

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable R. Knox McMahon, Plea Judge
The Honorable Edgar W. Dickson, PCR Judge

Appellate Case No. 2014-00694

Rikam Ikkesh Dozier, Petitioner,

v.

State of South Carolina, Respondent.

BRIEF OF RESPONDENT

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The PCR Judge properly declined to apply cumulative prejudice analysis in denying and dismissing Petitioner’s PCR Application. Notwithstanding the PCR Judge’s apt decision to remain within this Court’s jurisprudence, the justifiably maligned cumulative prejudice analysis is entirely inappropriate in the PCR forum for numerous compelling reasons illustrated by its illogical application in the present case.21

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QUESTION PRESENTED

1. Is there probative evidence to support the PCR Judge's denial of relief?

STATEMENT OF THE CASE

The Lexington County Grand Jury indicted Petitioner at the September 2008 term of General Sessions for armed robbery (2008-GS-32-2826) and criminal conspiracy (2008-GS-32-2827). App.pp.32-38. Bradley B. Hansen, Esq., represented Petitioner.

On April 2, 2009, Petitioner entered a guilty plea to armed robbery pursuant to the State's plea agreement. The Honorable R. Knox McMahon accepted Petitioner's plea and sentenced him to a term of fifteen (15) years of imprisonment for armed robbery. App.pp.1-31.

Petitioner did not appeal his sentence or conviction. Yet, Petitioner filed an application for post-conviction relief (PCR) on March 10, 2010. App.pp.39-52. A hearing was convened at the Lexington County Courthouse on November 15, 2012. App.pp.61-96. Petitioner was present and represented by Aimee Zmroczek, Esq., Senior Assistant Deputy Attorney General Karen C. Ratigan, Esq. of the South Carolina Attorney General's Office represented Respondent. The Honorable Edgar W. Dickson issued a memoranda order denying and dismissing the civil action on July 1, 2013. App.pp.183-84. A formal order was filed March 13, 2014. App.pp.199-212. Petitioner filed a post-trial motion to reconsider pursuant to Rule 59(e), SCRCP. App.pp.195-98. Judge Dickson denied Petitioner's motion in an order. App.pp.199-200.

This discretionary Petition follows.

STANDARD OF REVIEW

The proper standard for review of a PCR 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, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

STATEMENT OF THE FACTS

(a) Guilty Plea Hearing

Fourteen months prior to the plea hearing, Petitioner and co-defendant robbed a K-Mart retail store around noon. App.p.12. Both men wore black masks and were armed; Petitioner presented what had been modified and disguised to be a black handgun when he directed employees and customers “[e]verybody put your hands up.” App.p.12, ln. 22-23. The assailants robbed numerous employees and customers of their money. Petitioner and co-defendant fled on foot in the direction of a primary school. A bystander, who happened to be employed as a private investigator, watched the events transpire from the K-Mart’s parking lot. He immediately notified law enforcement. Ultimately, the responding officers apprehended Petitioner near the school’s premises. A ‘BB-gun,’ a mask, and Petitioner’s missing shoe were seized within Petitioner’s proximity of where he was apprehended. Petitioner identified co-defendant, which led to his arrest and seizure of eight hundred and seventy seven dollars (\$877) at his residence. Petitioner did not contest the State’s presentation of the facts; he expressed his remorse and explained his motive. App.p.19.

Petitioner pled guilty to one count of armed robbery and ensured the Plea Judge that he understood the penalty. App.p.8, ln.3-7; p.9, 3-7. Petitioner ensured the Plea Judge that he fully comprehended his discussions with counsel, that he was satisfied with counsel’s representation, and that he understood plea negotiations. App.p.11, ln.16-18; ln.22-24; p.10, 6-8. Subsequent to the Assistant Solicitor’s representations that the plea was as indicted and that the State did not oppose the mandatory minimum, Petitioner ensured the Plea Judge that he understood that the Assistant Solicitor’s comments did not bind the Plea Judge in his imposition of the ultimate sentence. App.p.9, ln.15-22; p.10, ln. 9-13. Prior to the colloquy, counsel informed the Plea

