

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2014-001518

Ronald H. Mack, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

1. Whether Petitioner's case should be remanded for resentencing based on the intervening cases of Miller v. Alabama, 132 S.Ct. 2455 (2012), and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), where Petitioner was a juvenile at the time of the offense and his sentence of fifty years is the functional equivalent of life without parole?
2. Whether the PCR Court erred in finding Petitioner's plea counsel provided effective assistance of counsel where plea counsel failed to advise Petitioner regarding the strength of the State's case, effectively advised Petitioner that he would not receive a fair trial in South Carolina, and failed to correct the Solicitor's misstatement that she could have pursued the death penalty in Petitioner's case?
3. Whether the PCR Court erred in finding Petitioner's guilty plea was knowing, intelligent, and voluntary where Petitioner was not advised that he was constitutionally ineligible for the death penalty after the Solicitor stated at the plea hearing that she considered pursuing the death penalty in Petitioner's case?

STATEMENT OF THE CASE

Petitioner was indicted during the July 2009 term of the Williamsburg County Grand Jury for murder; burglary, first degree; conspiracy; and possession of a weapon during the commission of a violent crime (2009-GS-45-180). Petitioner was represented by Legrand Carraway, Esquire.

On August 24, 2010, Petitioner appeared before the Honorable Clifton Newman, where he pled guilty to murder and burglary, first degree.¹ Judge Newman sentenced Petitioner to fifty years imprisonment for murder and thirty years imprisonment for burglary, first degree. Petitioner did not appeal his guilty plea or sentence.

Petitioner filed an application for post-conviction relief (PCR) on August 5, 2011 (2011-CP-45-0383). (App.pp.34-40). A hearing was held at the Sumter County Courthouse on May 27, 2014. (App.p.46). Petitioner was present and represented by Charles T. Brooks, Esquire. J. Croom Hunter, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable R. Ferrell Cothran, Jr., denied relief in an order filed July 1, 2014. (App.pp.61-67).

SUMMARY OF THE FACTS

Petitioner and the Victim were both highly involved in the Bloods gang. After briefly living in Maryland, Petitioner returned to South Carolina and began distributing drugs in the state on behalf of the gang. Through this, Petitioner became involved with the Victim, Ken Dorsey. Petitioner and the Victim had a falling out over money that the Victim owed Petitioner. On the night of April 4, 2009, Petitioner's mother and her boyfriend, both co-defendants of Petitioner, came to South Carolina from Maryland and drove Petitioner and Antonio McClary, another co-defendant, to the Victim's house. Petitioner broke into the Victim's house at

¹ The remaining charges were *nolle prossed*.

approximately 2:30 a.m. on April 5, 2009, while the Victim slept in a chair. Petitioner then shot the Victim three times with a 9-millimeter handgun. Petitioner's co-defendant, Antonio McClary, then finished off the Victim with a single shotgun blast.

The Victim's mother, who was sleeping in the adjoining room, awoke to a "sound that she thought was firecrackers inside her home" and called the police. A month later, police officers in Maryland arrested Petitioner and his co-defendants. A search warrant was executed on the home where the three were found and the shotgun was recovered, along with ammunition for a 9-millimeter handgun.

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).

ARGUMENT

- I. **Certiorari is unwarranted to review whether the PCR Judge properly denied and dismissed Petitioner's PCR Application where the legality of Petitioner's sentence under Miller v. Alabama, 132 S.Ct. 2455 (2012), and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014) was not raised to the PCR court and is not preserved for review.**

Petitioner asserts that the post-conviction relief judge erred in denying Petitioner's Application for PCR because intervening cases require a judge to apply an "individualized consideration of youth prior to the imposition of a life sentence without parole upon a juvenile offender." Petitioner's PWC, p. 1 (citing Miller v. Alabama, 132 S.Ct. 2455 (2012); and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014)). This argument is not preserved for review.

In his order of dismissal, and pursuant to S.C. Code Ann. §17-27-80 (2003), Judge Cothran fully addressed the only two issues Petitioner claimed in his application: (1) ineffective assistance of counsel, and (2) involuntary guilty plea. Judge Cothran did not mention Miller or any issues relating to Miller because the issue was not raised at the PCR hearing.

State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003) is controlling. In Dunbar, this Court held, "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." Id., at 142, 587 S.E.2d at 693-94. As the PCR Judge did not specifically rule upon the present issue, it is not preserved for review by this Court. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d. 543, 546 (2000); Plyler v. State, 309 S.C. 408, 409, 424 S.E.2d 477, 478 (1992).

