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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

On Certiorari to Greenville County Court of Common Pleas

Honorable Edward W. Miller, Circuit Court Judge for General Sessions
Honorable J. Mark Hayes, II, Circuit Court Judge for Common Pleas

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App. Case No.: 2020-001361

Oshaun J. Robinson, Respondent,

vs.

State of South Carolina, Petitioner.

BRIEF OF RESPONDENT

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INDEX

TABLE OF AUTHORITIES

CASES

FEDERAL

STATE

STATEMENT OF THE ISSUE

PETITIONER'S STATEMENT OF THE ISSUE:

> Whether 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 here were successful in a different case because Robinson pleaded guilty based on the twenty-five year sentence, avoiding LWOP.

RESPONDENT'S STATEMENT OF THE ISSUE:

> Whether the lower court should be upheld in finding that counsel provided Respondent ineffective assistance of counsel prior to and during his guilty plea proceeding on March 4, 2009 that warranted the remedy of the judgments and sentences entered against Respondent on March 4, 2009 being vacated and the charges remanded.

STANDARD OF REVIEW

On appeal, great deference is given to the lower court's findings of fact, but deference is not given to conclusions of law. *Smalls v. State*, 810 S.E.2d 836 (2018). The existence of "any evidence" of probative value is sufficient to uphold findings of fact. *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984). Questions of law are reviewed *de novo*, and the appellate court "will reverse the decision of the PCR court when it is controlled by an error of law." *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

STATEMENT OF THE CASE

This appeal stems from the granting of post conviction relief on the convictions and sentences resulting from a guilty plea entered in front of the Honorable Edward W. Miller on March 4, 2009. Also, relevant to this appeal are the trial proceedings that resulted in convictions and sentences on January 15, 2009 preceding the guilty plea.

A. Trial

In August 2008, Respondent was indicted by a Greenville County Grand Jury for armed robbery and possession of a weapon during the 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. pp. 439-443. These indictments were derived from an incident occurring on December 10, 2007.

On January 14-15, 2009, Respondent and his co-defendant, Kenneth Workman (Workman), proceeded to a joint trial in front of the Honorable C. Victor Pyle, Jr., in Greenville County.[1] Andrew Burke Moorman (Attorney Moorman) represented Respondent. App. p. 169. The jury found both defendants guilty as indicted but for a finding of guilty on the lesser included charge of assault and battery. App. p. 426. Respondent was sentenced to concurrent terms of twenty-five years for armed robbery, five years for conspiracy, five years for possession of a weapon during the commission of a violent crime, and thirty days for assault and battery. App. pp. 432-433, 445-448.

A timely notice of appeal was filed by Attorney Moorman and the appeal was perfected by Robert Pachak, Esquire, from the Office of Appellate Defense. App. p. 463. After briefing and oral argument, this Court affirmed Respondent's convictions and

[1] On December 1-2, 2008, a joint trial was held for Respondent and Workman that resulted in a mistrial due to a hung jury. App. pp. 1-168.

sentences via unpublished opinion. *State v. Robinson*, Op. No. 2012-UP-042 (S.C. Ct. App. filed January 25, 2012). App. pp. 499-502. The remittitur was issued on February 14, 2012. App. p. 503.

On December 5, 2012, Respondent timely filed an Application for Post Conviction Relief. App. pp. 504-512. The State filed a Return on June 21, 2013. App. pp. 514-519. On February 18, 2014, an evidentiary hearing was held in front of the Honorable G. Edward Welmaker during which Respondent and Attorney Moorman testified. App. pp. 521-546. Respondent was represented by Caroline Horlbeck, Esquire, and the State was represented by Karen Ratigan, Esquire. App. p. 521. On March 25, 2014, Judge Welmaker issued an Order denying the application. App. pp. 547-554. Thereafter, a timely notice of appeal was filed. App. p. 556.

Wanda H. Carter, Esquire, from the Office of Appellate Defense, perfected the appeal. On April 15, 2015, the South Carolina Supreme Court reversed the denial of relief and remanded the case for a new trial, finding the *Allen* charge given in the underlying trial was unconstitutionally coercive. *Robinson v. State*, Op. No. 2015-MO-018 (S.C. Sup. Ct. filed April 27, 2015). App. pp. 579-580.[2] The remittitur was issued on April 27, 2015. App. p. 581.

On remand, Respondent pled guilty, without negotiations or recommendations, before the Honorable Letitia H. Verdin on May 16, 2016 in Greenville County. Judge Verdin sentenced Respondent to concurrent terms of fifteen years for armed robbery, five

[2] The reversal in Respondent's PCR appeal was based upon the same issue and analysis found in the South Carolina Supreme Court's decision in Workman's PCR appeal. *Kenneth W. Workman v. State*, Op. No. 27514 (S.C. Sup. Ct. filed on April 15, 2015).

years for criminal conspiracy, five years for possession of a weapon during the commission of a violent crime and thirty days for simple assault. App. pp. 582-585.

B. Guilty Plea

In August 2008, Respondent was indicted by a Greenville County Grand Jury for criminal conspiracy (2008-GS-23-5385), assault and battery with intent to kill (ABWIK) (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. pp. 681-682, 687-688, 692-693. These indictments were derived from an incident occurring on December 14, 2007.

On March 4, 2009, Respondent pled guilty as indicted without negotiations or recommendations in front of the Honorable Edward W. Miller. Respondent was again represented by Attorney Moorman. Judge Miller accepted the guilty plea and sentenced Respondent to concurrent terms of twenty-five years for armed robbery, twenty years for ABWIK, five years for criminal conspiracy, and five years for possession of a weapon during the commission of a violent crime. App. pp. 683, 689-690. Judge Miller ordered that the sentences were to be run concurrent with the sentences on the trial charges. Respondent did not appeal his convictions or sentences.

On April 25, 2017, Respondent filed an Application for Post Conviction Relief. App. p. 586. On November 2, 2018, the State submitted a Return and Motion to Dismiss, along with a Conditional Order of Dismissal. App. pp. 595-603. The Honorable Perry H. Gravely signed the Conditional Order of Dismissal on November 8, 2018. App. p. 603. Respondent, through counsel Tara Dawn Shurling, Esquire, submitted a Response to Conditional order of Dismissal on December 4, 2018. App. p. 604. On December 18,

2018, the Honorable Perry H. Gravely issued a Form 4 Order holding the matter should be "set for a hearing." App. p. 610.

