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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Alison Renee Lee, Circuit Court Judge

Case No. 2006-CP-40-6751

KIMJARO PRESLEY, 299377,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the lower court err in denying the Petitioner Post-Conviction Relief where he met his burden of proof regarding his allegation that his constitutional right to effective assistance of counsel prior to trial, as secured by the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution, as well as Article I, Section 13 of the South Carolina Constitution, had been violated in that defense counsel failed to negotiate a plea agreement with the State that insured that the Petitioner would receive some benefit for his cooperation with the prosecution of his co-defendants and allowed the Petitioner to make a third statement to law enforcement on September 19, 2003 without such a plea agreement in place for the Petitioner's benefit and protection?

II. Did the lower court err in denying the Petitioner Post-Conviction Relief where he met his burden of proof regarding his allegation that his constitutional right to effective assistance of counsel prior to trial, as secured by the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution, as well as Article I, Section 13 of the South Carolina Constitution, had been violated in that defense counsel failed to clearly advise the Petitioner not to speak to the police without defense counsel being present after he was retained to represent the Petitioner where defense counsel's failure to adequately warn the Petitioner about the dangers and disadvantages of talking to law enforcement without legal counsel resulted in the Petitioner's issuance of his September 12, 2003 statement in which he incriminated himself in multiple felonies and provided valuable information to law enforcement concerning his co-defendants without the benefit of any sort of agreement with the prosecution for him to be rewarded for his cooperation.

III. Did the lower court err in denying the Petitioner Post-Conviction Relief where he met his burden of proof regarding his allegation that his constitutional right to effective assistance of counsel prior to trial, as secured by the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution, as well as Article I, Section 13 of the South Carolina Constitution, had been violated in that defense counsel neglected to explain to the Petitioner:

> (1) The procedures available to him if he went to trial to challenge the admissibility of his statements; and
> (2) The fact that if he proceeded to trial, and unsuccessfully attacked the admissibility of his statements, he would have

the right to have the ruling of the lower court reviewed by a higher court on appeal?

IV. Did the lower court err in denying the Petitioner Post-Conviction Relief where he met his burden of proof regarding his allegation that his constitutional right to effective assistance of counsel prior to trial, as secured by the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution, as well as Article I, Section 13 of the South Carolina Constitution, had been violated in that defense counsel failed to fully advise him of the function of the grand jury and the consequences of waiving his right to grand jury presentment on all his charges and where defense counsel failed to advise the Petitioner why the State wanted to amend his waiver of grand jury presentment on one count of armed robbery during his sentencing proceeding allowing the amendment requested without his express consent?

V. Did the lower court err in denying the Petitioner Post-Conviction Relief where he met his burden of proof regarding his allegation that his constitutional right to effective assistance of counsel prior to trial, as secured by the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution, as well as Article I, Section 13 of the South Carolina Constitution, had been violated in that defense counsel failed to properly advise the Petitioner that he would not be parole eligible under any circumstances if he pleaded guilty to the charges against him?

STATEMENT OF THE CASE

Kimjaro Presley, the Petitioner herein, was indicted by the Richland County Grand Jury for Armed Robbery (2003-GS-40-5389). On November 21, 2003, the Petitioner pleaded guilty to this charge, waived grand jury presentment, and pleaded guilty to an additional ten counts of Armed Robbery (03-GS-40-5780; 6247; 7443; 7444; 7445; 7446; 7447; 7448; 7587; 7589) and one count of Kidnapping (03-GS-40-5778). Sentencing on these Richland County charges was deferred until January 21, 2004, when the Petitioner also waived grand jury presentment and pleaded guilty to the following Lexington County charges: nine counts of Armed Robbery (03-GS-32-242; 243; 244; 4164; 4165; 4166; 4167; 4168; 4174), ten counts of Kidnapping (03-GS-32-4156; 4157; 4158; 4159; 4163; 4169; 4170; 4171; 4172; 4173), two counts of Criminal Conspiracy (03-GS-32-4160; 4161), one count of Assault and Battery With Intent to Kill (03-GS-32-4162), and one count of first degree Burglary (03-GS-32-4175). At the January 21, 2004 proceeding, the Petitioner's November 21, 2003 waiver of presentment on one of the Richland County armed robbery charges (03-GS-40-5780) was amended to a waiver of presentment for Attempted Armed Robbery.

The Petitioner was represented at both of these proceedings by Ernest Latony ("Tony") Dessausure, Esquire. On January 21, 2004, the Honorable G. Thomas Cooper, Jr., presiding circuit judge, sentenced the Petitioner to five (5) years imprisonment for each Conspiracy charge, twenty (20) years imprisonment for the Attempted Armed Robbery charge, twenty (20) years imprisonment on the Assault and Battery With Intent to Kill charge, thirty (30) years imprisonment on each Kidnapping charge, thirty (30) years imprisonment on each Armed Robbery charge, and fifty (50) years imprisonment on the first degree Burglary charge. All of the sentences were to run concurrently.

