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SC Court of Appeals

IN THE SUPREME COURT OF SOUTH CAROLINA
APPEAL FROM GREENVILLE COUNTY

The Honorable **J. Mark Hayes, II,**
Presiding Circuit Judge**,** Thirteenth Judicial Circuit

Appellate Case No. 2020-001361

Oshaun J. Robinson, #327798

Respondent,

v.

State of South Carolina, Petitioner,

Petitioner

RETURN TO
PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR RESPONDENT

NOW COMES the Respondent in the above captioned Post-Conviction Relief appeal, acting by and through his undersigned Counsel, who also represented him in the circuit court PCR action, most respectfully submitting that the circuit court correctly decided this case and that the Order of that court granting Respondent relief should be affirmed.

I.

PROCEDURAL HISTORY

At the conclusion of a jury trial commencing on January 15, 2009, Respondent was convicted of charges of Simple Assault (08-GS-23-5384), Criminal Conspiracy (08-GS-23-5383), and Possession of a Weapon (08-GS-23-5382), Armed Robbery and Possession of a Weapon During the Commission of a Violent Crime. (08-GS-23-5382). He received an aggregate sentence of twenty-five (25) years on those judgments. On March 4, 2009, Respondent once again appeared before the Court of General Sessions at which time he entered pleas to the following additional charges; 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). Judge Miller sentenced Respondent to imprisonment in the custody of the South Carolina Department of Corrections for concurrent terms of five (5) years for criminal conspiracy, twenty (20) years for assault and battery with intent to kill, twenty-five (25) years for armed robbery, and five (5) years for possession of a weapon during the commission of a violent crime. Said sentences were ordered to run concurrently with each other and concurrent to the sentences imposed at his earlier jury trial. As a result of these additional judges and sentences, Respondent was left with an aggregate sentence

of twenty-five (25) years. Respondent did not pursue a direct appeal from the judgments and sentences entered pursuant to his guilty pleas.

Respondent was represented in the Court of General Sessions on both sets of charges Andrew Burke Moorman, Esquire. Attorney Moorman also represented Respondent at his earlier jury trial on the other charges discussed *supra.* Assistant Solicitor Lucas Marchant, Esquire, represented the State in the prosecution of these charges. Respondent did pursue a direct appeal from the judgments and sentences entered at his ***jury trial.*** The public records of the South Carolina Court of Appeals verify that this direct appeal was filed by Trial and Plea Counsel, Andrew Moorman, on January 23, 2009. In an unpublished opinion, the South Carolina Court of Appeals affirmed those convictions and sentences. *See, State v. Robinson*, Unpublished Op. No. 2012-UP-042, decided January 25, 2012. Those judgments and sentences were, however, overturned in a subsequent PCR appeal. *Oshaun J. Robinson, v. State*, Op. No. 2015-MO-018 (Sup.Ct. dated April 15, 2015). The reversal in Respondent's PCR Appeal was based upon the same issue and analysis found in the Supreme Court's decision in the companion case of *Kenneth W Workmen v. State*, Op. No. 27514 (S.Ct. April 15, 2015).

Respondent subsequently entered pleas of guilty on May 16, 2016, to the charges he was originally convicted of at his jury trial. This time, Respondent received an aggregate sentence of fifteen (15) years of those judgments. Said sentences were run concurrent to each other and concurrent to the sentences he received pursuant to his guilty pleas on March 4, 2009, following his earlier jury trial. As a result, Respondent was left with an aggregate term of twenty-five (25) years.

In his Application for PCR, Respondent alleged generally that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteen Amendments to the United States Constitution, as well as Article I, §14 of the South Carolina Constitution, were violated prior to and during his guilty plea proceeding. He submitted that his pleas were not knowingly and entered inasmuch as they were the product of deficient representation by Plea Counsel in that Pleas Counsel failed to give him sufficient

advice concerning the potential impact of a successful appeal from the judgments and sentences entered at his jury trial.

