

STATE OF SOUTH CAROLINA  
In The Supreme Court

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MAY - 7 2014

CERTIORARI TO SPARTANBURG COUNTY  
Court of Common Pleas

The Honorable J. Mark Hayes II, Circuit Court Judge

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**S.C. Supreme Court**

Appellate Case No. 2013-001695

Joey Shawn Weir, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

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**QUESTION PRESENTED**

Did the PCR Court properly hold that Counsel was not ineffective for failing to request that three counts of injury to real property be considered as a continuous course of conduct?

## STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Petitioner was indicted at the November 2011 term of the Spartanburg County Grand Jury for one count of petit larceny (11-GS-42-4253), and one count of malicious injury to real property, fixtures or improvements to obtain non-ferrous metals (11-GS-42-4254). The Petitioner waived presentation to the Grand Jury on the following offenses: receiving stolen goods valued between \$2000 and \$10,000 (11-GS-42-6870); malicious injury to real property, fixtures or improvements to obtain non-ferrous metals, damages more than \$2000 and less than \$10,000 (11-GS-42-6941, -42, -44, -45, -46); and injury to real property, fixtures or improvements to obtain nonferrous metals, damage of more than \$10,000 (11-GS-42-6943). He was represented by James Cheek, Esquire. On January 6, 2012, the Petitioner pled guilty to all charges as indicted. He was sentenced by the Honorable R. Lawson McIntosh to time served for petit larceny (11-GS-42-4254), a concurrent period of five (5) years, suspended to (5) years of probation for receiving stolen goods (11-GS-42-6870), a concurrent period of five (5) years for all counts of injury to real property to obtain nonferrous metals, damage of \$2,000–\$10,000 (11-GS-42-6941, -42, -44, -45, -46), (11-GS-42-4253), and a consecutive period of ten (10) years for injury to real property to obtain nonferrous metals damages of \$10,000 or more (11-GS-42-6943). The Petitioner did not appeal his guilty plea or sentence.

The Petitioner subsequently filed a PCR application on March 20, 2012. The Respondent made its Return on or about January 30, 2013. An evidentiary hearing into the matter was convened on April 2, 2013, at the Spartanburg County Courthouse. The Petitioner was present at

the hearing and was represented by Thomas A. Belenchia, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. Following the hearing, The Honorable J. Mark Hayes II denied the PCR application by written Order dated July 24, 2013.

A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari was submitted. This Return to the Petition for Writ of Certiorari follows.

## STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

## ARGUMENT

**I. The PCR Court properly held that Counsel was not ineffective for failing to request that three counts of injury to real property be considered as a continuous course of conduct.**

Petitioner was charged with seven counts of malicious injury to real property, to obtain metals, petit larceny, and receiving stolen goods between \$2,000 and \$10,000. (App. p. 4-5). One of the counts of malicious injury to real property, to obtain metals, included damages of more than \$10,000. (App. p. 4). Following his plea, Petitioner was sentenced to serve a total of fifteen years, with the charge involving over \$10,000 of damage providing a consecutive ten year sentence to the concurrent five year sentences received. (App. p. 33-35). A restitution order in the amount of \$58,860 was also signed. (App. p. 35). Petitioner alleges that Counsel failed to properly object to and preserve the issue for appeal of the inadmissibility of the victim’s statement identifying Petitioner as the murderer. (App. p. 283-4).

In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that “Counsel's conduct so undermined the proper functioning of the adversarial process that the trial

cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of Counsel. First, the Petitioner must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland). Second, Counsel's deficient performance must have prejudiced the 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.

Petitioner testified that three of the indictments, -6941, -6942, and -6943, resulted from crimes that occurred on the same day within a twenty-four hour time period. (App. p. 81). Petitioner testified that the crimes occurred on July 12 and occurred at three commercial buildings which were all within a quarter of a mile of each other. (App. p. 81). Petitioner was sentenced to ten years, consecutive to his other sentences, on indictment -6943. (App. p. 34-35). Petitioner testified that at the time of his plea he was unaware that the three offenses could have been considered to be one offense. (App. p. 82). When asked if he had been aware of that possibility would he have pled guilty to all three offenses, Petitioner indicated that he “would’ve ... argued the fact of be consolidated as one.” (App. p. 82, lines 7-8).

