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.

SUPPLEMENTAL APPENDIX

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Whelthy McKune,.....Petitioner,

vs.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Whelthy McKune, Petitioner, through counsel, appeals the Order of Dismissal issued by the Honorable William P. Keesley on November 4, 2011, which was filed on November 8, 2011. The Petitioner, through counsel, also appeals the Order on Reconsideration issued by the Honorable William P. Keesley on June 13, 2012, which was filed on June 15, 2012 and mailed to counsel on July 27, 2012. The Petitioner, through counsel, received notice of the entry of the Order on Reconsideration via mail on July 2, 2012.

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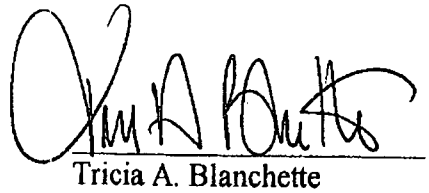
CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that I that I hand delivered this 30th day of July 2012, a copy of a Notice of Intent to Appeal to Kaelon E. May of the Attorney General's Office, at:

Office of the Attorney General
Att: Kaelon E. May, Ast. AG
1000 Assembly Street, Room 519
Columbia, SC 29201



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vs.

State of South Carolina, Respondent.

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

I. Whether The Lower Court Erred in Finding that Plea Counsel's Performance Was Not Ineffective and Prejudicial to the Petitioner Thus Rendering His Plea Involuntary Since There Was No Evidence of Probative Value to Support Such a Finding.

STANDARD OF REVIEW

The reviewing court will uphold the findings of the PCR court if there is any evidence of probative value to support those findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, if no probative evidence supports those findings, the reviewing court will not uphold the findings of the PCR court. Jackson v. State, 355 S.C. 568, 570, 586 S.E.2d 562, 563 (2003). Furthermore, the reviewing court will reverse the PCR court's decision when it is controlled by an error of law. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

STATEMENT OF THE CASE

During the January 2004 term of the Lexington County Grand Jury, Petitioner was indicted for Burglary, First Degree (Indictment No.: 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 filed, and Petitioner moved to withdraw his appeal. The South Carolina Court of Appeals granted Petitioner's motion by order dated December 17, 2008. App. p. 57.

On April 21, 2009, Petitioner filed an Application for Post Conviction Relief. 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 the following specific allegations to his original allegation of ineffective assistance of counsel and involuntary guilty plea:

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.

    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.

An evidentiary hearing was conducted on November 29, 2010 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, through counsel, admitted seventeen exhibits. The State offered the testimony of Cameron Littlejohn, Esquire. The court also had before it a copy of the Application, Respondent's Return, Petitioner's 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.

At the conclusion of the evidentiary hearing, the lower court indicated his concern that he may have had some involvement in Petitioner's case that could present a conflict and he took the matter under advisement. App. pp. 174-8. On September 16, 2011, the court issued a Memorandum Order of Denial, which instructed the State to submit an Order of Dismissal. App. p. 267. The 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), SCRCP, and/or Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP. 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. On July 30, 2012, Petitioner filed a Notice of Appeal from which this Petition for Writ of Certiorari follows.

ARGUMENT

I. The Lower Court Erred in Finding that Plea Counsel's Performance Was Not Ineffective and Prejudicial to the Petitioner Thus Rendering His Plea Involuntary Since There Was No Evidence of Probative Value to Support Such a Finding.

A. Summary of the Evidentiary Hearing Testimony

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 including the fact that he remained in the car during the robbery.[1] App. pp. 84-5, 91. On August 20, 2003, they discussed bond and Petitioner went up twice 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." 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. Upon the advice of counsel, he cooperated with

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

the State and provided his story. 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 him 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 State would not oppose any time recommendations made by the defense. App. p. 88. 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 form SLED. Petitioner discussed a number of statements and discovery materials that counsel failed to review with him and/or consider 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-defenant 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 potentially exculpatory information that counsel failed to pursue through investigation and/or present as mitigation on his behalf. 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, through counsel, introduced 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.

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 not oppose 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, lns. 11-14. As to 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. App. p. 115, lns. 5-10. Additionally, the State never alleged that Petitioner had entered the home. App. p. 115. 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 not presented during his plea and facts he did not agree with nor would he have pled to. 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. Despite knowing it was a possibility, he also indicated that he was surprised when the victims asked for a life sentence since his lawyer led him to believe it would not be imposed. App. p. 119. Upon hearing their request, 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 he denied involvement with the guns or going in the house, but counsel failed to refute the State's assertions regarding the forensic evidence or use any of the exculpatory evidence to support his position. App. p. 119. He 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. p. 121. Petitioner also introduced a letter dated May 12, 2004 that he received with the Motion. By way of this letter, Petitioner was informed that Mr. Littlejohn and his office thought his sentence was devastating and unfair and that Mr. Littlejohn was making calls on his behalf. App. pp. 121-2. 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 McMahon. App. p. 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 or refute the State's position that forensic evidence showed he went in the house. App. p. 126. In response, the State utilized his co-defendant's trial transcript to show that co-defendant McCoy implicated him as going in the house. 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. Additionally, Petitioner alleged that counsel should have addressed the change in the facts given by the State at the plea and 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. 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. 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. 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.

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 not go in the house." App. p. 147, lns. 23-4. He indicated that he was sure he received all of the discovery, but he admitted that he only reviewed "sections" of it with Petitioner. App. pp. 143, 150. He 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 not helpful due to McCoy's inconsistent statements. App. p. 151. He further admitted that he did not use a private investigator or conduct an independent investigation. App. p. 159.

As to plea negotiations, counsel recalled advising Petitioner that it would be in his best interest to cooperate. App. p. 146. When he was asked if he "attempted to engage in plea negotiations", counsel responded that he did not attempt but he "engaged in plea negotiations numerous times with Mr. Swarat." App. p. 145, lns. 19-23. He did not recall an offer for fifteen years and explained that he was able to get an offer for fifteen to life and "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 that he had seen the indictments if asked during his plea. 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 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. After which, plea counsel was asked about the variance in facts given by the State at the plea and sentencing proceedings, and he 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. He further 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. He surmised that the

two year delay was due to strategy and the intervening circumstances. App. pp. 163-4. He could not recall communicating with Petitioner during the two year delay, but he recalled talking to his mother a couple of times. App. p. 164-5. When asked about Petitioner's motion to relieve him as counsel or the delay in the order following 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 procided, "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. In Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009), this Court reiterated the prejudice requirement set forth in Hill. This Court reasoned that for Stalk to meet the prejudice requirement, he needed to show "some evidence that had counsel done an investigation he would have found a witness or evidence that was helpful" to him and that would have affected either counsel's advice or his decision to take the plea.