This Application for Post-Conviction Relief (hereafter PCR) was filed on April 25, 2017 and docketed at 2017-CP-23-02653. Respondent served its Return and Motion to Dismiss on November 2, 2018. A Conditional Order of Dismissal was entered on that PCR action on November 9, 2018. Respondent filed a timely Response to said Conditional Order of Dismissal on December 12, 2018. By way of a Form 4 Order issued by the Court on December 27, 2018, Respondent was granted a hearing. Said Order did not specify whether the matter was to be set for an evidentiary hearing on the merits of Respondent's claims, or, whether the sole issue before the Court was to be whether Respondent should be allowed to proceed with a full PCR action at some point in the future. *See*, Form 4 Order dated December 27, 2018, entered by the Honorable Perry H. Gravely, Chief Administrative Judge. **App. p. 610**. Following that order, a hearing was convened before the Honorable Alex Kinlaw, pressing circuit court judge, on this matter on April 15 and 17, 2019. **App. pp. 612 – 676.** Respondent was present at these proceedings and was represented by undersigned counsel, Tara Dawn Shurling, of the Richland County Bar. Petitioner was represented by Samuel L. Key, then Assistant Attorney General. Respondent testified on his own behalf at this hearing and additionally presented testimony from Plea Counsel, Andrew Burke Moorman. As previously noted, Attorney Moorman had also represented Respondent at his jury trial approximately seven (7) weeks prior to the guilty pleas at issue in this PCR action, **App. p.668, lines 6 – 9.** In addition to that testimony, Judge Kinlaw had before him a copy of the records of the Greenville County Clerk of Court regarding the subjection convictions and sentences, a copy of Respondent's records from the South Carolina Department of Corrections and the pleadings in this matter and the orders previously filed in connection with this PCR action. Judge Kinlaw also had before him copies of the exhibits introduced by Respondent during the April, 2019, proceedings held on Respondent's Motion to Dismiss. The records of the Greenville County Clerk of Court

indicate that the exhibits introduced during the April, 2019, proceedings were filed on April 17, 2019. By Order filed August 22, 2019, the Conditional Order of Dismissal in this matter was vacated. Respondent's Motion to Dismiss was denied.

An evidentiary hearing was convened before this Court on January 22, 2020. Respondent was present for this proceeding and was once again represented by undersigned counsel, Tara Dawn Shurling, Esquire. Likewise, Respondent was again represented by Samuel L. Key, Assistant Attorney General. At the outset of this proceeding, the parties requested that this Court incorporate by reference the testimony heard at the previous hearing before Judge Kinlaw. The parties further agreed that, with certain minor exceptions, that testimony would be accepted by this Court in lieu of testimony from Respondent and Plea Counsel, Andrew Morton. Exhibits introduced during that proceeding were filed on January 22, 2020 and included a transcript of the April, 2019, proceedings. On February 6, 2020, a Form 4 Order was entered directing both sides to file Proposed Orders in this matter. In said Order, the PCR Judge expressly found that the testimony of both Respondent and Plea Counsel appeared believable and was consistent with the transcript of the testimony heard at the April, 2019 proceedings. 8. **App. pp 63 - 865.**

Respondent's current Application for PCR addressed his claims that he received ineffective assistance of counsel prior to and during his guilty pleas approximately seven weeks after his jury trial. He further asserted that he was advised by Defense Counsel to plead guilty to the charges addressed in this Application, but that he was given very limited advice concerning the terms of his pleas, and the potential consequences of his pleas in relation to the judgments and sentences entered at his jury trial. He sought a reversal of the judgments and sentences entered pursuant to his pleas of guilty, entered March 4, 2009, on Indictments No. 2008-GS-23-5385 (assault and battery with intent to kill); 2008-GS-23-5386 (armed robbery) and 2008-GS-23-5387,(possession of a weapon during the commission of a violent crime).

II.

STANDARD OF REVIEW

The burden of proof is on the Respondent in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. *Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rule 71.1(e), SCRCP.* In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that Defense Counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984). In other words, the Respondent must show that, but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. *Id.*; *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. *Ard v. Catoe*, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007). Under the *Strickland Standard,* it is not necessary that an Respondent prove that counsel's deficient performance more than likely altered the outcome of his trial, but rather he is required to establish a probability sufficient to undermine confidence in that outcome. *Strickland, supra*, 466 U.S. at 697.

