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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON WRIT OF CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas
The Honorable Edward W. Miller, Plea Judge
The Honorable J. Mark Hayes, II, Post-Conviction Relief Judge

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Appellate Case No. 2020-001361

OSHAUN ROBINSON,

RESPONDENT,

v.

THE STATE

PETITIONER.

PETITION FOR A WRIT OF CERTIORARI

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> Where Robinson was convicted by a jury of one set of charges several months prior to pleading guilty to a second set of charges, the PCR court erred as a matter of law by conflating the deficiency and prejudice prongs of *Strickland*, ignoring the required presumption of competence, and relying entirely on hindsight to find counsel constitutionally ineffective for failing to advise Robinson prior to pleading guilty that a concurrent sentence on the plea convictions did not mean his trial convictions—which were pending on appeal at the time—were "merged" such that if his trial convictions were eventually overturned on direct appeal or collateral review, the plea convictions would not be simultaneously overturned where counsel never indicated or otherwise suggested to Robinson that an appeal on convictions from the jury trial would somehow also apply to a guilty plea that he engaged in months later and where the voluntariness of the plea did not depend on whether Robinson understood what *might happen* in the future if he were successful in a *different case* because Robinson pleaded guilty based on the twenty-five year sentence and avoiding LWOP.

STATEMENT OF THE CASE

This appeal arises from two distinct sets of charges; the first set was resolved initially by a jury trial in January 2009 jury trial and the second set was resolved by guilty plea in March 2009 guilty plea. The second set gives rise to the instant appeal.

A. Trial Charges

In August 2008, the Greenville County Grand Jury indicted Robinson for armed robbery (2008-GS-23-5382) possession of a weapon during commission of a violent crime (2008-GS-23-5382), conspiracy (2008-GS-23-5383), and assault and battery of a high and aggravated nature (ABHAN) (2008-GS-23-5384) (**trial charges**). The trial charges arose out of a December 10, 2007 incident where Robinson and co-defendants approached the victim's Jeep, pointed a firearm at him, and demanded his money and phone. The victim complied after Robinson punched him in the face.

On January 14–15, 2009,[1] Robinson and his co-defendant, Kenneth Workman, proceeded to a joint trial before the Honorable C. Victor Pyle, Jr. Andrew Burke Moorman (defense counsel)

[1] Robinson and Workman initially proceeded to trial on December 1–2, 2008, which resulted in a mistrial with a hung jury. (App. 1–168).

represented Robinson. The jury convicted both Robinson and Workman of the lesser-included offense of assault and battery and as indicted on the remaining offenses. Judge Pyle sentenced Robinson to concurrent terms of twenty-five years for armed robbery, five years for conspiracy, five years for possession of a weapon during commission of a violent crime, and thirty days for assault and battery.

Robinson file a timely notice of appeal of his trial convictions and sentences. Appellate Defender Robert Pachak represented Robinson on appeal. Following briefing and oral argument, the Court of Appeals affirmed Robinson's convictions and sentences in an unpublished *per curiam* opinion. *State v. Robinson*, Op. No. 12-UP-042 (S.C. Ct. App. filed Jan. 25, 2012). The case was remitted back to the circuit court on February 14, 2012.

On December 5, 2012, Robinson timely commenced a post-conviction relief action challenging his trial convictions. The State requested an evidentiary hearing through its return on June 21, 2013. On February 18, 2014, the PCR court convened an evidentiary hearing before the Honorable G. Edward Welmaker. Robinson and defense counsel both testified at the hearing. On March 25, 2014, Judge Welmaker issued an order denying the application on all grounds and dismissing with prejudice. Robinson appealed.

Appellate Defender Wanda H. Carter represented Robinson on his PCR appeal. On April 15, 2015, this Court reversed the denial of relief and remanded the case for a new trial, finding the *Allen* charge given by the trial judge unconstitutionally coercive. *Robinson v. State*, Op. No. 2015-MO-018 (S.C. Sup. Ct. filed April 15, 2015). The case was remitted back to the lower court on April 27, 2015.

On remand, Robinson pleaded guilty to the trial charges before the Honorable Letitia H. Verdin on May 16, 2016. No negotiations or recommendations were made as to sentencing. Judge Verdin sentenced Robinson to concurrent terms of fifteen years' imprisonment for armed robbery, five years for criminal conspiracy, five years for the weapons charge, and thirty days for simple assault.

B. Plea Charges

In August 2008, the Greenville County Grand Jury also indicted Robinson for criminal conspiracy (2008-GS-23-5385), assault and battery with intent to kill (2008-GS-23-5386), armed robbery, and possession of a weapon during the commission of a violent crime (2008-GS-23-5387); all of which arose out of a December 10, 2007 incident (**plea charges**). The plea charges arose out of a December 14, 2007 incident where Robinson and two co-defendants robbed the victim and shot him in the abdomen with a .38 caliber handgun before stealing his money, wallet, and watch.

While his direct appeal was pending on the trial charges, Robinson pleaded guilty as indicted before the Honorable Edward W. Miller on March 4, 2009. No negotiations or recommendations were made as to sentencing. Robinson was again represented by Moorman. Judge Miller accepted Robinson's plea and sentenced him to concurrent terms of twenty-five years for armed robbery, twenty years for assault and battery with intent to kill (ABWIK), five years for criminal conspiracy, and five years for possession of a weapon during commission of a violent crime. Judge Miller further ordered the new sentences run concurrent to the jury trial sentences. Robinson did not appeal.