The Petitioner timely filed a motion to reconsider sentence, and a hearing on this motion was convened on November 21, 2005. The Petitioner was represented by Jack B. Swerling, Esquire, at this proceeding. At the conclusion of the hearing, Judge Cooper denied the motion to reconsider sentence. The Petitioner did not appeal his judgments, sentences, or the motion to reconsider sentence.

Since the Petitioner entered pleas and was sentenced in both Richland County and Lexington County, the Petitioner filed two Applications for Post-Conviction Relief in this matter, one in each county. The Application for Post-Conviction Relief in Richland County was filed on November 13, 2006.[1] The State made a Motion for a More Definite Statement on March 9, 2010 and the Petitioner filed an Amended Application on March 10, 2010. An Evidentiary hearing was convened on March 15, 2010 before the Honorable Alison Renee Lee, presiding judge. By written Order dated February 8, 2011, the Court denied and dismissed the Application with prejudice. The Petitioner filed a Motion to Alter or Amend on February 24, 2011, which resulted in a Supplemental Order filed on July 20, 2011. The Petitioner filed a timely Notice of Appeal from said Order on August 19, 2011. He now asks that the Writ of Certiorari be issued and that he be permitted to submit a full briefing on the issues summarized herein.

EVIDENCE BEFORE THE LOWER COURT

At the Post-Conviction Relief hearing held in this case, the Petitioner presented testimony from himself, plea counsel Ernest Latony (Tony) Dessausure, from his attorney on the Motion to

[1] A similar Application was filed in Lexington County. The parties agreed to withdraw the Lexington County Application and allow all the Petitioner's claims raised on all of the charges to proceed forward in Richland County. Therefore, the ruling being appealed affects the Petitioner's Lexington County and Richland County judgments and sentences.

Reconsider, Jack Swerling, and from Attorney Samuel Mokeba. The State presented the testimony of August Gustav Swarat, II, the then Assistant Solicitor for Lexington County. In addition to this testimony, the lower court had before it the transcripts of the proceedings against the Petitioner[2], the records of the Richland County Clerk of Court and the Petitioner's records form the South Carolina Department of Corrections.

STATEMENT OF FACTS

On June 25, 2003, the Petitioner gave a statement to the Lexington County Sheriff's Department detailing his involvement in a number of armed robberies committed primarily in Richland County. See App. pp. 441-449. Shortly thereafter, defense counsel was retained to represent the Petitioner on his pending charges. In July 2003, defense counsel sent letters to the Fifth Circuit Solicitor's Office, the Eleventh Circuit Solicitor's Office, and numerous police officers informing them of his representation and specifically advising that they were not to talk to the Petitioner without first notifying him. App. p. 281, l. 23- p. 283, l. 8. [3]

On September 12, 2003, the Petitioner gave a sixteen-page statement to Investigator W. McDaniels with the Richland County Sheriff's Department after he asked his girlfriend to contact Investigator McDaniels for him. See App. pp. 407-422. Additionally, he provided crucial information concerning the involvement of his co-defendants in each of these offenses. Defense counsel was not notified by Investigator McDaniels that the Petitioner's statement was

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[2] This includes a transcript of the Petitioner's guilty plea proceeding on November 21, 2003, his sentencing on January 21, 2004, and his motion for reconsideration hearing on November 21, 2005.

[3] The Petitioner's Post-Conviction Relief testimony reflects that he didn't know anything about that letter until he saw a copy in the discovery materials he was provided. App. p. 335, ll. 14-25. His testimony is less clear as to whether his September statements were given before he saw this discovery, however, defense counsel's own testimony tends to indicate that the discovery materials had not been served when the September 12th statement was made. App. p. 288, l. 10-20.

being taken. In this statement, the Petitioner admitted his involvement in a number of additional crimes which were not covered by his first statement to Detective Lorick, including admitting to the home invasion of Cindy McLamore. See App. pp. 407-422. Additionally, he provided crucial information concerning the involvement of his co-defendants in each of these offenses. That admission led to the State charging the Petitioner with first degree burglary, among other charges, for the home invasion. The records before the PCR Court verify that the Petitioner was initially arrested on July 24, 2003. App. pp. 209-214. These records further confirm that he was served with multiple additional warrants following his third statement to law enforcement; September 19, 2003. App. pp. 222, 227, 234, 239, 244, 249, 254. 259. He was subsequently indicted by direct presentment for Burglary in the First Degree. Indictment No. 2003-GS-32-4175. App. pp. 202 A- 202 B.

The Petitioner's PCR testimony establishes that defense counsel was initially hired to represent him at his bond hearing approximately 2-3 days after his arrest. App. p. 334, ll. 12-22. His first statement, in which he confessed to crimes involving an auto parts store and a Chinese restaurant, was given before defense counsel was hired. App. p. 334, l. 23- p. 335, l. 9. The Petitioner's PCR testimony clearly asserts that after defense counsel was hired he never advised the Petitioner not make any further statements to the police. App. p. 335, ll. 10-13. Most significantly, the Petitioner indicated that defense counsel never advised him that any additional information he had might have could possibly be used to obtain some sort of concessions to his advantage in plea negotiations. His testimony clearly verifies his position that he never would have given further statements to law enforcement without a plea agreement in place had he known that the additional information he had might have been used by defense counsel to enhance his chances of negotiating a more favorable plea bargain. App. p. 336, l. 5-p. 338, l. 3.

