

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Honorable William P. Keesley, Circuit Court Judge

Case No. 2009-CP-32-1865
Appellate Case No. 2012-212676

Op. No. 2016-UP-012 (S.C. Ct. App. filed Jan. 13, 2016)

Whelthy McKune,

Petitioner,

v.

State of South Carolina,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Tricia A. Blanchette
Post Office Box 12725
Columbia, South Carolina 29211
(803) 988-0008
Attorney for Petitioner

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on April 4, 2016.

QUESTION PRESENTED

- I. Whether the South Carolina Court of Appeals erred by failing to find that counsel performance was ineffective and prejudicial thus rendering the guilty plea involuntary when counsel admittedly failed to conduct an independent investigation, failed to have a complete understanding of the evidence in order to properly advise Petitioner and refute evidence offered by the State, failed to ensure that Petitioner had the proper understanding of the terms of his plea, failed to move to withdraw or object when Petitioner's understanding of the terms of the plea agreement were breached and when there was a variation in facts from plea to sentencing, and failed to properly represent Petitioner in mitigation and reconsideration.

STATEMENT OF THE CASE

During the January 2004 term of the Lexington County Grand Jury, Petitioner was indicted for Burglary, First Degree (2004-GS-32-0001) and Criminal Conspiracy (2004-GS-32-0002). App. p. 49. On February 9, 2004, Petitioner entered a guilty plea in front of the Honorable Marc H. Westbrook at the Lexington County Courthouse. App. p. 1. Petitioner was represented by Cameron Littlejohn, Esquire. The Honorable Marc H. Westbrook sentenced Petitioner to life imprisonment for the burglary charge and a concurrent term of five (5) years for the conspiracy charge. App. p. 10. A notice of appeal was timely filed. Petitioner moved to withdraw his appeal, which the South Carolina Court of Appeals granted by order dated December 17, 2008. App. p. 57.

On April 21, 2009, Petitioner filed an Application for Post Conviction Relief in Lexington County. The State submitted a Return on or about May 11, 2010. App. p. 59. On November 16, 2010, Petitioner filed an Amendment to Application for Post Conviction Relief, which added a number of specific allegations to his original allegation of ineffective assistance of counsel and involuntary guilty plea.¹

¹ The allegations contained in the Amendment are as follows:

1. Ineffective assistance of counsel for failure to prepare and investigate, specifically, but not limited to the following claims:
 - a. Failure to provide and review the complete discovery materials with the Applicant prior to the entry of his plea.
 - b. Failure to review the indictments with the Applicant and discuss the charges set forth therein.
 - c. Failure to conduct an independent investigation.
 - d. Failure to ensure that the Applicant was fully advised regarding the original plea offer to 15 years and to ensure that the rejection of such offer was knowingly and understandably made by the Applicant.
2. Ineffective assistance of counsel regarding the entry of the plea and separate sentencing hearing.
 - a. Failure to properly advise the Applicant regarding the State's position on sentencing and/or move to withdraw when the State's position differed from what was conveyed by counsel to the Applicant.

On November 9, 2010, an evidentiary hearing was conducted at the Lexington County Courthouse in front of the Honorable William P. Keesley. App. p. 75. Petitioner was present and was represented by Tricia A. Blanchette, Esquire. Respondent was represented by A. West Lee, Assistant Attorney General. During the evidentiary hearing, Petitioner testified on his own behalf, and Petitioner admitted seventeen exhibits. The State offered the testimony of Cameron Littlejohn, Esquire. The lower court also had before it a copy of the Application, Respondent's Return, the Amendment, the records of the Lexington County Clerk of Court concerning the subject conviction, and Petitioner's records from the South Carolina Department of Corrections.

On September 16, 2011, the lower court issued a Memorandum Order of Denial. App. p. 267. An Order of Dismissal was signed by Honorable William P. Keesley on November 4, 2011 and filed on November 7, 2011. App. p. 270. On November 14, 2011, Petitioner, through counsel, filed a Motion for Rehearing Pursuant to Rule 59(a), SCRCPP, and/or Motion to Alter or Amend Pursuant to Rule 59(e), SCRCPP. App. p. 296. Respondent submitted a Return on January 23, 2012. App. p. 303. On June 13, 2012, the Honorable William P. Keesley denied Petitioner's Motion via Order on Reconsideration, which was filed on June 15, 2012. App. p. 312.

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- b. Failure to object and/or move to withdraw when the State provided the plea court with a variance in the facts from the plea to sentencing hearing.
 - c. Failure to refute the State's position that the Applicant entered the home during the robbery at issue.
 - d. Failure to present viable mitigation on the Applicant's behalf.
 3. Ineffective assistance of counsel regarding the reconsideration hearing.
 - a. Failure to have the motion heard in a timely manner despite repeated requests from the Applicant.
 - b. Failure to present an argument regarding the State's change in position as to sentencing or the variance in the facts from the plea to sentencing hearing.
 - c. Failure to present any viable evidence to refute the State's position that the Applicant entered the home during the robbery.
 - d. Failure to address the knowing and voluntary nature of the Applicant's plea.
 - e. Failure to offer viable mitigation on the Applicant's behalf. App. p. 71.