However, in Davie v. State, 381 S.C. 601, 613, 675 S.E.2d 416, 422-23 (2009), this Court reasoned that it is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant's self-serving statement may be sufficient to establish actual prejudice. See 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.").

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L. Ed. 2d 162 (1970)). In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support the lower court's decision. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006).

Here, Petitioner alleged that counsel provided ineffective assistance of counsel, which rendered his guilty plea involuntary, when he failed to prepare, investigate, and competently advise and represent Petitioner at his plea, sentencing and reconsideration hearings. Petitioner specifically alleged and counsel admitted that no independent investigation was conducted prior to the entry of Petitioner's guilty plea. This 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). At the evidentiary hearing, Petitioner testified, as is detailed above, regarding each meeting with counsel. He also testified about requests he made for counsel to speak with co-defendants and investigate the forensic evidence that supposedly existed to show that he entered the home in question. He specifically recalled providing counsel with a letter from co-defendant McCoy that was favorable to Petitioner's position, but counsel failed to look into it and was unable to provide the letter when later requested by Petitioner. He also testified that counsel failed to review the indictments with him prior to his plea or provide him with a copy when requested after his plea.

When counsel was on the stand, he readily admitted that he did not conduct an independent investigation nor did he utilize a private investigator. He also admitted that he most likely received and reviewed the indictments with Petitioner the day of his plea. Despite counsel's clear admissions in the record, the lower court found that counsel's lack of preparation did not amount to ineffective assistance of counsel.

At the evidentiary hearing, Petitioner provided the court a detailed account of the events in question and explained that he never entered the home and remained in the car while his co-defendants committed the robbery and murder. Counsel confirmed that Petitioner remained steadfast in his factual position and was adamant that he did not enter the home. Both Petitioner and counsel testified that the State theorized and informed the court that Petitioner entered the home during the course of the robbery by kicking in the back door. The State went as far as to say there was forensic evidence to establish that Petitioner entered the home in this manner. When counsel was specifically asked about the forensic evidence referenced by the State, he guessed that it may have consisted of a picture of the back door. App. p. 88. Petitioner made it clear that he only accepted the plea agreement due to counsel's advice regarding the forensic evidence that counsel advised him established his entry into the home. Unfortunately, Petitioner relied upon counsel's advice and entered a guilty plea not knowing that counsel's advice was based upon a picture of the back door and was not based upon a thorough review of the discovery, specifically the SLED file. Petitioner submits that counsel's clearly erroneous advice is similar to cases involving erroneous advice from counsel prior to the entry of a plea regarding parole eligibility. In such cases, this court has held that if trial counsel actively misinforms the defendant about parole eligibility, the defendant must prove he relied on the misinformation to receive post conviction relief. Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997); Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983); See also Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1988) (An inmate was entitled to post conviction relief because he received ineffective assistance of counsel when his attorney misstated the law with regard to his eligibility for parole and the inmate relied on

the advice in pleading guilty to murder.); Coats v. State, 352 S.C. 500, 575 S.E.2d 557 (2003) (Denial of claim for post conviction relief was reversed and remanded for evidentiary hearing as inmate was informed by counsel that he was parole eligible.)

When Petitioner obtained the SLED file on his own after his sentencing, Petitioner discovered that the file did not contain forensic evidence linking him to the back door, and he began to piece together the evidence counsel should have used to refute the State's theory and advise him correctly before entering his plea. While on the stand as detailed above, Petitioner went through investigate reports and statements from the victims and co-defendants that identified two not three robbers that entered the home throughout the course of the robbery and murder. Additionally, Petitioner highlighted investigative and interview reports that addressed a blood trail leading out the back door and over the fence. Petitioner explained how this evidence was relevant since co-defendant McCoy was bleeding when he exited the residence and co-defendant Haltiwanger informed law enforcement that the back door was kicked out by McCoy when he was fleeing. When asked about this evidence and his failure to address it with Petitioner prior to the entry of his plea, counsel explained "there was no real evidence to say that he definitely did not go in the house." App. p. 73, lns. 23-4. Upon proper review of the evidence presented at the evidentiary hearing and counsel's assumption that the State's evidence may have consisted of some pictures of the back door, it is incredulous to believe that counsel properly advised Petitioner to accept the plea based upon his understanding of the evidence. It appears that counsel did not have an understanding of the evidence, yet the lower court found that counsel conducted a sufficient investigation and provided effective assistance to Petitioner.

Turning to the plea, Petitioner and counsel both agreed that the plea was open from fifteen years to life and the only negotiation was that the State would not oppose defense counsel's recommendation on the sentence. 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, lns. 11-14. Petitioner also remembered counsel not being concerned that he would receive a life sentence, which was equally conveyed through counsel's testimony regarding his shock when the life sentence was imposed. 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 get away driver" and the State did not allege that he entered the home. Petitioner agreed with the facts given by the State; therefore, he entered a plea of guilty. He 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 to be sentenced 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, a request counsel vaguely remembered. 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 by the lower court. Clearly, counsel failed to object and/or move to withdraw Petitioner's guilty plea when the facts catastrophically varied from the plea to sentencing hearing and when Petitioner's understanding of the State's position on sentencing played out differently 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 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 and unknowing and counsel's failure to act amounted to highly prejudicial ineffective assistance.

To add insult to injury, counsel failed to offer any of the evidence contained in the discovery to refute the 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 facts than were given as the basis for his plea.

In the Order of Dismissal, the lower court held: "As to the allegations that counsel was ineffective for failing to refute the State's position that Applicant entered the home during the robbery at issue and for failing to present viable mitigation on the Applicant's behalf, this Court finds that these allegations are without merit." Order p. 22. The lower court cited to "valid strategic reasons" for counsel's performance. Petitioner submits that the lower court must be reversed since the record is void of any valid strategic reasons that would pass the muster of an "objective standard of reasonableness." See Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).