In his PCR testimony, defense counsel claimed that when he first met with the Petitioner he told his client not to give any more statements until they saw "what's out there." When asked if he explained to the Petitioner that any information he had available to disclose to law enforcement about other crimes could be used as potential leverage in the plea bargain process, defense counsel stated, "I'm sure I did. I can't give you any specific date, but I'm sure I did." App. p. 283, l. 9- p. 284, l. 6.

After defense counsel was informed that the Petitioner had given the September 12, 2003 statement, he arranged for the Petitioner to give another statement to the Lexington County Sheriff's Department on September 19, 2003. See App. pp. 423-433. In this statement, the Petitioner provided further detailed information concerning his involvement, and that of his co-defendants, in most of the robberies he had previously admitted his involvement to Investigator McDaniels in his September 12, 2003 statement. See App. pp. 423-433. Defense counsel testified that there were no agreements with the State at the time the Petitioner gave this statement. When asked why there was no agreement reached prior to the statement being given, defense counsel testified that the Petitioner had lost virtually all of his leverage and bargaining power by giving the statement to Investigator McDaniels. He testified that he was just "cleaning up a mess" at that point. It is apparent from his testimony however, that he never advised his client that by giving a third *counseled* statement on September 19th he would probably waive any argument he had for the exclusion of his September 12th statement based on the failure of law enforcement to contact defense counsel before interviewing the Petitioner. App. p. 289, l. 13, p. 300, l. 19.

The Petitioner's statements led to additional charges against his co-defendant John Hayward. Prior to Hayward's trial, the Petitioner waived grand jury presentment and pleaded

guilty to numerous Richland County charges. While the Petitioner was prepared to testify against Hayward, Hayward pleaded guilty "at the very last minute." See App. p. 39, ll. 17-18. (statement by Assistant Solicitor Pellizzari). At the Petitioner's evidentiary hearing, Hayward's plea attorney, Samuel Mokeba, testified before the PCR Court that the Petitioner's assistance with the State might have been the turning point for Hayward's decision to plead guilty.[4]

At the outset of the January 21, 2004, plea proceeding, Assistant Solicitor Pellizzari informed the plea court that "we need to amend one of [the Petitioner's] waivers" of grand jury presentment which were made at the November 21, 2003, plea proceeding. Assistant Solicitor Pellizzari explained why that waiver needed to be amended during her presentation of the facts:

> Your Honor, then on May 15th of 2003, it's indictment numbers 2003-GS-40-5780. That's the one that was amended to an attempted armed robbery. And 2003-GS-40-5778, that's one count of kidnapping. Your Honor, that incident occurred at Pasado's Restaurant on O'Neal Court here in Richland County. Your Honor, Mr. Presley and his co-defendant, Mr. Moody, came in the back of the restaurant armed with weapons, faces covered.
>
> They forced all the customers at gunpoint onto the floor while they were in the main part of the restaurant. There were two customers in particular who were forced down at gunpoint. They attempted to get into the safe which was in the office in the back area but they were not able to do so. Something spooked them and they ended up taking off without getting any money from that incident. And that's why we've amended that down to an attempted armed robbery.

See App. p. 32, l. 24-p. 33, l. 17. On November 21, 2003, the Petitioner signed a grand jury waiver on the face of Indictment No. 2003-GS-40-5780 for armed robbery. App. p. 212. On January 21, 2004 that waiver was amended with the consent of defense counsel. App. p. 213,

[4] Hayward received an aggregate 325 year sentence at his guilty plea proceeding. He then filed a PCR, which has been granted. Counsel for the State advised this Court during the PCR hearing that certiorari has been granted on his appeal to the Supreme Court of South Carolina from that ruling. In a subsequent unpublished opinion, the PCR Order in that case was affirmed in part and reversed in part. *John Hayward v. State*, 2011-MO-008 (filed March 7, 2011).

App. p. 18, ll. 12-14, and App. p. 25, l. 23- p. 27, l. 11. There is nothing in the record to indicate that this amendment was ever discussed with the Petitioner. Defense counsel's PCR testimony supports the Petitioner's position that this amendment was never discussed with him. App. p. 311, l. 14- p. 312, l. 21. At the Post-Conviction Relief hearing, the Petitioner testified that he would not have waived his right to trial by jury on any of his charges had he been aware that the State would ultimately admit that the facts on Indictment No. 2003-GS-40-5780 would only support his prosecution for Attempted Armed Robbery. He firmly asserted that had he understood that the State wanted to reduce one of the armed robbery charges because the facts did not support a charge of armed robbery, it would have influenced his decision to plead on the other charges as well. App. p. 341, l. 3- p. 342, l. 8. Moreover, the Petitioner's PCR testimony establishes that prior to his pleas, he did not understand the function of the grand jury. He unequivocally testified that had he understood the role of the grand jury, he would not have waived grand jury presentment on the charges for which he waived his right to have the grand jury take action. He stated that a grand jury waiver was never fully explained to him, and he believed the waiver was a paper he had to sign to waive a jury trial, so he could enter his pleas. App. p. 339, l. 23 – p. 342, l. 16.

