RECEIVED
Dec 20 2024
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas
The Honorable Grace Gilchrist Knie, Circuit Court Judge

Appellate Case No. 2023-001931

Ernest Floyd Jackson, II,

Petitioner,

v.

State of South Carolina,

Respondent.

AUSTIN V. STATE RETURN

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DON J. ZELENKA
Deputy Attorney General

ZACHARY W. JONES
S.C. Bar No. 104174
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER'S STATEMENT OF THE ISSUE ON APPEAL

Did the PCR judge err in refusing to find that the guilty plea was rendered involuntary by counsel's failure to explain that Petitioner could, pursuant to S.C. Code § 17-25-50, challenge the State's ability to seek a sentence of life without parole if Petitioner was convicted at trial?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES ON APPEAL

1. Is Petitioner's current argument preserved for appellate review, where the application of S.C. Code Ann. section 17-25-50 to Petitioner's charges was never raised to the PCR court?

2. Did the PCR court properly find Counsel's advice to Petitioner concerning the State's ability to seek a sentence of life without parole was not deficient, where Petitioner had already been convicted of two serious offenses and was charged with a third serious offense, and the incidents giving rise to the second and third offenses were not "so closely connected in point of time that they may be considered as one offense" but were in fact separated by more than four weeks?

STATEMENT OF THE CASE

On May 3, 2016, the York County Multijurisdictional Drug Enforcement Unit arranged a controlled purchase of crack cocaine from Petitioner through a confidential informant. The same informant made another controlled purchase of crack cocaine from Petitioner on June 2, 2016. Petitioner was charged with trafficking crack cocaine for the May 3, 2016, incident (Indictment No. 2017-GS-46-01958) and the June 2, 2016, incident (2017-GS-46-01962). Petitioner had previously been convicted of a proximity charge on May 22, 2010 (Indictment No. 2008-GS-46-01628), which was a "serious offense" under S.C. Code Ann. section 17-25-45(C)(2)(b).

In November of 2017, Petitioner was tried in his absence on Indictment No. 2017-GS-46-01962. He was convicted of trafficking crack cocaine over ten grams, first offense, and his sentence was sealed. On March 20, 2018, his sentence was unsealed, and he was sentenced to ten years' imprisonment.

On April 11, 2018, Petitioner appeared before the Honorable Edgar W. Dickson and pled guilty to trafficking crack cocaine over ten grams, second offense, on Indictment No. 2017-GS-46-01958. He was represented at that proceeding by Mindy H. Lipinski, Esq. ("Counsel"). Petitioner received a negotiated sentence of seventeen years' imprisonment, to run concurrently with his ten-year sentence on Indictment No. 2017-GS-46-0162. Petitioner did not appeal his conviction or sentence.

On February 21, 2019, Petitioner filed an application for post-conviction relief ("PCR") challenging his conviction on Indictment No. 2017-GS-01958 for the following reasons:

1. Ineffective Assistance of Counsel
    a. "Trial counsel was ineffective in allowing Defendant to plea to charges with trial court lacked jurisdiction to hear."
2. Prosecutorial Misconduct
    a. "The State violated applicant's right of due process, where it failed to provide applicant with all discovery under Rule 5, Brady and Giglio."

3. Involuntary Guilty Plea
    a. "Applicant plea was not [voluntarily] and [intelligently] given."

The State filed a return and motion for more definite statement. Petitioner subsequently filed an amended application on June 30, 2021, raising the following grounds for PCR:

> 1. Applicant believes that trial counsel was ineffective in pleading defendant to trafficking in methamphetamine because the indictment was for trafficking in crack cocaine. Methamphetamine is a chemically distinctive drug from crack cocaine, no evidence of the existence of methamphetamine and no proof of methamphetamine existed.
> 2. Trial court lack jurisdiction to sentence defendant to trafficking in methamphetamine because Applicant was never indicted for trafficking in methamphetamine.
> 3. Appellant (sic) believes that trial counsel was ineffective in pleading Applicant to trafficking in methamphetamine because such plea violated the Double Jeopardy clauses of the constitutions of South Carolina and the United States of America. Specifically, Application's (sic) guilty plea to trafficking in methamphetamine (indictment allege crack cocaine) on May 3, 2016 was a single continuous conspiracy arising out of the same facts and circumstance of his conviction for Tracking in Cocaine on June 2, 2016.
> 4. Appellant (sic) believes that his guilty pleas was not knowingly and intelligently give because trail counsel erroneously informed Applicant that a conviction under indictment 2017-gs-46-1958 constituted a third serious or most serious conviction, and that the State would seek life imprisonment if he was convicted at trial. However, Applicant's conviction under indictment 2017-gs-46-1958 and 2017-gs-46-1962 constituted a single continuance conspiracy and would only have been a second serious or most serious conviction, and would not have subject Application (sic) to a life sentence. But for trial counsel's erroneous advise/statement of the law, Applicant would not have plead guilty.

