STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
The Honorable Michael G. Nettles, Circuit Court Judge

RECEIVED
DEC 20 2019
S.C. SUPREME COURT

Appellate Case No. 2018-002016

STEPHEN FRANCOIS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

PETITIONER'S STATEMENT OF ISSUES PRESENTED

I. Whether the PCR Court erred in denying relief, where Petitioner's plea was not freely, intelligently, and voluntarily made, where plea counsel provided ineffective assistance of counsel and advised Petitioner that he would receive a sentence between fifteen and twenty-two years based on his lesser culpability compared to two co-defendants, where a global plea agreement contained a sentencing range of between fifteen and thirty years for all three defendants, where Petitioner pleaded guilty on the advice of counsel, and where Petitioner received a thirty year identical sentence to his two more culpable co-defendants?

II. Whether the PCR Court erred by denying Petitioner's request for a continuance, where Petitioner had received a transcript from a hearing involving two crucial post-trial motions less than three weeks before the evidentiary hearing, where Petitioner's father who was going to testify about the representations plea counsel made to Petitioner regarding sentencing was out of the country for work and could not attend the hearing following limited notice to Petitioner, and where Petitioner had been on lockdown repeatedly and therefore was unable to speak with his PCR counsel on the telephone?

RESPONDENT'S STATEMENT OF ISSUES PRESENTED

I. The PCR court correctly denied relief finding Petitioner's plea was knowing and voluntary where no evidence of prejudice was presented because any mistaken belief by Petitioner as to the potential sentence he might receive was cured by the colloquy with the plea court and Petitioner's responses during the colloquy directly contradict his assertions that his plea was involuntarily given.

II. The PCR court did not abuse its discretion in denying Petitioner's request for a continuance where PCR counsel was ready and prepared to go forward and Petitioner did not produce any evidence to show that he was prejudiced by the evidentiary hearing going forward.

STATEMENT OF THE CASE

The records before this Court establish Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During the June 2010 term, the Charleston County Grand Jury indicted Petitioner for two counts of first-degree burglary, two counts of armed robbery, three counts of kidnapping, and two counts of possession of a weapon (2010-GS-10-4545, -4546, -4547, -4535, -4540, -4541, -4543, -4544, -4754) following two separate home invasions and robberies that occurred days apart committed by Petitioner and four co-defendants. Petitioner retained Peter D. Brown, Esquire, to represent him on all charges. Ninth Circuit Solicitor Scarlett Wilson and Assistant Solicitor E. Culver Kidd, IV, prosecuted the case.

On January 19, 2011, Petitioner and two co-defendants (Miguel Starks and Reginald Rice) appeared in the Charleston County Court of General Sessions before the Honorable R. Markley Dennis, Jr., and pled guilty as indicted pursuant to a recommendation by the State for concurrent sentences not to exceed thirty years. Sentencing was deferred until after the defendants testified at the trial of co-defendant Sasha Gaskins.

On March 22, 2011, Petitioner and co-defendants Starks and Rice appeared before Judge Dennis for sentencing. Following presentations from counsels, Judge Dennis sentenced Petitioner to an aggregate thirty years imprisonment.[1]

Petitioner, through counsel, filed a timely motion to reconsider his sentence on April 1, 2011. The State filed a written reply to this motion on April 4, 2011. A hearing on this motion was

[1] Co-defendants Starks and Rice also received sentences of thirty years imprisonment.

held on November 13, 2014, before Judge Dennis.[2] Following the hearing, Judge Dennis denied the motion. Petitioner did not file a notice of appeal.

On August 25, 2015, Petitioner filed an application for post-conviction relief, alleging ineffective assistance of counsel and involuntary guilty plea without any specific allegations or facts to support these general allegations. The Charleston County Clerk of Court appointed Christopher L. Murphy, Esquire, to represent Petitioner.[3]

An evidentiary hearing was held on October 5, 2018, before the Honorable Michael G. Nettles, at the Charleston County Courthouse. Petitioner was present and was represented by Christopher L. Murphy, Esquire. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. At the evidentiary hearing, Petitioner proceeded forward on the following grounds for relief:

1. Counsel was ineffective for advising him he would receive a sentence of fifteen to twenty years; and
2. Involuntary Guilty Plea.