Where Defense Counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. Defense Counsel may not, however, explain away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992).

On appellate review, the standard of review in Post-Conviction Relief matters depends on the nature of the individual issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, our appellate courts give great deference to a Post-Conviction Relief court's findings of fact and will uphold them if there is *any* evidence in the record to support them. *Smalls*, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016*); Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); *Caprood v. State,* 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). Challenges based on questions of law will be reviewed *de novo* without deference to the lower court. *Id*. Such challenges will be reviewed without deference to the lower court's decision. Our appellate courts will reverse a decision based solely on an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

III.

DISCUSSION

Respondent submits that Defense Counsel neglected to discuss the potential consequences of these guilty pleas with him and that he specifically failed to address how the possible outcome of a direct appeal, and/ or Post-Conviction Relief, case arising from his judgments and sentences from his jury trial, might impact the judgments and sentences entered as a result of his guilty pleas. Specifically, where Respondent was advised that his pleas of guilty on March 4, 2009, would not result in him serving any more time than he had previous received as a consequence of his convictions at his jury trial. He further asserted that Plea Counsel never advised him that the State had not obtained indictments of the other charges they were proposing to dismiss as a term of his guilty plea agreement. While it was possible that the State might have sought indictments on some of the charges in question at a later date, there was no guarantee that the prosecution would succeed in obtaining a true billed indictment on any of these charges. That factor clearly potentially impacted the number of shots the prosecution

would have had at obtaining a life without parole sentence against Respondent had he refused to enter the pleas entered on March 4, 2009 pursuant to an agreement with the State. Respondent argues that, as a consequence of Counsel's inadequate advice concerning the relationship between these two sets of judgments and sentences, he was left with the understanding that the two sets of charges, and the sentences he received, were effectively *merged* by his entry of pleas pursuant to the terms of his negotiated plea deal with the State. Petitioner relies heavily on the fact that Plea Counsel testified that he was certain that he did not use the term " merged" in his conversations with this client about a decision on concerning entering these pleas. In truth, Respondent himself did not initially use the term "merged" to describe his understanding of the consequences of entering the pleas in question. He testified in terms of understanding that the set of charges sentences from his trial and from his pleas would be run together. He expressly stated that he never understood that if he chose to appeal the judgments and sentences from the jury trial, he would have to appeal those arising from his guilty pleas separately through a PCR action in order to try to avoid his twenty-five year sentence attached to his guilty pleas remaining in place and eliminating any possible gain obtained following a successful appeal from the judgments and sentences entered following his conviction at his previous trial. **App. p. 624, line 14 – p. 627, line 1; App. p. 665, line 1 – p. 667, line 3.**

Respondent's testimony during the hearings held in this matter[1] clearly asserted that it was his understanding that any changes to the judgments and sentences imposed at his jury trial would have the same impact upon the judgments and concurrent sentences entered on the charges addressed in the PCR application currently before this Honorable Court. Respondent's testimony asserts that it was his express understanding that his pleas on these charges would not result in a longer term of incarceration that that he received on the charges he originally went to

[1] Judge Kinlaw; April 15 and 17, 2019 (App.p.612, line 2 – p. 643, line 22) (April 15, 2019, Direct Examination) and Judge Hayes; January 22, 2020. App. p. 659, line 6 – p. 667, line 6. (April 17, 2019; Cross-examination and Re-direct Examination).

trial on. **App. p. 624, line 14 – p. 626, line 18.** Respondent's testimony clearly submitted that he was not worried about being convicted on the charges he was being advised to plead to, or those which the State had offered to dismiss as a consequence of his guilty pleas, because it was obvious to him that law enforcement was just trying to "*clear their books*" on those charges and had no evidence that he was guilty of the charges to which he had pleaded or the charges that were dropped as part of his plea deal. **App. p. 632, lines 10 – 21.** It was his position, however, that he pleaded guilty to these charges because he was assured 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 and it would eliminate the potential risk that the State might succeed in getting a life without parole sentence against him at some time in the future. **App. p. 625, line 13 – p. 626, line 18.**

