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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON WRIT OF CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
The Honorable Grace Gilchrist Knie, Plea Judge
The Honorable Walton J. McLeod, IV, Post-Conviction Relief Judge

Appellate Case No. 2019-001608

JAMES LEE WILLIAMS

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER’S STATEMENT OF ISSUE ON CERTIORARI

- I. Did the PCR court correctly grant Petitioner a belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), where the evidence showed Petitioner never knowingly and voluntarily waived his right to a direct appeal?

- II. Whether the PCR court erred in finding plea counsel provided effective representation where counsel failed to object when the court sentenced Petitioner without giving him the opportunity to speak on his own behalf in mitigation especially after the court had twice assured Petitioner that he would be given the opportunity to allocute?

RESPONDENT’S COUNTERSTATEMENT OF ISSUE ON CERTIORARI

- I. State does not contest the granting of belated appellate review pursuant to *White v. State*.

- II. The PCR court correctly found plea counsel was not constitutionally ineffective for failing to object to the plea judge sentencing Petitioner without first giving him the opportunity to speak on his own behalf because South Carolina does not recognize a right to allocution in non-capital cases; where Petitioner never communicated to plea counsel he wished to address the court at any point before or during the plea proceeding; where the plea judge brought Petitioner back into the courtroom shortly after his plea, gave him the opportunity to address the court, and he declined to do so; and where Petitioner failed to demonstrate he would not have pleaded guilty and would have insisted on going to trial had he known he would not have the opportunity to address the court before his sentence was imposed.

STATEMENT OF THE CASE

On January 17–18, 2016, James Lee Williams (Petitioner) went on a drug-fueled crime spree which ended with a high-speed police chase and the death of his co-defendant. On June 20, 2017, Petitioner appeared before the Honorable Grace Gilchrist Knie, circuit court judge, where he waived presentment to the grand jury, and pleaded guilty to assault and battery of a high and aggravated nature (ABHAN) (2017-GS-32-02175); armed robbery (2017-GS-32-02176); and possession of a weapon during the commission of a violent crime (2017-GS-32-02178). Assistant Public Defender Stephen R. Story, Jr. (Counsel) of the Lexington County Public Defender’s Office represented Petitioner. Assistant Solicitor Casey Rankin of the Eleventh Circuit Solicitor’s Office prosecuted the case.

In exchange for Petitioner’s plea, the State recommended concurrent sentences and dropped several remaining charges, including first-degree burglary and an additional armed robbery charge. Following the State’s recommendation, Judge Knie sentenced Petitioner to concurrent terms of twenty-five years’ imprisonment for armed robbery, twenty years for ABHAN, and five years for possession of a weapon during the commission of a violent crime. Petitioner did not appeal his convictions or sentences.

Petitioner timely commenced the underlying PCR action May 14, 2018. (App. 24–31). The State requested an evidentiary hearing through its return on September 7, 2018. (App. 32–41). On April 5, 2019, the PCR court convened a hearing before the Honorable Walton J. McLeod, IV. (App. 45–79). Petitioner was present and represented by Art Aiken, Esquire. Assistant Attorney General Johnny James represented the State. Petitioner and Counsel both testified at the hearing. On July 26, 2019, the PCR court issued an order granting Petitioner belated appellate review pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974), but denied relief on all other

grounds. (App. 81–87). The State timely moved to alter or amend pursuant to Rule 59(e), SCRE, on August 12, 2019. (App. 88–91). Judge McLeod denied the State’s motion on August 16, 2019. (App. 92–93). This appeal follows.

STATEMENT OF FACTS

On January 17, 2016, at approximately 11:15 in the evening, deputies responded to a 911 call in reference to a stabbing incident which occurred at a home in the Pelion area of Lexington County. (App. 9). They made contact with the victim's neighbor, Krystal Lawson, who was at the front door and told law enforcement that her neighbor from across the street, Joel Hendricks (Victim), was inside her house bleeding. (App. 9). EMS arrived on scene, and had to cut off Victim's clothes off in an attempt to stop the bleeding and look for any further injuries. (App. 9).