Judge that Petitioner had been submitted for a competency evaluation. App.p.4. Counsel summarized the finding of the evaluation, presented the evaluation report to the Plea Judge and made assurances that Petitioner was competent to stand to trial from the impressions he gleaned during their consultations. App.pp.4-5. In presenting Petitioner's mitigation, counsel described Petitioner as intelligent. App.p.24. The Plea Judge expressed a similar sentiment in stating, "[w]hen you talk--- When you talk now, you're very intelligent." App.p.24, ln.1-2.

Immediately prior to the imposition of the sentence, a colloquy ensued on the potential sentencing exposure for additional armed robbery charges that were abandoned pursuant to negotiations. App.p.28, ln.17—p.29, ln. 17.

(b) PCR Hearing

Petitioner testified on his behalf at the PCR hearing. He stated that counsel incorrectly told him that he would receive a ten (10) year sentence if he pled guilty. Petitioner stated he hired counsel to negotiate a plea on the three warrants he faced for armed robbery, criminal conspiracy, and kidnapping. Petitioner stated he had two meetings with counsel where they reviewed the evidence and discussed his version of the facts. Petitioner stated counsel told him that he was exposed to a ninety (90) year sentence. Petitioner stated, however, that counsel said he was working out a deal for a ten (10) year offer. Petitioner stated he believed he was pleading guilty in exchange for ten (10) years. App.pp.88. However, Petitioner stated that he desired an appeal because he "felt that [he] was sentenced too harsh." App.p.88, ln. 21-23.

Counsel testified to his course of conduct during the representation in chronological fashion. Counsel stated that he obtained discovery materials, reviewed State's evidence with Petitioner, and discussed the potential punishments and exposure to incarceration. App.p.65. Counsel stated Petitioner admitted his guilt from the beginning of the case; Petitioner's posture

did not change. App.p.66. Counsel summarized his efforts in negotiating a favorable plea. He stated, at first, negotiations stalled when the original Assistant Solicitor prosecuting the cases insisted upon prosecuting Petitioner for the full gamut of offenses that he committed during the K-Mart robbery. App.p.66. Counsel noted that his fortunes changed when the new Assistant Solicitor took over Petitioner's cases.

As a result of counsel's communications with the second, and ultimate, Assistant Solicitor, the State offered to plead Petitioner to just one count of armed robbery, without recommendation, in exchange for the dismissal of all the other charges. The offer included a provision that the State would refrain from opposing a request for the mandatory minimum sentence of ten (10) years. App.p.67. Counsel stated that he conveyed the offer to Petitioner who in turn accepted it. Counsel stated, that the plea hearing, was convened nearly six weeks after he conveyed the offer to Petitioner. Counsel stated, that at the plea hearing, Petitioner neither waived on his decision nor did he express confusion on any matter. App.p.69. Counsel stated that he learned Petitioner was disappointed that the Plea Judge decided to sentence him above the mandatory minimum. App.pp.69-70. Counsel was adamant that he did not promise or mislead Petitioner into believing that he would receive a guaranteed ten (10) year sentence. App.pp.69-70.

Upon cross-examination, counsel testified that he discussed the prospect of waiving Petitioner to Family Court for adjudication with the Assistant Solicitor. App.p.72. He stated that he informed Petitioner on this matter. App.p.73. Counsel stated his reasoning for submitting Petitioner for a mental evaluation.

In denying and dismissing this all too common 'swearing match' allegation of ineffective assistance of counsel, the PCR Judge found counsel's testimony credible and Applicant's claim

suspect. The PCR Judge referenced the guilty plea transcript to corroborate his credibility findings. App.pp.209-11.

I.

