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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to York County
The Honorable Grace Gilchrist Knie, Post-Conviction Relief Judge
The Honorable Daniel Hall, Plea Judge

Appellate Case No. 2020-000062

JENNIFER LYNN DALE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

PETITIONER'S STATEMENT OF ISSUES ON APPEAL

1. Whether the PCR court erred in finding plea counsel provided effective representation where counsel gave Petitioner erroneous legal advice as to her absolute defense to the burglary charge being that she could not burglarize the home she was living in with her family?

2. Whether the PCR court erred in finding that plea counsel provided effective representation where counsel did not adequately investigate and discuss the defense of duress with Petitioner where counsel knew that Petitioner was being physically abused by her co-defendant boyfriend Pendergrass, and that Petitioner was afraid for her life, which resulted in Petitioner's guilty plea being unknowing and involuntary?

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. The PCR court correctly found Petitioner failed to establish plea counsel was constitutionally ineffective for failing to advise her of a defense to the burglary indictment based on her habitation of the home that was burglarized, where an acquittal would be dependent on a highly factual analysis, and where plea counsel testified he discussed the possibility of Petitioner being acquitted of the burglary charge with Petitioner, but that Petitioner ultimately elected to forgo her right to challenge the burglary indictment at trial to accept a favorable plea offer to resolve all of the charges she faced which carried substantial minimum sentences.

2. The PCR court correctly found Petitioner failed to establish plea counsel was constitutionally ineffective for failing to properly investigate and advise Petitioner of a purported duress defense where plea counsel adequately investigated and discussed the defense of duress with Petitioner, which was based on Petitioner's allegations of abuse by a co-defendant and boyfriend, Mr. Pendergrass, where the record indicates that she was satisfied with plea counsel, and where Petitioner was not prejudiced by any alleged deficiency, as the record indicates Petitioner knowingly and voluntarily pleaded guilty and elected to forgo pursuing possible defenses at trial, and where Petitioner failed to establish what additional information plea counsel would have uncovered by way of additional investigation.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections. During its January 18, 2018 term, the York County Grand Jury indicted Petitioner for burglary, first-degree (2018-GS-46-00243), possession of a weapon during the commission of a violent crime (2018-GS-46-00243), armed robbery (2018-GS-46-00244), two counts of attempted murder, two counts of kidnapping, and one count of discharging a firearm into a dwelling. Geoffrey Dunn, Esquire (Plea Counsel) represented Petitioner. Assistant Solicitor Marina Hamilton (Hamilton) of the Sixteenth Circuit Solicitor's Office prosecuted the case.

On January 24, 2018, Petitioner appeared before the Honorable Daniel D. Hall, where she pleaded guilty to the lesser included offenses of attempted armed robbery and second-degree burglary and as indicted to possession of a weapon during the commission of a violent crime. The State also dismissed the two counts of attempted murder, two counts of kidnapping, and discharging a firearm into a dwelling under the terms of the plea agreement. Pursuant to negotiations between the State and Petitioner, Judge Hall sentenced Petitioner to eight years' imprisonment for attempted armed robbery, eight years' concurrent imprisonment for burglary in the second degree, and five years' concurrent imprisonment for possession of a weapon during the commission of a violent crime. Petitioner did not appeal her conviction or sentence.

On October 15, 2018, Petitioner filed her original application for post-conviction relief, alleging that she is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
2. Involuntary Guilty Plea

On October 28, 2019, Petitioner filed an amended application alleging the following claims:

1. That Defense Counsel failed to take into consideration the fact that the Petitioner was living at her father's residence and had the right to be there thus mitigating the issue of Burglary;
2. That the Petitioner was not involved in the incident. That she was forced to drive the Co-Defendant's to the location of the incident. That these issues of defense and/or mitigation were not taken into consideration by Defense Counsel;
3. That Defense Counsel was ineffective in not consulting the Defendant regarding the evidence against her or evaluating the evidence that the State had in her case;
4. That Defense Counsel was ineffective in not fully advising the Petitioner regarding her guilty plea. The Petitioner did not understand why she was entering into the plea. She believed that she had viable defenses;
5. That Defense Counsel was ineffective in his failure to speak with the Petitioner's Father regarding ownership of the house and her right to be there;
6. That Defense Counsel was ineffective in not properly investigating the case and the Petitioner's involvement in this case;
7. That the Petitioner had witnesses to speak in her favor. These witnesses were not called by Defense counsel;
8. That the Petitioner was charged with Possession of a Weapon when no weapon was found.

