STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO HORRY COUNTY
Court of Common Pleas
The Honorable William H. Seals, Circuit Court Judge

Appellate Case No. 2018-000214

HECTOR CASES-CARRERAS, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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ISSUE PRESENTED

The post-conviction relief judge properly found Petitioner freely, voluntarily, knowingly, and intelligently entered his guilty plea failed to establish he was prejudiced by Counsel's erroneous advice based on the evidence presented at Petitioner's PCR hearing.

STATEMENT OF THE CASE

Petitioner is presently confined by the South Carolina Department of Corrections pursuant to orders of commitment by the Horry County Clerk of Court. Petitioner was indicted at the May 2014 term of the Horry County Grand Jury for trafficking in illegal drugs (heroin), 28 grams or more (2014-GS-26-02133). David J. Canty, Esquire, represented Petitioner through a preliminary hearing. Dean N. Mureddu, Esquire, represented Petitioner thereafter. Senior Assistant Solicitor David P. Caraker, represented the State. On February 23, 2015, Petitioner pled guilty to the lesser-included offense of trafficking in heroin, between 4 and 14 grams, first offense. Consistent with the recommendation of the State, the Honorable Michael G. Nettles sentenced Petitioner to imprisonment for a term of 18 years. Petitioner did not appeal his plea or sentence.

On November 4, 2015, Petitioner filed an application for post-conviction relief (PCR) alleging he was being held unlawfully for the following reasons:

> Ineffective Assistance of Counsel;
>
> a. "Fail[ure] to make preliminary objection to terminate ambiguous statutory configurated charges"
> b. "Failure to raise/preserve[] substantial Fourth Amendment claim[s] of illegal search and seizure."
> c. "Failure to adequately investigate case; and Plea Counsel coerced [Petitioner] to plead guilty, and fail[ure] to withdraw[] plea when government breached negotiated plea; and plea was not knowingly or intelligently entered."
> d. "Fail[ure] to object to gross disparity and disproportion in sentencing guidelines, and weight category between schedule 1 drugs; and racial disparity in South Carolina criminal justice system that target Hispanic/Blacks."
> e. "Insufficient assistance of counsel(s) and abandonment."

(App.pp.83–95). The State filed its Return on October 24, 2016. (App.pp.103–107). On September 14, 2017, Petitioner filed an amended application for PCR, arguing:

Ineffective Assistance of Counsel;

a. "Fail[ure] to object to and to investigate the discrepancy in the weight of the drugs in the indictments and search warrants."
b. "Failure to have an interpreter present at meetings with Counsel."
c. "Failure to adequately investigate the case."
d. "Failure to completely discuss the Discovery and State's evidence with [Petitioner]."
e. "Failure to discuss with [Petitioner] the ability to take this case to trial, rather than accepting the plea."
f. "Failure to discuss with [Petitioner] the chain of custody, as well as the SLED reports regarding the drugs in question."
g. Failure to investigate and use the fact that [Petitioner] was living in Florida and that all of the drugs were found in his Co-Defendant'[s house.

Involuntary Guilty Plea

a. "[Petitioner] does not speak English and had difficulty understanding the plea."
b. "[Petitioner] was coerced into accepting the plea offer because of law enforcement's agreement that they were going to drop the charges against his daughter-in-law."
c. "[Petitioner] was forced into taking the plea as a result of [being] scared into accepting the plea."

(App.pp.99–101).

An evidentiary hearing into the matter was convened on Monday, September 18, 2017, at the Horry County Courthouse in Conway, South Carolina, before the Honorable William H. Seals. At the hearing, Petitioner testified he was represented by two attorneys: Canty (Preliminary Counsel) for approximately three months then Mureddu (Plea Counsel) through the date he pled. He claimed he met with Plea Counsel only four times, and each meeting lasted only five to ten minutes. During these meetings, he never saw any of State's evidence against him. He only saw the video evidence on the day he was to go to trial, only to discover he was not in the video. Plea Counsel told Petitioner he did not have a defense and did not have a way to win trial. (App.pp.22–28).

Petitioner testified he recalled receiving several plea offers, with the first "normal" offer being for eighteen years' incarceration, followed by one for fifteen years. After a period of time, the offer reverted to eighteen years, at which time Petitioner requested they go to trial to see if he could get a better offer or sentence. Further, it was Petitioner's understanding that in exchange for him pleading guilty, his son would also receive a lighter sentence and the charges would be dismissed against his daughter-in-law. (App.pp.28–29).

