STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to York County

Honorable J. Mark Hayes, Circuit Court Judge

ABBDUL OMAR EMMANUEL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001152

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding that plea counsel rendered effective assistance of counsel where counsel advised Petitioner that he would be sentenced to between twenty and twenty-five years and Petitioner was actually sentenced to forty years?

STATEMENT

Indictments and Charges

The York County grand jury returned multiple indictments against Petitioner Abbdul Emmanuel, related to various incidents. On April 17, 2014, the grand jury returned indictments for murder and possession of a firearm during the commission of a violent crime (2014-GS-46-01220 and -01220a), armed robbery and possession of a firearm during the commission of a violent crime (2014-GS-46-01221 and -01221a), and criminal conspiracy (2014-GS-46-01222). App. 132 – 137. On May 29, 2014, the grand jury returned indictments for criminal conspiracy (2014-GS-46-01503), attempted murder (2014-GS-46-01530), possession of a firearm during the commission of a violent crime (2014-GS-46-01531), carrying a pistol unlawfully (2014-GS-46-01532), criminal conspiracy (2014-GS-46-01533), and criminal conspiracy (2014-GS-46-01504). App. 154 – 165. On June 19, 2014, the grand jury returned indictments for first degree burglary (2014-GS-46-01880) and attempted murder (2014-GS-46-01881). App. 138 – 141. Emmanuel waived presentment to the grand jury with respect to the following charges: attempted murder and possession of a weapon during the commission of a violent crime (2014-GS-46-02876 and -02876a), unlawful carrying of a pistol (2014-GS-46-02884), criminal conspiracy (2014-GS-46-02885), and pointing and presenting a firearm (2014-GS-46-01223). App. 146 – 153.

Guilty Pleas and Sentencing

On July 21, 2014, Emmanuel appeared before the Honorable Roger L. Couch. Emmanuel was represented by Tyler Burns, and the State was represented by assistant solicitor Willy Thompson. App. 1. Emmanuel entered pleas of guilty to the lesser included offense of voluntary manslaughter (2014-GS-46-01220), possession of a firearm during the commission of a violent crime (2014-GS-46-01220a), armed robbery (2014-GS-46-01221), and criminal

conspiracy (2014-GS-46-01222). The prosecutor dismissed one count of possession of a firearm during the commission of a violent crime (2014-GS-46-01221a) and the first degree burglary charge (2014-GS-46-01880). App. 2, l. 4 – 3, l. 4. The prosecutor agreed to a negotiated sentencing range of twenty to forty years.[1] App. 3, ll. 5-8; App. 30, ll. 17-19. He further agreed that if guilty pleas were entered as to Emmanuel's remaining charges, any sentences for those offenses would be run concurrent to the sentences related to the charges he pled guilty to at the July hearing. App. 3, ll. 8-19. Additionally, the pending attempted murder charges would be reduced to assault and battery of a high and aggravated nature ("ABHAN"). App. 3, l. 19 – 4, l. 6. Thus, the prosecutor asked the plea court to defer sentencing on the charges to which Emmanuel was pleading guilty while they continued negotiations as to the remaining charges. App. 4, ll. 6-10. Defense counsel agreed with the prosecutor's recitation of the terms of the plea agreement. App. 4, ll. 19-21. Following a colloquy with Emmanuel and the prosecution's recitation of the facts, Judge Couch accepted Emmanuel's guilty pleas and deferred sentencing. App. 25, ll. 11-25.