Robinson commenced the underlying post-conviction relief action on April 25, 2017, challenging his March 2009 guilty plea.[2] The State made its return and motion to dismiss on November 2, 2018, requesting the application be summarily dismissed as time-barred. Pursuant to this request, the Honorable Perry H. Gravely, acting in his capacity as Chief Administrative Judge, issued a conditional order of dismissal on November 9, 2018, provisionally denying and dismissing the application as untimely pursuant to subsection 17-27-45(a) of the South Carolina Code (2014), but allowing Robinson twenty days to respond to the conditional order. Robinson, through PCR counsel,

[2] Because Robinson failed to pursue any type of challenge whatsoever or otherwise attempt to preserve the record by ordering the transcript, the transcript of the March 4, 2009 guilty plea is unavailable because this action was commenced eight years after the plea took place. *See* Rule 607(i), SCACR.

timely responded to the conditional order of dismissal. On December 27, 2018, Judge Gravely issued a Form 4 ordering the matter to be set for a hearing.

A hearing on the State's motion to dismiss convened before the Honorable Alex Kinlaw, Jr., on April 15 and 17, 2019. Robinson was present and represented by Tara Dawn Shurling, Robinson and defense counsel both testified. Judge Kinlaw subsequently took the matter under advisement and requested proposed orders from both parties. On April 22, 2019, Judge Kinlaw issued an order vacating the conditional order of dismissal and granting leave to proceed with a full evidentiary hearing.

On January 22, 2020, an evidentiary hearing convened before the Honorable J. Mark Hayes, II. Robinson was present and again represented by Tara Dawn Shurling, Esquire. Robinson and defense counsel both testified again. Judge Hayes took the matter under advisement and requested proposed orders from both parties. On May 19, 2020, Judge Hayes issued an order granting post-conviction relief. In response, on June 3, 2020, the State filed a motion to alter, amend, and reconsider pursuant to Rule 59(e), SCRCP. Robinson filed a response and a supplemental response. (App. 917–922; 923–25). On July 28, 2020, Judge Hayes issued a Form 4 denying the State's motion. (App. 926–29). He subsequently issued a formal order on September 9, 2020. (App. 930). This appeal follows.

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

> Where Robinson was convicted by a jury of one set of charges several months prior to pleading guilty to a second set of charges, the PCR court erred as a matter of law by conflating the deficiency and prejudice prongs of *Strickland*, ignoring the required presumption of competence, and relying entirely on hindsight to find counsel constitutionally ineffective for failing to advise Robinson prior to pleading guilty that a concurrent sentence on the plea convictions did not mean his trial convictions—which were pending on appeal at the time—were "merged" such that if his trial convictions were eventually overturned on direct appeal or collateral review, the plea convictions would not be simultaneously overturned where counsel never indicated or otherwise suggested to Robinson that an appeal on convictions from the jury trial would somehow also apply to a guilty plea that he engaged in months later and where the voluntariness of the plea did not depend on whether Robinson understood what *might happen* in the future if he were successful in a *different case* because Robinson pleaded guilty based on the twenty-five year sentence and avoiding LWOP.

In its order based entirely on hindsight and Robinson's self-serving testimony, the PCR court misapplied both prongs of *Strickland* by finding defense counsel constitutionally ineffective for leading Robinson to believe that the twenty-five year plea he entered into months after being convicted at trial meant "his guilty pleas would never result in him getting more time for them than he received for the charges he had been found guilty of at his jury trial." Although counsel never mentioned anything to Robinson about any sort of connection or relationship between these two entirely separate convictions aside from the twenty-five year concurrent sentence, the PCR court ignored the *Strickland* presumption of competence by finding counsel's deficient performance inexplicably created Robinson's bizarre misunderstanding that "the two sets of charges, and the sentences he received, were effectively *merged*" by his guilty pleas such that "any changes to the judgments and sentences imposed at his jury trial would have the same impact upon the [plea] judgments and concurrent sentences."

Conveniently, Robinson realized the two sets of charges were not "merged" at approximately the same time he received a fifteen-year plea offer on remand of the trial charges. Because he is currently serving fifteen years on the trial charges while the twenty-five year sentence on the plea charges still stands, he now complains his 2009 plea was involuntary because he ultimately received a

sweeter deal in 2016 on the trial charges. Instead of considering the circumstances Robinson was facing at the time of the plea—a life sentence—the PCR court relied entirely on *post hoc* assertions from Robinson that he would not have taken the plea offer while ignoring the fact that Robinson never testified or otherwise indicated he would have risked LWOP and gone to trial on these charges.

The PCR court finding credible Robinson's "express understanding" that pleading guilty to offenses such as armed robbery and ABWIK "would never impact his criminal record" and "stood no chance of hurting him in any way," is almost as absurd as its baseless accusation that the State forged the magistrate's signature and maliciously altered arrest warrants. Further, the nonsensical phrase used by the PCR court—that Robinson believed his "guilty pleas would never result in him serving more time than he would have to serve on the charges from his jury trial"—demonstrates the mental gymnastics required to conclude that Robinson's March 2009 plea was involuntary—not because he received a harsher sentence on the plea charges—but because he ultimately received a more favorable sentence on the trial charges seven years later. This Court should grant certiorari, reverse the post-conviction order granting relief, and reinstate Robinson's convictions and sentences.

