

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to Cherokee County
The Honorable Lee S. Alford, Plea Judge
The Honorable Robin B. Stilwell, PCR Judge

Appellate Case No. 2017-001777

ALONZO COLUMBUS JETER, III

PETITIONER

v.

STATE OF SOUTH CAROLINA

RESPONDENT

BRIEF OF RESPONDENT

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PETITIONER'S ISSUES ON CERTIORARI

- I. The PCR Court erred in finding that Plea Counsel was not ineffective for failing to provide adequate advice regarding the sell of a controlled substance within proximity of one-half mile of a playground, where the "playground" in question was a basketball goal which was property of a church and was located on the church's private grounds.
- II. ARGUMENT AGAINST PRECEDENT
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RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON CERTIORARI

- I. Petitioner's allegation that plea counsel was ineffective for failure to provide adequate advice regarding the sale of a controlled substance within proximity of one-half mile of a playground is not properly preserved for this Court's review because the issue was never ruled upon by the PCR court.
- II. The PCR court properly found that Petitioner's plea counsel provided effective assistance where he did not challenge indictments for possession of methamphetamine with intent to distribute within one-half mile of a playground because he entered his guilty plea to avoid sentencing exposure at trial, the challenges he wishes were made are factual challenges to the sufficiency of the evidence which were waived at his plea hearing, and the only prejudice he faces are speculative consequences that will only be felt if Petitioner commits additional crimes in the future, if at all.

STATEMENT OF THE CASE

Alonzo C. Jeter, III, (“Petitioner”) is presently confined in the South Carolina Department of Corrections. Petitioner was charged with two counts of distribution of methamphetamine, third or subsequent offense (2015-GS-11-0461; 2015-GS-11-0463); two counts of distribution of methamphetamine within one-half mile of a park or school (2015-GS-11-0462; 2015-GS-11-0464); and one count of trafficking in methamphetamine 10-28 grams, third offense (2015-GS-11-0465). Petitioner was represented by Christopher Kennedy, Esq., and Assistant Solicitor Cliff Sams, of the Seventh Circuit Solicitor’s Office, prosecuted the case. On July 16, 2015, Petitioner appeared before the Honorable Lee S. Alford, waived presentment to the grand jury on all charges, and entered a guilty plea to the lesser-included offenses of two counts of distribution of methamphetamine, second offense; and trafficking in methamphetamine 10-28 grams, second offense. Petitioner also entered a guilty plea, as indicted, to the two counts of distribution of methamphetamine within one-half mile of a park or school.¹ Judge Alford sentenced Petitioner to concurrent terms of fifteen years’ imprisonment for each count of distribution of methamphetamine and trafficking in methamphetamine, as well as concurrent terms of 10 years’ imprisonment for each count of distribution of methamphetamine within one-half mile of a school. Petitioner did not appeal his guilty plea or sentence.

On April 28, 2016, Petitioner filed an application for post-conviction relief. In his application, Petitioner alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel

¹ Petitioner was also charged with possession of an ounce or less of marijuana (2014-GS-11-591), second offense, and entered a guilty plea to that charge in the same proceeding. Judge Alford sentenced him to time-served, and Petitioner does not challenge that conviction in this action.

- a. Counsel failed to investigate and request continuance. . . . A continuance would have given counsel more time to investigate, prepare for mitigation and bargaining, as well as time to discover the applicant's state of mind and needs.
 - b. Counsel failed to challenge insufficient indictments.
 - c. Counsel failed to present nor allow me to present mitigating evidence and factors at opportunity
 - d. Counsel failed to obtain the original plea offer of seven (7) years.
 - e. Counsel failed to inform me of my right to appeal and make sure I understood what it was and how to do it.
 - f. Failure to withdraw guilty plea where indictment charging 'possession with intent to distribute marijuana' did not sufficiently state level of offense.
2. Due Process Violation
- a. My constitutional rights of due process under the Fourteenth Amendment, and applicable case law, was violated as counsel failed to request a competency hearing.
 - i. Absent counsel's errors there is a reasonable probability that the evidence would have been reweighed and thus it would have been concluded that the balance of aggravating and mitigating circumstances did not warrant such harsh sentencing and punishment.
 - ii. Applicant also had the right to be competent when entering a guilty plea and a complete picture of the Applicant's mental condition would have established that the Applicant was suffering from a mental or emotional disturbance both at the time the crimes were committed and at the time of entering a plea of guilty.
 - iii. Due process prohibits this conviction therefore the conviction is illegal.
3. Lack of Subject Matter Jurisdiction
- a. The court lacked subject matter jurisdiction to accept my guilty pleas.