On April 15 and 17, 2019, a hearing was held in front of the Honorable Alex Kinlaw. App. p. 612. Respondent was represented by Tara Dawn Shurling, Esquire, and the State was represented by Samuel L. Key, Esquire. App. p. 612. At the conclusion of the hearing, Judge Kinlaw requested proposed orders from both parties. App. p. 673. Both parties submitted proposed Orders. App. pp. 797-814. On April 22, 2019, Judge Kinlaw issued an Order Vacating Conditional Order of Dismissal and Granting Leave to Proceed with a Hearing on the Merits of the PCR Application. App. pp. 815.

On January 22, 2020, an evidentiary hearing was convened at the Greenville County Courthouse in front of the Honorable J. Mark Hayes, II. App. p. 824. Respondent was represented by Tara Dawn Shurling, Esquire, and the State was represented by Samuel L. Key, Esquire. App. p. 824. Via Form 4 Order issued on January 23, 2020, Judge Hayes requested proposed orders from both parties App. p. 862-863. Both parties submitted proposed Orders. App. pp. 867-892. On May 14, 2020, an Order was issued that was filed on May 19, 2020. App. pp. 893-909. On June 3, 2020, the State filed a Rule 59(e), SCRCP, Motion to Alter, Amend and Reconsider. App. p. 910-916. On June 16, 2020, PCR counsel submitted a Reply to Respondent's Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP, and a Supplemental Reply on June 23, 2020. App. pp. 917-925. On July 23, 2020, Judge Hayes issued a Form 4 Order denying Respondent's Motion and asking PCR counsel to propose a formal order in line with his findings.[3] App. pp. 926-927. A formal Order Denying Motion to Alter of Amend Pursuant to Rule 59(e),

[3] The Form 4 Order was filed on July 28, 2020. App. p. 926.

SCRCP, was issued on September 1, 2020 by Judge Hayes and filed on September 9, 2020. App. p. 930.

Thereafter, the State filed a Notice of Appeal on October 14, 2020. On March 5, 2021, the State filed a Petition, with Appendices. On November 17, 2021, this Court accepted Respondent's Amended Return. By Order dated October 19, 2023, this Court granted the State's Petition and ordered additional briefing.

On November 6, 2023, Tara Dawn Shurling, Esquire, filed a Motion to Withdraw as Respondent's counsel. On December 5, 2023, Tricia A. Blanchette, Esquire, entered her appearance as counsel for Respondent. By Order dated December 7, 2023, this Court granted the Motion to Withdraw and found Tricia A. Blanchette would remain counsel of record for Respondent. On April 18, 2023, the State filed the Brief of Petitioner, from which this Brief follows.

ARGUMENT

I. The lower court should be upheld in finding that counsel provided Respondent ineffective assistance of counsel prior to and during his guilty plea proceeding on March 4, 2009 that warranted the remedy of the judgments and sentences entered against Respondent on March 4, 2009 being vacated and the charges remanded.

A. Summary of the PCR Proceedings

Following the issuance of a Form 4 Order by the Honorable Perry H. Graveley finding that a hearing should be set, a hearing was held in front of the Honorable Alex Kinlaw, Jr. on April 15th and 17th, 2019. App. p. 610, 612. At the hearing in front of Judge Kinlaw, the parties addressed the purpose of the hearing, the timeliness of the PCR Application and the merits of Respondent's allegations. After Judge Kinlaw issued an Order Vacating Conditional Order of Dismissal and Granting Leave to Proceed with a Hearing on the Merits of PCR Application, the Honorable J. Mark Hayes, II, held an evidentiary hearing on January 22, 2020 and the testimony from the hearing with Judge Kinlaw was incorporated by reference. App. pp. 806, 824, 830-831.

At the outset of the hearing held in front of Judge Kinlaw, both parties offered their interpretation of "set for hearing" as reflected in the Form 4 issued by Judge Gravely before Judge Kinlaw took testimony from Respondent and Attorney Moorman. App. pp. 615-616. Following PCR counsel's explanation of Respondent's claims and the timeliness of the filing of the Application, Respondent was called to the stand. App. pp. 617-623.

When he took the stand, Respondent testified that following his trial in January of 2009 and receiving an aggregate sentence of twenty-five years, counsel negotiated and conveyed a plea offer on his remaining charges. App. p. 624. He testified that it was his

understanding the plea offer was for concurrent time to his trial sentences and he understood that both sets of charges were to run together and be merged, not legally separate. App. pp. 624-626, 659-660, 663-665. Specifically, the following testimony was elicited:

> Question: And was it your understanding that as a result of that plea that you were not ever going to have to worry about getting more time for those charges than you had already got --- well, pardon me – more time for those charges than you got on the charges that you were facing at the jury trial?
>
> Answer: Correct. That was my whole reason for pleading.
>
> Question: Okay. And was it your understanding that that meant that no matter what happened in the future that the sentence on those two things – the sentence on the things you pleaded to in March of 2009 was never going to be longer than the sentence you got for the things you went to trial on?
>
> Answer: Correct. That was the understanding I had.
>
> Question: Okay. Did your lawyer ever explain to you that in terms of the actual judgments and sentences that they would remain separate legally, and that if you chose to appeal either one, either the – the jury trial or the guilty plea proceeding that you had to appeal them both? Did he ever explain that to you?
>
> Answer: No, ma'am. If I was aware of that, I would have never took the plea to begin with.

App. p. 626, ln. 5 – p. 627, ln. 1.

While on the stand, he acknowledged that he understood the risk in going forward with seeking post conviction relief and that the charges that were dismissed could be reinstated. App. pp. 628-632. He testified that he was unsure that he was indicted on the dismissed charges and agreed that law enforcement appeared to be clearing the books

with the additional charges. App. p. 632-633. He acknowledged that he was threatened with life without parole prior to taking the guilty plea. App. pp. 637, 640.

He further testified that he did not file an appeal or post conviction relief application within one year of entry of his plea because he understood both sets of charges to be merged and only understood otherwise after his trial convictions and sentences were overturned. App. pp. 627-628, 663-666.

At the conclusion of direct, the following testimony was elicited:

Question: And just so we are real clear, because his Honor is going to have a real important decision to make in your case. You want to go forward and be able to demonstrate to the Court that your plea of guilty was entirely reliant upon your belief that you were not going to get any more time for those pleas than you got for the charges that you'd gone to trial on jury for?

