

STATE OF SOUTH CAROLINA
In the Supreme Court

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Jan 15 2025

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
Honorable Jocelyn J. Newman, Circuit Judge
Appellate Case No. 2024-00321

S.C. SUPREME COURT

JONATHAN CHRISTIAN HUGHES,
Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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ISSUES PRESENTED

Petitioner's Issue in Petition

1. Did the PCR court err finding defense counsel was not ineffective for failure to advise petitioner of his constitutional rights rendering petitioner's guilty plea invalid where the transcript does not reflect the colloquy between the plea court and petitioner regarding the waiver of constitutional rights?
2. Did the PCR court err finding defense counsel was not ineffective for failure to object or otherwise withdraw petitioner's guilty plea when a detective demanded the plea court sentence petitioner to the maximum where the solicitor did not recommend a sentence?

RESPONDENT'S COUNTER ISSUES PRESENTED

- I. Certiorari is not warranted where the record reflects that plea counsel advised the Petitioner of the constitutional rights the Petitioner was waiving by the entry of his guilty plea and the record reflects that the plea court had also advised the Petitioner of his constitutional rights. Deference is afforded the PCR judge's conclusion that counsel did advise the Petitioner of his trial rights prior to the entry of the guilty plea where evidence from counsel's testimony supports this finding.
- II. Certiorari should be denied counsel was not shown to be ineffective in the PCR Court for failing to object or move to withdraw the guilty plea when a representative of the Sheriff's Department spoke on behalf of his office and the victims in requesting a maximum sentence where the Solicitor's Office agreed that the full plea agreement only consisted of the State dismissing the kidnapping and weapons charges in exchange for Applicant pleading "straight up" to burglary and armed robbery and the Applicant confirmed he understood the charges he was pleading guilty to, the charges that were dismissed as part of the plea agreement, and the maximum sentence he could receive. (Plea Tr 4-5; R. 4-5). There was no evidence of an unkept plea bargain that would have restricted these comments. Deficient performance and prejudice have not been shown.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court’s findings of fact and will uphold them if there is **any** evidence in the record to support them. Id. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). “[W]e [also] afford great deference to a PCR court’s credibility findings.” Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 435 (2018). Foster v. State, No. 2020-000143, 2024 WL 1092329, at *1 (S.C. Ct. App. Mar. 13, 2024). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief 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).

“To establish a claim of ineffective assistance of counsel, the [PCR applicant] has the burden of proving ‘(1) counsel failed to render reasonably effective assistance under prevailing professional norms[] and (2) counsel’s deficient performance prejudiced the applicant’s case.’ ” Frierson, 423 S.C. at 262, 815 S.E.2d at 436 (quoting McKnight v. State, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008)).

“Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.” Strickland v. Washington, 466 U.S. 668, 700 (1984). Thus, “there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.” Id. at 697.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Lexington County Clerk of Court. Petitioner was arrested on February 15, 2015, following an investigation into an armed robbery and burglary of a residence involving Petitioner and two co-defendants, Jahmand McNeill and Antonio Johnson. During its April 2015 term, the Lexington County Grand Jury indicted Petitioner for first-degree burglary (2015-GS-32-0897); armed robbery (2015-GS-32-0898); two counts of kidnapping (2015-GS-32-0895, -0896); and possession of a weapon during the commission of a violent crime (2015-GS-32-0894). Senior Assistant Public Defender Jason S. Chehoski represented Petitioner on these charges and Assistant Solicitor Angela G. Martin of the Eleventh Circuit Solicitor’s Office prosecuted the case.

On April 14, 2016, Petitioner appeared before the Honorable William H. Seals, and pleaded guilty as indicted to first-degree burglary and armed robbery. The State dismissed the remaining charges as part of the plea agreement; however, no formal negotiations or recommendations were made from the State as to sentencing. Judge Seals accepted Petitioner’s plea and sentenced him to concurrent terms of forty years’ imprisonment for first-degree burglary and thirty years for armed robbery.