On July 30, 2012, Petitioner filed a Notice of Intent to Appeal. On October 26, 2012, a Petition for Writ of Certiorari and Appendix were filed. On February 28, 2013, the State submitted a Return to Petition for Writ of Certiorari. Thereafter, the appeal was transferred to the South Carolina Court of Appeals.

On June 24, 2014, the Court of Appeals denied the Petition for Writ of Certiorari via written Order. On July 7, 2014, Petitioner filed a Petition for Rehearing and Petition for Rehearing *En Banc*. On August 4, 2014, Respondent submitted a Return to Petition for Rehearing and Petition for Rehearing *En Banc*. On September 18, 2014, an Order was entered granting the Petition for Rehearing, withdrawing the Order denying Certiorari and granting Certiorari.

On October 14, 2014, the Brief of Petitioner was filed. On February 13, 2015, the Brief of Respondent was submitted. On November 3, 2015, an oral argument was held before the Court of Appeals. Tricia A. Blanchette, Esquire, made argument on behalf of Petitioner, and Patrick Schmeckpeper, Assistant Attorney General, made argument on behalf of the State. On January 13, 2016, an Opinion was issued by the Court of Appeals affirming the decision of the lower court. McKune v. State, Unpub. Op. No. 2016-UP-012 (S.C. Ct. App. filed Jan. 13, 2016).

A timely Petition for Rehearing and Petition for Rehearing *En Banc* was filed on January 26, 2016. The State did not file a response. By written Order and letter dated April 4, 2016, the Court of Appeals denied both Petitions for Rehearing. A copy of the letter and Order were received by Petitioner's counsel on April 11, 2016, and this Petition timely follows.

ARGUMENT

- I. The South Carolina Court of Appeals erred by failing to find that counsel performance was ineffective and prejudicial thus rendering the guilty plea involuntary when counsel admittedly failed to conduct an independent investigation, failed to have a complete understanding of the evidence in order to properly advise Petitioner and refute evidence offered by the State, failed to ensure that Petitioner had the proper understanding of the terms of his plea, failed to move to withdraw or object when Petitioner's understanding of the terms of the plea agreement were breached and when there was a variation in facts from plea to sentencing, and failed to properly represent Petitioner in mitigation and reconsideration.

The South Court of Appeals erred by failing to reverse the lower court when plea counsel's performance was ineffective and prejudicial thus rendering Petitioner's guilty plea involuntary. The error in failing to reverse the lower court and grant Petitioner relief must be addressed since counsel admittedly failed to conduct an independent investigation and failed to have a complete understanding of the evidence in order to refute evidence offered by the State and properly advise Petitioner. Counsel also failed to ensure that Applicant had a proper understanding of the terms of his plea, failed to move to withdraw or object when Petitioner's understanding of the terms of the plea agreement were breached, and address the variation in facts from plea to sentencing. To add insult to injury, counsel also failed to properly represent Petitioner in mitigation and on reconsideration.

A. SUMMARY OF TESTMONY FROM EVIDENTIARY HEARING

1. Whelthy McKune (Petitioner)

When Petitioner took the stand, he recalled meeting with Cameron Littlejohn, Esquire, six times at the detention center, and a copy of the visit logs were introduced. App. pp. 83-4, 180. Petitioner summarized each of those meetings. At their introductory meeting on August 8, 2003, Petitioner provided counsel with his story, which included

the fact that he remained in the car during the robbery.² App. pp. 84-5, 91. On August 20, 2003, they discussed bond and Petitioner went up on two occasions for a bond hearing. At the second bond hearing, counsel advised him that his court date was approaching and that bond would be a waste of money. App. p. 85. Counsel wanted him to accept a fifteen (15) year plea offer, but Petitioner did not have an “understanding really what was going on at that time, so I told him no.” App. p. 86, Ins. 1-4. Petitioner explained that he had not received all the discovery when the plea offer was conveyed to him. App. pp. 85-6, 112.

At their next meeting on September 22, 2003, Petitioner recalled meeting with Mr. Swarat and an investigator from the Solicitor’s office. Acting solely on the advice of counsel, he cooperated and provided his story of the events in question. App. pp. 86-7. He explained that he could not provide the information the State wanted regarding the guns since he did not have anything to do with the guns. App. p. 87, lines, 2-3.

On January 5, 2004, counsel provided Petitioner discovery to review, and they discussed the State’s theory that Petitioner supplied the guns and kicked in the back door. App. p. 87. Counsel advised Petitioner that it would be best to enter a guilty plea since he was facing fifteen years to life for conspiracy and burglary. App. p. 87. Counsel further advised Petitioner that the State would inform the plea court about how truthful the Petitioner had been throughout the whole process and the Solicitor “would state to the Judge that he did not oppose any recommendations Mr. Littlejohn made on my behalf.” App. p. 88, Ins. 1-5.

² At the evidentiary hearing, Petitioner provided a detailed version of the events that took place on November 13, 2002. App. pp. 109-112.

On January 7, 2004, counsel informed Petitioner that there was forensic evidence to prove that Petitioner kicked in the back door. App. p. 88. Counsel did not explain what the evidence was but convinced Petitioner he needed to take a plea. On January 8, 2004, counsel discussed mitigation with Petitioner. App. pp. 88-9.

