

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

CERTIORARI TO GREENWOOD COUNTY

Court of Common Pleas
Frank R. Addy, Jr., Plea Judge
R. Scott Sprouse, Post-Conviction Relief Judge

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SC Court of Appeals

Appellate Case No. 2018-000052

DAVID SCOTT MOONEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUES ON CERTIORARI

- I. Did the PCR court err in dismissing Petitioner's claim that plea counsel was ineffective in failing to obtain the report of the drug analysis conducted by the State Law Enforcement Division (SLED) and present to the plea court as mitigation evidence that the amount SLED verified as drugs differed from the amount the State represented to the plea court as having been confiscated from Petitioner's home?
- II. Did the PCR court err in rejecting Petitioner's claim that, but for plea counsel's failure to obtain a copy of the SLED drug analysis and address the discrepancies in the weight of active drugs found, he would not have pled guilty because the analysis would have shown law enforcement confiscated no drugs from his residence?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON CERTIORARI

- I. The post-conviction relief court properly found Petitioner failed to meet his requisite burden of proof as to any allegation pertaining to plea counsel's purported failure to review and utilize a drug analysis report from the South Carolina Law Enforcement Division (SLED) to establish a discrepancy in the total weight of methamphetamine product recovered from Petitioner's residence where Petitioner wholly failed to present the report or any evidence of what was in the report and the report had no bearing on Petitioner's decision to plead guilty or the sentence he received.
 - A. Petitioner failed to present the SLED drug analysis report or any other evidence to establish that there was a discrepancy between the total weight of methamphetamine product recovered from his residence, and, therefore, could not have met his requisite burden of proof.
 - B. Regardless of Petitioner's complete failure to present any evidence to support his claim, the post-conviction relief court properly rejected Petitioner's claim that plea counsel was constitutionally ineffective for failing to present the SLED drug analysis report as mitigation evidence during the sentencing proceedings where the record firmly establishes the plea court's sentence would not have changed had such a report been presented.
 - C. Regardless of Petitioner's complete failure to present any evidence to support his claim, the post-conviction relief court properly rejected Petitioner's claim that he would not had pled guilty but for plea counsel's failure to obtain the SLED drug analysis report and address purported discrepancies in the total weight of methamphetamine product where Petitioner knowingly, intelligently, and voluntarily entered his guilty plea in exchange for a reduction in offense, dismissal of related offenses, and the dismissal of charges against his father.

STATEMENT OF THE CASE

Petitioner David Mooney is presently confined in the South Carolina Department of Corrections. During its May 2015 term, the Greenwood County Grand Jury indicted Petitioner for trafficking in methamphetamine-400 grams or more (2015-GS-24-0724) following the Greenwood County Drug Enforcement Unit's raid of Petitioner's home and the recovery of more than 3.5 pounds of methamphetamine sludge and other items associated with methamphetamine production. Assistant Public Defender Thomas Adducci (Counsel) of the Eighth Circuit Public Defender's Office represented Petitioner. Assistant Solicitor Brian Moroney of the Eighth Circuit Solicitor's Office prosecuted the case. On August 13, 2015, Petitioner appeared before the Honorable Frank R. Addy, Jr., circuit court judge, and pled guilty to the lesser included offense of manufacturing methamphetamine. As part of a plea agreement with the State, the State dismissed associated charges of possession of altered ephedrine and attempted conspiracy but made no recommendation as to sentence.¹ Judge Addy sentenced Petitioner to a term of imprisonment of twelve years.

On September 22, 2015, Petitioner filed a *pro se* motion to reconsider his sentence. In this motion, Petitioner argued, amongst other things, that his sentence should be reduced because the State improperly added the weight from several bottles that were "an accumulation of several months" of methamphetamine production waste that he had "improperly disposed." (App. 21). On July 5, 2016, Judge Addy denied Petitioner's motion, finding "[b]ased on Mr. Mooney's substantial prior criminal history, the court believes the sentence imposed was appropriate." (App. 23). Petitioner did not pursue a direct appeal.