Plea counsel Peter D. Brown and Petitioner testified at the evidentiary hearing. Judge Nettles took the matter under advisement and subsequently denied Petitioner's application for relief. An Order of Dismissal was filed on October 24, 2018. This appeal follows.

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[2] While the motion to reconsider the sentence was pending, Petitioner filed a *pro se* motion to relieve counsel. The motion to relive counsel was also heard on this date, and to accommodate Petitioner's desire to relieve counsel, Judge Dennis allowed Petitioner and counsel to both argue the motion to reconsider his sentence. Judge Dennis ultimately relieved counsel at the conclusion of the hearing.

[3] Other attorneys had previously been appointed to represent Petitioner and were relieved due to conflicts.

STATEMENT OF THE FACTS

At the guilty plea, Solicitor Wilson, on behalf of the State, presented the following summary of facts:

> [T]his case involves two separate home invasions, two sets of victims on separate days. The same five codefendants were involved in each event. The first one was on February 24th, 2010. The victim was H. B. and his girlfriend. H. B. had known Reginald Rice from his days at The Citadel. His girlfriend had no connection to Mr. Rice or any one of the other defendants.
>
> Two days later, the second home invasion occurred with J. H. who knew both Reginald Rice and Miguel Starks from The Citadel. J. H. worked as an assistant coach in football at The Citadel, where Mr. Rice had played and Mr. Starks was currently on the football team. As I mentioned, Mr. Starks was enrolled at The Citadel at the time of these events. Mr. Rice had been a cadet in the past but was no longer there.
>
> The other three defendants, Mr. Francois and the two women who were involved, were students at the College of Charleston when all of this unraveled.
>
> These cases, although they happened with H. B. first and then with J. H. they were solved in reverse. Starting from the beginning, on February 24th of last year, Mr. Rice and Mr. Starks began planning the home invasion of H. B.
>
> I should right now, Judge, that with the media and others involved that there has been some inference or allegation that these two events were drug deals gone bad. They weren't, at all. These men were targeted. They were targeted by people who knew them and knew that they could be taken advantage of.

Mr. Starks and Mr. Rice began to plan. Mr. Starks enlisted the help of his friend, Mr. Francois, and Mr. Francois' girlfriend, whose name is Sasha Gaskins. The plan was for them to use a ruse to gain entry to H. B.'s home and steal anything that they could find, whether it was marijuana, drugs, electronics, whatever.

On that evening of the 24th, all of the defendants were together, including Miss Gaskins and Miss Bruster. They had dinner together, then they hung out at Mr. Starks' apartment where they talked further about doing this robbery. The three men were all dressed in black, they had two guns that they used in the robbery and also a sword that they used in the robbery. They rode to H. B.'s home and what they did was to have Miss Gaskins go to the door, knock on the door, claim that she needed help, wanted to use the phone. As she did that, H. B.'s girlfriend went to get the phone, allowed her to use it, Mr. Starks goes rushing in and Mr. Rice come in after him.

Your Honor, at that point the robbery and brutalization of the people lasted somewhere between two and three hours. They went in, they duct-taped them, blind —, — duct-taped their eyes closed.

At one point during the robbery, H. B.'s pants were pulled down and the sword was rubbed up against his genitals as he was threatened that if he didn't "give it up', "give up a stash, give up money, give up whatever he had" that they would basically castrate him. Also during the robbery H. B.'s girlfriend at the time was hit in the head with a pistol, she was forced to perform oral sex on who we believe was Mr. Starks. There are circumstantial evidence to that effect, although there is no DNA indicating that. Based on the testimony, we believe that it was Mr. Starks and that

we can prove that. During that time they recovered H. B.'s credit cards, ATM card. Mr. Starks actually left with Mr. Francois and the women to go to an ATM machine to try to get cash, leaving Mr. Rice there with the two victims.

