STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Sumter County
Court of Common Pleas
The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

2013-CP-45-098
Appellate Case No. 2014-002270

KEVIN C. BRADLEY,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Whether probative evidence supports the PCR court's finding that Petitioner's Plea Counsel was not ineffective for failing to advise Petitioner that the victim was not cooperating with prosecution and had written a letter asking the State to drop the charges, failing to advise Applicant that victim's credibility could be impeached if they proceed to trial, and failing to interview the victim.

II. Whether probative evidence supports the PCR court's finding that Plea Counsel was not ineffective for failing to advise him that a reversal on direct appeal of his convictions and sentences from his jury trial on indictment No. 2009-GS-45-0249, would not afford him the opportunity to challenge the judgment and sentence he received on indictment No. 2010-GS-45-30 pursuant to his guilty plea?

III. Whether probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective for failing to preserve Petitioner's appellate rights stemming from his guilty plea?

IV. Whether probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective for permitting Petitioner to plead guilty?

V. Whether probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective for failing to clarify the intent of the plea judge when he ordered the five year sentence for criminal sexual conduct – second degree (2010-GS-45-30) consecutive to his prior sentence?

VI. Whether probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective for permitting Petitioner to enter a plea of guilty without discussing the possibility of arguing that he would be ineligible for a life without parole sentence pursuant to S.C. Code Ann. § 17-25-45 where the sexual battery charged in the indictment occurred between October 1, 2006 and October 1, 2007?

VII. Whether probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective for failing to disclose to Petitioner that he had represented the victim and Joshua Edwards, a third party who was charged with committing a sexual battery against victim?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. Petitioner was true bill indicted at the January 2010 term of the Williamsburg County Grand Jury for Criminal Sexual Conduct with a Minor—Second Degree (2010-GS-45-30). William LeGrand Carraway, Esquire represented Applicant. On January 28, 2010, Applicant pled guilty before the Honorable Clifton Newman. Judge Newman sentenced Applicant to five years for Criminal Sexual Conduct in the Second Degree to run consecutive to his current sentences. Applicant did not appeal his guilty plea or sentence.

Petitioner filed a timely application for post-conviction relief on February 25, 2013[1] and May 20, 2014. Respondent made its amended return May 20, 2014. An evidentiary hearing into the matter was convened on May 27, 2014, at the Sumter County Courthouse. Petitioner was present at the hearing and was represented by Tara Shurling, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office. By order dated August 19, 2014 and filed August 25, 2014, the Honorable R. Ferrell Cothran, Jr., denied and dismissed the application with prejudice.

Subsequently, Petitioner filed a timely Notice of Appeal on October 20, 2014. Petitioner submitted her Petition for Writ of Certiorari on March 18, 2015. This Return follows.

[1] Petitioner originally filed a timely post-conviction relief application (Case No. 2010-CP-45-389) on September 29, 2010. In this original application, Applicant raised various allegations stemming from both indictment # 2009-GS-45-249 and indictment # 2010-GS-45-030. Due to the fact that both of these indictments are completely unrelated, the State requested PCR Counsel to file a separate PCR application for indictment # 2010-GS-45-030. Subsequently, PCR Counsel filed a new PCR application (Case No. 2013-CP-45-098) for indictment # 2010-GS-45-030 on February 25, 2013.

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 court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the Petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application 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 the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner's attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668, 104 S.Ct. 2052, 2064. The Petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance 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. With respect to

guilty plea counsel, the Petitioner must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

ARGUMENT

I. Probative evidence supports the PCR court's finding that Petitioner's Plea Counsel was not ineffective for failing to advise Petitioner that the victim was not cooperating with prosecution and had written a letter asking the State to drop the charges, failing to advise Applicant that victim's credibility could be impeached if they proceed to trial, and failing to interview the victim.

Petitioner argues that the PCR Court erred in finding the Plea Counsel was not ineffective in regards to his representation leading up to his guilty plea. However this argument is meritless as there is ample probative evidence to support the PCR Court's finding that Plea Counsel was not ineffective.

a) Probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective for failing to advise Petitioner that the victim was not cooperating with prosecution and had written a letter asking the State to drop the charges.