¹ As part of the plea agreement, the State also dismissed charges against Petitioner's elderly father, who also resided at the home. Petitioner testified this was the primary motivating factor in deciding to accept the State's plea offer. (App. 63; 72-73).

Petitioner filed a timely application for post-conviction relief on November 2, 2016, alleging he was being held unlawfully due to ineffective assistance of counsel. On September 13, 2017, Petitioner, through appointed counsel, filed an amended post-conviction relief application alleging:

1. Ineffective Assistance of Counsel
 - a. Counsel never moved to challenge the search warrant affidavit, and furthermore, Counsel never discussed or showed Petitioner the search warrant affidavit.
 - b. Counsel failed to present to the judge as mitigation during sentencing that the amount of drugs the State asserts were at the house was not consistent with the amount that SLED verified as drugs, nor did Counsel present evidence about the amount of drugs in the house Petitioner actually knew about. Had Counsel done so, the outcome of the sentence would have been different.
 - c. But for Counsel's presentation to the Petitioner regarding his strategy for a guilty plea, Petitioner would not have pled guilty and would have insisted on going forward with a trial. The day Petitioner was in court for a bond hearing, Counsel presented Petitioner with his "plan" for a guilty plea, which involved having the director of the Lighthouse there, along with the Petitioner's family, and getting Petitioner into a drug treatment program at his sentencing.
2. Newly Discovered Evidence
 - a. Greenwood Drug Enforcement Agents, Officers Byrd and Strickland, have since been arrested and indicted for misconduct in office.

On October 11, 2017, an evidentiary hearing was held before the Honorable R. Scott Sprouse, circuit court judge. At the evidentiary hearing, Petitioner proceeded on the allegations set forth in his amended application. Petitioner testified on his own behalf and Respondent presented trial counsel. Following the hearing, Judge Sprouse denied and dismissed the application with prejudice, finding Petitioner failed to meet his requisite burden of proof as to any of the allegations set forth at the hearing. A written order to this effect was filed on December 5, 2017.

STATEMENT OF FACTS

On January 13, 2015, Greenwood County Drug Enforcement Unit (DEU) Agents executed a search warrant for a residence located on Briggs Avenue, which was Petitioner's residence at that time. (App. 5.) During a sweep of the residence, Petitioner was found hiding in a drawer compartment in a set of bunkbeds in a bedroom. (App. 5.) Upon searching the bedroom where Petitioner was found, agents located two green plastic soda bottles inside an armoire. (App. 5.) One of the bottles contained a white sludge and the other bottle contained white sludge with a liquid and lithium strips inside. (App. 5.) A field test of the bottle containing the sludge, liquid, and lithium strips showed the items were positive for methamphetamine and ephedrine. (App. 5.) These items had a total weight of 171 grams. (App. 5.) The second bottle containing just the white sludge was also tested and yielded positive results for methamphetamine and ephedrine. (App. 5.) The total weight of the second bottle was also 171 grams. (App. 5.)

During the search, agents also located four coffee filters containing a white powdery substance, one empty pack of twelve-hour decongestant, one empty cold pack, one bottle of Crystal drain opener, and numerous coffee filters. (App. 5-6.) In the back exterior of the residence, agents located a yellow grocery bag containing lithium batteries with the strip removed. (App. 6.) In an exterior building, agents located one clear twenty-ounce plastic soda bottle containing a white sludge, gasser; one green plastic twenty-ounce soda bottle with a white cap that contained white sludge, which later tested positive for methamphetamine and had a total weight of 152 grams; one clear soda bottle containing white sludge that field tested positive for methamphetamine and had a total weight of 280 grams; a green twenty-ounce plastic bottle containing white sludge that tested positive for methamphetamine and had a weight of 119

grams; a green plastic bottle containing material that tested positive for methamphetamine and had a weight of 581 grams; a bottle with a hose coming from the cap; a one-liter clear bottle with a blue cap containing sludge that had a total weight of 132 grams; two more bottles containing sludge, gasser, one cold pack, six coffee filters with white powder residue, empty blister packs, one empty bottle of lighter fluid, an empty container of Zippo lighter fluid, and one empty pack of lithium batteries. (App. 6-7.) The total weight of the items was 1,604 grams (3.54 pounds). (App. 7.)