An evidentiary hearing convened on June 30, 2021, at the York County Moss Justice Center before the Honorable R. Lawton McIntosh. On October 22, 2021, Judge McIntosh denied and dismissed the application. Petitioner did not file a notice of appeal.

On June 16, 2022, Petitioner filed another PCR application raising a claim that his prior PCR attorney, Thurmond Brooker, Esq., was ineffective for failing to file a notice of appeal from Judge McIntosh's denial of Petitioner's first PCR application and that Petitioner was entitled to belated review of his PCR appeal issues pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395

(1991). A hearing was convened before the Honorable Grace Gilchrist Knie on December 5, 2023, at the Moss Justice Center. At the conclusion of the hearing, the parties agreed that Petitioner was entitled to belated review of his PCR appeal issues. Judge Knie issued an order granting *Austin* review on December 8, 2023. Petitioner subsequently filed a notice of appeal and petition for a writ of certiorari in this Court. As required by *King v. State*, 308 S.C. 348, 417 S.E.2d 868 (1992), Petitioner also filed an *Austin* petition challenging the previous PCR order. This *Austin* Return follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.*; *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

1. **Petitioner's current argument is not preserved for appellate review because the application of S.C. Code Ann. section 17-25-50 to Petitioner's charges was never raised to the PCR court.**

Petitioner's current argument on appeal is that Counsel was ineffective for failing to adequately advise Petitioner that he could challenge the State's request for a mandatory sentence of life imprisonment without parole ("LWOP") under S.C. Code Ann. section 17-25-50. The merits of this argument are analyzed *infra* in Section 2 of this Return. However, this Court need not decide this issue on the merits because it is not preserved for appellate review. This Court should deny the *Austin* petition because this issue—the only issue currently raised on appeal—was never argued to the PCR court.

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. *Gaddy v. Douglass*, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is "to give the [circuit] court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Through their enforcement and application, the circuit court is guaranteed a chance "to rule properly after it considered all relevant facts, law, and arguments" so that the appellate court is provided with everything needed to properly review the ruling within the limits of the applicable standard of review. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

For an issue to be preserved for appellate review pursuant to our issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the circuit court; (2) raised

by the appellant; (3) raised in a timely manner; and (4) raised to the circuit court with sufficient specificity. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004). Based on those requirements, an issue cannot ordinarily be raised or considered on appeal unless it was first presented to and ruled upon by the circuit court judge. *State v. Freiburger*, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); *see State v. Patterson*, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial.").

Likewise, an appellant is precluded from arguing one ground or theory in support of an issue during the circuit court proceedings and then a different ground or theory in support of the issue on appeal. *See State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (holding a defendant cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court); *State v. Thomason*, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal.").

The argument Petitioner now presents on appeal was never made to the PCR court. In fact, Petitioner did not mention section 17-25-50 *at all* in his initial PCR application filed on February 21, 2019; in his amended PCR application filed on June 30, 2021; or at the evidentiary hearing before Judge McIntosh. That statute was not mentioned by *any* party at *any* point during the proceedings before Judge McIntosh, and the statute is not mentioned anywhere in the PCR court's order denying the application. Petitioner did not file a motion to alter or amend Judge McIntosh's order. The application of section 17-25-50 to the charges in Petitioner's case was raised for the very first time in Petitioner's *Austin* petition. Appellate courts should not consider issues raised for the first time on appeal. *State v. Bonilla*, 429 S.C. 253, 284, 838 S.E.2d 1, 17 (Ct. App. 2019).