Petitioner mentions in a footnote that "[t]he sentencing issue was not raised in the PCR application or at the evidentiary hearing on May 27, 2014, because Byars was not filed until November 12, 2014." Petitioner's PWC, p.5, no.3. Petitioner then asks "in the interest of judicial economy" that this Court address the issue. Id. Petitioner admits that this petition is not the correct avenue by which this issue should be addressed and has complied with the correct avenue by filing a Motion for Resentencing in Clarendon County. Id. In light of this concession by Petitioner, Respondent submits that this issue is not properly before this Court.

II. The PCR court's finding that Petitioner's plea counsel provided effective assistance regarding Petitioner's chances at trial, as well as regarding the Solicitor's statements, is supported by probative evidence, where Counsel's conduct was reasonable within the professional norms. Further, in addition to not being preserved for appeal, any comments made by the Solicitor about the death penalty were corrected by the Judge.

Petitioner also asserts that the PCR court erred in finding Counsel's performance was not deficient because Counsel "effectively advised Mack that he would not receive a fair trial in

South Carolina, failed to advise Mack regarding the infirmities in the State's case against him, and failed to correct the Solicitor's misstatement that she could have pursued the death penalty." Petitioner's PWC, p.19. Respondent submits that only half of Petitioner's claim regarding ineffective assistance of counsel is preserved for appeal and submits that any and all claims regarding the Solicitor's comments about the death penalty are not preserved for review. In addressing the issues that are preserved for appeal, Respondent submits that Counsel provided effective assistance and performed to a standard within the reasonable norms of the profession. Counsel adequately assessed Petitioner's chances regarding both a trial and a guilty plea. In advising Petitioner, Counsel considered the evidence in favor of Petitioner and the overwhelming evidence against Petitioner

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of plea counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process" that the plea proceedings "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes plea counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland,

466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove plea counsel's performance was deficient. Id. Under this prong, the Court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, plea counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the applicant must show 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, 59 (1985).

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. at 115, 386 S.E.2d at 624)).

A. Probative evidence exists to support the PCR Court's finding that Petitioner received effective assistance of counsel.

At the evidentiary hearing, Petitioner admitted he pled guilty because he was, in fact, guilty. (App.p.54). Petitioner acknowledged he told the plea judge he was entering his plea freely and voluntarily. (App.p.52-53). The plea judge asked Petitioner multiple times if he was sure he wanted to plead guilty, and each time Petitioner answered he was sure. (App.pp.3-8). Furthermore, Petitioner admitted that he was advised by the plea judge that he waived the opportunity to raise any defenses by pleading guilty. (App.pp.51). At the plea, Petitioner stated

that he murdered the victim Ken Dorsey. (App.p.8). Petitioner reaffirmed this statement at the PCR hearing by admitting that he was “guilty of murder and the other various crimes.” (App.pp.54).

Plea counsel testified he obtained discovery from the State and went over the materials with Petitioner. (App.p.57). Counsel testified that the decision was made to plea because Petitioner never denied his guilt. (App.p.56). Petitioner also gave a statement to the police confessing to the crime. (App.pp.58). Counsel testified that although he did not go over any defenses with Petitioner, “[Petitioner] didn’t try to make any excuses for [the murder].” (App.p.58). Counsel testified he went over Petitioner’s rights prior to his plea and had no concerns that he understood what he was doing. (App.pp.58-59).

The record contains significant probative evidence Petitioner fully understood the risks and benefits of proceeding to trial. These risks included the overwhelming evidence against Petitioner, including his own confession. These risks and benefits factored into his calculated decision to enter a guilty plea and waive any right to challenge the evidence against him. Accordingly, the post-conviction relief judge did not err in finding plea counsel was not ineffective.

B. Petitioner’s claim regarding Counsel’s handling of the solicitor’s comments is not preserved for appeal.

Petitioner asserts that Counsel was also ineffective for failing to correct the Solicitor’s statements “that she could have sought the death penalty in Mack’s case.” (Petitioner’s PWC p. 23). This argument is not preserved for appeal. Petitioner did raise the issue of ineffective assistance of counsel in his application; however, Petitioner raised the issue only in regards to Counsel’s comments regarding Petitioner’s chances at trial. At the evidentiary hearing, Petitioner’s PCR Counsel asked Petitioner if he had any more complaints he wanted to tell the

judge, noting “[t]his is your day to talk about it.” (App.p.58). Petitioner responded “no, sir, not really.” (App.p.58). Respondent therefore submits that this argument is not preserved for appeal. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003) is again controlling. As the issue was not raised to the PCR Judge, he could not specifically rule upon it, and it is not preserved for review by this Court. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d. 543, 546 (2000); Plyler v. State, 309 S.C. 408, 409, 424 S.E.2d 477, 478 (1992).