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

- I. The post-conviction relief court properly found Petitioner failed to meet his requisite burden of proof as to any allegation pertaining to plea counsel's purported failure to review and utilize a drug analysis report from SLED to establish a discrepancy in the total weight of methamphetamine product recovered from Petitioner's residence where Petitioner wholly failed to present such a report or any evidence of what was in the report and such a report had no bearing on Petitioner's decision to plead guilty or the sentence he received.**

On appeal, Petitioner argues the post-conviction relief court erred by denying him relief as to two allegations related to plea counsel's purported failure to review and utilize a SLED drug analysis report to establish a discrepancy in the total weight of methamphetamine product recovered from Petitioner's residence. First, Petitioner alleges plea counsel should have presented the SLED drug analysis report during the mitigation portion of his plea proceeding as evidence that the amount of methamphetamine the State purported to have been recovered was inaccurate. Second, Petitioner alleges he would not have pled guilty but for plea counsel's failure to obtain and review the SLED drug analysis and use it to address purported discrepancies in the weight of drugs recovered. However, despite asserting these claims to the post-conviction relief court, Petitioner perplexingly never introduced the SLED drug analysis report into evidence or otherwise presented any evidence about its contents, and, accordingly, could not have met his requisite burden of proof as to either claim. Regardless of the lack of any evidence to support such claims, the post-conviction relief court properly rejected these arguments, finding Petitioner failed to establish plea counsel was ineffective. These findings are not controlled by an error of law and are supported by the record. This Court should deny certiorari.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Petitioner, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101

(2013). In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCPP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland to determine whether counsel’s conduct “was so ineffective as to require reversal” of the applicant’s conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel’s performance was deficient; and second, that the deficient performance prejudiced the applicant. Id. at 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is “necessarily linked to the practice and expectations of the legal community.” Padilla v. Kentucky, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel’s representation fell below an objective standard of “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland, however, “does not guarantee perfect representation[—]only a ‘reasonably competent attorney.’” Harrington v. Richter, 562 U.S. 86, 110 (2011) (quoting Strickland, 466 U.S. at 687). Representation is constitutionally ineffective only if counsel’s conduct “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair proceeding. Strickland, 466 U.S. at 686. Just as there is “no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.” Harrington, 562 U.S. at 110.

Accordingly, “[j]udicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689; see also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690).

Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Id. Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Butler, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts “must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed at the time of counsel’s conduct.” Strickland, 466 U.S. at 690. An applicant making a claim of ineffective assistance “must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.” Id. The reviewing court must then “determine whether, in light of all the circumstances, the identified

acts or omissions were outside the wide range of professionally competent assistance.” Id.

The Strickland standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; see also Harrington, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one. Harrington, 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” **not** whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690) (emphasis added).

The second, or “prejudice” prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel’s deficient performance 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.” Strickland, 466 U.S. at 694. Thus, it is not enough “to show the errors had some conceivable effect” on the outcome of the proceeding—counsel’s errors must be “so serious as to deprive the defendant of a fair trial.” Id. at 687 (emphasis added).

Because the Sixth Amendment right to counsel also applies to a defendant entering a

guilty plea, Hill v. Lockhart extended the two-part Strickland test to challenge guilty pleas based on ineffective assistance of counsel.” Hill, 474 U.S. 52; cf. Padilla, 559 U.S. at 373 (recognizing that the guilty plea process is a “critical phase of litigation” for purposes of the Sixth Amendment right to effective assistance of counsel). 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 counsel’s deficient performance prejudiced the defendant by causing him to plead guilty rather than go to trial. Hill, 474 U.S. 52.

