STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2017-001901

CHRISTOPHER SEABROOK, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
S.C. Bar No. 100108
Senior Assistant Deputy Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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RESPONDENT'S ISSUES PRESENTED

Did the post-conviction relief court properly find that Petitioner failed to establish counsel was constitutionally ineffective for advising Petitioner to accept a favorable plea offer from the State and Petitioner knowingly, voluntarily, and intelligently elected to forgo trial and enter guilty pleas.

STATEMENT OF THE CASE

The charges to which Petitioner entered guilty pleas stem from three separate incidents. The first incident occurred on June 21, 2013, when undercover officers from the North Charleston Police Department conducted a controlled undercover buy of marijuana from Petitioner; this buy was recorded on video. When officers attempted to arrest Petitioner, he fled on foot and officers observed him throwing a clear plastic bag containing marijuana on the ground. When Petitioner was eventually apprehended, he had several additional bags containing marijuana on his person. (Plea Tr. p. 6).

The second incident occurred on May 8, 2014, when the North Charleston Police Department responded to a barber shop in reference to threats Petitioner made to another person. Petitioner consented to a search of his person and officers found crack cocaine in Petitioner's pocket. Petitioner told officers he forgot he had the substance in his pocket. (Plea Tr. p. 6-7).

The third incident occurred on May 11, 2014, when Petitioner and his on-and-off-again girlfriend and child's mother where staying at a hotel in Charleston County. Petitioner became upset when there was a knock on the hotel room door and he thought the victim and someone else were trying to rob him. He hit the victim in the face, choked her with a belt, and cut her arm. The victim initially told law enforcement Petitioner had sexually assaulted her and held her against her will, but she later recanted the sexual assault and kidnapping allegations at a subsequent bond hearing. (Plea Tr. p. 7-8, 10-11; PCR Tr. p. 20).

During its September 2013 term of court, the Charleston County Grand Jury indicted Petitioner for distribution of marijuana—second offense (2013-GS-10-5008), possession with intent to distribute marijuana—second offense (2013-GS-10-5010). During its July 2014 term of court, the Charleston County Grand Jury indicted Petitioner for possession of cocaine base—

third offense (2014-GS-10-4190). During its September 2014 term of court, the Charleston County Grand Jury indicted Petitioner for first-degree criminal sexual conduct (2012-GS-10-4978).

On March 2, 2015, Petitioner appeared before the Honorable R. Markley Dennis, Jr., circuit court judge, in the Charleston County Court of General Sessions and pled guilty as indicted to distribution of marijuana—second offense, possession with intent to distribute marijuana—second offense , and possession of cocaine base—third offense, and to first-degree assault and battery. Pursuant to recommendation from the State for concurrent sentences, Judge Dennis sentenced Petitioner to nine years of imprisonment for each offense, with all four sentences to be served concurrently. Judge Dennis also made a finding Petitioner was not to be placed on the sex offender registry. A related kidnapping indictment was dismissed pursuant to the plea agreement.

Thereafter, Petitioner filed a timely *pro se* notice of appeal. In response, counsel informed the court he could "make no showing of any issues that may be reviewed on appeal." Thereafter, Petitioner filed his *pro se* explanation, which included an argument that the plea court lacked jurisdiction to accept his guilty plea because first-degree assault and battery was not a lesser-included offense of first-degree criminal sexual conduct. On June 17, 2015, the South Carolina Court of Appeals dismissed Petitioner's appeal for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. The Remittitur was return to the circuit court on August 6, 2015.

Thereafter, Petitioner filed an application for post-conviction relief on July 17, 2015, alleging:

1. Ineffective assistance of counsel for: failure to have all jail time served credited to defendant, failure to object to defective

indictment, failure to investigate and study case prior to recommending defendant accept plea.

2. The circuit court lacked subject matter jurisdiction to accept guilty plea for first-degree assault and battery where indictment failed to include necessary elements of offense.

Thereafter, Petitioner filed a *pro se* amendment on September 28, 2015. Respondent served its return to the application on February 23, 2016.

An evidentiary hearing on this application was held on December 8, 2016, in the Charleston County Court of Common Pleas before the Honorable G. Thomas Cooper, Jr., circuit court judge. Petitioner was present at the hearing and was represented by Rodney D. Davis, Esquire. At the hearing, Petitioner and plea counsel testified. By written order filed on August 17, 2017, Judge Cooper signed a written order denying relief, finding counsel failed to establish any constitutional deprivations entitling him to relief.

