and file the appropriate motion to alter or amend if the order fails to set forth the necessary findings and reasoning as required by statute and rule). Therefore, asking the State to draft a proposed order in this case was entirely appropriate.

Further, Petitioner's separation of powers assertion in this case was completely belied at the hearing on Petitioner's Motion to Alter or Amend. After Petitioner's counsel essentially read the written Motion verbatim as argument, the State informed Judge Gibbons that the proposed order was prepared pursuant to instructions given by Judge Gibbons, and the State "provided the order to [counsel] before providing it to [Judge Gibbons]." Petitioner's counsel did not dispute that the State sent the proposed order to him for review before sending it to Judge Gibbons. (Appendix, pp. 192-195, 200-205).

The State followed the process set out in Pruitt, Hall and Fishburne, and opposing counsel had ample opportunity to raise any issues regarding the proposed order before it was presented to and signed by Judge Gibbons. Rather than participate in the accepted practice regarding proposed PCR orders, Petitioner stood silent and then asserted after the order was filed that the well-recognized process is a constitutional violation.

Further, Judge Gibbons also laid to rest Petitioner's implication that Judge Gibbons merely adopted the State's "adversarial" proposed order without carefully reviewing it to ensure it included appropriate findings of fact and conclusions of law as to all issues raised.[1] After argument of counsel, the following colloquy occurred:

> The Court: Okay. But you agree with me that, that's not - - it doesn't become my order until I sign it, when it's filed?
>
> Mr. Phillips: Understood, as far as procedure, Yes, Your Honor.
>
> The Court: Okay. I respectfully deny your motion. I'm gonna deny the Motion to Alter or Amend under Rule 59(e) and I'm gonna keep my Order of Dismissal intact. **I believe it's correct, both on the facts and the law.**

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[1]Apparently, any proposed order denying relief to Petitioner would be considered "adversarial."

(Appendix, p. 205) (emphasis added). In short, Judge Gibbons affirmed that he reviewed the proposed order carefully, that the proposed order complied with the instructions he gave the State regarding its contents, and that he signed the order because he believed it was "correct, both on the facts and on the law." Therefore, Petitioner's separation of powers and improper delegation of authority assertions are completely meritless under the applicable law as well as the record in this case, and certiorari should be denied on this issue.

II. The record amply supports Judge Gibbons's findings that plea counsel employed a reasonable strategy regarding presentation of mitigation evidence for sentencing purposes at the plea hearing, the mitigation issues raised in the PCR application and Petitioner's PCR hearing testimony were presented at the plea hearing, and Petitioner did not ask plea counsel to file a motion for reconsideration of his sentence.

Petitioner contends Judge Gibbons erred in finding plea counsel was not ineffective for failing to present certain mitigation evidence and not filing a motion for reconsideration of Petitioner's sentence. Petitioner's contentions are meritless.

Like all defendants, Petitioner had a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). A PCR applicant has the burden to prove the allegations in his PCR action, and when alleging counsel was constitutionally ineffective, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686.

Strickland requires the applicant to prove counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Therefore, the function of the PCR court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney." *Id.* at 690.

In evaluating allegations of ineffective assistance of counsel, the appellate court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, the applicant must prove counsel's performance was deficient, which is measured by its "'reasonableness under prevailing professional norms.'" Cherry v. State, 300 S.C. 115, 386 S.E.2d 624, 625 (1989) (*quoting* Strickland, 466 U.S. at 690). The proper measure of performance is whether counsel provided

representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (*citing* Strickland, 466 U.S. at 690). PCR applicants must overcome this presumption to receive relief. Cherry, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 386 S.E.2d at 625. The ultimate focus of inquiry must be on the fundamental fairness of the result from the challenged proceeding. Strickland, 466 at 697.