<u>Post-Conviction Relief Testimony</u>

At the outset of the hearing April 2019 hearing before Judge Kinlaw, PCR counsel clarified Robinson's allegation of ineffective assistance of counsel regarding the plea charges:

> It is the Applicant's position that at the time he was receiving advice from his trial attorney on that subject, he was told that he was being afforded an opportunity for those crimes to be run together with the crimes from the jury trial. That they would all be treated as the same in terms of the start date for sentence. And that the time would be concurrent. And that in his mind, based on the advice of Counsel, he was -- he believed that they had effectively been merged in terms of that and from there forward, they were being treated as -- as one set of judgments and sentences effectively entered on the same date and merged for all intent and purposes.

(App. 617–18). Robinson testified he was convicted of the trial charges in January 2009, and that he received an aggregate twenty-five year sentence. (App. 624). Regarding the plea charges, Robinson

testified his attorney told him in February about a plea offer where he would receive a twenty-five year sentence that would run concurrent to the sentence he received at trial. (App. 624). Robinson ultimately accepted this offer. Robinson testified he pleaded guilty because he already had a twenty-five year sentence from the jury conviction, and if he did not plead guilty to these charges, the State was going to seek LWOP. (App. 625). Robinson testified he took the twenty-five year offer because it "ran in with the [twenty-five] years [he] was already serving." (App. 625).

Robinson explained that he understood concurrent meant that his sentences from the two sets of charges would be run together. (App. 625). When asked if the term "concurrent" was used with regard to sentencing, Robinson responded, "Just the sentencing. That's all I'm - -." (App. 625). He was then interrupted by PCR counsel, who asked what else "they" talked about. (App. 625–27). He then clarified that his "whole reason for pleading" was based on his understanding that, as a result of the plea, he would never have to worry about receiving more time for those charges than he had already received on the trial charges. (App. 626). Robinson then testified that "serving twenty-five years was the purpose of me pleading" (App. 637), but later testified he "would have never pled" had he known the charges were not "legally merged." (App. 664). Robinson then testified he did not recall whether plea counsel discussed this with him before the plea hearing in March 2009. (App. 664). Finally, Robinson testified that "nothing in the legal advice given to [him] by [his] attorney led [him] to understand that the only thing overlapping about these cases was the sentences." (App. 664).

Counsel testified, "[T]he goal for the guilty plea on current time, the sentences, was to reduce his exposure and eliminate to the largest extent possible the possibility that he'd be sentenced to life without parole." (App. 668–70). Because counsel no longer had his file and the plea occurred over ten years prior to the April hearing, counsel testified he did not recall the exact conversation he had with Robinson about the concurrent sentences. (App. 668–69). The following exchange took place during

PCR counsel's direct examination:

SHURLING:	So, basically, to be fair, you have no independent recollection of ever having a discussion with him about the fact that the charges being -- the sentences being concurrent only referenced the penalty -- the sentences themselves, and did not in any other respect merge the cases?
MOORMN:	Could you ask that question one more time?
SHURLING:	Do you here today -- and I realize you don't have your file. But do you have any independent recollection of ever explaining to him that the concurrency of the two sentences dealt only with the two sentences overlapping and in no regard indicated that the matters had been otherwise merged for any other legal purposes?
MOORMAN:	I'm just trying to understand the question. So –
SHURLING:	Let me rephrase it –
MOORMAN:	Yeah.
SHURLING:	-- if it's that poorly articulated. I'll say it fast. Did you ever talk about the fact that, look, this means this 25 and that 25 are going to be served at the exact same time, they're overlapping each other? You told him that?
MOORMAN:	I believe I did.
SHURLING:	And do -- you do not deny, do you, telling him what he testified to Monday, that you, basically, told him that these new pleas were not going to result in him serving any more time than he would have otherwise served on the jury trial?
MOORMAN:	I don't independently remember saying that, but I would have. Because that was the -- the recommendation on the pleas was for the same time that the sentence was for that he received at the jury trial, so.
SHURLING:	Thank you.
MOORMAN:	Yeah.
SHURLING:	But to be fair to Mr. Robinson, you don't have any recollection of telling him that for any other purpose, if he wanted to appeal the jury trial, if he was doing a PCR, whatever, that they still were independent cases and had to be treated independently as far as anything he might file in the future?
ROBINSON:	I can't remember telling him that -- I can't remember telling him that. I just don't have any independent recollection.

(App. 670–71).

At the January 2020 evidentiary hearing before Judge Hayes, Robinson agreed with PCR counsel that at least part of his motivation in taking the plea deal was to avoid potential exposure to

LWOP. (App. 816). He was aware at the time he receive the plea offer that the State was planning on serving him with a notice of intent to seek LWOP if he did not plead guilty. (App. 820–21). He testified again that his "whole purpose of pleading" was because he thought "it was all merged together." (App. 822). He then clarified that his "whole purpose of pleading" to the plea charges was because he already had twenty-five years, he "was expecting it to [run] together," and that he did not expect "to be doing time for different charges." (App. 822). Robinson further testified there would have been any purpose in taking the deal had he known the two sets of charges were not merged. (App. 824). Robinson testified it was his understanding "that if anything had happened to those judgments and sentences from [his] jury trial that was beneficial to [him] would also apply to the judgment [and sentences for the rest of the charges." (App. 825).

Robinson then testified on re-cross that he pleaded guilty both to avoid LWOP and because he thought his guilty pleas and trial convictions were merged. (App. 830–31). He again testified he pled based on serving twenty-five years but that he "did not expect it to not be merged together on down the line." (App. 831). He stated he believed the two cases were "permanently merged" and "that what affected one would affect the other." (App. 831–32).