On September 29, 2014, the same parties appeared before the Honorable Edward W. Miller for the entry of additional guilty pleas and sentencing. Assistant solicitor Thompson was joined by assistant solicitors Chris Epting and Jessica Holland. App. 28; App. 46, ll. 13-15. The prosecution advised the court that Emmanuel had previously entered guilty pleas to four offenses in exchange for a negotiated sentence of twenty to forty years, for which sentencing was deferred. App. 30, ll. 6-19. The prosecution agreed that any sentence on the additional charges

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[1] The sentencing range was referred to as both a recommendation and negotiation in various parts of the plea and sentencing transcripts. App. 3, ll. 5-8; App. 6, ll. 13-18; App. 8, ll. 19-22; App. 9, ll. 6-9; App. 30, ll. 17-25. The sentencing sheets were also inconsistent, with four of them marked "recommendation by the State," four of them marked "negotiated sentence," and two of them with no indication regarding whether the plea was with or without negotiations or recommendation. App. 142 – 145; App. 166 – 171.

to which Emmanuel was pleading guilty would be served concurrent to the sentence on the previous guilty pleas. App. 30, ll. 20-25. Emmanuel waived presentment on several charges and entered guilty pleas to the lesser included offenses of ABHAN (2014-GS-46-02876), possession of a weapon during the commission of a violent crime (2014-GS-46-02876a), unlawful carrying of a pistol (2014-GS-46-02884), two counts of criminal conspiracy (2014-GS-46-02885 and 2014-GS-46-01503), pointing and presenting a firearm (2014-GS-46-01223). The prosecution dismissed the remaining charges of two counts of attempted murder (2014-GS-46-01530 and 2014A4620304122), possession of a firearm during the commission of a violent crime (2014-GS-46-01531), carrying a pistol unlawfully (2014-GS-46-01532), and two counts of criminal conspiracy (2014-GS-46-01533 and 2014-GS-46-01504/ 2014A4620304123). App. 31, l. 1 – 33, l. 13.

Following a colloquy with Emmanuel, the prosecution read a more detailed version of the facts related to the offenses to which Emmanuel pled guilty at the July 2014 hearing. Compare App. 37, l. 7 – 43, l. 20, with App. 18, l. 5 – 24, l. 10. The prosecution's version of the facts related to the other incidents and resulting charges were also placed on the record. App. 45, l. 19 – 46, l. 8; App. 46, l. 14 – 47, l. 14. With respect to the final set of facts, Emmanuel answered "Yes. Yes sir." when Judge Miller asked if they were "true and accurate." Judge Miller responded: "Okay. Well, you're shaking your head no. Is it true, substantially true and correct?" and Emmanuel said "Yes, sir." App. 47, ll. 15-20.

The State made its presentation regarding sentencing, which consisted of a victim impact statement from the deceased victim's mother, remarks from one of the officers involved in the investigation, the admission of photographs from Emmanuel's Facebook account purportedly showing evidence of gang affiliation and holding a pistol, and a recitation of Emmanuel's

juvenile adjudications and adult criminal record. App. 47, l. 21 – 54, l. 14. The prosecution argued that Emmanuel had no "redeeming character" and was without "any hope that he will ever change the way he behaves" such that a forty year sentence was "the only way that our community can be kept safe." App. 54, ll. 6-14.

In response, plea counsel Burns explained that there were a variety of potential trial issues but Emmanuel ultimately arrived at the decision to plead guilty. There were conflicting statements given, some of which identified another individual as the shooter and others that supported a theory of non-liability under defense of others. However, counsel believed that a trial would likely result in a conviction for a lesser offense than murder and the plea provided an opportunity to dispose of additional charges without having them run consecutive. App. 54, l. 17 – 59, l. 1. Emmanuel's mother also addressed the court and expressed her condolences to the family. She said she tried to do her best as a single mother and explained that Emmanuel's father had just been released from jail the same month that Emmanuel was arrested. She acknowledged that she may not be living when Emmanuel is released but asked Judge Miller for mercy. App. 59, l. 5 – 60, l. 6.