Answer: That's correct.

Question: And you thought that meant from them moving forward that whatever you got on those charges would be what you got on the plea charges?

Answer: Right.

Question: If you had not believed that, would you have pleaded guilty?

Answer: No, ma'am.

Question: Okay. And if you had understood that the appeal – the PCR and the appeal on the charges that were adjudicated in the jury trial was separate in terms of appeal and consequences, would you have filed a PCR on your guilty plea charges before the 17-27-45 (a) PCR statute of limitations expired?

Answer: Yes, absolutely.

App. p. 642, ln. 9 – p. 643, ln. 5.

On redirect, Respondent's testimony concluded with the following:

Question: Okay. And nothing in your conversation, nothing in the legal advice given to you by your attorney led you to understand that the only thing overlapping that these cases was the sentence?

Answer: Absolutely not.

App. p. 666, ln. 23 – p. 667, ln. 2.

When Attorney Moorman took the stand he recalled representing Respondent at his trial and subsequent guilty plea. App. p. 668, lns. 4-9. He agreed that he was able to negotiate a plea deal for Respondent to receive concurrent time. App. p. 668, lns. 10-13. When asked about what he explained regarding "concurrency," he responded that he had not been able to obtain his file from the Public Defender's Office and it was ten years ago. App. p. 668, lns. 14-19. He further responded there was a concern of life without parole, and he explained: "And 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. p. 668, ln. 24 – p. 669, ln. 2.

After testifying that he was court appointed, he also testified that he was retained on additional charges, but he could not recall and was hesitant to say he had every single charge. App. p. 669, lns. 4-16. Regarding his advice prior to the entry of the guilty plea, the following testimony was elicited:

Question: 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?

Answer: 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.

Question: Thank you.

Answer: Yeah.

Question: But to be fair to Mr. Robinson, you don' have any recollection of telling him that for any other purpose, if he wanted to appeal the jury trial, 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?

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

App. p. 671, lns. 11- p. 672, ln. 5.

By way of the Order Vacating Conditional Order of Dismissal and Granting Leave to Proceed with a Hearing on the Merits of the PCR Application, Judge Kinlaw found that the Conditional Order of Dismissal should be vacated and a hearing set on the merits. App. pp. 815, 823. In reaching this conclusion, Judge Kinlaw noted that Respondent had made the following claim:

> [H]e received ineffective assistance of counsel prior to, during and after his guilty pleas approximately one month after his trial. He asserts that he was advised by Defense Counsel to plead guilty to the charges addressed in this Application, but that he was given very limited advice from him concerning the terms of his pleas, and no advice concerning the potential consequences of his pleas in relation to the judgments and sentences entered following his jury trial.

App. pp. 817-818.

At the outset of the Discussion section of his Order, Judge Kinlaw stated Respondent's argument as follows:

> Applicant argues that Defense counsel neglected to discuss the potential consequences of these guilty pleas with him and that he specifically failed to address how the possible outcome of a future direct appeal or Post-Conviction Relief case arising from his judgments and sentences from his jury trial, might impact his the judgements and sentences entered as a result of his guilt pleas. Applicant asserts that, as a consequence of

> Counsel's inadequate advice concerning the relationship between these two sets of judgements and sentences, he was left with the understanding that the two sets of charges, and the sentences he received, were effectively merged by entry of his guilty pleas pursuant to the negotiated plea deal with the State.

App. p. 818.

Regarding the testimony offered at the hearing, Judge Kinlaw concluded:

> In Applicant's testimony during the hearing held in this matter he asserted that it was his understanding that any changes to the judgments and sentences imposed at his jury trial would have the same consequences for the judgements and concurrent sentences entered on the charges addressed in this application. Applicant's testimony asserts that it was his express understanding that his pleas on these charges would never impact his criminal record and would never result in a longer term of incarceration.
>
> The testimony taken at the recent hearing on this application reflects Applicant's belief that all charges entered at his trial, and those to which he pleaded, were effectively merged. He testified that at the time of the opinion in his PCR Appeal from his jury trial, he did not understand that the reversal of the judgements and sentences from his jury trial did not similarly impact the judgments and sentences from his guilty plea.

App. pp. 818-819.

After finding that Respondent should be allowed to proceed with his Application, the court noted that in making his ruling he was relying upon the testimony of Respondent, Attorney Moorman, the exhibits introduced and the arguments advanced by PCR counsel. App. pp. 820. The court discussed counsel's testimony that he advised Respondent that he would not serve a longer sentence as a result of the plea deal for concurrent time than what he received from his jury trial, and the court found it was important to consider that counsel had also represented Respondent at his trial and was familiar with the case and sentences imposed. App. p. 820. The court also discussed that counsel testified that he did not admonish Respondent that the cases were only concurrent as to sentence and the consequences that could follow if the trial convictions and

sentences were overturned on appeal. App. p. 820. After consideration and summary of counsel's testimony, the court concluded: "That being the case, it is not difficult to see how a defendant might reach the same understanding that Applicant has now expressed to this Court." App. p. 820. Referring to Respondent's testimony, the court concluded his discussion by finding: "He unambiguously testified that the only reason he pleaded to these charges was the fact that he believed they were being completely merged with the charges a jury had found him guilty of, therefore, stood no chance of hurting him in any way." App. pp. 822-823.

At the outset of the hearing held in front of the Honorable J. Mark Hayes, II, PCR counsel explained that they "had essentially covered everything necessary… to address the underlying claims at the previous hearing," and she asked that the transcript of the April 2019 be incorporated by reference. App. p. 830, lns. 11-21. She further indicated, as had been discussed at the bench, that she intended to call Respondent for the limited purposes of addressing the matter of risk and to address the State's "concerns about whether or not the record was adequately clear on the question of whether or not the pleas were at least in part motivated by the desire to avoid exposure to an LWOP sentence." App. p. 831, lns. 3-14. Thereafter, the court requested and was provided a copy of the transcript of the prior hearing.[4] App. p. 831, ln. 20 – p. 832, ln. 2.