Respondent testified that Plea Counsel never explained to him that the ***only*** sense in which the judgments and sentences he received as a result of his March 4, 2009, guilty pleas would be connected to the judgments and sentences he received at his earlier jury trial was the fact that his sentences from the pleas would be ordered to be served concurrent to the sentences from his jury trial. While he acknowledged that the fact that the sentences were ordered to be concurrent on applied to the sentences, he steadfastly asserted he was never advised that the two sets of charges would remain separate legally and that if he appealed the judgments and sentences from the jury he would need to appeal the judgments and sentences from the pleas separately if he desired to challenge them as well. Respondent testified that he never would have taken the plea deal if he had understood that fact. He further indicated that if he had understood that fact after his pleas were entered he would have separately attacked the judgments and sentences arising from those pleas. Respondent clearly stated that if he had known he would have to file a separate Post-Conviction Relief action to challenge the judgments and sentences from the guilty pleas he would have done so, but that he never understood that the

judgments and sentences from the guilty please were legally separate and not impacted by the reversal of the judgments and sentences from his jury trial until just days before his pleas on the charges that were originally the disposed of through the jury trial. **App. p. 628, lines 3 – 17; App. p. 642, line 24 – p. 643, line 5.** At that point, Respondent discovered it was too late to file a PCR action pursuant to §17-27-45(A). Respondent then hired Counsel and filed a second PCR action pursuant to §17-27-45 (C). **App. p. 627, line 15 – p. 628, line 2.**

The testimony taken at the hearings on this application reflect Respondent's belief that all the charges disposed of at his jury trial, and those to which he pleaded, were effectively merged. He testified that at the time of the opinion in his PCR Appeal from his jury trial, he did not understand that the reversal of the judgments and sentences from his jury trial did not similarly impact the judgments and sentences from his guilty plea as well. According to his PCR testimony, Respondent did not become aware that his judgments and sentences from his guilty plea proceeding were not simultaneously reversed by the decision from the Supreme Court on his PCR appeal until the final stages of his plea negotiations on the charges which were remanded to the Court of General Sessions as a result of that appeal. Respondent testified that within a few days after this discovery, on May 16, 2016, he entered pleas on the charges which had originally been disposed of at the jury trial addressed in his PCR appeal.

Following these new pleas, Respondent began the task of raising the funds necessary to hire a lawyer in an attempt to secure a collateral review of his guilty pleas addressed in his current PCR Application. On April 25, 2017, less than 365 days after he discovered that his judgments and sentences on these charges had not been overturned along with those arising from his jury trial, Respondent filed his current Application for Post-Conviction Relief. Based upon that chronology, he submitted that this application was timely filed pursuant to S.C.Code Ann §17-27-45(C). **App. p. 665, line 1 – p. 666, line 1.** By previous Order, Judge Kinlaw found this

filing to be timely. Petitioner did not appeal that order and therefore, the timeliness of the filing of this PCR action is not before this Court on appeal. **App. p. 823.**

Respondent was granted the right to proceed on the merits of his PCR Application by Order of the Honorable Alex Kinlaw, filed August 22, 2019. Judge Kinlaw found that the hearing held on April 15 and 17, 2019, was for the purpose of determining whether Respondent should be allowed to move forward with his current PCR Application and be granted an evidentiary hearing on the merits of his underlying claims. Judge Kinlaw then found that Respondent should be granted leave to proceed with this collateral action. In so ruling the Court took into account the Respondent's own PCR testimony, the testimony of his defense counsel, Andrew Burke Moorman, Esquire, the exhibits introduced by Respondent and the arguments advanced by his PCR Counsel, Tara Dawn Shurling. **App. p. 823.**

Judge Kinlaw noted in his Order that Defense Counsel recalled in his PCR testimony, advising Respondent of what the term concurrent meant and the fact that the concurrent sentences he would receive, if he accepted the plea deal being offered, would not result in him serving a longer sentence than that which he had already received at his jury trial. **App. p. 820**. As argued by Respondent, the Court noted that this same Defense Attorney represented Respondent at that jury trial and therefore, would have been very familiar with that case and the sentences imposed at its conclusion. **App. p. 668, lines 6 – 9**.