Counsel testified that he did not request that the three aforementioned indictments been considered as a continuous course of conduct because he did not think it was appropriate. (App. p. 97). Counsel noted that the crimes appeared to be three separate and distinct crimes. (App. p. 97). Counsel also testified that the charge of indictment -6943 provided for a sentence of up to ten years, as did any of the charges which were deemed third or subsequent property offenses. (App. p. 100). Counsel also testified that his understanding was that the statute regarding continuous court of conduct applied primarily to cases involving the three-strikes law, which are serious and most serious. (App. p. 101).

Petitioner was charged on each of the aforementioned indictments with violating S.C. Code Ann. § 16-11-253 (B). However, because of his prior record, Petitioner was also charged with violating S.C. Code Ann. § 16-1-57, which sets forth that a person convicted of a property crime must, upon conviction for a third or subsequent offense, be punished as prescribed for a Class E felony, which includes a maximum sentence of up to ten years. S.C. Code Ann. § 16-1-90 (E). Petitioner faced a maximum of ten years on each charge of malicious injury to property he faced because of his prior record, each of which could have been run consecutive to the others.

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). The Petitioner failed to meet his burden of proof as to this claim.

Even if Counsel was deficient for failing to make the argument that the offenses constituted a continuous course of conduct, it is clear that the Petitioner suffered no prejudice in this matter. When the Petitioner was brought back before the plea judge for an amendment and clarification of the sentences following the plea earlier that morning, the judge stated that it was his “intention was that [Petitioner] receive five (5) years, and, then, another ten (10) years.” (App. p. 35, lines 21-22). The judge also stated that it was his “intention that [Petitioner] receive a consecutive fifteen (15) year sentence.” (App. p. 36, lines 2-3). Later, the judge stated that he wanted Petitioner to serve fifteen years, after which Petitioner would begin a period of five years of probation. (App. p. 37, lines 13-15). It is clear that because of the unequivocal statements made by the judge at the time of sentencing, even if several of the charges had been considered as a continuous course of conduct, the judge would have still sentenced Petitioner to fifteen years.

Respondent submits that the Petitioner failed to meet his required burden of proof and probative evidence exists to support the court’s denial of his post-conviction relief application.

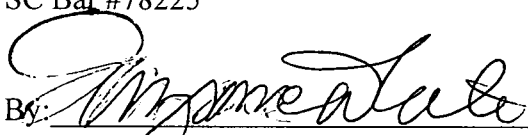
**CONCLUSION**

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON  
Attorney General

SUZANNE H. WHITE  
Assistant Deputy Attorney General  
SC Bar #78225

By:   
ATTORNEYS FOR THE RESPONDENT

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May 7, 2014

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO SPARTANBURG COUNTY  
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

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Circuit Case No.: 2012-CP-42-1292  
Appellate Case No.: 2013-001695

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JOEY SHAWN WEIR,

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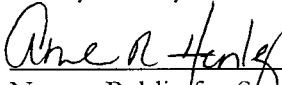
**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, Robert M. Pachak, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211, on this the 7<sup>th</sup> day of May, 2014.

  
\_\_\_\_\_  
Anne A. Mueller  
Legal Assistant for Respondent

SWORN to before me this  
7<sup>th</sup> day of May, 2014.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina  
My Commission Expires: 7/18/2017



ALAN WILSON  
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737  
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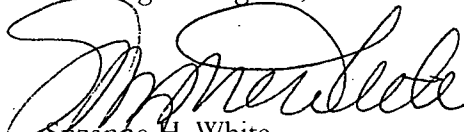
Honorable Daniel E. Shearouse  
Clerk of the Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211

**RE: Joey Shawn Weir v. State of South Carolina  
Circuit Court Case No: 2012-CP-42-1292  
Appellate Case No.: 2013-001695**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this return today.

With highest regards,



Suzanne H. White  
Assistant Deputy Attorney General

SHW/aam  
Enclosures

cc: Robert M. Dudek, Esquire (w/enclosure)