Petitioner argued to the PCR court that his two distributions of crack cocaine on May 3 and June 2, 2016, should be considered "a single continuous conspiracy" under the five-factor test set

forth in *State v. Amerson*, 311 S.C. 316, 319–20, 428 S.E.2d 871, 873 (1993). The issue in *Amerson* was whether a defendant who conspired to traffic marijuana into the state over two non-overlapping time periods could be charged with two separate conspiracies or only one continuing conspiracy. This Court set forth and applied a five-factor "totality of the circumstances" test and held that, although the conspirators committed multiple trafficking offenses in the course of their criminal enterprise, there was only a single continuing conspiracy. The Court adopted the reasoning of *Braverman v. U.S.*, 317 U.S. 49, 53 (1942):

> Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.

Therefore, the *Amerson* Court affirmed the trial court's decision to dismiss a second conspiracy indictment against the defendants on double jeopardy grounds.

The rule announced in *Amerson* is not based on S.C. Code Ann. section 17-25-50; in fact, that statute is not mentioned anywhere in the *Amerson* opinion. Section 17-25-50 concerns a different issue altogether; namely, whether multiple separate and distinct offenses may be treated as one offense for the purposes of sentencing where they are "so closely connected in point of time that they may be considered as one offense." In *Bryant v. State*, 384 S.C. 525, 532, 683 S.E.2d 280, 284 (2009), this Court interpreted section 17-25-50 to preclude the imposition of an LWOP sentence on the basis of multiple "strike" offenses "when the multiple offenses are inextricably connected and share an immediate temporal proximity." *Bryant* did not even mention *Amerson*, much less apply *Amerson's* five-factor test to the calculation of "strikes" under section 17-25-50.

Petitioner questioned Counsel at length on the *Amerson* test at the June 30, 2021, evidentiary hearing, going through the five factors one-by-one. (App.p.89, line 24–p.100, line 23).

Petitioner also took the stand and testified that Counsel had not discussed the possibility of a double jeopardy defense with him or advised him "that those two separate events constituted one conspiracy." (App.pp.137–38). Neither Petitioner nor the State asked any questions about S.C. Code Ann. section 17-25-50, and no witnesses offered any testimony about it.

The PCR court's order characterized Petitioner's argument concerning Counsel's alleged deficiency as follows:

> Applicant claims his guilty plea violated double jeopardy inasmuch as the crack cocaine drug transactions of May 3, May 20, and June 2, 2016 constituted a "single continuous conspiracy" arising out of the same facts and circumstances of his conviction for trafficking crack cocaine on June 2, 2016. Also that trial counsel erroneously informed applicant that a conviction under 2017-GS-46-1958 constituted a third serious or most serious conviction. Applicant urges error based upon a "single continuing conspiracy" referenced above.
>
> Applicant asserts that the five-part multi prong test provided in *State v. Amerson*, 311 SC 316, 428 S.E.2d 821 (1992), for determining whether one or more conspiracies exist should be used to find a continuing conspiracy.

(App.p.193).

The PCR court then thoroughly explored the application of *Amerson* to the facts of Petitioner's case and, ultimately, ruled that *Amerson* did not apply to Petitioner's charges because Petitioner's multiple charges were for trafficking crack cocaine, not conspiracy. (App.pp.208–18). Therefore, the PCR court found Counsel was not ineffective for failing to advise Petitioner that he could prevail on double jeopardy grounds or that his conviction on Indictment No. 2017-GS-46-01958 would not constitute a third serious conviction. The PCR court did not address S.C. Code Ann. section 17-25-50, and Petitioner did not subsequently raise that statute in a motion to alter or amend.

On appeal, Petitioner now attempts to pivot away from the *Amerson* test and base his ineffectiveness claim on section 17-25-50 instead. This is improper, as section 17-25-50 is a completely distinct legal rule from *Amerson*. This Court has acknowledged that the *Amerson* test applies *only* to multiple *conspiracy* charges, not to multiple charges for the substantive offense of trafficking. *State v. Gordon*, 356 S.C. 143, 151 n.7, 588 S.E.2d 105, 109 n.7 (2003) (holding defendant's reliance on *Amerson* is misplaced where he faces multiple charges for trafficking, as opposed to conspiracy), *overruled on other grounds by Bryant*, 384 S.C. 525. Tellingly, after the *Gordon* Court held *Amerson* did not apply, it went on to affirm the trial court's refusal to impose an LWOP sentence based on S.C. Code Ann. section 17-25-50. *Id.* at 151–55, 588 S.E.2d at 109–11, *overruled by Bryant*, 384 S.C. 525. Clearly, therefore, this Court has recognized that *Amerson* and section 17-25-50 are different legal rules and involve different analyses. Petitioner is attempting to raise a completely different argument on appeal than he raised to the PCR court; this is not permissible. *See Bailey*, 298 S.C. at 5, 377 S.E.2d at 584; *Thomason*, 355 S.C. at 288, 584 S.E.2d at 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal.").

