Attachment No. 1 please See pages 1 and 8.

1st

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON) C.A. No. 2004-CP-04-2184
)
Marcus Martin, # 299118,)
)
Applicant,)
)
v.) ORDER
)
State of South Carolina,)
)
Respondent.)

Marcus Martin (hereinafter "Applicant") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Applicant was indicted at the May 2003 term of the Anderson County Grand Jury for criminal conspiracy (2003-GS-04-1733), possession of a firearm during the commission of a violent crime (2003-GS-04-1734), murder (2003-GS-04-1735), armed robbery (2003-GS-04-1736, 1737), and assault and battery with intent to kill (2003-GS-04-1738). He was represented by Robert Gamble, Esquire (hereinafter "Plea Counsel"). On January 13, 2004, Applicant pled guilty as indicted. He was sentenced by the Honorable J. Cordell Maddox, Jr. (hereinafter "Plea Judge") to confinement for periods of five (5) years, five (5) years, thirty (30) years, thirty (30) years, thirty (30) years, and twenty (20) years respectively, concurrent. Applicant did not appeal his conviction or sentence.

This matter was heard at the Anderson County Courthouse on November 15, 2007. Appearances are of record.

In his application, Applicant alleges that he is being held in custody unlawfully for the following reasons: (1) he was "denied the right of appeal;" (2) ineffective assistance of counsel;

(3) the trial court did not have subject matter jurisdiction; and (4) he was "denied the right of proving elements of murder beyond a reasonable doubt."

Applicant's third claim, that the Trial Court lacked subject matter jurisdiction, is without merit. Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong. Dove v. Gold Kist, Inc., 314 S.C. 235, 237-238, 442 S.E.2d 598, 600 (1994). A review of the record clearly indicates that there is no basis upon which to conclude that the trial court lacked subject matter jurisdiction.

Further, the indictments charging Applicant are facially valid and proper. "An indictment is adequate and valid on its face if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent prosecution." State v. James, 321 S.C. 75, 472 S.E.2d 38, 40 (1996); State v. McIntire, 221 S.C. 504, 71 S.E.2d 410, 412 (1952). The indictments in this case are facially valid because they contain all the necessary elements of the offenses intended to be charged, state the date of the offenses, and state the name of the accused.

The Court interprets the first, second, and fourth allegations to be claims of ineffective assistance of counsel. In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); Butler, 334 S.E.2d at 814.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 688. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorneys' performance by its "reasonableness under professional norms." Cherry, 386 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

At his hearing, Applicant testified Plea Counsel was ineffective in failing to do the following: (1) explain the elements of the charges he faced; (2) inform him of the right to appeal; (3) move to quash the indictment; and (4) show Applicant the discovery material. Applicant further testified that Plea Counsel begged and cajoled him to enter a plea of guilt.

Additionally, Applicant claims his plea was involuntary, as he did not understand the mandatory minimum. Applicant claims the evidence was insufficient to convict him, and had he known about the evidence regarding the gun, he would have gone to trial.

PC #3

As to Applicant's claim that Plea Counsel failed to inform him of the elements of the charges against him, Plea Counsel testified he did in fact inform Applicant of the elements of the charges against him. Measuring the credibility and weight of the evidence, the Court believes Plea Counsel's testimony to be credible. However, the record of Applicant's plea reveals he was not informed of the elements of the charges to which he pled, nor did Plea Counsel confirm to the Court that he explained the element of the charges to Applicant.

It is well settled that a trial judge should not accept a guilty plea without an affirmative showing that it was intelligent and voluntary. Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969). To knowingly and voluntarily enter a plea of guilt, the defendant must understand the following: (1) the nature and crucial elements of the charges; (2) the consequences of the plea; and (3) the constitutional rights he is waiving. State v. Rikard, 371 S.C. 295, 300-301, 638 S.E.2d 72,75 (Ct. App. 2006) (citing Rollison v. State, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001)). Case law requires the trial judge to clearly convey the elements of the charges to the party pleading guilty, or to confirm through colloquy with counsel that the party pleading guilty understands the elements of the crime to which he or she is pleading. State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993).