As I mentioned earlier, this went on for several hours. Mr. Starks and the others returned from the ATM machine. I do not believe that they were successful in that attempt. They became unloading various electronics from the home into the car.

That was all on Wednesday night. Evidently they were not satisfied with what they recovered in that robbery and began to discuss doing another one. The chosen victim this time was J. H. There was discussion that the reason that they thought that it would work with J. H. was because he was a nice guy, he would fall for their ruse.

So two nights later, on Friday night into Saturday morning, their plan began to unfold. In that event, J. H. lived in an apartment complex that you had to take an elevator to get to his residence. What they did was have Miss Gaskins call and claim to be a girlfriend of an acquaintance and claim that she was broken down, that she needed help, and could he come get her and she explained where she was.

This was the middle of the night, obviously, but J. H. got up — I think that he was a little suspicious, because he began trying to contact the acquaintance to see what was going on with his girlfriend as he was getting ready to go and rescue her.

He gets ready. He comes down, comes out of the bottom of his apartment, where he is immediately confronted by Mr. Rice with a gun. He drops to his knees, he drops his cell phone. The other two join in and they take him back upstairs, they duct-tape him, duct-tape his eyes closed and began ransacking his apartment. They

put him in the bedroom. They eventually got his dog and put his dog in a bedroom. His dog was going crazy, as you might imagine. Continued to look for anything that they could find of value.

Again, Mr. Starks found his card. Left the apartment, in J. H.'s car, met back up with the girls and they went to get money from an ATM machine. I believe that time they were successful, that he had gotten the PIN number from J. H. — as he had with H. B. the previous time. They were able to get some cash. They went back and began to unload J. H.'s belongings into the car where the women were. They drove away and left.

In both situations--in the situation with H. B, he thought that he recognized Reginald Rice's voice. Then in J. H.'s situation, he thought that he recognized both Mr. Starks' and Mr. Rice's voice; although neither of them could see their face.

J. H. immediately got untied from his duct-tape and went next door to the nursing home, because he didn't have a phone, to call police. The police came immediately and met up with Mr. Francois and Mr. Rice, who were nearby, and stopped them. J. H. was called out to identify them. Obviously he had not seen their faces but they fit the description of clothing and otherwise.

Mr. Rice did not give a statement immediately but Mr. Francois, under questioning, broke and began to tell pieces of what happened; which obviously led to Mr. Starks. Again, because of the voice recognition, Mr. Starks was already a suspect very early on in this.

At this point the County and the City, they're realizing that they have very similar MO's in these cases and began to piece it together. Mr. Starks eventually was

arrested, as were the two girls, all of whom — except for Mr. Rice gave statements which while somewhat minimized their own culpability as to who exactly planned it or who exactly did what first, but the general picture that everyone gave fit as to what happened these two nights. Again, there was some minimization that went on in those statements but clearly there was cooperation against each other, which we believe they would be convicted on all these charges.

Since the time of their arrest, more recently, Mr. Rice has begun to cooperate. He has had one session where he told his version of what happened. It fits generally with what we had heard from the other defendants.

Search warrants were executed and much of the loot or the items that were stolen from H. B.'s home and from J. H.'s home were recovered in Mr. Starks' apartment, and also from a friend of the two women involved. They had deposited some of the items with a friend, who we don't think had any involvement. Those items were recovered as well.

(Plea Tr. p. 33-41). After Solicitor Wilson's recitation of the facts, Petitioner and his two-co-defendants agreed with the summary of facts as presented by the State. (Plea Tr. p. 41-44).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.; Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

I. The PCR court correctly denied relief finding Petitioner's plea was knowing and voluntary where no evidence of prejudice was presented because any mistaken belief by Petitioner as to the potential sentence he might receive was cured by the colloquy with the plea court and Petitioner's responses during the colloquy directly contradict his assertions that his plea was involuntarily given.