Petitioner argues Plea Counsel failed to advise him that victim was not cooperating with prosecution and was asking the State to drop the charges against him prior to his plea. (Pt. p. 24). 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. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010).

In the instant case, the PCR Court found Plea Counsel credibly testified that he discussed the fact that both victim and victim's mother were reluctant witnesses for the State.[2] (App. p. 71 lines 14-21; p. 72 lines 5-11; p. 79 line 24—p. 80 line 8). Plea Counsel further testified that he

[2] Where matters of credibility are involved, the Court gives great deference to a judge's findings, because the Court lacks the opportunity to directly observe the witnesses. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses)

advised Petitioner that the victim was going to appear as if "the solicitor is making [victim] come in here" and testify. (App. p. 72 line 23—p. 73 line 4).

Furthermore, Respondent notes that the letter written by victim and read during the Petitioner's plea states that victim "did have sex" with Petitioner. (App. p. 9 lines 6-14). Nothing about the minor victim's plea for leniency absolves Petitioner of his guilt. If anything, the letter corroborates Plea Counsel's testimony that victim would have reluctantly testified that she had sexual relations with Petitioner, but does not absolve Petitioner of his guilt.

Additionally, Respondent submits that the PCR Court properly found that Petitioner failed to show that he was prejudiced by Plea Counsel's failure to advise him of victim's alleged reluctance to testify. (App. p. 217). Petitioner's argument is based solely on the victim's letter asking for mercy on behalf of the Petitioner. Petitioner's failure to produce testimony from the victim results in an inability to prove prejudice. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Based off of the forgoing, Respondent submits that there is ample probative evidence to support the PCR Court's finding that Plea Counsel's was not ineffective.

b) Probative evidence supports the PCR Courts finds that Plea Counsel was not ineffective for failing to advise Applicant that victim's credibility could be impeached if they went to trial.

Petitioner argues Plea Counsel was ineffective for failing to advise him that the victim could be impeached with her allegations that Petitioner was the father of her infant child. 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. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010).

In the instant case, the victim reported to Department of Social Services (hereinafter "DSS") that Petitioner was the father of her child. (App. p. 71 lines 16-19; p. 71 line 22—p.73

line 4). As a result of this allegation, DSS conducted a paternity test. The paternity test proved that Petitioner was not the father of the victim's child. (App. p. 71 lines 3-9). The PCR Court found Plea Counsel credibly testified that he advised Petitioner that they could impeach the victim with Paternity test results. (App. p. 219; p.71 1lines 10-21). However, Plea Counsel explained that it was not in dispute that Petitioner had a relationship with victim. Plea Counsel noted that victim's mother knew victim and Petitioner's relationship, but she did not realize Petitioner's age. (App. p. 71 lines 19-21). Plea Counsel stated that the results of the paternity test did not negate the fact that both victim and victim's mother believed that Petitioner was the father of her child. (App. p. 71 lines 14—p. 73 line 3). Nor does the paternity test impeach the victim's assertion that she had sex with Petitioner. (App. p. 77 lines 7-8).

Furthermore, Respondent submits that Petitioner can show no prejudice as he was well aware of the paternity test results and its potential impacts on the victim's credibility prior to his guilty plea. (App. p. 8 lines 18-23; p.71 lines 10-21). Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) (knowing and voluntary plea waives non-jurisdictional defects and defenses, including challenges to the sufficiency of the evidence (citing Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975); State v. Fuller, 254 S.C. 260, 174 S.E.2d 774 (1970))). Based off of the forgoing, Respondent submits that there is ample probative evidence to support the PCR Court's finding that Plea Counsel's was not ineffective.

c) Probative evidence supports the PCR Court's finding the Plea Counsel was not ineffective for failing to interview the victim.

Petitioner argues Plea Counsel was ineffective for failing to interview the victim prior to his plea. Petitioner argues Plea Counsel should have questioned the victim about her ability to testify under oath that Petitioner had sex with her. (Pt. p. 24). Respondent submits that ample

probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective for failing to formally interview victim.

In the instant case, the victim failed to testify at the PCR hearing. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Petitioner can show no prejudice due to his own failure to secure victim's testimony during the PCR hearing. Based off of the forgoing, Respondent submits that there is ample probative evidence to support the PCR Court's finding that Plea Counsel's was not ineffective.