A hearing was held on November 13, 2019, before the Honorable Grace Gilchrist Knie. At the outset of the hearing, Petitioner stated he was proceeding on the allegations set forth in Petitioner's amended application. Plea Counsel, Petitioner, and Petitioner's father, Ricky Lee Dale (Father), testified at the PCR hearing. By Order dated December 4, 2019, and filed December 11, 2019, Judge Knie denied relief and dismissed Petitioner's application with prejudice. Petitioner subsequently filed a notice of appeal.

STATEMENT OF FACTS

On June 18, 2017, Petitioner drove three individuals, who would later become her co-defendants, to a residence. (App. 11). Petitioner and her co-defendants broke into the residence armed with shotguns to retrieve a gun from one of the residents. (App. 11-12). Once inside, the co-defendants assaulted a twelve year-old child living at the home. (App. 12). Once the group realized the child was not the intended target, Petitioner took him to his mother's room while still armed with a shotgun. (App. 12). Two co-defendants, also armed with guns, took $340 from the pants of one of the residents during the incident. (App. 12). A cooperating co-defendant told the State Petitioner helped initiate the idea to "get this done." (App. 12).

STANDARD OF REVIEW

In PCR matters, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

ARGUMENT

On appeal, Petitioner asserts the post-conviction relief court erred in denying her relief as to two separate grounds of ineffective assistance of counsel—first, Petitioner claims counsel was ineffective for providing erroneous legal advice regarding a defense to the burglary charge based upon her habitation of the burglarized home; and second, Petitioner claims counsel was ineffective for failing to investigate and discuss the defense of duress with Petitioner. However, the PCR court properly considered the record in its entirety, listened to the evidence and arguments presented, and determined Petitioner did not meet her burden of establishing counsel was constitutionally ineffective as to either claim. These findings are supported by ample probative evidence and not premised on any errors of law, and accordingly, this Court should deny certiorari.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. *Butler v. State,* 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, an applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington,* 466 U.S. 668 (1984); *Butler,* 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland,* 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. *Cherry v. State,* 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. *Id.* at 117, 386 S.E.2d at 625. First, an applicant must prove counsel's

performance was deficient. *Id.* Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." *Id.* (quoting *Strickland,* 466 U.S. at 688 (1984)). Second, counsel's deficient performance must have prejudiced an applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117-18, 386 S.E.2d at 625. When there has been a guilty plea, an applicant must prove counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart,* 474 U.S. 52, 58-59 (1985); *Roscoe v. State,* 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland,* 466 U.S. 668.

In evaluating issues concerning guilty pleas, this Court will consider the entire record, including the transcript of the guilty plea proceeding and the evidence presented at the post-conviction relief hearing. *Roddy v. State,* 339 S.C. 29, 528 S.E.2d 418 (2000). Voluntariness of a guilty plea is not merely determined by an examination of a specific inquiry by the plea court alone but rather is determined by the record of both the guilty plea proceeding and the post-conviction relief hearing. *Id*. In order to find a guilty plea was knowingly and voluntarily 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 (1969). Further, "[a] guilty plea is a

solemn, judicial admission of the truth of the charges" against an applicant; thus, an applicant's right to contest the validity of such a plea is usually foreclosed. *Dalton v. State*, 376 S.C. 130, 137–38, 654 S.E.2d 870, 874 (citing *Blackledge v. Allison*, 431 U.S. 63 (1977)). Therefore, 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*. (citing *Crawford v. United States*, 519 F.2d 347 (4th Cir. 1975)); *Edmonds v. Lewis*, 546 F.2d 566 (4th Cir. 1976).