Interestingly, counsel had the opportunity to cure his utter failure at the reconsideration hearing, but the record clearly shows that he was unprepared and unwilling to submit a viable argument on Petitioner's behalf. After acknowledging his utter shock over Petitioner's life sentence, counsel readily admitted that during the two years it took for the reconsideration hearing, he did not communicate with Petitioner. At the reconsideration hearing, instead of disputing the assertion that forensic evidence linked Petitioner to entering through the back door, counsel informed the court that the State had forensic evidence that showed that Petitioner entered the home. The reconsideration hearing was counsel's golden opportunity to address the evidence discovered by Petitioner and the variance in the facts from plea to sentencing, but counsel did not seize the opportunity to effectively represent Petitioner.

The fundamental problem explained by Petitioner was that he entered his plea under one set of facts, but he was sentenced under an entirely different set of facts, which caused him to request that counsel withdraw his guilty plea. At the plea proceeding the State informed the court that Petitioner acted solely as a "getaway driver" but at sentencing the State informed the court that Petitioner provided the guns and entered the home through the back door during the course of the robbery. In response, counsel failed to move to withdraw Petitioner's guilty plea or raise any concern in the variance of the fact on which the plea was entered versus the facts on which the sentence was imposed. As was admitted by plea counsel, he "probably" needed to do something to preserve the issue of the voluntary nature of the plea for appellate review but as the record reflects he failed to do so. In that regard, Petitioner's case is analogous to the line of cases in which counsel failed to object and/or withdraw a guilty plea and was found to be ineffective. See Sprouse v. State, 355 S.C. 335, 340, 585 S.E.2d 278, 281 (2003) (Finding defendant was entitled to post conviction relief where the State failed to honor the plea agreement it made with defendant and trial counsel failed to ensure that the State adhered to the original plea agreement.); Thompson v. State, 340 S.C. 112, 116-17, 531 S.E.2d 294, 296-97 (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, 53-54, 374 S.E.2d 683, 684-85 (1988) (Holding trial counsel rendered ineffective assistance of counsel in failing to withdraw guilty plea after State reneged on plea, and reasoning that counsel's conduct in not protecting defendant's right to enforce the plea agreement with the solicitor's office fell below "prevailing professional norms.").

Turning to prejudice, Petitioner made it abundantly clear that but for counsel's deficient performance, he would not have accepted the guilty plea and proceeded to trial. Unfortunately for Petitioner, the prejudice does not rest on this assertion alone. Here, Petitioner received a life sentence after entering a guilty plea, which begs the questions of what was the benefit of entering the guilty plea. When this question was asked of plea counsel, he gave a straight forward answer: "Well, quite frankly, no. If he had gone to trial and gotten convicted, he probably would have gotten the same sentence." App. p. 89, lns. 3-7. Petitioner submits that the life sentence that was imposed screams of the prejudice he suffered due to counsel's utter failure to effectively represent him. Therefore, Petitioner would urge this Court to closely examine the record and find counsel provided ineffective assistance of counsel, which rendered his guilty plea involuntary, when he failed to prepare, investigate, and competently advise and represent Petitioner at his plea, sentencing and reconsideration hearings.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant this Petition for Writ of Certiorari and allow the Petitioner to proceed to briefing the requested issues under Rule 243(j), SCACR, or reverse the Order of Dismissal and grant the Petitioner a new trial.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

This 24 day of October, 2012.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2012-212676

Whelthy McKune,.....Petitioner,

v.

State of South Carolina,.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the PCR Judge correctly find that Petitioner failed to prove plea counsel was ineffective in investigating his case prior to the plea, sentencing, and reconsideration hearings?

2. Did the PCR Judge correctly find that Petitioner failed to prove that his guilty plea was rendered involuntary due to plea counsel's alleged failure to advise him of the terms of the offer?

STATEMENT OF THE CASE

On January 12, 2004, Petitioner entered a guilty plea for Burglary – First Degree, Criminal Conspiracy. (App.p.4). Petitioner pled guilty to conspiring and committing a burglary of the victim at his home with co-defendants Quincy McCoy and John Henry which resulted in the victim's murder. Judge Westbrook advised Petitioner that he was facing fifteen years to life sentence on the Burglary charge. (App.p.5). Subsequently, the solicitor announced a brief recitation of the facts establishing the elements of the offenses. (App.pp.6-7). Judge Westbrook accepted Petitioner's plea and deferred sentencing until the conclusion of Henry's trial. (App.p.8).

On February 9, 2004, Petitioner was sentenced to life imprisonment for Burglary – First Degree and five years imprisonment for Criminal Conspiracy; sentences to run concurrently. At the sentencing hearing, the solicitor expounded upon additional facts of the offenses that were brought out at Henry's trial. Judge Westbrook had presided over co-defendant's trial. The solicitor noted that the third co-defendant, McCoy, placed Petitioner inside the victim's home during the offense. McCoy's testimony was corroborated by evidence of damage to the door behind the victim's home. The sentencing judge made reference to McCoy's inconsistent testimony at co-defendant's trial and stated,

> Judge Westbrook: "Okay I don't know how accurate that is then if it came from Mr. McCoy"
>
> ***
>
> Solicitor: "It's corroborated by the forensic evidence, but no, sir. You'd [sic] have to take Mr. McCoy's word for it."

Two victims testified. The deceased victim's wife asked Judge Westbrook to impose the maximum term of imprisonment. During the mitigation phase of the hearing, plea counsel stated that "as to [Petitioner] entering the house, he has always denied having anything to do with going in the house." Plea counsel cited Henry's trial and noted that "[y]our Honor's probably aware from the trial I was not there when Mr. McCoy testified, but I could tell from the numerous statements, inconsistent statements, that he gave that Mr. McCoy had a real problem with telling the truth." (App.p.15, ln. 16-18).

Petitioner was granted a reconsideration hearing on October 17, 2006. Judge McMahon presided over the hearing. At the hearing, counsel stated that "none of the victims, nothing else, indicates that [Petitioner] here went in the house." (App.p.15). Judge McMahon, with the transcripts before him, found that Judge Westbrook was "in the best position to evaluate and observe the defendant, along with all other witnesses who testified during the trial of this case." (App.p.47).

A timely Notice of Appeal was filed and Petitioner subsequently moved to withdrawal his appeal. The South Carolina Court of Appeals granted the motion by an order dated December 17, 2008. (App.p.57).