Petitioner cannot claim that the PCR court "erred," when the PCR court was never given a fair opportunity to rule on the merits of Petitioner's current argument. *See State v. Stone*, 376 S.C. 32, 36, 655 S.E.2d 487, 488–89 (2007) ("If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call."); *I'On*, 338 S.C. at 422, 526 S.E.2d at 724 ("The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred."); *see also Queen's Grant*, 368 S.C. at 372-373, 628 S.E.2d at 919 ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate

review." (citations omitted)); *cf. Powers v. City of Aiken*, 255 S.C. 115, 117, 177 S.E.2d 370, 371 (1970) ("We have searched the record and agree that the trial judge was not given an opportunity to rule upon this issue, and accordingly, the question is not properly before us. This is a court of review."). Therefore, the argument Petitioner now advances on appeal is not properly preserved for appellate review pursuant to well-established South Carolina law. Petitioner's argument cannot appropriately be considered for the first time on appeal. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[E]rror preservation has been a critical part of appellate practice in this State for a long time, serving to ensure . . . that we do not reach issues which were not ruled upon by the trial court. . . . If our review of the record establishes that an issue is not preserved, then we should not reach it."); *State v. Head*, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (holding an appellate court "cannot address unpreserved errors"); *Plyler v. State*, 309 S.C. 408, 413, 424 S.E.2d 477, 480 (1992) (holding an issue that was neither raised at the PCR hearing nor ruled on by the PCR court is procedurally barred on appeal), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019); *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (holding an issue that was not raised in the PCR application or at the PCR hearing is not properly before the appellate court).

Because the only issue raised in Petitioner's *Austin* petition was never raised to or ruled on by the PCR court, this Court should deny the petition.

2. **The PCR court properly found Counsel's advice to Petitioner concerning the State's ability to seek a sentence of life without parole was not deficient, where Petitioner had already been convicted of two serious offenses and was charged with a third serious offense, and the incidents giving rise to the second and third offenses were not "so**

closely connected in point of time that they may be considered as one offense" but were in fact separated by more than four weeks.

Even if this Court were to reach the merits of Petitioner's unpreserved argument, the argument fails as a matter of law. S.C. Code Ann. section 17-25-50 does not preclude an LWOP sentence in Petitioner's case, so Counsel's advice to Petitioner was clearly correct concerning the State's ability to seek LWOP following a conviction at trial.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668 (1984). Where, as in this case, a PCR Petitioner alleges ineffective assistance of counsel as a ground for relief, the Petitioner must prove that "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 v. Washington*, 466 U.S. 668, 686 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*: first, the Petitioner must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. In the context of a guilty plea, the applicant must show there is a reasonable probability that, but for ineffective assistance of counsel, he would not have pled guilty but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

In the present case, Petitioner claims that S.C. Code Ann. section 17-25-50 required his May 3, 2016, and June 2, 2016, trafficking offenses to be treated as a single "strike," precluding the State from seeking an LWOP sentence against him. Petitioner also claims Counsel was deficient for failing to advise him of this, and he contends he would not have entered a guilty plea if he had known that he could not be sentenced to LWOP if convicted at trial.

S.C. Code Ann. section 17-25-45 (sometimes called the "three-strikes" provision; *see Bryant*, 384 S.C. at 534, 683 S.E.2d at 285) provides that a person convicted of a serious offense, including trafficking crack cocaine, must be sentenced to LWOP if he has two or more prior convictions for a serious offense. There is no dispute that Petitioner's 2010 proximity conviction counts as one "strike." The adequacy of Counsel's advice to Petitioner depends on whether his two distributions of crack cocaine on May 3 and June 2, 2016, should be counted together as one offense (bringing the total number of strikes to two) or separately as two offenses (bringing the total number of strikes to three and warranting a sentence of LWOP).

> In determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses.