II. Probative evidence supports the PCR court's finding that Plea Counsel was not ineffective for failing to advise him that a reversal on direct appeal of his convictions and sentences from his jury trial on indictment No. 2009-GS-5-0249, would not afford him the opportunity to challenge the judgment and sentence he received on indictment No. 2010-GS-45-30 pursuant to his guilty plea.

Petitioner argues that the PCR Court erred in finding the Plea Counsel was not ineffective for failing to advise him of his appellate rights as a result of his jury trial, failing to advise him of his appellate rights as a result of his guilty plea, and failure to advise of the potential impact

Graham v. Florida had on his case. However this argument is meritless as there is ample probative evidence to support the PCR Court's finding that Plea Counsel was not ineffective.

a) Probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective for failing to advise him of his right to file a direct appeal stemming from his jury trial, in which Petitioner was represented by separate counsel.

Petitioner argues Plea Counsel was ineffective for failing to advise him of his right to file a direct appeal stemming from his jury trial, in which Petitioner was represented by separate counsel. (Pt. p. 25). Respondent can think of no controlling case law that extends counsels duties to advice of appellate procedures for which he had no actual representation. Notably, Petitioner cites no authority to support his argument that Plea Counsel had a duty to advise Petitioner of his direct appeal rights stemming from his jury trial.

b) Probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective for failing to advise him of his appellate rights after the guilty plea.

Petitioner argues that the PCR Court erred in finding Plea Counsel was not ineffective for failing to advise him of his appellate rights following his guilty plea. However, ample probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective.

The United States Supreme Court has rejected a "bright-line rule that counsel must always consult with the defendant regarding an appeal." Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000). They instead held that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Id. "[A]lthough not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of

potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings." Id.

In the instant case, the PCR Court found Petitioner failed to present any credible evidence that he requested Plea Counsel to file an appeal on his behalf. The PCR Court found Petitioner's testimony that he asked Plea Counsel to file an appeal once the plea judge gave him a consecutive five years to be not credible. (App p. 136 lines 10-15). Furthermore, the mere fact that Petitioner was not satisfied with the sentence he received is certainly not grounds for a direct appeal. Notably, there were no objections made during the plea. Based off of the forgoing, Respondent submits that there is ample probative evidence to support the PCR Court's finding that Plea Counsel's was not ineffective for failing to advise him of his right to appeal.

c) Probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective for failing to discuss the potential impacts of United States Supreme Court case Graham v. Florida[3].

Petitioner argues that Plea Counsel was ineffective for failing to advise him of the potential impacts of Graham v. Florida. Petitioner argues that the decision in Graham would have been very beneficial to his case and would have had an impact on his decision to plead guilty. However, this argument is without merit as ample probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective.

In the instant case, Petitioner pled guilty on January 28, 2010. Graham was not decided until May 17, 2010, approximately five months after Petitioner's plea. This Court has consistently followed the common sense rule that a trial attorney does not have to be clairvoyant and anticipate possible changes in the law. Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994). Cartrette v. State, 323 S.C. 15, 448 S.E.2d 553 (1994); Thornes v. State, 310 S.C.

[3] 560 U.S. 48, 130 S.Ct. 2011 (filed May 17, 2010).

306, 426 S.E.2d 764 (1993). Notably, Plea Counsel credibly testified that that he was not aware of the status of Graham at the time of Petitioner's plea. (App. p. 109 lines 4-17). Therefore, Plea Counsel cannot be held ineffective for failing to anticipate the decision in Graham. Based off of the forgoing, Respondent submits that there is ample probative evidence to support the PCR Court's finding that Plea Counsel's was not ineffective.

III. Probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective for failing to preserve Petitioner's appellate rights stemming from his guilty plea.

Petitioner argues that the PCR Court erred in finding Plea Counsel was not ineffective for failing to advise him of his appellate rights following his guilty plea. However, ample probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective.

The United States Supreme Court has rejected a "bright-line rule that counsel must always consult with the defendant regarding an appeal." Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000). They instead held that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Id. "[A]lthough not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings." Id.

In the instant case, the PCR Court found Petitioner failed to present any credible evidence that he requested Plea Counsel to file an appeal on his behalf. The PCR Court found Petitioner's testimony that he asked Plea Counsel to file an appeal once the plea judge gave him a

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IV. Probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective for permitting Petitioner to plead guilty.