Petitioner filed his Application for post-conviction relief (PCR) on April 21, 2009, alleging ineffective assistance of counsel and involuntary guilty plea. At the subsequent PCR hearing, Petitioner alleged trial counsel was ineffective for not objecting to the solicitor's recitation of the facts at the sentencing hearing, specifically to the statement that the Petitioner was in the house and that Petitioner provided the guns used

in the crime. Petitioner also alleged trial counsel was ineffective for failing to investigate the forensic evidence possessed by the State linking the Petitioner to entering the victim's home. Petitioner claimed he was driving both co-defendants to West Columbia when he learned of the plan to rob of the victim for marijuana. (App.p.143). Petitioner provided police of a statement to this effect. (App.p.144).

At the PCR hearing, Plea counsel further testified he reviewed the extensive discovery disclosures with Petitioner. Plea counsel testified he did not interview the co-defendants because he had their statements and he decided not to use the letter sent to him by McCoy because of McCoy's prior inconsistent statements. (App.p.150-151). Plea counsel did not recall obtaining substantial SLED documentation in discovery. (App.p.154).

Plea counsel testified that he advised Petitioner that he would likely be convicted at trial of Murder, Armed Robbery and Kidnapping due to his confession coupled with the statements made by his co-defendants. (App.p.144-145). Plea counsel testified that any beneficial investigation that could have speculatively proven Petitioner did not enter the victim's home would not have negated an imminent conviction at trial. Plea counsel testified the solicitor was prepared to proceed on additional Murder, Armed Robbery, and Kidnapping charges if Petitioner proceeded trial. (App.p.167-8). Thus, plea counsel engaged in guilty plea negotiations with the solicitor. Petitioner testified that he was never given a fifteen year plea bargain but had always been offered burglary first and conspiracy with the State taking no position on sentencing. (App.p.146). Plea counsel advised Petitioner that it was in his best interest to cooperate with the solicitor and testify

against the co-defendants in order to obtain a favorable position at sentencing. (App.p.146). Plea counsel testified that at sentencing hearing, he presented Petitioner's version of the facts that Petitioner never entered the victim's home during the Burglary and Murder. (App.p.149). Plea counsel testified that the issue of whether Petitioner entered the victim's home turned on a credibility finding. (App.p.148-149). Plea counsel testified his strategy was to refute the solicitor's theory of the offense and recitation of facts instead of making an objection. (App.p.160). Furthermore, Plea counsel advised Petitioner of the terms of the guilty plea offer regarding its possible sentencing range. (App.p.155). Plea counsel testified he never promised Petitioner that Judge Westbrook would impose a particular sentence. (App.p.155).

The PCR Judge dismissed Petitioner's Application. The PCR Judge found that Petitioner failed to prove plea counsel was ineffective for failing to review and investigate Petitioner's claim that he never entered the victim's home. The PCR Judge stated, "[Petitioner] could not point to any specific matters counsel failed to discover which would have caused him to proceed with a jury trial instead of pleading guilty." (App.p.286). The PCR Judge found Petitioner's testimony not credible. The PCR Judge found that Petitioner's allegation was only supported by speculation. (App.p.287). The PCR Judge found plea counsel adequately investigated the discovery and effectively attacked McCoy's credibility during the sentencing hearing. (App.p.287).

Additionally, the PCR Judge found Petitioner failed to prove plea counsel was ineffective for not advising him of the terms of the guilty plea offer. (App.p.289). The PCR judge stated that, "[Petitioner] knew about the potential for life imprisonment on the

charge of burglary in the first degree. It was the (Trial) [J]udges decision to impose the sentence, and the harshness of the sentence was not due to errors or admissions of counsel, nor had it been established to having been due to errors or admissions of counsel, nor had it been established to having been due to any impropriety on behalf of the state." (App.p.289).

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).

Furthermore, for an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

ARGUMENT

I.

The PCR Judge correctly found plea counsel effectively prepared and investigated Petitioner's case prior to the plea, sentencing, and reconsideration hearings.

Petitioner argues plea counsel was ineffective for failing to investigate and present evidence to rebut the solicitor's version of the offense. Evidence of probative value shows the PCR Judge did not err in finding plea counsel adequately prepared for the hearings and investigated the State's evidence. First, plea counsel pursued a reasonable strategy by presenting Petitioner's version of the facts at the sentencing hearing and advising Petitioner to cooperate with the solicitor in order to bolster his position in mitigation at sentencing. Second, the investigation Petitioner referenced at the PCR hearing was speculative. Regardless, Petitioner failed to prove the alleged ineffectiveness resulted in prejudice because any beneficial result of the additional investigation would not have negated his guilt for Burglary—First Degree, or Criminal Conspiracy.

"[T]he determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." Stalk v. State, 383 S.C. 559, 562, 681 S.E.2d 592, 594 (2009). Without a doubt, "[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation." Thompson v.

Wainwright, see also Strickland v. Washington. When evaluating the reasonableness of counsel's conduct, "the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (internal citations omitted).

Petitioner failed to present forensic evidence that proved his theory of the offense. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)). None of the evidence referenced at the PCR hearing disproved McCoy's statement that Petitioner was in the victim's home during the offense.

Plea counsel pursued an effective plea strategy by advising Petitioner to cooperate with the State and by presenting Petitioner's version of facts at sentencing. When forming a trial strategy, "[c]ounsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (citing Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)). Plea counsel stated Petitioner never denied his role in the offense. As a result, Plea counsel pursued a valid plea mitigation strategy in advising Petitioner to cooperate in the State's case against Henry. (App.p.75). Additionally, plea counsel attacked McCoy's credibility at the sentencing hearing. Accordingly, Petitioner failed to prove the first prong of the Strickland test – that

trial counsel failed to render reasonably effective assistance under prevailing professional norms.

Furthermore, Petitioner failed to prove that plea counsel's alleged failure to investigate resulted in prejudice. First, overwhelming evidence of guilt existed to prove Petitioner's guilt. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); see also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001). Any evidence proving Petitioner did not enter the victim's home would have completely failed to negate Petitioner's guilt pursuant to his liability as an accomplice. As the Court of Appeals has noted:

> "Under the 'hand of one is the hand of all' theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Condrey, "A defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." Id.

State v. Thompson, 374 S.C. 257, 261-62, 647 S.E.2d 702, 704-05 (Ct. App. 2007) (internal citations omitted).

Petitioner's confession and McCoy's statements proved his guilt under SC Code § 16-11-311(A)(1)(b) by Petitioner's participation in the offense where another participant in the crime causes physical injury to a person who is not a participant in the crime. Petitioner willfully conspired and engaged in a planned burglary of the victim at his home that inevitably led to his murder.