Petitioner explained that counsel failed to obtain a copy of the indictments to review with him prior to his plea. App. p. 89. Petitioner introduced a letter from Mr. Littlejohn's office indicating that the indictments were not contained in his file and he would need to obtain a copy from the Clerk of Court. App. p. 90-1. Petitioner explained that counsel never provided him a complete copy of discovery or documentation of the forensic evidence that tied him to the crime scene. Therefore, Petitioner requested and received his complete file from SLED.

While on the stand, Petitioner discussed a number of statements and discovery materials that counsel failed to review with him and/or address prior to the entry of his plea that supported his position that he did not enter the home, along with his two co-defendants, and explained how the back door was kicked out by a fleeing co-defendant. App. pp. 96, 98 . The relevant portions are as follows:

1. Statement of Esqueen Merritt (victim) dated November 13, 2002: Two individuals entered home and does not mention door being kicked in by third individual. App. p. 93.
2. Statement of Esqueen Merritt dated November 15, 2002: Identification of Quincy McCoy as individual that approached her with gun before she let him and another individual into the home. App. p. 94.
3. Statement of Vickie Merritt (victim) dated November 13, 2002: Indicates two individuals were in the house and explains possible motive of co-defendant Terry Haltigwanger. App. pp. 94-5.
4. Statement of Vickie Merritt dated November 14, 2002: Provides a detailed description of the two robbers that entered the home. App. p. 95.

5. Statement of Vickie Merritt dated November 15, 2002: Identifies Quincy McCoy as the shooter and states that there were two robbers in the home. App. p. 96.
6. Interview of Terry Haltiwanger (co-defendant): States that Petitioner never left the car and explains how the back door was kicked out by a fleeing co-defendant. App. pp. 97-8.
7. Lexington County Crime Scene Report: States that the backed door was kicked in with a blood trail that leads out the back door. Petitioner explained this was relevant since co-defendant Quincy McCoy was bleeding when he exited the home. App. pp. 98-100.
8. Investigative Report of Officer Weed: Indicates there was a blood trail going out the back door and over the fence. App. p. 104.
9. Investigative Report of Officer McIntosh: Indicates that co-defendant Quincy McCoy stated that Petitioner stayed in the car during the robbery. App. pp. 105-6.

Petitioner explained these discovery materials contained exculpatory information, which refuted the State's assertions, and counsel failed to address this information with him or the court. He also explained that counsel failed to speak to his co-defendants or conduct any type of investigation. Specifically, he recalled providing Mr. Littlejohn a letter written by Quincy McCoy explaining Petitioner's minimal role, but Mr. Littlejohn failed to follow up on the letter and did not provide a copy to Petitioner when requested. App. p. 107. Petitioner identified a copy of a letter that he sent to Mr. Littlejohn requesting a copy of his file and explained that Mr. Littlejohn failed to respond to the letter. App. p. 108, 235.

Turning to the plea, Petitioner explained that he took the plea due to Mr. Littlejohn's advice regarding the forensic evidence and the State's agreement to inform the court verbally about the lack of opposition to any recommendation made by the defense as to length of sentence, which Petitioner understood was fifteen years. App. p.

113. Regarding his understanding of the State's position on sentencing, he explained: "I took it at from how it was explained and the way I received it, he was actually going to state to the judge that he didn't oppose it. But he stayed silent on it." App. p. 113, Ins. 11-14. As to counsel's advice regarding the risk of receiving the maximum sentence, Petitioner recalled counsel not being concerned that he would receive a life sentence as a result of the plea. App. p. 114.

At the plea hearing on January 12, 2004, the State informed the court that Petitioner acted solely as the getaway driver and did not alleged that he had entered the home. App. p. 115, Ins. 5-10. Petitioner concluded that he agreed with the facts presented by the State but did not understand why it was omitted that he was threatened by his co-defendants. App. p. 116.

Regarding the sentencing hearing held on February 9, 2004, Petitioner explained that he took issue with the statement that he was only seventy-five percent truthful with the State since he cooperated fully pursuant to the advice of counsel. App. p. 117. Also, the State informed the court that he provided the guns and entered the back door during the robbery, which were facts he would not have agreed to during the entry of his plea. App. p. 117. The court specifically asked if Petitioner was in the house or not, and the State responded that forensic evidence and Quincy McCoy confirmed that he was in the house. App. pp. 117-8.

In response, counsel failed to request that proof be offered or address the evidence which showed that Petitioner did not enter the house. App. p. 118. Petitioner recalled his surprise when the victims asked for a life sentence since his lawyer led him to believe it was not a possibility. App. p. 119. He recalled telling counsel that he did not want to go

forward and counsel responding that he would file a motion. App. p. 119. In mitigation, counsel did inform the court that Petitioner denied involvement with the guns and with going in the house, but counsel failed to refute the State's assertions regarding the forensic evidence or use any evidence to support Petitioner's position. App. p. 119. Petitioner also explained that counsel failed to inform the court that his co-defendants threatened to pistol whip him. App. pp. 119-20.

