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,

vs.

State of South Carolina, Respondent.

BRIEF OF PETITIONER

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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 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, from which this Brief 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 included 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 on two occasions for a bond hearing. At the second bond hearing, counsel advised him that his court date was approaching and that bond would be a waste of money. App. p. 85. Counsel wanted him to accept a fifteen (15) year plea offer, but Petitioner did not have an "understanding really what was going on at that time, so I told him no." App. p. 86, lns. 1-4. Petitioner explained that he had not received all the discovery when the plea offer was conveyed to him. App. pp. 85-6, 112.

At their next meeting on September 22, 2003, Petitioner recalled meeting with Mr. Swarat and an investigator from the Solicitor's office. Acting solely on the advice of counsel, he cooperated with the State and provided his story of the events in question. App. pp. 86-7. He explained that he could not provide the information the State wanted

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

regarding the guns since he did not have anything to do with the guns. App. p. 87, lines, 2-3.

On January 5, 2004, counsel provided Petitioner discovery to review, and they discussed the State's theory that Petitioner supplied the guns and kicked in the back door. App. p. 87. Counsel advised Petitioner that it would be best to enter a guilty plea since he was facing fifteen years to life for conspiracy and burglary. App. p. 87. Counsel further advised Petitioner that the State would inform the plea court about how truthful the Petitioner had been throughout the whole process and the 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.

While on the stand, 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 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 identified a copy of a letter that he sent to Mr. Littlejohn requesting a copy of his file and explained that Mr. Littlejohn failed to respond to the letter. App. p. 108, 235.

Turning to the plea, Petitioner explained that he took the plea due to Mr. Littlejohn's advice regarding the forensic evidence and the State's agreement to 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 counsel's advice regarding the risk of receiving the maximum sentence, Petitioner recalled counsel not being concerned that he would receive a life sentence as a result of the plea. App. p. 114.

At the plea hearing on January 12, 2004, the State informed the court that Petitioner acted solely as the getaway driver. 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 Petitioner denied involvement with the guns and with going in the house, but counsel failed to refute the State's assertions regarding the forensic evidence or use any of the exculpatory evidence to support his position. App. p. 119. Petitioner also explained that counsel failed to inform the court that his co-defendants threatened to pistol whip him. App. pp. 119-20.

Petitioner introduced a copy of the Motion for Reconsideration filed on February 11, 2004. App. pp. 121, 237. Petitioner also introduced a letter dated May 12, 2004 that he received with the Motion. App. p. 239. By way of this letter, Petitioner was informed that Mr. Littlejohn and his office thought Petitioner's sentence was "devastating" and "unfair" and that Mr. Littlejohn was making calls on his behalf. App. pp. 121-2, 239. Petitioner explained he did not know what transpired from those calls since his letters to Mr. Littlejohn and request for him to obtain the plea and

sentencing transcripts went unanswered. App. pp. 122-125. During the extended pendency of the motion, the Honorable Marc H. Westbrook passed away, so the motion was heard on October 17, 2006 by the Honorable R. Knox McMahon. App. pp. 22, 125.

At the hearing, counsel informed the court that Petitioner claimed he did not enter the house, but counsel failed to utilize the SLED file and discovery materials to verify this claim or refute the State's position that forensic evidence showed he went in the house. App. p. 126. In response, the State referenced his co-defendant's trial transcript to show that co-defendant McCoy implicated him as going in the house. App. pp. 31-2. As Petitioner noted, counsel failed to explain Petitioner's inability to refute the testimony of a co-defendant during another co-defendant's trial. App. p. 126-7. When asked by the court, counsel also somewhat confusingly placed Petitioner in the house. App. p. 27. Of utmost importance, Petitioner alleged that counsel should have addressed the variance in the facts given by the State from the plea to the sentencing hearings and his desire to withdraw his guilty plea. App. p. 128.

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

instruction from the Court of Appeals for counsel to properly file the appeal. App. pp. 133-5, 266.