Petitioner filed a notice of appeal challenging the denial of post-conviction relief. On February 26, 2018, Petitioner, through counsel filed his petition for a writ of certiorari with this Court. In this petition, Petitioner only challenges counsel's representation as to his first-degree assault and battery conviction and explicitly only asks this Court to vacate this plea. Petitioner does **not** challenge his pleas for the remaining three drug offenses for which he received concurrent nine year sentences.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly denied post-conviction relief where Petitioner failed to establish counsel was constitutionally ineffective for advising him to accept a favorable plea offer from the State and Petitioner knowingly, voluntarily, and intelligently elected to forgo trial and enter guilty pleas.

Petitioner asserts counsel was constitutionally ineffective for advising Petitioner to plead guilty to first-degree assault and battery because it was not a lesser-included offense of first-degree criminal sexual conduct, Petitioner failed to waive presentment to the grand jury, and the facts giving rise to the plea did not support a conviction for first-degree assault and battery. However, the post-conviction relief court properly denied Petitioner post-conviction relief, as Petitioner knowingly, voluntarily, and intelligently entered his guilty pleas to all three offenses, including first-degree assault and battery, and failed to establish that counsel's performance was constitutionally ineffective. This Court should deny certiorari.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her 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 prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, the applicant must prove that

counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "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, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, an applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

"A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." 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, 74 (1977)). "Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea." Garren v. State, Op No. 2015-000756 (S.C. Sup. Ct. filed Apr. 25, 2018) (Shearouse Adv. Sh. No. 17 at 60); see Jamison v. State, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that "guilty plea[s] must be treated as final in the vast majority of cases" and instructing that caution must be

exercised so as not to "undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea").

In the present case, Petitioner knowingly, voluntarily, and intelligently entered guilty pleas to all offenses, including to distribution of marijuana—second offense, possession with intent to distribute marijuana—second offense, possession of cocaine base—third offense, and first-degree assault and battery after admitting his guilt and informing the court he knew his constitutional rights and wished to voluntarily waive these rights to enter his guilty pleas. (App. p. 5). The plea court specifically asked Petitioner if he understood he was pleading to first-degree assault and battery rather than first-degree criminal sexual conduct as indicted and Petitioner explicitly told the court he understood and his lawyer had explained the difference in these two charges to him. (App. p. 3). Petitioner told the plea court he had not been threatened or promised anything to induce his guilty plea. (App. p. 5). Petitioner informed the plea court he knew the potential sentences he faced for each offense and wished to plead guilty to each. (App. p. 2-4). Petitioner agreed with the facts as presented by the State, including that he hit the victim with a closed fist, choked her with a belt, and cut her arm with an aluminum can. (App. p. 7-9). Petitioner signed sentencing sheets for all four offenses, including first-degree assault and battery, indicating he wished to plead guilty. (App. p. 161-164).

Despite entering these pleas knowingly, voluntarily, and intelligently, Petitioner now asserts he is entitled to post-conviction relief as to the first-degree assault and battery plea and sentence, and ultimately, a new trial for that offense, because his attorney was constitutionally ineffective for advising him to plead guilty where first-degree assault and battery is not a lesser-included offense of first-degree criminal sexual conduct, Petitioner did not waive presentment to the grand jury to first-degree assault and battery, and his conduct does not meet the statutory

requirements for first-degree assault and battery. However, the post-conviction relief court properly denied relief, as Petitioner failed to establish that counsel was either deficient in advising Applicant to plead guilty or that he was prejudiced as a result of this purported deficiency.

Initially, Petitioner cannot establish that plea counsel's performance was constitutionally deficient for securing a favorable plea deal to resolve all of Petitioner's charges at once. Counsel testified Petitioner was anxious to get into court and resolve all the charges at once and initially wanted to State to allow him to plead to second-degree assault and battery rather than first-degree criminal sexual conduct. (App. p. 117). Counsel testified the State made an offer to allow Petitioner to resolve all charges at once, including a plea to first-degree assault and battery rather than the first-degree criminal sexual conduct indictment, and he advised Petitioner he should accept the State's plea offer. (App. p. 117-18, 120-21). Petitioner testified he discussed the sentencing sheets with counsel, including that he was pleading guilty to first-degree assault and battery because he admitted to striking the victim in the face. (App. p. 82, 108). Petitioner testified he thought he was pleading guilty to first-degree assault and battery as a new charge rather than first-degree criminal sexual conduct because the victim has recanted her rape allegations and he admitted to punching her in the face. (App. p. 87, 90-91, 92, 94, 108). He testified he thought the first-degree criminal sexual conduct charge had already been dismissed prior to the plea, which comports with his earlier testimony that he entered the plea to first-degree assault and battery because he acknowledged he had struck the victim in the face. (App. p. 87-88, 90-91, 92). Based on this testimony, along with the signed sentencing sheet for first-degree assault and battery, the only logical conclusion that can be drawn is that Petitioner wished to waive presentment to the grand jury for first-degree assault and battery and pled guilty to

secure a favorable global resolution of all his charges. See State v. Smalls, 364 S.C. 343, 347, 613 S.E.2d 754, 756 (2005) ("We hold that signing a sentencing sheet for a charge to which a defendant has pled guilty constitutes a written waiver of presentment.")[1]