Petitioner argues on appeal that the PCR court erred in denying him relief because his decision to plead guilty was involuntary based on counsel's assertion that he would receive a sentence of twenty-two years.[4] Petitioner claims that this error on the part of counsel rises to the level of constitutional ineffectiveness and warrant the reversal of his conviction and a remand for

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[4] Contained within Petitioner's brief are a litany of conclusory arguments not set forth in the statement of issues on appeal:

1. Counsel was not prepared to argue the Motion to Reconsider (PWC p. 3);
2. Counsel was ineffective for failing to move to sever the pleas and sentencing (PWC p. 8; p. 13);
3. Counsel failed to secure the appearance and testimony of family members at the motion to reconsider hearing (PWC p. 8);
4. Counsel failed to discuss with Petitioner the option to go to trial (PWC p. 13);
5. Counsel failed to discuss with Petitioner that he could receive a *lighter sentence* at trial (PWC p. 13) (emphasis added).

Respondent refers to Rule 208(b)(1)(B), SCACR, and does not put forth responses to these shoehorned allegations in this Return, but will address them if requested to by this Court. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); *Solley v. Weaver*, 247 S.C. 129, 131, 146 S.E.2d 164, 165 (1966) ("We have held in many cases that every ground of appeal ought to be so distinctly stated that the Court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue."); *see also* Rule 208(b)(1)(D), SCACR (requiring "discussion and citations of authority" in the appellant's brief for this Court to consider an issue); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004) ("Numerous cases have held that where an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal."); *see also Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct.App.2001); *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct.App.2000); *Welch v. Epstein*, 342 S.C. 279, 288 n. 1, 536 S.E.2d 408, 412 n. 1 (Ct.App.2000); *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 439 S.E.2d 283 (Ct.App.1993).

trial. To the contrary, the post-conviction relief court correctly found Petitioner did not meet his requisite burden of proof as to these allegations and denied relief.

In order to successfully challenge a conviction or sentence on the basis of ineffective assistance of counsel, Petitioner must demonstrate counsel's performance fell below an objective standard of reasonableness, and that he was prejudiced by counsel's deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). With respect to the first prong, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. With respect to the second prong, one must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

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. *Blackledge v. Allison*, 431 U.S. 63 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. *Crawford v. United States*, 519 F.2d 347 (4th Cir.1975); *Edmonds v. Lewis*, 546 F.2d 566 (4th Cir.1976).

A defendant who pleads guilty on the advice of counsel may attack the voluntary, knowing, and intelligent character of the plea by showing that counsel's representation was below an objective standard of reasonableness. *Porter v. State*, 368 S.C. 378, 383–84, 629 S.E.2d 353, 356 (2006); *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). The "prejudice," requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. *Hill v. Lockhart,* 474 U.S. 52, 59 (1985). In other words, the applicant must prove prejudice by showing that, but for counsel's inadequacy, there is a reasonable

probability he would not have pleaded guilty and, instead, would have insisted on going to trial. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007); *Wolfe v. State*, 326 S.C.158, 485 S.E.2d 367 (1997).

To find a guilty plea is voluntarily and knowingly entered into, 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, 242 (1969); *Roddy v. State,* 339 S.C. 29, 33–34, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both." *Pittman v. State*, 337 S.C. 597, 600, 524 S.E.2d 623, 625 (1999).

"[T]he voluntariness of a guilty plea is not determined by an examination of the 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 the record of the post-conviction hearing." *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). "When determining issues relating to guilty pleas, this Court will consider the entire record, including the transcript of the guilty pleas and the evidence presented at the PCR hearing." *Roddy*, 339 S.C. at 33.

"In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing." *Dalton v. State*, 376 S.C. 130, 138-39, 654 S.E.2d 870, 874 (Ct. App. 2007); *Wolfe*, 326 S.C. at 165 (1997).

