

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS
Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

Opinion No. 2016-UP-011 (S.C. Ct. filed January 13, 2016)

JAMES C. HELMS,

Respondent,

vs.

THE STATE,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON APPEAL

I.

Did the Court of Appeals err in affirming the lower court where there was no probative evidence to support the finding that counsel was ineffective for misadvising Respondent about the exact sentence and actual confinement in the Department of Corrections he would receive and serve if he pled guilty?

STATEMENT OF THE CASE

Respondent was indicted at the February 2010, term of the Lexington County Grand Jury for possession of pseudoephedrine, 100-200 grams (2010-GS-32-0465), possession with intent to distribute marijuana (2010-GS-32-0464), and manufacturing methamphetamine (2010-GS-32-0463). (App.pp.144-58). Respondent was represented by Gene Stockholm, Esq. (App.p.1). On June 21, 2010, the Respondent pled guilty to the lesser-included offense of possession of pseudoephedrine, 28-100 grams, and to the remaining two (2) charges as indicted. (App.pp.1-43). The Honorable R. Knox McMahon sentenced Respondent to a term of seven (7) years imprisonment for possession of pseudoephedrine, a term of seven (7) years imprisonment for manufacturing methamphetamine, and to a term of five (5) years imprisonment for possession with intent to distribute (PWID) marijuana. The sentences were to be served concurrently. (App.p.43). Respondent did not appeal his conviction or sentence.

Respondent filed an application for post-conviction relief on April 5, 2011 (2011-CP-32-1356). (App.pp.45-52). The State made its Return to the application on September 8, 2011. (App.pp.53-8). An evidentiary hearing into the matter was convened on January 31, 2012, at the Lexington County Courthouse. (App.pp.59-86). Respondent was present at the hearing and was represented by Benjamin A. Stitley, Esq. The State was represented by Kaelon E. May, Esq., of the Office of the Attorney General. At the hearing, the Respondent testified on his own behalf. (App.pp.63-70). Additionally, the Respondent offered the testimonies of Kim Sandy, Ronnie Sandy, Rusty Murphy, and Tina Finley. (App.pp.70-1). The State offered the testimony of Gene Stockholm, Esq. (counsel). (App.pp.72-82).

The Honorable Eugene C. Griffith, Jr. granted post-conviction relief to Respondent by Order dated February 8, 2012 and filed February 9, 2012. (App.pp.88-93). Petitioner filed a

timely Motion for Rehearing and/or Motion to Alter or Amend Judgment Pursuant to Rule 59(a)(e), SCRCF. (App.pp.94-102). In conjunction with its Motion, Petitioner submitted a Proposed Order of Dismissal. (App.pp.104-19). The Proposed Order of Dismissal was signed by Judge Griffith on March 2, 2012. (App.p.136). Subsequently, Judge Griffith issued an Order Vacating Dismissal because the Proposed Order of Dismissal was improvidently signed by the Court on March 2, 2012. (App.p.139). The Order Vacating Dismissal directed the February 8, 2012 Order Granting Respondent's post-conviction relief remain the final order of the Court. (App.p.139). On March 13, 2012, Judge Griffith issued a Form 4 Order denying Respondent's motion for rehearing and/or motion to alter or amend judgment pursuant to Rule 59(a)(e), SCRCF. (App.p.140).

Petitioner filed a timely Notice of Appeal, followed by a petition for writ of certiorari. Respondent filed a return petition for writ of certiorari. The case was subsequently transferred to the South Carolina Court of Appeals. The Court of Appeals granted the petition for writ of certiorari by order filed June 11, 2014. Following oral argument, the court of appeals affirmed the PCR judge's order granting post-conviction relief. James Clayton Helms v. State, Op. No. 2016-UP-011 (filed January 13, 2016). Petitioner filed a timely Petition for Rehearing, which the Court of Appeals denied by order filed February 22, 2016.