Emmanuel expressed remorse over Michael Giddens' death. He said that he did not go there with the intent to harm anyone but saw the barrel of the shotgun Giddens was holding pointed toward his co-defendant and "panicked." Emmanuel said: "I know that I done wrong and I didn't mean for any of this to happen. I did not mean for anyone to get hurt." He asked the family, the court, and God for forgiveness. App. 60, l. 9 – 61, l. 21. Defense counsel concluded by responding to the officer's allegation that drive by shootings had drastically decreased in the community since Emmanuel's arrest, noting that there were a lot of individuals arrested at the same time as Emmanuel, such that it was an oversimplification to say that the crime reduction

was solely related to Emmanuel. He asked that Emmanuel be sentenced in accordance with what he actually did and not exceed the thirty years for manslaughter. App. 61, l. 22 – 62, l. 11.

Judge Miller began the imposition of the sentence by saying: "When you come to Court you bring your prior record with you and you have got quite a record, Emmanuel." App. 62, ll. 12-14. He then sentenced Emmanuel to an aggregate terms of forty years, comprised of thirty years for manslaughter, five years for each count of possession of a weapon during a violent crime, a consecutive ten years for armed robbery, five years for pointing and presenting, twenty years for ABHAN, five years for each count of conspiracy, and one year unlawful carrying of a pistol. App. 62, ll. 14-20; App. 142 – 145; App. 166 – 171.

Post-Conviction Relief

On October 28, 2015, Emmanuel filed an application for post-conviction relief ("PCR"). App. 64 – 71. The State filed its return on July 8, 2016. App. 72 – 77. On February 1, 2017, an evidentiary hearing was held before the Honorable J. Mark Hayes. Emmanuel was represented by Nathan Sheldon, and the State was represented by assistant attorney general Justin Hunter. App. 78. The witnesses at the hearing included Emmanuel and his plea attorney, Tyler Burns. App. 79. Burns was appointed to represent Emmanuel because the public defender's office was conflicted by its representation of Emmanuel's co-defendant. App. 84, l. 17 – 85, l. 5; App. 94, l. 23 – 95, l. 12.

Emmanuel testified that Burns advised him that if he did not accept the State's plea offer, he could be facing a life sentence. App. 86, ll. 8-18. He recalled that the State's original plea offer was forty-five years, which he rejected immediately. App. 86, l. 19 – 87, l. 4. Emmanuel wanted to go to trial at that point, but Burns advised him that his co-defendants accepted plea offers in exchange for testifying against Emmanuel. App. 87, ll. 7-18. Eventually the State

extended a final plea offer, which Emmanuel discussed with Burns both at the initial July plea hearing and at the subsequent September plea hearing. Emmanuel explained: "He [Burns] told me if I took the plea that I would be sentenced to twenty to twenty-five years." App. 87, l. 22 – 88, l. 5; App. 88, ll. 14-17; App. 89, ll. 1-4; App. 91, ll. 13-15. Additionally, if Emmanuel entered the guilty plea, the State would drop the pending accessory charges against Emmanuel's mother and sister. App. 88, ll. 14-25. Emmanuel did not understand that he could be sentenced to forty years at the September hearing and thought he would be sentence to twenty-five years. App. 89, ll. 5-12. Emmanuel would have gone to trial if he had understood that he was exposed to a potential forty year sentence by his guilty plea. App. 89, ll. 16-22. Emmanuel described that Burns "basically... coerced" him to enter the guilty plea and said he would not have accepted it had Burns not "leaned" on him to do so. App. 90, ll. 15-22.

When confronted with the solicitor's statement at the plea hearing that the recommendation was twenty to forty years, Emmanuel explained that he was a teenager at the time and did not understand what that meant. App. 91, ll. 16-24. When asked why he never mentioned the sentencing range promised by counsel at the plea hearing, Emmanuel said: "I was such – dazed by what was going on and I was so rushed and it was so much pressure on me at the time I didn't fully understand what was going on." App. 93, ll. 5-9. When asked if he ever told the judge that he did not understand, Emmanuel said:" No, sir, cause he's [Burns is] a lawyer, the way he [Burns] was breaking it down it sounded way different than what he [the judge] was saying." App. 93, ll. 17-18.