Mr. Chehoski filed a timely motion to reconsider sentence and memorandum in support, citing the disparity between the sentence Petitioner received compared with Antonio Johnson, who

pled before Petitioner and was sentenced to twenty years' imprisonment. The State filed a memorandum in opposition to Petitioner's motion on April 29, 2016. On May 3, 2016, Judge Seals issued an order denying Petitioner's motion to reconsider.

Following Judge Seals' denial of Petitioner's post-plea motion, Mr. Chehoski filed a notice of appeal on Petitioner's behalf. Appellate Defender Susan B. Hackett represented Petitioner on appeal, raising the following issue:

Whether the plea court erred in denying plea counsel's motion to reconsider the sentence when his sentence was disparate to that of a co-defendant?

Following briefing, our Court of Appeals issued an unpublished opinion affirming Petitioner's convictions and sentences on October 17, 2018. *Hughes v. State*, 2018-UP-382 (S.C. Ct. App. filed Oct. 17, 2018). The case was remitted back to the circuit court on November 2, 2018.

PCR Matters

This matter comes before the Court by way of post-conviction relief (PCR) action commenced by Jonathan C. Hughes (Petitioner) on November 1, 2019, alleging he is entitled to post-conviction relief based on multiple allegations of ineffective assistance of counsel, conflict of interest, and involuntary guilty plea. The State requested an evidentiary hearing through its return and motion for a more definite statement on March 3, 2020.

In his original application for post-conviction relief, Petitioner alleges he is being held in custody unlawfully based on the following (verbatim):

1. Ineffective assistance of counsel: "didn't object to solicitor bringing up another case during plea"
2. Ineffective assistance of counsel: "didn't ensure I agreed with factual basis of guilty plea"
3. Involuntary guilty plea: "lawyer didn't tell me solicitor would ask for the maximum sentence"

4. Conflict of interest: “public defender’s office represented by codefendants”

The State requested an evidentiary hearing through its return and motion for a definite statement on March 3, 2020. On May 26, 2020, PCR counsel filed an amended application pursuant to Rule 71.1, SCRPC, to conform to the evidence presented at the PCR hearing in the event that any new issues arise during the court of the hearing. PCR counsel further amended the application to include the following claims:

5. Applicant’s counsel, Jason Chehoski, failed to discuss the evidence with applicant.
6. Applicant’s counsel, Jason Chehoski, failed to inform the solicitor that he would accept a 15 year sentence as part of a plea.
7. Applicant’s counsel Jason Chehoski failed to object to the solicitor presenting information to the court regarding the co-defendant Jahmand McNeill’s second Burglary committed the same day as this incident. (Transcript p.8, Lines 19-23).
8. **Applicant’s counsel Jason Chehoski failed to object to the solicitor presenting a witness that requested the maximum possible sentence. (Transcript p. 11, Lines 15-16) and failed to advise applicant that this would be presented by the state.**
9. Applicant’s counsel, Jason Chehoski, coerced the applicant into entering a guilty plea by informing the applicant he would receive a sentence of 20 years like his co-defendant Antonio Johnson
10. Applicant’s counsel, Jason Chehoski had a conflict of interest in representing Applicant. Applicant has learned that another Lexington Public Defender, David Mauldin, represented co-defendant Jahmand McNeill in this case. Applicant believes that this prevented counsel from being effective in his representation of applicant and applicants counsel should have made a motion to have an attorney outside of the public defender’s office appointed to represent him.
11. During the plea the court did not find that the applicant was entering the plea voluntarily (Transcript p. 11, Lines 19-21).
12. [T]he court did not make a finding that there was a factual basis for the plea and it did not inquire if the applicant agreed to the facts as presented by the state.

On November 28, 2020, PCR counsel filed a second amended application to include the following claims:¹

13. Counsel failed to meet with applicant a sufficient number of time to review the evidence.
14. **Prior to the guilty plea, Applicant's counsel failed to explain the details of the Applicants guilty plea and sentencing.**
15. Applicant's counsel failed to interview the victims David Quintana and Alva Valdez regarding these charges.
16. Applicant's counsel failed to interview the witnesses Diamond McLamb and Derrick McNeil regarding these charges.
17. Applicant's counsel failed to interview the co-defendants Antonio Johnson and Jahmand McNeill regarding these charges.
18. Following the plea Applicants counsel failed to file a motion to reconsider the sentence.