Petitioner also testified his primary language is Spanish and has trouble understanding English. Whenever one of his attorneys used an interpreter, he could not "really understand a lot of their language because all Spanish is not the same." As a result, he did not understand all the legal terms used during his plea hearing, including that his plea must be freely, voluntarily, knowingly, and intelligently given. (App.pp.29–31).

On cross-examination, Petitioner claimed he did not provide any information to Plea Counsel, including potential leads or witnesses to testify in his defense. He claimed Preliminary Counsel was unable to speak Spanish. He stated he did not feel like proceeding to trial was an option because Plea Counsel was not adequately prepared. He further claimed that although he told the plea judge he was satisfied with his attorney and understood the rights he was waiving, he only said those things because it was "part of the process" of pleading guilty. (App.pp.31–38).

Preliminary Counsel testified he met Petitioner through another client of his and agreed only to represent him at the preliminary hearing. Based on what he learned at that hearing, he was not willing to continue his representation. Preliminary Counsel is fluent in Spanish, uses it daily in his practice, and visited Puerto Rico "a dozen times at least" in his life. To his knowledge, Petitioner was bilingual; he gave Petitioner the option to communicate in either

Spanish or English and he chose the latter. Preliminary Counsel conversed with Petitioner for close to an hour, during which time he observed he was "perfectly fluent" in English and understood everything discussed. (App.pp.43–46; 48–49).

Preliminary Counsel sent Plea Counsel a letter outlining what occurred at the preliminary hearing and explaining his understanding of the case, including the evidence against Petitioner. He did not see any issues with the search warrant obtained by officers or the evidence against Petitioner, including the fact Appellant was seen fleeing the bathroom in which heroin was found. (App.pp.46–47).

Plea Counsel assumed representation of Petitioner following the preliminary hearing. Plea Counsel testified he prepared Petitioner's case for trial and his efforts included reviewing all the discovery and reviewing the evidence for any "defects . . . in the procedures" used in its collection. (App.pp.20–25).

Plea Counsel testified that when he took over representation of Petitioner, the latter did not appear to speak English well. So, every time he met with him, Plea Counsel used an interpreter to communicate with him. On one occasion, Plea Counsel used Petitioner's wife as an interpreter while reviewing evidence. At the end of that meeting, Plea Counsel gave them copies of the evidence to further review at their leisure. Petitioner's wife spoke English well and, based on the answers he received, he observed Petitioner understood the information communicated through his wife. (App.pp.25–27).

Plea Counsel did not believe there was a viable trial strategy to defend Petitioner: the only potential defense would be to blame the whole crime on Petitioner's son, but Petitioner was found fleeing from the bathroom in which the drugs were found. Petitioner never denied his involvement in the charged crime, and his sole focus on the trial process was on negotiating a

favorable plea deal. Plea Counsel communicated all of Petitioner's right to him, including a right to a jury trial, but Petitioner ultimately decided to plead guilty. (App.pp.27–29; 30–33; 36–41).

Plea Counsel recalled that he received two plea offers in the case: the first was for 18 years' incarceration. Petitioner was hoping for 10 years' and encouraged Plea Counsel to negotiate a shorter sentence. Through additional efforts, Plea Counsel obtained an offer for 18 years. Petitioner repeatedly questioned Plea Counsel about what punishments his son and daughter-in law faced; Plea Counsel told Petitioner that he was not concerned with what happened to Petitioner's son and "didn't care what happened" to him or his daughter-in-law, and negotiations with the State did not involve any discussion about what would happen to them. (App.pp.29–30; 33–35; 42–43).

Senior Assistant Solicitor David Caraker, who represented the State at the plea hearing, testified he never offered a plea deal to Petitioner which included any promises or references to Petitioner's son and daughter-in-law. Notably, Caraker noted that the CI in the case, who does not speak Spanish, communicated with Petitioner when brokering the drug deals. (App.pp.49–54).

At the conclusion of the plea hearing, the plea judge raised, sua sponte, the question of whether Petitioner was informed of the maximum and minimum penalty ranges; the only specific reference to a sentencing range in the record was that of Petitioner's negotiated sentence of 18 to 20 years' incarceration. He requested the PCR attorneys research the issue and inform him of their results. (App.pp.54–59).

On December 20, 2017, the PCR Judge issued an order denying relief. In the order, Judge Seals found neither counsel was deficient, nor could he conceive of any prejudice, in

failing to challenge the discrepancy in weight between Appellant's arrest warrant (116.7 grams) and the Grand Jury Case Summary (316.7 grams) as both weights were well in excess of the 28 gram threshold for the crime charged and no argument was presented to the court as to why the discrepancy in weight could have been used to benefit Petitioner. The PCR judge also found neither counsel was deficient, nor was Petitioner prejudiced, in failing to hire a "professional" interpreter; the PCR judge found through his observation that Petitioner had a "complete" understanding of the English language because Petitioner responded to questions at the PCR hearing with great haste. Further, the PCR judge found Petitioner's testimony not credible, particularly his claim that Preliminary Counsel was unable to speak Spanish given the latter's extensive history and skill with the language. The PCR Judge was also satisfied with Plea Counsel's use of various interpreters at his meetings with Petitioner. (App.pp.109–18).