Any beneficial evidence obtained from an additional investigation would have

only gone to mitigation at sentencing. Additionally, Petitioner failed to prove that counsel's alleged failure resulted in a substantial detriment at the sentencing hearing. The solicitor even conceded that the State's theory of the case required Judge Westbrook to find McCoy's statement credible. No other substantive evidence definitively proved Petitioner entered the victim's residence. Judge Westbrook presided over Henry's trial and heard ample testimony regarding McCoy's various statements. Additionally Judge McMahon reviewed the Henry trial transcript when denying Petitioner's motion for sentence reconsideration. Therefore, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. Thus this issue is without merit.

II.

The PCR judge correctly ruled that Petitioner failed to prove that his guilty plea was involuntarily rendered as a result of plea counsel's alleged failure to effectively advise Petitioner of the terms of the guilty plea.

Petitioner argues that plea counsel failed to enforce the solicitor's guilty plea offer because the solicitor changed his version of the facts of the offense at the sentencing hearing subsequent to the previous hearing where Petitioner entered his guilty plea. Evidence of probative value shows the PCR judge correctly ruled that plea counsel effectively advised Petitioner of the circumstances and consequences regarding the guilty plea. The solicitor's guilty plea offer precluded any stipulation to the facts of the offense. Therefore, Petitioner's second issue before this Court is without merit.

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984). "In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) (citing Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

Plea counsel testified that the solicitor offered to plead Petitioner to Burglary—First and Criminal Conspiracy without recommendation or negotiation. At the February 9, 2006 sentencing hearing, the solicitor's further development of the State's version of the offense during his recitation of facts did not render Petitioner's guilty plea

involuntary.

Petitioner failed to prove that plea counsel allegedly misadvised him that the guilty plea offer included a stipulation to the facts of the offense.

Therefore, Petitioner waived his right to present a defense and confront his accusers when he entered the guilty plea on January 12, 2004. As noted by the United States Supreme Court:

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Malloy v. Hogan. Second, is the right to trial by jury. Duncan v. Louisiana. Third, is the right to confront one's accusers. Pointer v. Texas.

Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274 (1969) (internal citations omitted). Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. Thus, Petitioner's second issue on appeal is without merit.

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

CONCLUSION

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

Respectfully submitted,

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By: _____
ATTORNEYS FOR RESPONDENT

14, 28th, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable William P. Keesley, Circuit Court Judge

WHELTHY MCKUNE,

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:

Tricia Blanchette, Esq.
PO Box 12725
Columbia, SC 29211

This 28th day of February, 2013

Troyeshi Brailey
LEGAL ASSISTANT

The South Carolina Court of Appeals

Whelthy McKune, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-212676

ORDER

This matter is before the Court on a petition for a writ of certiorari following the denial of Petitioner's application for post-conviction relief. The petition for a writ of certiorari is denied.

Thomas C. Young J.

J.

J.

Columbia, South Carolina

cc: Tricia A. Blanchette, Esquire
John Walter Whitmire, Esquire

FILED

June 24, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

WHELTHY MCKUNE,

PETITIONER,

V.

THE STATE,

RESPONDENT.

PETITION FOR REHEARING
AND
PETITION FOR REHEARING *EN BANC*

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STATEMENT OF THE CASE

During the January 2004 term of the Lexington County Grand Jury, Petitioner was indicted for Burglary, First Degree (Indictment No.: 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 filed, and Petitioner moved to withdraw his appeal. The South Carolina Court of Appeals granted Petitioner's motion by order dated December 17, 2008. App. p. 57.

On April 21, 2009, Petitioner filed an Application for Post Conviction Relief. 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 specific allegations to his original allegation of ineffective assistance of counsel and involuntary guilty plea. App. p. 71.

An evidentiary hearing was conducted on November 29, 2010 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, through counsel, admitted seventeen exhibits. The State offered the testimony of Cameron Littlejohn, Esquire. The court also had before it a copy of the Application, Respondent's Return, Petitioner's 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.

At the conclusion of the evidentiary hearing, the lower court indicated his concern that he may have had some involvement in Petitioner's case that could present a conflict and he took the matter under advisement. App. pp. 174-8. On September 16, 2011, the court issued a Memorandum Order of Denial, which instructed the State to submit an Order of Dismissal. App. p. 267. The 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), SCRCP, and/or Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP. 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.

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, this Court denied the Petition for Writ of Certiorari via written Order, from which this Petition for Rehearing and Petition for Rehearing En Banc follows.

ARGUMENT

Pursuant to Rule 221, SCACR, Petitioner would respectfully request that this Court review the Petition for Writ of Certiorari, filed on October 26, 2012, and reconsider the decision entered on June 24, 2014 to deny the Petition for Writ of Certiorari without written explanation or opinion.

By way of the Petition for Writ of Certiorari, Petitioner argued that the lower court erred in finding that plea counsel's performance was not ineffective and prejudicial thus rendering the plea involuntary since there was no evidence of probative value to support such a finding. Petitioner would ask this Court to reconsider the complete argument set forth in the Petition for Writ of Certiorari before upholding the decision of the lower court that found that counsel's ineffective assistance was excusable despite counsel's admission that the plea was of no benefit to Petitioner. App. p. 163, lns. 3-7. The record, specifically the testimony from the PCR hearing, shows that no probative evidence supports the findings of the PCR court; therefore, Petitioner urges this Court to not uphold the findings of the lower court. See Jackson v. State, 355 S.C. 568, 570, 586 S.E.2d 562, 563 (2002).

By way of the Petition for Writ of Certiorari, Petitioner argued, in detail, that counsel provided ineffective assistance of counsel, which rendered his guilty plea involuntary, when he failed to prepare, investigate, and competently advise and represent Petitioner at his plea, sentencing and reconsideration hearings. As was admitted by plea counsel, no investigation was conducted nor was the complete discovery reviewed with Petitioner before counsel advised him to enter a guilty plea, which resulted in the maximum sentence of life. As is argued in detail in the Petition, counsel also errantly

advised Petitioner to enter a guilty plea due to unsubstantiated "forensic" evidence that showed that Petitioner entered the home forcibly through the back door.

