STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2016-000775

Rudis Arnoldo Ventura, #351029, ...Petitioner,

v.

State of South Carolina, ...Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Should the Court deny review where the record contains ample evidence of probative value to support the PCR Court's finding that Petitioner failed to satisfy his burden of proving Counsel was ineffective for failing to investigate or for advising him to cooperate with the State?

II. Should the Court deny review where the record supports the PCR court's finding that Petitioner failed to satisfy his burden of proving that his guilty plea was involuntary?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Petitioner was indicted at the May 2009 term of the Spartanburg County Grand Jury for two counts of murder (2009-GS-42-2370, count 1); (2009-GS-42-2371, count 1). He was then indicted at the May 2010 term of the Spartanburg County Grand Jury for burglary, first degree (2010-GS-42-3025). Both charges arose from the same set of circumstances. Petitioner was represented by R. Scott Davis, Esquire. On February 3, 2011, pursuant to negotiations with the State, Petitioner appeared before the Honorable J. Derham Cole and pleaded guilty to burglary, first degree, as indicted, and, after waiving presentment to the Grand Jury, to two counts of accessory after the fact to murder (2009-GS-42-2370, count 2); (2009-GS-42-2371, count 2). He also agreed to testify truthfully against his codefendants. As a result, the State dismissed the charges for murder and Applicant's sentencing was deferred.

On May 23, 2012, the Honorable J. Mark Hayes II sentenced the Applicant to concurrent sentences of life for burglary, first degree, and fifteen years for each account of accessory after the fact to murder. Through his attorney, Applicant filed a Motion to Reconsider the terms of his sentence on May 24, 2012. In an Order issued on January 28, 2013, Judge Hayes reduced Applicant's sentence for burglary, first degree, from life to 40 years of incarceration, to be served concurrently. Applicant did not appeal his conviction or sentence.

Petitioner filed his application Post-Conviction Relief ("PCR") September 19, 2013. The State made its return on August 18, 2014. An evidentiary hearing into the matter was convened on November 10, 2015, at the Spartanburg County Courthouse before the Honorable Larry B. Hyman, Jr.. Petitioner was present and represented by J. Bradley Bennett, Esquire. Respondent notes that Bennett was substituted as counsel. Alicia A. Olive, Esquire, of the South Carolina

Attorney General's Office, represented Respondent. At the hearing, Petitioner testified on his own behalf. R. Scott Davis, ("Counsel") also testified. By Order dated March 8, 2016, and filed March 14, 2016, Judge Hyman denied and dismissed Petitioner's application for PCR with prejudice.

STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, this Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)).

ARGUMENT

I. The record contains ample evidence of probative value to support the PCR Court's finding that Petitioner failed to satisfy his burden of proving Counsel was ineffective for failing to investigate or for advising him to cooperate with the State.

The record fully supports the PCR Court's finding that Petitioner failed to prove ineffective assistance of Counsel.

In a PCR action, the applicant has the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must show counsel's "conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The applicant "must first demonstrate that counsel was deficient and then must also show the deficiency resulted in prejudice." Walker v. State, 407 S.C. 400, 404-05, 756 S.E.2d 144, 146 (2014). "The two-part test adopted in Strickland also applies to challenges to guilty pleas based on ineffective assistance of counsel." Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011).

First, the applicant must show that counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, he would not have [pleaded] guilty, but would have insisted on going to trial." Thompson v. State, 340 S.C. 112, 116, 531 S.E.2d 294, 297 (2000).

Petitioner asserts the PCR Court erred in finding Counsel was not ineffective for not investigating. There is ample evidence in the record to support the finding that Counsel "demonstrated the normal degree of skill, knowledge, professional judgment, and representation that is expected of an attorney who practices criminal law in South Carolina." (App. p. 9).

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). See also United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995) ("[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would

have been obtained had his counsel undertaken the desired investigation and of showing 'whether such information . . . would have produced a different result.'").

At the PCR hearing, Counsel was questioned about his investigation. (App. p. 138). He testified that his investigation involved speaking with Petitioner, speaking to the attorneys representing Petitioner's codefendants, and speaking with the Solicitor's office and trying to determine through the discovery material what evidence they had to place Petitioner at the scene. (App. p. 138, lines 9-14). Petitioner produced absolutely no evidence of what Counsel failed to discover had he conducted a more complete investigation. Accordingly, the PCR Court correctly found that Petitioner failed to show any deficiency in Counsel's performance.

Further, the record supports the PCR judge's finding that Petitioner failed to show prejudice because the PCR court could only speculate as to what information Counsel failed to uncover or how that information would have affected the Petitioner's decision to plead. See Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417).