The record is void of any indication that the Plea Judge informed Applicant of the elements of any of the charges against him. Accordingly, pursuant to the above, Applicant's pleas as to the charges against him must fail.

Applicant claims Plea Counsel failed to inform him of his right to appeal. "[A]bsent extraordinary circumstance, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea." Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995). Applicant has offered no evidence of extraordinary circumstances warranting

ACH #4

such constitutional protection. Applicant's claim as to Plea Counsel's failure to inform him of his right to appeal is meritless.

Applicant claims Plea Counsel was ineffective for not moving to quash the indictments. The basis for this claim is that the only witness to have appeared before the grand jury was a law enforcement officer by the name of C.H. Hutton, PPD. Applicant's relies on State v. Anderson, 312 S.C. 185, 439 S.E.2d 835 (1993) to support this claim.

Applicant's reliance on Anderson is misplaced. Anderson stands for the proposition that it is improper for someone from the Solicitor's office to appear as the sole witness before a grand jury. Here, the witness was not the Solicitor or anyone from her office. Accordingly, Applicant's claim under Anderson is without merit. A motion to quash the indictment was not a viable motion available to Applicant.

Applicant claims Plea Counsel did not share discovery material with him. He claims this caused him prejudice, as he did not know about the gun issue addressed herein below. Applicant further testified that he did not believe the evidence was sufficient for the State to convict him.

As to the latter claim, the facts presented by the Solicitor on the record are sufficient to support a conviction. The record in a guilty plea proceeding must establish a factual basis for the plea. Rikard, 638 S.E.2d at 75 (citing LoPiano v. State, 270 S.C. 563, 569, 243 S.E.2d 448, 451 (1978); State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975)). The record refutes Applicant's claim that the evidence against him was insufficient to support a conviction. Applicant was not required to affirm for the record the facts presented by the State at his plea.

In Rikard, the South Carolina Court of Appeals held that a post conviction relief applicant was not entitled to withdraw a guilty plea because of the plea judge's failure to make a finding on the record that the applicant accepted the facts presented by the State at the plea. *See*

Rikard, 638 S.E.2d at 75-76. Although the applicant did not specifically acknowledge the accuracy of the State's recitation of the facts, he did not object at the hearing. Id. at 76. The plea record and the applicant's testimony indicated he was aware of the charges to which he pled and the potential sentences he faced as a result. Id. Further, the State presented a sufficient factual basis for those charges. Id.

Here, as in Rikard, the State put on the record the factual basis for the charges to which Applicant pled guilty. Here, as in Rikard, Applicant did not object to or challenge the State's factual presentation. Here, as in Rikard, the evidence indicates that Applicant was aware of the charges against him and the sentence he faced for those charges, and he pled guilty. Here, as in Rikard, the facts presented provided sufficient support for all of the charges to which Applicant pled guilty. The trial judge was not required to make a finding of record at the hearing that Applicant accepted the facts presented at his plea. Id.

As to Applicant's claims regarding discovery material, there is no evidence that a lack of discovery material caused Applicant to plead guilty. Applicant has failed to place in the record any evidence, other than his claim and the gun dispute addressed herein below, that could have influenced him to plead guilty rather than continue on to trial. Applying the tests set forth in Cherry and Hill, Applicant has failed to carry his burden of proof and failed to establish he is entitled to post conviction relief on this issue.

Applicant claims Plea Counsel begged and cajoled him into entering his plea. Plea Counsel denied this allegation and observed that the threat of life without parole was "pressure enough" to induce Applicant to plead "straight up." When directly asked to by the Plea Judge whether he wanted "to plead guilty to criminal conspiracy, possession of the firearm during the commission of a violent crime, assault and battery with intent to kill, armed robbery, another

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count of armed robbery, and murder," Applicant answered "Yes, Sir." (Plea Transcript, p. 52, ll. 13-18). This exchange between Applicant and the Plea Judge makes it clear that Applicant wanted to plead guilty. For him to now retreat from that position is clearly pleader's remorse and mutes his claim that he was pushed into his plea by Plea Counsel.

