

STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to Lexington County
J. Cordell Maddox, Circuit Court Judge

Appellate Case No. 2018-000740

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S.C. SUPREME COURT

HENRY ANTONIO BURGESS,..... PETITIONER,

v.

STATE OF SOUTH CAROLINA,.....RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUE

Trial counsel erred in coercing petitioner to plead guilty to second degree burglary in order to obtain a lesser sentence and avoid a greater sentence via a first degree burglary charge under the misapprehension that a first degree burglary charge could materialize because the structure unlawfully entered was building (not a dwelling), which meant that a first degree burglary charge was not an option in the case. (Petition for Writ of Certiorari, p. 1).

RESPONDENT'S COUNTER-STATEMENT OF ISSUE

Whether certiorari should be denied where: (1) the PCR Court did not address the specific issue raised on appeal because it was not raised to it, nor was a Rule 59, SCRCR, Motion to Alter or Amend filed requesting the PCR Court to rule on this issue; (2) neither petitioner nor counsel testified at the PCR hearing that Petitioner was coerced with the threat of a first degree burglary charge but Petitioner testified at PCR he pled guilty to avoid a potential 30 year sentence on his indicted charges which did not include burglary 1st degree and Petitioner claimed at PCR he did not want a new trial but only wanted a sentence reduction; and (3) it was impossible that Petitioner's burglary 2nd true-billed indictment could be upgraded to burglary 1st degree on the day of Petitioner's trial, the same day he pled guilty?

STATEMENT OF THE CASE

Petitioner [a PCR applicant] is incarcerated in the Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Petitioner was **indicted** at the March 2015 term of the Lexington County Grand Jury for burglary second (2nd) degree (violent) (Ind. # 2015-GS-32-00545), possession of burglary tools (Ind. # 2015-GS-32-00544), and malicious injury to electric utility lines (Ind. # 2015-GS-32-00546). (App. 88-93). Petitioner **was not** indicted for burglary in the first (1st) degree. (App. 88-93). Sally J. Henry, Esquire, represented Petitioner on the indicted charges. Petitioner was facing a potential sentence of 30 years if convicted at trial on all true-billed indictments and if all sentences were ordered to run consecutive to each other by the trial judge.¹ (App. 88-93).

The Guilty Pleas

On the morning of November 16, 2015, shortly before Petitioner's case was to be called for trial on the above true-billed indictments [burglary 2nd degree violent, possession of burglary tools, and malicious injury to utility lines], Petitioner decided not to proceed with a jury trial but instead plead guilty as indicted to all charges. (Guilty Plea Tr. / App. 13). Petitioner pleaded guilty and the Honorable Clifton Newman, Circuit Court Judge ("the plea/sentencing court") accepted the guilty pleas.² Judge Newman sentenced Petitioner, without negotiations or recommendations, to 15 years for burglary 2nd degree (violent), 10 years for malicious injury to electric utility lines, and 5 years for possession of burglary tools, with credit for 337 days of incarceration awaiting trial. The sentences were all ordered to run concurrently. Petitioner was also on probation at the time he committed these crimes for a previous burglary 2nd degree

¹ S.C. Code Ann. §§ 16-11-312 (B)(2)&(3), 16-11-740, & 16-11-20.

² The record shows after accepting Petitioner's guilty pleas to the above true-billed indictments, Judge Newman allowed the jury pool from which Petitioner's jury was to be selected to re-enter to courtroom and observe the sentencing proceeding. (Guilty Plea Tr./App. 1-33).

(violent). At the same time as his guilty pleas to the above indictments, Petitioner was found by Judge Newman to have violated his probation. Judge Newman revoked 5 years of his probation and that sentence was ordered to run concurrent with the sentences on the above mentioned indictments. As a result, Petitioner's aggregate sentence was 15 years with all sentences run concurrent. (App. 1-33). Petitioner did not appeal his convictions or sentences.

The PCR Action

Petitioner then filed an application for post-conviction relief (PCR) on May 20, 2016 in Lexington County. Respondent filed a Return to the same. In his application, Petitioner alleged he was being held in custody unlawfully for the following reasons:

1. "Denial of Effective Assistance of Counsel"
 - a. "Counsel failed to provide adequate assistance"
 - b. "Guilty due to counsel's ineffectiveness"
2. "Involuntary Guilty Plea"
 - a. "Did not make informed decision of plea"

A PCR hearing was held on December 14, 2017 before the Honorable J. Cordell Maddox, Jr. ("the PCR Court"). (App. 50-78). Petitioner was present and represented by Aimee J. Zmroczek. Assistant Attorney General Melody J. Brown represented the State. At the PCR hearing, Petitioner testified in his own behalf. Petitioner's plea counsel, Sally J. Henry testified on behalf of the State. At the PCR hearing, Petitioner proceeded on the ground of ineffective assistance of counsel/involuntary guilty plea, in that: (1) he felt pressured to plead guilty; (2) his counsel did not do enough to develop an identification defense; and, (3) counsel did not do enough in offering evidence in mitigation. However, at the PCR hearing, **Petitioner did not claim nor did his plea counsel testify that Petitioner pled guilty out of fear his charges might be increased to burglary 1st degree**, the issue now raised on appeal. (PCR Tr./App. 50-78).