STATEMENT OF FACTS

Relevant Facts and Testimony from the Guilty Plea Hearing

The State called its case for trial on June 21, 2010 before Judge McMahon. Subsequent to the jury's empanelment, the State requested a brief recess to negotiate a plea agreement with Respondent. (App.p.21). A guilty plea hearing followed. (App.pp.21-43). The solicitor summarized the facts of Respondent's guilt as follows. As a result of a tip that Respondent was distributing methamphetamine, the police investigated his residence. Upon arrival, the police detected a pungent odor distinct to the production of methamphetamine. Respondent was detained and subsequently arrested upon the discovery of marijuana in his possession. The police obtained a search warrant for Respondent's residence and discovered an active methamphetamine lab in the process of making anhydrous ammonia, a critical ingredient in methamphetamine. Other necessary products used in the manufacture process were discovered in bulk. Over two-hundred tablets of pseudoephedrine were recovered from the residence. The weight of the pseudoephedrine recovered was one hundred and sixty-five grams. Respondent's two co-defendants, Threatt and Lloyd, were also arrested. The co-defendants previously pled guilty and had made inculpatory statements against Respondent. (App.pp.34-8).

Respondent entered guilty pleas as indicted on the PWID marijuana and manufacturing charges and to the lesser-included offense of possession of pseudoephedrine, 28 - 100 grams, which carried a penalty of a minimum seven (7) year prison term to a maximum penalty twenty-five (25) year prison term. He additionally faced a term of up to five (5) years imprisonment for PWID marijuana and a term of up to fifteen (15) years imprisonment for manufacturing methamphetamine. (App.p.27).

The pleas were entered absent a recommended or negotiated term of imprisonment from the State. (App.p.29). The agreement was memorialized at the hearing as follows.

[Solicitor]: Your Honor, we are **reducing the pseudoephedrine charge** to the lesser included as you just indicated. There are also **two other charges that we are not going forward** with on this case, a disposal of methamphetamine product and a possession of Oxycodone.

[The Court]: All right, [counsel], has the solicitor correctly and completely stated the negotiations into the record.

[Counsel]: Yes, Your Honor.

[The Court]: [Respondent], **has the solicitor fully and completely stated what you understand the negotiations to be?**

[Respondent]: Yes Sir.

[The Court]: **Is there anything more in your mind?**

[Respondent]: No Sir.

(App.p.30, ln.5-10; p.30, ln.20—p.31, ln.5) (emphasis added). Counsel pleaded for Judge McMahon to consider the mandatory minimum sentence for possession of pseudoephedrine, 28 - 100 grams, during his mitigation case. (App.pp.39-40). Judge McMahon accepted Respondent's pleas and commented "I find there is a substantial factual basis for these guilty pleas, that [Respondent's] decision to enter guilty pleas in these matters is freely, voluntarily, knowingly, and intelligently made. He has had the advice and counsel of a very competent attorney with whom he says he is well and totally satisfied." (App.p.38, ln.13-20). (App.p.41, ln. 14-16).

Relevant Testimony from the PCR Hearing

Respondent proceeded on an allegation of ineffective assistance of counsel that his guilty plea was rendered involuntary as a result of counsel's misadvice that he would only serve eighteen months of active incarceration before becoming parole eligible. (App.p.62). He testified that the realization of a mandatory twenty-five (25) year prison sentence upon conviction resulted in his desire to enter a favorable plea agreement. (App.p.65). Respondent's epiphany

occurred after he exercised his right to a trial, the State called its case, and a jury had been empaneled. He stated he accepted the plea agreement because he presumed he would receive the mandatory minimum seven (7) year prison sentence for the lesser-included offense of possession of pseudoephedrine, 28 – 100, because “solicitor would be on board” with imposition of the sentence. Based on this underlying presumption, he further stated that counsel advised him that “I’d get the seven, but I’d only do like three, three and a half and I’d be out a year and half on parole.” (App.p.66, ln. 8-9). He noted that certain family and friends were present during his discussion with counsel on the matter. (App.p.67). He attributed counsel’s alleged misadvice on parole eligibility as the ‘but for’ reason he pled guilty. According to Respondent, the State had drastically misrepresented the amount of pseudoephedrine in its case. He claimed that in actuality he only possessed twenty-four (24) grams of Sudafed. (App.p.68).