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

2. Cameron Littlejohn, Esquire (Plea Counsel)

When Cameron Littlejohn, Esquire, was called to the stand, he recalled meeting with Petitioner on several occasions. He recalled discussing the charges and Petitioner's side of the story, which was factually similar to Petitioner's testimony on direct. App. pp. 142-3. He agreed that Petitioner remained steadfast in his factual position. App. p. 143. On the other hand, he explained that the State was adamant that Petitioner had "broken in the back door and gone in while the robbery/burglary/killing went on." App. p. 147, lns. 15-18. He went on to explain that "there was no real evidence to say that he definitely did not go in the house." App. p. 147, lns. 23-4. Counsel 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. Counsel did not specifically recall receiving or reviewing the SLED file and indicated that the forensic evidence referred to by the State may have consisted of some pictures of the back door. App. p. 162. He admitted that he did not attempt to speak to any of Petitioner's co-defendants since he had their statements. App. pp. 150-51. He did recall a letter from co-defendant McCoy but surmised that it was likely not helpful due to McCoy's inconsistent statements.

App. p. 151. He admitted that he did not use a private investigator nor did he conduct any form of an independent investigation. App. p. 159.

As to plea negotiations and advice rendered, counsel recalled advising Petitioner that it would be in his best interest to cooperate with the State. App. p. 146. When 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. Counsel did not recall an offer for fifteen years and explained that he was able to get an offer for fifteen to life with the deal that "the State would take no position on sentencing." App. p. 146.

Turning to the plea and sentencing, counsel stated that he believed he got the indictments the day of the plea and showed them to Petitioner so he could answer 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.

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

PCR counsel: And would you agree or disagree that you would need to object to preserve that issue for your client for appellate review as far as a variation in the facts and the knowing and voluntary nature of the guilty plea?

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

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

When asked if he was surprised by Petitioner's sentence, counsel responded: "You'd probably find my jaw over there next to that podium." App. p. 155. Counsel

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 reasoned that the two year delay in having the motion heard was due to his strategy and the intervening circumstances. App. pp. 163-4. Counsel could not recall communicating with Petitioner during the two year delay, but he recalled talking to Petitioner's mother a couple of times. App. p. 164-5. When asked about Petitioner's motion to relieve him as counsel and the delay in the order on the motion to reconsider, counsel answered repeatedly that he could not recall or did not remember. App. p. 165-6. In response to whether there was any benefit of Petitioner's guilty plea, counsel responded: "Well, quite frankly, no. If he had gone to trial and gotten convicted, he probably would have gotten the same sentence." App. p. 163, lns. 3-7.

B. Argument

A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). In South Carolina, the courts have consistently held that that a defendant must have a full understanding of the consequences of his plea and the charges against him. Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997), Simpson v. State, (317 S.C. 506, 455 S.E.2d 175 (1995). Additionally, a defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the assistance provided by counsel, "There is a strong presumption that counsel rendered adequate assistance and

exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

In a PCR stemming from a guilty plea, an applicant alleging a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). Therefore, an applicant that entered a plea on the advice of counsel may only attack the voluntary nature of that plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, applicant would not hve 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), the South Carolina Supreme Court reiterated the prejudice requirement set forth in Hill. The 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. Id.

However, in 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.).

"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. The lower court 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. Petitioner submits that the record, specifically the testimony elicited at the evidentiary hearing, shows that no probative evidence supports the findings of the lower 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).

Specifically, Petitioner alleged and counsel admitted that no independent investigation was conducted prior to the entry of Petitioner's guilty plea. The South Carolina Supreme Court has held that trial counsel has a duty to perform a reasonable investigation, which at a minimum includes the duty to conduct an independent investigation of the facts and circumstances of the case and interview potential witnesses. Lounds v. State, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008); See Ard v. Catoe, 372

S.C. 318, 331, 642 S.E.2d 590, 597 (2007). At the evidentiary hearing, Petitioner testified, as is detailed above, regarding each meeting with counsel. He also testified about the 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. It is clear counsel 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.

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, the South Carolina Supreme 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.) It is clear from Petitioner's testimony that he relied upon the erroneous advice of counsel regarding the forensic evidence in deciding to enter a plea.

After sentencing when Petitioner obtained the SLED file on his own, he 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.[2] 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 that refuted his advice about the forensic evidence and the State's theory of the case, 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 when he advised him to enter the guilty plea.