On March 30, 2018, Judge Maddox issued an Order of Dismissal denying and dismissing the PCR application with prejudice. (App. 79-87). **Judge Maddox' Order does not address the specific claim Petitioner now raises on appeal to this Court.** (App. 79-87). Petitioner did not file a Rule 59, SCRCPC, Motion to Alter or Amend to have the specific issue now raised on appeal addressed by the PCR Court.

The PCR Appeal

Petitioner then filed a Petition for Writ of Certiorari with this Court appealing Judge Maddox' Order. Petitioner now alleges he pled guilty because he was mistakenly advised by counsel that he could be charged with burglary 1st degree, which carries 15 years to life imprisonment. (Pet. for Writ of Cert. pp. 3-7). This is Respondent's Return to Petitioner's Petition for Writ of Certiorari.

Respondent asserts: (1) the issue Petitioner raises to this Court is not preserved for appellate review because it was not raised and preserved below; (2) there is no merit to the issue Petitioner now raises even if it had been preserved because there was no evidence at the PCR hearing that Petitioner pled guilty for the reason asserted but for different reasons, and Petitioner testified at PCR he did not want a new trial, but a sentence reduction; and finally (3) it was impossible for Petitioner's burglary 2nd indictment to have been upgraded to burglary 1st degree on the day of Petitioner's trial, the same day he pled guilty.

RELEVANT FACTS

The record shows Petitioner was guilty beyond any doubt of the crimes with which he was charged/indicted. And, he would have been convicted if he had proceeded to trial the morning of his guilty pleas. (Guilty Plea Tr./App. 3-7; 13-16; 26-27 & 88-93).

On December 10, 2014, at approximately 1:00 a.m., Petitioner used burglary tools to cut the electrical power to the *El Cheapo* gas station in Lexington County. He then took a hammer and knocked a hole in the wall of the store and entered the store unlawfully at night. Petitioner had at least 2 prior convictions for burglary at the time of this present crime. Once in the store, Petitioner took money from near a cash register, and cigarettes and candy and placed them in a black garbage bag. He then attempted to exit the store with the bag but the bag of stolen goods was too large to go through the hole Petitioner had made in the wall. The entire burglary and Petitioner were captured on store surveillance cameras. When police arrived, Petitioner then fled the store and entered a nearby wooded area. A responding police officer viewed the surveillance video and then drove down the road and met Petitioner coming out of the same wooded area. Petitioner was wearing the exact same clothes seen in the store surveillance video of the burglary. He also had cement dust on his clothes consistent with him previously knocking out the cinder block wall to enter the store illegally. He was arrested and in his possession in a book bag were burglary tools. He was arrested because he matched the person seen in the store surveillance video. After being read his Miranda rights, Petitioner confessed to committing the crimes to a police investigator and gave police additional details of the burglary. (Guilty Plea Tr./App. 3-7; 13-16; 26-27 & 88-93).

At his guilty plea, Petitioner admitted to Judge Newman he was guilty of breaking into the store. (Guilty Plea Tr./App. 10, ll. 12-16). He admitted he was guilty of each of the true-billed indictments. (Guilty Plea Tr./App. 12, ll. 2-17). He admitted the facts as recited by the Solicitor were true. (Guilty Plea Tr./App. 16, ll. 4-9). He agreed he had no defense to the charges. (Guilty Plea Tr./App. 11, ll. 20-22). He provided a letter to Judge Newman in which he threw himself on the mercy of the court. (Guilty Plea Tr./App. 18, ln. 3 – 20, ln. 20).

Further, Petitioner had an extensive prior criminal record. Petitioner was convicted in 1987 of burglary 2nd degree and grand larceny, in 1990, of trespassing and failure to stop for a police command, in 1992, of burglary 2nd degree, in 1995 of use of car without owner's consent and possession of a stolen vehicle, and in 1998, his probation or parole was violated. In 2001, he was convicted of enticing a child from attendance in public school; in 2002, of public disorderly conduct, simple assault, and aggravated assault and battery (ABHAN), in 2003, of receiving stolen goods and ABHAN, in 2005 of burglary 2nd degree violent and petit larceny and another attempted burglary, and in 2010, of burglary 2nd degree violent. The victim in that burglary was the same victim as in the present case. And, Petitioner committed that crime in the same fashion. Petitioner was on probation for that burglary at the time he committed the present burglary. (Guilty Plea Tr./App. 6, ln. 13 – 7, ln. 7; 13, ln. 21 – 15, ln. 25; 16, ln. 22 – 17, ln. 11). As a result, Petitioner had been in prison numerous times but had not been rehabilitated. Petitioner was released from prison about 2 years before this current burglary. (Guilty Plea Tr./App. 1-33).