Respondent made its return on November 15, 2016, moved the Court to dismiss Petitioner's allegations regarding subject-matter jurisdiction and due process violations, and requested an evidentiary hearing on the allegations of ineffective assistance of counsel and involuntary guilty plea.

An evidentiary hearing convened on March 20, 2017, before the Honorable Robin B. Stilwell, at the Spartanburg County Court House. Petitioner proceeded on several issues, including

an allegation that his plea counsel was ineffective for failing to challenge the indictments for possession to distribute methamphetamine within one-half mile of a park because the “park” in question was a basketball goal located on the property of the Macedonia Baptist Church, in Gaffney, South Carolina.

Judge Stilwell denied Petitioner’s request for post-conviction relief as to the two distribution charges, and took the allegations of ineffective assistance regarding the distributions of methamphetamine near a school or park and the trafficking charges under advisement. On April 27, 2017, Respondent filed a motion to reopen the record because evidence of Petitioner’s prior convictions were discovered, refuting some of the evidence presented at the March 20 hearing. A hearing on this motion was held on June 30, 2017. At the conclusion of the hearing Judge Stilwell denied Petitioner’s request for post-conviction relief. A final order of dismissal was signed on July 24, 2017.

Petitioner filed a notice of appeal on August 28, 2017, and the appeal was perfected by Lanelle Cantey DuRant, Esq., of the South Carolina Commission on Indigent Defense. Petitioner, through counsel, filed a petition for writ of certiorari on June 6, 2018. On July 24, 2018, Petitioner filed a motion to relieve counsel and proceed *pro se*. Petitioner’s motion was granted and he filed a *pro se* petition for writ of certiorari on October 25, 2018.

In Petitioner’s *pro se* petition, he presented the following issues:

1. The PCR Court erred in denying post-conviction relief to the Petitioner when plea counsel failed to have Petitioner’s mental competency examined and allowed Petitioner to enter in a guilty plea while under duress;
2. The PCR Court erred in finding that Plea Counsel was not ineffective for failing to provide adequate advice concerning proximity within one-half mile of a park/school;
3. The PCR Court erred in not finding Plea Counsel ineffective for failing to challenge the improper enhancement of Petitioner’s 2015

methamphetamine convictions based on a prior possession of crack cocaine conviction from 2004 and a possession of marijuana conviction from 2013;

4. The PCR Court erred in denying Petitioner's Motion for Discovery which would have provided the PCR Court and Petitioner with facts and evidence of Petitioner's PCR claims;
5. The PCR Court erred in granting the State's Motion to Reopen the PCR Record thereby prejudicing Petitioner and violating Petitioner's Due Process Rights.

Respondent made its return to the petition for writ of certiorari on February 15, 2019.

Respondent stated the issues as follows:

1. The post-conviction relief judge properly found Petitioner was not entitled to post-conviction relief due to improper sentencing enhancements where Petitioner failed to prove that counsel was deficient in advising him to plead guilty to the charges and Petitioner was further not prejudiced by Counsel's conduct where the State had substantial evidence of Petitioner's guilt and the weight of the charges against Petitioner could have resulted in a sentence of life without parole rather than the fifteen year term of imprisonment Petitioner received pursuant to the terms of his guilty plea (Petitioner's Issue III).
2. The post-conviction relief judge properly found Petitioner was not entitled to post-conviction relief where Counsel was not ineffective for failing to make factual challenges to the two indictments for distribution of methamphetamine within one-half mile of a park or school and Petitioner was not prejudiced whatsoever by any error where Petitioner would still be serving the same sentence regardless of whether the indictments at issue.
3. The post-conviction relief judge properly found Petitioner was not entitled to post-conviction relief where Counsel was not ineffective for failing to have Petitioner's mental competency examined where Petitioner made no statements or engaged in any behavior that would lead Counsel to question Petitioner's competency. Further, Petitioner failed to establish prejudice from Counsel's alleged error where he produced no evidence that he was actually mentally incompetent. (Petitioner's Issue I).
4. The post-conviction relief judge properly denied Petitioner's Motion for Discovery where Petitioner failed to establish good cause for the PCR judge to grant the motion.
5. The post-conviction relief judge properly granted the State's Motion to Reopen the Record.