Victim told law enforcement that earlier that evening his cousin had left the residence to go to the Peanut Store to get some drinks while he stayed at home. (App. 9). Victim heard a knock on the door and when he went to answer it, he looked outside and saw someone wearing a black jacket. (App. 9). Thinking it was his cousin, Victim opened the door. (App. 9). At that point, an unknown white male with a tear drop tattoo on his face—later identified as Petitioner—pushed his way into Victim's home, tased him with a pink taser, and stabbed him in the left armpit with a knife. (App. 3–4, 9). Petitioner fled, stealing Victim's truck. (App. 4). Victim was able to run across the street to Lawson's house, where law enforcement eventually responded. (App. 9, 10).

Just prior to clearing the scene, at around 4:10 AM, patrol units were advised of an armed robbery at 44 Truck Stop by a suspect matching the description given by Victim. (App. 10). Law enforcement then responded to the 44 Truck Stop, where the cashier reported an unknown white male wearing blue jeans, a black hoodie, and something covering his face. (App. 12). The suspect—Petitioner—entered the store around 3:56 AM, and approached the cashier. (App. 12). Petitioner presented a large folding knife and taser to the cashier, demanding all the money from the cash register. (App. 12). He then reached over the counter, taking approximately \$300.00 from

the register and then exited the store through the front entrance. (App. 12). The cashier told law enforcement the suspect left in a small black car and was headed toward Batesburg. (App. 12).

Several minutes later, at approximately 4:45 AM, another dispatch was transmitted about an armed robbery occurring at Hill View Truck Stop with the same suspect description. (App. 10, 13). While en route to the second armed robbery location, a deputy sheriff passed an older black model Honda Civic traveling northbound, which matched the vehicle description given by dispatch. (App. 13). He activated his blue lights, and a chase ensued. (App. 13).

The Honda Civic made an aggressive right turn onto a dirt road, increasing its speed, and turning down several other unpaved roads. (App. 13). At one point, the deputy observed what appeared to be a brown paper bag thrown from the driver's side window. (App. 13). The Civic continued to turn down random dirt roads, and eventually spun out of control. (App. 13). The deputy exited his vehicle and approached the Civic. (App. 13). Petitioner's co-defendant, Jerrid Green, was slumped over the driver's side window, unconscious and bleeding from the head. (App. 14). He died on the scene. (App. 14).

A white male with tattoos on his face, wearing a black hoodie and black bandana around his neck was in the back seat. (App. 13–14). After multiple repeated commands to put his hands out of the window, the man finally complied. (App. 14). This man was identified as Petitioner. (App. 14). Law enforcement found large amounts of money in the car. (App. 14). A pink taser and black folding knife were found on Petitioner's person. (App. 14).

Before he was apprehended, law enforcement met with Petitioner's girlfriend, Samantha Swearingen, and Green's wife, Rachel Azmer. (App. 10). Swearingen stated she and Azmer had been at home with Petitioner and Green earlier that evening. (App. 10). Later on that night, the men left, claiming they were going to Walmart. (App. 10). Shortly thereafter, Swearingen and

Amzer both attempted to call Petitioner and Green, but neither of them answered. (App. 10). Eventually they were able to make contact with Petitioner and Green, who stated they had a flat tire and would be home shortly. (App. 10). Swearingen also reported owning a pink taser, which was missing from her purse. (App. 10–11). She believed Petitioner had taken it with him. (App. 11).

Azmer testified Petitioner and Green met and became friends in prison. (App. 11). She told law enforcement she “knew something was up because [Petitioner and Green] were adamant that they had to go to Walmart and seemed to be in a hurry to go.” (App. 11). She also received a call from Green’s phone that went to voicemail, and inadvertently recorded a conversation between Petitioner and Swearingen. (App. 11). In the voicemail, Petitioner can be heard stating, “that was an easy thirty and they would be home soon.” (App. 11). Azmer identified the knife used in the stabbing as being Swearingen’s and identified the black jacket the suspect wore as belonging to Petitioner. (App. 11).