Petitioner introduced a copy of the Motion for Reconsideration filed on February 11, 2004. App. pp. 121, 237. Petitioner also introduced a letter dated May 12, 2004 that he received with the Motion. App. p. 239. By way of this letter, Petitioner was informed that Mr. Littlejohn and his office thought Petitioner's sentence was "devastating" and "unfair" and that Mr. Littlejohn was making calls on his behalf. App. pp. 121-2, 239. Petitioner explained he did not know what transpired from those calls since his letters to Mr. Littlejohn and request for him to obtain the plea and sentencing transcripts went unanswered. App. pp. 122-125. During the extended pendency of the motion, the Honorable Marc H. Westbrook passed away, so the motion was heard on October 17, 2006 by the Honorable R. Knox McMahan. App. pp. 22, 125.

At the hearing, counsel informed the court that Petitioner claimed he did not enter the house, but counsel failed to utilize the SLED file and discovery materials to verify this claim. App. p. 126. The State referenced his co-defendant's trial transcript to show that co-defendant McCoy implicated him as going in the house. App. pp. 31-2. As Petitioner noted, counsel failed to explain Petitioner's inability to refute the testimony of a co-defendant during another co-defendant's trial. App. p. 126-7. When asked by the court, counsel also somewhat confusingly placed Petitioner in the house. App. p. 27.

not go in the house.” App. p. 147, lns. 23-4. Counsel thought he received all of the discovery, but he admitted that he only reviewed “sections” of it with Petitioner. App. pp. 143, 150. Counsel did not specifically recall receiving or reviewing the SLED file and indicated that the forensic evidence referred to by the State may have consisted of some pictures of the back door. App. p. 162. He admitted that he did not attempt to speak to any of Petitioner’s co-defendants since he had their statements. App. pp. 150-51. He did recall a letter from co-defendant McCoy but surmised that it was likely not helpful due to McCoy’s inconsistent statements. App. p. 151. He admitted that he did not use a private investigator nor did he conduct any form of an independent investigation. App. p. 159.

As to plea negotiations and advice rendered, counsel recalled advising Petitioner that it would be in his best interest to cooperate. App. p. 146. When asked if he “attempted to engage in plea negotiations”, counsel responded that he “engaged in plea negotiations numerous times with Mr. Swarat.” App. p. 145, lns. 19-23. Counsel did not recall an offer for fifteen years and explained that he was able to get an offer for fifteen to life with the deal that “the State would take no position on sentencing.” App. p. 146.

Turning to the plea and sentencing, counsel stated that he believed he got the indictments the day of the plea and showed them to Petitioner so he could answer the court that he had seen the indictments. App. p. 156. He admitted that Petitioner may have asked about withdrawing his guilty plea, but he did not remember the conversation. App. p. 152. When asked why he did not utilize the victims’ statements or any other evidence to refute the State’s allegation that Petitioner entered the home as a third robber, he explained: “Well, if you recall, Judge Westbrook presided over the trial which occurred

Petitioner alleged that counsel should have addressed the variance in the facts given by the State from the plea to the sentencing hearings and his desire to withdraw his guilty plea. App. p. 128.

On November 8, 2006, Petitioner filed a motion to relieve counsel due to his dissatisfaction with his assistance at the reconsideration hearing. App. pp. 129-30, 246. On April 2, 2007, he wrote the Honorable William P. Keesley trying to get the motion heard, but no hearing was held. App. pp. 130-1, 260. On November 25, 2007, he wrote the Honorable R. Knox McMahon about rendering a decision on the reconsideration motion, and an Order was issued on November 27, 2007. App. pp. 131-2, 262, 265. Petitioner further explained counsel's failure to file his direct appeal, which resulted in his pro-se filing and instruction from the Court of Appeals for counsel to properly file the appeal. App. pp. 133-5, 266.

On cross-examination, Petitioner affirmed his direct testimony. App. pp. 135-8. On redirect, Petitioner thoroughly explained that but for counsel's ineffective assistance, he would not have pled guilty and would have proceeded to trial. App. pp. 140-1.

2. Cameron Littlejohn, Esquire (Plea Counsel)

When Cameron Littlejohn, Esquire, was called to the stand, he recalled meeting with Petitioner on several occasions. He recalled discussing the charges and Petitioner's side of the story, which was factually similar to Petitioner's testimony on direct. App. pp. 142-3. He agreed that Petitioner remained steadfast in his factual position. App. p. 143. On the other hand, he explained that the State was adamant that Petitioner had "broken in the back door and gone in while the robbery/burglary/killing went on." App. p. 147, lns. 15-18. He went on to explain that "there was no real evidence to say that he definitely did

before Whelthy's sentencing, so he heard all the witnesses' testimony. App. p. 158, lns.

16-18. Thereafter, the following testimony was elicited:

PCR counsel: And during that trial, Mr. John Henry was the person on trial; is that correct?

Mr. Littlejohn: That's correct.

PCR counsel: And did you or Mr. McKune have the opportunity during the course of that trial to refute any of the facts or defend Mr. McKune's position in front of Judge Westbrook?

Mr. Littlejohn: During the trial?

PCR counsel: During John Henry's trial?

Mr. Littlejohn: No.

PCR counsel: Okay. So the opportunity that you would have had to refute anything that was brought up at trial was actually at the sentencing hearing; is that correct?

Mr. Littlejohn: That's a safe statement, uh-huh.

PCR counsel: So did you use any of the discovery materials at the sentencing hearing to refute what was presented at trial or what the State was giving as facts at the sentencing hearing?

Mr. Littlejohn: I think the record will reflect what I presented to the court.

App. pp. 158-9, lns. 19-25, 1-12.