In the testimony had in this PCR action, Defense Counsel admitted that he had no recollection of ever advising Respondent 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. p. 671, line 5 – p. 672, line 5; App. p. line 24 – p. 856, line 17.** Defense Counsel acknowledged that he did not admonish his client concerning the fact that the two cases were only concurrent as to sentence. He admitted that he *did not qualify* his advice that the entry of the pleas would not result in him receiving any more time for these pleas than he got for the jury trial charges.

App. p. 856, line 18 – p. 859, line 8. Judge Kinlaw found that, on those facts, it was not difficult to see how a defendant might reach the same understanding that Respondent expressed to the Court. **App. p. 821.** Judge Kinlaw's Order assigned no fault to Respondent for failing to find out the reality of what impact a reversal of the judgments and sentences he received at his jury trial would have on the judgments and sentences received pursuant to his subsequent guilty pleas. As far as his SCDC records would have revealed, the sentences on both sets of charges were in fact the same and they were run concurrent. Therefore, Respondent had no notice of what the result of a reversal on the jury trial judgments and sentences might ultimately be. Judge Kinlaw found that, based on his attorney's advice, Respondent had no way of knowing that he might in fact ultimately end up getting more time on the guilty plea charges than he received on the charges originally disposed of by jury trial. Judge Kinlaw found Respondent's testimony credible on this point particularly in light of Defense Counsel's own testimony. As for the timeliness of this current application, Judge Kinlaw's Order found that Respondent had no reason to question the soundness Defense Counsel's advice until he learned, during the plea negotiation process when the jury trial charges were remanded for a new trial, that whatever sentence he received on remand of those charges would not change the sentence he received on the charges currently before the Court.[2] **App. p. 821.**

In addition to the findings made by Judge Kinlaw, this Court is constrained to note several additional facts which persuade this Court of the credibility of Respondent's testimony and the merit of his PCR claims. Respondent was represented at trial by the same lawyer that represented him at the pleas now before this Court for review. The public Records of the South Carolina Court of Appeals show that the Notice of Appeal on those charges was filed by Respondent's lawyer at both his trial and his guilty pleas, Andrew Moorman, on January 23, 2009. Thus, at the time Respondent was advised by Counsel that his pleas would not result in him getting more time on the

[2] The original return closed this paragraph with the sentence, "This Court agrees." This sentence came from the Proposed Order drafted for the Court by Respondent's PCR Counsel and was obviously inadvertently included in the Return as originally filed. That sentence has been stricken in this version of the Return.

charges he was pleading to than he received for the charges he had gone to trial on, he knew there was going to be a direct appeal. Although that direct appeal did not result in the reversal of the judgments and sentence entered at Respondent's trial, it could have and Counsel did not explain how such a reversal might impact Appellant's ultimate aggregate sentence. Furthermore, as a criminal defense lawyer, it is reasonable to infer that he would have know that even if the direct appeal were not successful, Respondent would have a right to a PCR action which might also impact his ultimate aggregate sentence on these two sets of charges.

Judge Hayes found that the degree to which Respondent could reasonably have believed that these two sets of charges were "***merged***", as opposed to simply having concurrent sentences, was further supported by other facts in this case. The twenty-three (23) charges that were dismissed following these pleas were all made brought by way of arrest warrants with supporting made by ***Officer C.W. Hanning*** of the Greenville County Sherriff's Office. Each of the warrants that were dismissed on March 9, 2009, purport to be signed off on by ***Magistrate Judge James E. Hudson***, Judges Code No. 5031. All but *three* of these warrants were dated as signed on December 27, 2007. All twenty-three dismissed charges were *nol prossed* on March 9, 2009. All of Respondent's charges from his trial, his guilty pleas and the warrants that were dismissed following his pleas, were served on him on December 28, 2007. A single warrant on one of the charges that went to trial was dated December 27, 2009, and three that were dismissed, were likewise dated December 27, 2009. The signatures on those three arrest warrants are not even similar to the signatures on the other twenty charges that were dismissed. Furthermore, the PCR Court observed that one of the arrest warrants on a charge to which Respondent pleaded on March 4, 2009, originally showed an offense date of December 18, 2007. The portion of that warrant signed by Magistrate Hudson was likewise originally dated December 18, 2007. Both those dates were changed to December 14, 2007 by hand. The Affidavit portion of that Warrant, again signed by Officer C. W. Hanning, remained dated December 18, 2007. *See, Warrant No. I-474445*. The changes on these dates are not