The matter was transferred to the Court of Appeals on February 28, 2019. On October 19, 2020, this Court granted certiorari as to Issue Two, and ordered briefing, as provided by Rule 243(j) SCACR. Petitioner filed his first brief on January 26, 2021. On March 1, 2021, this Court denied Petitioner's motion to exceed the page limits of Rule 208, SCACR, and ordered that he file an amended brief within the fifty page limit. Petitioner's amended brief was filed on March 29, 2021.

STATEMENT OF THE FACTS

Petitioner's charges stem from drug transactions that took place in 2015. Cherokee County Sheriff's Deputies captured Petitioner selling methamphetamines on three separate occasions during the course of an undercover narcotics investigation. (App. 16, 4 – App. 17, 9). The first transaction took place on January 12, 2015, and Petitioner was caught on video selling methamphetamine to an undercover operative. (App. 16, 6-10). The investigation continued when officers again purchased an eight ball (approximately 3.4 grams) of methamphetamine from Petitioner on January 14, 2015. (App. 16, 11-21). Finally, undercover officers coordinated with Petitioner to return the next day to purchase more narcotics. On January 15, 2015, Petitioner was caught on video selling 10.4 grams of methamphetamine to an undercover operative. (App. 16, 22 – App. 17, 9).

STANDARD OF REVIEW

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

ARGUMENT

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. *Strickland*, 466 U.S. at 687. “There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel’s assistance after conviction or 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. “[E]very effort must be made to eliminate the distorting effects of hindsight” and to evaluate counsel’s decisions at the time they were made. *Id.* Accordingly, courts must be wary of second-guessing counsel’s tactics. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the petitioner must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” *Cherry*, 300

S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117-18, 386 S.E.2d at 625. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. *Strickland*, 466 U.S. at 693. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.*

Regarding guilty pleas specifically, an applicant must show there is a reasonable probability that, but for ineffective assistance of counsel, he or she would not have pled guilty but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). The petitioner's right to contest the validity of a plea is usually, but not invariably, foreclosed because of the inherent solemnity and truthfulness inherently included in the plea's judicial procession. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Absent valid reasons why the applicant is entitled to depart from previous judicial admissions made at the plea hearing, statements made during the original proceeding remain conclusive. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

I. Petitioner’s allegation that plea counsel was ineffective for failure to provide adequate advice regarding the sale of a controlled substance within proximity of one-half mile of a playground is not properly preserved for this Court’s review because the issue was never ruled upon by the PCR court.

Respondent asserts at the outset that issue two of Petitioner’s petition for writ of certiorari, on which this Court granted certiorari, was not presented to nor ruled upon by the PCR Court, and therefore is not preserved for appeal. Petitioner frames the issue as a question of whether the PCR Court erred in finding that plea counsel was not ineffective for failing to provide adequate advice regarding whether the facts of his case supported a charge of selling narcotics within one-half mile of a park or school. No such finding was made by the PCR court. The PCR Court only ruled upon whether plea counsel was ineffective for (1) failing to investigate and request a continuance, (2) failing to present mitigation evidence, (3) failing to obtain the original seven year plea offer, (4) failing to inform Petitioner of his right to an appeal, (5) failing to challenge the sufficiency of the indictments, (6) failing to challenge improper enhancements.