When asked about the variance in the facts given by the State from the plea to the sentencing hearing, counsel responded: "Well, typically you don't object during a plea or a sentencing proceeding, you refute or respond to what the State has presented and vice versa." App. p. 160. Following further questioning on the subject, the following took place:

PCR counsel: And would you agree or disagree that you would need to object to preserve that issue for your client for appellate

review as far as a variation in the facts and the knowing and voluntary nature of the guilty plea?

Mr. Littlejohn: That is a good question. I am not sure. I'm not sure whether you need to object to preserve it. Probably so.

App. p. 161, lns. 15-20.

When asked if he was surprised by Petitioner's sentence, counsel responded: "You'd probably find my jaw over there next to that podium." App. p. 155. Counsel explained that he filed the motion for reconsideration because the sentence was "too harsh". App. p. 152. He said his thinking was to let time pass and let things simmer down, but in letting time pass Judge Westbrook was killed in a car accident and Mr. Swarat moved to the Attorney General's Office. App. pp. 152-3. During the two years the motion was pending, counsel did not recall communicating with Petitioner, but he recalled talking to Petitioner's mother a couple of times. App. p. 164-5. When asked about Petitioner's motion to relieve and the delay in the order on the motion to reconsider, counsel answered repeatedly that he could not recall or did not remember. App. p. 165-6. In response to whether there was any benefit of Petitioner's guilty plea, counsel responded: "Well, quite frankly, no. If he had gone to trial and gotten convicted, he probably would have gotten the same sentence." App. p. 163, lns. 3-7.

B. ARGUMENT

A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). In South Carolina, the courts have consistently held that that a defendant must have a full understanding of the consequences of his plea and the charges against him. Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997), Simpson v. State, (317 S.C. 506, 455 S.E.2d 175 (1995)).

Additionally, a defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the assistance provided by counsel, "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).

In a PCR stemming from a guilty plea, an applicant alleging a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). Therefore, an applicant that entered a plea on the advice of counsel may only attack the voluntary nature of that 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, applicant would not have pled guilty and insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985), Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000). In Hill, the Supreme Court of the United States made it clear that the "voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." 474 U.S. at 57, 106 S.Ct. at 369. Here, Petitioner has and continues to argue that a proper review of the record demonstrates that counsel provided deficient performance, well below that of the range of competence hopefully required of attorneys in this State, requiring reversal of the lower court and granting of relief.

In Smith v. State, 407 S.C. 270, 278, 754 S.E.2d 900, 904 (Ct. App. 2014) the South Carolina Court of Appeals reversed the lower court and held that that plea counsel was ineffective when she failed to object after the State's recommendation that the court

impose the maximum sentence. Id. at 278, 754 S.E.2d at 904 .³ Thereafter in Smith v. State, 413 S.C. 194, 775 S.E.2d 696 (2015), this Court upheld the reversal by the Court of Appeals but took the opportunity to clarify the appropriate relief – a new trial. Similarly to Petitioner, Smith was subjected to a bifurcated plea proceeding due the State’s desire for him to testify at a co-defendant’s trial. 407 S.C. 270, 272-4, 754 S.E.2d 900, 901-2. Prior to his plea and sentencing, Smith also understood that the State was going to take a different position on sentencing than was taken in front of the court.⁴ 407 S.C. 270, 274-5, 754 S.E.2d 900. 902-3. As the records reflect, both Petitioner and Smith testified that they would not have entered their plea under the State’s actual sentencing position and that they wanted to withdraw their plea as a result of the State’s failure to comply with their understanding of the plea agreement. Regarding the appropriate relief, this Court held:

We now clarify the proper remedy is a new trial. Although Smith's attorney was deficient for failing to object at the sentencing hearing, the underlying question is whether Smith would have entered into the plea agreement had he known the State was going to breach the agreement. See Jordan, 297 S.C. at 54, 374 S.E.2d at 684 (stating a defendant alleging ineffective assistance of counsel during a guilty plea must show "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial") (quoting Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)). Therefore, the proper remedy for counsel's ineffective assistance is invalidation of the entire agreement.

Smith v. State, 413 S.C. 194, 195-96, 775 S.E.2d 696, 696-97 (2015)

In deciding Smith, both Courts relied upon Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000) (Concluding defendant established a claim for ineffective assistance of

³ Undersigned counsel (Tricia A. Blanchette) was appointed to represent Gerald Smith at the evidentiary hearing from which the appeal in Smith v. State was taken.

⁴ Smith understood the State was going to remain silent on sentencing, but the State requested the maximum sentence in front of the court. Id. at 274-5, 754 S.E.2d at 902-3.

counsel where trial counsel failed to object when the solicitor recommended the maximum sentence in violation of the plea agreement.) and Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1998) (Granting PCR when defendant pled guilty based on belief that Solicitor would not oppose or recommend probation and finding defense counsel's failure to draw the plea court's attention to solicitor's violation of plea agreement fell below prevailing professional norms.). Petitioner submits the deficiencies of counsel in the instant case far exceed the deficient performance addressed in Smith, Thompson and Jordan.