When Respondent took the stand, he agreed that at least part of his motivation to enter the plea was to avoid exposure to life without parole. App. pp. 834, lns. 4-10, 838-839. When asked about his sentence following trial and the sentence resulting from the

[4] Following the examination of Respondent, the record reflects that a stipulation was entered that the transcript of the April 2019 hearing would be incorporated by the court in making his decision on the merits. App. p. 850, ln. 22 – p. 851, ln. 9.

plea, he responded: "I thought it was all merged together. That was my whole purpose of pleading." App. p. 839-840, p. 839, ln. 25 – p. 840, ln. 3. On redirect, the following testimony was elicited:

> Question: Mr. Robinson, you and I discussed a moment ago in your testimony that part of the consideration in pleading was certainly to avoid exposure to a life without parole sentence?
>
> Answer: That's correct.
>
> Question: Part of it?
>
> Answer: Definitely
>
> Question: But as is set forth in more detail in the transcription from the April 2019 proceeding you also testified that it was your belief based on the advice of counsel that the deal you were pleading to meant that the charge you were pleading to were effectively merged –
>
> Answer: That's the knowledge that I had. That was my whole purpose of pleading because I had 25 years, and I was expecting it to be ran together. I didn't expect me to be doing time for different charges.

App. p. 841, lns. 3 – p. 841, ln. 20.

After PCR counsel indicated she had no further questions, the court requested that she further address what Respondent expected. App. p. 845, lns. 2-6. When asked about his understanding, he responded:

> The knowledge I had that it was merged together. It was ran concurrent. That's all I knew as far as the charges being together, concurrent. I didn't know anything about if I had got if reversed on down the line that I was going to be held accountable as I am now. I wasn't aware of that. And I wasn't informed that.

App. p. 845, lns. 9-23. He also agreed that it was his understanding that anything that might happen legally with the judgements and sentences from the jury trial would also

affect the judgments and sentences from the guilty plea, which was his reason for not filing a PCR application timely after the entry of his guilty plea. App. p. 846, ln. 24 – p. 848, ln. 4.

On recross, he agreed that facing LWOP was part of his consideration, but he also explained that he pled based upon his understanding the charges were merged. He stated: "During that time I had 25 years. So I pled upon me having 25 years. I didn't expect it to not be merged together on down the line. I didn't win my case until like seven years later." App. p. 848, ln. 25 – p. 849, ln. 6. In response on redirect the following testimony was elicited:

Question:	Just so we are real clear here, it is your testimony that you didn't just think the sentence were concurrent? You thought the cases themselves --
Answer:	Overall.
Question:	Were combined, merged?
Answer:	That's correct. Overall. Not just the sentence, overall. Whatever happens with this one, it was going to – this follow – up as well.
Question:	And so to sort of connect the dots here, in your mind you had a jury trial that you were going to potentially have some kinds of appeals from? You didn't pursue any sort of appeal including a PCR from your guilty plea cases because you didn't think it was necessary because of the merger that you had in your mind? And if you understand correctly, if you believed that they were permanently merged and that what affected one would affect the other, that whatever happened with your appeals in the jury case would likewise affect our plea, correct? That's –
Answer:	That's correct.
Question:	And because of that you thought that your pleas were a permanent solution to eliminating the LWOP exposure?

Answer: That's correct. Now, --

Question: And you didn't understand that depending on what happened on appeal with the trial case, you could be right back in the same situation you had been in before?

Answer: Correct.

App. p. 849, ln. 12- p. 850, ln. 14.

After being called to the stand, Attorney Moorman confirmed that Respondent was eligible for LWOP following his January 2009 conviction, and he discussed the State planning to serve LWOP notice prior to the entry of the guilty plea. App. p. 852, lns. 21 – p. 853, ln. 7. Over PCR counsel's objection, counsel also revisited the matter of his advice regarding the merger of the convictions and sentences. App. pp. 853-855. He acknowledged his prior testimony that he could not recall what he specifically advised Respondent regarding the relationship between the charges, but he added that he did not affirmatively represent to Respondent that his appellate rights for both charges "were all lumped in together." App. p. 855, lns. 10-21.

On cross-examination, he stated that his testimony from the prior hearing that he could not recall any discussions with Respondent about the consequences an appeal on the jury trial case would have on his guilty plea case remained true. App. p. 856, lns. 6-17. When further asked about his advice and Respondent's interpretation, he responded that he could not "speak to how he interpreted what I told him." App. p. 856, ln. 18-25. He qualified his prior response in consideration of his earlier testimony by explaining that it had not occurred to him until that day that it would have been an incorrect statement of the law to advise Respondent that his appellate rights on the two separate convictions

were merged. App. pp. 857-858. At the close of his cross-examination, the following testimony was elicited:

> Question: Well, let me ask you this. If you ever represent somebody in a jury trial and subsequently represent them in a plea on facts and circumstances that make them related to each other similarly to the case before this Court, will you cover that issue with them next time?
>
> Answer: Absolutely.
>
> Question: And you see the value of that discussion and the importance of it?
>
> Answer: I see it from the standpoint of eliminating any confusion or possibility that the issue – I'd be a part of the litigation on this issue in the future.

App. p. 858, ln. 23 – p. 859, ln. 8.

Following the conclusion of the hearing, Judge Hayes issued a Form 4 Order requesting proposed orders from both parties and setting forth the "facts as I see them at this moment." App. p. 863. Thereafter, Judge Hayes issues an Order granting post conviction relief. App. p. 893.

By way of his Discussion, Judge Hayes noted Respondent's arguments and testimony presented at both hearings. App. pp. 898-900. In summation, he concluded:

> The testimony taken at the hearings on this application reflect Applicant's belief that all the charges disposed of at his jury trial, and those to which he pleaded, were effectively merged. He testified that at the time of the opinion in his PCR Appeal from his jury trial, he did not understand that the reversal of the judgments and sentences from his jury trial did not similarly impact the judgments and sentences from his guilty plea. According to his PCR testimony, Applicant did not become aware that his judgments and sentences from his guilty plea proceeding were not also effectively reversed by the decision from the Supreme Court on his PCR appeal until the final stages of his plea negotiations on the charges which were remanded to the Court of General Sessions as a result of that appeal. Applicant testified that within a few days after his discovery, on May 16, 2016, he entered pleas on the charges which he had originally been

> disposed of at the jury trial and addressed in his PCR appeal. PCR II, Tr. p. 52, line 15 – p. 55, line 22.

App. p. 900.