Ultimately, the State entered into no negotiations with the Petitioner regarding his plea aside from allowing the Petitioner to be sentenced for all of the offenses in one proceeding. Assistant Solicitor Swarat informed the plea court that

> He is absolutely promised nothing. If you give him life in prison, that doesn't go beyond any agreement I had with him. I just promised him I would tell the Court about any cooperation he gave.

See App. p. 52a, ll. 20-24. The plea judge ultimately sentenced the Petitioner to an aggregate fifty year term of imprisonment.

ARGUMENT

Standard of Review

This Application for Post-Conviction Relief generally raises numerous specific allegations of ineffective assistance of counsel. The standard of review for a Post-Conviction Relief action is whether "any evidence of probative value" exists to support the Post-Conviction Relief court's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The burden of proof is on the Applicant 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 trial 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 Applicant 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).

On the one hand, where trial counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. 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 the other hand, counsel may not 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. In the case of Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the Supreme Court of South Carolina found that

> Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness. (Emphasis in original) (internal citations omitted).

Defense counsel's failure to advise the Petitioner not to speak to the police without defense counsel being present after he was retained

As previously described, *infra*, the Petitioner gave a second, damaging, statement to law enforcement on September 12, 2003, after he retained plea counsel. In this statement, the Petitioner admitted his involvement in a number of additional crimes which were not covered by his first statement, including the home invasion of Cindy McLamore. Plea counsel was not aware that the Petitioner was giving this statement. The Petitioner testified at his evidentiary hearing that plea counsel did not warn him to avoid communicating with law enforcement. The Petitioner acknowledges that plea counsel testified that he had advised the Petitioner, at their first meeting, not to give any further statements. Contrary to this assertion, however the totality of defense counsel's testimony indicates while Counsel may have believed he admonished the Petitioner on this point, he did not have a clear memory of telling him why it was important not to talk to the police any further until advised to do so. App. p. 283, ll. 18-22. Plea counsel testified that he had sent an Edwards[5] letter to authorities, but did not testify that he copied the Petitioner on this letter. Plea counsel ultimately concluded that such significant damage had been done by the second statement, that he advised the Petitioner to give a third comprehensive statement, in an apparent attempt to mitigate that damage.

[5] Edwards v. Arizona, 451 U.S. 477 (1981). Plea counsel testified that his letter advised law enforcement of his representation, and that he did not want anyone speaking to his client without his knowledge. See App. p. 282, ll. 6-16.

The PCR court found that plea counsel did advise the Petitioner not to speak with law enforcement, after he was retained. The Petitioner submits that the PCR court erred in its determination, where there was no evidence to suggest that the Petitioner received a copy of plea counsel's Edwards letter, and contrary to plea counsel's assertions, the Petitioner testified that he was not so advised. The Petitioner submits that plea counsel was ineffective for not firmly warning him to avoid communications with law enforcement outside of the presence of his attorney. As described above, the second and third statements given to law enforcement were very damaging to the defense case, and the Petitioner was clearly prejudiced by his continuing communications with law enforcement. Therefore, the evidence does not support the PCR court's finding that counsel was not ineffective.[6]

. Defense counsel was ineffective for advising the Petitioner to give his third statement without first negotiating an agreement with the State providing for the Petitioner to receive some potential benefit in exchange for his cooperation with the prosecution.

The Petitioner asserts that defense counsel was ineffective for failing to obtain some form of protection for the Petitioner prior to allowing the Petitioner to give his September 19, 2003, statement to the Lexington County Sheriff's Department. Defense counsel should have attempted to negotiate an agreement with the prosecution which provided some benefit to the Petitioner if his cooperation lead to *either* convictions or pleas by his co-defendant, John Hayward. Absent such and agreement, the State was free to use the Petitioner's detailed statements to scare Hayward into pleading guilty and to avoid having to significantly reward the petitioner for his contribution to that outcome as long as they did not need him to testify against Hayward at a jury trial.

[6] This issue was not addressed in the Order of Dismissal. The issue was brought to the Court's attention by way of a Rule 59(e) Motion, SCRCP, and it was then subsequently ruled upon in a Supplemental Order of Dismissal dated July 18, 2011.