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. *Gaddy v. Douglass*, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). “At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge.” *Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014) (citing *Wilder Corp v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). “If an issue was neither raised at the PCR hearing nor ruled upon by the PCR court, it is procedurally barred.” *Plyler v. State*, 309 S.C. 408, 409, 424 S.E.2d 477 (1992) (overruled on unrelated grounds) (citing *Hyman v. State*, 278 S.C. 501, 299 S.E.2d 330 (1983)). An issue not argued in an appellant’s brief is deemed abandoned on appeal. *State v. Stone*, 290 S.C. 380, 350 S.E.2d 517 (1986).

Respondent notes that the Court's November 30, 2020, order addressing several of Petitioner's motions characterizes the issue as "whether the post-conviction relief court erred by finding trial counsel was not ineffective for failing to provide adequate advice concerning his indictment for distribution of a controlled substance within proximity of a school." Petitioner attempts to reframe the issue with arguments that his guilty plea was made involuntarily, that plea counsel was ineffective for failing to investigate the physical characteristics of the church, and that plea counsel failed to ensure a proper factual basis existed and statutory elements were met for his charges and plea.

To the extent that counsel's advice regarding the proximity indictments was addressed by the PCR court, it was only regarding advice on whether the church listed in the indictments meets the elements of the statute. Petitioner now argues that the indictments should have said that the locations giving rise to a proximity charge must be "public" places, and that a drug transaction made within proximity of such a location must be sold "knowingly." None of this was raised and ruled upon by the lower court and Petitioner did not file a motion to conform the pleadings to the evidence. His arguments that his counsel failed to advise him that he may have had a defense to the proximity charge, or that the indictments did not adequately recite the statutory language are simply not proper. Therefore, this issue is not properly before the Court and is not an extraordinary case where preservation deficiencies should be overlooked in the interest of justice.

- II. The PCR court properly found that Petitioner's plea counsel provided effective assistance where he did not challenge indictments for possession of methamphetamine with intent to distribute within one-half mile of a playground because he entered his guilty plea to avoid sentencing exposure at trial, the challenges he wishes were made are factual challenges to the sufficiency of the evidence which were waived at his plea hearing, and the only prejudice he faces are speculative consequences that will only be felt if Petitioner commits additional crimes in the future, if at all.**

Even assuming Petitioner's claims are properly raised, he has failed to show that the PCR court erred in finding that his counsel was not ineffective in advising him on the proximity charge. Petitioner's brief asserts that his plea counsel failed to properly investigate his case, which caused counsel to fail to challenge the indictments and misadvise Petitioner on the proximity offense, and therefore rendered Petitioner's plea involuntary. Petitioner argues that prejudice in his case should be presumed, or alternatively, that he suffered prejudice from his plea counsel's performance because the proximity convictions may be used against him to enhance future charges. Petitioner's brief also raises an "argument against precedent." These arguments are without merit.

- A. The PCR court properly found Petitioner was not prejudiced by his counsel's performance because he was properly indicted and the challenges he wishes were made to the indictments are factual challenges to be made to the sufficiency of the evidence, which were waived when he entered his guilty plea.**

Petitioner argues the PWID proximity indictments were facially invalid because they failed to properly inform him of the elements of the charges he was facing. Specifically, Petitioner alleges that the indictments should have said that the locations giving rise to a proximity charge must be "public" places, and that a drug transaction made within proximity of such a location must be sold "knowingly."

South Carolina law states that:

"[e]very indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided."

S.C. Code Ann. § 17-19-20 (1976).

"An indictment is a notice document." *State v. Gentry*, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). If an indictment is timely made, the circuit court should judge the sufficiency of the

indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense to be charged. *Id.* 363 S.C. at 102-03, 610 S.E.2d at 500. The true test of an indictment's validity is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet. *State v. Smalls*, 336 S.C. 301, 519 S.E.2d 793 (1999). A motion to quash an indictment does not test the sufficiency of the State's evidence; the sufficiency of the evidence can properly be challenged only by a motion for a directed verdict following the State's presentation of its case at trial. *State v. Massey*, 430 S.C. 349, 358, 844 S.E.2d 667, 672 (2020).