1. The PCR court correctly found Petitioner failed to establish plea counsel was constitutionally ineffective for failing to advise her of a defense to the burglary indictment based on her habitation of the home that was burglarized, where an acquittal would be dependent on a highly factual analysis, and where plea counsel testified he discussed the possibility of Petitioner being acquitted of the burglary charge with Petitioner, but that Petitioner ultimately elected to forgo her right to challenge the burglary indictment at trial to accept a favorable plea offer to resolve all of the charges she faced which carried substantial minimum sentences.

In her petition, Petitioner alleges Plea Counsel did not properly advise her of a defense for her burglary charge based upon her habitation of the home that was burglarized. However, whether Petitioner would be acquitted of the burglary charge based upon her living situation would be based upon a highly fact-intensive jury determination. Plea Counsel and Petitioner discussed the possibility of Petitioner's burglary charged being dismissed; however, Petitioner faced the risk of much longer sentences for the remaining charges. Ultimately, Petitioner voluntarily and knowingly waived her right to pursue her defense at trial by accepting the highly beneficial plea agreement, knowing there was a possibility of an acquittal for the burglary charge. The record also directly refutes any allegation that Petitioner was prejudiced by any alleged deficiency as Petitioner knowingly and voluntarily waived her right to go to trial despite knowing that she had the possibility of asserting the defense at trial. Accordingly, based upon the standard set forth above, Petitioner failed to establish Plea Counsel was constitutionally ineffective, and therefore, this Court should deny certiorari and uphold the PCR court's denial of post-conviction relief.

Petitioner testified at the PCR hearing her charges arose from an incident in which a man was robbed inside the home of Father (App. 51). Petitioner testified she knew the individuals inside the home because she was also living in Father's home. (App. 51, 59, 62). Petitioner also testified she discussed with Plea Counsel the fact that she was living in Father's home. (App. 51, 57). Petitioner testified she lived in Father's home, along with her four children, her siblings, and the twelve-year old victim who was injured during the underlying crime. (App. 51). Father testified the home where the incident occurred is in his name, but Petitioner is allowed to be there. (App. 81, l. 5-10). Father testified Petitioner had her own key to his home and she "could come and go" as she pleased. (App. 81, l. 10-15). Father testified that when he and Plea Counsel specifically discussed the defense as it relates to the burglary charge, Plea Counsel told him it was "part of the plea." (App. 82, 1-3).

Plea Counsel testified he researched the issue of whether you can burglarize your own home, and the results were either a "gray area" or not favorable to Petitioner. (App. 49, l. 19- 50, l. 10). Plea Counsel testified he was concerned because even if he could prove to a jury that Petitioner lived in Father's home, it was still a risk to Petitioner to go to trial and pursue the defense. (App. 50, l. 1-10). Plea Counsel testified a "jury very well" could have acquitted her for the burglary charge, but Plea Counsel further testified Petitioner was still facing other charges, including armed robbery, which he was concerned about as the robbery charge would not be covered by this defense. (App. 50; 90, l. 24- p. 91; 98). Plea Counsel testified the mandatory minimums Petitioner was facing were worse than Petitioner's plea offer. (App. 91, l. 1-10). Plea Counsel testified he could not recall if Petitioner ever told him she was staying with Pendergrass at the time of the incident, or whether she was staying at Father's house at that time. (App. 91).

First, Petitioner asserts Plea Counsel was deficient by failing to properly advise her regarding the potential defense to her burglary charge. However, there was no guarantee that Petitioner would be acquitted of the burglary charge, as the inquiry regarding this defense is highly factual. Plea Counsel discussed the possibility of Petitioner being acquitted of the burglary with Petitioner based upon her testimony that she lived in the residence, however, pursuing this defense posed a risk for Petitioner, and Petitioner ultimately chose to voluntarily and knowingly plead guilty to receive the benefits of the highly beneficial plea bargain. Accordingly, Petitioner failed to establish Plea Counsel was deficient.