Turning to the plea and sentencing proceeding, Petitioner testified that he was advised by counsel that the State would inform the plea court that they did not oppose plea counsel's sentence recommendation. Yet, the State stood silent and did not provide such information to the court. Also at the plea portion of the bifurcated proceedings, the State provided a factual basis that Petitioner acted solely as the getaway driver and did not enter the home. This was the factual basis on which Petitioner entered his plea. When Petitioner appeared for sentencing, the State informed the court 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.[1] 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. He also testified that he requested that counsel withdraw his plea due to the variance in the recommendation and facts, and counsel testified that he vaguely remembered Petitioner's request, which he did not act on at the sentencing or reconsideration hearing.

Petitioner submits that his case is right in line with the facts, ineffective assistance and prejudice this Court found in Smith v. State, 407 S.C. 270, 754 S.E.2d 900 (Ct. App.

[1] Petitioner argued in the Petition for Writ of Certiorari that ample evidence existed to refute the State's "new" version of the fact. See Petition p. 22-23.

2014).[2] 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. Id. at 272-4, 754 S.E.2d at 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.[3] Id. at 274-5, 754 S.E.2d at 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. Yet, in Smith this Court found that plea counsel was ineffective when she failed to object to the State's recommendation that the court impose the maximum sentence. See also Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000), Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1998).

Additionally, in the instant case, Petitioner not only alleged that counsel was ineffective regarding the State's position on sentencing but also that there was a prejudicial factual variance from plea to sentencing, which counsel failed to address. As a result, Petitioner submits that plea counsel's ineffective assistance exceeds that which was present in Smith. Furthermore, the prejudice is clearly evident from the court's imposition of a life sentence. Plea counsel simply said it best, "If he had gone to trial and gotten convicted, he probably would have gotten the same sentence." App. p. 89, lns. 3-7.

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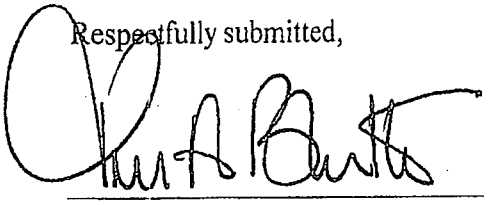
[2] Undersigned counsel (Tricia A. Blanchette) was appointed to represent Gerald Smith at the evidentiary hearing from which the appeal in Smith v. State was taken.

[3] 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.

CONCLUSION

In consideration of the above stated arguments, Petitioner respectfully requests that the Court conduct a full review of the previously submitted Petition for Writ of Certiorari and Appendix. Petitioner would further urge this Court to reverse the Order filed on June 24, 2014 and allow Petitioner to further brief the arguments or remand to the lower court for a new trial.

Respectfully submitted,



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

This 7 day of July 2014.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

WHELTHY MCKUNE,

PETITIONER,

V.

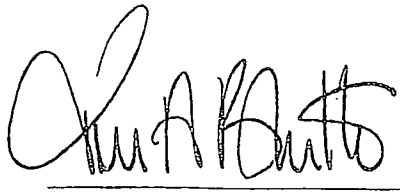
THE STATE,

RESPONDENT.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that I hand delivered this 7th day of July 2014, a copy of the Petition for Rehearing and for Rehearing En Banc, to J. Walt Whitmire of the Attorney General's Office, at:

Office of the Attorney General
ATT: J. Walt Whitmire, Ast. AG
1000 Assembly Street
Columbia, SC 29201



Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
(803) 988-0008
Attorney for Petitioner

July 7, 2014

STATE OF SOUTH CAROLINA

In The Court of Appeals

CERTIORIA TO LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge
Appellate Case No.: 2012-212676

Order Denying Petition for a writ of Certiorari (filed June 24, 2014)

The State,

Respondent,

vs.

Whelthy McKune,

Petitioner.

RETURN TO PETITION FOR REHEARING AND PETITION FOR REHEARING *EN BANC*

---

1. Petitioner filed its Petition for Rehearing and Petition for Rehearing *En Banc* on July 7, 2014. By letter dated July 24, 2014, this Court directed Respondent to file a Return.

1. Rule 243 governs appeals from Post Conviction Relief Actions. See Rule 243, SCACR. Pursuant to Rule 240, SCACR, "[A]ny party opposing a motion or petition shall have ten (10) days from the date of service thereof to file an original and six (6) copies of his return with the clerk and serve on all parties a copy of the return; provided, however, a return to a petition or motion for rehearing under Rule 221 need not be filed unless requested by the court." Rule 240, SCACR. Pursuant to Rule 221, "A petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court. **No petition for rehearing shall be**

allowed from an order denying a petition for a writ of certiorari under Rule 242, SCACR." Rule 221, SCACR (emphasis added); see also Hollins v. Wal-Mart Stores, Inc., 392 S.C. 313, 709 S.E.2d 625 (2011). In State v. Rucker, the South Carolina Supreme Court held, "[w]e conclude that a petition for rehearing following the denial of a petition for a writ of certiorari to the Court of Appeals is not authorized by the South Carolina Appellate Court Rules." State v. Rucker, 321 S.C. 552, 553, 471 S.E.2d 145 (1996). In Ellison v. State, the South Carolina Supreme Court held, "a decision by the Court of Appeals to grant or deny a writ of certiorari in a PCR case is a matter committed to that court's discretion, and a decision to deny certiorari in such a case can never be deemed "a special reason" justifying the exercise of our discretion under Rule 226." Ellison v. State, 382 S.C. 189, 191, 676 S.E.2d 671, 672 (2009).

2. Respondent submits that the Court's request for a Return to Petitioner's Petition for Rehearing and Petition for Rehearing *En Banc* is in contravention to Rule 221, SCACR. The Court exercised its discretion to deny the Petition for a Writ Certiorari. Respondent further submits that Petitioner has not and simply cannot, as a matter of course, satisfy Rule 221's particularity requirement from the Court's Order denying the Petition for a Writ of Certiorari.

3. "A petition for rehearing must show points supposedly overlooked or misapprehended by the court. Its purpose is not to present points the lawyers of losing parties overlooked themselves or to have the case tried in the Court of Appeals a second time." Checker Yellow Cab Co., Inc. v. Checker Cab & Parcel Serv., Inc., 287 S.C. 608, 612, 340 S.E.2d 549, 552 (Ct. App. 1986). "Litigants are not required to petition for rehearing and certiorari following an adverse decision of the Court of Appeals in order to be deemed to

have exhausted all available state remedies for federal habeas corpus review." State v. Lyles, 381 S.C. 442, 444, 673 S.E.2d 811, 812 (2009). "A hearing or rehearing *en banc* is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

4. Respondent submits that that the Petition for Rehearing and Petition for Rehearing *En Banc* are without merit. The Court appropriately exercised its discretion in denying Petitioner's Petition for a Writ of Certiorari. See Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) ("This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them."); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000) ("In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief.").