Moorman also testified. He was asked specifically whether he told Robinson that his guilty plea charges and sentences were merged. (App. 835). The following exchange ensued:

KEY:	Okay. Did you tell Mr. Robinson that everything was merged?
MOORMAN:	So ---
SHURLING:	Your Honor, I'm sorry. I'm reluctant to ever interrupt, but I would somewhat object. Well, not somewhat, I would object. We've agreed not to replow that field and to rely on the April 2019 transcript. And it appears that Respondent is now endeavoring to go back through questioning on the underlying issues that we agreed to rely on the transcript from the former proceeding for. [3]

[3] Prior to the January 2020 hearing, the parties apparently agreed to submit and incorporate the April 2019 transcript. It is unclear based on the record the exact terms of this agreement. However, although she elicited further testimony from Robinson, PCR counsel attempted to prevent the State from questioning counsel at the January 2020 hearing.

KEY: Your Honor, there was testimony during Mr. Robinson -- or Mr. Robinson testified that he thought the charges and sentences were merged. All I'm trying to do is defend that allegation by asking these questions of his attorney.

SHURLING: And again, Your Honor, I would note that those same exact representations were made by Mr. Robinson at the previous proceeding and Respondent had the opportunity to ask Mr. Moorman any questions and wanted to elicit answers they hoped would defend against the merits of the underlying claims at that time. And what they're doing is having agreed to rely on the record from the prior proceeding, they're now attempting to have a second bite of the apple. And that isn't fair.

(App. 835–36). The Court allowed the question. (App. 836).

KEY: Mr. Moorman, did you tell Mr. Robinson that his jury conviction and his guilty plea conviction, the charges and the sentences, were merged?

MOORMAN: As I testified in the hearing in April, I cannot remember specifically what I said to Mr. Robinson as it related to the relationship between the charges.

I can tell you -- what I can say is I did not tell him that charges to which he'd pled months after a guilty verdict that his appellate rights for those charges with the guilty pleas and his appellate rights with the -- related to the jury convictions, that somehow they were all lumped in together and that an appeal on conviction from the jury trial somehow would also be an appeal on a guilty plea that he engaged in months later. I did not affirmatively represent that to him in any conversations we had.

(App. 837). The following exchange subsequently occurred on cross-examination:

SHURLING: Do you recall in your previous testimony saying that you had no recollection of giving him any advice concerning what impact, if any, subsequent appeals of the jury trial, judgments and sentences would have on the guilty plea judgments and sentences?

MOORMAN: Could you ask that question one more time?

SHURLING: Do you recall testifying here previously that you had no recollection of ever advising your client of what impact, if any, subsequent appeals from the judgments and sentences entered at the jury trial would have on the judgments and sentences entered on the separate grouping of charges pursuant to the guilty plea? That you had no recollection of having any discussion with him about what consequences, if any, subsequent appeals on the jury trial cases, and sentences and judgments would have on the guilty plea cases and judgments?

MOORMAN: Yes.

SHURLING: But is that still true?

MOORMAN: Yes.

SHURLING: I'm trying to understand if you have no recollection of having any discussion with him about that, then how can you be sure here today that you didn't say something to him that he could have interpreted to mean that the two sets of judgments -- judgments were, in fact, merged as opposed to simply sentences overlapping?

MOORMAN: In my testimony I don't -- my testimony is not that -- I can't speak to how he interpreted what I told him. So I -- any testimony -- I'm not giving an opinion as to how he viewed what I told him. So I don't know if I understand your question.

SHURLING: Well, I guess what I'm saying is if your testimony at the previous proceeding, and the record will speak for itself, is that you have no recollection of giving him any advice concerning what impact subsequent appeals of any sort with regard to the judgments and sentences entered at the jury trial would have on the judgments and sentences entered pursuant to the plea, that you have no recollection of going there with him, of telling him anything concerning that. And taking your former testimony to be truthful, as I do, my question is how can you say now what you do know is that you never told him that the two were merged per se?

MOORMAN: My testimony was that I never told him that -- the reason why is that is not a -- **that thought never occurred to me until today when I was in court that that's an incorrect statement of the law. I would never have said that.**

So that's where it comes from. I would never have said that because that's not a correct statement of the law. The fact that my client was found guilty in a jury trial, that he pled months later, and the appeal related to the convictions for the jury trial somehow would be linked, that notion would have never occurred to me.

SHURLING: I understand. But you do understand that the defendant's state of mind, what he believed you to have meant and what he relied upon in formulating his decision to waive his very valuable right to a jury trial is the operative question, his state of mind at the time of his plea.

MOORMAN: I'm going to let the judge decide what the operative ---

SHURLING: Okay.

MOORMAN: --- question is

SHURLING: If you have no recollection of engaging in that discussion with him, that's consistent with your testimony from before?

MOORMAN: Yes.

SHURLING: My question is -- just a second ago you said until today that underlying issue had never occurred to you. We addressed that issue to a degree in the previous proceeding, did we not?

MOORMAN: My testimony was not that the underlying issue never occurred to me. The specific -- the specific advice, the possibility of the advice of me affirmatively instructing him that somehow his appeal rights related to a jury verdict of

> guilty and his appeal rights related to a guilty plea that occurred months later somehow had been linked or the appeal on the jury verdict covered the guilty plea appeal, that was the testimony. So the issue -- I've known about the issue.

(App. 837–40).