Petitioner cites to *State v. Coffin*[1], in support of her argument. In *Coffin*, the defendant moved into the mobile home leased by his girlfriend, in accordance with the girlfriend's lease. *Id*. at 130-131, 502 S.E.2d at 98-99. The defendant was listed as a legal visitor pursuant to the lease, and a copy of his driver's license was affixed to the lease. *Id*. Coffin's girlfriend subsequently "threw [Coffin] out" of the home. *Id.* Coffin alleged he was in lawful possession of the home, and that he could not be convicted of the burglary charge because he did not need consent to enter the home. *Id*. at 132 502 S.E.2d at 99. "[Coffin's] rights were defendant solely on the girlfriend's good graces." *State v. Singley*, 392 S.C. 270, 709 S.E.2d 803 (2011)(discussing the distinctions between Coffin and Singley). Accordingly, the Court in Coffin found that the evidence presented a jury issue as to whether Coffin was in lawful possession of the mobile home at the time of the crime.

Petitioner also cites to *Singley* in support of her argument. In *Singley*, Singley inherited a 12.5 percent interest in his childhood home. *Singley*, 392 S.C. at 272, 709 S.E.2d at 604. Singley lived in this home in his twenties, moved away, and subsequently returned to the home in April

[1] 331 S.C. 129, 502 S.E.2d 98 (1998).

2005. *Id*. Singley lived in the home for approximately three weeks in April 2005, before his mother ultimately kicked him out of the home. *Id*. Six months later, he returned to the home by entering through a back window, ultimately robbing his mother and threatening to kill her. *Id*. This Court held that the evidence warranted submission to the jury in Singley's case. This Court noted, "the proper test is whether, under the totality of the circumstances, a burglary defendant had custody and control of, and the right and expectation to be safe and secure in, the dwelling burglarized." *Singley*, 392 S.C. 270, 709 S.E.2d 803 (2011) (citing *State v. McMillian*, 158 N.H. 753, 973 A.2d 287, 292 (2009)). This Court further noted, "If so, he is a person in lawful possession and cannot be convicted of burglary. If not, the jury must then determine whether the alleged victim had this interest and whether the defendant invaded it." *Id*. Finally, this Court stressed that the inquiry was fact-intensive, and noted that an ownership interest was not dispositive, although probative. *Id.*

Ultimately, there was no guarantee that Petitioner would be acquitted of the burglary charge, as the inquiry is highly fact intensive. An acquittal for Petitioner's burglary charge would come down to a jury determination, creating a risk for Petitioner. Plea Counsel informed Petitioner that she could be acquitted of the burglary charge if she were to take her case to trial. In fact, Plea Counsel testified at the PCR hearing he still thought a "jury very well" could have acquitted her for the burglary charge, and that he and Petitioner discussed that possibility. (App. 90, l. 24- p. 91; 98). Plea Counsel testified the benefit of the possibility of acquittal for the burglary charge was negated by the fact that Petitioner faced other serious charges including armed robbery for which the minimum sentences were significantly more than what Petitioner was being offered. (App. 91). Plea Counsel testified he and Petitioner discussed the risks associated with this defense. (App. 97).

Petitioner was aware she could potentially be acquitted of the burglary charge. But as Plea Counsel explained, Petitioner faced a risk. (App. 90-91). Petitioner faced other charges including armed robbery and possession of a weapon during the commission of a violent crime, in addition to the charges dismissed pursuant to the plea agreement: two counts of attempted murder, two counts of kidnapping, and one charge of discharging a firearm. (App. 15). Even if an acquittal of the burglary charge was all but certain, Petitioner still would face conviction for the myriad of other charges she faced for which this defense did not apply. Petitioner was aware of these risks, and like all criminal defendants, she had to perform a cost-benefit analysis of the crimes she was facing and the benefit of the plea offer. After performing a cost-benefit analysis, Petitioner knowingly and voluntarily opted to forgo pursuing the defense because she was "scared" to go to trial. (App. 60, l. 24-25). It is clear that Petitioner opted to take the plea deal of a mere eight years, in exchange for pleading to lesser included offenses and having remaining charges dropped. Accordingly, Petitioner failed to meet her burden requiring her to establish that Plea Counsel was deficient.