A hearing into the matter convened before the undersigned on June 6, 2022, at the Lexington County Courthouse. Applicant was present at the hearing and represented by Ola A. Johnson. Assistant Attorney General Lillian L. Meadows appeared on behalf of the State. Both Applicant and his trial counsel, Jason S. Chehoski, testified at the hearing.

On December 5, 2023, Judge Newman signed an order denying PCR. App. 88-125. In the order the PCR court found defense counsel was not ineffective and petitioner's guilty plea was made freely, knowingly, and voluntarily. App. 114. The PCR hearing court found petitioner knew the nature of the charges against him, the terms of the plea agreement, and the consequences of pleading guilty. The court found the plea transcript indicated all defendants pleading guilty on that

¹ PCR counsel additionally amended the application on Applicant's behalf to conform to the evidence presented at the PCR hearing in the event that any new issues arise during the course of the hearing. See Simpson v. Moore, 367 S.C. 587, 599, 627 S.E.2d 701, 708 (2006), *abrogated on other grounds* by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018); Rule 15(b), SCRPC (pleadings may be amended, even after judgment, to conform to issues tried by express or implied consent but not raised in the original pleadings).

day were brought before the plea court as a group and advised of their rights. Further the court found credible defense counsel's testimony that he explained to petitioner the constitutional rights he was waiving by pleading guilty. App. 117. Lastly, the court found counsel was not ineffective for failure to object or withdraw petitioner's guilty plea when Detective Spivey asked the plea court to give petitioner the maximum sentence. App. 111-113.

Summary of the Crime

On February 14, 2015, David Quintana, Alva Valdez, and their three children were asleep in their home. (Plea Tr. 6; R. 6). Mr. Quintana, hearing a noise, went into the den and discovered an armed gunman at approximately 1:00 am. (Plea Tr. 6; R. 6). The gunman, later identified as McNeill, first forced Mr. Quintana and Ms. Valdez back into their bedroom. (Plea Tr. 6-7; R. 6-7). He then forced the couple into their bathroom. (Plea Tr. 6; R. 6).

It was at that time that the couple heard commotion and other people coming into the home and walking down the hall. (Plea Tr. 6; R. 6). McNeill told them if they did not be quiet and cooperate, the men would kill their children. (Plea Tr. 6; R. 6). Meanwhile, Petitioner and Johnson entered the home and stole several items, including: (1) X-box video game consoles; (2) a Wii video game console; (3) Valdez's pocketbook, containing her credit cards; and (4) an old Bible, considered a family heirloom. (Plea Tr. 7; R. 7). The three co-defendants then fled on foot while Mr. Quintana called law enforcement. (Plea Tr. 7-8; R. 7-8).

Shortly after arriving at the scene, officers found Petitioner and Johnson walking through the neighborhood. (Plea Tr. 8; R. 8). Officers, not in possession of evidence implicating the two men in the robbery, allowed Petitioner and Johnson to head home after obtaining their identification information. (Plea Tr. 8; R. 8). The two men returned home and hid some of the

stolen items, buried the clothes they were wearing, and tried to dispose of their shoes after observing the officers' interest in their footwear.² (Plea Tr. 8–9; R. 8–9).

Meanwhile, McNeill attempted a second home invasion a few hours later in that same general area. (Plea Tr. 8; R. 8). However, the homeowner caught McNeill and held him there until police arrived. (Plea Tr. 8–9; R. 8–9). When McNeill was arrested, officers found Ms. Valdez's credit cards and other stolen items on his person. (Plea Tr. 9; R. 9). Petitioner and Johnson were ultimately implicated as McNeill's accomplices in the earlier robbery. (Plea Tr. 9; R. 9). Officers eventually recovered the buried clothes and other stolen items from Petitioner and Johnson. (Plea Tr. 9; R. 9).

² The record indicates officers were interested in the men's shoes because they knew the door to the home was kicked in during the burglary. (Plea Tr. 8; R. 8).