Discussion

The Sixth and Fourteenth Amendments to the United States Constitution guarantee all criminal defendants the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). In post-conviction relief actions, 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. *Id.* at 687. To obtain relief, 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. *Id.* at 687–88; *accord. Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable").

The applicant has the burden of establishing both deficiency and prejudice in order to be entitled to relief. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRCP. To prove deficient performance, the applicant must establish that, in light of all the circumstances, the acts or omissions complained of "were outside the wide range of competence" demanded of attorneys in criminal cases. *Strickland*, 466 U.S. at 688. To prove prejudice, the applicant must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. A reasonable probability is a probability "sufficient

to undermine confidence in the outcome." *Id.* Significantly, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id*. at 696.

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. *Jordan v. State*, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988). 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. *Hill*, 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.* 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 v. Kentucky*, 559 U.S. 356, 372 (2010).

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).

"[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). The test 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." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). The State may properly encourage guilty pleas either by being more lenient to those who enter such pleas, *Brady v. United States*, 397 U.S. 742, 750–53 (1970), or by increasing the risks of punishment on those who do not. *Alford*, 400 U.S. at 37 (1970). 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) (citing *Hill*, 474 U.S. 52).

A. Although the record clearly demonstrates Robinson understood the terms of the March 2009 plea agreement and twenty-five year sentence that would run concurrent to the twenty-five year sentence he received at his January 2009 trial, the PCR court blatantly disregarded the *Strickland* presumption of competence by blatantly relying on hindsight and Robinson's self-serving, contradictory testimony to conclude Robinson's March 2009 plea involuntary as a result of counsel's constitutionally deficient performance based on Robinson ultimately receiving a fifteen-year sentence on remand of the trial charges in 2016.

Despite Robinson's self-serving, contradictory testimony, the PCR court based its entire ruling on Robinson's purported "understanding" of the March 2009 plea agreement. These factual determinations are not just incorrect; they are directly contradicted by other evidence in the record including Robinson's own testimony. *See Goss v. State*, 425 S.C. 101, 108, 820 S.E.2d 373, 376 (2018) ("When a factfinder evaluates the credibility of witnesses, the mental process employed often requires the credibility evaluations to be based upon a consideration of all the evidence, not simply the parts the factfinder chooses to see and hear first-hand.").

Instead of acknowledging the sentence included in the plea offer—twenty-five years—the PCR court nonsensically couches the plea offer as an assurance that Robinson's "guilty pleas would not result in him serving more time than he would have to serve on the charges from his jury trial." As demonstrated by his multiple requests for clarification, even counsel did not understand what PCR counsel was asking him when she repeatedly used the phrase during direct and cross-examination.[4] (App. 670–71). Nothing in the record indicates counsel "assured" or "advised" Robinson that "his pleas would never result in him getting more time for them than he received for the charges he had been found guilty of at his jury trial." Rather, plea counsel testified he told Robinson the plea offer included a twenty-five year recommendation from the solicitor, which would run concurrent to the twenty-five year sentence he received at trial. (App. 668–70).

In fact, Robinson's testified several time that he pleaded guilty based on the twenty-five year sentence and avoiding LWOP—*not* that he "would never receive more time on the charges he was pleading to than he received for the charges he had gone to trial on." During the April hearing, PCR counsel asked Robinson to specifically state his understanding of the plea offer. Robinson replied,

> Basically, I pled based upon me serving 25 years. And if I didn't plea, they were saying they was going to give me a life sentence. So that's what made me take the plea for the 20 -- 25 years ran in with the 25 years I was already serving.

(App. 623). Robinson mentioned several additional times throughout his testimony that avoiding LWOP and serving a twenty-five year sentence was his purpose or "whole" purpose of pleading guilty. (App. 635, 821).

The PCR court nonetheless faults counsel for failing to explain to Robinson that a concurrent twenty-five year sentence means a concurrent twenty-five year sentence and does not mean charges he

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[4] As Mark Twain is reputed to have said, "The more you explain it, the more I don't understand it." *SEC v. Chenery Corp.*, 332 U.S. 194, 214 (1947) (Jackson, J., dissenting).

was convicted of in a completely separate proceeding would somehow "merge" with the new convictions such that they "would never impact his criminal record and would not result in a longer term of incarceration." At the April hearing, Robinson was asked if the word "concurrent" was used in his discussions about the plea offer with counsel and the solicitor. (App. 623). He responded that it was, but *just with regard to sentencing*. (App. 623). PCR counsel then interrupted him. Contrary to the PCR court's findings, Robinson clearly understood the terms of the plea offer.

In *Williams v. Head*, the Eleventh Circuit Court of Appeals explained that, "where the record is incomplete or unclear about [counsel's] actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment," noting that the "district court correctly refused to turn that presumption on its head by giving Williams the benefit of the doubt when it is unclear what [counsel] did or did not do." 185 F.3d 1223, 1227–28 (11th Cir. 1999). Here, unlike the Court in *Williams*, the PCR court found counsel ineffective despite Robinson's failure to identify anything counsel said or did which led him to believe that "concurrent" applied to anything other than sentencing, which in itself is particularly questionable given his earlier testimony that he understood "concurrent" to apply *only* to sentencing. (App. 664–65). The PCR court nonetheless found counsel "created Robinson's misunderstanding by not making it clear that if the jury trial judgments were overturned in any subsequent appeal, the guilty plea judgments and sentences would not be" and further that counsel failed "to explain that the net result could be that Applicant might ultimately get less time on remand for the charges on which he had gone to trial, or even no time if he were acquitted on retrial." (App. 886). It appears the PCR court ignored counsel's testimony, although it found both Robinson and counsel credible. (App. 863). When asked how counsel knew that he "never told [Robinson] that the two [cases] were merged *per se*," counsel stated he "would never have said that because that's not a correct statement of the law." (App. 837). Counsel further testified that he was

certain he never affirmatively represented to Robinson that his appellate rights "were all lumped in together and that an appeal on conviction from the jury trial somehow would also be an appeal on a guilty plea that he engaged in months later." (App. 835). Robinson's testimony that "nothing in the legal advice given to [him] by [his] attorney led [him] to understand that the only thing overlapping about these cases was the sentences" does not sufficiently "identify the acts or omissions of counsel that were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690.