Based upon the prejudice standard set forth above, Petitioner failed to establish how she was prejudiced by any alleged deficiency. Petitioner testified she was pleading guilty on her own free will. (App. 10). Petitioner testified she did not have complaints regarding Plea Counsel and that she had enough time to speak with him regarding her case. (App. 9-10). Petitioner testified she was pleading guilty because she was in fact guilty. (App. 10). Moreover, Plea Counsel testified she took the plea voluntarily. (App. 98). Plea Counsel testified she went back and forth as to whether she wanted to plead guilty. (App. 98). Plea Counsel testified that had Petitioner ultimately wanted to take the case to trial, he would have taken the case to trial. (App. 98). Although Petitioner conveniently alleged in her PCR action that she did not want to plead guilty and would

have pleaded guilty but for the alleged deficiency, the credible evidence clearly establishes that Petitioner has not met her burden requiring her to prove that she would have gone to trial. Accordingly, Petitioner failed to meet her burden requiring her to establish that Plea Counsel was ineffective, and therefore, this Court should deny Petitioner's petition and uphold the PCR court's denial of post-conviction relief.

II. The PCR court correctly found Petitioner failed to establish plea counsel was constitutionally ineffective for failing to properly investigate and advise Petitioner of a purported duress defense where plea counsel adequately investigated and discussed the defense of duress with Petitioner, which was based on Petitioner's allegations of abuse by a co-defendant and boyfriend, Mr. Pendergrass, where the record indicates that she was satisfied with plea counsel, and where Petitioner was not prejudiced by any alleged deficiency, as the record indicates Petitioner knowingly and voluntarily pleaded guilty and elected to forgo pursuing possible defenses at trial, and where Petitioner failed to establish what additional information plea counsel would have uncovered by way of additional investigation.

In her Petition, Petitioner asserts Plea Counsel failed to adequately investigate and discuss Petitioner's possible duress defense with Petitioner. More specifically, Petitioner alleges Plea Counsel failed to interview witnesses who were aware of Pendergrass's abuse of Petitioner, and suggests that the record is "devoid" of any evidence that Plea Counsel discussed the duress defense with Petitioner. However, contrary to Petitioner's assertions, the record reflects that Petitioner and Plea Counsel discussed the facts giving rise to a purported duress defense and the risks associated with this defense, but that Petitioner ultimately pleaded guilty to receive the benefit of her plea offer. Moreover, Petitioner failed to meet her burden requiring her to show how Plea Counsel was ineffective for allegedly failing to investigate her defense. Accordingly, this Court should deny certiorari and uphold the PCR court's denial of post-conviction relief.

To excuse a criminal act, the degree of coercion must be present, imminent, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done. *State v. Robinson*, 294 S.C. 120, 121, 363 S.E.2d 104, 104 (1987). Duress is no defense if

there is any reasonable way, other than committing the crime, to escape the threat of harm. *Id.*, citing *Hill v. State*, 135 Ga. App. 766, 219 S.E.2d 18 (1975). The fear of injury must be reasonable. *Id.*, citing *Hill*, 135 Ga. App. at 135*; Jones v. State*, 207 Ga. App. 379, 62 S.E.2d 187 (1950).

"'Although counsel should conduct a reasonable investigation into potential defenses, *Strickland* does not impose a constitutional requirement that counsel uncover every scrap of evidence that could conceivably help their client.'" *Tucker v. Ozmint*, 350 F.3d 433, 442 (quoting *Green v. French*, 143 F.3d 865, 892 (4th Cir. 1998)). Moreover, "failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." *Porter v. State*, 368 S.C. at 385-86, 629 S.E.2d at 357, *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836 (citing *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

Petitioner testified she told Counsel her side of the story: that she was previously abused by Pendergrass and that she was afraid of him. (App. 56, l. 23 – 57, l. 6). Petitioner further testified she told Plea Counsel that Pendergrass forced her to drive the co-defendants to Father's home and partake in the crime. (App. 57). Petitioner testified she had to drive her and her co-defendants to Father's home to commit the armed robbery or she was "going to be dead." (App. 57). Petitioner testified that on a previous occasion, Pendergrass beat her in front of her child, and Pendergrass tried to strangle her. (App. 57, l. 17-25). Petitioner also testified there were multiple other instances of abuse leading up to the robbery at Father's home. (App. 58). Petitioner testified Father called the police to report the abuse, but she did not press charges. (App. 58, l. 9-13). Petitioner testified she only told Plea Counsel and the judge presiding over her bond hearing that she was forced to drive her co-defendants to the scene of the crime. (App. 71, l. 8-14). Petitioner testified

she did not tell the police upon her arrest. (App. 71, l. 8-14). Father testified he has personal knowledge of prior abuse by Pendergrass. (App. 38-39). Father testified Pendergrass previously strangled Petitioner in front of Petitioner's young son. (App. 39, l. 8). Father testified he spoke with Plea Counsel regarding this abuse. (App. 83, l. 4-6).