initialed or dated. On two other of the charges Respondent pleaded to on that date, the offense date was obviously originally December 18, 2007 and the date of the affidavit was also December 18, 2007. Both those dates were changed to December 14, 2007, by hand. The date Magistrate Hudson signed these two warrants was listed as December 18, 2007, but that was not changed on these two warrants unlike I-474445. See, Warrants No. I-474444 and I-474443. None of the changes on these two warrants are initialed or dated. According to the twenty-three (23) warrants for the charges that were dropped, these offenses all occurred between November 21, 2007 and December 14, 2007. App p. 697 - p. 785. Despite the fact that all these offenses took place within the same time period as those for which Respondent went to trial, and those to which he pleaded, it is worthy of note that the State had not obtained true billed indictments on any of charges dismissed in exchange for Respondent's guilty pleas. Respondent has alleged, and Plea Counsel did not dispute, that he was not made aware of this fact prior to his guilty pleas. **App. p. 835, lines 4 – 11.**

The PCR Court found that Plea Counsel's representation was deficient in that he failed to fully advise Respondent 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. Both Judge Kinlaw and Judge Hayes found Respondent's testimony to be credible and not inconsistent with Plea Counsel's own testimony concerning what advise he gave Respondent. For that reason, Judge Hayes found that reversal of the judgments and sentences entered against Respondent on March 4, 2007 was necessary and appropriate. **App. p. 889, para. 2.**

The PCR Court noted that Respondent had been represented throughout this PCR action by Counsel with extensive experience in the field of Post-Conviction Relief. He was questioned at length at the proceeding held on the State's Motion to Dismiss, concerning his understanding of the potential consequences of a reversal of the judgments and sentences involved in this application. He was further questioned concerning the twenty-three (23) other charges against him which were

dismissed on March 9, 2009, following his pleas on March 4, 2009. As noted in Judge Kinlaw's Order, Respondent indicated that he had been advised by his current PCR Counsel that the State might pursue prosecution of some, or all, of those charges if he ultimately succeeded in having his guilty pleas overturned. During that proceeding, Respondent testified that at the time of his pleas he did not know that the State had not even obtained indictments in any of those charges despite the fact that they stemmed from incidents which took place during the same approximate time period as his other charges. Respondent testified that he was not worried about being prosecuted on any of the twenty-three (23) charges that were dismissed, because he was not guilty of those crimes. **App. p. 835.**

Elsewhere in his PCR testimony Respondent testified that he was ***"falsely accused"*** of the crimes the State took him to trial on and noted that his first trial on those charges ended in a hung jury. **App. p. 637, lines 14 – 24.** He further indicated that the only reason he pleaded to the charges before the Court was not because he was guilty, but because he was getting threatened with LWOP if he did not plead. Respondent further testified that he understood that just because the State had not previously sought indictments from the grand jury on these warrants, there was nothing to stop them from attempting to do so in the future should he succeed in getting these pleas overturned. PCR Counsel also questioned Respondent on the record concerning the fact that armed robbery and assault and battery with Intent to Kill are both most serious crimes pursuant to S.C. Code Ann. §17-25-45 and therefore, the possibility existed that he would get a life without parole sentence if the State ever successfully prosecuted him for even one more count of Armed Robbery, Assault with Intent to Kill or any other *most serious* or *serious* offense where the crime occurred more than twenty-four (24) hours before or after the Armed Robbery Count to which he pleaded on May 16, 2017. The charges dismissed following Respondent's pleas on March 4, 2009 included three additional armed robberies, two additional counts of Assault and Battery with Intent to Kill and one count of First Degree Burglary. Thus they gave the prosecution as many as six additional