Plea counsel Tyler Burns said that despite Emmanuel's young age and the complexity of the legal issues they were dealing with, Emmanuel seemed familiar with the process since "it

wasn't his first run in." [2] App. 97, ll. 12-23. Emmanuel was facing a myriad of charges, and the prosecution indicated its intention to try the attempted murder cases first and pursue a mandatory life without parole sentence under the recidivist statute for the murder charge. App. 99, ll. 6-15. Burns noted that Emmanuel had given a statement confessing to the attempted murder charges, but the detective was recorded telling Emmanuel "if he would just tell the police what happened all the warrants would be withdrawn and he could walk out of there a free man; that he wouldn't face any consequences." App. 99, l. 16 – 100, l. 7. Burns filed a motion to enforce the agreement and for dismissal of the charges, which was denied. However, he used waiver of a potential civil lawsuit against the city as leverage to get the murder charge reduced to voluntary manslaughter.[3] App. 100, l. 7 – 101, l. 2; App. 117, ll. 3-14.

Burns could not "remember exactly" the terms of the State's first plea offer, but said it "was around forty to fifty" and "wasn't anything great." App. 101, ll. 3-9. At that point, the murder charge had not been reduced and when the offer was presented to Emmanuel he rejected it and said he wanted to go to trial. App. 101, ll. 9-14. Burns said that he and Emmanuel discussed the State's final plea offer on three or four occasions. App. 101, l. 15 – 102 l. 9. He described the terms of the final offer as requiring pleas to a reduced charge rather than murder and to several other charges, while additional charges would be dismissed, for a sentencing range

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[2] Emmanuel had multiple prior juvenile adjudications and one prior adult conviction that resulted in a sentence under the Youthful Offender Act ("YOA"). App. 51, l. 13 – 53, l. 16.

[3] Plea counsel made no mention of potential suppression of the pre-trial statements due to their procurement through police coercion. See Jackson v. Denno, 378 U.S. 368, 376-77 (1964) (stating a defendant in a criminal proceeding has the "constitutional right ... to object to the use of [a] confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession"); State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) ("If a suspect's will is overborne and his capacity for self-determination critically impaired, use of the resulting confession offends due process. A statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise.").

of twenty to forty years. App. 102, ll. 10-19; App. 103, ll. 20-22. There was some potential for consecutive sentencing on the charges related to the deceased victim because no one charge would have carried a potential forty year sentence, but the prosecution agreed that any of the other charges (pled to at the September hearing) would run concurrent. App. 102, l. 20 – 103, l. 7; App. 111, l. 4 – 113, l. 5. Part of the arrangement also related to the pending charges against Emmanuel's mother and sister, as the prosecution "basically said they would lose interest in his family if he were inclined to basically end the case." App. 101, l. – 102, l. 3.

Burns admitted that he discussed a sentence of twenty to twenty-five years with Emmanuel. He contended:

> Yeah. I never promised him that but with his age and the fact that we were basically foregoing a trial on all these cases, that that was pretty much his best case scenario of what he was looking at. I didn't think that he was going to get the absolute minimum. We didn't have anywhere close to mitigation that would justify a judge coming anywhere close to the minimum of the range. **And I didn't truly at the time foresee the maximum either.**
>
> I kind of would tell all of my clients, kind of told 'em all the same, that there's the difference between what's probable and what's possible. What's possible was getting forty years and what was probable I thought truly at that time was a range of twenty-five to thirty. But that was, again, his best case scenario.

App. 103, l. 23 – 104, l. 13 (emphasis added). Burns said that Emmanuel wanted an "absolute" as to what sentence he would get, which Burns said he could not provide. However, Burns told Emmanuel that his educated guess as to the sentence he would receive was twenty to thirty years, but that he could be "dead wrong – that it's happened many times in the past." App. 104, l. 14 – 105, l. 4. Burns claimed that he never promised a particular sentence and told Emmanuel "[y]ou could walk out of there with forty." App. 105, l. 4 – 106, l. 11.