The Petitioner argues that due to defense counsel's ineffectiveness, his pleas of guilty were the product of ineffective assistance of counsel in that counsel's actions left him with virtually no option but to plead guilty to the charges without any significant reward for his extensive cooperation. Defense coumsel should have attempted to negotiate an agreement with the prosecution which provided some benefit to the Petitioner if his cooperation lead to *either* convictions or pleas by his co-defendant, John Hayward. Absent such an agreement, the State was able to use the Petitioner's detailed statements to scare Hayward into pleading guilty and to avoid significantly rewarding the Petitioner for his contribution to that outcome as long as they didn't need him to testify against Hayward at a jury trial. Defense counsel was also ineffective for advising the Petitioner to give his third statement without advising him of a potential constitutional challenge to the second statement, and without explaining that giving the third statement might effectively waive any challenge to the admissibility of the second one. Accordingly, the Petitioner argues that he is entitled to a new trial.

At the time the Petitioner gave the September 12, 2003, statement to Investigator McDaniels, he was represented by defense counsel. Defense counsel was not contacted prior to the statement being given. Additionally, the Petitioner testified before this Court that Investigator McDaniels promised him that he would assist him in court if he admitted to his involvement in the crimes. Given all of these factors, there was certainly a reasonable possibility that the voluntariness and legality of the statement could have been challenged at trial. See generally State v. Register, 323 S.C. 471, 478, 476 S.E.2d 153, 158 (1996) ("A statement may be held involuntary if ... obtained by any direct or implied promises"); State v. Anderson, 357 S.C. 514, 518-519, 593 S.E.2d 820, 822 (Ct. App. 2004) (holding that statements obtained in violation

of the Sixth Amendment right to counsel "may not be admitted as substantive evidence in the prosecution's case in chief") (quoting Michigan v. Harvey, 494 U.S. 344, 345 (1990)).

"[U]ncertainty concerning a potential legal challenge may well provide a defendant a catalyst in plea negotiations with the State." Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). However, instead of identifying any potential challenges to the validity of the Petitioner's statement to Investigator McDaniels, defense counsel decided instead to have the Petitioner give another statement to the Lexington County Sheriff's Department wherein he restated his involvement in some of the robberies he admitted he committed in the earlier statement in addition to admitting his involvement in still more robberies not addressed in his previous statements. See Applicant's Exhibit #2. Defense counsel's stated reason for advising the Petitioner to give this final statement was that the Petitioner had virtually no leverage remaining, so the Petitioner might as well be as cooperative as possible, despite having no firm agreement with the State in exchange for his cooperation. There is no evidence that defense counsel used the potential problems with the manner in which the second statement was taken in an attempt to negotiate some benefit for the petition in exchange for a third statement.

The Petitioner's statements were the primary source of evidence against him as well as against his co-defendants. Had defense counsel presented an articulable challenge to the statement made to Investigator McDaniels, he might have succeeded in obtaining an agreement from the State to recommend a particular sentence or sentencing range. In exchange for this agreement, defense counsel could have assured the State that they would receive information about all of the robberies known by the Petitioner in addition to receiving a statement that would be free of any constitutional defects. Defense counsel made no effort to obtain any agreement of this sort. Instead, defense counsel testified that since they had lost three-fourths of the farm, they

might as well give up the remaining fourth. App. p. 292, ll. 4- p. 296, l. 8, and App. p. 297 B, l. 14-p. 300, l. 19.

There can be no doubt that defense counsel's failure in this regard prejudiced the Petitioner. As a result of defense counsel's ineffectiveness, the Petitioner was left with little or no way to defend himself against the State's allegations. Furthermore, giving the final statement to the police left the Petitioner with little or no leverage with the State to enter into a favorable plea bargain. Finally, once the final statement was given, the Petitioner had virtually no plausible defense at trial to many of the charges against him. Given the complete failure of defense counsel to negotiate with the State on his client's behalf before allowing the Petitioner to give his final statement, the Petitioner is entitled to relief on this issue.

Even if the Post-Conviction Relief Court had found that the Petitioner was entitled to relief, it still would have had to determine what type of relief to order. The Petitioner recognizes the State's concern that the final statement to the Lexington County Sheriff's Department was constitutionally sound with regard to the State's actions in obtaining the statement. However, permitting the Petitioner to receive a new trial while simultaneously allowing the State to use this statement against him would be an inequitable solution and would not serve to remedy the error caused by defense counsel's ineffectiveness. After all, the statement was obtained in violation of the Sixth Amendment—the right to the effective assistance of counsel at every critical stage of prosecution. Consequently, the Petitioner asserts that the proper remedy is to vacate the Petitioner's convictions and sentences and to order that the Petitioner's statement to the Lexington County Sheriff's Department given on September 19, 2003, cannot be used against him by the State in their case-in-chief if the Petitioner proceeds to trial. This affords the Petitioner the ability to return to the point where the ineffective assistance of counsel occurred,

and restores the parties to their respective positions prior to the violation of the Petitioner's Sixth Amendment rights. See Rolen v. State, 384 S.C. 409, 414, 683 S.E.2d 471, 474 (2009) (finding tailored relief should remedy "the precise prejudice resulting from plea counsel's deficient performance"). The Petitioner would then once again be free to challenge the admissibility of his September 12th statement at his trial.