After discussing the merger matter and the dismissal of twenty-three additional charges, Judge Hayes held: "This Court finds Plea Counsel's representation was deficient in that he failed to fully advise Applicant concerning how a reversal on the judgments and sentences entered at his earlier jury trial might change the sentence for those offenses and thereby change the impact of the pleas he was considering entering." App. p. 904. Following further discussion, to include Respondent's belief that entry of his guilty plea "could not ever result in him getting a longer sentence than he received for the charges originally prosecuted at his jury trial," the court concluded: "It is believable to this Court that the insufficient advice of Plea Counsel created Applicant's misunderstanding by not making it clear that the if the jury trial judgments were overturned in any subsequent appeal, the guilty plea judgments and sentences would not be." App. p. 906.

In his Conclusion, the court held:

> In light of the above, it is the finding of this Court that Plea Counsel provided Applicant ineffective assistance of counsel prior to and during his guilty plea proceeding on March 4, 2009. On the facts of this case, Plea Counsel should have recognized that his advice to Applicant concerning the fact that his guilty pleas would not result in him serving more time than he would have to serve on the charges from his jury trial, was very much contingent upon the outcome of any appeal Applicant might win in the future. At the time of his advice, he knew Applicant already had a direct appeal pending from his jury trial. He knew this because he had represented Applicant at that trial and, according to the public records of the South Carolina Court of Appeals; he had filed that appeal himself. While it was a later appeal from a PCR action which resulted in the reversal of those judgments and sentences, the fact that Applicant wanted to appeal his conviction and sentences from his jury trial should have prompted this advice from Plea Counsel. This Court further finds that Applicant's pleas of guilty were not knowingly and voluntarily entered inasmuch as they were the product of Plea Counsel deficient

performance.

App. p. 907.

B. Discussion

The lower court should be upheld in finding that counsel provided Respondent ineffective assistance prior to and during his guilty plea proceeding on March 4, 2009 that warranted the remedy of the judgments and sentences entered against Respondent on March 4, 2009 being vacated and the charges remanded. As noted in the Order of the lower court, Respondent alleged generally that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendment to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution, were violated prior to and during his guilty plea proceeding. App. pp. 894-895.

It is well established that 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 (1969). In South Carolina, courts have consistently held that that a defendant must have a full understanding of the consequences of his plea and the charges against him. *Smith v. State*, 329 S.C. 280, 494 S.E.2d 626 (1997), *Simpson v. State*, (317 S.C. 506, 455 S.E.2d 175 (1995). Additionally, a defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution.[5] *See Strickland v.*

[5] The "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." *Montejo v. Louisiana*, 556 U.S. 778, 786, 129 S. Ct. 2079 (2009) (*quoting United States v. Wade*, 388 U.S. 218, 227-228, 87 S. Ct. 1926 (1967)). Critical stages include arraignment, post-indictment interrogations, post-indictment lineups, negotiation and the entry of a guilty plea. *See Hamilton v. Alabama*, 368 U.S. 52, 82 S. Ct. 157 (1961) (arraignment); *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199 (1964) (postindictment interrogation); *Wade, supra* (postindictment lineup); *Padilla v. Kentucky*, 559 U. S. 356, 130 S.Ct. 1473 (2010)

Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). In examining the assistance provided by counsel, "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

In a PCR stemming from a guilty plea, an applicant alleging a constitutional violation must frame the issue as one of ineffective assistance of counsel. *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (1999). Therefore, an applicant that entered a plea on the advice of counsel may only attack the voluntary nature of that 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, applicant would not have pled guilty and insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366 (1985), *Jackson v. State*, 342 S.C. 95, 535 S.E.2d 926 (2000). In *Hill*, the Supreme Court of the United States made it clear that the "voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." 474 U.S. at 57, 106 S.Ct. at 369.

In *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010), the Supreme Court of the United States examined the role of advising a client about a plea offer and ensuing guilty plea and the proper application of the *Strickland* standard. *See also Missouri v. Frye*, 566 U.S. 134, 132 S. Ct. 1399, 1405-06 (2012). In *Padilla*, the Court discussed the duties of counsel in advising a client with respect to a plea offer that leads to a guilty plea. *Padilla* held that a guilty plea, based on a plea offer, should be set aside because

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(*Argersinger v.Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972) (guilty plea).

counsel misinformed the defendant of the immigration consequences of the conviction. The Court made clear that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." 559 U.S., at ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284, 298.

In *Glover v. United States*, 531 U.S. 198, 121 S. Ct. 696 (2003), the Supreme Court of the United States held "any amount of [additional] jail time has Sixth Amendment significance." In *Davie v. State*, 381 S.C. 601, 613, 675 S.E.2d 416, 422-423 (2009), the South Carolina Supreme Court reasoned that it is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of case, a defendant's self-serving statement may be sufficient to establish actual prejudice. *See Jackson v. State*, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000) (Rejecting objective evidence requirement established in *Judge* and finding Petitioner proved he was prejudiced by counsel's deficient performance in failing to properly advise the Petitioner that he was pleading to a felony rather than a misdemeanor where Petitioner's uncontradicted testimony established that he would not have pled had he known the charge was a felony.) overruling *Judge v. State*, 321 S.C. 554, 562, 471 S.E.2d 145, 150 (1996) ("The second prong of the ineffective assistance inquiry – prejudice – is shown by demonstrating through objective evidence… [the existence of] a reasonable probability that, but for counsel's advice, [the defendant] would have accepted the plea. Mere statements by the PCR petitioner that he would have accepted the plea agreement but for counsel's incompetence are insufficient to show prejudice because they are self-serving and inherently unreliable."); *See also Smith v. State*, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) ("The defendant's undisputed testimony that he would not

have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty."); *Thompson v. State*, 340 S.C. 112, 531 S.E.2d 294 (2000) (Holding that there was enough evidence to demonstrate that there was a reasonable probability that defendant would not have pled guilty even though defendant did not specifically testify that he would have insisted upon going to trial if he had known the solicitor was going to make recommendation.).