Petitioner argues that the PCR Court erred in finding that Plea Counsel was not ineffective for permitting him to plead guilty. However, ample probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective.

Petitioner argues that Plea Counsel should not have allowed him to enter a guilty plea because he professed his innocence on prior occasions. Petitioner argues that he only pled guilty after being warned that he could potentially face a mandatory life sentence if he was convicted at trial. 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. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison , 431 U.S. 63, 97 S. Ct. 1621, 52 L.Ed.2d 136 (1977)). Therefore, statements made

during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975).

Furthermore, a guilty plea generally constitutes a waiver of non-jurisdictional defects and claims of violations of constitutional rights. See Rivers v. Strickland, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975) (a plea of guilty constitutes a waiver of non-jurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea); Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891 (1981). Therefore the plea waives any non-jurisdictional defects and defenses, including challenges to the sufficiency of the evidence. "Where a defendant voluntarily, intelligently, and understandingly enters a plea of guilt, this makes it unnecessary for the State to offer evidence to prove the offense charged in the warrant or indictment." State v. Allen, 261 S.C. 448, 200 S.E.2d 684, 686 (1973). This is because the guilty plea "admits all matter of fact averments of the accusation." Id. The defendant admits all circumstances described in the indictment, leaving only sufficiency of the indictment for review and waiving all other defenses. State v. Thomason, 341 S.C. 524, 534 S.E.2d 708, 709 (2000).

In the instant case, the record reveals Petitioner knowingly and intelligently entered his guilty plea. Specifically, Petitioner was advised of the potential charges he was facing. (App. p. 3 line 21—p. 4. line 2). The plea court advised Petitioner of that he was pleading to strike offenses and if convicted of another strike he would be sentenced to life without parole. (App. p. 3 lines 21-24). Petitioner was advised of his right to a jury trial, his right to have the indictment presented to grand jury, his right to challenge the State's evidence, and his right to testify at trial. (App. p. 4 lies 11-23). Petitioner told the Court it was his decision alone to plead guilty, that he was pleading straight up without any promises as to sentence, and that he had not been

threatened in any way to plead guilty. (App. p. 4 lines 24—p. 7 line 5). Petitioner stated to the plea court that he wanted to waive his right to have the indictment presented to the grand jury. (App. p. 7 lines 6-9). Based off of the foregoing, there is ample probative evidence to support the PCR Court finding that Petitioner knowingly, intelligently, and understandably entered his guilty plea.

Notably, during the PCR hearing Petitioner stated that he lied under oath when answering the plea judge's questions. (App. p. 135 lines 2-6). Petitioner claimed he was only pleading guilty to avoid a life without parole sentence. However, pleading guilty to avoid a possibly greater sentence, without more, does not render a guilty plea involuntary. Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed. 2d 747 (1970); Wicker v. State, 310 S.C. 8, 12, 425 S.E.2d 25, 27 (1992).

Petitioner further argues that he was not facing a mandatory life without parole sentence if convicted of his second most serious strike due to Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011 (filed May 17, 2010) (holding that life without parole violates the Eighth Amendment when imposed on juvenile nonhomicide offenders). Petitioner argues that he could not have been sentenced to life without parole under S.C. Code Ann. § 17-25-45 because the indictment alleged that the sexual battery occurred sometime between October 1, 2006 and October 1, 2007. Petitioner turned eighteen on July 17, 2007. Petitioner argues that he could not be sentenced to a mandatory life without parole sentence because he was seventeen turning eighteen during the dates alleged in the indictment.

However, Petitioner's argument is meritless. Initially, Respondent would note that this Court has consistently followed the common sense rule that a trial attorney does not have to be clairvoyant and anticipate possible changes in the law. Gilmore v. State, 314 S.C. 453, 457, 445

S.E.2d 454, 456 (1994). Cartrette v. State, 323 S.C. 15, 448 S.E.2d 553 (1994); Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993). Notably, Plea Counsel credibly testified that that he was not aware of the status of Graham at the time of Petitioner's plea. (App. p. 109 lines 4-17). Therefore, Plea Counsel cannot be held ineffective for failing to anticipate the decision in Graham.