The PCR court found that plea counsel's performance in this regard was not deficient. The Petitioner submits that the PCR court erred in its determination, where the evidence presented establishes that plea counsel did not even attempt to challenge the September 12, 2003 statement. There was evidence adduced at the 2010 hearing demonstrating that plea counsel simply advised the Petitioner to give another incriminating statement, rather than trying to challenge the previous one. Someone facing the number of serious charges that the Petitioner was charged with committing was entitled to more vigorous representation. He did not receive it, and, consequently, defense counsel's performance was deficient. The Petitioner submits that plea counsel was ineffective and that he was prejudiced as a result. Therefore, the evidence does not support the PCR court's finding that counsel was not ineffective.

Defense counsel's failure to explain to the Petitioner his ability to challenge admission of his statements at trial and to have the ruling of the lower court reviewed by a higher court on appeal

When the Petitioner's PCR attorney questioned plea counsel at the evidentiary hearing as to whether he advised the Petitioner about the procedures available at trial to challenge admissibility of the statements, plea counsel stated his *belief* that he had discussed these matters with the Petitioner. Plea counsel added, "I can't say for certain." See App. p. 298, ll. 12-18. When asked if he informed the Petitioner that even if a trial judge admitted the statements, the jury would still have a predicate obligation to determine them knowingly and voluntarily given, plea counsel responded that he "believed" he had. When subsequently asked if he had told the

Petitioner that he could appeal a judgment of the trial court to a higher authority, he replied, "Yes, ma'am." See App. p. 299, ll. The Petitioner testified, at his evidentiary hearing, that he was never advised of the procedures available to challenge admissibility of his statements, nor of the predicate obligation the jury would have to find that the statements were knowingly and voluntarily given before considering them. See App. p. 350, l. 22-p. 351, l. 14. He further testified that he was not advised that he could challenge a lower court ruling by appealing to a higher court, until after his sentencing. See App. 351, l. 15-p. 352, l. 3; p. 375, ll. 10-21. While the Petitioner has testified with *certainty* that he was not advised of this very obvious disadvantage of entering guilty pleas, plea counsel has *tentatively* asserted that he might have advised the Petitioner regarding the procedures available to challenge his statements at trial. Plea counsel testified that he did advise the Petitioner that he could challenge a lower court ruling by appealing to a higher court. Defense counsel's PCR testimony demonstrates however, that he did not even consider the question of whether the Petitioner issuing a *third* statement might waive any existing challenge of the *second* statement, much less discuss that consideration with his client. App. p. 298, l. 2- p. 300, l. 9.

The PCR court found that the Petitioner's testimony in this regard was not credible and that he was not prejudiced by any alleged deficiency. The Petitioner submits that the PCR court erred in its determination that his testimony was not credible, where plea counsel's response to the question of whether he discussed certain advantages of going to trial was hesitant, at best. There was evidence adduced at the 2010 hearing demonstrating that the Petitioner's second, highly damaging statement was given to law enforcement without the advice or knowledge of his retained counsel, and that plea counsel was ineffective for permitting the third statement to be given. The Petitioner submits that trial counsel was ineffective for failing to ensure that the

Petitioner was aware of the manner in which the second statement could be challenged, and for failing to fully advise the Petitioner concerning the availability of appellate review before advising the Petitioner to make yet another statement.[7] Therefore, the evidence does not support the PCR court's finding that counsel was not ineffective.

Defense counsel was ineffective for failing to advise the Petitioner as to why the State wanted to amend his waiver of grand jury presentment during the guilty plea proceeding. And further for failing to fully advise him concerning the function of the grand jury and the significance of the waiver of grand jury presentment. In specific, defense counsel was ineffective for failing to explain to the Petitioner the reason why the State wanted to amend his previous waiver on one count of armed robbery and in consenting to the amendment of the indictment in question without the Petitioner's express consent.

The Petitioner alleged that defense counsel was ineffective for failing to properly explain the meaning of the State's desire to amend the 03-GS-40-5780 indictment from armed robbery to attempted armed robbery. The Petitioner argues that had defense counsel properly explained to him the reason the State needed to have his previous waiver amended, he would have wanted defense counsel to move to withdraw his pleas of guilty. Accordingly, the Petitioner contends that he is entitled to a new trial.

As a threshold matter, the Petitioner would note that defense counsel never adequately explained the function of the grand jury to him. The Petitioner's PCR testimony illustrates his confusion between waiving *a jury trial* in order to enter guilty pleas versus entering a knowing waiver of presentment of charges to the *grand jury*. App. p. 339, l. 23- p. 34, l. 23. The

[7] The Petitioner would note that each subsequent statement was damaging to the Petitioner because they, A) further inculpated the Petitioner in additional crimes and B) provided the State, free of charge so to speak, additional leverage to use to convince the Petitioner's co-defendants, most significantly, John Hayward, to plead.