Petitioner testified that the charge of distribution within proximity to a park or school related to the proximity of Macedonia Baptist Church. (App. 64, 17-22). Petitioner admitted that the church had a basketball goal on its premises. (App. 64, 21-22). He stated that he did not raise any concerns about whether the church basketball court could sufficiently be considered a "park" to plea counsel because he trusted his counsel to know the law. (App. 65, 10-11). Plea counsel testified that he did not know anything about the church itself, but stated that "a church under the statute complies with the half mile. . . ." (App. 85, 12-14). Petitioner's PCR counsel argued that the indictment was facially invalid because the church in proximity to Petitioner's drug transaction was neither a park nor a school. (App. 105, 5-13).

The indictment in question states the date, Petitioner's full name, the county in which the offense took place, the actions alleged to be unlawful, the specific location giving rise to the proximity offense, the illicit substance alleged to have been distributed, and the specific statute

alleged to have been violated. (App. 227). Petitioner's plea counsel stated that Petitioner was properly indicted and waived presentment of the indictments to the grand jury. (App. 95, 12-23). Plea counsel saw no reason to challenge the indictments on the grounds that the facts did not support the charge. (App. 96, 4-10).

Petitioner's argument that his plea counsel's performance was deficient when he traveled to the church to measure the distance, but not to look for a playground, is immaterial, because the indictment could not have been quashed on either of those grounds. The PCR court properly found that these factual challenges to the allegations contained within an indictment are properly made at trial. (App. 182). The appropriate way for Petitioner to avoid liability on the proximity charges would have been to proceed to trial and move for a directed verdict at the conclusion of the State's case if no evidence had been introduced that a park or playground was within one half mile of where he sold the narcotics or that the State had failed to prove a park or playground existed at the church. Petitioner explicitly waived his ability to do so by entering his plea. He did so after a colloquy from the court that informed him of his rights and the effects of his plea. He cannot now obtain post-conviction relief by targeting facially valid indictments as a way to challenge the sufficiency of the evidence against him.

Because of Petitioner's plea, there simply is no way to know what evidence the State may have introduced at trial to prove the requirements of the proximity statute. Whether he could have actually prevailed on a directed verdict motion is entirely speculative which is insufficient to entitle him to post-conviction relief. Cite to the cases re: speculation is not enough.

Therefore, Petitioner has failed to prove he was prejudiced by his counsel's failure to advise him on challenges to the indictments. This Court should affirm the PCR court's ruling.

B. The PCR Court properly found that Petitioner was not prejudiced by Counsel's performance because Petitioner entered his guilty plea because of concerns about sentencing exposure at trial, not because of plea counsel's alleged misadvice about the indictments.

Petitioner's entire argument is based upon the premise that his counsel misunderstood the law, errantly believed the facts supported a conviction for the proximity charges, and therefore provided ineffective assistance by failing to properly advise him on that point. This argument is without merit because the record shows that any incorrect advice from counsel did not induce Petitioner's guilty plea. Rather, Petitioner entered his guilty plea to the lesser-included offense of trafficking in methamphetamine, second offense, because he did not want to risk the sentencing exposure at a trial for trafficking in methamphetamine, third offense. His plea allowed him to receive a sentence of fifteen years' imprisonment, whereas he would have been facing a mandatory minimum of twenty-five years' at trial. Therefore, he has not met his burden of proving that he was prejudiced by his counsel's performance.

"Ordinarily, a defendant's testimony, several years after a guilty plea, that his plea was induced by erroneous advice of counsel is not persuasive." *Hinson v. State*, 297 S.C. 456, 458, 377 S.E.2d 338 (1989). There is no error where there is no "evidence that a defendant's plea was induced such that, *but for the erroneous advice*, the defendant would not have pled guilty but would have insisted on going to trial." *Roscoe v. State*, 345 S.C. 16, 546 S.E.2d 417 (2001) (emphasis added). To obtain relief on claims that a plea was allegedly induced by misadvice, a petitioner must 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).