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).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). “The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases.” *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To prove prejudice, the applicant must prove 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 (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

ARGUMENT

I. The State does not contest the granting of belated appellate review pursuant to *White v. State*.

To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal. *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986). Counsel has a constitutionally-imposed duty to consult with a defendant about an appeal only when there is reason to think either: (1) that a rational defendant would want to appeal or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

Petitioner alleges plea counsel was ineffective for failing to file an appeal on his behalf, and that he did not knowingly and intelligently waive his right to an appeal. At the PCR hearing, Petitioner testified he asked Counsel following the guilty plea to file a direct appeal on his behalf. (App. 56, 63). He stated Counsel instructed him to “get in contact with the court,” although Counsel did not specify which court. (App. 56). Petitioner assumed Counsel was referring to the Clerk of Court. (App. 56). Petitioner testified that was the only conversation he had with Counsel regarding an appeal. (App. 57).

Petitioner introduced a letter he filed with the Lexington County Clerk of Court, indicating he wanted to appeal his guilty pleas. (App. 57, 80). Petitioner did not hear back, and at some point thereafter wrote a second letter to the Clerk inquiring about his appeal. (App. 58). The Clerk responded that no appeal had been filed in his case. (App. 57). Petitioner testified he was unaware he had to file his appeal with the Court of Appeals, and believed his appeal had been filed successfully when he sent the first letter to the Clerk. (App. 58).

Counsel testified he never had any conversation with Petitioner regarding an appeal. (App. 77). He stated Petitioner never asked him to file an appeal nor did he tell him to get in touch with

the court. (App. 73–74). Counsel testified that, had Petitioner asked him about appealing, he would have had a conversation with him first about the possible merits of an appeal. (App. 74). Counsel stated that, had Petitioner asked him to file an appeal, Counsel would have filed an appeal and sent a copy to the Circuit Court, Court of Appeals, Attorney General’s Office, and the Office of Appellate Defense. (App. 74).

Although the PCR court found Counsel’s testimony and recollection credible, the court granted Petitioner a belated appeal of his guilty plea pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) (finding that a defendant who did not knowingly and voluntarily waive his right to direct appeal of his conviction is entitled to a belated review of direct appeal issues). Respondent does not contest the PCR court’s decision in this regard, and addresses the issues raised in this belated appellate review in the accompanying Brief of Respondent Pursuant to *White v. State*, also served on today’s date.

II. The PCR court correctly found plea counsel was not constitutionally ineffective for failing to object to the plea judge sentencing Petitioner without first giving him the opportunity to speak on his own behalf because South Carolina does not recognize a right to allocution in non-capital cases; where Petitioner never communicated to plea counsel he wished to address the court at any point before or during the plea proceeding; where the plea judge brought Petitioner back into the courtroom shortly after his plea, gave him the opportunity to address the court, and he declined to do so; and where Petitioner failed to demonstrate he would not have pleaded guilty and would have insisted on going to trial had he known he would not have the opportunity to address the court before his sentence was imposed.

Despite never giving any indication he wished to address the plea court at any point prior to filing the instant action for post-conviction relief, Petitioner maintains he was denied due process because he was not afforded the opportunity to be heard before the court imposed his sentence. Notably, however, Petitioner does not challenge the knowing and voluntary nature of the plea. Petitioner instead argues plea counsel deficiently failed to object to the court sentencing Petitioner without allowing him to allocute and that he was prejudiced as a result. The PCR court rejected this claim, finding credible plea counsel's testimony that Petitioner never indicated to Counsel he wished to address the court at any point. Moreover, the PCR court correctly concluded that any possible prejudice was cured when the plea judge brought Petitioner back into the courtroom shortly after the plea, gave him the opportunity to speak, and he told the court he had nothing to say. Petitioner further failed to present any evidence or allege any special circumstances that might support the conclusion that he placed particular emphasis on his ability to address the court before sentencing in deciding whether to plead guilty or go to trial. As these findings are supported by probative evidence and do not constitute an error of law, certiorari should be denied.

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, *Hill v. Lockhart*, 474 U.S. 52 (1985), extended the two-part *Strickland* test to challenge guilty pleas based on ineffective assistance of counsel. The analysis of counsel's performance under the first prong of *Strickland* remains unchanged—the applicant must show that counsel's

representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases. *Lockhart*, 474 U.S. at 58–59. 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. The applicant must further convince the court that a decision to reject the plea bargain would have been rational under the circumstances. *Padilla*, 559 U.S. at 372.