Burns contended that acceptance of the plea offer was in Emmanuel's best interest. Burns said that he thought Emmanuel committed the crimes and that he was a young man who

would be able to walk out of prison one day rather than facing a probable life without parole sentence had he proceeded to trial. App. 106, l. 12 – 107, l. 13. However, Burns agreed that he was ready and willing to take the cases to trial and that was their original intention. App. 108, ll. 5-15.

On cross-examination, PCR counsel asked Burns if it was fair to say that Burns relayed an offer of twenty to forty to Emmanuel but essentially said twenty-five to thirty was realistically what he was hoping for as far as the sentence imposed. App. 110, ll. 20-23. Burns responded:

> I think the way I said it was that that short absolute best case scenario, that if your stars are aligned, and all things kind of went in your favor that's the top of the mark what you're looking at. I really didn't want to build up any hope one way or the other.

App. 110, 24 – 111, l. 3. Burns admitted that the State's sentencing presentation was "a pretty tough act to follow." App. 112, l. 24 – 113, l. 5.

Regarding the component of the plea related to dismissal of charges against Emmanuel's family members, Burns explained that the solicitor never explicitly made that part of the plea offer. He said: "That would have been a pretty dirty statement to make by any prosecutor to say you know to kind of blackmail any defendant that they're gonna hold their family hostage with charges." App. 115, ll. 5-12. Nonetheless, Burns said "it was kind of a wink and a nod situation that we were gonna lose interest in his family and not make the victim's family really involved in this if we can wrap all this up at once." App. 115, ll. 12-15. Burns communicated that as part of the plea package to Emmanuel. Burns had previously worked in the solicitor's office along with all three prosecutors handling Emmanuel's charges and had no "reason to doubt that they would double cross Mr. Emmanuel on this." App. 115, l. 16 – 116, l. 1.

Order of Dismissal

On February 2, 2017, Judge Hayes filed a form Order stating that the PCR application was taken under advisement. App. 120. On May 9, 2017, Judge Hayes filed an Order of Dismissal, denying Emmanuel's PCR application. Despite Emmanuel's lengthy testimony, the order summarized his testimony relevant to the plea offers as follows:

> He testified that the first plea offer he received was for forty-five years, which he rejected. Applicant testified that he received a final offer, and Counsel told him it would be twenty to twenty-five years. Applicant testified that he wanted to go to trial but was coerced to take the plea.

App. 124. Judge Hayes found plea counsel's testimony credible and ruled that Emmanuel did not meet "his burden of proof of establishing that his plea counsel was ineffective in his advice to Applicant concerning the guilty plea." App. 129. He found that the forty year sentence "was in the range originally recommended and announced on the record by the State during the first hearing before Judge Couch." App. 129. He further found that "Counsel relayed the plea offer recommendation of twenty to forty years and did not promise or guarantee a specific amount of time that Applicant would receive." App. 129. Judge Hayes ruled that "Applicant's belief that he would receive a sentence between twenty and twenty-five years does not change the fact that he was well informed from Counsel prior to the plea and from the plea judge during the plea hearing that the recommendation from the State was twenty to forty years." App. 129. As a result, he ruled that counsel was "not ineffective" regarding his plea advice. App. 129.

Judge Hayes ruled that Emmanuel could not prove prejudice, finding: "Applicant has failed to show that he was prejudiced by Counsel's actions because Applicant has failed to show that he otherwise would have elected to go to trial, and has not shown any error in Counsel's assistance that led him to plead guilty instead." App. 129 – 130.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding that plea counsel rendered effective assistance of counsel where counsel advised Petitioner that he would be sentenced to between twenty and twenty-five years and Petitioner was actually sentenced to forty years.