Kim Sandy testified at the PCR hearing that she was present for counsel’s discussion with Respondent regarding the plea agreement. She stated that she had a prolonged friendship with Respondent. (App.pp.70-1). Consistent to Respondent’s testimony, she stated she witnessed counsel advise Respondent that he would get a “seven years and would do about three, three and a half and he would be out in about eighteen months” if he pled guilty (App.p.70, ln.22-23). By stipulation, Respondent offered the same testimony from three other confidants, Ronnie Sandy, Rusty Murphy and Tina Finley, that apparently witnessed counsel’s same advice to Respondent on the sentence he would receive and ultimately serve if he pled guilty. (App.p.71).

Counsel testified to his course of conduct during the representation. He testified to his evaluation of the State’s evidence and opined “[Respondent’s trailer] was a pretty large meth lab... there was oxycodone, marijuana, a lot of pseudoephedrine.” (App.p.74, ln.5; p.74, ln. 12-13). He explained the case turned into a swearing match between Petitioner and his two co-

defendants that rented the trailer in question from him. (App.pp.73-4). He testified that Respondent was an uncooperative client. Despite counsel's requests, Respondent did not communicate directly with him or provide beneficial information or witnesses to aid his defense. As a result, counsel was wary about the viability of the defense's case at trial. (App.pp.77-8).

Counsel testified to the circumstances that surrounded the plea agreement reached at trial. The solicitor entertained plea negotiations after Judge McMahon expressed his concerns about the non-discretionary penalty scheme of the possession of pseudoephedrine, 100 - 200 grams. (App.p.78). Thus, the solicitor offered to plead Applicant to the lesser-included offense of pseudoephedrine, 28 - 100 grams, and to not object to counsel's request for concurrent service on the other offenses. (App.p.79). Counsel was adamant that he never promised Respondent a specific sentence and term of actual service in the Department of Corrections. He elaborated, **"other than the fact that we were trying to get the minimum** mandatory seven, no. It was -- the sentence range from judge was seven to twenty-five." (App.p.80, ln. 18-20) (emphasis added). Counsel fervently disputed the contention that he promised Respondent that he would serve eighteen (18) months active service in prison. He clarified that he advised Respondent that would be required to serve eighty-five (25) percent of the possession of pseudoephedrine, 28 - 100 grams, offense before he would become eligible for parole. (App.p.80).

Order Granting Relief

The PCR Judge ruled "Respondent's PCR should be granted where he was improperly advised as to the sentence he could and would receive." (App.p.93). The PCR Judge made the finding that, "the Court is firmly convinced that [Respondent] relied on information that if he entered a plea to the charge he would be able to be paroled after a matter of approximately

eighteen months of incarceration.” (App.p.92). The PCR Judge found counsel ineffective solely upon the testimony of Respondent and that of his family and friends.¹ (App.p.92).

¹ Petitioner notes the troubling nature of the PCR Judge’s failure to reconcile his findings of fact from testimony presented by Respondent and his witnesses with counsel’s consistent testimony on the issue before this Court in light of Judge McMahon’s finding that counsel was “a very competent attorney” at the guilty plea hearing. See App.p.38, ln. 18-19.

ARGUMENT

I.

The Court of Appeals erred in affirming the PCR Judge's finding that Respondent met his burden to prove counsel was ineffective for misadvising him on the exact sentence he would receive if he pled guilty absent a compulsory review of the plea colloquy. Further, reversal is necessitated where there is no evidence of probative value to support the grant of relief where the plea Judge cured any founded or unfounded allegation as to counsel's advice on the particular sentence Respondent would receive if he pled guilty.