CONCLUSION

For all of the foregoing reasons, and for all the reasons set out in the return, Respondent respectfully requests that the Court should deny the Petition for Rehearing and Petition for Rehearing En Banc as a matter of course pursuant to Rule 221, SCACR and on lack the lack of merit.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

WALT WHITMIRE
Assistant Attorney General

BY: _____

WALT WHITMIRE
SC Bar No. 100793

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-4198

ATTORNEYS FOR RESPONDEN

August 4, 2014.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

CERTIORIA TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable William P. Keesley, Circuit Court Judge
Appellate Case No. 2012-212676

WHELTHY MCKUNE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

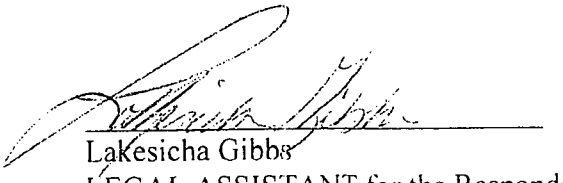
RESPONDENT.

CERTIFICATE OF SERVICE

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

Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette, LLC
PO Box 12725
Columbia, SC 29211

This 4th day of August, 2014



Lakesicha Gibbs
LEGAL ASSISTANT for the Respondent

The South Carolina Court of Appeals

Whelthy McKune, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-212676

ORDER

Appellant has filed a petition to rehear this court's order of June 24, 2014, denying Appellant's petition for a writ of certiorari. After careful consideration, the petition for rehearing is granted, and we withdraw our order denying certiorari and grant certiorari. The parties shall serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

Thomas C. Hoff J.

James E. Lockemy J.

I would deny the petition for rehearing.

Paula H. Thomas J.

Columbia, South Carolina

cc:
Tricia A. Blanchette, Esquire
John Walter Whitmire, Esquire
Alan McCrory Wilson, Esquire
The Honorable William P. Keesley

FILED
Sept. 18, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Whelthy McKune, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-212676

Appeal From Lexington County
William P. Keesley, Circuit Court Judge

Unpublished Opinion No. 2016-UP-012
Heard November 3, 2015 – Filed January 13, 2016

AFFIRMED

Tricia A. Blanchette, of the Law Office of Tricia A. Blanchette, LLC, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Assistant Attorney General John Walter Whitmire, and Assistant Attorney General Patrick Lowell Schmeckpeper, all of Columbia, for Respondent.

PER CURIAM: In this post-conviction relief (PCR) matter, Petitioner Whelthy McKune appeals the PCR court's order denying his PCR application, alleging

ineffective assistance of counsel. Specifically, McKune argues plea counsel was ineffective for (1) failing to adequately prepare for and investigate his case, (2) failing to adequately explain the State's position on sentencing, (3) failing to object or move to withdraw McKune's guilty plea at sentencing, and (4) failing to present a viable defense on McKune's behalf at the reconsideration hearing. We disagree and affirm pursuant to Rule 220(b), SCACR, and the following authorities: *Stalk v. State*, 383 S.C. 559, 560–61, 681 S.E.2d 592, 593 (2009) (stating that in order to establish a claim for ineffective assistance of plea counsel, a PCR applicant must prove: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the applicant's case); *Edwards v. State*, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011) ("In reviewing a PCR court's decision, an appellate court is concerned only with whether there is any evidence of probative value that supports the decision."); *Holden v. State*, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) (finding appellate courts give great deference to the PCR court's findings of fact and conclusions of law); *Wolfe v. State*, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997) ("A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing (1) that counsel's representation fell below an objective standard of reasonableness and (2) that there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty but would have insisted on going to trial."); *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result."); *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) ("[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." (emphasis omitted)); *Drayton v. Evatt*, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) ("[Appellate courts] give great deference to a [PCR court's] findings where matters of credibility are involved since [appellate courts] lack the opportunity to directly observe the witnesses."); *Strickland v. Washington*, 466 U.S. 668, 700 (1984) ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats [an] ineffectiveness claim."); *Stalk*, 383 S.C. at 562, 681 S.E.2d at 594 ("[I]n order to satisfy the 'prejudice' requirement, the defendant must show that 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."); *Hutto v. State*, 387 S.C. 244, 249, 692 S.E.2d 196, 198 (2010) ("No prejudice occurs, despite deficient performance, when there is overwhelming evidence of guilt.").

AFFIRMED.

SHORT, GEATHERS, and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

WHELTHY MCKUNE,

PETITIONER,

V.

THE STATE,

RESPONDENT.

PETITION FOR REHEARING
AND
PETITION FOR REHEARING *EN BANC*

Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
(803) 988-0008
Attorney for Petitioner

INDEX

STATEMENT OF THE CASE

During the January 2004 term of the Lexington County Grand Jury, Petitioner was indicted for Burglary, First Degree (Indictment No.: 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 filed, and Petitioner moved to withdraw his appeal. The South Carolina Court of Appeals granted Petitioner's motion by order dated December 17, 2008. App. p. 57.

On April 21, 2009, Petitioner filed an Application for Post Conviction Relief. 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 the following specific allegations to his original allegation of ineffective assistance of counsel and involuntary guilty plea:

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.

    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.

An evidentiary hearing was conducted on November 29, 2010 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, through counsel, 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, Petitioner's 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.

At the conclusion of the evidentiary hearing, the lower court indicated his concern that he may have had some involvement in Petitioner's case that could present a conflict and he took the matter under advisement. App. pp. 174-8. On September 16, 2011, the lower court issued a Memorandum Order of Denial, which instructed the State to submit an Order of Dismissal. App. p. 267. The 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), SCRCP, and/or Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP. 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.

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, this Court 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, 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 this Court. 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 this Court affirming the decision of the lower court, from which this Petition for Rehearing and Petition for Rehearing *En Banc* follows. McKune v. State, Unpub. Op. No. 2016-UP-012 (S.C. Ct. App. filed Jan. 13, 2016).