In yet another example of its refusal to show a modicum of deference to defense counsel,[5] the PCR court bases its deficiency finding in part on counsel's testimony that he did not specifically recall advising Robinson "of the consequences that would follow if his judgments and sentences from the jury trial were to be overturned on direct appeal, or in a PCR action, at a later date." (App. 901–02). It is unclear why it was necessary for counsel to explain a non-consequence of a collateral matter in a different case. *Cf. State v. Marshburn*, 109 N.C. App. 105, 109, 425 S.E.2d 715, 718 (1993): ("To be relevant [to withdrawal of a plea], the defendant must show that the misunderstanding related to the direct consequences of his plea, not a misunderstanding regarding the effect of the plea on some collateral matter."). Nonetheless, counsel's inability to recall specific details of conversations he had ten years ago does not diminish the *Strickland* presumption and is not probative on whether his representation fell below an objective standard of reasonableness. *See Greiner v. Wells*, 417 F.3d 305, 326 (2d Cir. 2005) ("Time inevitably fogs the memory of busy attorneys. That inevitability does not reverse the *Strickland* presumption of effective performance.").

Although *Strickland* instructs reviewing courts to evaluate counsel's actions in light of the "strong presumption that counsel's conduct falls within the wide range of reasonable professional

[5] Review of counsel's actions is hallmarked by deference, 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;

assistance," *Id.* at 689, the PCR court again ignored the *Strickland* deferential standard by finding counsel deficient for "failing to fully advise [Robinson] concerning how a reversal on the judgments and sentences entered at his earlier jury trial might change the sentence for those offenses and thereby change the impact of the pleas he was considering entering." (App. 884). Because Counsel filed a notice of appeal for Robinson following his convictions at trial, the PCR court reasoned, counsel "should have recognized" that his advice regarding the twenty-five year plea offer "was very much contingent upon the outcome of any appeal [Robinson] might win in the future." (App. 887). The PCR court fails to cite any facts or legal principles it applied in reaching this conclusion, and this strained deficiency finding is one of many examples of the PCR court's failure to "eliminate the distorting effects of hindsight" in order to "evaluate the conduct from counsel's perspective *at the time*." *Strickland*, 466 U.S. at 689 (emphasis added). There is nothing in the record—including Robinson's own testimony—suggesting that his decision to plead guilty had anything to do with the possibility of prevailing on appeal.

Throughout its improper hindsight analysis, the PCR court failed to consider that counsel could not have known at that time of the plea that Robinson's trial convictions would be overturned seven years later *and* that he would ultimately receive a more favorable sentence. "That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." *McMann v. Richardson*, 397 U.S. 759, 770 (1970). Indeed, the logical conclusion from this position would require this Court to adopt a standard that counsel is ineffective unless he possesses Periclean foresight adequately represent criminal defendants.

B. Even if the PCR court's hindisght analysis was proper and counsel was somehow deficient for failing to predict Robinson's trial convictions would eventually be overturned and he would ultimately receive a more favorable sentence, the PCR court erroneously concluded Robinson satisfied the *Hill* prejudice standard

because it found only that Robinson would not have taken the plea deal absent counsel's deficient performance and where the record is devoid of anything—including Robinson's own testimony—indicating he would have insisted on going to trial in light of the fact that he received the benefit of the bargain in accordance with what induced his plea—a twenty-five year sentence and avoiding LWOP—and where the PCR's prejudice determination is based in part on baseless accusations of prosecutorial misconduct that were never raised in the application.

Beyond incorrectly applying the *Strickland* deficiency prong, the PCR court's prejuidce determination is based solely on "*post hoc* assertions from" Robinson about what he would have done rather than "look[ing] to contemporaneous evidence to substantiate [Robinson]'s expressed preferences." *Lee*, 137 S. Ct. at 1966; *cf. Hooper v. Garraghty*, 845 F.2d 471, 475 (4th Cir. 1988) (noting that, while a defendant's self-serving statement after-the-fact that he would have proceeded to trial absent counsel's act or omission "carries some probative value, such a statement suffers from obvious credibility problems and must be evaluated in light of the circumstances the defendant would have faced at the time of his decision"). Although the *Hill* prejudice prong "focuses the inquiry on a subjective question, the answer to that question must be reached through an objective analysis." *Hooper*, 845 F.2d at 475.