ARGUMENT

Certiorari should be denied where the issue raised by Petitioner is not preserved for appellate review and neither petitioner nor counsel testified at the PCR hearing that Petitioner was coerced with the threat of a first degree burglary charge but Petitioner testified at PCR he pled guilty to avoid a potential 30 year sentence on his indicted charges which did not include burglary 1st degree and Petitioner claimed at PCR he did not want a new trial but only wanted a sentence reduction.

STANDARD OF REVIEW

(Appellate Standard)

The proper standard of review of a post-conviction relief (PCR) evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief (PCR) judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

(PCR Court's Standard)

In a post-conviction relief (PCR) proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant 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, 104 S.Ct. 2052, 2064 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland. The applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

A two-pronged test is used in evaluating 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, 300 S.C. at 117, 386 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. 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 pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

When an applicant “enters a plea on the advice of counsel, [he] may only attack the voluntary and intelligent character of the plea” by way of the long established two-prong test to

show ineffective assistance of counsel. Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Hill v. Lockhart, 474 U.S. 52, 58-59 (1985)). “A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel’s performance was deficient; and second, evidence that the applicant was prejudiced by that deficiency.” Stalk v. State, 383 S.C. 559, 560–61, 681 S.E.2d 592, 593 (2009) (citing Hill v. Lockhart, *supra*). In regards to the first prong, “[t]he proper measure of attorney performance remains reasonableness under prevailing professional norms.” Strickland, 104 S.Ct. at 2065. In order to satisfy the prejudice requirement, “the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pled guilty and would have insisted on going to trial.” Hill v. Lockhart, 474 U.S. at 59.

At all times during the proceeding, an applicant maintains the burden of establishing that he is entitled to relief. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Moreover, an applicant must overcome “a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” Morris v. State, 371 S.C. 278, 282, 639 S.E.2d 53, 55 (2006). An applicant must demonstrate 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.” Butler, 286 S.C. at 442, 334 S.E.2d at 441 (quoting Strickland, 466 U.S. at 686).

“It is beyond dispute that a guilty plea must be both knowing and voluntary.” Parke v. Raley, 506 U.S. 20, 29 (1992). *See also* Boykin v. Alabama, 395 U.S. 238, 242 (1969) (“a guilty plea should only be accepted where the record evidences ‘an affirmative showing that it was intelligent and voluntary.’”). What is key to the analysis in reviewing the plea for voluntariness is “whether the plea represents a voluntary and intelligent choice among the alternative courses

of action open to the defendant.” Raley, 506 U.S. at 29 (*quoting North Carolina v. Alford*, 400 U.S. 25, 31 (1970))). However, as noted above, “[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel” was incompetent. Tollett v. Henderson, 411 U.S. 258, 267 (1973)).

To find a guilty plea is voluntarily and knowingly made, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as the evidence presented at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)).

Further, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, [an applicant’s] right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977)). Statements made during a guilty plea should be considered conclusive, unless a PCR applicant presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975) *overruled on other grounds by U.S. v. Whitley*, 759 F.2d 327 (4th Cir.1985)).

Ineffective Assistance of Counsel / Involuntary Guilty Plea Claim at PCR

Petitioner’s PCR hearing testimony indicated, basically, that he felt pressured to plead guilty [**not because of the threat of burglary 1st degree but for other reasons**]; he felt he did not have sufficient assistance from counsel in presenting the State’s lack of evidence, specifically identification; and, he wanted his counsel to do more in obtaining a lenient sentence. (PCR

Tr./App. 56-71). Petitioner admitted 3 times in his PCR testimony that he pleaded guilty because he did not want to receive 30 years, which was the time he was facing on the 3 indicted charges if he went to trial. **(PCR Tr./App. 63, 64, 67).** Petitioner never testified that he pleaded guilty because he was told or thought the burglary 2nd charge could be upgraded to burglary 1st degree. **(PCR Tr./App. 56-71).** Though in his direct testimony Petitioner appeared to indicate the State had no identification evidence, and counsel should have fashioned a defense based on lack of identification evidence or presented this at sentencing, on cross-examination he agreed that at the plea he had agreed with the facts read by the Solicitor and agreed he waived his right to a trial so he could plead guilty. **(PCR Tr./App. 56-71).** Though Petitioner indicated agreement at least in part that he understood his plea, he asserted he did not recall admitting guilt. However at one point during his PCR testimony he admitted guilt again **(PCR Tr./App. 58)**, (see also the record showing he specifically admitted “I broke into that store.” (Guilty Plea Tr./App. 10, ll. 15-16)), but asserted at PCR he wanted less time on his sentence, *i.e.*, “a better sentence.” **(PCR Tr./App. 56-71).** Petitioner testified he did not want a new trial or to go back to square one on his original charges, but he wanted his sentence reduced, *i.e.* a time cut. **(PCR Tr./App. 56-71).**