The analysis of counsel’s performance under the first prong of Strickland remains unchanged—the applicant must show counsel’s representation fell below the objective standard of reasonableness demanded of attorneys in criminal cases. Hill, 474 U.S. at 58–59; accord Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000). An applicant alleging his plea was induced by ineffective assistance of counsel must prove counsel’s advice to plead guilty was not “within the competence demanded of attorneys in criminal cases.” Hill, 474 U.S. at 56.

The second, or “prejudice” prong, however, “focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.” Id. at 58–59. Specifically, when an applicant claims counsel’s deficient performance caused him to accept a plea, the applicant “must show that there is a reasonable probability that, but for [plea] counsel’s [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial.” Id. at 59. This inquiry “focuses on a defendant’s decisionmaking” and does not turn on the outcome of a defendant’s actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. Lee v. United States, 582 U.S. ___, 137 S. Ct. 1958, 1966 (2017). However, an applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. Padilla, 559 U.S. at 372. The question here is whether the

applicant, if correctly informed of circumstances surrounding the plea, would have pleaded guilty—not whether counsel would have still advised him or her to plead guilty. Turner v. State, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

Surmounting Strickland's high bar is never an easy task, and the strong societal interest in finality has “special force with respect to convictions based on guilty pleas.” Lee, 582 U.S. ___, 137 S. Ct. at 1967 (internal citations and quotation marks omitted); cf. Hill, 474 U.S. at 58 (“[R]equiring a ‘prejudice’ showing from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel ‘will serve the fundamental interest in the finality of guilty pleas.’”). Reviewing “[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney’s deficiencies. Lee, 582 U.S. ___, 137 S. Ct. at 1967. Rather, judges should “look to contemporaneous evidence to substantiate a defendant’s expressed preferences. Id. In determining whether a guilty plea was taken in accordance with constitutional standards, the reviewing judge must analyze and consider the entire record, including the transcript of the plea and the evidence presented at the PCR hearing. Harres, 282 S.C. at 134, 318 S.E.2d at 361.

The performance and prejudice standards, however, “do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” Id. at 696. Moreover, “there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.” Id. at 697. The court “need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may

evaluate the prejudice prong only. *Id.*

“[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced.” Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). Accordingly, because a criminal defendant waives several constitutional rights by pleading guilty, the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently. Boykin v. Alabama, 395 U.S. 238 (1969); Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999).

To be intelligent, a plea must be made by a mentally competent defendant who understands both the charges against him or her and the consequences of his or her plea. Brady v. United States, 397 U.S. 742, 748 (1970). To be voluntary, a plea must be free of threats or other coercion that would impermissibly distort the defendant’s choice. *Id.* at 755; see also United States v. Smith, 440 F.2d 521, 528–529 (7th Cir. 1971) (Stevens, J., dissenting) (explaining voluntariness relates to the trustworthiness of the admission of guilt and binding character of the waiver of the constitutional protections which would be available to the accused if he elected to stand trial).

Before a court can accept a guilty plea, the defendant must be advised of the constitutional rights he or she is waiving; the right to a jury trial, the right to confront one’s accusers, and the privilege against self-incrimination. Boykin, 395 U.S. at 243. Additionally, in order to knowingly and voluntarily plead guilty, the defendant must have a full understanding of the consequences of the plea, including the nature and crucial elements of the offense(s); the maximum and any mandatory minimum penalty; and the nature of the constitutional rights being waived. Pittman, 337 S.C. at 599, 524 S.E.2d at 624.

However, it is “well established that a guilty plea is not rendered invalid because it

represents a compromise by defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment.” United States v. Cox, 464 F.2d 937, 942 (6th Cir. 1972) (citing Brady, 397 U.S. 742). The State may properly encourage guilty pleas either by being more lenient to those who enter such pleas, Brady, 397 U.S. at 750-753, or by increasing the risks of punishment on those who do not. North Carolina v. Alford, 400 U.S. 25, 37 (1970). The standard for determining the validity of a guilty plea is “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Id. at 31.