Mitigation Evidence

In this case, Petitioner asserts Beasley and Odom were deficient because they failed to present the following mitigation evidence: 1) Petitioner was molested while in the Boy Scouts; 2) Petitioner received a head injury during a car crash that negatively affected his behavior; 3) Petitioner witnessed people being murdered when he was a young boy; and 4) Petitioner's son was uncomfortable around the Murder Victim's boyfriend, which combined with the Murder Victim's earlier abortion triggered old trauma causing Petitioner to lose control. Petitioner's argument relies solely on his testimony at the PCR hearing, and conveniently ignores the testimony of Beasley and Odom regarding their representation of Petitioner, which Judge Gibbons expressly found was credible, and the two mental health reports that were submitted to the court prior to the plea hearing.

At sentencing, Beasley stated: 1) Petitioner "was exposed to a lot of things in the area he grew up in"; 2) Petitioner "witnessed a murder"; 3) Petitioner saw "people do lots of bad things

with drugs"; 4) Petitioner was "abused in ways" that were "not even comfortable for me to talk about in the courtroom"; and 5) "[s]ome of the things [Petitioner's] been diagnosed with from his past as a kid is posttraumatic stress disorder and some other issues that I'll let Dr. Maddox elaborate on later." Beasley then read a statement from Petitioner and presented multiple witnesses on Petitioner's behalf. (Appendix, pp. 22-37).

Dr. Maddox advised the court Petitioner had a prior history of inpatient psychiatric treatment, which she believed was for depression, and she diagnosed him with depression. She stated Petitioner had "a very extensive trauma history," he "was a victim of abuse," and he "witnessed a lot of abuse." She further testified Petitioner "definitely had an alcohol problem," and "a little bit of cognitive impairment as a result of his alcohol use." (Appendix, pp. 38-40).

In addition to the details Beasley and Dr. Maddox provided at the hearing, the court had the mental health reports from Dr. Maddox and the Department of Mental Health. Dr. Maddox's report included the following information: 1) Petitioner believed his father had killed his Pekingese dog; 2) Petitioner reported he was exposed to "yelling and stuff" by his mother's boyfriend; 3) Petitioner reported his friend's uncle molested him "while at summer camp in Pennsylvania"; 4) Petitioner reported that a number of his friends were killed "in front" of him; 5) a man robbed Petitioner at knifepoint when he was eleven or twelve years old; 6) Petitioner was robbed at gunpoint when he was in high school; and 7) someone stole a necklace from him near Radio Station. As to Petitioner's medical history, the report stated: 1) Petitioner had a closed head injury as an infant when "[t]hey dropped me"; 2) he sustained another head injury in a car accident in 1991 when he "went through the windshield"; and 3) he reported experiencing residual headaches on the left side of his head and seeing "sparkles." The report further stated Petitioner told Dr.

Maddox his son had told him that the Murder Victim "is coming home and messing around."[2] (Supplemental Appendix, pp. 12-15).

The Department of Mental Health's competency evaluation report stated Petitioner "reported that he was sexually abused when he was 10 years old while at camp" and "staying with a host family," but Petitioner did not report the abuse. It further stated Petitioner "always had a difficult relationship with his father," and Petitioner's mother reported his father "exposed him to a sexual encounter with a woman when he was 13 years old." (Supplemental Appendix, pp. 1-11).

In short, through Beasley's statements, Dr. Maddox's statements and the mental health reports, the court had virtually all the information Petitioner now contends Beasley and Odom failed to provide at the plea hearing.[3] The only information not discussed at sentencing was Petitioner's unsupported assertions at the PCR hearing that his son was afraid of the Murder Victim's boyfriend and the Murder Victim had an abortion, which he now contends made him lose control when he committed the murder. Both Beasley and Odom testified that during their multiple meetings with Petitioner, he never said anything about his son being afraid of the Murder Victim's boyfriend or the Murder Victim having an abortion. (Appendix, pp. 147-149, 159-160).