Petitioner testified that the charge of distribution within proximity to a park or school related to the proximity of Macedonia Baptist Church. (App. 64, 17-22). Petitioner admitted that the church had a basketball goal on its premises. (App. 64, 21-22). He stated that he did not raise

any concerns about whether the church could sufficiently be considered a “park” to plea counsel because he trusted his counsel to know the law. (App. 65, 10-11). Instead, the only thing he told his attorney was that “they had jumped on [him] in jail” because he “couldn’t get [him]self together.” (App. 74, 9-16; App. 79, 8-14). Petitioner and his PCR counsel had the following exchange on direct examination at the evidentiary hearing:

PCR Counsel: [D]id you plead guilty to [trafficking, second offense] because you believed that those charges were, uh, were going to stick?

Applicant: No, it, um, they said it was my third offense and I asked Mr. Kennedy and he said yes, it’s gonna be my third offense and said that, um, have have a plea deal for ya for second offense and I I took the plea because I thought it was gonna be third offense and, uh, you know, it’s gonna be automatic t - - uh, 25 years.

(App. 65, 23 – App. 66, 6).

He explained that he would have gone to trial if he had known of an entrapment defense and if he would have known that it was not actually his third offense. (App. 76, 16-18).² In any event, Petitioner never stated, and the record does not show, that he entered his guilty plea because of advice he received on the proximity charge indictments.

There is no evidence in the record to suggest that Petitioner entered his plea to the proximity charges because of the alleged misadvice of counsel. The record shows Petitioner did not ask counsel about whether the church’s basketball court in question was sufficient to meet the elements of the statute. Furthermore, he accepted the plea agreement because he wanted to avoid the lengthy mandatory minimum sentencing exposure he would be facing if convicted at trial on the trafficking charge, which the plea agreement reduced to a second offense, allowing him to avoid a mandatory minimum. The notion that Petitioner would have proceeded to trial on both the proximity charges

² Confusingly, he explained that he did know it was not his third offense. (App. 76, 16-22).

and the more severe third-offense distribution charges had his counsel told him that he could likely beat the proximity charges alone is in plain contradiction of the record, as well as common sense. To do so would have been plainly irrational under the circumstances, considering the evidence against him indicating guilt of the distribution charges.³ Whether his plea counsel believed that the proximity offense could be proven by the state at trial is immaterial, because Petitioner chose to accept the plea offer to avoid a greater sentence on another charge.

It is clear that Petitioner was motivated to enter the guilty plea because he wanted to take advantage of the more lenient sentencing range attached to the lesser-included second offenses. Therefore he has not met his burden of showing that he would have proceeded to trial but for counsel's errant advice regarding the PWID proximity indictments. Therefore, he has not shown prejudice and the decision of the PCR court should be affirmed.

C. The PCR court properly found that Petitioner was not prejudiced by his counsel's performance because he is currently serving other concurrent sentences, and it is those other sentences that would be used as enhancements should Petitioner reoffend after serving his present sentence.

Petitioner acknowledges the PCR court's finding that even if the indictment had been successfully challenged, he would still be incarcerated because the proximity convictions' sentences are less than other concurrently imposed sentences that he does not challenge. However, he asserts that he nevertheless suffers prejudice because the proximity convictions may be used to enhance subsequent charges at some point in the future. This argument is without merit.

Prejudice resulting from ineffective assistance of counsel may be presumed where there is a complete denial of a criminal defendant's right to counsel at a critical stage of his trial, where

³ Applicant was caught selling methamphetamine to undercover police operatives on both audio and video on three separate occasions. (App. 15, 12 – App. 17, 9).

there is a constructive denial resulting from his counsel's failure to subject the prosecution's case to meaningful adversarial testing, and when the likelihood that any lawyer could provide effective assistance is so small that such a presumption is appropriate without inquiry into counsel's conduct. *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984). Absent these narrow circumstances, a defendant must show actual prejudice. *Id.* A PCR applicant's burden of proving prejudice is not met by merely showing a speculative possibility that prejudice may have occurred, rather, actual prejudice must be shown. *See Dalton*, 376 S.C. 130, 654 S.E.2d 870 (finding no prejudice where applicant presented no proof beyond mere speculation about what a witness may have said).