Petitioner maintains counsel’s failure to object when the plea judge began to announce the sentence without first giving Petitioner the opportunity to speak constitutes deficient performance comparable to that where an attorney fails to object to a substantive evidentiary rule or constitutional violation. However, Petitioner fails to cite to any authority suggesting the right to allocution in a non-capital criminal matter is a right guaranteed by the constitution of South Carolina or the United States.

At common law, the practice of allocution entailed the defendant’s right in *capital cases* to be *asked* by the court whether he had any reason why sentence should not be imposed. *Green v. French*, 143 F.3d 865, 881 (4th Cir. 1998) (citing *State v. Green*, 336 N.C. 142, 191, 443 S.E.2d 14, 42 (1994)), *abrogated on other grounds by Williams v. Taylor*, 529 U.S. 362 (2000). At that time, however, capital defendants had no right to counsel nor could they testify on their own behalf. *French*, 143 F.3d at 881. Allocution therefore afforded a convicted defendant with his only opportunity to address the court. *Id.*

Addressing the issue in 1998, the Fourth Circuit commented that “common law history does not create a constitutional right to allocution in the quite different modern context where a

criminal defendant receives other sufficient procedural rights and protections to cure any potential constitutional defect of being deprived of a formal allocution.” *Id.*

Nearly 150 years ago, this Court in *State v. Trezevant* vacated a defendant’s *death* sentence because he was never asked “if he ha[d] anything to say why judgment should not be pronounced on him.” 20 S.C. 363, 364 (1884). This common law right, which is now statutorily guaranteed, applied only to capital cases even at that time. *See id.* at 363 (“There is no doubt that in capital cases the practice of asking this question before sentence has been universally recognized and followed in this State from the earliest period of our judicial history.”).

Thereafter, seventy years ago, this Court in *State v. Phillips* explained that the common law right of allocution does not apply “in the absence of statute in a misdemeanor case” and that “its omission is not fatal to affirmance of sentence *for any offense less than capital.*” 215 S.C. 314, 318–19, 54 S.E.2d 901, 903 (1949) (emphasis added)). The defendant in that case was convicted of a misdemeanor, and this Court noted that the “the lengthy conversation after [the] plea and before [the] sentence between the court and [the defendant] . . . would have met the [allocution] requirement had it been applicable.” *Id.* at 319.

Further, neither the United States Supreme Court (USSC) nor the Fourth Circuit have recognized a constitutional right to allocution, even in capital cases. The USSC has only addressed the “right” to allocution in the context of Rule 32(i)(4)(A)(ii)¹ of the Federal Rules of Criminal Procedure, which mandates the sentencing court “afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.” *See e.g.*,

¹ Formerly Rule 32(a) (amended December 1, 2002)

Green v. United States, 365 U.S. 301 (1961).² Significantly, in *Hill v. United States*, the USSC declined to recognize a Rule 32(i)(4)(A)(ii) violation as a basis for habeas relief, stating:

The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.

368 U.S. 424, 428 (1962) (quotation marks omitted). Plea counsel therefore cannot be held constitutionally ineffective for failing to object to the purported denial of a non-existent constitutional right.³

At the PCR hearing, Counsel testified that Petitioner never—before, during, nor after the plea proceeding—told him he wanted to personally address the court. (App. 72). Counsel recalled Judge Knie realizing later that day that she had forgotten to give Petitioner the opportunity to speak during his plea. (App. 72). Judge Knie had security bring him back into the courtroom and went

² The USSC in *Green* interpreted Rule 32(i)(4)(A)(ii) in light of its common law origins, and merely instructed the lower federal courts in future cases to address defendants personally as a matter of “good judicial administration”—not as a matter of constitutional right. *Id.* at 305. *See French*, 143 F.3d at 878 (“The [*Green*] opinion never held, nor did any of the Justices even hint, that the right to allocution is protected by the Due Process Clause.”).