Applicant claims his plea was involuntary because he did not understand that the murder charge carried a mandatory minimum sentence of thirty years. Applicant claims he was informed by Plea Counsel that the sentence for murder was an eighty-five (85%) percent sentence, not a mandatory minimum sentence. Plea Counsel testified his file reflected that he in fact told Applicant of the mandatory minimum and that it was "day for day." Plea Counsel did not recall telling Applicant anything regarding an eighty-five (85%) percent sentence. Again, the credibility on this issue lies with Plea Counsel. Applicant has failed to carry his burden of proof as to this claim.

Finally, Applicant claims there was a dispute about the gun that was used as the murder weapon. The grounds underlying this allegation escape the Court, as the murder weapon was described as a "nine millimeter" at Applicant's plea (Plea Transcript p. 53, ll. 3-4). Plea Counsel described the murder weapon as a "Glock," this being confirmed by a forensic consultant. (Plea Transcript p. 60, l. 11 – p. 61, l. 3). Plea Counsel testified at Applicant's post conviction relief hearing that he discussed the murder weapon with the forensic consultant. The mystery in Applicant's claim regarding the gun is that Applicant never explained to the Court's satisfaction what the gun "dispute" was, nor did he explain what difference it made in his decision to plead, other than to say he would not have pled had he known about the gun "dispute." There is no evidence of any gun "dispute" on the record. Applicant has failed to carry his burden of proof on this issue under Cherry and Hill.

Ne #7

Based on the Plea Judge's failure to advise Applicant as to the elements of the charges to which he pled, Applicant is entitled to the relief he seeks in his post conviction relief application. Applicant's plea is vacated, his sentences are voided, and he is entitled to a new trial on the charges against him under indictments 2003-GS-04-1733, 1734, 1735, 1736, 1737, and 1738.

IT IS SO ORDERED.

John C. Hayes, III
Presiding Judge

November 29th, 2007
York, South Carolina.

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Attachment No. 2

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) C.A. No. 2004-CP-04-2184
COUNTY OF ANDERSON)
)
Marcus Martin, #299118,)
)
Applicant,)
) ORDER
vs.)
)
State of South Carolina,)
)
Respondent.)

This Court issued an Order herein, filed December 3, 2007, granting Applicant post-conviction relief. The State has filed a motion pursuant to Rule 59(e) South Carolina Rules of Civil Procedure asking the Court to alter or amend said Order.

The gist of the State's motion is that Applicant did not carry his burden of proof and failed to prove that he was not fully informed of the elements of the charges to which he pled.[1]

In Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (Sup.Ct. 2000) our Supreme Court stated:

> Before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he or she is waiving. In addition to the requirements of Boykin,[2] a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense. . . (emphasis the Court's), 535 S.E.2d at 651).

[1] In this motion, the State has obviously borrowed liberally from its motion in the case of Thomas Chad Heaton v. State (2004-CP-04-0767). This is all well and good, but in so doing the Court suggests (a favorite word of the State) that the State make sure not to simply mirror other orders. Since second paragraph of motion relates to the charges: Those enumerated are those of Heaton, not Applicant here. In fact, the Court must concede much of this Order mirrors its Order in Heaton.

[2] Boykin v. Alabama, 395 U.S. 238 (1969).

As to the elements of the offense to which one is entering a plea, the Court states the defendant "must" be aware of the "crucial elements" of the offense. The Anderson Court found that the trial judge's failure to include the elements of "heat of passion" and "provocation" did not induce Anderson's guilty plea.