chance to seek an LWOP sentence against the Petitioner. Respondent testified that the only reason he 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. The PCR Judge who presided over the evidentiary hearing in this case expressly found it believable that the insufficient advice of Plea Counsel created Respondent's misunderstanding by not making it clear that the if the jury trial judgments were overturned in any subsequent appeal, the guilty plea judgments and sentences would not be. Counsel's failure to explain that the net result could be that Respondent 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, resulted his inability to make a fully informed decision with regard to these pleas. Counsel's failure to advise Respondent that the prosecution had not obtained indictments on the twenty-three charges they agreed to dismiss as part of the plea agreement, deprived the Respondent to accurately assess how may opportunities the prosecution would have to seek an LWOP sentence against him if he declined to waive his right was his right to trial on the charges to which he pleaded on March 4, 2009. Likewise, Petitioner's assertion that the sentencing sheets prove there were no "negotiations or recommendations" fails. The Petitioner references portions of Pleas counsel's testimony wherein he speaks to the recommendations in this pleas agreement. ***See***, **Petition for Writ of Certiorari, pgs. 8 and19.**

The records of the proceeding held in connection with this PCR action demonstrate that Respondent firmly asserted that he understood the risks of going forward with this PCR, but was not deterred from going forward because he was confident the State did not and *could not* have any evidence to convict him on any of these charges. Respondent has argued that, in his opinion, the State was simply trying to "*clear their books*" on him by charging him in a bunch of unsolved cases. He explained that he felt the state wanted him to plead to at least one set of these crimes in exchange for them "*dismissing*" the other pending charges as part of a plea agreement; a process which would enable them to record that all twenty-seven (27) charges (the four pleas involved in the

application currently before the Court and the 23 counts dismissed following his pleas on March 4, 2009). Respondent asserted that the fact that the State did not get indictments on twenty-three (23) of the dismissed charges was at least some evidence of that intent by the State. The documentation on the dismissal of these twenty-three charges is found in the Appendix to the State's appeal. **App.pp. 677 – p. 796.** Respondent testified that the State did not have a case against him on these charges or any of the twenty-three (23) other charges that were dismissed after his pleas. In terms of the prejudice analysis required in this, and every PCR case, it is crucial to note that Respondent not being advised that indictments had not been obtained on these charges went directly to Respondent's risk assessment. After all, despite his claims of innocence, Respondent was lead to *believe*[3] the prosecution had many more charges for most serious offenses just waiting to be tried if he chose not to take the deal being offered to him. Since none of the twenty-three charges against him that were ultimately dismissed five (5) days after his pleas had in fact been true billed, there is no way to know whether the State would have been able to try Respondent on any of these charges, much less the ones that would have qualified as a second strike.

Furthermore, it is important to note that Respondent testified that he was not guilty of the charges for which he went to trial and that following the reversal of those judgments and sentences in his PCR appeal, he did not plead to those charges until after he discovered for the first time a few days before the 2016 pleas that the two sets of charges were not legally combined as a consequence of his March 4, 2009 pleas. Respondent unambiguously testified that the only reason he pleaded to these charges was the fact that he believed his charges his pleas were being completely combined with the charges a jury had found him guilty of and, therefore, stood no chance of hurting him in any way. The record below undeniably establishes that Respondent decided to move forward with collateral review of his pleas with full knowledge of the risks involved.

[3] Word *believe i*nserted in the Amended Return to correct a typographical error.

In response to Petitioner's footnote 3, Counsel herein is compelled to note that she was aware of the Petitioner's intent to seek to reopen Respondent's testimony before the hearing before Judge Hayes began.