³ However, while USSC has not addressed whether it violates due process to turn down a defendant’s *affirmative request* for allocution, *McGautha v. California*, 402 U.S. 183, 219 n. 22 (1971, the Fourth Circuit in *Ashe v. North Carolina* held that, “when a defendant *effectively communicates* his desire to the trial judge to speak prior to the imposition of sentence, it is a denial of due process not to grant the defendant’s request.” *Ashe v. North Carolina* 586 F.2d 334, 336 (4th Cir. 1978) (emphasis added); *but see State v. Green*, 336 N.C. 142, 193, 443 S.E.2d 14, 43 (1994) (“A failure to ask a convicted person whether he has anything to say before sentence is pronounced, alone, does not constitute grounds for a new trial or require a reversal of the verdict.”) (citing *McGrady v. Cunningham*, 296 F.2d 600, 603 (4th Cir.1961)). Petitioner clearly did not make such a request—if anything, Petitioner *affirmatively declined the court’s offer*.

back on the record. The following exchange occurred:

THE COURT: Mr. Williams, when you were here earlier today, sir, we took a recess for me to confer with counsel and I came back and I neglected to give you the opportunity to address the Court. If you would like to do that, I would like to give you that opportunity at this time. You are still under oath, sir, because you were sworn earlier today.

PETITIONER: Uhm, I don't have anything to say.

THE COURT: Are you sure?

PETITIONER: Mm-hmm. Yes, ma'am.

(App. 21). The PCR court therefore concluded that any potential prejudice was cured because Petitioner was ultimately given the opportunity to address the court.

Beyond Petitioner himself stating—under oath—that he had nothing to say, Counsel testified Petitioner never mentioned wanting to address the court after he was sentenced. (App. 72). Nor was Counsel aware of anything in particular that Petitioner wanted him to communicate to the court in mitigation. (App. 72). Counsel further testified Petitioner did not ask him any questions or attempt to have any kind of discussion with Counsel before he was re-presented to Judge Knie. (App. 72). Counsel therefore had no reason to even suspect Petitioner wanted to address the court before he was sentenced.

Petitioner, however, testified he spoke with Counsel about five minutes after his guilty plea, although he could not recall what the conversation entailed. (App. 64). Petitioner stated he told Counsel at that time that he “wanted an appeal because [he] asked for a chance to speak [but] wasn't given that chance.” (App. 64). Petitioner testified this conversation occurred “hours” before he was brought back in the courtroom by Judge Knie. (App. 62–63). When asked by PCR counsel why he later told Judge Knie he had nothing to say, Petitioner stated that “he had already been

sentenced” and concluded that “nothing [he] would have said would have held any weight in what [he has] already been given.” (App. 53).

Since Petitioner and Counsel both recalled Petitioner being brought back before the court hours after his plea, Counsel’s recollection of the events following the plea is more feasible. Had Petitioner pointed out to Counsel “five minutes” after the plea that he wanted to speak but was not given the opportunity, Counsel presumably would have told Judge Knie right away. He likely would not have waited until later that day when it dawned on Judge Knie that she forgot to allow Petitioner to speak. Given Counsel’s credible testimony that Petitioner never mentioned wanting to address the court, Counsel’s purported failure to object an objective standard of “reasonableness under prevailing professional norms.” *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

Even had counsel objected and Petitioner addressed the court before he was sentenced, Petitioner’s testimony at the PCR hearing of what he would have told the court is neither powerful nor particularly mitigating given what plea counsel had already presented. Specifically, Petitioner stated he would have told the court he had been released from prison a few months before he committed these crimes, and that he “wasn’t rehabilitated at all in the eleven years that [he] was locked up.” (App. 53). He further testified he would have told Judge Knie he was suffering from circumstances resulting from his prior convictions—such as being a registered sex offender—and complained that he only received \$400 a month from the State program he was enrolled in after he was released from prison. (App. 53).

Petitioner testified that certain opportunities and cheaper housing were unavailable to him because he was a registered sex offender. (App. 53–54). He stated he panicked because he could not afford the cost of living, “and the result[] of that was the charges . . . that were held against

[him].” (App. 54). Petitioner further stated he would have asked the court for mercy because again he was not guilty of some of the charges to which he had just pleaded guilty. (App. 55).

Explaining to Petitioner that he could not plead guilty and then tell the court he was not guilty, PCR counsel asked Petitioner what else he would have told the court. Petitioner replied:

There was really nothing -- I mean, besides the fact that I -- I couldn't pick the charges that I was going to be convicted and sentenced of. So, I mean, I took that plea -- I made clear that I would rather go to trial and be found innocent of the charges that I'm innocent of and guilty of the charges that I'm guilty of instead of just going in there blindly. And, I mean, I went in there blindly because I was under the impression that it was going to be something dramatically less than what it was.