"When trial counsel articulates a valid reason for employing certain trial strategy, counsel will not be deemed ineffective." Washington v. State, 440 S.C. 550, 891 S.E.2d 668, 677 (Ct. App. 2023) (*quoting* McKnight v. State, 378 S.C. 33, 661 S.E.2d 354, 359 [2008]). "Courts must be wary of second-guessing counsel's trial tactics...." Whitehead v. State, 308 S.C. 119, 417 S.E.2d

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[2]There is no indication Petitioner ever told Dr. Maddox that his son was "afraid" of the Murder Victim's boyfriend, or that the Murder Victim had an abortion.

[3]Petitioner apparently believes including the term "Boy Scouts" in reference to the camp he was attending when he was molested was of paramount importance. In reality, the type of camp he attended was irrelevant, and the court was aware Petitioner reported being sexually molested "at camp."

529, 531 (1992). Beasley and Odom testified they strategically attempted to provide the court with as much information as possible regarding Petitioner's history and mental status while honoring Petitioner's request that the details not be brought out in court.

Judge Gibbons found Beasley's and Odom's testimony was credible, and "many of the incidences now raised were touched on at the plea hearing, including Applicant's history of cognitive impairment, mental health issues, and tough childhood," and then concluded Petitioner "failed to meet his burden of proof regarding either prong of the *Strickland* analysis." (Appendix, p. 189). As set forth above, the record amply supports Judge Gibbons' findings and conclusion regarding the mitigation evidence issue.

<u>Motion to Reconsider Sentence</u>

Petitioner testified he told Beasley and Odom to file an appeal on his behalf because he did not know the difference between an appeal and a motion to reconsider the sentence, "but his intent on requesting an appeal was for reconsideration."[4] Petitioner's sister testified she emailed Odom after Petitioner was sentenced "requesting something for a lighter sentence," she did not remember "exactly" what she asked Odom to do, but "[Odom] knew we wanted - - definitely - - we thought the life was extreme." (Appendix, pp. 114-115, 128, 166-167).

Beasley testified they did not discuss a motion for reconsideration of the sentence with Petitioner, but they did file an appeal at Petitioner's request even though he told Petitioner there were no meritorious issues for appeal. He further testified he did not believe a motion for reconsideration was warranted because there was nothing to justify it. Odom also testified there were no discussions with Petitioner about a motion to reconsider the sentence and she did not

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[4]Petitioner stated he wanted to "reconsider my plea" on the basis he was guilty but mentally ill. Petitioner included the mitigation issues only <u>after</u> PCR Counsel followed with a leading question. (Appendix, p. 115).

believe such a motion would have been successful, but they did file an appeal at Petitioner's request. (Appendix, pp. 140, 149-150, 156, 161-162).

Petitioner merely makes the conclusory assertions that the failure of Beasley and Odom to file a motion for reconsideration to submit the "omitted relevant and compelling mitigation evidence was not reasonable under the circumstances," and this prejudiced Petitioner "because there is a reasonable probability that this relevant and compelling mitigation evidence could have resulted in a reduced sentence." Judge Gibbons found Beasley and Odom "credibly testified that they filed a notice of appeal upon Applicant's request but did not recall discussing a motion to reconsider the sentence," and "that they did not think the motion would have been successful." (Appendix, p. 190).

As discussed above, much of the "relevant and compelling mitigation evidence" Petitioner now claims Beasley and Odom failed to present was **in fact** presented to the court before sentence was imposed. Thus, there is virtually **no** probability, much less a reasonable probability, Petitioner's sentence would have been reduced under the circumstances. Further, even assuming Petitioner and his sister wanted a motion for reconsideration filed, it would have been meritless and had no impact. *See* Ervin v. State of South Carolina, 438 S.C. 559, 885 S.E.2d 387, 394 (2023) ("Of course, no attorney is obligated to raise a meritless defense.").

The record amply supports Judge Gibbons' findings and conclusions regarding the mitigation evidence and motion for reconsideration issues. Accordingly, certiorari should be denied on this issue.

III. The record amply supports Judge Gibbons' finding that plea counsel discussed the charges and possible sentences with Petitioner prior to the plea hearing, and Petitioner freely, knowingly, intelligently and voluntarily pled guilty.