The Anderson case appears to be the bedrock upon which State v. Rikard, 371 S.C. 295, 638 S.E.2d 72 (Ct.App. 2006) and Rollison v. State, 346 S.C. 506, 552 S.E.2d 290 (Sup.Ct. 2001) stand. This line of cases,[3] the Court believes, require that the trial court must be certain that a pleading defendant understands the charge to which he or she is pleading. The Court may establish this through a colloquy with the defendant or counsel. (See Rikard) This requirement falls under the Due Process Clause[4] rather than the sixth amendment right to counsel.[5] Therefore, the issue on this front is not one of ineffective assistance of counsel but is whether or not a defendant has voluntarily, knowingly, and intelligently entered his plea. Boykin, supra.

State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (Sup.Ct. 1976) requires the record to reflect that the trial court "has assured itself that the plea [is] voluntary and intelligently entered with full knowledge of the nature of the offense", (emphasis supplied). Lambert does not require the trial court to express the defendant's rights with "precise language." However, it is clear that the nature of the offense must be conveyed to the defendant by the court or that trial counsel must establish that he or she has conveyed to the defendant information as to the nature of the offense to which he is

[3] At least two cases precede Anderson, but it is in Anderson that the Court highlights the requirement for that the "crucial elements" be understood by the defendant. *See* State v. Hazel, 275 S.C. 292, 271 S.E.2d 602 (Sup.Ct. 1980) and State v. Dover, 304 S.C. 433, 405 S.E.2d 391 (Sup.Ct. 1991).

[4] Fifth Amendment to the Constitution of the United State; Article I, Section 3, to the Constitution of the State of South Caroling

[5] Sixth Amendment to the Constitution of the United States. Article I, Section 3, to the Constitution of the State of South Carolina through the Fourteenth Amendment to the Constitution of the United States.

pleading to the extent that the defendant has "full knowledge of the nature of the offense". Lambert, supra.

The State offers pages 48-50 of the Transcript as evidence that Applicant "understood the charges against him." Contrariwise, these pages contain no acknowledgment by Applicant that he understood the charges against him. At page 52 of the Transcript, Applicant was asked if he was guilty of the charges and the charges were read to a jury venire at the commencement of Applicant's trial, (Trial TR p. 4). However, in no instance is Applicant apprised of the crucial elements of the charges to which he pled. The colloquy between the judge and Applicant's trial counsel does not establish that Applicant was informed by him what were the crucial elements of the charges he faced.

While trial counsel did testify that he told Applicant "the elements of the charges", this information was not conveyed to the trial judge. The record at the time of the plea must comport with due process requirements. The record cannot be propped up at a later time. A plea is deficient if it fails to comply with the requisite requirements of due process at the time the plea is entered.

Wherefore, the State's Motion to Alter or amend this Court's Order herein granting Applicant Post-Conviction Relief is DENIED.

IT IS SO ORDERED.

John C. Hayes, III
Presiding Judge

January 3, 2008
York, South Carolina

Attachment No 3.

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Marcus Martin, Respondent,

v.

State of South Carolina, Petitioner.

Appeal From Anderson County
John C. Hayes, III, Circuit Court Judge

Unpublished Opinion No. 2011-UP-489
Heard October 19, 2011 – Filed November 2, 2011

REVERSED AND REMANDED

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Respondent.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General A. West Lee, and Assistant Attorney General Kaelon E. May, all of Columbia, for Appellant.

PER CURIAM: In this post-conviction relief (PCR) case, the State appeals the PCR court's grant of PCR to Marcus Martin regarding his guilty plea to a number of crimes. We reverse and remand for an additional finding by the PCR court.

Martin was indicted for one count of murder, two counts of armed robbery, one count of assault and battery with intent to kill, one count of possession of a firearm during the commission of a violent crime, and one count of criminal conspiracy. After jury voir dire, his counsel notified the plea court that he agreed to plead guilty to all of the charges. The plea court proceeded with its colloquy, and it eventually accepted the plea as made knowingly and voluntarily. During the plea hearing, however, the plea court did not define or explain the elements of the charges to Martin, and Martin's counsel did not confirm to the plea court that he had done so.