S.C. Code Ann. § 17-25-50. This Court, in *Bryant*, interpreted this statute to preclude a sentence of LWOP based on multiple convictions for offenses that "are inextricably connected and share an immediate temporal proximity." *Bryant*, 384 S.C. at 532, 683 S.E.2d at 284. The *Bryant* Court pointed to *State v. Woody*, 359 S.C. 1, 596 S.E.2d 907 (2007), as an example of the "proper application of section 17-25-50 to preclude a life without parole sentence." *Bryant*, 384 S.C. at 532, 683 S.E.2d at 284. In that case, Woody had two prior convictions for armed robbery arising out of "a single incident at the same time and at the same location—a robbery of the store's clerk and the store itself." *Id.* The Court held the two armed robberies were so inextricably connected and proximate in time that, as a matter of law, they constituted a single offense for the purposes of section 17-25-50. *Id.*; *accord State v. Boyd*, 288 S.C. 206, 209–10, 341 S.E.2d 144, 146 (Ct. App. 1986) (holding section 17-25-50 required multiple convictions "arising out of simultaneous acts committed in the course of a single incident" to be treated as one for sentencing purposes).

However, Bryant was charged with three separate armed robberies, committed in three different locations on three consecutive days. *Bryant*, 384 S.C. at 527, 683 S.E.2d at 281. The Court held Bryant's offenses could not be construed as a single offense under section 17-25-50 because Bryant's crimes were not inextricably connected and did not share an immediate temporal proximity. *Id.* at 533, 683 S.E.2d at 284.

Petitioner argues that his offenses were "inextricably connected" because the State used the same confidential informant to purchase drugs from him at the same residence. However, the mere fact that the crimes involved the same parties and occurred at the same location does not render those crimes "inextricably connected." Petitioner's two distributions of crack cocaine were separate, independent acts. This case is factually distinguishable from *Woody* and *Boyd* where the defendants received multiple convictions for a single act.

In addition, *Bryant* clearly states that multiple offenses can be treated as one *only* if they are inextricably connected *and* "share an immediate temporal proximity." Despite citing this language in his *Austin* petition, Petitioner has not even attempted to show that his crimes shared an immediate temporal proximity. If anything, the temporal prong is even more important than the "inextricable connection" prong, because section 17-25-50 expressly applies only to offenses "committed ***at times*** so closely connected ***in point of time*** that they may be considered as one offense" (emphasis added).

In this case, Petitioner was charged with the crime of trafficking crack cocaine on May 3, 2016, and on June 2, 2016—two different days, separated by more than four weeks. Petitioner's crimes are easily distinguishable from the simultaneous offenses that *Woody* and *Boyd* held should be treated as one offense. Under *Bryant*, even offenses committed on *consecutive* days do not share the "immediate temporal proximity" necessary to be treated as a single offense under section 17-25-50; how then could two offenses occurring *a month apart* merit treatment as one offense? The word "immediate" means "[o]ccurring without delay; instant." IMMEDIATE, *Black's Law Dictionary* (12th ed. 2024). The phrase "immediate temporal proximity" cannot reasonably be read to include two distinct events separated by a month-long delay.[1]

Counsel cannot have been deficient for omitting to present this patently meritless argument to Petitioner as a potential reason to reject the guilty plea agreement and take his chances at trial. There can be no question that section 17-25-50 would not preclude the State from seeking an

---

[1] Petitioner also argues that any ambiguity in section 17-25-50 should be construed in his favor. However, the *Bryant* Court found there was no ambiguity in the statute as it applied to Bryant's case. *Bryant*, 384 S.C. at 533, 683 S.E.2d at 284. Similarly, in this case, there is no ambiguity. No reasonable reading of "closely connected in point of time" or "immediate temporal proximity" applies to the month-long time period at issue in this case.

LWOP sentence in this case if Petitioner had been convicted at trial. Because Counsel cannot have been deficient for failing to give Petitioner incorrect advice, the PCR court did not err in finding Petitioner failed to meet his burden of proving his guilty plea was induced by Counsel's ineffective assistance. Accordingly, the Court should deny the *Austin* petition in this case.

CONCLUSION

For the foregoing reasons, this Court should deny this *Austin* Petition. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DON J. ZELENKA
Deputy Attorney General

ZACHARY W. JONES
S.C. Bar No. 104174
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

12/10, 2024