(App. 55–56).

As outlined above, in order to prove prejudice in the guilty plea context, in the guilty plea context, the applicant must establish “a reasonable probability that, but for counsel’s [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial.” *Lockhart*, 474 U.S. at 59; *accord. Stalk v. State*, 383 S.C. 559, 562, 681 S.E.2d 592, 594 (2009). He “must convince the court” that such a decision “would have been rational under the circumstances.” *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010). The prejudice prong therefore “ordinarily requires more than simply a[n] [applicant]’s assertion that but for counsel’s deficient performance he would not have pled but would have gone to trial.” *Stalk*, 383 S.C. at 563, 681 S.E.2d at 595. The applicant’s “subjective preferences, therefore, are not dispositive[—]what matters is whether proceeding to trial would have been objectively reasonable in light of all of the facts.” *United States v. Fugit*, 703 F.3d 248, 260 (4th Cir. 2012).

At the PCR hearing, Counsel testified he inherited Petitioner’s case from another attorney. (App. 65–66). Based on his conversations with Petitioner and his previous attorney, it was Counsel’s understanding that Petitioner wanted to plead guilty and they never seriously

contemplated going to trial. (App. 67–68). Counsel testified it was understood that Petitioner was looking at life without parole based on his prior armed robbery and kidnapping convictions.⁴ (App. 68–69).

At some point, Counsel testified, Petitioner inquired about filing a speedy trial motion. Petitioner changed his mind after Counsel telling him, “if we file a speedy trial motion, the likelihood is we get ready for trial, we go to trial.” (App. 68). Counsel further recalled going over each charge while reviewing discovery with Petitioner. (App. 68).

Regarding possible trial strategies or defenses, Counsel advised Petitioner that, of all his charges, the weakest case for the State was probably the burglary charge simply because there was only one witness. (App. 70–71). However, Counsel cautioned Petitioner again that he could receive a life sentence for the burglary conviction alone. (App. 70–71). As far as the armed robbery charges, Counsel testified there were never any discussion with Petitioner about any potential defenses. (App. 71).

Counsel recalled his initial discussion with the solicitor about the case, although he did not recall any plea offer during their first meeting. (App. 68–69). After that, Counsel testified his strategy in plea negotiations was to first try to work out an offer that would “take life off the table,” and from that point on “just try to get the best deal possible.” (App. 69). Counsel testified Petitioner was aware the solicitor could seek life without parole should he decided to go to trial. (App. 70).

Ultimately, they arrived at a plea deal where the State would recommend concurrent sentences and drop the remaining charges, including one count of first-degree burglary, an

⁴ Both kidnapping and armed robbery are classified as “most serious offenses” under section 17-25-45 of the South Carolina Code. *See* S.C. Code Ann. § 17-25-45(A)(1)(a) (“[U]pon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has . . . one or more prior convictions for . . . a most serious offense.”).

additional count of armed robbery, one count of grand larceny, and two counts of possession of a weapon during the commission of a violent crime. Counsel testified he never promised Petitioner he would receive any particular sentence, and that he advised Petitioner only of the sentence he could receive within the parameters of the plea offer. (App. 71). He told Petitioner he was looking at ten to thirty years for the armed robbery, zero to twenty for ABHAN, and five on the weapons charge. (App. 71–72).

Although the PCR court did not make a finding regarding Petitioner’s credibility, it explicitly found Counsel’s testimony to be credible.⁵ Petitioner’s testimony at the PCR hearing contradicted both counsel’s testimony and his own testimony from his guilty plea. Despite agreeing with the solicitor’s recitation of the facts set forth during his plea proceeding, Petitioner stated several times at the PCR hearing that he was not guilty of some of the charges he pled to although he could not articulate which charges he was referring to. (App. 54, 55, 60–61).