Martin subsequently applied for PCR, alleging his plea counsel was ineffective because his plea was not knowing and voluntary. At the PCR hearing, Martin testified (1) he did not understand the elements of the crimes he plead to and (2) his plea counsel did not explain those elements to him. Despite this allegation, plea counsel testified he explained the elements to Martin, and in its order addressing Martin's application, the PCR court found plea counsel's testimony credible. However, the PCR court explicitly stated that it must disregard that testimony because "[t]he record at the time of the plea must comport with due process requirements. The record cannot be propped up at a later time." The PCR court then found that during the plea hearing the plea court did not explain the charges to Martin and Martin's counsel did not confirm that he had done so. Consequently, the PCR court held the plea was not knowing and voluntary, and it granted PCR. This appeal followed.

The State argues the PCR court erred in granting PCR because the PCR court explicitly disregarded plea counsel's testimony that he explained the elements of the crime to Martin even though the PCR court also found that testimony credible. We agree.

On appeal from PCR proceedings, this court must affirm the findings and holdings of the PCR court unless the findings are not supported by "any

evidence of probative value" or the holdings are "controlled by an error of law." Bailey v. State, 392 S.C. 422, 432, 709 S.E.2d 671, 676 (2011). "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that" he was prejudiced by counsel's errors. Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009). In determining whether plea counsel was ineffective for permitting the defendant to plead guilty, the ultimate test is not the plea court's explanations or questions or the plea counsel's answers; rather, the test is the extent of the defendant's understanding revealed by the entire record, including evidence admitted at the PCR hearing. See Holden v. State, 393 S.C. 565, 572-74, 713 S.E.2d 611, 615-16 (2011); Rolen, 384 S.C. at 413, 683 S.E.2d 474.

Here, the PCR court failed to consider the entire record. It explicitly found credible plea counsel's testimony that he explained the elements of the crimes to Martin. Yet the PCR court ignored that testimony simply because it was not presented at the time of the plea. Therefore, the PCR court's decision is affected by an error of law.

Despite plea counsel's testimony, Martin testified he did not understand the elements of the charges against him, and the order granting PCR did not make a finding as to whether Martin understood those elements. Therefore, we reverse and remand for a finding of whether Martin in fact understood the elements of the crimes he plead to. In making this finding, the PCR court must consider the entire record. If Martin did not understand the elements, the PCR court must find whether this lack of understanding prejudiced him. If Martin did understand the elements, his plea was knowing and voluntary and plea counsel was not ineffective for permitting the plea.[1]

REVERSED AND REMANDED.

FEW, C.J., and THOMAS and KONDUROS, JJ., concur.

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[1] During oral argument, Martin conceded that the record reflected a sufficient factual basis for the plea, description of sentencing maximums and minimums, and explanation of the constitutional rights waived.

Attachment No. 4

Please See Pages 2 and 3

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON) TENTH JUDICIAL CIRCUIT
) GENERAL SESSIONS
)
) C.A. No.: 2004-CP-04-2184
Marcus Martin,)
)
Applicant,)
) ORDER
vs.) ON REMAND
)
State of South Carolina,)
)
Respondent.)

The above captioned Post-Conviction Relief case was remanded to the undersigned by the Court of Appeals in Unpublished Opinion No. 2011-UP-489. The case is remanded with directions to the undersigned to make a finding "of whether Martin understood" the elements of the six offenses to which he pled guilty on January 13, 2004. Further, the undersigned is instructed to determine whether or not Applicant was prejudiced in entering his plea if he did not understand the crimes' elements.

The Court of Appeals found that in finding that Applicant was not informed of the elements of the offenses to which he pled that this Court erred in ignoring trial counsel's hearing testimony. Trial counsel testified at the Post-Conviction Relief hearing that he had informed Applicant of the elements of the offenses to a limited extent as discussed herein below. The undersigned found this testimony credible.