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

[2] Petitioner was alleged to be the third robber.

defense counsel's recommendation on the sentence, yet counsel failed to enforce Petitioner's understanding of this material term of the plea agreement. Regarding his understanding of the State's position on sentencing, Petitioner 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 Petitioner recalled the State stood silent and did not inform the Court of the lack of opposition as Petitioner expected nor did counsel ensure that Petitioner's understanding of the plea agreement was placed on the record.

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).[3] 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.[4] 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

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

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

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.).

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.

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

Only after Petitioner had entered his guilty plea and appeared for sentencing did the State allege that he provided the guns and entered the home during the robbery. Clearly, the facts on which the plea was entered and accepted and the facts given by the State at the sentencing proceeding varied from getaway driver to active participant

completely changing Petitioner's level of culpability. At the evidentiary hearing, Petitioner made it clear that he would not have entered his plea if he would have heard the facts presented by the State at the sentencing proceeding or known that the State was going to stay silent regarding sentencing recommendations. Petitioner testified that he requested that counsel withdraw his plea, and counsel testified that he vaguely remembers Petitioner's request, which he did not act on at the sentencing or reconsideration hearings.

Overall, Counsel could not provide a straight answer when asked about the variance in the facts or Petitioner's understanding of the State's sentencing recommendation. Counsel repeatedly stated that he would defer to the transcript and it was not typical to object during a plea. Similarly, counsel was also unable to provide the court a straight answer at sentencing when specifically asked whether Petitioner was in the house or not. Here, counsel's failure was immense yet somehow found to be reasonable by the lower court. Clearly, counsel failed to object and/or move to withdraw Petitioner's guilty plea when the facts drastically varied from the plea to sentencing hearing and when Petitioner's understanding of the State's position on sentencing 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 being sentenced under another set of facts that were highly damaging to Petitioner. Here, counsel's failure to act in a

competent manner rendered Petitioner's plea absolutely involuntary. As a result, counsel's failure to act amounted to highly prejudicial ineffective assistance.

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

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." App. p. 291. 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 Petitioner's understanding of the State's position on sentencing, the variance in the facts from plea to sentencing and the exculpatory evidence discovered by Petitioner, but counsel did not seize the opportunity to effectively represent Petitioner.

It is clear that Petitioner 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) (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.); Jordan v. State, 297 S.C. 52, 53-54, 374 S.E.2d 683, 684-85 (1988) (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.).

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. Petitioner thoroughly outlined the exculpatory information contained in the file and defenses available to the State's version of the facts that were available if he would have proceeded to trial. Additionally, Petitioner explained that he had provided counsel a letter from a co-defendant (McCoy) explaining Applicant's limited role and Applicant testified that he was threatened by his co-defendants.

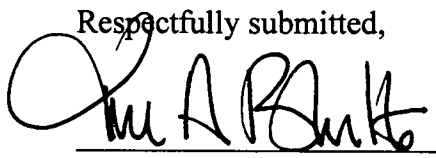
Unfortunately for Petitioner, the prejudice resulting from counsel's ineffective assistance does not rest on foregoing trial alone. Here, Petitioner received a life sentence after entering a guilty plea, which begs the questions of what was the benefit of entering the guilty plea. When this question 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. The letter from plea

counsel's office dated May 12, 2004 summarizes Petitioner's sentence best as unfair, surprising, shocking and devastating. App. p. 239. 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, Petitioner respectfully requests that this Court reverse the findings in the Order of Dismissal and grant Petitioner relief due to plea counsel's ineffective assistance.

Respectfully submitted,



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This 8 day of October, 2014.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable William P. Keesley, Post-Conviction Relief Judge

---

Appellate Case No. 2012-212676

Whelthy McKune, ... Petitioner,

v.

State of South Carolina, ... Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

1. Does probative evidence support the PCR Judge finding that Petitioner failed to prove counsel was ineffective in investigating his case prior to the plea, sentencing, and reconsideration hearings?