This Court should deny review because there is ample evidence in the record to support the court's finding that Petitioner failed to satisfy his burden of proving Counsel was ineffective for failing to investigate.

Likewise, the record supports the PCR Court's finding that Counsel was not ineffective for advising Petitioner to cooperate with authorities or for not putting an agreement in writing. Counsel testified Petitioner's cooperation was not the catalyst for the burglary charge. (App. p. 144). He testified the charge was not related to that but "the Solicitor decided that he had initially

not charged everyone that he felt was present with burglary. And he went back and did that and it wasn't because of [Petitioner's] statement or [Petitioner's] polygraph test." (App. p. 145, lines 1-4).

Lastly, the record supports the PCR court's finding that Petitioner failed to show prejudice. Petitioner was first indicted for two counts of murder and would have been facing both murder charges if he had gone to trial. (App. p. 135). Counsel testified he never made any promises to Petitioner regarding a length of sentence, but that he did tell him he would be given credit for the time he had spent in jail up until the time he pleaded guilty. (App. p. 134, line 21-p. 135, line 1). He also testified that the solicitor would have charged him with burglary regardless of his cooperation. Counsel testified the offer made by the State was to dismiss the murder charges and allowing him to plead to accessory after the fact of murder without making a recommendation because he agreed to testify against the codefendants. (App. p. 134, lines 8-12). Counsel further testified that the State does not "want the person who testified to say that they are testifying because they have been offered a deal." (App. p. 134, lines 12-15). Due to Petitioner's cooperation in prosecuting his co-defendants, the State dismissed the murder charges. (App. p. 134). Though Petitioner was initially sentenced to life for burglary, Counsel made a motion to reconsider, which was successful, and Petitioner is now only serving a forty-year sentence as opposed to life. (App. p. 16). Counsel effectively advocated for Petitioner at the sentencing hearing and impressed upon the judge the extent of Applicant's cooperation with the investigation and prosecution of his co-defendants. (App. pp. 109-11). Accordingly, there is ample evidence in the record to support the PCR court's finding that Petitioner failed to show he was prejudiced by any deficiency in Counsel's conduct.

II. The record supports the PCR court's finding that Petitioner failed to satisfy his burden of proving that his guilty plea was involuntary.

Petitioner argues that the PCR court erred in finding Petitioner failed to satisfy his burden of proving his guilty plea was involuntary. Petitioner argues that, based on Petitioner's self-serving testimony that Counsel told him he was going to receive a sentence of time-served, the PCR court should have found counsel was deficient.

Petitioner's specific arguments fall under ineffective assistance of counsel and were not addressed by the PCR court in its order pertaining to whether Petitioner proved his plea was involuntary. The PCR judge's order only addressed the allegation of whether the plea was involuntary on the basis that Petitioner was not provided a translator. Petitioner did not file a motion pursuant to rule 59(e). Respondent submits, therefore, that in the context of involuntary guilty plea, this allegation is not preserved. See Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge." (citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998))).

Nevertheless, on the merits, Respondent submits the record supports the PCR judge's finding that Petitioner did not satisfy his burden of proving either ineffective assistance of counsel or involuntary guilty plea.

In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable

probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Hill v. Lockhart, 474 U.S. 52; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. 668)). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

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, 243-44, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)).

An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. at 56. Furthermore, "[a] guilty plea is a solemn, judicial

admission of the truth of the charges" against the applicant. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. at 137-38, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

Here, the PCR court found Petitioner did make the requisite evidentiary showing and the record supports that finding. The PCR court found that the record fully supports the knowing and voluntary nature of Petitioner's plea and that Petitioner has presented no valid reason why he should be allowed to depart from the statements made at his guilty plea hearing. The PCR court noted that during the PCR hearing, though Petitioner employed the use of a translator, he often answered questions without the use of a translator and did not appear to have problems communicating in or understanding English. (App. p. 13). Furthermore, Counsel testified that during his representation of Petitioner, they communicated in English and he never had problems communicating with Petitioner. (App. p. 133, lines 5-10) He further testified that during the course of his representation of Petitioner, he never felt Petitioner did not understand his advice due to a language barrier. (App. p. 133, lines 11-13). Counsel stated Petitioner never requested an interpreter. (App. p. 133, lines 11-15).

At his guilty plea, Petitioner stated that he was not promised anything other than the plea negotiations and the agreement reached with the State in exchange for his guilty plea and that he was not pressured, threatened, or coerced to plead guilty. (App. p. 73, lines 16-25). At the plea hearing Petitioner acknowledged that the sentencing range for his burglary charge was fifteen

years to life, that the range for his accessory after the fact charges was zero to fifteen years and that the range for murder was thirty years to life. (App. p.59, line 1-p. 72, line 19).