For the purpose of sentencing, "the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense. . . ." S.C. Code Ann. § 17-25-50. Where a defendant is convicted on two or more counts for the violation of the Controlled Substance Act arising out of simultaneous acts committed in the course of a single incident, the convictions will be considered as only one for the purpose of sentencing under a subsequent conviction. *State v. Boyd*, 288 S.C. 206, 209-10, 341 S.E.2d 144, 146 (Ct. App. 1986). Additionally, disposing of multiple offenses in a single adjudication avoids separate enhancement of each offense, even though the multiple offenses could be used for enhancement purposes if they were disposed of in separate proceedings. *Bryant v. State*, 384 S.C. 525, 534, 683 S.E.2d 280, 284-85 (2009).

Clearly Petitioner's case is not one in which prejudice may be presumed. The record shows that he was represented by counsel at each critical stage of his trial and that his counsel negotiated a plea agreement on his behalf. His counsel was able to obtain an agreement to allow Petitioner to enter a plea to several reduced charges. There is no evidence supporting the assertion that this

Court should presume prejudice. Therefore, Petitioner must prove actual prejudice to meet his burden.

Petitioner argues that the PCR court erred in not finding that he was prejudiced by counsel's advice on the proximity charges because even though the sentences run concurrently with the longer sentence on the trafficking charge, those charges may nevertheless be used to enhance a future offense that he may commit in the future. This is entirely speculative, and is insufficient to support post-conviction relief. It is unknown whether Petitioner will serve his time, be released, reoffend, be prosecuted, and have his proximity convictions used against him as sentencing enhancements. Ultimately, that is up to Petitioner. He cannot obtain post-conviction relief today by asserting that he will commit another crime tomorrow.

Furthermore, even if it could be said with certainty that Petitioner will reoffend, be prosecuted, and his sentences be enhanced, he still would not benefit from post-conviction relief on the proximity charges in this case. He was charged with the proximity offenses for the same drug transactions that gave rise to his distribution charges and entered his guilty plea to all of the charges as part of the same adjudication. Those distribution charges would be unaffected by a grant of post-conviction relief based on incorrect advice regarding the proximity offenses, and therefore the distribution charges could still be used for enhancement. All of the charges were adjudicated in the same proceeding, so they would only count for one total strike. The relief Petitioner is requesting will serve him no benefit. Clearly he has not suffered prejudice from his counsel's performance. This Court should affirm the ruling of the PCR court and deny relief.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the PCR court and deny Petitioner's requested relief.

Respectfully submitted,

ALAN WILSON
Attorney General

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By:



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ATTORNEYS FOR RESPONDENT

July 28, 2021

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

CERTIORARI TO CHEROKEE COUNTY

The Honorable Lee S. Alford, Plea Judge
The Honorable Robin B. Stilwell, PCR Judge
Appellate Case No. 2017-001777

ALONZO C. JETER, III

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RECEIVED

Jul 28 2021

SC Court of Appeals

PROOF OF SERVICE

I, William H. Ray, certify that I have today served the within **Brief of Respondent** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**Alonzo C. Jeter, III, #282902
Dorm-Room-Bunk: U7-0218-A
Tyger River Correctional
200 Prison Road
Enoree, SC 29335**

This 28th Day of July, 2021.



Eva D. Cook
Legal Assistant for Respondent



ALAN WILSON
ATTORNEY GENERAL

July 28, 2021

The Honorable Jenny A. Kitchings
Clerk of Court — SC Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED

Jul 28 2021

SC Court of Appeals

Re: Alonzo C. Jeter, III. v. State of South Carolina
Appellate Case No. 2017-001777
Lower Court Case No. 2016-CP-11-0293

Dear Ms. Kitchings:

Attached is a copy of the original **Brief of Respondent** in the above referenced case for filing in your office.

Sincerely,

William H. Ray
Assistant Attorney General
SC Bar #104476

WHR/ec

cc: Alonzo C. Jeter, III, #282902