Plea Counsel testified Petitioner never denied driving her co-defendants to the home where the crime occurred. (App. 47). Plea Counsel testified Petitioner told him she was forced to drive the co-defendants and assist with the crime. (App. 47). Plea Counsel testified it was "very possible" either Petitioner or Father told him about the prior instances of abuse. (App. 49, l. 6-12). Plea Counsel testified the alleged abuse and coercion is something he would have told the solicitor during plea negotiations if Petitioner or Father had told him about the prior abuse. (App. 89, l. 10-13). Plea Counsel testified the State had a co-defendant who was willing to testify against Petitioner and testify to the fact that she helped plan the crime. (App. 89, l. 22 – 90, l. 3). Plea Counsel testified he personally believed Petitioner's story that she suffered abuse and was forced to partake in the crime, but the issue was ultimately whether the jury would believe Petitioner's story. (App. 97). Plea Counsel stated he and Petitioner discussed the risks associated with going to trial and pursuing this defense, as the issue would be up to a jury. (App. 97). When asked if Petitioner provided him with witnesses that he did not contact, Plea Counsel indicated "Not that I remember." (App. 92, l. 17-20).

As an initial matter, Petitioner provided no facts or context at her PCR hearing to support her allegation she was "forced" to partake in the crime, other than that she suffered previous instances of abuse from Pendergrass. (App. 56-58). The record is unclear as to how Pendergrass allegedly forced her to partake in the crime, and why she was unable to escape without partaking

in the crime. *Robinson,* 294 S.C. at 12, 363 S.E.2d at 104. Petitioner merely made conclusory allegations that she was "forced" to drive the co-defendants to the scene of the crime.

Regardless, Plea Counsel testified at the PCR hearing that he discussed the events giving rise to the possible duress defense with Petitioner and Father. (App. 88; 89, l. 1-9; 92). However, Plea Counsel also testified that the State intended to call a co-defendant as witness against Petitioner, which he believed was for the purpose of establishing the fact that, according to the State's theory of the case, Petitioner conspired to commit the crime[2]. (App. 90). Moreover, the following exchange took place during the PCR hearing between PCR counsel and Plea Counsel:

> Q: Kind of going back to what you were talking about when you said that – what she had told you was that, um, **that she was forced to drive**, that she lived in the home, um, and you said that the situation turned bad, that's pretty much consistent with her story that's been throughout this whole – even today is consistent with –
>
> A: I- throughout this entire case, our side of the story was different from the State's side of the story.
> ...
>
> A: Whether or not a jury believes it to the point where they cut her lose was always the question –
>
> A: ---**and that was the discussions that she and I had.**

(App. 97).

Petitioner also testified she and Plea Counsel discussed her side of the story of her case, including her allegation that she was forced to partake in the crime. (App. 56-57). Importantly, although Petitioner did not use the word "duress", Petitioner testified she believed at the time of her guilty plea that she had a defense based upon her allegation that she was forced to partake in the crime. (App. 56). During her plea hearing, Petitioner testified she had enough time to speak

[2] Hamilton also indicated at the plea hearing that the State intended to present a witness to show Petitioner conspired to commit the crime. (App. 12).

with Plea Counsel regarding her case. (App. 9, l. 13-15). Petitioner testified she did not have any complaints regarding Plea Counsel. (App. 10, l. 1-4). Moreover, Petitioner signed her name on the Plea Waiver form indicating, "My lawyer has reviewed with me the factual and legal issues surrounding my case, **including any defenses** I may have and he or she has done everything I asked him to do. I am satisfied with his or her services." (App. 20). Petitioner has not provided or alleged a legitimate or plausible reason to depart from her testimony given during the plea hearing. *See Dalton v. State*, 376 S.C. 130, 137–38, 654 S.E.2d 870, 874 (citing *Crawford v. United States,* 519 F.2d 347 (4th Cir. 1975) ("[A]dmissions '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.'")). Clearly the record shows she was advised and aware of the possibility of a duress defense, and ultimately decided to plead guilty to receive the substantial benefit of her plea offer.