A defendant’s knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and “may be accomplished by colloquy between court and defendant, between court and defendant’s counsel, or both.” State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993); see also Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997) (guilty plea not involuntary where the colloquy demonstrated the trial judge asked defendant twice whether he understood there were no promises and that no sentencing recommendations were binding on the judge). To ensure the defendant understands the consequences of his or her guilty plea, the trial judge “usually questions the defendant about the facts surrounding the crime and punishment that could be imposed.” Dover v. State, 304 S.C. 433, 434–35, 405 S.E.2d 391, 392 (1991). However, the trial judge “does not have to direct the defendant’s attention to every consequence of his plea provided the record reveals affirmative awareness of the consequences of a guilty plea.” Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 776 (1998).

The voluntariness of a guilty plea, however, “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, 282 S.C. at 133, 318 S.E.2d at 361. In evaluating 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. Wolfe, 326 S.C. at 165, 485 S.E.2d at 370; cf. Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994) (finding that, where the transcript of the guilty plea proceeding refuted applicant’s claim that he did not understand the terms of a plea bargain, granting PCR was inappropriate notwithstanding applicant’s claim his lawyer misadvised him).

Nonetheless, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual . . . , a criminal inmate’s right to contest the validity of such a plea is usually, but not invariably, foreclosed.” Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977); see also Jamison v. State, 410 S.C. 456, 469–71, 765 S.E.2d 123, 129–30 (2014) (observing that “guilty plea[s] must be treated as final in the vast majority of cases” and instructing that caution must be exercised so as not to “undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea”). Indeed, admissions made during a guilty plea should be considered conclusive unless an applicant presents valid reasons why he should be allowed to depart from the truth of his statements.” Id. at 137–38, 654 S.E.2d at 874 (internal citations and quotation marks omitted); cf. Blackledge, 431 U.S. at 73–74 (pointing out that representations made by a defendant, his lawyer, and the prosecutor at a guilty plea hearing, as well as any findings made by the judge accepting the plea, constitute a “formidable barrier in any subsequent collateral proceedings”).

An applicant who enters a plea on the advice of counsel may “only attack voluntary, knowing and intelligent character of the plea by showing that plea counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but

for counsel's errors, the [applicant] would not have pled guilty, but would have insisted on going to trial." Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

In the present case, Petitioner failed to meet his burden of proof and the post-conviction relief court properly denied relief. This Court should deny certiorari.

A. Petitioner failed to present the SLED drug analysis report or any other evidence to establish that there was a discrepancy between the total weight of methamphetamine product recovered from his residence, and, therefore, could not have met his requisite burden of proof.

Initially, this Court should deny certiorari because Petitioner failed to present any evidence whatsoever to support his allegations, and, accordingly, could not meet his burden of proof. Petitioner's allegations are centrally premised upon a discrepancy between the amount of methamphetamine product that was actually located at his residence and the amount of methamphetamine product reported in the SLED drug analysis report. However, Petitioner never presented any evidence to support such a claim.

At the evidentiary hearing, Petitioner failed to present the SLED drug analysis report or any other evidence to establish that there was a discrepancy between the total weight of methamphetamine product recovered from his residence. His allegations are based on pure speculation that a discrepancy exists and he failed to present any evidence to support this claim. Petitioner testified to this himself, stating he was unaware what the results of such drug analysis would be and that he was speculating it would be beneficial because "friends" had their charges dropped based on drug analysis reports. (App. 65). Accordingly, he failed to meet his requisite burden of proof. See Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Butler, 286 S.C. at 442, 334 S.E.2d at 814 ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

Without presenting any such evidence, it is impossible that Petitioner could have met his burden of proof as to either allegation. Accordingly, the post-conviction relief court properly denied relief. This Court should deny certiorari.

B. Regardless of Petitioner’s complete failure to present any evidence to support his claim, the post-conviction relief court properly rejected Petitioner’s claim that plea counsel was constitutionally ineffective for failing to present the SLED drug analysis report as mitigation evidence during the sentencing proceedings where the record firmly establishes the plea court’s sentence would not have changed had such a report been presented.