The trial judge found Applicant's plea to have been entered "freely and voluntarily," and based on the advice of counsel. (Trial TR[1] p. 62, LL 14-18 and p. 64, LL 3-5).

A review of the Post-Conviction Relief hearing reveals this exchange:

[2]Q. Okay. And in terms of the guilty plea and the elements of

[1] Herein TR stands for Transcript.

each one of these crimes, was he advised as to the elements of each one of these crimes?

A. I don't know that I would have put it in textbook language but I told him what it meant, what the law means when it says armed robbery. That's taking another with force of a gun.

(Post-Conviction TR p. 21, LL 13-19).

The above is trial counsel's sole testimony regarding whether he advised Applicant as to the elements of the six indictments (five charges, two were for the same offense, armed robbery).

In the Court's Order of November 29, 2007, the Court may have been generous in finding that trial counsel informed Applicant of the crimes' elements. Actually, what the Court found was that trial counsel "testified he did in fact inform Applicant of the elements of the charges against him." This was found credible by the Court.

However, a closer look at trial counsel's testimony reveals that he testified only that he told Applicant what "it" meant, "it" being armed robbery. Only two (2) of the six charges to which Applicant pled were for armed robbery. The Court of Appeals, like the undersigned, stretched this testimony as to a limited explanation the charges, to wit, armed robbery to a finding that "plea counsel testified he explained the elements" to Applicant. (See third and fourth paragraphs of Court of Appeals Opinion).

The finding, by the undersigned, on reflection, does not appear to be supported by the record, but must be relied upon now as the Court of Appeals has agreed with the State's assertion

[2] Question by Post-Conviction Relief counsel. Answer by trial counsel.

that the undersigned erred because it "explicitly disregarded plea counsel's testimony that he explained the elements of the "crime"."[3]

To comply with the Court of Appeals remand, the consideration by the undersigned, in spite of the above observations, is that from the record, the Court must consider whether Applicant understood the elements of the "crimes"[4] he pled to. Further, the undersigned is to determine from the record whether any lack of understanding of the elements of the crimes to which he pled worked to Applicant's prejudice.

Applicant testified he did not, at the time of his plea of guilt, understand the elements of "the crime" when he pled guilty and that trial counsel had not explained to him the elements of the charges to which he was pleading, specifically the murder charge. (PCR TR p. 6, LL 14-20).

Based on the entire record, the Court finds Applicant did not understand the elements of his charge of murder.

I find applicant was advised of the elements of armed robbery by trial counsel and from the record, Applicant understood the elements of the conspiracy. (See PCR TR p. 19, LL 10-15).

The record is silent as to any understanding by Applicant of the elements of possession of a firearm during commission of a violent crime, or assault and battery with intent to kill. Therefore, Applicant has failed to carry his burden of proof as to his lack of understanding of these offenses. The record supports only a failure by Applicant to understand the elements of the charge of murder. (PCR TR p. 6, LL 17-20).

The premise of the Court of Appeals' Opinion is that a defendant can plead guilty to a crime, in this case murder, and not understand the elements of the crime and somehow not be

[3] The Court of Appeals may have tacitly recognized that trial counsel only testified as to explain in one of the charges by use of the singular.
[4] This directive is in the plural.

prejudicial thereby. Prejudice is something detrimental to one's legal rights. Blacks Dictionary, 7th Ed. P. 1198.

Arguably, it is inherently prejudicial to a defendant when at counsel's insistence he or she enters a plea of guilty to the crime of murder without understanding what he or she is accepting legal responsibility for having done. However, the prejudice test set forth below is not so stringent.

The Court now examines whether or not Applicant was prejudiced by his lack of understanding of the elements of the crime of murder. The Court finds Applicant was not prejudice by his lack of understanding of the elements of murder as he testified he pled guilty based on counsel's advice and not based on the elements of murder, along with other considerations noted below. That is, regardless of what the State would be required to prove for Applicant to be convicted of murder, he entered his plea.