Petitioner claims he only pled guilty because counsel promised him he would receive a sentence on the "lower end or lower half" of the capped thirty year plea agreement, "either between fifteen and twenty-two years," as he was the "least culpable" of the three co-defendants. (App'x

p. 245, ll. 1-5; p. 246, ll. 7-9). Petitioner testified he knew he was "facing two life sentences, plus 130 years" on all of the charges. (App'x p. 277, ll. 14-16). When asked if he ever wanted a trial, Petitioner answered: "If I had known it was gonna be 30 years or nothing, I mean, yes, I talked with [counsel] about a trial, but he told me no, that was not an option because ... we cooperated."(App'x p. 282, ll.17-21).[5] After listening to counsel's testimony, Petitioner was recalled and asked whether he heard counsel testify that Petitioner did not have any defense that would lead to a not guilty, and whether he agreed with that summation. Petitioner answered in the affirmative and agreed that he had no defense to the charges against him. (App's p. 307-08).

Counsel stated he never told Petitioner that he would receive a certain sentence, and furthermore, told Petitioner that the plea court was not bound to that agreement. "He knew he was in that range (15-30) the entire time. What he might have heard or what he might've hoped for, or what we all might've hoped for was less than 30." (App'x p. 298, ll.24-25; p. 299, ll. 1). While counsel told Petitioner he hoped the plea court would sentence Petitioner in the lower range of the plea agreement, counsel made no promises. "It was understood that he was less culpable because he didn't get to pick the victims... [t]hey knew he didn't participate as much..." (App'x p. 293, ll. 9-20). Regarding the possibility of a trial in this case, counsel stated that it was never an option here: "Realistically, no. No, it was not, because the die had already been cast because of his cooperation and because he had been caught right outside the residence." (App'x p. 287, ll. 20-24). He further added that his only opinion on Petitioner going to trial was that Petitioner would be convicted, and because of that, Petitioner's only real option was to plead guilty. (App'x p. 288, ll. 1-6).

[5] Petitioner provided a full statement to police the day he was arrested and fully admitted his involvement in the crimes, and his confession to police helped them locate two of Petitioner's co-defendants, all before counsel was ever retained.

The testimony offered at the evidentiary hearing and the guilty plea colloquy establish that Petitioner knowingly and intelligently pled guilty based upon the effective assistance of counsel. Petitioner's claims of ineffective assistance are directly contradicted by his affirmation under oath during the plea colloquy that he was satisfied with counsel's representation. *See Blackledge*, 431 U.S. at 74 ("Solemn declarations in open court carry a strong presumption of verity."); *Bell v. State*, 410 S.C. 436, 442, 765 S.E.2d 4, 7 (Ct. App. 2014).

At his guilty plea hearing, when asked whether he was "totally satisfied" with the representation of his attorney, Petitioner answered, "Yes, sir." (App'x p. 16, ll. 22-24). Petitioner stated that it was his decision to waive his right to a jury trial, and that no one threatened him or promised him anything in order to plead guilty. (App'x p. 32, ll. 7-18). Petitioner was advised by counsel and the plea court of the charges, the potential penalties, the elements of the offense, and the rights that he was waiving by pleading guilty. (App'x p.15-21). When asked whether he understood that the plea court was not bound by the recommended sentence, Petitioner answered, "Yes, sir." (App'x p. 18, ll. 10-13). Based on that understanding, that the plea court could sentence Petitioner to "a minimum of fifteen years and a maximum of life in prison," Petitioner affirmed and answered, "I plead guilty, Your Honor." (App'x p. 18, ll. 14-19). Further, the plea court informed Petitioner of the maximum sentences he could receive for each of his charges prior to Petitioner's plea being entered. (App'x p. 17-21).

The plea court also asked Petitioner whether he understood there were no promises made regarding his guilty plea. Petitioner's answers to those questions reflect an awareness of the potential range of sentences and an understanding that he had not been promised anything in return for his guilty plea. After pleading guilty to each of the indicted offenses, the plea court again asked

Petitioner whether he was "fully satisfied with [his] lawyer," to which Petitioner answered, "Yes, sir," (App'x p. 21, ll. 5-7).