Petitioner submits the Court of Appeals erred in affirming the PCR judge's finding that counsel was ineffective. The PCR Judge granted relief based upon a finding of fact that counsel misadvised Respondent he would serve eighteen (18) months in the Department of Corrections on a mandatory minimum seven (7) year prison sentence if he pled guilty. However, "firmly convinced" the PCR Judge was that counsel promised a certain prison sentence and early release date, its finding failed to take into account the fact that Respondent pled guilty to all three offenses without negotiations or recommendations for the mandatory minimum on the possession of pseudoephedrine, 28 – 100 grams, along with the two other offenses as indicted. Petitioner contends that the question itself of whether counsel was ineffective for allegedly misadvising Respondent regarding parole eligibility was collateral to the determinative issue before the Court of Appeals.

The PCR Judge erred as a matter of law in granting relief based upon the consideration of limited witness testimony presented at the PCR hearing that was entirely refuted by Judge McMahon's comprehensive plea colloquy with Respondent; in addition Respondent signed sentencing sheets prior to entering the plea that corroborated the plea agreement as memorialized at the hearing. Respondent presented no credible reason on why he should be allowed to depart from the statements and assurances he made to Judge McMahon. There simply exists no

competent, yet alone probative, evidence to support the PCR Judge's finding that Respondent met his burden under Strickland's prejudice prong. The grant of relief in this case relied on a presumption of wishful thinking², all too common in the PCR forum, where an inmate litigant alleges his attorney promised him a certain prison sentence despite a plea judge's contrary instructions on the matter, *as well as his own contrary assertions during the plea*. Therefore, Petitioner submits that even a cursory review of the entire record, dictated by Holden v. State³ and its progeny, unequivocally necessitates reversal.

Standard of Review

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them. However, it will reverse the decision of the PCR court when its decision is not supported by probative evidence of record or it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007). "In determining guilty plea issues, **it is proper to consider the guilty plea transcript** as well as evidence at the PCR hearing." Suber, 640 S.E.2d at 886(emphasis added). The transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367, 370 (1997). Even where counsel fails to advise, or even misadvises, a defendant regarding a critical aspect of his charges, such as the sentencing range, the error is cured where the trial court during a guilty plea properly advises the defendant about the matter in question. Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415

² See Wolfe, 485 S.E.2d, 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.").

³ Holden, 713 S.E.2d 611.

(1998); 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.).

Effective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). “There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687.

A PCR applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). In contrast, parole eligibility has been held to be a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea. Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983). However, if the defendant's attorney undertakes to advise the defendant about parole eligibility and gives erroneous advice, then the plea may be collaterally attacked. Smith v. State, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997).

Discussion

In Holden v. State, the South Carolina Supreme Court reversed a grant of PCR that was entirely based upon an adverse credibility finding concerning Holden's attorney. Holden v. State, 393 S.C. 565, 713 S.E.2d 611, 614 (2011). At the PCR hearing, Holden testified that she pled guilty to forty-six indictments based upon her attorney's promise that she would receive a three and one-half year prison sentence. Id. The Court noted that Holden's claim of prejudice lacked any credible evidentiary basis in light of the thorough colloquy at her plea hearing. Id., 313 S.E.2d at 616. Her allegation of ineffective assistance of counsel was proven outlandish where the plea judge instructed her on the possible penalty that each offense carried in addition to the absence of a sentencing recommendation from the State. Id. The Court also noted that her signature on the sentencing sheets refuted the PCR allegation and stated that "on each of the sentencing sheets there is a 'checked' box indicating that the plea was 'Without Negotiations or Recommendation.'" By signing each of these forms, Holden manifested her desire to plead guilty and acknowledged the lack of a sentence recommendation." Id., Holden, 713 S.E.2d at 616-17. Thus, the Court held Holden's allegation of ineffective assistance of counsel was the product of her wishful thinking as to sentencing. Id., Holden, 713 S.E.2d at 617. The Court affirmed its longstanding jurisprudence that a plea colloquy is a sacred occasion that is all but immune from contrary *post-hoc* representations from the convicted. Id.