ARGUMENT WHY CERTIORARI SHOULD BE DENIED

- I. **Certiorari is not warranted where the record reflects that plea counsel advised the Petitioner of the constitutional rights the Petitioner was waiving by the entry of his guilty plea and the record reflects that the plea court had also advised the Petitioner of his constitutional rights. Deference is afforded the PCR judge's conclusion that counsel did advise the Petitioner of his trial rights prior to the entry of the guilty plea .**

In his petition, the Petitioner claims his guilty plea was invalid because his counsel failed to advise him of his constitutional rights and the transcript of the plea does not reflect the colloquy. However, based upon the testimony at the PCR proceeding, the PCR court found counsel's testimony credible involving his discussions with his client about his constitutional rights to a trial that he waived App. 117-118. Order, p. 32-33. This Court should deny certiorari for the following reasons.

A. The Record before this Court Supports that Petitioner Hughes was advised of his Constitutional rights related to a jury trial and guilty plea by the Plea Court.

At the outset, the Respondent submits that the Petitioner Hughes was advised of the constitutional rights he was waiving by the plea judge, the Honorable William H. Seals, before his own colloquy began. First, at Appendix p.9 (Plea Tr. p.4, ll. 1-3, the following is set out:

(Prior to this hearing, all defendants were required to stand as a group as their rights were recited by the Court).

App. 9, l. 1-3.

Second, after the guilty plea colloquy of the Petitioner began, Judge Seals made the following inquiry of Hughes:

Q: Were you in the courtroom when I went over your right to a jury trial?

A: Yes, sir.

Q: Did you understand those rights?

A: Yes, sir.

Q: And you want to give up your right to a jury trial and plead guilty today[?]

A: Yes, sir.

App. 9, II. 1-8; (Plea Tr.p.4-5). Judge Seals then inquired of the Petitioner whether he was satisfied with his lawyer, whether he had answered all of the Petitioner's questions, whether he had done everything he had asked him to do and whether he had had enough time with his lawyer. App. 9, II. 9-16. The Petitioner further declared that he had answered the plea court's questions truthfully. App.p. 10, II. 1-2.

The Petitioner's PCR Testimony

During the PCR proceeding, the Petitioner testified that he was unaware of his right to confrontation at the time of his plea. The pertinent testimony was as follows:

Q. Okay. And were you properly advised of all your rights during your plea?

A. No, sir.

Q. So were you not advised about the right to confront witnesses at trial?

A. No, sir.

Q. In other words, right of confrontation?

A. No, sir.

Q. You didn't hear about that?

A. No, sir.

Q. And did you ever get advised of your right to remain silent?

A. Uh, when I first got arrested.

Q. But at the plea you were not advised of that?

A. No, sir.

Q. And was there ever a finding that you have knowingly and intelligently waived these rights? Do you remember the Court ever doing that?

A. What do you mean?

Q. Did the Court ever find that you understood your rights and you waived your rights at this guilty plea? Do you feel like that was done?

A. Well, when the Judge asked me if I was guilty, I didn't really give him an answer.

Q. Okay. But you were not advised of those rights that I just questioned you about? You were not advised --

A. Not all of them. I didn't know I could ask. I didn't know I could question victims and witnesses and things like that.

Q. You mean the right of confrontation?

A. Yes. Yes. Yes, sir.

Q. You did not know at trial that you had that right?

A. Yes, sir.

App.p. 63-64.

On cross-examination, Petitioner was again asked about his alleged knowledge about his constitutional rights.

Q. ... And then you also testified that Mr. Chehoski never went over any of your constitutional rights with you including your right to a jury trial, et cetera?

A. No. I mean, yeah. He told me I could go to trial if I wanted to, but that was about it. He never told me that I could, that he could ask the witnesses or victims questions and things like that. He never told me that.

App.p. 67.