Finally, Petitioner asserts Beasley's and Odom's "performance fell below an objective standard of reasonableness under prevailing professional norms because [they] failed to properly advise Petitioner regarding the sentencing consequences of his guilty plea," specifically "the mandatory minimum sentence for murder and that the sentence must be served day-for-day." Petitioner correctly asserts that in guilty plea cases, the PCR judge must consider the guilty plea hearing transcript as well as evidence presented at the PCR hearing in determining whether a PCR applicant's guilty plea was voluntarily, intelligently and freely entered, which is exactly what Judge Gibbons did in this case.

At the plea hearing, the court went over each charge (murder and possession of a firearm during commission of a violent crime) against Petitioner and the potential sentence on each charge if Petitioner was convicted. Significantly, as to the murder charge, the court specifically advised Petitioner that if he was convicted at trial or the court accepted a guilty plea on that charge, Petitioner "could receive a life sentence," and "**must receive not less than a 30-year sentence.**" (emphasis added). When the court asked Petitioner if he understood the charges and potential sentences, Petitioner responded "yes, sir." (Appendix, pp. 4-5).

The court then asked Petitioner if he understood that by pleading guilty he was giving up multiple constitutional rights, including the right to remain silent, the right to require the State to prove guilty beyond a reasonable doubt, the right to a jury trial, and the right to confront all witnesses against him. When the court asked Petitioner about giving up the right to confront and examine the witnesses, Petitioner responded "no, sir," then said "yes, sir." Petitioner stated he was not really sure about the question, and the court told him to "[j]ust ask me if you don't understand

something." The court gave a detailed explanation about the right to confront and examine witnesses, and asked again if Petitioner wanted to give up that right. When Petitioner responded "no," the court asked him if he wanted to have a jury trial, and he responded "no." At that point, Beasley conferred with Petitioner, and then explained Petitioner was "confused" because he thought it meant he could not call witnesses to speak on his behalf. After the court again explained what the right to confront and examine meant in the context of a criminal case, Petitioner indicated he did want to give up that right. (Appendix, pp. 6-13).

Before accepting Petitioner's guilty plea, the court asked him if anyone had promised anything in return for his plea, or forced him in any way to plead guilty, and Petitioner responded "no, sir" to both questions. The court then asked Petitioner if he was pleading guilty freely and voluntarily and if he was in fact guilty of the charges, and Petitioner responded "yes, sir" to those questions. Petitioner also advised the court he did not suffer from any mental condition that impaired his ability to understand what he was doing that day and all of the decisions he had made up to that point, and he wanted to go forward with the guilty plea. After the State recited the facts of the murder and Petitioner told the court the facts as stated were correct and accurate, the court accepted Petitioner's guilty pleas to both charges. (Appendix, pp. 13-22).

At the PCR hearing, Petitioner testified Beasley did not tell him "what [the murder charge] carries and how long - - if it was day-for-day." On cross-examination, Petitioner admitted he was present during the plea hearing and what the court told him about the charges, but stated he "was confused" and "didn't know if I had a - - you know, a right to say I was confused."[5] (Appendix, pp. 105-106, 117-123).

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[5]Interestingly, Petitioner testified he did not recall many things he said during the plea hearing until he was confronted with the plea hearing transcript, and then grudgingly admitted making the statements.