Petitioner Emmanuel was just nineteen years old when he entered the initial pleas in this case. He had an eleventh grade education. App. 12, ll. 14-23. His most recent employment was as a warehouse worker. App. 13, ll. 12-25. Emmanuel had some prior interactions with the justice system, but aside from one Youthful Offender Act ("YOA") sentence, they all resulted in juvenile adjudications. App. 51, l. 13 – 53, l. 16. Notably, both Emmanuel and plea counsel agreed that the initial plea offer for a sentence of forty-five years was immediately rejected and trial preparations continued. App. 86, l. 19 – 87, l. 4; App. 101, ll. 3-14. Emmanuel accepted the State's final plea offer because plea counsel advised him that he would be sentenced to twenty to twenty-five years and the pending charges against his mother and sister would be dismissed. App. 87, l. 22 – 88, l. 5; App. 88, ll. 14-25; App. 89, ll. 1-12; App. 91, ll. 13-15.

While transcripts reflected that the solicitor put the twenty to forty year sentencing range on the record, Emmanuel explained that he did not understand what that meant and instead relied upon the advice that his attorney gave him regarding how he would actually be sentenced. App. 91, ll. 16-24; App. 93, ll. 5-9; App. 93, ll. 17-18. Emmanuel testified that he would have gone to trial if he had understood that he was exposed to a potential forty year sentence by his guilty plea. App. 89, ll. 16-22. Plea counsel acknowledged that he and Emmanuel discussed a sentencing range of twenty to twenty-five years, but contended that he never promised any specific sentence and apprised Emmanuel of the possibility of a forty year sentence. App. 103, l. 23 – 106, l. 11; App. 110, 20 – 111, l. 3. While plea counsel did not think a minimum sentence was realistic, he said: "I didn't truly at the time foresee the maximum either." App. 104, 3-7. If

plea counsel did not foresee the imposition of the maximum forty-year sentence, it is reasonable to conclude that his client, Emmanuel, did not foresee receiving the maximum sentence either. Further, it is notable that plea counsel admitted that dismissal of charges against Emmanuel's family members was an unspoken term of the plea agreement, casting serious doubt on what else went "unsaid" but promised during the plea negotiations. App. 101, l. 24 – 102, l. 3; App. 115, l. 5 – 116, l. 1.

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief by a preponderance of the evidence. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Rule 71.1(e), SCRCP. The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results." Brady v. United States, 397 U.S. 742, 758 (1970).

"A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the 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, the defendant would not have pled guilty, but would have insisted on going to trial." Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009). "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).

This Court has held that "a defendant has the right to effective assistance of counsel during the plea bargaining process." Davie v. State, 381 S.C. 601, 607, 675 S.E.2d 416, 419. "[A]s a general rule, defense counsel has the duty to communicate formal offers from the

prosecution to accept a plea on terms and conditions that may be favorable to the accused." Missouri v. Frye, 566 U.S. 134, 145 (2012); see also Davie, 381 S.C. at 609, 675 S.E.2d at 420 (2009) (adopting "rule that counsel's failure to convey a plea offer constitutes deficient performance" and holding "counsel is required to ***fully communicate*** with the client so that the client can make an ***informed decision*** regarding any proposals by the State" (emphasis added)). Plea bargaining can benefit both parties by providing "[t]he potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing." Frye, 566 U.S. at 144. "In order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations." Id. "Anything less might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him." Id. (internal citations and quotations omitted). Reversal is required where counsel provides erroneous sentencing advice that induces the client's guilty plea. Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 486 (1991).