The PCR Judge further found Petitioner's claims that Plea Counsel failed to: (1) investigate the case and review discovery; (2) explain the right to a jury trial; (3) discuss chain of custody; (4) investigate the defense of "mere presence";(5) advise the Petitioner as to his sentencing exposure; and (6) Petitioner pled because he believed he was doing so as part of a "package deal" with his son and daughter-in-law not credible, and counsels' testimonies credible. In accordance with these findings, the PCR judge found counsels were not deficient, nor was Petitioner prejudiced, in any of these regards. (App.pp.118–22).

Regarding the sua sponte observation that the Plea Court failed to apprise Petitioner of the sentencing range for the lesser-included offense to which he pled, the PCR Judge found Petitioner did not raise the allegation in his application nor did he present testimony addressing it, therefore the issue was not properly before the court. Additionally, Petitioner "clearly knew

the consequences of his plea" and his sentence fell within the range negotiated with the State. Thus, the PCR Judge declined to consider the issue. (App.pp.124–25).

Finally, the PCR Judge found: (1) by failing to argue counsels were ineffective by failing to challenge his charges as violations of equal protection laws, such issue was waived; (2) counsel's failure to challenge the subject-matter jurisdiction of the plea court was "patently without merit." (App.pp.122–23).

On February 12, 2018, Petitioner filed a Notice of Appeal, appealing the PCR court's denial of his application for PCR. Petitioner filed his Petition for Writ of Certiorari and the Appendix on September 24, 2018. This Return on behalf of the State now follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief 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, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

The post-conviction relief judge properly found Petitioner freely, voluntarily, knowingly, and intelligently entered his guilty plea failed to establish he was prejudiced by Counsel's erroneous advice based on the evidence presented at Petitioner's PCR hearing.

Petitioner argues the PCR Judge erred in denying his application for PCR because his guilty plea was not freely, voluntarily, knowingly, and intelligently made because: (1) Petitioner does not speak English and had difficulty understanding his attorney and the plea; (2) Petitioner was coerced into accepting the plea offer because he believed by accepting the plea the charges would be dismissed against his daughter-in-law; and (3) he felt Plea Counsel was not prepared to defend him at trial, so he was forced to plead. The State disagrees with these allegations of error. Substantial evidence in the record supports the PCR Judge's findings.

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "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." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). 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. "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). With respect to guilty plea counsel, the applicant must show 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, 59 (1985).

In Petitioner's case, there is substantial evidence which supports the PCR Judge's findings and contradicts Petitioner's allegations that his plea was not freely, voluntarily, knowingly, and intelligently entered. Preliminary Counsel testified Petitioner was fluent in English and elected to communicate with him in English instead of Spanish even though Preliminary Counsel was fluent in Spanish. Plea Counsel used interpreters in every interaction with Petitioner and observed that Petitioner understood the questions asked and information presented to him. Plea Counsel testified he was prepared to defend Petitioner and met with on several occasions during which he provided him copies of all the evidence of his guilt and discussed potential trial strategies, but given the substantial evidence against him, Petitioner focused on pursuing a favorable plea deal. Further, both Plea Counsel and the solicitor testified neither Petitioner's son's or daughter-in-law's potential punishments were a part of the plea offer.

CONCLUSION

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

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

January 18, 2019.

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO HORRY COUNTY
Court of Common Pleas
The Honorable William H. Seals, Circuit Court Judge

Appellate Case No. 2018-000214

HECTOR CASES-CARRERAS, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

PROOF OF SERVICE

I, William F. Schumacher, IV, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tommy A. Thomas, Esquire
P.O. Box 88
Irmo, S.C. 29603

I further certify that all parties required by Rule to be served have been served. This 18th day of January, 2019.

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ALAN WILSON
ATTORNEY GENERAL

January 18, 2019

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

RE: **Hector Cases Carreras v. State of South Carolina**
Appellate Case No. 2018-000214
Lower Court Case No. 2015-CP-26-7903

Dear Mr. Shearouse:

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

Sincerely,

William F. Schumacher, IV
Assistant Attorney General
S.C. Bar No. 100231

WFS/mm
Enclosures

cc: Tommy A. Thomas, Esquire