Affirmance is warranted where ample probative evidence supports the PCR Judge's finding that Petitioner failed to meet his burden to prove his guilty plea was rendered involuntary because counsel incorrectly advised him that he would receive the mandatory minimum 10 (ten) year sentence for armed robbery if he pled guilty as indicted.

Petitioner first argues the PCR Judge committed reversible error in rejecting Petitioner's claim that counsel incorrectly advised him that he was going to receive a guaranteed ten year sentence if he pled guilty. Petitioner makes several disjointed assertions that: (1) counsel's testimony that he discussed the terms, conditions, and consequences of the plea offer was inconsequential because an evaluation report purportedly evidenced Petitioner's confusion on the matter;¹ (2) the Plea Judge misled Petitioner by miscalculating the sentencing exposure on all of the additional charges that the State dismissed as part of the plea agreement at the end of sentencing phase of the plea hearing; and, (3) the Assistant Solicitor's statement that the State did oppose the imposition of a mandatory minimum ten (10) year sentence misled further misled Petitioner and exacerbated counsel's incorrect advice. Brief of Petitioner, pp.9-10; p.7; p.12.

Effective Assistance of Counsel

The two-part test adopted in Strickland also "applies to challenges to guilty pleas based on ineffective assistance of counsel." Hill v. Lockhart, 474 U.S. 52, 58 (1985). "Plea counsel is ineffective within the meaning of the Sixth Amendment only when the applicant satisfies both requirements." Stalk v. State, 383 S.C. 559, 561, 681 S.E.2d 592, 593 (2009). A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a

¹ Petitioner argues, "[i]t is obvious that [c]ounsel did not read the report since it contained obvious errors as to Petitioner's understanding of his crimes and penalties." Brief of Petitioner, p.9.

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." Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

"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." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) (internal citation omitted). "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Id. (internal citation omitted).

Discussion

The PCR Judge correctly denied Petitioner's PCR Application where Petitioner's hope for a sentence to the mandatory minimum of ten (10) years for armed robbery compared to his expectation on the matter is a distinction with a difference that compels affirmance.

A.

Petitioner abandoned his burden to produce any credible evidence to establish that Petitioner suffered psychological deficits that affected his ability to communicate and appreciate

attorney client discussions. Petitioner failed to meet his burden of production, let alone proof.

Due process prohibits the conviction of a person who is mentally incompetent. Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 595 (1992) (citing Bishop v. United States, 350 U.S. 961 (1956)). “The accused must have sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him.” Id. (citing Carnes v. State, 275 S.C. 353, 271 S.E.2d 121 (1980)).

Petitioner did not present competent evidence that showed that he suffered from any cognitive deficits that would have inhibited his ability to understand the case and communicate with counsel. Petitioner asserts that Dr. Cross’s competency finding that “[Petitioner] named his three charges and estimated a possible fifteen year sentence if given a maximum conviction” shows Petitioner held the erroneous belief that he was exposed to a maximum fifteen year prison sentence. App.p.116. Whether Dr. Cross meant Petitioner estimated he would get a concurrent fifteen year sentence when exposed to substantially more time upon conviction or if he meant Petitioner was under the erroneous impression that he was only exposed to a maximum fifteen year sentence upon conviction is unknown. Petitioner’s failure to call Dr. Cross to testify bars him from such speculation now. See Lorenzen v. State, 376 S.C. 521, 530, 657 S.E.2d 771, 777 (2008) (citing Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005)) (“A PCR applicant cannot show that he was prejudiced by counsel’s failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence”).

Petitioner conveniently neglected to present and question counsel on the actual psychological evaluation report.² Dr. Cross evaluated Petitioner six months prior to the plea

² Upon Petitioner’s cross-examination question, “Okay, [d]idn’t it in fact state that he, [Petitioner], your client, he named his three charges and he estimated a possible 15-year sentence as a maximum conviction?...counsel

offer being conveyed and discussed with Petitioner. Counsel gave undisputed testimony that he successfully engaged Petitioner in direct and open communication during the representation. App.p.68. Furthermore, Petitioner ensured the Plea Judge that he fully understood his discussions with counsel. App.p.11, ln. 16-18. Petitioner ensured the Plea Judge that he was of sound mind. App.p.7, ln. 4-7. Petitioner made these assurances in light of the Plea Judge's instruction to either speak up or confer with counsel if he became confused. App.p.6, ln. 4-13.