Petitioner[4] chooses to emphasize repeatedly that the decision of the PCR Court was based entirely upon the self serving testimony of Respondent. That is simply not true. In their Certiorari Petition they acknowledge that Plea Counsel testified that he had no independent recollection of ever advising Respondent that if the two sets of judgments and sentences from his jury trial and his guilty pleas would have to be addressed separately *if* [5]he wished to challenge them on appeal. **Petition for Writ of Certiorari pg. 8.** Petitioner further acknowledged that when Plea counsel was questioned as to whether his previous testimony before Judge Kinlaw was true concerning the fact that he had no recollection of ever advising Respondent concerning what impact subsequent appeals from the jury trial might have on the guilty plea charges and judgments. **Petition for Writ of Certiorari pg. 10.** This argument also demonstrates a fundamental misunderstanding of the operative question before the Court; Respondent's state of mind at the time of the pleas in question.

Ironically, Petitioner relies upon this Honorable Court's decision in ***Turner v. State***, 335 S.C. 382, 385, 517 S.E.2[d] 442, 444 (1999), for the proposition the real question before the lower court is whether Respondent would have still pleaded guilty if correctly advised on these matter, not whether Plea Counsel would have still advised him to. **Petition for Writ of Certiorari, pg. 13.** In the context of a guilty plea, the operative question becomes whether a defendant, but for counsel's errors and omissions, would have exercised his right to trial. ***Hill v. Lockhart***, 474 U.S. 52 (1985). Further, the Respondent must show that there is a reasonable probability that he would have insisted on proceeding to trial on the matter instead of pleading guilty. ***Porter v. State***, 368 S.C. 378, 629 S.E.2d 353 (2006). A guilty plea, along with the resulting waiver of fundamental constitutional

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[4] In the original Return, this sentence contained a typographical error in that the sentence started with "Respondent" when it should have read "Petitioner." That error has been corrected in this Amended Return.

[5] The word if was inadvertently left out of this sentence in the original Return. In this Amended Return if has been added to correct this typographical err.

rights, is valid only if made voluntarily, knowingly, and intelligently. ***Boykin v. Alabama***, 395 U.S. 238, 242-43 (1969) ("For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality."). It has long been established that what a defendant believed the consequences of his plea would be, not what they really would be, is at the validity of guilty pleas. Respondent's insistence on going through with his PCR stands as bold proof of his sworn testimony that he would not have pleaded guilty to the charges in question on March 4, 2009 if he had been adequately advised concerning the possible consequences of an appeal from his judgments and sentences arising from his jury trial. He has also unequivocally testified that he would have filed a separate appeal from these pleas had he know they would not be covered by the direct appeal from judgments and sentences that arose from his jury trial.

In these Post-Conviction Relief proceedings, the Respondent has the burden of proof to establish that he is entitled to relief by a preponderance of the evidence. **Rule 71.1(e), S.C.R.Civ.P.**

IV.

CONCLUSION

In light of the above Respondent asserts that the PCR Court correctly found that Plea Counsel provided Respondent ineffective assistance of counsel prior to and during his guilty plea proceeding on March 4, 2009. The PCR Court correctly found that. on the facts of this case, Plea Counsel should have recognized that his advice to Respondent concerning the fact that his guilty pleas would not result in him serving more time than he would have to serve on the charges from his jury trial, was very much contingent upon the outcome of any appeal Respondent might win in the future. At the time of this advice, he knew Respondent already had a direct appeal pending from his jury trial. He knew this because he had represented Respondent at that trial and, according to the public records of the South Carolina Court of Appeals; he had filed that appeal himself. While it was a later appeal from a PCR action which resulted in the reversal of those judgments and

sentences, the fact that Respondent wanted to appeal his convictions and sentences from his jury trial should have prompted this advice from Plea Counsel. Judge Hayes correctly held that Respondent's pleas of guilty were not knowingly and voluntarily entered inasmuch as they were the product of Plea Counsel deficient representation. Respondent has meet his burden of proof on these Sixth Amendment claims and the PCR Court correctly found that the appropriate remedy is for the judgments and sentences entered against Respondent pursuant to his guilty pleas entered on March 4, 2009, to be vacated and these charges be remanded to the Greenville County Court of General Sessions for a new trial.

S/ Tara D. Shurling

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September ___20______, 2021