2. Does probative evidence support the PCR Judge finding that Petitioner failed to prove that his guilty plea was rendered involuntary due to 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 to 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 faced fifteen years to life sentence on the Burglary charge. (App.p.5). Subsequently, the solicitor announced a brief recitation of the facts of Petitioner's guilt. (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. The sentences were to be served 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 the 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 account was corroborated by evidence that showed the rear door of the victim's home had been damaged. Judge Westbrook commented:

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 addressed Judge Westbrook during the aggravation phase of the sentencing hearing. 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 supplied the firearms used in the crime. Petitioner also alleged 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, 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 had strategically decided not to use the letter sent to him by McCoy where he already had the co-defendant's statement. (App.pp.150-51). Plea counsel did not recall obtaining useful SLED records in the State's discovery disclosures. (App.p.154).

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.pp.144-45). Counsel testified that the purported evidence introduced at the PCR hearing that showed Petitioner did not enter the victim's home constituted conjecture; furthermore, he noted that the matter at issue did not diminish the State's overwhelming evidence of Petitioner's guilt. Plea counsel testified the solicitor was prepared to proceed on additional Murder, Armed Robbery, and Kidnapping charges if Petitioner went to trial. (App.pp.167-68).

Petitioner testified that he was never promised a fifteen year plea bargain; but was promised that the State would take no position on sentencing. (App.p.146). 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 for sentencing. (App.p.146). Counsel

testified that at the 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). Counsel testified that the issue of whether Petitioner entered the victim's home turned on a credibility finding. (App.pp.148-49). Counsel testified his strategy was to refute the solicitor's theory of the offense instead of making an objection. (App.p.160). Furthermore, counsel advised Petitioner of the terms of the plea agreement concerning sentencing exposure. (App.p.155). Counsel testified he never promised Petitioner that Judge Westbrook would impose a particular sentence. (App.p.155).

In denying and dismissing the PCR 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 fatally reliant upon speculation. (App.p.287). The PCR Judge found plea counsel adequately evaluated the State's evidence and effectively attacked McCoy's credibility during the sentencing hearing. (App.p.287).

Additionally, the PCR Judge found Petitioner failed to prove 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 [Judge Westbrook]'sdecision 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, 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. at 668).

ARGUMENT

I.

Certiorari was improvidently granted where the PCR Judge made a sound finding that Petitioner failed to meet his burden to prove that counsel's performance was ineffective in investigating his case prior to the plea, sentencing, and reconsideration hearings.

Petitioner argues 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 counsel adequately prepared for the hearings and investigated the State's evidence. First, 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. 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.

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)). Counsel stated Petitioner never denied his role in the offense. As a result, counsel pursued a valid plea mitigation strategy in advising Petitioner to cooperate in the State's case against Henry. (App.p.75). Additionally, counsel attacked McCoy's credibility at the sentencing hearing. Accordingly, Petitioner failed to prove the first prong of the Strickland test -- that counsel failed to render reasonably effective assistance under prevailing professional norms.

Furthermore, Petitioner failed to prove that 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 decisively 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 withoutmerit and unworthy of certiorari.

II.

Certiorari was improvidently granted where the PCR Judge made a sound finding that Petitioner failed to meet his burden to prove that his guilty plea was involuntarily rendered as a result of plea counsel's purported ineffective performance in failing to effectively advise Petitioner of the terms of the plea agreement

Petitioner argues that 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 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. Alabam 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).

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, 395 U.S. at 243 (internal citations omitted). Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance. Thus, Petitioner's second issue on appeal is without merit and unworthy of certiorari.

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 reasons stated above, this Court should affirm the lower court's ruling and deny the requested relief

Respectfully submitted,

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By: _____
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February 13, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable William P. Keesley, Post-Conviction Relief Judge

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Appellate Case No. 2012-212676

Whelthy McKune, ... Petitioner,

v.

State of South Carolina..... Respondent.

CERTIFICATE OF SERVICE

I, John W. Whitmire, certify that I have today served the within Brief of Respondent upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Tricia A. Blanchette, Esquire
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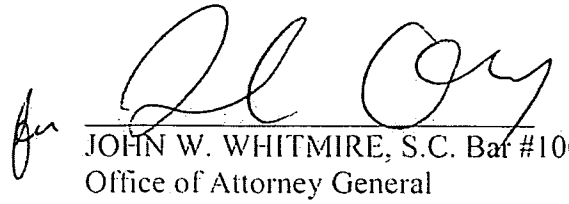
I further certify that all parties required by Rule to be served have been served. This 13th day of February, 2015.



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