Furthermore, the mere fact that Petitioner committed the sexual battery when he was seventeen and continued to commit the sexual battery while he was eighteen is of no consequence. When Petitioner pled guilty he admitted to all circumstances described in the indictment, leaving only sufficiency of the indictment for review and waiving all other defenses. State v. Thomason, 341 S.C. 524, 534 S.E.2d 708, 709 (2000). As a result, Petitioner admitted to committing a sexual battery against the victim while he was eighteen years old. Because this was Petitioner's second most serious strike, he would have been subjected to a mandatory life without parole sentence per S.C. Code Ann. § 17-25-45 had the State not presented his charges as if there were no prior convictions during his guilty plea.[4] Therefore, the holding in Graham would be inapplicable to Petitioner because he had the potential of receiving a second most serious strike for an offense that he committed while he was eighteen years old.

V. Probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective for failing to clarify the intent of the plea judge when he ordered the five year sentence for criminal sexual conduct – second degree (2010-GS-45-30) consecutive to his prior sentence.

[4] Petitioner was convicted of criminal sexual conduct - first degree and criminal sexual conduct – second degree (2009-GS-45-249) on January 27, 2010. The indictment alleged Petitioner committed the acts while over the age of eighteen years old. Those convictions amounted to one most serious strike. Petitioner was additionally indicted for criminal sexual conduct – second degree (2010-GS-45-30) a second most-serious strike. However, Petitioner was allowed to plead guilty as if he had no prior strikes. Had Petitioner not pled guilty, he would have faced a mandatory life without parole sentence if convicted of criminal sexual conduct – second degree.

Petitioner argues Plea Counsel was ineffective for failing to clarify the intent of the plea judge when he ordered Petitioner five year sentence run consecutive to his sentence for indictment 2009-GS-45-249. However this argument is meritless as ample probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective.

In the instant case, Petitioner had been convicted of criminal sexual conduct – first degree and criminal sexual conduct –second degree. Both charges stemmed from indictment 2009-GS-45-249). The Honorable Clifton Newman sentenced Petitioner to twenty five year term of imprisonment for criminal sexual conduct – first degree and twenty year term of imprisonment for criminal sexual conduct – second degree. At the conclusion of his guilty plea, Judge Newman sentenced Petitioner to a five year term of imprisonment for criminal sexual conduct – second degree (2010-GS-45-30) to run consecutive to the sentence he received on indictment 2009-GS-45-249. Plea Counsel opined that the plea judge was simply running the five year sentence to the twenty five year sentence for criminal sexual conduct – first degree. (App p. 92 line 20—p. 93 line 9). Specifically, Plea Counsel reasoned that it was unreasonable to assume to that the plea judge was ordering the five year sentence to run consecutive to the twenty year sentence because it would have no impact on Petitioner aggregate sentence. (App p. 92 line 20—p. 93 line 9). Based off of the forgoing, Respondent submits that there is ample probative evidence to support the PCR Court's finding that Plea Counsel's was not ineffective for failing to advise him of his right to appeal.

VI. Probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective for permitting Petitioner to enter a plea of guilty without discussing the possibility of arguing that he would be ineligible for a life without parole sentence pursuant to S.C. Code Ann. § 17-25-45 where the sexual battery charged in the indictment occurred between October 1, 2006 and October 1, 2007.

Petitioner argues that the PCR Court erred in finding Plea Counsel was not ineffective for failing to discuss the possibility of arguing that he would be ineligible for a life without parole sentence pursuant to S.C. Code Ann. § 17-25-45 where the sexual battery charged in the indictment occurred between October 1, 2006 and October 1, 2007. However, there is ample probative evidence to support the PCR Court's finding that Plea Counsel was not ineffective.

Petitioner argues that he was not facing a mandatory life without parole sentence if convicted of his second most serious strike due to Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011 (filed May 17, 2010) (holding that life without parole violates the Eighth Amendment when imposed on juvenile nonhomicide offenders). Petitioner argues that he could not have been sentenced to life without parole under S.C. Code Ann. § 17-25-45 because the indictment alleged that the sexual battery occurred sometime between October 1, 2006 and October 1, 2007. Petitioner turned eighteen on July 17, 2007. Petitioner argues that he could not be sentenced to a mandatory life without parole sentence because he was seventeen turning eighteen during the dates alleged in the indictment.