Petitioner asserts in her Petition that Plea Counsel failed to investigate her possible defense because Petitioner gave him names of individuals other than Father[3] who would corroborate her allegations of abuse she allegedly sustained from Pendergrass. To the extent that Petitioner was referring to any individuals other than Father, Petitioner failed to name these alleged specific individuals, and failed to provide testimony from said alleged individuals at the PCR hearing. *Glover v. State,* 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). To the extent Petitioner was referring to Father, as mentioned above, Father briefly testified regarding this alleged abuse, but also testified that he discussed the alleged abuse with Plea Counsel. (App. 83). When asked if

[3] It appears Petitioner was asserting that she informed Plea Counsel of other individuals, other than Father, as she testified at her PCR hearing that she informed Plea Counsel of more than one witness. (App. 64, l. 24- 65, l. 2).

Petitioner provided him with witnesses that he did not contact, Plea Counsel indicated "Not that I remember." (App. 92, l. 17-20).

Ultimately, Petitioner was given ample opportunity to express any concerns she had regarding her possible defense and Plea Counsel's representation, yet failed to do so. Instead, Petitioner conveniently asserts on PCR that she and Plea Counsel did not discuss this defense while also arguing that she "believed" she had this defense at the time of her plea. Petitioner indicated at her plea hearing that she did not have complaints regarding Plea Counsel, and indicated on her plea waiver form that she and Plea Counsel discussed defenses. (App. 10, l. 1-3; 22). Regardless, the totality of the record establishes that she and Plea Counsel discussed this potential defense and Plea Counsel adequately investigated the defense. Petitioner knowingly and voluntarily opted to forgo pursuing this defense at trial to receive the benefit of an extremely favorable plea offer. Accordingly, Petitioner failed to meet her burden, and therefore, this Court should deny certiorari and affirm the PCR court's Order denying post-conviction relief.

Moreover, based upon the prejudice standard set forth above, Petitioner failed to establish how she was prejudiced by any alleged lack of investigation and discussion as it relates to her possible duress defense. First, the credible portions of the record conclusively refute any contention that Plea Counsel did not discuss the possible defense with her and that she would have gone to trial. At the plea hearing, Petitioner testified she was pleading guilty on her own free will. (App. 10). Petitioner testified she did not have complaints regarding Plea Counsel and that she had enough time to speak with him regarding her case. (App. 9-10). Petitioner testified she was pleading guilty because she was in fact guilty. (App. 10). Moreover, Plea Counsel testified she entered the plea voluntarily. (App. 98). Plea Counsel testified she went back and forth as to

whether she wanted to plead guilty. (App. 98). Plea Counsel testified that had Petitioner ultimately wanted to take the case to trial, he would have taken the case to trial. (App. 98).

Second, with respect to the investigation of the possible defense, Petitioner has failed to establish what additional information these additional witnesses would have provided to help her case, as any testimony regarding Mr. Pendergrass's alleged abuse would be cumulative to the testimony from either Petitioner or Father had Petitioner proceeded to trial. Moreover, as discussed above, to the extent Petitioner refers to any possible witnesses other than Father, Petitioner failed to provide testimony from such additional witnesses. *See Glover*, 318 S.C. at 498-99. As stated above, Petitioner did not provide the names or testimony of these additional witnesses at the PCR hearing. Based on the standard set forth above, Petitioner has failed to meet her burden as to deficiency and prejudice. Accordingly, this Court should deny certiorari and uphold the PCR court's decision denying post-conviction relief.

CONCLUSION

Based on the foregoing arguments, Petitioner has failed to meet her burden as to both deficiency and prejudice. Therefore, the State requests certiorari be denied. Should this Court grant Petitioner's Petition, Respondent requests permission to fully brief the issues addressed herein.

s/ Brianna L. Schill

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DECEMBER 30, 2020.

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