B.

The PCR Judge correctly found Petitioner failed to meet his burden to exempt Petitioner from the presumption of verity in his representations and assurances to Plea Judge material to the Petitioner's PCR testimony that he was under the false belief that counsel negotiated a guaranteed ten (10) year sentence.

Petitioner's testimony that he lied to the Plea Judge on his understanding of the terms of his plea because "I was 17 at the time and I was going with what my counsel said, what he told me to say" undercuts the credibility of the PCR allegation itself. App.p.84, ln. 19-25. "A statement that questions are "routine" is not an invitation to answer them untruthfully, nor does it constitute a reason to believe the questions and statements of the judge during a guilty plea proceeding mean nothing." Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997). "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." Blackledge v. Allison, 431 U.S. 63 (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); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

responded "I will let the document speak for itself." App.p.74, ln. 3-6.

Even the most cursory inspection of the record reveals ample probative evidence in support of the PCR Judge's finding here. App.pp.9-10; p.37; pp.67-69; p.75. p.120; pp.180-82. First, Petitioner ensured the Plea Judge that he fully understood that he was pleading guilty, straight-up, to armed robbery which afforded the Plea Judge full discretion to impose a prison sentence between ten (10) and thirty (30) years. App.pp.9-10. Second, correspondence between counsel and the second Assistant Solicitor in conjunction to their representations at the plea hearing consistently accounted for the plain terms of the plea agreement. App.pp.180-82; p.9. Third, Petitioner signed the plea sheet that denoted the plea as "as indicted" and "without negotiations or recommendations." See James v. State, 377 S.C. 81, 85, 659 S.E.2d 148, 150 (2008) (reversing grant of PCR as to applicant's guilty plea where plea sheet and applicant's conduct at plea hearing expressed applicant's desire to plead guilty). Fourth, and most telling, Petitioner had over a month to deliberate on the matter before the plea hearing.

Moreover, counsel's PCR testimony concerning the terms of the plea agreement was corroborated by the plea transcript. See Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997) (citing Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994) (where transcript of guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, grant of PCR was inappropriate notwithstanding applicant's claim lawyer misadvised him). Alternatively, the corroboration also constituted probative evidence to support the PCR Judge's finding that counsel's testimony was credible on the matter. See Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) ("The PCR court's findings on matters of credibility are given great deference by this Court."). Simply, the expectation of a certain sentence compared to the hope of a favorable sentence constitutes a distinction with a difference. See Wolfe, 326 S.C. at 165, 485 S.E.2d at 371 ("Wishful thinking regarding sentencing does not equal a misapprehension

concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made.”).

Whether the Assistant Solicitor’s statement that the State did oppose the imposition of a mandatory minimum ten (10) year sentence constituted a State ‘recommendation’ or not is a non sequitur because the Plea Judge gave Petitioner a windfall when he interpreted it to be a joint recommendation. App.p.10, ln.9-10. Importantly, and for reasons noted above, the Plea Judge’s colloquy with Petitioner on the matter cured any prospect of post-hoc PCR prejudice. See Holden, 393 S.C. at 575, 713 S.E.2d at 616 (citing Moorehead v. State, 329 S.C. 329, 333, 496 S.E.2d 415, 417 (1998) (reversing grant of PCR on the ground that there was no evidence to support the PCR judge's finding that applicant received ineffective assistance of counsel due to erroneous sentencing advice where “any misconception was cured at the plea hearing”)); Roddy, 339 S.C. at 35, 528 S.E.2d at 422 (2000) (citing Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996) (holding that where Respondent testified he knew judge was not required to accept recommendation, Respondent could not complain that his guilty pleas were not knowingly and voluntarily made)).