Notwithstanding the fact that, as PCR counsel stated, “you can’t plead and then tell the court you’re not guilty,” Petitioner failed to present any evidence or allege any special circumstances that might support the conclusion that he placed particular emphasis on his ability to address the court before sentencing in deciding whether to plead guilty or go to trial. When asked which crimes he did not commit or which part of the solicitor’s recitation of the facts were inaccurate, Petitioner stated he was “under the impression that [he] was going to get a chance to speak for [him]self before [he] was sentenced” and that he would have “ma[d]e it clear” at that time that he was not guilty of some of the charges. (App. 60, 70).

⁵ This Court has repeatedly held that it gives great deference to the PCR court’s findings involving witness credibility since this Court lacks the opportunity to directly observe the witnesses. *See, e.g., Drayton v. Evatt*, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993).

Petitioner clearly failed to present any valid reason why he agreed with facts that he now claims are not true. *Dalton v. State*, 376 S.C. 130, 137–38, 654 S.E.2d 870, 874 (Ct. App. 2007) (“[B]ecause a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, 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.” (internal citations and quotation marks omitted)); cf. *Blackledge v. Allison*, 431 U.S. 63, 73–74 (1977) (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”).

Ultimately, Petitioner falls far short of satisfying the prejudice standard under *Lockhart*. Petitioner merely stated that, had he known prior to the plea, that he would not get a chance to address the court until after he was sentenced, he would have insisted on going to trial. (App. 63). Even if this statement is subjectively true, Petitioner failed to present any evidence tending to show that the decision to go to trial would have been objectively reasonable given the multiple life sentences he was facing. Compare *Alexander v. State*, 303 S.C. 539, 543, 402 S.E.2d 484, 485–86 (1991) (finding petitioner satisfied the prejudice prong based on his testimony he would not have accepted a fifteen-year plea offer but would have gone to trial where counsel erroneously informed him he could receive up to one-hundred years unless he pleaded guilty where the actual sentencing range for the offenses was seven to twenty-five years).

This Court has made clear the prejudice prong ordinarily requires “something more” than simply a defendant’s assertion that but for counsel’s deficient performance he would not have pleaded guilty but would have gone to trial. *Stalk*, 383 S.C. at 563, 681 S.E.2d at 595 (citing *Lockhart*, 474 U.S. at 58–59). The fact that Petitioner at some point purportedly expressed some

sort of interest in a speedy trial motion is hardly sufficient to show he reasonably would have risked facing multiple life sentences at trial rather than plead guilty and receive, at most, a thirty-year sentence based on the solicitor's recommendation.

Finally, Petitioner testified at the PCR hearing he was "under the impression" he would receive a lighter sentence, and specifically that he would receive no more than sixteen years (App. 56). Consistent with Counsel's testimony, however, Petitioner acknowledged at the plea hearing the maximum sentence he could receive on each charge and confirmed at that he understood that the "only thing that ha[d] possibly been promised to [him]" regarding the plea was that the solicitor's office would recommend concurrent time. (App. 7). Petitioner failed to allege any facts at the PCR hearing tending to prove he was prevented from informing the plea court that it was his understanding he would sixteen years or less. (App. 56).

Therefore, contrary to Petitioner's PCR testimony, "[t]he colloquy establishes that [Petitioner] did not have any misconceptions regarding sentencing." *Roddy v. State*, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (reversing PCR court's finding of an involuntary guilty plea); *see also Harres v. Leeke*, 282 S.C. 131, 134, 318 S.E.2d 360, 360 (1984) (finding that the fact that defendant "thought" judge would give lighter sentence not ground for relief).

Petitioner, in other words, was lucky to receive the deal that he did. Pleading guilty "generally involves a conscious decision to accept both the benefits and burdens of a bargain." *United States v. Fugit*, 703 F.3d 248, 260 (4th Cir. 2012). That decision may not be lightly undone by buyer's remorse on the part of one who has reaped advantage from the purchase. *Id.* Petitioner, consequently, cannot show that declining to plead guilty "would have been rational under the circumstances," and his remaining ineffective assistance arguments thus fail for lack of prejudice.

CONCLUSION

Based on the foregoing argument, this Court should deny certiorari and affirm the PCR court's dismissal of Petitioner's PCR application. Should this Court grant the petition, the State seeks permission to more fully brief the issues discussed above.

Respectfully submitted,

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