In denying relief, the PCR court cited to Wolfe v. State, 485 S.E.2d 367, 371, 326 S.C. 158, 165 (1997), for the proposition that "[w]ishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made." App. 129. Wolfe was indicted for assault and battery with intent to kill ("ABWIK") and possession of a firearm or knife during the commission of a violent crime. 485 S.E.2d at 368, 326 S.C. at 161. Following denial of the defense's pre-trial motions but before the State's began its case, Wolfe entered an open plea. Id. At the PCR hearing, Wolfe said his attorney represented to him that he would receive a reduced sentence of ten to fifteen years, while plea counsel said he expressed only a hope for such an outcome. Id. In addition to the

routine questions about the maximum sentences for each offense and whether Wolfe had been made any promises, plea counsel interjected that he had told Wolfe "that it would be my hope that by, as I say, standing up here like a man and admitting to the wrongful act that took place that perhaps that the Court may take that into consideration as some mitigation toward his sentence." Id. at 369, 326 S.C. at 161-62. Plea counsel further stated that he told Wolfe there had been no promises made by the court and there were no negotiations from the State. Id. at 369, 326 S.C. at 162. Wolfe acknowledged that he understood that the court was not bound by any recommendations, and Wolfe was ultimately sentenced to the maximum on each offense. Id.

In finding that plea counsel was not ineffective, the Wolfe Court found that "any possible misconceptions on Wolfe's part were cured by the colloquy during the actual guilty plea hearing," citing both the general questioning by the plea court and Wolfe's lawyer's statements on the record at the guilty plea hearing. 485 S.E.2d at 370, 326 S.C. at 164-65. The court found that any representation that counsel made that the questions from the Court were "routine" were "not an invitation to answer them untruthfully, nor does it constitute a reason to believe the questions and statements of the judge during a guilty plea proceeding mean nothing." Id. at 370-71, 326 S.C. at 165. The Court further noted that while Wolfe hoped for and expected a reduced sentence, it was not clear from his testimony that counsel ever told him that he would get a reduced sentence. Id. at 371, 326 S.C. at 165. Rather, Wolfe acknowledged at the PCR hearing that he was made no promises as to the sentence he would receive. Id. Thus, the Wolfe Court found "no probative evidence suggesting any ineffective assistance by Wolfe's counsel prejudiced him or rendered his plea involuntary." Id. at 371, 326 S.C. at 165-66.

Here, while the plea and sentencing transcripts were properly considered by the PCR court, they are but one component of evaluating the validity of a guilty plea. See Suber v.

State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) ("In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing."); Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000) ("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."). Admittedly, Judge Couch made multiple references to the fact that the State was making a sentencing recommendation to which the sentencing judge would not be bound, discussed the maximum potential sentences, and asked if there were any promises or guarantees made regarding the plea or sentence. App. 6, l. 13 – 10, l. 2; App. 14, l. 17 – 15, l. 5. However, the sentencing range was referred to as a "recommendation" at the first plea hearing and as a "negotiated sentence" at the final plea and sentencing hearing. App. 3, ll. 5-8; App. 6, ll. 13-18; App. 8, ll. 19-22; App. 9, ll. 6-9; App. 30, ll. 17-25. The sentencing sheets were also inconsistent, with four of them marked "recommendation by the State," four of them marked "negotiated sentence," and two of them with no indication regarding whether the plea was with or without negotiations or recommendation. App. 142 – 145; App. 166 – 171.

Unlike Wolfe, plea counsel in the present case never placed on the record at the plea hearing anything regarding his advice to Emmanuel about the sentence he would receive. Further, Emmanuel was unequivocal in his testimony at the PCR hearing that plea counsel told him "if I took the plea that I would be sentenced to twenty to twenty-five years." App. 87, ll. 22-25; see also App. 88, ll. 14-18; App. 89, ll. 1-4. Emmanuel explained that though there were inconsistencies between his understanding of the plea agreement and statements by the plea judge, he relied on Burns' advice about how he would be sentenced. App. 91, l. 16 – 93, l. 18. This Court has noted that "[a]n expression of satisfaction with plea counsel is necessarily

conditional. The extent of satisfaction is dependent upon the attorney's diligence and degree of information shared with the client." Kolle v. State, 386 S.C. 578, 592 n. 5, 690 S.E.2d 73, 80 n. 5 (2010). "Although a plea of guilty may preclude certain PCR claims, it would not preclude those that directly involve the voluntariness and knowledge with which the guilty plea was made." Id. Notably, it was only following the guilty plea colloquy with Emmanuel that the argument related to sentencing took place. Despite the wide sentencing range apparently possible, Burn's "presentation" at sentencing lacked focus, especially when compared to the prosecution. See App. 47 – 62; App. 112, l. 24 – 113, l. 5.