In the instant case, Petitioner not only alleged that counsel was ineffective for failing to enforce Petitioner's understanding of the State's agreed position on sentencing but also that there was an unaddressed prejudicial factual variance from plea to sentencing that rendered the entry of his plea involuntary. Again, the complete lack of effective assistance and resulting prejudice far exceeds that addressed in Smith, Thompson and Jordan, yet the Court of Appeals chose to ignore this obvious conclusion that should have been reached from the arguments set forth in the Brief, Oral Argument and Petition for Rehearing.

To fully comprehend the erroneous findings made by the Court of Appeals and lower court, it is necessary to understand how Petitioner's bifurcated guilty plea played out. On January 12, 2004, Petitioner stood in front of the late Judge Marc Westbrook and entered a guilty plea to burglary and criminal conspiracy. Petitioner entered this guilty plea based upon his counsel's advice that he should forego a trial due to forensic evidence, linking him to the scene of the home invasion and murder, and his

understanding that the State would verbally inform the Court that they did not oppose the defense recommendation to the minimum sentence.

As the record reflects, the Assistant Solicitor provided a two page factual basis on which the plea was entered and accepted, which he concluded by saying – “he acted solely as the getaway driver.” App. p. 7, ln. 13. When asked if he had anything to say, counsel responded that he would wait for sentencing. App. p. 8.

On January 16, 2014, the Lexington county trial of co-defendant John Henry concluded. Henry, who shot the victim seven times, received a life sentence. Counsel was admittedly absent from the trial when co-defendant McCoy, who also shot the victim, gave yet another version of events, which placed Petitioner in the home and providing the guns.⁵ App. p. 15.

On February 9, 2004, Petitioner appeared for the sentencing portion of his plea proceeding. The Assistant Solicitor stated that he agreed to inform the Court about Petitioner’s cooperation, but he added that based upon the co-defendant’s testimony and his pre-trial investigation, Petitioner was only seventy-five percent truthful. App. p. 11. He further stated that McCoy testified that Petitioner provided the guns and entered by kicking in the back door while the victim was being robbed and killed– which was “corroborated by forensic investigation into this case” App. pp. 11-12. When questioned about McCoy’s testimony and asked to refute what the State was alleging, counsel admitted that he was not present for the testimony of McCoy and he allowed the State to bolster the credibility of McCoy when the court called it into question. App. p. 15. Furthermore, counsel did not respond to the State’s bolstering by pointing out that

⁵ McCoy received a thirty year sentence. The transcript of John Henry’s trial was not introduced by the State at the evidentiary hearing and is not part of the record before this Court.

McCoy not Petitioner lead the State to the guns even after the State attempted to use such detail to further bolster McCoy at the reconsideration hearing. App. p. 41.

Twenty months after sentencing, Petitioner appeared in front of Judge McMahon for reconsideration. At the evidentiary hearing, counsel admitted he did not meet with Petitioner despite being shocked by his sentence. App. pp. 164-5. At the reconsideration hearing, counsel simply informed the court that Petitioner did not agree with State's assertion he went in the house and allowed his mother and employer to address the court. It is unexplained why he failed to point out that the solicitor changed the facts and level of culpability from "solely get away driver" to entering the house and providing the guns or why he did not address the discovery introduced at the evidentiary hearing that refuted the State's heightened level of Petitioner's culpability. His attempt to address the disparity in sentencing led right into the State bolstering co-defendant McCoy's cooperation and playing down Petitioner's cooperation. App. p. 42. He further never mentioned the letter from McCoy he acknowledged receiving but losing at the evidentiary hearing. App. p. 151. Counsel merely responded to the State by explaining that plea negotiations were a reason for late cooperation, but he otherwise squandered the opportunity to inform the court of the following major issues raised by Petitioner to both the lower and appellate court:

1. Petitioner assertion that he was threatened by his co-defendants when he was pistol whipped and kept at the location via gun point. App. pp. 110-11, 116.
2. The breach of Petitioner's understanding that counsel would request and the State would inform the Court verbally of no opposition to the minimum sentence. App. p. 113, lns. 11-14.

3. The variation in facts from plea to sentencing that heightened the level of Petitioner's culpability and rendered the entry of his guilty plea unknowing and involuntary.
4. Counsel's failure to require the State to substantiate their assertion regarding "forensic proof" despite advising Petitioner to plea due to it and allowing such information to be given to the court prior to imposing Petitioner's sentence. Additionally, counsel's failure to refute this assertion with the discovery addressed by Petitioner at the evidentiary hearing.

Specifically, when asked about the State's assertion regarding forensic proof at the evidentiary hearing, counsel seemed to recall that the forensic proof was some pictures, which the Assistant Attorney General admitted he had not seen. App. p. 174. Clearly, counsel nor the State offered any evidence to refute Petitioner's claim that the forensic proof was not substantiated and was refuted by the discovery items he referenced during his testimony outlined above.⁶ Additionally, counsel conceded that he did not conduct an independent investigation, but he later attempted to excuse his failure by indicating that he would have had enough time before the calling of Petitioner to trial with co-defendant Henry.⁷ App. p. 85, Ins. 19-21, 94. Clearly, counsel's performance was deficient and Petitioner was prejudiced due to counsel's advice to plea due the unsubstantiated forensic proof and failure to refute the State's assertion regarding forensic proof.

⁶ Via the Brief of Respondent previously filed, the State concedes that beyond McCoy's statement, no other substantive evidence definitively proved Petitioner entered victim's residence. Brief of Respondent p. 12.