Here, not only was Robinson facing LWOP on the plea charges, he had twenty-three additional pending warrants which were all dismissed in exchange for his guilty plea. Specifically, the State *nolle prossed* three additional armed robbery charges; two additional ABWIK charges; a first-degree burglary charge; an additional ABHAN charge; and multiple conspiracy and weapons charges as part of the plea agreement. In its failed attempt to reconcile its prejudice finding with the overt benefit Robinson obtained by the dismissal of these charges, the PCR court relied on Robinson's testimony that he was "not worried" about being prosecuted on any of the twenty-three charges that were dismissed as part of the March 2009 plea deal because "he was not guilty of those crimes." (App. 885). The PCR court further found credible Robinson's testimony that he was only charged with these

offenses because law enforcement was trying to "clear their books" and that the State wanted him to plead guilty to one set of these charges and dismiss the rest which would "enable them to record that all twenty-seven charges" had been resolved. (App. 885). Robinson's contention "that the State did not get indictments on twenty-three of the dismissed charges was at least some evidence of that intent by the State" is also a statement the PCR court somehow found credible. (App. 887). These self-serving conclusions do not survive even the slightest scrutiny. Solicitors routinely dismiss unindicted charges in accordance with plea agreements. Moreover, the PCR court's statement that the State did not "get" indictments is inaccurate—the State *never sought* indictments on these warrants.

The PCR court further proceeded to baselessly attack the solicitor, magistrate judge, and arresting officer, referring to *all* of the arrest warrants as "purport[ed] to be signed off" by Judge Hudson and claiming "the signature on three of the [*nolle prossed*] arrest warrants are not even similar to the signature on the other twenty." (App. 883). For no discernable reason, the PCR court indicates that one warrant from the trial charges and three *nolle prossed* warrants are dated December 27, 2009. None of the twenty-seven warrants are dated December 27, 2009. According to the PCR court, however, these "facts" somehow support the reasonableness of Robinson's alleged "understanding" that his two sets of charges were merged, and that he was prejudiced because counsel "created this misunderstanding."

It is worth noting that the warrants were never even *mentioned* at the evidentiary hearing before Judge Hayes, although Judge Kinlaw admonished PCR counsel during the April 2019 hearing for claiming "they" altered dates on certain warrants when she "[doesn't] have a clue who 'they' are." (App. 650). When PCR counsel continued complaining about the audacity of some unspecified person fixing a date by hand, Judge Kinlaw correctly pointed out that the date on the warrant matched the dates on the sentencing sheets. (App. 650). Although no prosecutorial misconduct claim was ever

raised, PCR counsel proceeded to double down on her accusations, speculating that the solicitor presented false or improper information to the grand jury. (App. 650). Disparaging rhetoric cannot substitute for evidence, of which PCR counsel presented none. Moreover, none of these alleged issues with the warrants are probative on Robinson's belief that his two sets of charges were merged.

The PCR court further refers to unspecified "documentation" which purportedly supports Robinson's testimony that he "pleaded to the charges not because he was guilty, because he was getting threatened with L[W]OP if he did not plea[d]." (App. 885). The solicitor presenting Robinson with the reality of his two options—forgoing trial or facing LWOP—on charges of which he was plainly subject to prosecution is not a "threat" despite the PCR court's ridiculous characterization of it as such. *See Brady*, 397 U.S. at 751 (declining to hold a guilty plea compelled and invalid "whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged"); *cf. Dingle v. Stevenson*, 840 F.3d 171, 175 (4th Cir. 2016) ("Some element of pressure exists in every deal, as the tradeoff between present certainty and future uncertainty is emblematic of the process of plea bargaining."); *United States v. Cox*, 464 F.2d 937, 942 (6th Cir. 1972) (noting that 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") (citing *Brady*, 397 U.S. 742).

Nonetheless, to the extent Robinson pleaded guilty to avoid LWOP, this decision "did not render his plea involuntary." *Satterwhite v. State*, 325 S.C. 254, 259, 481 S.E.2d 709, 712 (1997). *Wicker v. State*, 310 S.C. 8, 425 S.E.2d 25 (1992) (explaining that "pleading guilty to preclude exposure to the death penalty does not, in and of itself, render an otherwise valid guilty plea defective (citing *Alford*, 400 U.S. at 39 (1970); *cf. Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (pointing out that

the difficult choice between going to trial and pleading guilty is an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas).

Further in support of its prejudice determination, the PCR court refers to Robinson's "credible" testimony that the State had "no evidence" he was guilty of the charges he pleaded guilty to in March 2009 and that he was "falsely accused" of the trial charges he pleaded guilty to in 2016.[6] (App. 878, 885). This factual determination is at odds with Robinson's "solemn declaration" of guilt made during both plea hearings, which "carries a presumption of truthfulness." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977); *see Fields v. Attorney Gen. of State of Md.*, 956 F.2d 1290, 1299 (4th Cir. 1992) ("Absent clear and convincing evidence to the contrary, a defendant is bound by the representations he makes under oath during a plea colloquy."); *cf. United States v. Smith*, 440 F.2d 521, 528–529 (7th Cir.) (Stevens, J., dissenting) (explaining that 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). By crediting what was so obviously self-serving, the PCR court did not address or even acknowledge the fact that Robinson previously admitted his guilt in open court.

Crucially, the PCR court further erred in its prejudice determination because it did not analyze Robinson's claim in the context of whether he would have gone to trial; instead it credits Robinson's testimony that he "never would have taken the plea deal" absent counsel's deficient performance. According to *Hill*, the defendant must show "a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty *and would have insisted on going to trial*." 474 U.S. at

[6] The PCR court further found Robinson's decision to proceed forward with the instant PCR action supported its decision to grant relief because Robinson "was confident the State did not and could not have any evidence to convict him on any of these charges." (App. 886). The State has been unable to locate any caselaw suggesting that a PCR applicant's decision to proceed forward with his own PCR action somehow supports the grant of relief.