In *Ray v. State*, 303 S.C. 374, 401 S.E.2d 151 (1991), counsel was found to be ineffective for erroneously advising the defendant regarding the sentence he could receive, thus inducing a guilty plea. On appeal, the State agreed that the advice given was erroneous but argued that the lack of prejudice required reversal. *Ray*, 303 S.C. at 376, 401 S.E.2d at 153. In addressing the difference between the sentence Ray was advised he could receive (life) versus the actual sentence he could receive (possible 75 years without parole) and the issue of prejudice the Court reasoned:

> We hold this distinction is sufficient to satisfy prong two of the *Hill v. Lockhart* test. Ray's steadfast maintenance of his innocence; his uncontroverted testimony that he would not have pled guilty absent the erroneous advice of counsel; and the real distinction between the penalty Ray faces and the advice given him, convince us to *REVERSE* the lower court and *REMAND* for a new trial.

Ray v. State, 303 S.C. 374, 376, 401 S.E.2d 151, 153 (1991).

In *Frierson v. State*, 423 S.C. 257, 815 S.E.2d 433 (2018), the South Carolina Supreme Court further addressed the prejudice analysis in a case stemming from a guilty plea. The Court explained and clarified:

> 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 have not 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).

Id. In affirming as modified, the Court further held:

> Because the prejudice inquiry in a case involving a guilty plea is so limited, it was error for the court of appeals to conduct an overwhelming evidence analysis in this case. *See Smalls*, 422 S.C. at ___, 810 S.E.2d at 843-47 (surveying cases that discuss overwhelming evidence - all of which involved a conviction obtained at trial).

Id. In conclusion, the court emphasized the following:

> We reiterate the prejudice analysis is limited to the outcome of the plea process – whether but for counsel's deficiency, the defendant would have declined to plead and instead proceeded to trial.

Id.

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007); *See Moorehead v. State*, 329 S.C. 329, 496 S.E.2d 415 (1998).[6] "Specifically, the voluntariness of a guilty plea is not determined by an examination of a 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 also from the record of the PCR hearing." *Roddy v. State*, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000).

As quoted above, in reaching his decision to grant relief Judge Hayes concluded:

> In light of the above, it is the finding of this Court that Plea Counsel provided Applicant ineffective assistance of counsel prior to and during his guilty plea proceeding on March 4, 2009. On the facts of this case,

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[6] In *Moorehead v. State*, 329 S.C. 329, 496 S.E.2d 415 (1998), the South Carolina Supreme Court reversed the lower court's grant of PCR relief. At the evidentiary hearing, Moorehead testified that he entered his guilty plea because counsel advised him he would receive probation. Counsel did not agree with this assertion by Moorehead. *Id.* at 416. In reversing the lower court's finding that counsel misadvised Moorehead and relief was warranted, the Supreme Court reasoned that Moorehead's responses that he had not been promised anything and the plea judges statements regarding the plea negotiations did not support the granting of relief. *Id.* at 416-717.

> Plea Counsel should have recognized that his advice to Applicant concerning the fact that his guilty pleas would not result in him serving more time than he would have to serve on the charges from his jury trial, was very much contingent upon the outcome of any appeal Applicant might win in the future. At the time of his advice, he knew Applicant already had a direct appeal pending from his jury trial. He knew this because he had represented Applicant at that trial and, according to the public records of the South Carolina Court of Appeals; he had filed that appeal himself. While it was a later appeal from a PCR action which resulted in the reversal of those judgments and sentences, the fact that Applicant wanted to appeal his conviction and sentences from his jury trial should have prompted this advice from Plea Counsel. This Court further finds that Applicant's pleas of guilty were not knowingly and voluntarily entered inasmuch as they were the product of Plea Counsel deficient performance.

App. p. 907.

In his discussion preceding his conclusion, Judge Hayes noted Respondent's arguments and testimony presented at both hearings. App. pp. 898-900. In summation, he reasoned as follows:

> The testimony taken at the hearings on this application reflect Applicant's belief that all the charges disposed of at his jury trial, and those to which he pleaded, were effectively merged. He testified that at the time of the opinion in his PCR Appeal from his jury trial, he did not understand that the reversal of the judgments and sentences from his jury trial did not similarly impact the judgments and sentences from his guilty plea. According to his PCR testimony, Applicant did not become aware that his judgments and sentences from his guilty plea proceeding were not also effectively reversed by the decision from the Supreme Court on his PCR appeal until the final stages of his plea negotiations on the charges which were remanded to the Court of General Sessions as a result of that appeal. Applicant testified that within a few days after his discovery, on May 16, 2016, he entered pleas on the charges which he had originally been disposed of at the jury trial and addressed in his PCR appeal. PCR II, Tr. p. 52, line 15 – p. 55, line 22.

App. p. 900.

After discussing the merger matter and the dismissal of twenty-three additional charges, Judge Hayes held: "This Court finds Plea Counsel's representation was deficient

in that he failed to fully advise Applicant concerning how a reversal on the judgments and sentences entered at his earlier jury trial might change the sentence for those offenses and thereby change the impact of the pleas he was considering entering." App. p. 904. Following further discussion, to include Respondent's belief that entry of his guilty plea "could not ever result in him getting a longer sentence than he received for the charges originally prosecuted at his jury trial," the court concluded: "It is believable to this Court that the insufficient advice of Plea Counsel created Applicant's misunderstanding by not making it clear that the if the jury trial judgments were overturned in any subsequent appeal, the guilty plea judgments and sentences would not be." App. p. 906.

Petitioner submits that Judge Hayes' reasoning and conclusions made in determining that relief was warranted are fully supported by the law and the record before this Court. At both hearings, Respondent repeatedly testified and clarified that he would not have pled guilty but for the misunderstanding that he had from counsel's advice that the trial and plea convictions and sentences were merged and he faced no risk of receiving more time than he would serve on the trial convictions and sentences. App. pp. 624-628, 642-643, 659-660, 663-667, 839-841, 845-850. Following the hearing incorporated into the record and considered by Judge Hayes, Judge Kinlaw addressed Respondent's testimony, as follows: "He unambiguously testified that the only reason he pleaded to these charges was the fact that he believed that they were being completely merged with the charges a jury had found him guilty of, therefore, stood no chance of hurting him in anyway." App. pp. 822-823.

Additionally, the granting of relief should not be reversed on account of the testimony elicited from counsel since counsel's testimony actually supports the lower

court's findings. At the first hearing, Attorney Moorman testified that he had not been able to retrieve his file and testified to his memory of the advice offered, as follows:

> Question: 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?
>
> Answer: 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.
>
> Question: Thank you.
>
> Answer: Yeah.
>
> Question: But to be fair to Mr. Robinson, you don' have any recollection of telling him that for any other purpose, if he wanted to appeal the jury trial, 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?
>
> Answer: I can't remember telling him that – I can't remember telling him that. I just don't have any independent recollection.