Further, Petitioner's testimony that, at the guilty plea, he understood the sentencing range to be fifteen to thirty years, is clearly contradictory to his claim that counsel's 'promise' of a twenty-two year sentence induced his plea. (App'x 249, ll. 20-22). *See Wolfe v. State*, 326 S.C. 158, 485 S.E.2d 367 (1997) (fact defendant "hoped" and "expected" to get reduced sentence does not render plea invalid; "wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences"); *Harres v. Leeke*, 282 S.C. 131, 318 S.E.2d 360 (1984) (fact defendant "thought" judge would give lighter sentence not ground for relief); *cf. State v. Dozier*, 263 S.C. 267, 210 S.E.2d 225 (1974) (disparate sentences between co-defendants is not per se abuse of discretion); *cf. Knox v. State*, 340 S.C. 81, 530 S.E.2d 887 (2000) (to be knowing and voluntary, plea must be entered with awareness of consequences of plea, i.e. proper advice by judge on mandatory minimum sentencing).

Therefore, Petitioner cannot establish that counsel was deficient for relaying to Petitioner that he hoped the court would give a lower sentence instead of the thirty years Petitioner received. Petitioner has not presented this Court with any evidence to support his claim that counsel's advice fell below an objective standard of reasonableness. Petitioner's claims of ineffective assistance of counsel do not show both the deficient performance and resulting prejudice required by *Strickland*. Accordingly, the post-conviction relief court properly denied relief, and this Court should deny certiorari as to this issue.

II. The PCR court did not abuse its discretion in denying Petitioner's request for a continuance where PCR counsel was ready and prepared to go forward and Petitioner did not produce any evidence to show that he was prejudiced by the evidentiary hearing going forward.

Petitioner's argues the PCR court abused its discretion by denying his request for a continuance when he did not have time to adequately prepare for his PCR evidentiary hearing, because he received the reconsideration hearing transcript a month prior to the hearing; his father was out of the country and unable to testify on his behalf; and he had limited contact with PCR counsel in the months preceding the hearing.[6] However, this argument set forth by Petitioner misconstrues the substance of Petitioner's request to the PCR court, and the record clearly shows Petitioner was not prejudiced by the evidentiary hearing going forward.

The denial of a motion for a continuance is within the sound discretion of the trial judge and his ruling will not be overturned on appeal absent clear abuse of discretion resulting in prejudice to the appellant. *State v. Morris*, 376 S.C. 189, 656 S.E.2d 359 (2008); *State v.*

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[6] *See supra* note 4 and accompanying text. In support of this issue, Petitioner dives headfirst into the realm of speculative argument and conjecture to show how Petitioner *could have been* prejudiced from the PCR court denying his request for a continuance:

1. Petitioner's case could have been significantly more thorough;
2. Petitioner's father could have provided an affidavit or testified;
3. Petitioner could have amended his application to perhaps include additional claims;
4. Petitioner could have raised that counsel was unprepared for the motion to reconsider;
5. Petitioner could have subpoenaed the solicitor and assistant solicitor from his case to testify.

(PWC p. 14).

Cf. Jackson v. State, 329 S.C. 345, 351, 495 S.E.2d 768, 771 (1998) (It is pure speculation to conclude the outcome of respondent's trial would have been different if counsel had interviewed and/or called additional witnesses); *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995) (prejudice from trial counsel's failure to interview or call witnesses could not be shown where the PCR applicant failed to introduce evidence of what the uncalled witnesses' testimony would have been and an applicant's mere speculation what a witness' testimony would have been cannot satisfy the applicant's burden of showing prejudice); *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993) (pure conjecture as to what a witness's testimony would have been is not sufficient to show a reasonable probability the result at trial would have been different); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992) (prejudice from trial counsel's failure to interview or call witnesses could not be shown where witnesses did not testify at PCR hearing).