Plea counsel testified that at the time of Petitioner’s trial and eventual guilty pleas she had been practicing law 22 years, mostly in criminal law. She met with Petitioner “many, many times,” reviewed the available evidence which included a confession and a video of the crime that showed him in the store, and was prepared to go to trial the day of the pleas. **(PCR Tr./App. 71-77).** Counsel testified that in her pre-trial preparations Petitioner told her a 3rd party committed the offenses, and Petitioner knew who the 3rd party was, but Petitioner would not tell counsel, so counsel’s hands were tied as far as presenting this defense. **(PCR Tr./App. 71-77).** Counsel testified that prior to the date of trial the State offered a straight up plea to burglary 2nd

violent, dropping the remaining charges, which she communicated to Petitioner, but Petitioner refused to accept the State's plea offer, stating he wanted a trial. (PCR Tr./App. 71-77). As a result, counsel prepared for trial and was ready for trial. (PCR Tr./App. 71-77). However, on the day trial was to start, Petitioner indicated to her for the first time that he wished to plead guilty. (PCR Tr./App. 71-77). She explained to him he would have to plead guilty to all of the charges. (PCR Tr./App. 71-77). He provided her a hand written letter which she would later present to the court in sentencing. (PCR Tr./App. 71-77). (See Guilty Plea Tr./App. 18). Counsel testified she made preparations for trial and mitigation, had witnesses available, argued Petitioner's medical limitations, and generally for leniency. (PCR Tr./App. 71-77). (See Guilty Plea Tr./App. 1-33). She indicated the evidence was supportive of guilt – particularly the confession and videotape. Counsel testified it was Petitioner on the store surveillance videotape. (PCR Tr./App. 71-77). In her PCR testimony, counsel **did not testify** that Petitioner was threatened that if he did not plead guilty his burglary 2nd indictment could be upgraded to burglary 1st degree. (PCR Tr./App. 71-77). This was simply not an issue at the PCR hearing. (PCR Tr./ App. 56-71; 71-77).

The PCR Court's Order

Because of the specific issue Petitioner is now raising on appeal, it is necessary to review exactly what the PCR Court ruled on. Based on **the allegations and testimony presented at the PCR hearing**, the PCR Court **addressed those allegations and correctly found they had no merit**. (Order of Dismissal / App. 79-87).

In its Order of Dismissal, the PCR Court pointed out that when an applicant "enters a plea on the advice of counsel, [he] may only attack the voluntary and intelligent character of the plea" by way of the long established two-prong test to show ineffective assistance of counsel. (Citing Frasier, 351 S.C. at 389, 570 S.E.2d at 174 (citing Hill, 474 U.S. at 58-59. The PCR

Court noted: “A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel’s performance was deficient; and second, evidence that the applicant was prejudiced by that deficiency.” (Quoting Stalk, 383 S.C. at 560–61, 681 S.E.2d at 593 (*citing Hill, supra*). The PCR Court pointed out, in regards to the first prong, “[t]he proper measure of attorney performance remains reasonableness under prevailing professional norms.” (Quoting Strickland, 104 S.Ct. at 2065.) And, in order to satisfy the prejudice requirement, “the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pled guilty and would have insisted on going to trial.” (Quoting Hill, 474 U.S. at 59).

The PCR Court also noted that at all times during the proceeding, an applicant maintains the burden of establishing that he is entitled to relief. (Citing Suber, 371 S.C. 554, 558, 640 S.E.2d 884, 886. Moreover, an applicant must overcome “a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” (Quoting Morris, 371 S.C. at 282, 639 S.E.2d at 55. And, an applicant must demonstrate 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.”” (Quoting Butler, 286 S.C. at 442, 334 S.E.2d at 441 (*quoting Strickland*, 466 U.S. at 686).

After reviewing the testimony of Petitioner and plea counsel, the PCR found the record supported plea counsel’s testimony, and the Court found counsel’s testimony credible. The Court found Petitioner’s testimony at PCR was contradicted by the plea itself, was inconsistent in critical part, and the PCR Court found his testimony was not credible as to the allegations of deficient representation and involuntary plea.

The PCR Court found that according to the guilty plea transcript, the State was about to call the case for trial and select a jury. (Referencing Guilty Plea Tr./App. 13). Rather than proceed to trial, Petitioner chose to waive his right to a jury trial and all accompanying rights and plead guilty. Petitioner was facing a total possible sentence of 30 years if convicted of all charges, and Petitioner had a lengthy prior criminal record that would be considered at sentencing. Rather than receiving a possible sentence of 30 years, Petitioner pled guilty and asked for mercy from the trial judge and received a sentence of 15 years concurrent on all charges, and his probation violation was even run concurrent. He was also given credit for 337 days of time served awaiting trial. (See Order of Dismissal/App. 79-87).