App. p. 671, lns. 11- p. 672, ln. 5.

At the hearing in front of Judge Hayes, the State was allowed to revisit the topic of the advice given prior to the entry of the guilty plea on the matter of merger over counsel's objection. App. pp. 853-855. Attorney Moorman acknowledged his prior testimony that he could not recall what he specifically advised Respondent regarding the relationship between the charges, but he added that he did not affirmatively represent to Respondent that his appellate rights for both charges "were all lumped in together." App. p. 855, lns. 10-21.

On cross-examination, he stated that his testimony from the prior hearing that he could not recall any discussions with Respondent about the consequences an appeal on the jury trial case would have on his guilty plea case remained true. App. p. 856, lns. 6-17. When further asked about his advice and Respondent's interpretation, he responded that he could not "speak to how he interpreted what I told him." App. p. 856, ln. 18-25. He qualified his prior response in consideration of his earlier testimony, by explaining that it had not occurred to him until that day that it would have been an incorrect statement of the law to advise Respondent that his appellate rights on the two separate convictions were merged. App. pp. 857-858. At the close of his cross-examination, the following testimony was elicited:

Question:	Well, let me ask you this. If you ever represent somebody in a jury trial and subsequently represent them in a plea on facts and circumstances that make them related to each other similarly to the case before this Court, will you cover that issue with them next time?
Answer:	Absolutely.
Question:	And you see the value of that discussion and the importance of it?
Answer:	I see it from the standpoint of eliminating any confusion or possibility that the issue – I'd be a part of the litigation on this issue in the future.

App. p. 858, ln. 23 – p. 859, ln. 8. As Judge Kinlaw and Judge Hayes found, Respondent submits that is believable that counsel's deficient advice led to his misunderstanding that resulted in the entry of an involuntary guilty plea. Even counsel admitted that he would provide better advice in the future to avoid any confusion and litigation having to address the matter.

Also, interwoven throughout the Order issued by Judge Hayes granting relief is discussion and analysis regarding the record before the court regarding the twenty-three additional charges dismissed in conjunction with the entry of the plea. App. pp. 903-907. In the State's argument that there is no probative evidence to support prejudice the twenty-three additional charges are discussed. Brief of Petitioner pp. 19-20.

A proper review of Judge Hayes' Order demonstrates that he addressed the twenty-three charges that were dismissed in further support of finding that relief was warranted. Respondent submits that counsel's handling of the charges being pled to and being dismissed was not reasonable under prevailing professional norms, especially in consideration of his prior representation of Respondent at trial. When evaluating the reasonableness of counsel's conduct, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). Moreover, while the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. *Id.*

In *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008), the South Carolina Supreme Court reversed the lower court and granted PCR relief when counsel failed to conduct a reasonable investigation. The Court held that a reasonable investigation includes interviewing witnesses and conducting an independent investigation of the facts of the case. *Lounds*, 380 S.C. at 460, 670 S.E.2d at 649, *See Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590. In *McKnight*, the South Carolina Supreme Court held: "This Court has recognized that strategic choices made by counsel after an incomplete investigation are

reasonable 'only to the extent that reasonable professional judgment supports the limitations on the investigation.'" *McKnight v. State*, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (*quoting Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)).

As evidenced from the record developed at both hearings and the findings of both Judge Kinlaw and Judge Hayes, the record is absent of any independent investigation conducted into the charges on which the plea was entered or the twenty-three additional charges that were dismissed in conjunction with the guilty plea. As Judge Hayes noted there were also concerns raised regarding the charging documents and lack of indictments on the twenty-three additional charges. Respondent asserted that it was his understanding that law enforcement was simply trying to clear their books with these additional charges. App. pp. 632-633. It is clear from the record that counsel did not conduct an investigation into these charges before negotiating or offering advice to Respondent on entering the guilty plea. Respondent submits that counsel's failure to conduct any form of investigation into the charges on which he pled and those dismissed further supports Judge Hayes' granting of relief.

It also appears the State is assigning error to the lower court regarding the matter of the avoidance of the threat of a sentence of life without parole by entering the plea. As the record reflects, the original intent of calling Respondent to testify at the hearing in front of Judge Hayes was for the the limited purposes of addressing the matter of risk and to address the State's "concerns about whether or not the record was adequately clear on the question of whether or not the pleas were at least in part motivated by the desire to avoid exposure to an LWOP sentence." App. p. 831, lns. 3-14.

When Respondent took the stand, he agreed that at least part of his motivation to enter the plea was to avoid exposure to life without parole. App. pp. 834, lns. 4-10, 838-839. When asked about his sentence following trial and the sentence resulting from the plea, he responded: "I thought it was all merged together. That was my whole purpose of pleading." App. p. 839-840, p. 839, ln. 25 – p. 840, ln. 3. On redirect, the following testimony was elicited:

> Question: Mr. Robinson, you and I discussed a moment ago in your testimony that part of the consideration in pleading was certainly to avoid exposure to a life without parole sentence?
>
> Answer: That's correct.
>
> Question: Part of it?
>
> Answer: Definitely
>
> Question: But as is set forth in more detail in the transcription from the April 2019 proceeding you also testified that it was your belief based on the advice of counsel that the deal you were pleading to meant that the charge you were pleading to were effectively merged –
>
> Answer: That's the knowledge that I had. That was my whole purpose of pleading because I had 25 years, and I was expecting it to be ran together. I didn't expect me to be doing time for different charges.

App. p. 841, lns. 3 – p. 841, ln. 20.

After PCR counsel indicated she had no further questions, the court requested that she further address what Respondent expected. App. p. 845, lns. 2-6. When asked about his understanding, he responded:

> The knowledge I had that it was merged together. It was ran concurrent. That's all I knew as far as the charges being together, concurrent. I didn't know anything about if I had got if reversed on down the line that I was

going to be held accountable as I am now. I wasn't aware of that. And I wasn't informed that.

App. p. 845, lns. 9-23. He also agreed that it was his understanding that anything that might happen legally with the judgements and sentences from the jury trial would also affect the judgments and sentences from the guilty plea, which was his reason for not filing a PCR application timely after the entry of his guilty plea. App. p. 846, ln. 24 – p. 848, ln. 4.