Counsel Jason Chehoski's Unequivocal Testimony that He Personally Advised Petitioner of his Constitutional Rights, including his Right to Confrontation Prior to the Guilty Plea

During defense counsel Chehoski's PCR testimony, he testified that he met with him between six or seven times prior to the guilty plea where he discussed the possible charges and sentencing. Pertinent to this issue, he powerfully stated:

Q. Okay. And did you discuss his constitutional rights with him ***including his right to a jury trial, to confront witnesses?***

A. **Yes.** I go over their rights with them individually before we go in front of the Judge when we sign the paperwork.

Q. Okay. And did he ever indicate to you that he didn't understand your discussions about the charges or his rights?

A. We wouldn't have gone in front of the Judge if I felt he didn't understand what he was doing.

App.p. 69, ll. 12-23 (emphasis added).

On cross-examination, counsel Chehoski re-affirmed that he did go over the constitutional rights Petitioner was waiving with him prior to the plea:

Q. Okay. During the plea, did you realize that during this plea there was no advisement? Or was there, prior to this transcript, was there any type of advisement that you remember where the Court advised Mr. Hughes of his right to confrontation at trial or his right to remain silent?

A. *Again, I personally go over that with my clients.* When it's on the record, I don't remember specifically what Judge Seals discussed on the record and whatever is on the record is what I would defer to.

Q. Okay. Are you saying you do, you remember you advised him of these rights or you're not sure or what?

A. *Especially on a serious case like this, yes, I did it.*

App.p. 77, ll. 8-20 (*emphasis added*).

The PCR Judge Concluded the Chehoski was Credible in his testimony that he advised Hughes of his Constitutional Rights.

The PCR Court firmly addressed this contested issue giving credence to the persuasive and powerful testimony of Jason Chehoski. In rejecting the similar assertions presented in this certiorari petition, the PCR Court rejected the claim with a firm factual determination that Petitioner was advised by counsel.

The PCR Court held as follows in rejecting the Petitioner's fact-based claim:

Here, Applicant testified at the PCR hearing that neither the plea court nor Mr. Chehoski advised him of his constitutional rights. Specifically, he recalled Mr. Chehoski telling him he could go to trial but "that was about it." He further stated that neither Mr. Chehoski nor the plea court advised him of his right to confront and question witnesses against him at trial. Applicant additionally testified that he was advised of his right to remain silent when he got arrested but not at his plea. He stated that the plea judge asked him if he was guilty but that Applicant "didn't really give an answer." Finally, Applicant testified that the plea court did not make a finding that he waived those rights or that his guilty plea was knowingly and voluntarily entered.

This Court disagrees finds Applicant knew the nature of the charges against him, the terms of the plea agreement, and the consequences of pleading guilty in accordance with the requirements of *Boykin* and *Pittman*. Here, the record indicates that all defendants pleading guilty that day were brought before the plea court as a group and advised of their rights. (Plea Tr. 4; R. 4). Judge Seals additionally asked Applicant about his understanding of those rights at the outset of his individual plea proceeding. (Plea Tr. 5; R. 5). Applicant confirmed—under oath—that he understood and wished to these rights and plead guilty. (Plea Tr. 5; R. 5). Applicant

additionally told Judge Seals he understood the charges he was pleading guilty to, the charges that were dismissed as part of the plea agreement, and the maximum sentence he could receive. (Plea Tr 4–5; R. 4–5).

In addition to Applicant’s representations to the plea court, *this Court finds credible plea counsel’s testimony that he explained to Applicant the constitutional rights he would have at trial, including the ability to confront and cross-examine witnesses against him and call witnesses on his own behalf at trial.* As discussed in section B, supra,³ Mr. Chehoski testified that his general practice is to discuss with his clients their constitutional rights several times, especially in a case as serious as Applicant’s. Specifically, his general practice when a client pleads guilty is to go over each constitutional right a final time right before they appear before the plead judge. He additionally testified he would not have allowed Applicant to appear before the plea court that day and plead guilty if he had any doubt regarding Applicant’s understanding of these rights.

Further, Applicant’s claim that the plea court did not make a specific finding that his guilty plea was knowingly voluntarily entered is directly refuted by the record. When Judge Seals accepted the plea, he expressly found Applicant was “doing so freely, intelligently, and with the advice of competent counsel.” (Plea Tr. 11; R. 11). *See United States v. Terry*, 606 F. App’x 712, 713 (4th Cir. 2015) (rejecting the defendant’s attempt to “challenge[] his plea on the ground that the district court did not take special care to assure that his plea was knowing and voluntary” where the district court conducted a sufficient colloquy and reiterating that “[a] guilty plea is valid where the defendant voluntarily, knowingly, and intelligently pleads guilty ‘with sufficient awareness of the relevant circumstances and likely consequences’ ” (quoting *Brady*, 397 U.S. at 748)).