The PCR Court found the record showed Petitioner was guilty beyond any doubt of the crimes with which he **was indicted** and he would have been convicted if he had proceeded to trial **that morning on the true-billed indictments**. The PCR Court pointed out the following critical facts in its Order of Dismissal: Petitioner used burglary tools to cut the power to the *El Cheapo* gas station. He then took a hammer and knocked a hole in the wall of the store and entered the store unlawfully at night. Petitioner had at least 2 prior convictions for burglary at the time of this crime, making this a burglary 2nd violent. Once inside, Petitioner took money from near a cash register, and cigarettes and candy and placed them in a bag. He then attempted to exit the store with the bag but the bag of stolen goods was too large to go through the hole he had made in the wall. The entire burglary and Petitioner were captured on store surveillance cameras. Petitioner then fled the store, as police arrived, and entered a wooded area. A police officer viewed the surveillance video and then drove down the road and met Petitioner coming out of the same wooded area. Petitioner was wearing the exact same clothes seen in the video of the burglary. Petitioner also had cement dust on his clothes consistent with him previously

knocking out the cinder block wall to enter the store. Petitioner was arrested in possession of burglary tools contained in a book bag. Petitioner was arrested because he matched the person seen in the store surveillance video. After being read his Miranda rights, Petitioner confessed to a police investigator and gave police additional details of the burglary. (Ref. Guilty Plea Tr./App. 3-7; 13-16; 26-27). The PCR Court found the record fully and fairly supported Petitioner would have been convicted had he proceeded to trial. (See Order of Dismissal/App. 79-87).

The PCR Court also pointed out in its Order, that at his guilty plea, Petitioner admitted to Judge Newman he was guilty of breaking into the store. (Ref. Guilty Plea Tr./App. 10, ll. 12-16). He admitted he was guilty of each of the true-billed indictments. (Ref. Guilty Plea Tr./App. 12, ll. 2-17). He admitted the facts as recited by the Solicitor were true. (Ref. Guilty Plea Tr./App. 16, ll. 4-9). Petitioner agreed he had no defense to the charges. (Ref. Guilty Plea Tr./App. 11, ll. 20-22). And, he provided a letter to Judge Newman in which he threw himself on the mercy of the court. (Ref. Guilty Plea Tr./App. 18, ln. 3 – 20, ln. 20).

Further, the PCR Court noted Petitioner had an extensive prior criminal record that would have been considered at sentencing had he proceeded to trial. Petitioner was convicted in 1987 of burglary 2nd degree and grand larceny, in 1990, of trespassing and failure to stop for a police command, in 1992, of burglary 2nd degree, in 1995, of use of car without owner's consent and possession of a stolen vehicle, in 1998, of a probation violation, in 2001, of enticing a child from attendance in public school, in 2002, of public disorderly conduct, simple assault, and ABHAN, in 2003, of receiving stolen goods and ABHAN, in 2005, of burglary 2nd degree violent and petit larceny and another attempted burglary, and in 2010, of burglary 2nd degree violent. The victim in that burglary was the same victim as in the present case. And, Petitioner committed the crime in the same fashion and was on probation for that burglary at the time he committed the present

burglary. (Ref. Guilty Plea Tr./App. 6, ln. 13 – 7, ln. 7; 13, ln. 21 – 15, ln. 25; 16, ln. 22 – 17, ln. 11). (See Order of Dismissal/App. 79-87).

The PCR Court found, Petitioner had not shown counsel was deficient in her representation of him, and there was no credible evidence of any undue or improper pressure on Petitioner to plead guilty to the charges. Rather, the plea transcript showed a knowing and voluntary plea on facts that well-support the crime and the sentence handed down. (See App. 1-33). In particular, the PCR Court noted the overwhelming evidence of guilt including the video evidence and confession of guilt.³ And, the PCR Court found the record showed Petitioner made the decision to plead guilty in hopes of a lesser sentence on the indicted charges and his probation violation, not from any ineffective assistance of counsel. As a result, the PCR Court found, Petitioner failed to meet his burden of proof to show deficient performance or resulting prejudice. *See Hill v. Lockhart*. (See Order of Dismissal/App. 79-87).

Involuntary Guilty Plea Allegation

The PCR Court also pointed out: “It is beyond dispute that a guilty plea must be both knowing and voluntary.” (Quoting *Parke v. Raley*, 506 U.S. at 29. Also referencing *Boykin*, 395 at 242 (“a guilty plea should only be accepted where the record evidences ‘an affirmative showing that it was intelligent and voluntary.’”). And, what is key to the analysis in reviewing the plea for voluntariness is “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” (Again quoting *Raley*, 506 U.S. at 29 (*quoting Alford*, 400 U.S. at 31)). However, as noted above, “[w]hen a criminal defendant

³ The PCR Court also stated here that “the State could have straight indicated [sic] [indicted] for first degree burglary in this case because of the two priors... ([Quoting the] Guilty Plea Tr. p. 7, ll. 2-4)” and “the record supports Applicant was already receiving a benefit from the charging decisions...[.]” The PCR Court went on to find Petitioner “...made the decision to plead guilty in hopes of a lesser sentence on the lesser charge, not from any ineffective assistance.” (App. 84-85).

has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel” was incompetent. (Citing Tollett, 411 U.S. at 267).