The present case before bears numerous strikingly problematic similarities to Holden. Respondent assured Judge McMahon that he understood possession of pseudoephedrine, 28 – 100 grams, carried a non-suspendable penalty of a minimum seven (7) years imprisonment to a maximum twenty-five (25) years imprisonment (App.pp.24-5). Respondent did not dispute or correct this assurance in any way. Subsequent to Judge McMahon's instruction on the sentencing

schemes, Respondent expressed his continued desire to plead guilty. (App.p.29, ln.22—p.30, ln.2). Respondent did not dispute or waiver on his intent in any way. He also expressly stipulated to the solicitor’s recitation of the plea agreement and assured Judge McMahon of its correctness. See State v. Thrift, 312 S.C. 282, 295, 440 S.E.2d 341, 348 (1994)(“We also hold that prospectively for all plea agreements entered after the filing of this opinion, we will limit our review of a plea agreement only to those terms which are fully set forth in the record.”). Respondent assured Judge McMahon he was pleading guilty absent improper inducement or coercion. (App.p.31, ln. 8-18). He did not contest or dispute his assurances here in any way. See Wolfe, 485 S.E.2d at 371(“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.”). Furthermore, Judge McMahon did not leave the matter to conjecture. (App.p.65, ln.25—p.66, ln.14).

[The Court]: Tell me what you are doing in front of me today?
[Respondent]: Ruling out the chance of a mandatory 25 [sic] for a mandatory seven

[The Court]: The **hope of a mandatory seven**?
[Respondent]: **Yes sir.**

(App.p.41, ln. 14-16) (emphasis added). Importantly, Respondent again did not contest or dispute his assurances here in any way.

Further evidence shows that Respondent manifested his intent to plead ‘straight-up’ up to lesser-included offense in return for receiving the benefit of avoiding the indicted offense’s, possession of pseudoephedrine, 100 – 200 grams, mandatory minimum penalty of twenty-five (25) years imprisonment when he signed the sentencing sheet prior to enter his plea. (App.p.20, ln. 14-17). The boxes “lesser-included offense” and “without negotiations or recommendations” were checked on the sentencing sheet for the offense. (App.p.158). See Holden, 713 S.E.2d at

616-17(citing James v. State, 377 S.C. 81, 85, 659 S.E.2d 148, 150 (2008)). Importantly, the nominations on the sentencing sheets were consistent with memorialization of the plea agreement at the plea hearing.

Thus, Respondent's *post-hoc* representation made at the PCR hearing that he entered the plea because counsel promised him that he would get minimum seven (7) year prison sentence for possession of pseudoephedrine, 28 - 100 grams, and obtain early release in eighteen (18) months was highly suspect.⁴ The entire factual basis for the grant of relief was negated by Respondent's representations, assurances, and conduct at the plea hearing where he pled guilty with the certain knowledge that the Judge McMahon had the unbridled discretion to sentence him to the maximum, minimum, or anything in between on each of the three offenses. See Stalk v. State, 375 S.C. 289, 300-01, 652 S.E.2d 402, 407-08 (Ct. App. 2007) aff'd as modified, 383 S.C. 559, 681 S.E.2d 592 (2009)(holding that "[a]ny misconceptions concerning his constitutional rights, the charges, or potential sentences on [the defendant]'s part were cured by the colloquy."). Even assuming counsel told Respondent he would only serve eighteen (18) months, he **must** have known he was facing significantly more time than that on a charge that carried a maximum of twenty-five (25) years. The fact that he **hoped** for less does not change the analysis.

Petitioner contends the presumption of truthfulness in Respondent's statements, assurances, and representations at his plea hearing must be deemed conclusive. Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (U.S.N.C. 1977). In Blackledge, 431 U.S. 63, the Court explained that a defendant's representations at the time of his guilty plea are not "invariably insurmountable" when challenging the findings made by the judge accepting the

⁴ Implicit in Respondent's PCR testimony is the further presumption that he would receive a sentence of less than seven (7) years imprisonment for Manufacturing Methamphetamine.

plea, “constitute a formidable barrier Solemn declarations in open court carry a strong presumption of verity,” and a subsequent presentation of conclusory allegations and contentions that are wholly incredible in the face of the record are subject to summary dismissal. Id. at 73-74; Crawford v. United States, 519 F.2d 347 (4th Cir. 1975) overruled by United States v. Whitley, 759 F.2d 327 (4th Cir. 1985); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976). This Court in Dalton v. State noted that “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.” Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007).