Beasley testified they discussed the charges and sentencing ranges with Petitioner, and Petitioner seemed to understand what he was doing by pleading guilty. Odom also testified they discussed the charges and sentencing ranges with Petitioner, they had multiple discussions with him about the potential for the death penalty, the plea negotiations, and "what a trial would look like," and Petitioner ultimately decided that he wanted to enter a guilty plea. (Appendix, pp. 139-140, 152-154).[6]

Petitioner's PCR hearing testimony that he was "confused" at the plea hearing and did not understand he had a right to tell the court he was confused is simply not credible, and insufficient to set aside his guilty plea. *See* Garren, 813 S.E.2d at 710 (applicant's own PCR testimony that he was under the influence of some unknown medication at his plea hearing was insufficient to establish the applicant's guilty plea was involuntary). Indeed, Petitioner had no problem telling the court he "wasn't sure about the questions" relating to giving up his right to confront and examine witnesses, and then responding to the court's question only after Beasley and the court explained it to him again. (Appendix, pp. 8-12). If Petitioner was "confused" about anything, he clearly knew he could tell the court because the court expressly told him to let the court know if he did not understand something, and Petitioner had numerous opportunities to do so.

Judge Gibbons reviewed the plea hearing and considered the PCR hearing testimony, made detailed findings of fact regarding the voluntariness of Petitioner's guilty pleas, and

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[6]Petitioner notes "neither Plea Counsel had any notes to support their testimony regarding their visits with Petitioner." (Petition, p. 19). Notably, both Beasley and Odom testified they summarized the discussions in letters to Petitioner, and the hearing transcript indicates PCR Counsel actually had those letters because he referenced the contents of one letter regarding Beasley's opinion that the State would not be successful in proving an aggravating factor to support the death penalty. (Appendix, pp. 144-145, 157-158).

concluded Petitioner "pled freely, knowingly, intelligently, and voluntarily." The findings and conclusion are amply supported by the record.

Regarding Beasley's and Odom's purported failure to advise Petitioner the murder conviction sentence had to be served day-for-day, even assuming they failed to do so, it was not ineffective assistance of counsel.[7] Essentially, Petitioner was not eligible for parole as a consequence of his murder conviction. It is well established that parole eligibility is a collateral consequence of sentencing and counsel is not ineffective for failing to specifically advise the defendant about it before the defendant enters a guilty plea. Randall v. State, 356 S.C. 639, 591 S.E.2d 608, 609 (2004); Jackson v. State, 349 S.C. 62, 562 S.E.2d 475, 475 (2002) (parole eligibility is a collateral consequence of sentencing and that counsel need not advise a client about his parole eligibility).

Judge Gibbons found Petitioner understood he would receive a sentence between thirty years and life imprisonment, he was never told at the plea hearing that any part of the sentence could be suspended, and he told the court at the plea hearing that he was not promised or offered anything to plead guilty. Judge Gibbons further found that even if Beasley and Odom did not definitively advise Petitioner on whether the sentence was day-for-day, there was no indication they misadvised Petitioner about it, or that having that information would have caused Petitioner

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[7]Petitioner did not raise this issue in his Motion to Alter or Amend Pursuant to Rule 59(E), SCRCP.

to go to trial rather than plead guilty.[8] (Appendix, pp. 187-188). Those findings are amply supported by the record.

Judge Gibbons' findings and conclusion regarding the voluntariness of Petitioner's guilty plea and consideration of the day-for-day collateral consequence of his murder conviction are supported by the record. Accordingly, certiorari should be denied on this issue.

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[8] Indeed, Petitioner knew he was facing the death penalty if he was convicted at trial. It is undisputed that the circumstances of the murder were on video and brutal, and the State intended to seek the death penalty. Further, all of the facts about Petitioner's history, which Petitioner did not want revealed at the plea hearing, would have been revealed in detail during a trial. Consequently, Petitioner's conclusory assertion aside, it is unlikely Petitioner would have elected to proceed to trial even if told he would have to serve any sentence imposed day-for-day.

CONCLUSION

Based on the foregoing and the record, the State submits the Petition for Writ of Certiorari should be denied in its entirety.

Respectfully submitted,

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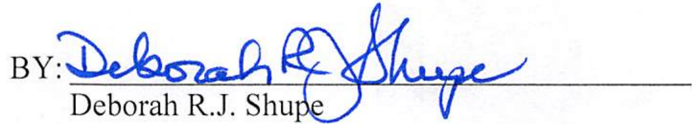
BY: 
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