The PCR Court pointed out that to find a guilty plea is voluntarily and knowingly made, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. (Citing Boykin, 395 U.S. 238; Dover, 304 S.C. 433, 405 S.E.2d 391. And, in determining guilty plea issues, it is proper to consider the guilty plea transcript as well as the evidence presented at the PCR hearing. (Citing Harris, 282 S.C. 131, 318 S.E.2d).

Further, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, [an applicant’s] right to contest the validity of such a plea is usually, but not invariably, foreclosed. (Citing Blackledge, 431 U.S. 63). And, statements made during a guilty plea should be considered conclusive, unless a PCR applicant presents valid reasons why he should be allowed to depart from the truth of his statements. (Citing Crawford, 519 F.2d 347 *overruled on other grounds by Whitley*).

The PCR Court found Petitioner presented no reason to support that he should be allowed to depart from the truth of the statements he made during his guilty plea hearing – particularly those responses indicating that he was guilty of the offenses and that he knowingly, voluntarily, and intelligently entered his pleas of guilty to the above indictments. Moreover, the totality of the guilty plea transcript reflected that the guilty pleas were knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea. In particular, the record reflected Judge Newman carefully questioned Petitioner on his understanding that he was not

then suffering any impairment that would prevent his understanding of the proceedings, that he, in fact, did understand the proceedings; that he understood the charges; understood the presumption of innocence, the right to cross-examination, the right to present witnesses, the State's burden of proving guilt beyond a reasonable doubt; that he was pleading guilty voluntarily, without promise of anything, because he was actually guilty of the crimes; and, that he was satisfied with counsel. (Ref. Guilty Plea Tr./ App. 7, ln. 21 – 12, ln. 22).

Given Petitioner's burden of proof and the analysis to be applied to this claim, the claim of involuntary plea was, in essence, a claim of ineffective assistance of counsel, and was treated as such. As resolved above, the PCR Court found Petitioner failed in his burden of showing ineffective assistance of counsel. Thus, Petitioner failed to show ineffective assistance such as would undermine the voluntary nature of his plea, which was otherwise supported by the plea record. As a result, the PCR Court found, Petitioner was not entitled to any relief on his involuntary guilty plea claim **raised at PCR**. (See Order of Dismissal/App. 79-87).

And, the PCR Court found, Petitioner had not carried his burden of proof to show a reasonable probability he would not have pleaded guilty but would have proceeded to trial. *See Hill v. Lockhart*. Rather, the evidence before the PCR Court indicated the State was about to call the case for trial and draw a jury when Petitioner decided to plead guilty and throw himself on the mercy of the Court. As a result, the PCR denied relief. (Order of Dismissal/App. 79-87).

THE ISSUE RAISED ON APPEAL

The specific issue Petitioner raises on appeal from the denial of PCR was not raised to or addressed by the PCR Court in its Order of Dismissal and Petitioner did not file a Rule 59, SCRC, Motion to Alter or Amend, to have this specific issue addressed by the PCR Court. Therefore, the issue is not preserved for appellate review. Regardless, there is no merit to the

specific issue now raised by Petitioner as counsel was neither deficient nor can Petitioner prove Hill v. Lockhart prejudice. Therefore, certiorari must be denied.

The Lack of Preservation of the Specific Issue Petitioner Raises

Petitioner now argues on appeal from the denial of PCR that he was coerced into pleading guilty and his guilty pleas were involuntary because *allegedly* counsel informed him if he did not plead guilty his burglary charge could be upgraded to burglary 1st degree. (Pet. for Cert. 1, 3-7). However, this specific issue was not raised to the PCR Court. (See PCR Tr./App. 50-78). At the PCR hearing, Petitioner did not testify he pled guilty because he was threatened that his burglary 2nd charge could be upgraded to burglary 1st degree. (PCR Tr./App. 56-70). Petitioner testified different 3 times he pled guilty because he did not want to receive 30 years on the charges he was facing; burglary 2nd, possession of burglary tools, and malicious injury to electric utility lines. (PCR Tr./App. 63, 64, 67). Nor did plea counsel testify that she informed Petitioner his burglary 2nd charge could be upgraded to burglary 1st degree. (PCR Tr./App. 71-77). In fact, counsel testified she was prepared to go to trial the morning of Petitioner's trial on burglary 2nd degree [and the other indicted charges] and **it was Petitioner** who informed her he had decided he did not want a trial and wanted to plead guilty and was going to plead guilty. (PCR Tr./App. 71-77). He gave counsel a letter he wanted counsel to provide to Judge Newman. (PCR Tr./App. 71-77). As a result, the specific issue now raised was not addressed by the PCR Court in its Order of Dismissal, and Petitioner did not file a Rule 59, SCRPC Motion to Alter or Amend to have the PCR Court address this specific issue. (PCR Tr./App. 50-78; Order of Dismissal/App. 79-87). As a result, the issue now raised on appeal is not preserved for appellate review. Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007)(failure to file Rule 59 Motion to have unaddressed issue addressed in the Order of Dismissal, results in issue not being preserved

for review on appeal from PCR); Bostick v. Stevenson, 589 F.3d 160 (4th Cir. 2009)(same). The petition for writ of certiorari should be denied.