⁷ The South Carolina Supreme Court has held that trial counsel has a duty to perform a reasonable investigation, which at a minimum includes the duty to conduct an independent investigation of the facts and circumstances of the case and interview potential witnesses. Lounds v. State, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008); See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007).

Similarly to the arrangement in Smith, Petitioner's plea and sentence were bifurcated due to his cooperation with the State and testimony at his co-defendant's trial. Petitioner noted that when he entered his plea the State informed the court that he "acted solely as getaway driver" and the State did not allege that he entered the home. App. p. 115. Petitioner explained that he agreed with the facts given by the State; therefore, he entered a plea of guilty. Petitioner explained that the only omission in the facts at the plea proceeding was counsel's failure to address the threats he received from his co-defendants.

Only after Petitioner had entered his guilty plea and appeared for sentencing did the State allege that he provided the guns and entered the home during the robbery. Clearly, the facts on which the plea was entered and accepted and the facts given by the State at the sentencing proceeding varied from getaway driver to active participant completely changing Petitioner's level of culpability. At the evidentiary hearing, Petitioner made it clear that he would not have entered his plea if he would have heard the facts presented by the State at the sentencing proceeding or known that the State was going to stay silent regarding sentencing recommendations. Petitioner testified that he requested that counsel withdraw his plea, and counsel testified that he vaguely remembered Petitioner's request, which he did not act on at the sentencing or reconsideration hearings.

Overall, counsel could not provide a straight answer when asked about the variance in the facts or Petitioner's understanding of the State's sentencing recommendation. Counsel repeatedly stated that he would defer to the transcript and it was not typical to object during a plea. Similarly, counsel was also unable to provide the

court a straight answer at sentencing when specifically asked whether Petitioner was in the house or not. Here, counsel's failure was immense yet somehow found to be reasonable. Clearly, counsel failed to object and/or move to withdraw Petitioner's guilty plea when the facts drastically varied from the plea to sentencing hearing and when Petitioner's understanding of the State's position on sentencing was violated in the courtroom. As a result, counsel failed to ensure that Petitioner's plea was freely and voluntarily entered. Counsel excused his own failure by explaining that Judge McMahon heard the facts at the co-defendant's trial, but hearing facts at a co-defendant's trial did not cure the involuntary and unknowing nature of a plea accepted on one set of facts that were favorable to Petitioner and being sentenced under another set of facts that were highly damaging to Petitioner. Here, counsel's failure to act in a competent manner rendered Petitioner's plea absolutely involuntary. As a result, counsel's failure to act amounted to highly prejudicial ineffective assistance.

To add insult to injury, counsel failed to offer any of the exculpatory evidence contained in the discovery to refute the incriminating facts given by the State at the sentencing hearing. As is detailed above, there was ample evidence to show that only two individuals that were identified as Petitioner's co-defendants entered the home and that a bleeding co-defendant fled out the back door instead of the Petitioner kicking it in as was alleged by the State. Instead of calling into question the State's assertion of the facts and position that there was forensic evidence to show Petitioner entered the home, plea counsel stood silent and allowed Petitioner to be sentenced under a completely different set of unsubstantiated facts that heightened Petitioner's level of culpability from the facts on which the guilty plea was entered and accepted.

At the evidentiary hearing both the Assistant Attorney General and counsel acknowledged the variation in facts from plea to sentencing. When counsel was asked why he did not object or move to withdraw due to such variation in facts, he responded that “typically you don’t object during a plea or sentencing proceeding.” App. p. 154, 160. Petitioner testified that he asked counsel to withdraw during the sentencing proceeding and counsel responded that he would file a motion. App. p. 119. Counsel admitted he could not recall but that Petitioner may have asked to withdraw. App. pp. 151-2. In his Order, the lower court chalked up counsel’s failure to a valid strategic decision. Petitioner submits that his finding must be reversed as it has no support from the aforementioned cases of Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000) (Concluding defendant established a claim for ineffective assistance of counsel where trial counsel failed to object when the solicitor recommended the maximum sentence in violation of the plea agreement.), Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1998) (Granting PCR when defendant pled guilty based on belief that Solicitor would not oppose or recommend probation and finding defense counsel’s failure to draw the plea court’s attention to solicitor’s violation of plea agreement fell below prevailing professional norms.), and Smith v. State, 413 S.C. 194, 775 S.E.2d 696 (2015), 407 S.C. 270, 754 S.E.2d 900 (Ct. App. 2014).

Here, Petitioner suffered prejudice when he relied upon the advice of counsel and decided to forego a trial. Petitioner clearly testified that he would not have pled and would have gone to trial but for the errant advice and deficient assistance of his counsel. See Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000) (Finding that Applicant’s testimony that he would not have pled guilty if he knew he could greater than twenty

years was enough to establish prejudice.). Petitioner submits that his life sentence standing alone kicks in a Davie prejudice analysis. See Davie v. State, 381 S.C. 601, 613, 675 S.E.2d 416, 422-23 (2009), (Reasoning that it is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice; depending on the facts of the case, a defendant's self-serving statement may be sufficient to establish actual prejudice).⁸ In response to whether there was any benefit of Petitioner's guilty plea, counsel responded: "Well, quite frankly, no. If he had gone to trial and gotten convicted, he probably would have gotten the same sentence." App. p. 163, lns. 3-7

As discussed above, Petitioner also suffered prejudice when counsel failed to move to withdraw his guilty or preserve the variance in the facts for appeal. See Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009) (Finding ineffective assistance of counsel for counsel's failure to move to withdraw a guilty plea and preserve issue for appeal). Furthermore, Petitioner was prejudiced when counsel failed to provide mitigation information regarding Petitioner being threatened.