Petitioner testified that he never would have waived his right to grand jury presentment had he understood the function of the grand jury. App. p. 340, l. 24- p. 341, l. 6. He further indicated that if he had understood why the State wanted to suddenly amend that armed robbery count, it would have made him question his decision to plead guilty on that count and some of the other armed robbery counts. App. p. 341, l.7 – p. 342, l. 16. At the November 21, 2003, guilty plea proceeding, the Petitioner agreed to waive grand jury presentment to twelve armed robberies, including the armed robbery contained in indictment number 03-GS-40-5780. However, at the outset of the January 21, 2004, guilty plea and sentencing proceeding, the State informed the plea court that it wanted to amend the waiver of grand jury presentment for the 03-GS-40-5780 charge in order to reduce the charge from armed robbery to attempted armed robbery. This amendment was permitted by the plea court. See App. p. 25, l. 23-p. 27, l. 11. As previously noted, the Petitioner was not questioned about this amendment, and defense counsel said he didn't think he had any discussion with his client about the issue. App. p. 25, l. 23-p. 27, l. 11 and App.p. 312, ll. 13-14.

Both defense counsel and the Petitioner testified before this Court that defense counsel did not explain why the State wanted to amend the waiver of grand jury presentment. This was error on defense counsel's part. While the need for the waiver was to reduce the severity of the offense, the right to have the grand jury review the indictment is a constitutional right. The waiver of that right needs to be done knowingly and intelligently. The testimony of the Petitioner establishes that he did not have the requisite knowledge of the grand jury's function necessary to make a knowing and voluntary waiver of that right on *any* of his changes, and that if he had understood the reason the State wanted to amend one of the indictments for armed robbery to which he had previously waived presentment, it would have made him question his decision to

plead guilty on other counts as well. The issue wasn't whether the Petitioner would have logically wanted a charge reduced. The Petitioner has explained that the sudden change in the State's position as to what they could prove on this charge, would have provided a reasonable basis for him to reconsider his decision about pleading to other charges. Therefore, the evidence is clear that the amendment to the Petitioner's previous waiver was made without the advice of counsel and was made involuntarily.

Furthermore, the Petitioner was prejudiced by defense counsel's deficient performance. The motivating factor behind the Petitioner's pleas of guilty was the sheer number of serious charges against him. The Petitioner, as previously noted, has testified that had he known that the State was overplaying its hand in charging him with armed robbery on this count, he would have wanted to withdraw his plea of guilty. It is certainly reasonable to believe that this revelation may have caused him to question the true measure of the State's case against him on all his charges. Defense counsel's failure to explain the amendment to him and his failure explain to the Petitioner his option to move to withdraw his guilty pleas clearly prejudiced the Petitioner.

At the time the State sought to amend the Petitioner's waiver of presentment, the plea judge had not yet accepted his pleas on the Lexington County charges. Accordingly, the Petitioner would have been free to withdraw his pleas to those charges as a matter of course. See State v. Bickham, 381 S.C. 143, 148, 672 S.E.2d 105, 107 (2009) ("[I]n a typical guilty plea a defendant has a right to withdraw a guilty plea prior to formal acceptance by the plea judge") (Justice Kittredge, concurring). It is likely that if a motion to withdraw the pleas of guilty entered on November 21, 2003, been made, it would have been granted as well.

This Court is cognizant of the fact that in Rolen v. State, *supra*, the Supreme Court was presented with a case where the criminal defendant wanted to withdraw his guilty plea but

defense counsel failed to make a motion to withdraw the plea. In Rolen, the Supreme Court found defense counsel ineffective for failing to make the appropriate motion, granted relief, and remanded "the case to the point in the guilty plea proceeding in which counsel should have sought to withdraw the plea." 384 S.C. at 414, 683 S.E.2d at 474. However, the facts in Rolen are distinguishable from the present case. Unlike the criminal defendant in Rolen, the Petitioner was not pleading to only one charge. Instead, the Petitioner was pleading to multiple charges, some of which had been accepted by the plea court in an earlier proceeding and some of which had yet to be accepted. To grant the tailored relief given in Rolen, the PCR Court would have to have vacated the Petitioner's *Lexington* County convictions and remanded this case to the point in time where the motion to withdraw the Richland County pleas should have been made. The more equitable, and simple, solution is to vacate all of the Petitioner's judgments, and sentences, and remand all his charges for new trials. This remedy is in fact appropriate where the Petitioner clearly did not knowingly waive grand jury presentment on multiple charges in Richland and Lexington County. This particularly true inasmuch as it is impossible to know what impact this knowledge would have had on the Petitioner's choices even in regards to those counts which were the subject of true billed indictments.

Defense counsel was in effective in his failure to properly advise the Petitioner that he would not be parole eligible under any circumstances if he pleaded guilty and for failing to ask for a recess to discuss the Petitioner's obvious lack of understanding on this crucial point when it became apparent during the sentencing proceeding that he believed there was some scenario under which the plea judge could issue sentences on which he was eligible for parole.