The Merits

Regardless, even if Petitioner had preserved this issue for appeal, there is no merit to Petitioner's argument, and as a result, certiorari must be denied. Petitioner failed to meet his burden of proof on this claim at PCR. (PCR Tr./App. 56-77). Strickland; Hill; Butler v. State. The PCR Court also correctly found the record supported plea counsel's testimony and it was credible. The Court correctly found Petitioner's testimony at PCR was contradicted by the plea itself, was inconsistent in critical part, and was not credible as to the allegations of deficient representation and involuntary plea. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993).

Petitioner has taken a misstatement by the Assistant Solicitor at the guilty plea, that she could have indicted Petitioner for burglary 1st degree, because Petitioner had at least 2 prior burglary convictions, and considered doing so, **but did not**, [See Guilty Plea Tr./App. 7, ll. 2-7]⁴ and the PCR Court's repeating this misstatement in one paragraph of the Order of Dismissal [See App. 84, ln. 21 – 85, ln. 2],⁵ and argues this is evidence Petitioner was improperly coerced into

⁴ The Assistant Solicitor was incorrect in this one statement. Because Petitioner burglarized a non-residence, even though Petitioner had numerous prior convictions for burglary, Petitioner could only be indicted for burglary 2nd degree violent. S.C. Code Ann. §16-11-312 (B)(2)&(3). As will be shown, this misstatement is irrelevant as the Solicitor did not seek an indictment for burglary 1st but only burglary 2nd degree violent, which was the true-billed indictment petitioner was to be tried on the morning of his guilty pleas.

⁵ Here in the Order of Dismissal, the PCR Court referenced the Solicitor's misstatement at the guilty plea that Petitioner could have been indicted for burglary 1st degree, but was not. The PCR Court found that in addition to the overwhelming evidence of guilt, including the confession and videotape, petitioner also received the benefit of the State's charging decision. This reference or finding is irrelevant as the PCR Court specifically and correctly found in the next sentence that Petitioner pleaded guilty in hopes of obtaining a more lenient sentence on the indicted charges, which is completely accurate and fully supported by the entire record. (See Guilty Plea Tr./App. 1-33; Indictments/App. 88-93; & PCR Tr./App. 56-77).

pleading guilty to the charges he was going to trial on the date of his guilty pleas because he thought his charges could be upgraded to burglary 1st degree.⁶ There is no merit to this argument because Petitioner was going to trial the morning of his pleas on the indicted charges of burglary 2nd, malicious injury to utility lines, and possession of burglary tools. (See Guilty Plea Tr./App. 1-33; Indictments /App. 88-93). Petitioner's true-billed indictment for burglary 2nd degree could not have been upgraded to burglary 1st degree the day of his trial or during his trial. (App. 1-33). See S.C. Code Ann. §17-19-100. The record shows Petitioner **was indicted for** burglary 2nd degree, possession of burglary tools, and malicious injury to electric utility lines. (Guilty Plea Tr./App. 1-33; Indictments/App. 88-93). Petitioner was **not indicted** for burglary 1st degree. (Id.). On the morning of Petitioner's trial on **burglary 2nd degree**, possession of burglary tools, and malicious injury to utility lines, Petitioner decided he did not want to proceed with a trial on the **indicted charges**, on which he was facing 30 years,⁷ but wished to plead guilty and throw himself on the mercy of the court, which he did. (Guilty Plea Tr./App. 1-33).

Counsel credibly testified she was prepared to try Petitioner's case on the indicted charges the morning of his trial; however, Petitioner notified her for the first time that he did not wish to have a jury trial, but wanted to plead guilty. Petitioner handed her a letter that he wanted her to give to Judge Newman. The record shows that letter was read in open court at Petitioner's sentencing after Petitioner pled guilty. (App. 1-33).

Based on the record, Petitioner cannot show deficient performance or resulting prejudice. The evidence against Petitioner was overwhelming where he cut the electrical lines to the *El*

⁶ Petitioner's appellate counsel is not even sure of this allegation of coercion for in two (2) different places in the Petition for Certiorari, appellate counsel states "presumably" or "apparently," Petitioner was coerced by this alleged threat. (See Pet. for Writ of Cert. pp. 3 & 4).

⁷ See S.C. Code Ann. §§ 16-11-312 (B)(2)&(3), 16-11-740, & 16-11-20.