ARGUMENT

Pursuant to Rule 221, SCACR, Petitioner would respectfully request that this Court review the Brief of Petitioner, in addition to the oral argument made before this Court on November 3, 2015. Petitioner, through counsel, would submit that this Court has failed to address the entirety of Petitioner's argument and has errantly focused on whether counsel was ineffective for failing to properly prepare and investigate. In the standing Opinion, this Court appears to have relied upon Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009). As a result, this Court failed to address the prejudice Petitioner suffered and counsel's request that this Court conduct a prejudice analysis similar to the analysis utilized by both appellate courts in 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).[1] Furthermore, it appears this

[1] Additionally Applicant would ask this Court to consider the alternative prejudice argument set forth as follows in the Brief of Petitioner:

Court was lured in by the State's overreaching and misplaced argument regarding overwhelming evidence of guilt, which was not the analysis this Court applied in Smith.[2] 407 S.C. 270, 754 S.E.2d 900 (Ct. App. 2014). As was argued in the Brief and at oral arguments, Petitioner would ask this Court to consider the following and find that reversal and relief is required in this case.

To understand the ineffective assistance provided and prejudice suffered, 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

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[I]n Davie v. State, 381 S.C. 601, 613, 675 S.E.2d 416, 422-23 (2009), the South Carolina Supreme Court reasoned that it is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant's self-serving statement may be sufficient to establish actual prejudice. See 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."), Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000) (Holding that there was enough evidence to demonstrate that there was a reasonable probability that defendant would not have pled guilty even though defendant did not specifically testify that he would have insisted upon going to trial if he had known the solicitor was going to make a recommendation.).

Brief pp. 19-20.

[2] This argument was made in more detail in reply during the oral arguments.

minimum sentence. [3] 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, was sentenced to life. 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.[4] App. p. 15.

On February 9, 2004, Petitioner appeared for the sentencing portion of his bifurcated 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, which means it was known at the time of the plea but not mentioned on the record at the plea, Petitioner was only seventy-five percent truthful. App. p. 11. He continued by stating that there was testimony 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. Additionally, counsel failed to utilize the nine evidentiary items

[3] Petitioner submits that the "forensic evidence" was refuted and not substantiated at the evidentiary hearing or in the record before this Court.

[4] 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.

outlined in Petitioner's brief, failed to point out that McCoy not Petitioner lead the State to the guns – which the State admitted when they were attempting to bolster the cooperation of McCoy at the reconsideration hearing, and failed to ask the State for the forensic proof that Petitioner entered the back door. App. p. 41.

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. After counsel and the Assistant Attorney General acknowledged the variation in facts from plea to sentencing, he 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 cases like 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).

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 but never pointed out that the solicitor changed the facts and level of culpability from "solely get away driver" to entering the house and providing the guns. 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, as was fully addressed in the Brief of Petitioner and also addressed at the oral argument:

1. Petitioner was threatened by his co-defendants.

2. Petitioner's understanding that counsel would request and the State would not oppose a request for 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.

4. Counsel failed to require the State to substantiate the "forensic proof," which was refuted at the evidentiary hearing and unsubstantiated by State in record before the lower court and this Court.[5]

Petitioner submits that this Court has misapprehended and/or overlooked each of the above listed four points, which are argued in more detail in the Brief of Petitioner. Specifically, Petitioner submits that his case is right in line with the facts, ineffective assistance and prejudice this Court addressed in Smith v. State, 407 S.C. 270, 754 S.E.2d 900 (Ct. App. 2014) and the later decision of the South Carolina Supreme Court.[6] Smith v. State, 413 S.C. 194, 775 S.E.2d 696 (2015). 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. Id. at 272-4, 754 S.E.2d at 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.[7] Id. at 274-5, 754 S.E.2d at 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 this material term of their plea agreement. In Smith, this Court found 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; See also 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

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

[6] 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.

[7] 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.

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.).

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 a prejudicial factual variance from plea to sentencing, which counsel failed to address. As a result, Petitioner submits that plea counsel's ineffective assistance exceeds that which was present in Smith, Thompson and Jordan.

As the record demonstrates, counsel admittedly did no investigation, was not present at the trial of co-defendant Henry or know the file well enough to call the State out when the State came up with a strategy to get Petitioner a life sentence and no benefit from his plea.[8] Simply put, there is no evidence of probative value to support the lower court's finding that counsel rendered effective assistance. What did he do, where is the effective assistance found by the lower court? This is not a matter of mere inattentiveness as the Court addressed in Stalk. 383 S.C. 559, 681 S.E.2d 592 (2009).

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 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

[8] When asked at the evidentiary hearing, counsel testified that he would have had adequate time to start investigation if Petitioner went to trial with John Henry. App. p. 167.

have pled guilty if he knew he could greater than twenty years was enough to establish prejudice.).

Additionally, Petitioner 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 the life sentence itself kicks in Davie prejudice analysis. 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. 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).

Finally, Petitioner submits that this Court's clear reliance on overwhelming evidence of guilt to defeat any finding of prejudice is misplaced. First, Petitioner submits that this finding misinterprets the findings of the lower court and the issue of overwhelming evidence of guilt was first raised by the Respondent on appeal and not properly before this Court. Secondly, 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 case stemming from a guilty plea. See Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1993) (Overwhelming evidence of guilt analysis

in matter 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), 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), 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). Thirdly, 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). Finally, Petitioner respectfully asks this Court to reconcile the lack of a finding of overwhelming evidence in Smith with such a finding in the instant case.

CONCLUSION

In consideration of the above stated arguments, Petitioner respectfully requests that the Court conduct a full review of the previously submitted Petition for Writ of Certiorari, Brief, and Appendix, along with the arguments orally presented to this Court. Petitioner would further urge this Court to grant rehearing, reverse the Opinion filed on January 13, 2016 and remand to the lower court for a new trial.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

This 26 day of January 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JAN 26 2016
SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable William P. Keesley, Circuit Court Judge

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

Whelthy McKune,.....Petitioner,

vs.

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 January 2016, a copy of a Petition for Rehearing to Patrick Schmeckpeper of the Attorney General's Office, at:

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The South Carolina Court of Appeals

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Re: Whelthy McKune v. State
Appellate Case No. 2012-212676

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

CLERK

The South Carolina Court of Appeals

Whelthy McKune, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-212676

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.

J.

Stephanie P. McDonald J.

Columbia, South Carolina

cc:
Tricia A. Blanchette, Esquire
John Walter Whitmire, Esquire
Alan McCrory Wilson, Esquire
Patrick Lowell Schmeckpeper, Esquire

FILED
April 4, 2016