Petitioner submits that Court of Appeals apparent reliance on overwhelming evidence of guilt to defeat any finding of prejudice is erroneous and misplaced. This finding misinterprets the findings of the lower court and ignores Petitioner's argument

⁸ See also Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000) (Rejecting objective evidence requirement established in Judge and finding Petitioner proved he was prejudiced by counsel's deficient performance in failing to properly advise the Petitioner that he was pleading to a felony rather than a misdemeanor where Petitioner's uncontradicted testimony established that he would not have pled had he known the charge was a felony), overruling Judge v. State, 321 S.C. 554, 562, 471 S.E.2d 146, 150 (1996) ("The second prong of the ineffective assistance inquiry--prejudice--is shown by demonstrating through objective evidence . . . [the existence of] a reasonable probability that, but for counsel's advice, [the defendant] would have accepted the plea. Mere statements by the PCR petitioner that he would have accepted the plea agreement but for counsel's incompetence are insufficient to show prejudice because they are self-serving and inherently unreliable.") (citation omitted); See also Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) ("The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty.").

that the issue of overwhelming evidence of guilt was first raised by Respondent on appeal and not properly before an appellate court.

Additionally, Petitioner submits that such a finding is based purely upon speculation as to facts and evidence that were not submitted at a trial or in the record before this Court. The trial record of Petitioner's co-defendant was **not** admitted by the State at the evidentiary hearing, and the facts the State offered in support of the plea varied, as discussed above, from entry to sentencing. Simply put, the record before this Court is absent of admissible evidence that amounts to overwhelming evidence and the Court of Appeals has failed to provide any in the standing Opinion. See Hutto v. State, 397 S.C. 244, 692 S.E.2d 196 (2010) (Addressing and identifying specific evidence from trial that amounted to overwhelming evidence of guilt and a finding that no reasonable jury would find the defendant not guilty).

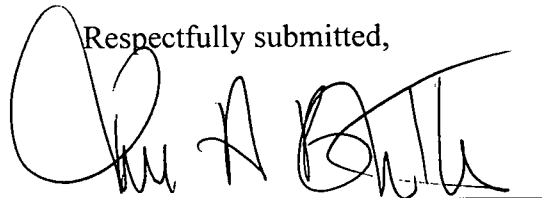
Based upon the body of case law finding overwhelming evidence of guilt in post conviction relief cases, Petitioner submits that such an analysis is not properly applied in a post conviction relief case stemming from a guilty plea. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1993) (Overwhelming evidence of guilt analysis in **trial** involving an alibi charge.), Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991) (Overwhelming evidence of guilt analysis applied in a matter involving the introduction of bad act evidence at **trial**.), Jackson v. State, 355 S.C. 568, 586 S.E.2d 562 (2003) (Overwhelming evidence of guilt analysis applied in determining prejudice suffered from failure to give a self-defense instruction at **trial**.), Harris v. State, 377 S.C. 66, 659 S.C. 140 (2008) (Overwhelming evidence of guilt analysis applied in matter involving failure to obtain first **trial** transcript). If this Court sees fit to uphold the finding of the Court of Appeals

regarding overwhelming evidence of guilt, Petitioner asks this Court, as he did the Court of Appeals, to reconcile the lack of a finding of overwhelming evidence in Smith with such a finding in the instant case.

Finally, Petitioner submits that the lower court did reference United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039 (1984). App. p. 286. Therefore, it would be proper for this Court to find that this case presents a complete breakdown of the adversarial process amounting to presumed prejudice versus making an improper finding of overwhelming evidence of guilt. See United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039 (1984); Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006).

CONCLUSION

In consideration of the above stated arguments, Petitioner respectfully requests that this Court conduct a full review of the record and argument and find that it is necessary to grant Certiorari and reverse the Opinion of the South Carolina Court of Appeals filed on January 13, 2016 and remand to the lower court for a new trial.

Respectfully submitted,


Tricia A. Blanchette – Bar # 74904
Post Office Box 12725
Columbia, South Carolina 29211
(803) 988-0008
ATTORNEY FOR PETITIONER

This 25 day of April 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Honorable William P. Keesley, Circuit Court Judge

Case No. 2009-CP-32-1865
Appellate Case No. 2012-212676

Op. No. 2016-UP-012 (S.C. Ct. App. filed Jan. 13, 2016)

Whelthy McKune,

Petitioner,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that I that I hand delivered this 26th day of April 2016, a copy of a Petition for Writ of Certiorari and Supplemental Appendix to Patrick Schmeckpeper of the Attorney General's Office, at:

Office of the Attorney General
Att: Patrick Schmeckpeper, Ast. AG
1000 Assembly Street, Room 519
Columbia, SC 29201



Tricia A. Blanchette – Bar #74904
PO Box 12725
Columbia, SC 29211
(803) 988-0008

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