Counsel testified he discussed with Petitioner the charges he was facing as well as the elements and potential punishments. (App. p. 132, lines 1-4). The PCR Court found that Counsel's testimony was more credible than Petitioner's testimony as a matter of general impression. (App. p. 7). Counsel testified he reviewed all discovery with Petitioner on several occasions, both before and after he began cooperating. (App. p. 131, lines 17-25). He testified he discussed with Petitioner the charges he was facing as well as the elements and potential punishments. (App. p. 132, lines 1-4). Petitioner asserts that Counsel requested a "time served" sentence and cites to page 111 of the Appendix. This assertion is incorrect. Rather, Counsel stated the following: "I'm asking [the court] . . . to sentence him to the minimum sentence that is allowed by the statute that he has pled guilty under, give him credit for time served and run his other charges concurrently." (App. p. 111, lines 7-11). Counsel did not ask for a sentence of time-served; he asked for the minimum sentence allowed for the offense of burglary first—fifteen years —and requested that Petitioner be given credit against that sentence for the time he had served in jail while awaiting trial on the charges. (App. p. 111).

Aside from Petitioner's testimony, there is no evidence in the record to support a finding that Petitioner was ever told he would receive a sentence of time-served. The PCR court found that Counsel's testimony was more credible than Petitioner's testimony. (App. p. 13). This Court "give[s] great deference to a [PCR] judge's findings where matters of credibility are involved since [it] lack[s] the opportunity to directly observe the witnesses." Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (citing S.C. Dept. of Social Services v. Forrester, 282 S.C. 512,

320 S.E.2d 39 (Ct.App.1984)). Therefore, the record supports the PCR court's finding that Petitioner failed to show deficiency.

The record also supports the PCR court's finding that Petitioner failed to show that but for the alleged deficiency, he would not have pleaded guilty but would have insisted on going to trial. Petitioner was facing two counts of murder if he had gone to trial. As a result of his agreement to cooperate with the authorities, the State agreed to dismiss the murder charges. Counsel testified he felt the State could have proven beyond a reasonable doubt that he was present at the scene and "as the hand-of-one, hand-of-all, he could have been convicted of two counts of murder." (App. p. 132, lines 22-25). He stated he explained the hand-of-one, hand-of-all theory to him on numerous occasions. (App. p. 133, lines 1-3). Though the burglary charge was also serious, the minimum sentence he was exposed to on that charge was fifteen rather than thirty years. Moreover, Petitioner would have been exposed to potential consecutive sentences if he had been convicted of the murders at trial. Although Petitioner was initially sentenced to life for burglary, as a result of Counsel's motion to reconsider, the sentencing judge reduced the punishment to forty years. (App. p. 16). Therefore, the record supports the PCR judge's finding that Petitioner failed to prove that but for the alleged deficiency, he would not have pleaded guilty.

Accordingly, there is ample evidence in the record to support the PCR court's finding that Petitioner failed to satisfy his burden of proving ineffective assistance of counsel or that his guilty plea was involuntary.

CONCLUSION

For the foregoing reasons, 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

January 3, 2017.

STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Spartanburg
The Honorable Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2016-000775

RUDIS ARNOLD VENTURA, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT

CERTIFICATE OF SERVICE

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

Mr. J. Bradley Bennett, Esquire
Salvini & Bennett, LLC
101 W. Park Ave.
Greenville, SC 29601

This 3rd day of January, 2017

Ashley Hayworth
ASHLEY HAYWORTH
PARALEGAL

ALAN WILSON
ATTORNEY GENERAL

January 3, 2017

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

RE: **Rudis Arnold Ventura v. State of South Carolina**
Appellate Case No.: 2016-000775

Dear Mr. Shearouse:

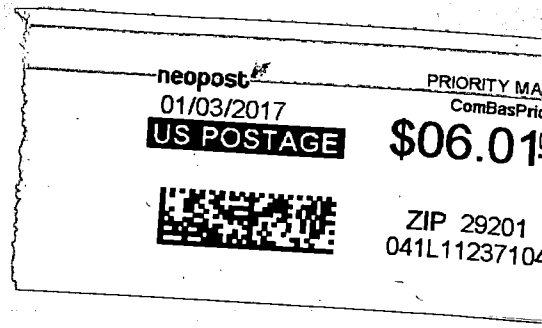
Enclosed for filing are the original and six (6) copy of the **Return Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Alicia A. Olive
Assistant Attorney General
SC Bar No. 102089

AAO/ah
Enclosures

cc: J. Bradley Bennett, Esquire



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