59 (emphasis added). A mere allegation by the defendant that he would have insisted on going to trial is insufficient to establish prejudice. *See Stalk v. State*, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009) (explaining that "the prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial").

Robinson, however, does not even make *this* allegation nor did he present any testimony indicating he would have insisted on going to trial. Rather, Robinson claims only that, absent counsel's deficient performance, he would not have entered into *that* agreement. *See Smith v. State*, 369 S.C. 135, 137, 631 S.E.2d 260, 261 (2006) (finding the PCR applicant failed to show prejudice where he "declined to testify whether he would choose not to plead guilty and face another trial in light of the plea bargain he received"). The constitutional requirement of effective assistance of counsel is intended, however, "to guarantee a fair disposition of defendant's case, not to ensure that he is able to drive the hardest possible plea bargain . . ." *United States v. Horne*, 987 F.2d 833, 836 (D.C. Cir. 1993) (citing *Fields*, 956 F.2d at 1298).

In *Thrift*, this Court explained that "a plea bargain rests on contractual principles," and therefore, "each party should receive the benefit of the bargain." *State v. Thrift*, 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1994). *See United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986) (explaining that, in analyzing plea agreements, contract principles will be "wholly dispositive" because "[n]either side should be able . . . unilaterally to renege or seek modification simply because of uninduced mistake or change of mind") (cited with approval in *State v. Compton*, 366 S.C. 671, 678, 623 S.E.2d 661, 665 (Ct. App. 2005). Robinson cannot deny he received the benefit of the bargain—a twenty-five year sentence—although he now claims his plea was induced by the "promise . . . that he would not have to serve any more time for the crimes he pleaded guilty to than he had to serve for those he had been found guilty of at trial." *See Fields*, 956 F.2d at 1299 (finding the voluntary and intelligent nature of

the plea bargain is evidenced by the "by the fact that the plea agreement was favorable to him and accepting it was a reasonable and prudent decision" because he would have received a substantially harsher sentence had he been convicted at trial). The only hint of a "promise" comes from Robinson's own self-serving testimony and his flatly contradicted by the record. Robinson should not be permitted to obtain the benefit on his side of having the State forego prosecuting him for multiple violent crimes only to come back years later and deprive the State of its benefit by forcing it to reassemble its case where witnesses' memories would at best be considerably challenged." *See Premo v. Moore*, 562 U.S. 115, 131 (2011) (cautioning that "[f]ailure to respect the latitude *Strickland* requires . . . may bring instability to the very process the inquiry seeks to protect because prosecutors must have assurances that a plea will not be undone in court years later").

Despite Robinson's failure to identify anything counsel said or did that led him to this bizarre understanding, there is nothing in the record aside from Robinson's own testimony that the plea was induced by anything other than the twenty-five year sentence and avoiding LWOP.[7] The fact that he later received a more favorable sentence on the trial charges does not invalidate his plea—"[p]leading guilty typically entails a deliberate choice to accept the risks and rewards of a deal, and that decision may not be casually set aside on the basis of buyer's remorse." *Dingle*, 840 F.3d at 174; *State v. McGill*, 250 N.C. App. 121, 130, 791 S.E.2d 702, 708 (2016) (finding that a defendant cannot "unilaterally

[7] The State would further note that, although the transcript from Robinson's March 2009 guilty plea is unavailable, on each of the sentencing sheets there is a "checked" box indicating that the plea was "Without Negotiations or Recommendation." (App. 921–24). Each of the four sentencing sheets from his 2016 guilty plea also indicate they were entered without negotiations or recommendations. (App. 580–84). By signing each of these forms, Robinson "manifested his desire to plead guilty and acknowledged the lack of a sentence recommendation." *Holden v. State*, 393 S.C. 565, 575, 713 S.E.2d 611, 616–17 (2011), *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836. This Court has held that "[t]his indication, that the answers provided in the plea sheet were correct, is the most instructive." *James v. State*, 377 S.C. 81, 85, 659 S.E.2d 148, 150 (2008); *see Roddy v. State*, 339 S.C. 29, 35–36, 528 S.E.2d 418, 422 (2000) (reversing the PCR court's grant of relief because "a plea is not involuntary where the applicant did not receive the concurrent sentence he 'expected' because he was never told he absolutely would get concurrent time").

undo the plea agreement because he no longer deems it advantageous based upon collateral matters").

The PCR court's order further includes contradictory findings regarding what induced Robinson's plea. First, the PCR court first finds the only reason Robinson pleaded guilty was because "he was getting threatened with L[W]OP if he did not plea[d]." (App. 905). However, contrary to this finding, the court also found "the only reason [Robinson] pleaded guilty to these charges was his belief that those pleas could not ever result in him getting a longer sentence than he received for the charges originally prosecuted at his jury trial." (App. 906). Further, in its final conclusion, the PCR court states Robinson "unambiguously testified that the only reason he pleaded to these charges was the fact that he believed his charges were being completely merged" with the prior jury trial convictions. (App. 907). Thus, the court's final conclusion that Robinson unambiguously testified the *only* reason he pleaded guilty was because he believed his charges were merged is *directly at odds* with the court's finding that Robinson also pleaded guilty to avoid LWOP.

CONCLUSION

Based on the foregoing argument, this Court should grant certiorari and reverse the PCR court's order granting relief.

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