Additionally, there is evidence in this case that there was another "term" of the plea agreement never placed upon the record but which also contributed to the decision to plead guilty. Specifically, the solicitor indicated that they would "lose interest" in the charges pending against Emmanuel's mother and sister if none of the pending cases against Emmanuel went to trial. Plea counsel Burns recognized the potential impropriety of inducing a defendant to bargain away his constitutional rights in order to protect members of his family, so he described it as more of "a wink and a nod situation."[4] App. 115, l. 5 – 116, l. 1. The lack of candor to the plea court regarding the third party related component of Emmanuel's plea bargain casts a shadow

[4] While threats to prosecute third parties do not make a guilty plea *per se* involuntary, "guilty pleas made in consideration of lenient treatment as against third persons pose a greater danger of coercion than purely bilateral plea bargaining[.]" United States v. Nuckols, 606 F.2d 566, 569 (5th Cir.1979); see People v. Sandoval, 140 Cal. App. 4th 111, 125 (2006) (noting "that a plea is likely to be involuntary if the court finds that a promise of leniency to a third party was a significant consideration in the defendant's decision to plead guilty."). Some federal courts have adopted a rule that the State's threat to prosecute a third party must be made in good faith—*i.e.,* that the State must have probable cause to support the charge being threatened. See United States v. McElhaney, 469 F.3d 382 (5th Cir. 2006); United States v. Vest, 125 F.3d 676 (8th Cir.1997); United States v. Pollard, 959 F.2d 1011 (D.C. Cir. 1992); Harman v. Mohn, 683 F.2d 834, 838 (4th Cir. 1982).

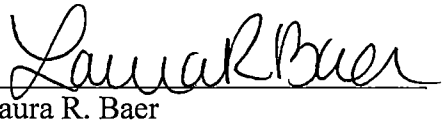
over the entire plea proceedings. In light of all of this evidence, the PCR court's findings that plea counsel was not deficient cannot stand.

The PCR court further erred in finding that Emmanuel failed to show prejudice "because Applicant has failed to show that he otherwise would have elected to go to trial, and has not shown any error in Counsel's assistance that led him to plead guilty instead." App. 129 – 130. As discussed *supra*, plea counsel erroneously informed Emmanuel that he would receive a sentence of twenty-five years, which induced Emmanuel's guilty plea. Emmanuel testified that he would have gone to trial if he had understood that he was exposed to a potential forty year sentence by his guilty plea. App. 89, ll. 16-22. Plea counsel Burns agreed that he was ready and willing to take the cases to trial, indicative of the fact that Emmanuel had always expressed a desire for trial prior to entry of guilty pleas. App. 108, ll. 5-15. "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." Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). Thus, Emmanuel presented sufficient evidence to prove prejudice.

Having proven both deficiency and prejudice, Emmanuel is accordingly entitled to vacation of his guilty pleas and a new trial.

CONCLUSION

Based on the foregoing, Petitioner Abbdul Omar Emmanuel respectfully requests that this Court grant the petition for writ certiorari and order further briefing of the issue raised herein. If this Court does not order further briefing, Petitioner requests that his guilty pleas be vacated and his case remanded for a new trial.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of November, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable J. Mark Hayes, Circuit Court Judge

ABBDUL OMAR EMMANUEL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Justin J. Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Abbdul Omar Emmanuel, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 20th day of November, 2017.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 20th day of November, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027 .