Regardless of his total failure to present any evidence to support his allegation, Petitioner alleges the post-conviction relief court improperly denied his claim that his plea counsel was constitutionally ineffective for failing to obtain and present the SLED drug analysis report for use in mitigation to reduce his sentence. However, the record firmly refutes this allegation and establishes the plea court’s sentence was based on Petitioner’s extensive prior criminal record. The post-conviction relief court properly denied relief. This Court should deny certiorari.

Petitioner asserts the bottles recovered from his home were not from active methamphetamine cooking operations, but rather, were “sludge,” the remaining waste-product from prior methamphetamine cooking operations. He argues “there would not have been any active methamphetamine in the sludge as the drug had already been removed from the bottle and used.” (PWC 7). As previously discussed, Petitioner failed to present any evidence to support this bald assertion. Regardless, Petitioner claims counsel was ineffective for failing to challenge the amount of methamphetamine in mitigation, which led to “a near maximum allowable sentence.” PWC (7).

The record is full of evidence that directly refutes this assertion. In his motion to reconsider his sentence, Petitioner argued his sentence should be reduced because the State improperly added the weight from several bottles that were “an accumulation of several months”

of methamphetamine production waste that he has “improperly disposed.” (App. 21). In response, the plea court denied Petitioner’s motion, finding “[b]ased on Mr. Mooney’s substantial prior criminal history, the court believes the sentence imposed was appropriate.” (App. 23). It is abundantly clear that Petitioner’s sentence was the result of his **substantial prior criminal history** rather than any errors or omissions in counsel’s representation.

Moreover, during the plea proceeding, the plea court directly stated it was aware the total weight of methamphetamine product cited by the State was “sludge,” not finished methamphetamine:

THE COURT: My understanding though is this was not finished product. This was sludge, correct?

MR. MORONEY: Correct.

(App. 7).

Then, directly before imposing its sentence, the plea court again stated he was aware the total amount of methamphetamine cited by the State was based on an unfinished mixture and was substantially more than the yield of consumable methamphetamine that would be created from the process:

[P]lease understand, sir that there are two things driving this sentence. **First of all is your criminal history which I think you will admit is abysmal, sir.** And the second is just the sheer amount of drugs. **I realize its unfinished product. I realize if the process had continued we would be dealing with a much smaller amount of drugs,** but when you have several bottles going at the same time that indicates for the Court that this was not just for your own personal amusement or medication. This was for something a little bit more substantial, Mr. Mooney.

(App. 18) (emphasis added). Again, it is abundantly clear from the record that Petitioner’s sentence was the result of his prior record and the plea court was well aware the total amount of methamphetamine cited by the State was not finished methamphetamine product.

Petitioner's speculative assertions that his sentence would have been more lenient had counsel presented the SLED drug analysis report (which he speculates would have established a discrepancy in the amount of methamphetamine recovered from his home) are directly refuted by the record. The post-conviction relief court properly denied relief. This Court should deny certiorari.

- C. Regardless of Petitioner's complete failure to present any evidence to support his claim, the post-conviction relief court properly rejected Petitioner's claim that he would not had pled guilty but for plea counsel's failure to obtain the SLED drug analysis report and address purported discrepancies in the total weight of methamphetamine product where Petitioner knowingly, intelligently, and voluntarily entered his guilty plea in exchange for a reduction in offense, dismissal of related offenses, and the dismissal of charges against his father.**

Regardless of his total failure to present any evidence to support his allegation, Petitioner also alleges the post-conviction relief court improperly denied his claim that his plea counsel was constitutionally ineffective for failing to obtain the SLED drug analysis report and he would not have pled guilty had this report been obtained. Again, this allegation is directly refuted by the record, which establishes Petitioner knowingly, intelligently, and voluntarily entered his guilty plea in exchange for a reduction in offense, dismissal of related offenses, and the dismissal of charges against his father. The post-conviction relief court properly denied this allegation. This Court should deny certiorari.

At the evidentiary hearing, Petitioner unequivocally testified he pled guilty because he wanted the State to drop charges against his elderly father, who resided with him and was not involved in the methamphetamine production scheme. Specifically, Petitioner testified:

- A. [. . .]And the only reason I was even entertaining to pleading guilty to anything because they had my father charged with it.
- Q. Most of the drugs were Karen's, right?
- A. Uh-huh, (affirmative).