App.p. 117-118. (emphasis added).

Certiorari is not warranted on this issue.

The Petitioner contends the he is entitled to relief because there is “no evidence in the record, other than counsel’s testimony regarding what he usually did, that demonstrates petitioner was advised and knowingly waived his constitutional rights prior to the plea” and that counsel had

³ Respondent submits the reference in the Order to Section B of the Order, related to the rejected ineffective assistance of counsel claim that there was a failure on counsel’s part to explain terms of plea agreement and plea process to the Applicant. App.p. 99-101.

no independent recollection of what the plea court's advisement of rights consisted of that day.⁴ However, the error in Petitioner's claim is convincingly shown by the last sentence in the argument on this ground. "Defense counsel was ineffective for failing to advise petitioner of his constitutional rights prior to his guilty plea and petitioner's plea was rendered invalid by that failure." *Petition for Writ of Certiorari*, p. 7.

Contrary to the hopes of the Petitioner, the trial court found as a fact that counsel Chehoski did advise the Petitioner of his constitutional rights prior to the plea, rejecting the Petitioner's claim otherwise. This fact is supported by the credible evidence of counsel Chehoski as shown above and cannot be ignored by this Court. See Harden v. State, 360 S.C. 405, 409, 602 S.E.2d 48, 50 (2004) (highlighting that "[w]hen examining issues related to a guilty plea, it is appropriate to consider the entire record, including the transcript of the guilty plea, and the evidence presented at the PCR hearing"). Although there is no need to go further to reject the allegation, in light of the credible testimony of counsel Chehoski, it breathes added life to Petitioner's own statements in open court at the time of his guilty plea that he "understood those rights" and wanted to give up his right to a jury trial and plead guilty. App.p. 9.

It must be clear in this setting the powerful impact of these words. Indeed, admissions made during a guilty plea should be considered conclusive unless an applicant presents valid reasons why he should be allowed to depart from the truth of his statements. Blackledge v. Allison, 431 U.S. at 73-74 (1977) (pointing out that representations made by a defendant, his lawyer, and the prosecutor at a guilty plea hearing, as well as any findings made by the judge accepting the plea, constitute a "formidable barrier in any subsequent collateral proceedings").

⁴ Contrary to what counsel Chehoski may have been aware, the pre-plea colloquy of the advisement of rights to the number of defendants pleading guilty that day was not part of the transcript provided to the PCR Court or part of this Appendix.

What is more persuasive why certiorari should be denied is the standard of review which Petitioner necessarily has to ignore under his argument. The testimony of Chehoski specifically undermined the testimony of Petitioner and the argument before this Court which is essentially to ignore all the testimony and evidence, other than Hughes's PCR testimony. However, the standard of review reasonably does not authorize this Court to ignore the credible evidence that supported the PCR Court's decision, just because the Petitioner disagrees with it in hindsight. Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011) ("In reviewing a PCR court's decision, an appellate court is concerned only with whether there is any evidence of probative value that supports the decision."); *id.* ("The appellate court will reverse the PCR court only where there is either no probative evidence to support the decision or the decision was controlled by an error of law."); Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000) ("To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." (citing Boykin v. Alabama, 395 U.S. 238 (1969))); *id.* at 33, 528 S.E.2d at 420 (2000) ("[T]he voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing [court] 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.").

Analogous to this situation is Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972). In this case, the Court held that where the record of postconviction hearing disclosed that plea of guilty was voluntarily and intelligently entered, error of trial court in failing to make record affirmatively showing voluntariness of plea was harmless beyond any reasonable doubt. In Vickery, the PCR Court relied upon testimony from the PCR hearing to resolve whether the plea was entered with

an understanding of the constitutional rights. Accord, Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

Certiorari on this claim is not warranted.