C.

Whether the Plea Judge miscalculated the total sentencing exposure Petitioner faced had the State prosecuted the full gamut of charges that stemmed from the K-Mart robbery is a similar non sequitur. See Pittman, 337 S.C. at 600, 524 S.E.2d at 625.

Counsel’s credible testimony that he engaged in lengthy plea negotiations, had extensive discussions on the matter with Petitioner, and had conveyed the offer to Petitioner nearly six weeks prior to the plea hearing all corroborated the PCR Judge’s finding that he accurately apprised Petitioner on the terms of the plea offer. Thus, any potential prejudice from the Plea

Judge's comment was cured by counsel's competent representation. Regardless, the Plea Judge's incorrect comment was irrelevant where the court had already accepted Petitioner's voluntary plea after an extensive colloquy. App.p.8, ln. 3-8; p.10, ln.9-13. Presuming counsel took the extraordinary measure of moving to withdraw Petitioner's plea based on the Plea Judge's comments at issue, the matter would have been entirely discretionary because it was moot at that stage of the plea hearing. This Court in State v. Riddle held:

The withdrawal of a guilty plea is generally within the sound discretion of the trial judge. State v. Neal. In this case the trial judge determined the plea was knowingly and voluntarily entered. The trial judge informed appellant of the maximum sentence he could receive. Appellant stated he had not been promised anything in return for his plea. He also stated he knew the judge did not have to accept the State's sentence recommendation or the State's recommendation concerning his probation revocation. Such a determination of voluntariness will normally show the trial judge did not abuse his discretion.

State v. Riddle, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982) (internal citation omitted). Last, regardless of Petitioner's 'best practices' concern that the State had not sought indictments on most of the viable charges against Petitioner from the K-Mart robbery, when they were used as leverage in plea negotiations, counsel gave undisputed testimony that Assistant Solicitor had convincing evidence to pursue numerous cases against Petitioner had he chosen to do so. Petitioner's concerns are outside of the purview of a Strickland analysis. "It is the sole constitutional province of the Solicitor's office to dictate the terms of plea offer." Ex parte Harrell v. Attorney Gen. of State, 409 S.C. 60, 69, 760 S.E.2d 808, 812 (2014). Because Strickland does not impose a duty on criminal defense attorneys to invade the constitutional province of the executive branch of government, the allegation is facially without merit.

Thus, Petitioner's various assertions are red herrings that fail to negate the substantial probative evidence that supports the PCR Judge's ruling. Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance

under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel’s performance.

II.

Affirmance is warranted where Petitioner’s argument that counsel’s unique ecclesiastical approach to the practice law constituted ineffective assistance of counsel is facially unsound.

Petitioner argues that counsel’s policy to only negotiate pleas, his contingency that a client confess before taking a case, and his approach to “fair and just” punishment constituted unethical representation.

At the PCR hearing, counsel testified “I work for the Christian Legal Center and we practice law maybe a little bit differently than any attorney in this courtroom.” App.p.68, ln. 11-13. He further stated that “once there’s an admission and the client is aware of what that means, the admission of guilt is trying to attempt to find a fair and just punishment that is fair to the client.” App.p.68, ln.16-19. Counsel’s retainer agreement limited the scope of representation to just a plea. App.p.65.

In denying and dismissing Petitioner’s PCR Application, the PCR Judge noted that counsel’s general policies and procedures were ‘unique’ and heightened the prospect for deficient and ineffective performance as a matter of general impression. App.p.209. Yet, the PCR Judge found Petitioner failed to meet his burden to prove counsel’s performance rendered his plea involuntary in this particular case. App.p.210.

Effective Assistance of Counsel

The breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment right to counsel. Nix v. Whiteside, 475 U.S. 157, 165 (1986). The demand for money by appointed counsel from the client was found unethical but not ineffective in Kohler v.