Cheapo gas station, committed the burglary on surveillance video, had at least 2 prior convictions for burglary, was captured near the crime scene, was captured wearing clothing that matched those on the surveillance video, was carrying burglary tools on him, and Petitioner confessed to police he committed the crimes. Petitioner had no defense to the crimes. (Guilty Plea Tr./App. 1-33). Petitioner was facing a total of 30 years on all 3 true-billed indictments with his extensive criminal record. Petitioner had been incarcerated in prison numerous times but had not been rehabilitated. Petitioner was released from prison just 2 years before this current burglary. The State was about to call Petitioner's case for trial and select a jury. Instead of proceeding to a jury trial and risking a maximum sentence of 30 years in prison, Petitioner pleaded guilty, threw himself on the mercy of the court and pleaded for mercy, and received a concurrent sentence of 15 years, 10 years, and 5 years. Petitioner also knew he was on probation for a prior burglary 2nd degree violent, involving the same victim. This probation violation could have been run consecutive to Petitioner's other sentences had he gone to trial. Instead, Petitioner received a 5 year sentence concurrent on his probation revocation as well. (Guilty plea Tr./App. 1-33). As a result, on this record, Petitioner cannot show deficient performance or that there is a reasonable probability he would not have pleaded guilty but would have gone to trial on the indicted charges. Hill v. Lockart; Butler v. State.

Further, there was no evidence introduced at the PCR hearing that Petitioner was coerced into pleading guilty by the threat his burglary 2nd degree indictment would be upgraded to burglary 1st degree. (PCR Tr./App. 56-77). Butler v. State. Nor could it have been the day of his trial/plea. S.C. Code Ann. §17-19-100; State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2007); State v. Guthrie, 352 S.C. 103, 572 S.E.2d 309 (2002); Weinhauer v. State, 334 S.C. 327, 513 S.E.2d 840 (1999), (*overruled other grounds*, State v. Gentry, 363 S.C. 93, 610 S.E.2d 494

(2005)); Clair v. State, 324 S.C. 144, 478 S.E.2d 54 (1996). This ground, even had it been preserved for appeal, has no merit and must be denied and dismissed with prejudice. Id.

Petitioner further claims his plea was not entered knowingly or voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the Petitioner had a full understanding of the consequences of his plea and the charges against him. Boykin, 395 U.S. 238; Dover, 304 S.C. 433, 405 S.E.2d 391. In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. Harris, 282 S.C. 131, 318 S.E.2d 360. As the PCR Court found, the guilty plea transcript reflects the guilty pleas were knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea. (Guilty Plea Tr./App. 1-33). Petitioner's jury was about to be selected and the jury pool remained outside the courtroom until Petitioner's guilty pleas were accepted by Judge Newman. They were then allowed back into the courtroom. Petitioner was clearly aware of his right to have a jury trial because he waived that right the morning of his trial. Petitioner also waived all of his other trial rights on the record before Judge Newman. Petitioner also was informed of the maximum sentences on each indicted charge. Knowing all of this, Petitioner still chose to plead guilty and ask for mercy from Judge Newman. (Guilty Plea Tr./App. 1-33).

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, Petitioner's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge, 431 U.S. 63. Statements made during a guilty plea should be considered conclusive, unless Petitioner presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford., 519 F.2d 347. As the PCR Court correctly found, Petitioner has presented no reasons to show that he should be allowed to depart from the truth of the statements he made during his guilty plea hearing that he was guilty of the indicted offenses and

he knowingly, voluntarily, and intelligently entered his pleas of guilty to the above indictments. (Guilty plea Tr./App. 1-33). Based on this record, Petitioner has not shown counsel was deficient or that he was prejudiced by counsel's performance. Hill v. Lockhart. The PCR Court's Order is supported by overwhelming probative evidence. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624. The petition for certiorari must be denied.

CONCLUSION

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

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
February 4, 2019

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

FEB 04 2019

Certiorari to Lexington County
J. Cordell Maddox, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2018-000740

HENRY ANTONIO BURGESS,..... PETITIONER,

v.

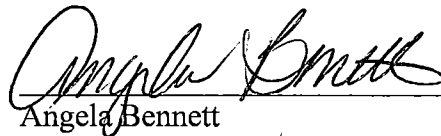
STATE OF SOUTH CAROLINA,.....RESPONDENT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Return to Petition for Writ of Certiorari*, dated February 4, 2019, on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, South Carolina 29211-1589

I further certified that all parties required by Rule to be served have been served. This February 4, 2019.



Angela Bennett
Administrative Assistant

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RECEIVED

FEB 04 2019

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

February 4, 2019

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

Re: *Henry Antonio Burgess v. State of South Carolina*
Certiorari to Lexington County
Appellate Case No. 2018-000740

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari along with proof of service for the above-referenced case.

Sincerely,

J. Anthony Mabry
Senior Assistant Attorney General

JAM:ab
Enclosures

cc: Wanda H. Carter, Esquire
Victim Advocacy Division