II. Certiorari should be denied counsel was not shown to be ineffective in the PCR Court for failing to object or move to withdraw the guilty plea when a representative of the Sheriff's Department spoke on behalf of his office and the victims in requesting a maximum sentence where the Solicitor's Office agreed that the full plea agreement only consisted of the State dismissing the kidnapping and weapons charges in exchange for Applicant pleading "straight up" to burglary and armed robbery and the Applicant confirmed he understood the charges he was pleading guilty to, the charges that were dismissed as part of the plea agreement, and the maximum sentence he could receive. (Plea Tr 4-5; R. 4-5). There was no evidence of an unkept plea bargain that would have restricted these comments. Deficient performance and prejudice have not been shown.

In the second claim in the petition Petitioner requests post-conviction relief because he believes that trial counsel Chehoski should have objected to a law enforcement officer's testimony on behalf of the victim's in asking for a maximum sentence. The Petitioner has failed to show that there was any restriction at the part of the plea for any victim's or law enforcement to express their concerns about the crime or a potential sentence. Petitioner questions that authority and standing of the officer to speak on the victim's behalf. He further question the ability of anyone to speak at his sentencing other than his counsel. The plea colloquy indicated that the full plea agreement consisted of the State dismissing the kidnapping and weapons charges in exchange for Applicant pleading "straight up" to burglary and armed robbery. Applicant confirmed he understood the charges he was pleading guilty to, the charges that were dismissed as part of the plea agreement, and the maximum sentence he could receive. App.p.8-9, 13. Rather than receiving the maximum of life on burglary, he was sentenced to 40 years on burglary first defense and 30 years concurrent on armed robbery.

Detective Spivey's Request and Statement

The focus of the issue arises from the statement in sentencing of Detective Spivey from the Lexington County Sheriff's Department. In his statement to the plea court after the factual basis of the plea was made by the Solicitor, the following occurred:

MS. MARTIN: . . . Your Honor, the victims are here. They did not want to address the Court, but you know, it was very traumatic. and Detective Spivey from the Sheriff's Department would like to be heard as far as sentencing at the appropriate time.

THE COURT: All right. Right now will be fine.

MS. MARTIN: Thank you.

DET.SPIVEY: Thank you, Your Honor. Just want to reiterate some of the stuff that she was -- that Angela was saying.

This case was something that happened over Valentine's Day. I would see some time for -- for severity that took place in these -- these victims' lives. Fear, I mean, that's the biggest thing I can say. These are true, true victims that you will want to call it in this matter. You know, to -- to have a family be put into a -- to a shower and be -- have threatened their children in regards to this matter, not knowing what's going on with the children while they're in the shower and not being able to move, you know, I mean, they're -- they're basically rendered helpless in the matter. And so it's a -- it's a everyday nightmare for -- for a father or mother not knowing what's going on with their children.

But kinda go into also with the children, you know, knowing these people are inside the house, burying their heads to kind of cover up that

they're not -- that they're sleeping, faking that they're asleep while they hear all this activity going on, you know, it's just -- it's -- it's a nightmare for any family.

But I just wanted to basically ask that you give the max you possibly can give him.

THE COURT: All right.

DETECTIVE SPIVEY: Thank you, Your Honor.

App.p. 14-15. After these comments, the plea judge acted the guilty plea as being freely , intelligently, and with advice of counsel. App.p. 15, ll. 19-21.

Petitioner's Testimony on this Issue

During the PCR hearing, Petitioner complained that he was not given any “notice” that anyone on behalf of the State would be requesting a maximum sentence. App.p. 61. He complained that defense counsel did not object to it. App.p. 61. Petitioner confirmed that counsel told him that he was facing 15 to life imprisonment on the charges. App.p. 65, ll. 13-17.

Counsel Chehoski's testimony

Counsel Chehoski testified that he sought to have the State agree to a 15 year sentence, by was advised that there was not going to be any offers. App.p. 70-71, 74. In response to the Petitioner's complaint at the hearing, counsel Chehoski indicated that it was victim impact at the time and they are free to say whatever they feel is appropriate as long as it is not derogatory toward my client. App.p. 71, ll.11-18. On cross-examination, counsel addressed it in the following manner:

Q. Okay. Did you make any type of objection or motion to withdraw when the State called a witness that asked for the maximum possible sentence?