Prejudice to a criminal defendant arises when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Here, a review of the record reveals that trial counsel's failure to inform Applicant of the elements of murder did not work to Applicant's prejudice. Clearly Applicant knew he was pleading to having shot the victim who died as a result. (Plea TR p. 53, LL 6-8). Applicant also understood he was pleading to a planned attempt to commit an armed robbery. (Plea TR p. 53, LL 16-19 and PCR TR p. 8, LL 2-17).

Applicant also entered his plea contemporaneously with pleas to other charges. The Court has found Applicant has not carried his burden of proof to establish he failed to understand all charges other than Murder.

The following is the exchange wherein Applicant pled to all of the charges against him:

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The Court: And Mr. Martin, do you want to plead Guilty of Criminal Conspiracy, Possession of a Firearm During the Commission of a Violent Crime, Assault and Battery with Intent to Kill, Armed Robbery, Another Count of Armed Robbery and Murder?

Defendant Martin: Yes, Sir.

The Court: And are you guilty of those charges?

Defendant Martin: Yes, Sir.

(Plea TR p. 51, LL 13-20).

Applicant pled to several offenses in addition to the charge of murder. The Court has found Applicant has not carried his burden of proof to establish trial counsel's error as to these other offenses. At the PCR hearing, Applicant testified. First, Applicant testified specifically that his plea was involuntary as he did not understand the "mandatory minimum sentence required by my plea of guilty." (PCR TR p. 6, LL 7-9). Applicant did not testify that he pled to the murder charge involuntarily due to his lack of understanding of the crime's elements, but rather based on the "mandatory minimum sentence" attached, according to Applicant, to the crime of murder. (PCR Transcript p. 6, LL 7-9); p. 11, LL 17-21; p. 14, LL 7-9; p. 14, LL 18-22; and p. 15, LL 3-6). Applicant testified he thought the murder sentence was a no parole (Applicant calls it "85 percent"). (PCR Transcript p. 14, LL 5-9).

Applicant has not carried his burden of proof on his allegation that he was told by trial counsel that the charge of murder was, as he calls it, an 85 percent sentence. Trial counsel testified that he did not think he told Applicant he may be eligible for early release on the murder

charge. Trial counsel testified that his notes indicated to him that he informed Applicant that the minimum penalty for murder was thirty (30) years "day for day." (PCR TR p. 21, LL 6-12). At his plea, Applicant was present when the Solicitor stated to the plea judge that murder carried "thirty to life." (Plea TR p. 50, 14-15). And when trial counsel noted to the plea judge that "punishment is allowed at thirty." (PleaTR p. 61, LL 13-14).[5]

There is nothing in the record, save Applicant's testimony, that indicates Applicant was ever told that murder carried anything but a minimum day for day thirty years to life. Applicant has perhaps truncated this argument by virtue of his concession at oral argument that the record reflected a sufficient description of sentencing maximums and minimums. (Opinion Footnote 1). However, it is addressed in this Order as the Court finds that the sentencing issue is relevant to the issue of prejudice.

Finally, and telling, is Applicant's testimony that he pled guilty thinking that he could appeal his plea. (Plea TR 11, LL 24-25 through p. 12, L 4).

The undersigned has reviewed the entire record in this matter and based on same finds that Applicant has failed to carry his burden of proof and failed to establish that he is entitled to Post-Conviction Relief on any grounds. Specifically, he has failed to prove that, but for counsel not advising him as to the elements of murder, the result of the proceeding would have been different. Therefore, Applicant's Application for Post-Conviction Relief is dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Petition for Writ of Certiorari within thirty (30) days of the service of this Order to secure appellate review. See

[5] Applicant's co-defendant did not plead to murder. Co-Defendant's counsel as to co-defendant's sentence states "we all know this is eighty-five percent." (Trial TR p. 57, L 16).

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Rule 203 and 243, South Carolina Appellate Court Rules (SCACR). The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the Petition.

IT IS SO ORDERED.

John C. Hayes, III
Presiding Judge

February 1st, 2012
York, South Carolina

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