On recross, he agreed that facing LWOP was part of his consideration, but he also explained that he pled based upon his understanding the charges were merged. He stated: "During that time I had 25 years. So I pled upon me having 25 years. I didn't expect it to not be merged together on down the line. I didn't win my case until like seven years later." App. p. 848, ln. 25 – p. 849, ln. 6. In response on redirect the following testimony was elicited:

Question: Just so we are real clear here, it is your testimony that you didn't just think the sentence were concurrent? You thought the cases themselves --

Answer: Overall.

Question: Were combined, merged?

Answer: That's correct. Overall. Not just the sentence, overall. Whatever happens with this one, it was going to – this follow – up as well.

Question: And so to sort of connect the dots here, in your mind you had a jury trial that you were going to potentially have some kinds of appeals from? You didn't pursue any sort of appeal including a PCR from your guilty plea cases because you didn't think it was necessary because of the merger that you had in your mind? And if you understand correctly, if you believed that they were permanently merged and that what affected one would affect the other,

that whatever happened with your appeals in the jury case would likewise affect our plea, correct? That's –

Answer: That's correct.

Question: And because of that you thought that your pleas were a permanent solution to eliminating the LWOP exposure?

Answer: That's correct. Now, --

Question: And you didn't understand that depending on what happened on appeal with the trial case, you could be right back in the same situation you had been in before?

Answer: Correct.

App. p. 849, ln. 12- p. 850, ln. 14.

After being called to the stand, Attorney Moorman confirmed that Respondent was eligible for LWOP following his January 2009 conviction, and he discussed the State planning to serve LWOP notice prior to the entry of the guilty plea. App. p. 852, lns. 21 – p. 853, ln. 7. It is clear from the record that Attorney Moorman advised Respondent of the risk of LWOP before entering the plea. Here, the problem is that the advice regarding LWOP risk was coupled with counsel's errant advice that lead to Respondent's belief that as a result of the plea he would not get a longer sentence than he received for the charges originally prosecuted at his jury trial. Despite Respondent candidly admitting that the risk of LWOP was part of his consideration, he made it clear that his only reason for pleading guilty was his belief regarding merger that resulted from counsel's advice.

It appears the State has misconstrued the court's discussion of the LWOP matter as a basis of his prejudice finding and argues that the court failed to make the proper prejudice findings under *Strickland* and *Hill*. The State has asked this Court to reverse the lower court because Respondent failed to meet the prejudice prong. In properly

examining the record, to include Respondent's testimony, clearly the prejudice requirement as set forth in *Strickland* and *Hill* has been met.

At the first hearing, Respondent testified that that it was his understanding the plea offer was for concurrent time to his trial sentences and he understood that both sets of charges were to run together and merged, not legally separate. App. pp. 624-626, 659-660, 663-665. Specifically, the following testimony was elicited:

> Question: And was it your understanding that as a result of that plea that you were not ever going to have to worry about getting more time for those charges than you had already got --- well, pardon me – more time for those charges than you got on the charges that you were facing at the jury trial?
>
> Answer: Correct. That was my whole reason for pleading.
>
> Question: Okay. And was it your understanding that that meant that no matter what happened in the future that the sentence on those two things – the sentence on the things you pleaded to in March of 2009 was never going to be longer than the sentence you got for the things you went to trial on?
>
> Answer: Correct. That was the understanding I had.
>
> Question: Okay. Did your lawyer ever explain to you that in terms of the actual judgments and sentences that they would remain separate legally, and that if you chose to appeal either one, either the – the jury trial or the guilty plea proceeding that you had to appeal them both? Did he ever explain that to you?
>
> Answer: No, ma'am. **If I was aware of that, I would have never took the plea to begin with.**

App. p. 626, ln. 5 – p. 627, ln. 1 (emphasis added).

Additionally, at the conclusion of direct in addressing the potential risk associated with being granted relief, the following testimony was elicited:

> Question: And just so we are real clear, because his Honor is going to have a real important decision to make in your case. You

want to go forward and be able to demonstrate to the Court that your plea of guilty was entirely reliant upon your belief that you were not going to get any more time for those pleas than you got for the charges that you'd gone to trial on jury for?

Answer: That's correct.

Question: And you thought that meant from them moving forward that whatever you got on those charges would be what you got on the plea charges?

Answer: Right.

Question: **If you had not believed that, would you have pleaded guilty?**

Answer: **No, ma'am.**

Question: Okay. And if you had understood that the appeal – the PCR and the appeal on the charges that were adjudicated in the jury trial was separate in terms of appeal and consequences, would you have filed a PCR on your guilty plea charges before the 17-27-45 (a) PCR statute of limitations expired?

Answer: Yes, absolutely.

App. p. 642, ln. 9 – p. 643, ln. 5.

The record before this Court makes it abundantly clear that but for counsel's advice Petitioner would not have entered a guilty plea; thus, he would have put the State's case to the test at trial on the pled to and twenty-three dismissed charges. Not only did Respondent suffer prejudice by foregoing a trial for a misinformed plea, but he also suffered prejudice when counsel's advice that he would not serve more time than he would serve on his trial charges proved to be erroneous. *See Glover v. United States*, 531 U.S. 198, 121 S. Ct. 198 (2003) (Holding any amount of [additional] jail time has Sixth Amendment significance). In line with the federal and state precedent addressed above, Respondent submits that the lower court's reliance on his testimony that he would not

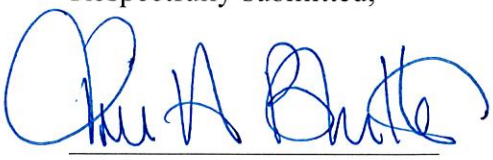
have pled guilty but for counsel's deficient advice satisfies the prejudice requirement. The State's arguments otherwise are simply not supported by the record and are in contravention to the well-established precedent regarding prejudice addressed above.

In sum, Respondent submits that the State's arguments are an attempt to get this Court's attention away from the fact that counsel's conduct failed to make the adversarial process work in this particular case. *See Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). Respondent urges this Court to uphold the lower court and find that counsel provided ineffective assistance prior to and during the entry of his guilty plea, which rendered his guilty plea involuntary. Therefore, relief should be upheld as granted.

CONCLUSION

Based upon the arguments and record before this Court, Respondent respectfully requests that this uphold the granting of relief by the Honorable J. Mark Hayes, II.

Respectfully submitted,



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