However, Petitioner's argument is meritless. Initially, Respondent would note that this Court has consistently followed the common sense rule that a trial attorney does not have to be clairvoyant and anticipate possible changes in the law. Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994). Cartrette v. State, 323 S.C. 15, 448 S.E.2d 553 (1994); Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993). Notably, Plea Counsel credibly testified that that he was not aware of the status of Graham at the time of Petitioner's plea. (App. p. 109 lines 4-17). Therefore, Plea Counsel cannot be held ineffective for failing to anticipate the decision in Graham.

Furthermore, the mere fact that Petitioner committed the sexual battery when he was seventeen and continued to commit the sexual battery while he was eighteen is of no consequence. When Petitioner pled guilty he admitted to all circumstances described in the indictment, leaving only sufficiency of the indictment for review and waiving all other defenses. State v. Thomason, 341 S.C. 524, 534 S.E.2d 708, 709 (2000). As a result, Petitioner admitted to committing a sexual battery against the victim while he was eighteen years old. Because this was Petitioner's second most serious strike, he would have been subjected to a mandatory life without parole sentence per S.C. Code Ann. § 17-25-45 had the State not presented his charges as if there were no prior convictions during his guilty plea.[5] Therefore, the holding in Graham would be inapplicable to Petitioner because he had the potential of receiving a second most serious strike for an offense that he committed while he was eighteen years old.

Additionally, Petitioner presented no credible evidence that the State would not have been able to prove the charges alleged in the indictment. To the contrary, Petitioner chose to plead guilty, admitted his guilt while under oath, and in doing so, agreed with the facts as presented in the indictment. Based off of the forgoing, Respondent submits that there is ample probative evidence to support the PCR Court's finding that Plea Counsel's was not ineffective for failing to advise him of his right to appeal.

VII. Probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective for failing to disclose to Petitioner that he had represented the victim and Joshua Edwards, a third party who was charged with committing a sexual battery against victim.

[5] Petitioner was convicted of criminal sexual conduct - first degree and criminal sexual conduct – second degree (2009-GS-45-249) on January 27, 2010. The indictment alleged Petitioner committed the acts while over the age of eighteen years old. Those convictions amounted to one most serious strike. Petitioner was additionally indicted for criminal sexual conduct – second degree (2010-GS-45-30) a second most-serious strike. However, Petitioner was allowed to plead guilty as if he had no prior strikes. Had Petitioner not pled guilty, he would have faced a mandatory life without parole sentence if convicted of criminal sexual conduct – second degree.

Petitioner argues that PCR Court erred in finding that the Plea Counsel was not ineffective for failing to disclose to Petitioner that he had previously represented both the victim and Joshua Edwards on prior occasions. However, there is ample probative evidence to support the PCR Court's finding that Plea Counsel was not ineffective.

a) Probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective for failing to disclose to the Petitioner that he had previously represented the victim on prior truancy charges.

Petitioner argues that the PCR Court erred in finding that Plea Counsel was not ineffective for failing to disclose that he had previously represented the victim on truancy charges. However, there is ample probative evidence to support the PCR Court's finding that Plea Counsel was not ineffective.

It is well established that the fact that counsel does not advise a defendant of a potential conflict of interest does not affect the constitutionality of a conviction. Jackson v. State, 328 S.C. 345, 354, 495 S.E.2d 768, 773 (1998). Furthermore, the mere possibility of a conflict of interest is insufficient to impugn a criminal conviction. State v. Gregory, 364 S.C. 150, 612 S.E.2d 449 (2005). Additionally, an applicant must show that his counsel actively represented conflicting interest to establish a claim of ineffective assistance of counsel. Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984). "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001) (emphasis added).

In the instant case, Petitioner argues Plea Counsel's labored under a conflict of interest which divided his loyalty between Petitioner and Victim. As a result of this divided loyalty,

Petitioner argues Plea Counsel was unable to comprehend the possibility that his former client had intentionally lied about the paternity of her child in order to protect the true biological father of the child. (Pt. p. 31). In support of his argument, Petitioner notes that Plea Counsel expressed various personal opinions of victim regarding her veracity and credibility. (Pt. p. 32). Petitioner mistakenly asserts that Plea Counsel admitted that he "neither considered, nor discussed with Petitioner, the fact that her previous false allegations of paternity might be used to challenge her credibility if Petitioner went to trial." (Pt. p. 31).