Kelly, 890 F.Supp. 207, 215-16 (W.D. N.Y. 1994). See Robinson v. LaFleur, 225 F.3d 950, 953 (8th Cir. 2000) (finding that plea offer communicated not overcome by prior disciplinary against attorney for failure to communicate in unspecified circumstances).

Discussion

Petitioner's argument here is facially without merit. "A conclusory unsupported allegation without evidence that a different result is probable is deficient." U.S. v. Popoola, 881 F.2d 811, 813 (9th Cir. 1989). In light of counsel's credible testimony that Petitioner made a full admission of his culpability at the initial consultation in conjunction with the entire record here where Petitioner's guilt was uncontested, Petitioner neglected to produce any testimony or evidence that showed how the manner in which counsel practices law somehow coerced him into the making the admissions. Notably, Petitioner confessed to police prior to retaining counsel. Furthermore, counsel evaluated the State's evidence, reviewed discovery materials with Petitioner, submitted Petitioner for a psychological evaluation to ensure competency, and labored in numerous other ways indicative of constitutionally effective counsel.

Similarly, Petitioner entirely neglected to produce any evidence that showed how the manner in which counsel practiced law inhibited attorney/client communication, and somehow adversely affected Petitioner's intelligent and voluntary decision to plead guilty. Simply, Petitioner fails to connect his challenge to the propriety of counsel's approach to the practice of law in a fashion to implicate his constitutional right to effective representation. See Montejo v. Louisiana, 556 U.S. 778, 790 (2009) (the Constitution does not codify ABA Model Rules). Respondent submits that further discussion on the matter is unnecessary.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly,

Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel’s performance.

III.

Affirmance is warranted where Petitioner’s argument that counsel’s performance was ineffective for failing to transfer jurisdiction of Petitioner’s case to Family Court is structurally unsound and facially without merit.

Petitioner speculatively asserts that the Assistant Solicitor may have shown compassion to Petitioner and remanded his case to be adjudicated in Family Court. Despite counsel’s undisputed testimony that his discussions with the Assistant Solicitor on the matter proved unfruitful, Petitioner still asserts counsel’s performance was deficient because he did not sufficiently document his labor.

Discussion

Petitioner’s argument that counsel’s performance here was deficient for failing to document his conversations with the Assistant Solicitor on the matter is farcical. Counsel provided credible testimony that the State had no interest in transferring jurisdiction of Petitioner’s case to Family Court. Even in the absence of testimony, Strickland demands the Petitioner hold the burden to produce credible evidence to prove he is entitled to relief for ineffective assistance of counsel. Chandler v. U.S., 218 F.3d 1305, 1314 n. 15 (11th Cir. 2000) (en banc) (An ambiguous or silent record cannot disprove the strong and continuous presumption of competence).

Furthermore, Petitioner’s reliance on S.C. Code Ann. § 63-19-1210(3) (2008) is misplaced³ where the statute only governs jurisdiction “over a case involving a child.” Id.

³ S.C. Code Ann. § 63-19-1210(3) (2008) provides that “[w]hen an action is brought in a circuit court which, in the opinion of the judge, falls within the jurisdiction of the family court, he may transfer the action upon his own motion or the motion of any party.” Id.

(emphasis added). Because Petitioner was indicted and pled guilty to a Class A felony⁴ at the age of sixteen, the legislature classifies Petitioner as an adult under S.C. Code Ann. § 63-19-20 (2008), which vests the prosecuting solicitor with exclusive discretion to remand the adjudication of the case to Family Court. For reasons announced above, Strickland does not extend the Sixth Amd. right to constitutionally effective representation to matters that are in the exclusive province of the executive branch of government. Ex parte Harrell, 409 S.C. at 69, 760 S.E.2d at 812 (2014).