In the present case, Judge McMahon conducted a comprehensive colloquy with Respondent regarding his present mental state, waiver of constitutional rights, admission of guilt, satisfaction with counsel, understanding of the plea agreement, and acknowledgment of the penalty schemes on each offense. As a result, Judge McMahon adjudicated Respondent’s guilty pleas as freely, voluntarily, knowingly and intelligently made. He evaluated the State’s recitation of evidence and found a substantial factual basis for the plea. See S. Carolina Dep’t of Soc. Servs. v. Forrester, 282 S.C. 512, 516, 320 S.E.2d 39, 42 (Ct. App. 1984)(“Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.”).

Respondent testified at the PCR hearing that he was overcome with the novelty of General Sessions, or “big boy” court; yet, he was a competent adult, property holder, and father who made a logical decision to plead guilty in light of the alternative of facing a requisite twenty-five (25) year prison sentence upon conviction. (App.p.64, ln 3-5; pp.40-2). He admitted his guilt as an accomplice to the methamphetamine manufacture and distribution operation.

(App.p.41). Notably, he did not contest or dispute the summary of the State's evidence of his guilt in any way. He explained that he recently became a first-time criminal offender in his middle ages because of a recent drug addiction. (App.p.41). During the mitigation phase of the plea hearing, Respondent candidly apprised the judge of his current inability to clear a drug test; a certain violation of his prior bond and an adverse factor in sentencing. (App.p.41). Fortuitously, Judge McMahon credited him for his candid response and admissions when the Judge employed his sentencing discretion in Respondent's favor. (App.p.43). Thus, Respondent has presented no compelling, let alone credible, reason why he should be allowed to depart from the presumption of truthfulness in his statements at the plea hearing.

Accordingly, the Court of Appeals erred in affirming the PCR Judge's ruling where there is no evidence that supports the finding that Respondent met his burden to prove the second prong of Strickland – that he was prejudiced as a result of counsel's performance. Judge McMahon's colloquy with Respondent and the solicitor's recitation of the plea agreement at the plea hearing, and the sentencing sheets indisputably prove Respondent knew he faced a possible twenty-five (25) year term of imprisonment for possession of pseudoephedrine, a possible fifteen (15) year term of imprisonment for the manufacture of methamphetamine, and a possible five (5) year term of imprisonment for PWID marijuana. Respondent's hope of an aggregate term of seven (7) years imprisonment with eighteen (18) months active service in prison in comparison to his expectation on the matter is a distinction with a difference that compels reversal.

As Respondent entirely failed to meet this burden of proving ineffective assistance of counsel on this issue, the PCR Judge erred in granting 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.”). The court of appeals therefore erred in

affirming the PCR Judge's ruling.

CONCLUSION

For the foregoing reasons, Respondent submits this Court should grant Petitioner's petition for certiorari, reverse the court of appeals' ruling affirming the PCR Judge's grant of relief, and return Respondent to the State's custody so that he may serve the remainder of his sentences.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

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SC SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
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The Honorable Eugene C. Griffith, Circuit Court Judge

JAMES CLAYTON HELMS, # 341440

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

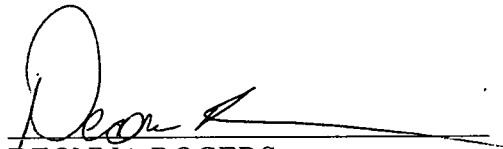
RESPONDENT.

CERTIFICATE OF SERVICE

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

**Robert Michael Dudek, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201**

This 23rd day of March, 2016


DEONNA ROGERS
LEGAL ASSISTANT