McMillian, 349 S.C. 17, 561 S.E.2d 602 (2002); *State v. Babb*, 299 S.C. 451, 385 S.E.2d 827 (1989); *see also State v. Pendergrass*, 270 S.C. 1, 239 S.E.2d 750 (1977).

Likewise, Petitioner has not shown how the denial of the continuance was prejudicial to him. Although Petitioner expressed his unease of proceeding because he had limited contact with his PCR counsel leading up to the hearing, he was unable to state a legally sound reason why a continuance was necessary. Moreover, at the commencement of the evidentiary hearing, PCR counsel stated he was prepared and ready to go forward. (App'x p. 236, ll. 22-25). PCR counsel explained:

> I have sent him, I just counted up, eight letters throughout my representation. I have his guilty plea, his sentencing plea, his motion for reconsideration, transcripts here. I spoke with his counsel, counsel for the codefendants, and I am prepared to go. He does not want to go forward today.

(App'x p. 237, ll. 3-8).

Here, Petitioner has not referenced any specific testimony or evidence that he would be able to produce had the continuance been granted. A portion of Petitioner's argument is that his father was not able to attend the evidentiary hearing, however review of the record before this Court clearly shows this to be an illusory claim. Petitioner never brought the absence of his father to the attention of the PCR court during his request, but rather waited until the end of his direct examination to raise it.[7] (App'x p. 270). In addition, Petitioner lamented that he had only received

[7] Petitioner cites Rule 40(i)(2), SCRCP, in support of this claim. However, Petitioner failed to comply with the provisions of the statutory language he cited: "A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the foregoing matters what fact or facts he believes the witness if present would testify to, and the grounds for such belief." Respondent is left to speculate as to Petitioner's reason for wanting his father to testify, other than to bolster the testimony already given by Petitioner. Further, Petitioner's assertion that he "made a showing that his father had 'some particular contribution to make,'" is a fantastical caricature of the record before this Court. The record is absent of any indication from Petitioner that his father would produce novel or material testimony in support of his request for a continuance (had this argument actually been raised to the PCR court).

the reconsideration transcript a few weeks before the hearing, but failed to enumerate on the record any specific reason why he needed more time to prepare.[8]

In *State v. Motley*, 251 S.C. 568, 572, 164 S.E.2d 569, 570 (1968), this Court upheld the trial court's denial of a motion for continuance because "[t]he appellant does not point to any specific testimony or other evidence that he could have produced had his motion been granted." *Bozeman v. State*, 307 S.C. 172, 175, 414 S.E.2d 144, 146 (1992) (Denying relief where petitioner failed to point to any other evidence or witnesses which could have been produced if a continuance had been granted).

Petitioner failed to show how the PCR court abused its discretion in denying his request for a continuance. The record reflects that PCR counsel was ready and prepared to go forward at the evidentiary hearing and Petitioner's case had been scheduled and continued *five times* prior. Petitioner had ample time to secure the sentence reconsideration transcript and the testimony of any relevant witness(es) in an affidavit, if necessary. Therefore, Petitioner failed to show any prejudice to him from the PCR court denying his request for a continuance. Accordingly, the PCR court correctly denied relief, and this Court should deny certiorari as to this issue.

[*Conclusion and signature page to follow*]

[8] (App'x p. 191-215) The Reconsideration transcript was twenty-four pages long. The sentence reconsideration hearing was held on November 11, 2014. Petitioner has provided no explanation as to why he waited nearly *four* years to secure the transcript that contained, as Petitioner described, "two crucial post-trial motions."

CONCLUSION

Because the PCR court properly determined Petitioner failed to establish any constitutional ineffectiveness, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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Dec. 18, 2019

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2018-002016

STEPHEN FRANCOIS, 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 placing one copy in the United States Mail, addressed to:

Taylor Davis Gilliam, Esquire
S.C. Commission on Indigent Defense
P.O Box 11589
Columbia, SC 29201

This 18th day of December, 2019.

Sara E. Gunton
Assistant Attorney General