Should the court find that the issue is preserved for appeal, Respondent submits, *arguendo*, that any misstatement made by the solicitor was corrected by the judge during the plea hearing. Petitioner asserts that the solicitor claimed “she could have sought the death penalty in Mack’s case.” (App.p.23). In outlining the charges to Petitioner, the judge clearly stated that the each charge carried “a maximum sentence of life imprisonment.” (App.p.4). The solicitor made the comment in question after the Petitioner stated his intent to plead guilty and after the judge accepted the plea. (App.p.25). Thus, when Petitioner pled guilty he did so knowing that the death penalty was not an option. Further, the solicitor merely stated that the case was “worthy of a conversation about a death penalty case.” (App.p.25). She did not state that she could have sought such a penalty. Accordingly, Respondent submits that this argument is not preserved for appeal and alternatively that any misstatements made by the Solicitor were cured by the judge’s instructions to Petitioner.

III. Certiorari is unwarranted to review whether Petitioner’s guilty plea was knowing, intelligent, and voluntary, where Petitioner’s argument that he was not advised he was constitutionally ineligible for the death penalty is not preserved for appellate review.

Finally, Petitioner asserts the PCR Court erred in finding Petitioner’s guilty plea was involuntarily made because “the solicitor stated on the record that she considered pursuing the death penalty in Mack’s case and would have done so but for protest from the victim’s mother.”

(Petitioner's PWC, p.23). This argument is not preserved for review.

Pursuant to S.C. Code Ann. §17-27-80 (2003), the PCR Judge fully addressed the only similar allegation raised by Petitioner in his "Allegations" section as follows:

This Court finds Applicant has failed to demonstrate that his guilty plea was entered involuntarily. Applicant testified that he recalled the plea judge going over his rights with him prior to his guilty plea. Applicant further testified that no one promised or threatened him in order to make him plead guilty. Applicant testified he was satisfied with Counsel's services. Applicant testified he was, in fact, guilty of the crimes to which he pled guilty.

App.p.23. This finding, while made in relation to a claim of an involuntary guilty plea, was not made in relation to a claim regarding a guilty plea made solely because Petitioner thought that he could receive the death penalty. The finding was made in relation to the vague phrase that Petitioner was "[c]oerced into pleading guilty." (App.p.62). Petitioner did not claim that this "coercion" came as a result of the belief that he would get the death penalty. Therefore, the death penalty argument was not raised and is not preserved for review. See State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003); Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d. 543, 546 (2000); Plyler v. State, 309 S.C. 408, 409, 424 S.E.2d 477, 478 (1992).

Nevertheless, should the Court find that the issue is preserved for appeal, Respondent again submits, *arguendo*, that Petitioner pled guilty knowing that the maximum punishment possible was life imprisonment. The record shows that nearly immediately after the plea hearing began, and well before the solicitor mentioned the death penalty, the judge informed Petitioner that the maximum penalty possible for either charge is life imprisonment. The phrase "death penalty" does not appear in Petitioner's PCR application, the PCR hearing, or the Judge's Order of Dismissal. In fact, in the entire Appendix, which does not include Petitioner's PWC, the phrase only appears twice. (App.p.25). These two instances, spoken in the same breath, occur

when the Solicitor speaks to the judge after Petitioner has pled guilty and after the judge has accepted the plea.

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

August 20, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

RONALD H. MACK,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

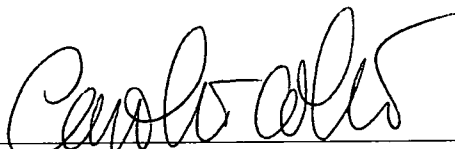
RESPONDENT.

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:

Laura R. Baer, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 20th day of August, 2015



CAROLINE COLLINS
LEGAL ASSISTANT



RECEIVED

AUG 20 2015

S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

August 20, 2015

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

Re: Ronald H. Mack v. State of South Carolina
Appellate Case No. 2014-001518
Lower Court Case No. 2011-CP-45-0383

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

J. Croom Hunter
Assistant Attorney General
SC Bar No. 101253

JCH/cc
Enclosures

cc: Appellate Defender Laura R. Baer (2 copies)