Petitioner asserts that his conduct did not comport with the requirements for first-degree assault and battery. Under S.C. Code Ann. § 16-3-600(C)(1), first-degree assault and battery requires (1) the actor injured another through nonconsensual touching of the private parts with lewd and lascivious intent or during the course of a robbery, burglary, kidnapping, or theft; or (2) the actor offered or attempted to injure another person with the present ability to do so by a means likely to produce death or great bodily injury or during the commission of a robbery, burglary, kidnapping, or theft. In the present case, the record establishes conclusively that Petitioner hit the victim with a closed fist resulting in a fracture to her eye socket and choked her with a belt, both of which alone can likely produce great bodily injury or death. Petitioner's argument his conduct of choking and striking the victim in the face with such force to fracture her eye socket would only sustain an indictment for second-degree assault and battery is without merit.

Moreover, Petitioner's argument that counsel's advice to plead guilty to first-degree assault and battery is clearly deficient because first-degree assault and battery is not a lesser-included offense of first-degree assault and battery is not dispositive on this case. As the post-conviction relief court properly noted, South Carolina Courts have not expressly ruled that first-

[1] In his petition, Petitioner attempts to distinguish his case from Smalls by emphasizing that the sentencing sheet in Smalls was checked to indicate he wished to waive presentment to the grand jury, which he asserts to be the dispositive factor. However, the Smalls opinion makes clear that the checking of this particular box is one factor for the court to consider when determining if a defendant has waived presentment, not the only factor as Petitioner argues. Moreover, Petitioner's own conduct and testimony at the PCR hearing further supports his intention to waive presentment to the grand jury as to first-degree assault and battery.

degree assault and battery is not a lesser-included offense of first-degree criminal sexual conduct, and therefore, counsel cannot be deemed deficient for advising his client to accept a favorable plea offer from the State to plead to first-degree assault and battery when his client clearly wanted to enter a plea to first-degree assault and battery. See State v. Primus, 349 S.C. 576, 579–80, 564 S.E.2d 103, 105 (2002) overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) (holding that assault and battery of a high and aggravated nature is a lesser included offense of first degree criminal sexual conduct). Petitioner's assertions that counsel's performance must be deficient because first-degree assault and battery is not a lesser-included offense of first-degree criminal sexual conduct ignores the ample evidence in the record that establishes counsel's performance was in accordance with professional standards and comported with his client's own wishes to secure a favorable plea offer to globally resolve all charges at once for concurrent sentences. Petitioner's performance was in accordance with reasonable professional standards. This court should deny certiorari.

Additionally, Petitioner has failed to establish any prejudice for counsel's purported deficiency, as he never testified he would not have pled guilty but for counsel's advice to plead guilty. In contrast, Petitioner testified he believed he was pleading guilty to first-degree assault and battery based on his conduct of striking the victim, indicting he did indeed wish to enter a guilty plea to that charge. As Petitioner failed to establish he would not have pled guilty but for counsel's advice, he failed to establish any prejudice. Hill v. Lockhart, 474 U.S. 52 (1985) (holding that with respect to guilty plea counsel, an applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial). As previously discussed, Petitioner's assertions that he suffered prejudice because his actions did not satisfy the requirements for first-degree assault and

battery are without merit. Petitioner has failed to establish any prejudice, and therefore, this court should deny certiorari.

Ultimately, Petitioner made a knowing, voluntary, and intelligent decision to plead guilty to first-degree assault and battery is part of a global plea offer from the State to resolve all pending charges at once for concurrent sentences. Counsel's performance was in accordance with professional standards and Petitioner has failed to establish any prejudice. Therefore, the post-conviction relief court properly denied relief. Certiorari should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
S.C. Bar No. 100108
Senior Assistant Deputy Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

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PETITIONER

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

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

Laura R. Baer, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

This 9th day of July, 2018.

Lindsey McCoy
Legal Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737
PCR FACSIMILE: 803.734.4113

July 9, 2018

RECEIVED
JUL 09 2018
S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Christopher Seabrook v. State of South Carolina
Appellate Case No. 2017-001901
Lower Court Case No. 2015-CP-10-3975

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
S.C. Bar # 100108

MHJ/lm
Enclosures

cc: Laura R. Baer, Esquire
Victim Advocacy Division