Q. But you were, the reason why you decided that day that you were going to plead guilty is because you wanted the charges dropped from your dad?

A. Pretty much. He didn't have anything to do with anything. He didn't even know what meth looked like.

Q. So he had never done, he wasn't a drug use. [. . .]

(App. 63). Counsel also testified his notes revealed a primary motivating factor in resolving this case was to have charges dropped against Petitioner's father. (App. 72). It is clear from the record that Petitioner's decision to enter a guilty plea to reduced charges was motivated by his desire to have charges dropped against his father.

Moreover, counsel testified he and Petitioner discussed issues pertaining to the amount of drugs prior to the plea, including that the lesser-included offense of manufacturing methamphetamine was not based on any particular amount of methamphetamine and that the total amount of any mixture of methamphetamine would all be imputed to him based on the law. (App. 74-75). The record establishes Petitioner was aware his guilty plea was not based on any particular weight of methamphetamine and that any amount of methamphetamine in the bottles recovered—no matter how small—would be imputed against him. This advice was correct. See *State v. Johnson*, 410 S.C. 10, 763 S.E.2d 36 (Ct. App. 2014) (finding statutes for trafficking methamphetamine explicitly provide the weight of all the mixture that contained methamphetamine should be used). Counsel correctly advised Petitioner of his options, and, after weighing his options, Petitioner knowingly, voluntarily, and intelligently elected to plead guilty to reduced charges in exchange for the dismissal of additional charges for himself and charges against his elderly father. Petitioner cannot establish that he would not have pled guilty or that his plea was involuntary based on counsel's purported failure to obtain the SLED drug analysis report. The post-conviction relief court properly denied relief. This Court should deny certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. Should this Court grant the petition for writ of certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

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Senior Assistant Deputy Attorney General
SC Bar No. 100108

By: s/Megan Harrigan Jameson
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May 19, 2020

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

CERTIORARI TO GREENWOOD COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Trial Judge
R. Scott Sprouse, Post-Conviction Relief Judge

Appellate Case No. 2018-000052

RECEIVED

May 19 2020

SC Court of Appeals

DAVID SCOTT MOONEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PROOF OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Appellate Defender Jessica M. Saxon
jsaxon@sccid.sc.gov

This 19th day of May, 2020.

s/Megan Harrigan Jameson
Megan Harrigan Jameson
Senior Assistant Deputy Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
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From: Megan Jameson
To: ["Saxon, Jessica"](#)
Cc: [Eighthcircuitpcr](#)
Subject: David Mooney Return to Petition for Certiorari
Date: Tuesday, May 19, 2020 11:59:00 AM
Attachments: [Mooney.David.Return.to.Petition.for.Certiorari.w.CL&POS\(02281853xD2C78\).pdf](#)

Ms. Saxon,

Attached please find the Return to the Petition for Certiorari for David Mooney v. State, Appellate Case No. 2018-000052. I will be electronically filing it momentarily.

Best,



Megan Harrigan Jameson
Senior Assistant Deputy A.G.
Post-Conviction Relief Section

S.C. Attorney General's Office
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May 19 2020
SC Court of Appeals

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ALAN WILSON
ATTORNEY GENERAL

May 19, 2020

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May 19 2020

SC Court of Appeals

The Honorable Jenny A. Kitchings
Clerk of the South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201
(By Electronic Filing Only)

**Re: David S. Mooney v. State of South Carolina
Appellate Case No. 2018-00052**

Dear Mr. Kitchings,

Enclosed for filing please find Respondent's Return to Petition for Writ of Certiorari in the above-captioned case. Petitioner is also being served with a copy of the same.

Please let me know if I can provide anything additional at this time.

Sincerely,

/s/ Megan Harrigan Jameson

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
SC Bar No. 100108

MHJ/
Enclosures

cc: Appellate Defender Jessica M. Saxon (by email only)
Victim Advocacy Division (by email only)