Even Petitioner's argument on Strickland's prejudice prong here is facially illogical. The notion that the Assistant Solicitor would entertain transferring Petitioner's case to Family Court is incredible. Petitioner, an admitted gang member,⁵ committed a brazen robbery that traumatized numerous victims and caused them to suffer lasting effects. App.pp.12-16. Therefore, the PCR Judge did not err in denying Petitioner's claim of ineffective assistance of counsel here where the claim is incapable of supporting a grant of relief.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

IV.

⁴ S.C. Code Ann. § 16-1-20 (1995).

⁵ Dr. Ross noted in her evaluation report that Petitioner was a member of the "Folks" gang who "estimated intellectual functioning appeared to be in a high average range." App.p.117. (emphasis added). Respondent submits that while Dr. Ross' evaluation report, Plaintiff's Exhibit D, App.pp.116-18, lack substantial evidentiary value where it was submitted into evidence absent proper authentication or competent testimony, it is of note in showing that the PCR action itself lacks credibility. See Smith v. State, 369 S.C. 135, 138-39, 631 S.E.2d 260, 261-62 (2006) (An "averment in a PCR application" is insufficient to warrant relief. An applicant seeking relief must present probative evidence to support PCR allegation that a defense attorney's purported deficient performance entitles him to relief").

The PCR Judge properly declined to apply cumulative prejudice analysis in denying and dismissing Petitioner’s PCR Application. Notwithstanding the PCR Judge’s apt decision to remain within this Court’s jurisprudence, the justifiably maligned cumulative prejudice analysis is entirely inappropriate in the PCR forum for numerous compelling reasons illustrated by its illogical application in the present case.

In denying Petitioner’s application for post-conviction relief, the PCR judge found that the “[he] is bound to apply the law as defined, or not defined, [he] cannot find the cumulative effect of [counsel]’s representation has prejudiced [Petitioner].” App.p.209. Petitioner asserts the PCR Judge erred to embrace a cumulative prejudice analysis predicated upon an incorrect interpretation of Strickland coupled with wishful thinking from academics.

Adjudication in PCR

“Unless a defendant makes both showings [i.e., both deficient performance and prejudice] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable” See Strickland, 466 U.S. at 687.

A number of other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative effect analysis is inappropriate and that the appropriate analysis focuses upon each individual allegation of ineffective assistance. See Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998); Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996); Jones v. Sotts, 59 F.3d 143, 147 (10th Cir. 1995). As the Fourth Circuit Court of Appeals explained in Fisher v. Angelone:

Fisher argues that the cumulative effect of his trial counsel’s individual actions deprived him of a fair trial. We disagree. Having just determined that none of counsel’s actions could be considered constitutional error, see Lockhart v. Fretwell, 506 U.S. 364, 369 n. 2 (1993) (“[U]nder Strickland v. Washington, 466 U.S. 668 674 (1984), an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance and (2) prejudice, it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial. Not surprisingly, it has long been the practice of the Fourth Circuit individually to

assess claims under Strickland v. Washington.” See, e.g., Hoots v. Allsbrook, 785 F.2d 1214, 1219 (4th Cir. 1986) (considering ineffective assistance claims individually rather than considering their cumulative impact). In fact, in Arnold v. Evatt, 113 F.3d 1352 (4th Cir 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 715 (1998), the Fourth Circuit recently rejected a similar request to review the alleged errors of a trial court cumulatively rather than individually. See Id. at 1364 (“Based on the findings of this court concerning the individual claims of error, we reject this claim.”).

To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now. In so holding, we are in agreement with the majority of our sister circuits that have considered the issue.

Id. (footnote omitted). See also Meuller v. Angelone, 181 F.3d 557, 586n.22 (4th Cir. 1999) (“Petitioner also urges us to consider the cumulative effect of his ineffective assistance of counsel claims rather than whether each claim, considered alone, establishes a constitutional violation. This argument is squarely foreclosed by our recent decision in Fisher, 163 F.3d [...at] 852-53 [...]”). Therefore, the Federal bench has correctly decided that prejudice must be considered on an individual, not a collective basis. Fisher, 163 F.3d at 852.