To the contrary, the PCR Court found Plea Counsel credibly testified that he discussed the fact that they could impeach the victim with results of the paternity. (App. p. 219; p.71 lines 10-21). Plea Counsel noted that it was not in dispute that Petitioner had a relationship with victim. Plea Counsel explained that victim's mother knew of the relationship, but did not realize Petitioner's age. (App. p. 71 lines 19-21). Plea Counsel stated that the negative results of the paternity test did not negate the fact that both victim and victim's mother believed that Petitioner was the father of her child due to Petitioner's prior relationship with victim. (App. p. 71 lines 14—p. 73 line 3). Nor does the paternity test impeach the victim's assertion that she had sex with Petitioner. (App. p. 77 lines 7-8).

Furthermore, Plea Counsel stated that he advised Petitioner of his prior representation of victim. (App. p. 58 line 24—p. 59 line 9). Plea Counsel further stated that he represented victim several years prior to representing Petitioner. (App. p. 58 lines 6-13). Plea Counsel stated that he did not feel as though he owed any loyalty to Victim. (App. p. 111 lines 13-17). Plea Counsel further credibly testified that his prior representation of victim did not negatively impact his representation of Petitioner. (App. p. 111 lines 21-25). If anything, Plea Counsel's past representation of victim enhanced his advice to Petitioner. (App. p. 110 line 19—p. 111 line 8)

Plea Counsel stated that his prior representation allowed him to gain some insight about how victim would appear to a jury if Petitioner chose to proceed to trial. (App. p. 110 line 19—p. 111 line 8). Notably, Plea Counsel stated that he advised Petitioner that both victim and her mother would appear as credible. (App. p. 104 line 23—p. 105 line 7). As previously noted, both victim and victim's mother would have testified that Petitioner and victim carried on a sexual relationship. Based off of the foregoing, there is ample probative evidence to support the PCR Court's finding that Plea Counsel was not laboring under a conflict of interest due to his prior representation of victim.

b) Probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective for failing to disclose to Petitioner that he had previously represented Joshua Edwards.

Petitioner argues Plea Counsel was ineffective for failing to advise him that he had previously represented Joshua Edwards, another individual who was prosecuted for having had sex with victim. However, there is ample probative evidence to support the PCR Court's finding that Plea Counsel was not ineffective.

It is well established that the fact that counsel does not advise a defendant of a potential conflict of interest does not affect the constitutionality of a conviction. Jackson v. State, 328 S.C. 345, 354, 495 S.E.2d 768, 773 (1998). Furthermore, the mere possibility of a conflict of interest is insufficient to impugn a criminal conviction. State v. Gregory, 364 S.C. 150, 612 S.E.2d 449 (2005). Additionally, an applicant must show that his counsel actively represented conflicting interest to establish a claim of ineffective assistance of counsel. Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984). "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his

attorney's performance." Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001) (emphasis added).

In the instant case, Petitioner concedes that that there is no evidence which establishes that Petitioner was prejudiced by Plea Counsel's previous representation of Joshua Edwards. (Pet. p. 33). Petitioner merely argues that Plea Counsel's failure to disclose his prior representation provides further evidence of Plea Counsel's failure to be fully candid with Petitioner.

Notably, the PCR Court found Plea Counsel credibly testified that he did not feel his prior representation of Joshua Edwards amounted to a conflict of interest. (App. p. 230). Furthermore, Plea Counsel credibly testified that he represented Petitioner to the best of his abilities and owed no duty of loyalty to Joshua Edwards. (App. p. 58 lines 6-18; p. 230). Based off of the foregoing, there is ample probative evidence to support the PCR Court's finding that Plea Counsel was not ineffective for failing to disclose his prior representation of Joshua Edwards.

[signature to follow]

CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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July 20, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County
Court of Common Pleas
The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

2013-CP-45-098
Appellate Case No. 2014-002270

KEVIN C. BRADLEY,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

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This 20th day of July, 2015

CAROLINE COLLINS
LEGAL ASSISTANT