At the end of the plea proceeding, the Petitioner pleaded with the court to sentence him in a manner that allowed parole eligibility. He stated that parole eligibility was his "main concern." See App. p. 72, l. 17-p. 73, l. 1. This fact, alone, would indicate that the Petitioner did not understand that, under the law, the charges to which he had pleaded made him ineligible for

parole. Plea counsel did not pull the Petitioner aside at the proceeding to correct this misunderstanding. In his PCR testimony when asked if he advised the Petitioner he would not be eligible for parole he stated, "I'm certain I did tell Mr. Presley that." See App. p. 302, ll. 11-18. The balance of his testimony however, gives rise to real doubt as to whether he himself was confusing having told the Petitioner that he would have to serve 85% of any sentence imposed with having specifically advised him he would not, under any circumstances, be eligible for parole. Defense counsel repeatedly noted that this issue was covered in his presentation to the plea court. App. p. 302, l. 19-25 and App. p. 303, ll. 22-25. In his presentation to the Plea Court he does state at one point that, "*I have explained to him an 85% sentence. I have explained to him life sentences. I have explained to him no parole sentences to the offenses.*" App. p. 59, ll 13-16. What isn't clear is whether defense counsel explained that this statement applied to anything other than life sentences. The record establishes that the Petitioner had been told by the plea court that his First Degree Burglary charge carried a *potential* sentence of life without parole. App. p. 20, ll. 22-25. The Petitioner was facing additional charges in North Carolina for which defense counsel advised him he might face the possibility of life without parole if he's convicted of those robberies in North Carolina. App. p. 52 b, ll. 4-22. Thus, the only context in which the phrase " no parole" was utilized in Court referenced the First Degree Burglary charge and the North Carolina charges. When the plea Court reviewed potential sentences for each offense with the Petitioner, there was no mention of parole ineligibility with reference to *any* charge except the burglary count. Thus the Petitioner asserts it is far from clear that defense counsel advised him that he would be ineligible for parole on the majority of his charges even if he wasn't given a life sentence for burglary. The Petitioner testified at his Post-Conviction Relief hearing that he did not understand that his guilty pleas would make him ineligible for

parole, and that he would have attempted to withdraw his pleas if he had been informed of this fact. See App. p. 355, l. 23-p. 356, l. 12. The Petitioner's prayer for the Court to sentence him in a manner that would make him parole eligible is consistent with a belief that he would be eligible for parole as long as he didn't get a life sentence on the burglary count.

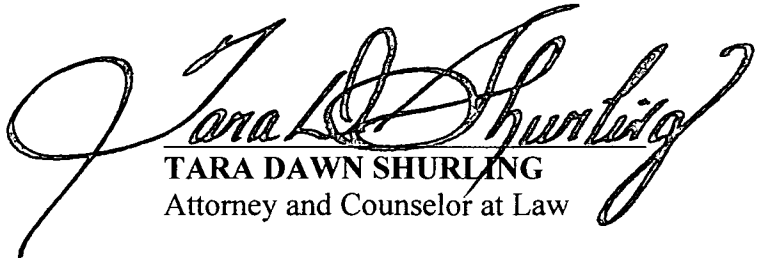
The PCR court determined that plea counsel had advised the Petitioner of his ineligibility of parole, and that even if he had not, the Petitioner would not be prejudiced by the omission of information that defense counsel was not required to provide. The Petitioner submits that the PCR court erred in its determination, where the record, itself, supports the Petitioner's contention that he did not understand that he was ineligible for parole. There was evidence adduced at the 2010 hearing demonstrating supporting the claim that plea counsel failed to advise and further supporting the Petitioner's claim that he was prejudiced by his lack of understanding.[8] The Petitioner submits that he would not entered the pleas, or in the alternative, would have asked that they be withdrawn, if he had been informed that he would be ineligible for parole. Contrary to the finding of the PCR Court, the Petitioner would assert that defense counsel was obligated to adequately inform him of this crucial factor. *See, Padilla v. Kentucky*,___ U.S. ___, 130 S.Ct. 1473(2010) Therefore, the evidence does not support the PCR court's finding that counsel was not ineffective.

[8] The Petitioner's misunderstanding is in no way unique. A common misbelief is that the reference to an 85% service requirement is in fact a reference to the percentage of a sentence an individual will have to serve if they don't make parole. In other words, without clarification, the term "85% offense" can too easily be misunderstood to mean that service of 85% of a sentence is required to "max-out" a sentence if you aren't granted early release on parole.

CONCLUSION

For the reasons stated, the Petitioner asks this Honorable Court to grant the writ and allow full briefing on the issues summarized herein.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

This 11th day of June, 2012.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Alison Renee Lee, Circuit Court Judge

RECEIVED
JUN 18 2012
S.C. SUPREME COURT

Case No. 2006-CP-40-6751

KIMJARO PRESLEY, 299377,

PETITIONER,

v.

THE STATE,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Writ of Certiorari in the above-entitled case has been served upon opposing counsel, Rob Corney, Assistant Attorney General, by depositing in the U.S. Mail, postage prepaid, this 11th day of June, 2012.

TARA DAWN SHURLING
Attorney and Counselor at Law

ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 11th day of June, 2012.

(L.S.)
Notary Public for South Carolina
My Commission Expires: 3/12/2013