In Green v. State, 351 S.C. 184, 196-97, 569 S.E.2d 318, 324-25 (2002), the Court expressly declined to address whether a PCR applicant is entitled to relief based upon the supposed cumulative effect of trial counsel’s alleged errors. See also Simpson v. State, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (recognizing that “[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina” and holding that “[b]ecause the PCR court found that only one of Simpson’s allegations had merit, there was no need to conduct a cumulative-error analysis”). Such an analysis is not constitutionally required.

Discussion

The State submits, for reasons noted above, that Petitioner failed to meet his burden to

prove Strickland's deficiency prong on each allegation of ineffective assistance of counsel. Before an alleged error may be considered as a factor contributing to cumulative prejudice, a court first must find that the alleged error is, in fact, constitutional error. To hold otherwise is to conclude that even non-deficient performance might result in reversal of a conviction. Such a conclusion is manifestly contrary to the analysis set forth in Strickland. See Strickland, 466 U.S. at 687. Ultimately, zero (plus) zero (plus) zero equals zero.

Regardless, the PCR judge correctly declined to apply a cumulative prejudice analysis here. Predicated upon academic musings,⁶ Petitioner myopically urges this Court to now employ a cumulative prejudice analysis to ineffectiveness claims, such as employed in Brady cases. See Kyles v. Wheatly, 514 U.S. 419 (1985). Despite Petitioner's abandonment of any analysis on the proper mode of aggregating counsel's purported errors, the present case illustrates the fatal flaws of a cumulative prejudice framework where counsel's purported deficient performance in one matter would reasonably cure his purported deficient performance on an unrelated matter. For example, Petitioner argues counsel's unique faith based limited approach constituted prejudice under Strickland's second prong. Brief of Petitioner, pp.12-13. Yet, counsel's unique approach to the practice of law would reasonably enhance his ability to ensure effective attorney/client communications to the level of priest/parishioner. One does not have wear the collar or be adorned in the cloth to reasonably conclude that counsel's faith based approach consequently enhanced his ability to communicate with Petitioner outside of the temporal confines of the ABA standards. Thus, counsel's purported deficient faith based approach to practice would

⁶ It is troubling that the impetus of Petitioner's argument relies upon the academic, John Blume, who has called into question this Courts moral compass. See Twenty-Five Years of Death: A Report of the Cornell Dealt Penalty Project on the "Modern" Era of Capital Punishment in South Carolina, 54 S.C. L. Rev. 285, 318, n.48 (2002) (emphasis added) ("The direct appeal affirmance rate in capital cases in South Carolina rose after Attorney General Charles Condon was elected, due in part to his making death penalty appeals a political issue. Part of Condon's campaign involved criticizing the South Carolina Supreme Court for its record in capital cases").

presumably cure Petitioner's allegation that counsel failed to ensure he understood the terms of the plea agreement. Brief of Petitioner, p. 9.

Although the above example relies on supposition, so would any cumulative error analysis where the aggregation would always devolve into an equity based standard of conjecture, inherently incapable of consistent application or review.

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should affirm the PCR Judge by dismissing the writ of certiorari as improvidently granted.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

July 22nd, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County

The Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No: 2014-000694

RIKAM IKKESH DOZIER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,


RESPONDENT.

CERTIFICATE OF SERVICE

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

Ms. Aimee Zmroczek, Esquire
A.J.Z. Law Firm, LLC.
PO Box 11961
Columbia, SC 29211

This 22nd day of July, 2015.



Ashley Haworth
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

JUL 22 2015

July 22, 2015

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Rikam Ikkesh Dozier v. State of South Carolina
Appellate Case No.: 2014-000694

Dear Ms. Kitchings:

Attached are the original and thirteen (13) copies of the **Brief of Respondent** in the above referenced case for filing in your office.

Sincerely,

J. Walt Whitmire
Assistant Attorney General

JWW/ah
Enclosures

cc: Aimee Zmroczek, Esquire