A. I did not.

Q. Okay. Do you remember that happening? Referencing page 11 in the transcript.

A. I don't remember it, but again I would defer to the transcript.

Q. Okay. And when that happened, did you ever advise Mr. Hughes that it was possible at the guilty plea that that might happen, that someone could get up and ask for the max?

A. I don't remember specifically telling him that, but generally my practice is, especially on a serious case like this, that there would be victim impact and that they can ask for anything they want.

Q. But in this case it was law enforcement. You didn't tell him the State could present a witness, but that law enforcement could do that?

A. I don't specifically recall telling him that, no.

App.p. 75-76.

The PCR Court's Order and Conclusions.

Judge Newman rejected this ground within her order as part G. App.p. 111-113. The following salient points are within her order. First, in addressing the testimony of counsel Chehoski statement on whether he had a basis to object to the sentencing statement of law enforcement, the PCR Court cited as persuasive authority, *Winkler v. State*, 418 S.C. 643, 653, 795 S.E.2d 686, 692 (2016) (explaining that “[o]ne of the key circumstances a court must consider in its examination of counsel’s decision not to make a particular objection is whether there was any law to support the objection”). App.p. 112. Second, the PCR Court noted that the record does not reveal that the

Petitioner or defense counsel was specifically aware that Det. Spivey would appear but specifically concluded:”

Nonetheless, **Applicant failed to provide any basis upon which plea counsel could have objected or withdrawn the plea, and the record indicates the State complied with the plea agreement.** Specifically, the record is devoid of any statements from Assistant Solicitor Martin regarding sentencing. *Cf. State v. Rikard*, 371 S.C. 295, 302, 638 S.E.2d 72, 76 (Ct. App. 2006) (holding that the plea court did not err in denying the defendant’s request to withdraw her guilty plea where the defendant was pleading “straight up” without any negotiations or recommendations and the State indicated on the sentencing sheet that it would make no recommendation regarding sentencing but then requested that the court impose the maximum sentence).

App.p. 112-113.

Third, the PCR Court recognized that victim impact evidence is admissible in sentencing and is not limited to the actual victims, but to the circumstances of the crimes as noted by counsel Chehoski in his reasonable testimony. Order, p. 27, n. 13. App.p. 112. As Mr. Chehoski mentioned, this Court would further note that a victim of any crime committed in South Carolina is guaranteed certain constitutional and statutory rights to justice and due process that “are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants[.]” S.C. Code Ann. § 16-3-1505; see *id.* (“[T]he General Assembly declares its intent, in this article, to ensure that all victims of and witnesses to a crime are treated with dignity, respect, courtesy, and sensitivity . . .”). Specifically, Article I, § 24(A)(5) of the South Carolina Constitution provides that “victims of crime have the right to . . . be heard at any proceeding involving a post-arrest release decision, a plea, or sentencing.” Victim impact evidence is “simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question . . .” *Payne v. Tennessee*, 501 U.S. 808, 824–25 (1991).

Respondent submits that the Petitioner has wholly failed to prove deficient performance on this issue. He merely pointed to the sentencing form where the box was check “without Negotiations or Recommendations” as suggestion the government as a whole would stand mute. As the PCR Court noted, the Solicitor did not make a request for any particular sentencing other than to allow the case to move forward where the Petitioner acknowledged that he was facing a life sentence and to describe the horrors that Hughes and his gang wreaked upon the entire family that day. App. 10-14. There is no credible evidence of an unkept plea bargain where none existed.

Similarly, the PCR Court was correct to alternately find that 6th Amendment prejudice was not found under Strickland by the failure to object. . The sentencing court did not sentence the Petitioner to the maximum, which would have been a life sentence and consecutive sentence of 30 years on armed robbery. App.p. 113. These conclusions are correct as a matter of law and facts presented. Simply put, like Chehoski’s credible testimony and the record, there was not an appropriate legal basis to preclude the comments of Det. Spivey.

This specification does not authorize or warrant the grant of certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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January 22, 2025