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May 13 2022

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Charleston County
The Honorable Bentley S. Price, Post-Conviction Relief Judge
The Honorable Clifton Newman, Trial Judge

Appellate Case No.: 2022-000028

ANTHONY MCCLAIN,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

ISSUES ON WRIT OF CERTIORARI

I. Did the PCR court err as a matter of law in granting post-conviction relief and awarding a new trial to McClain based on a claim that counsel was constitutionally ineffective for failing to adequately challenge the State's notice of intent to seek without pursuant to S.C. Code Ann. § 17-25-45 when the State's notice was proper and valid and McClain cannot establish any deficiency nor any prejudice?

II. Did the post-conviction relief court err as a matter of law in granting post-conviction relief and awarding a new trial to McClain based on a claim that his guilty plea was rendered involuntary based on counsel' inadequate handling of his life without parole notice when the record unequivocally established McClain entered a knowing, intelligent, and voluntary plea after multiple days of trial because he did not want to risk a possible life sentence upon conviction based on the State's proper and valid issuance of its intention to seek life without parole pursuant to S.C. Code Ann. §17-25-45?

STATEMENT OF THE CASE

Petitioner Anthony McClain is presently confined in the South Carolina Department of Corrections. During its November 2015 term, the Charleston County Grand jury indicted McClain for kidnapping (2015-GS-10-5698), possession of a weapon during the commission of a violent crime (2015-GS-10-05969), armed robbery (2015-GS-10-5967) and two counts of pointing and presenting a firearm (2015-GS-10-5964; 2015-GS-10-5966). McClain was originally represented by Assistant Public Defender John Kozelski, Esquire but later retained private counsel Aaron Mayer, Esquire. Assistant Solicitor David L. Osborne of the Ninth Circuit Solicitor's Office prosecuted the case.

On February 17, 2017, the State filed a notice of its intention to seek life without parole pursuant to S.C. Code Ann. § 17-25-45 based on McClain's prior federal conviction and attempted to serve this notice on McClain; however, McClain refused to sign the notice of service. App 3. The State again served McClain on February 22, 2017, and McClain accepted service. Counsel for McClain subsequently filed a motion to set aside the life without parole. App 4.

In addition to the issue regarding life without parole, there were several pre-trial issues that needed to be determined such as the State's motion to join both sets of charges into one trial, a hearing pursuant to *Jackson v. Denno*[1] to determine if McClain's video statements were voluntarily waived under his rights to *Miranda*[2], and the admissibility of prior bad acts pursuant South Carolina Rules of Evidence rule 404(b) and *State v. Lyle*[3]. Furthermore, a hearing determining if McClain's identification procedure was unduly suggestive pursuant to *Neil v. Biggers*[4], the

[1] *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964)
[2] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
[3] *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923)
[4] *Neil v. Biggers,* 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)

admissibility of evidence of excited utterances was necessary, a suppression hearing on any evidence allegedly obtained in a manner that violates defendant's constitutional rights, and whether or not McClain could be impeached through his prior convictions. The State filed a thorough pre-trial brief addressing all these issues, including the notice of intention to seek life without parole pursuant to S.C. Code Ann. § 17-25-45 based upon *State v. Phillips*, that allows the trial court to consider a crime that may not be contemplated by S.C. Code Ann. § 17-25-45, to determine whether there are any equivalent offense to seek life without parole. In this brief, the State contends that McClain was properly served with the notice of intention to seek life without parole pursuant to S.C. Code Ann. § 17-25-45 because his federal conviction for aiding and abetting carjacking while armed with a firearm was a qualifying most serious offense, as the facts of the case – carjacking while armed with firearm-- strongly resembled the most serious offense of armed robbery.

On March 10, 2017, pre-trial motions were heard before the Honorable R. Markley Dennis, circuit court judge. Regarding McClain's motion to set aside the State's notice of intention to seek life without parole pursuant to S.C. Code Ann. § 17-25-45, Judge Dennis asked the State to explain how the State determined the notice was proper based on McClain's prior record. App 43. Assistant Solicitor Osborne explained that McClain's 1995 federal aiding and abetting carjacking was a qualifying most serious offense that would trigger the imposition of life without parole pursuant to S.C. Code Ann. § 17-25-45. Assistant Solicitor Osborne further discussed that comparing the federal statute to the state statute can be a bit confusing, but the carjacking coupled with the charge for possession of a firearm should be considered as an armed robbery, which is most serious. However, he admitted that he was positive if the sentencing court would agree with the federal charge being a qualifying conviction for purposes of Section 17-25-45, McClain would be eligible

for life without parole but that the issue should be presented to and decided by the sentencing judge. App 45-48. Judge Dennis ruled that this matter should be before the sentencing judge for his interpretation during sentencing, and that he would not rule on the propriety of the life without parole notice. Specifically, Judge Dennis said:

> It's left to the discretion of the Judge whether or not it's met. And I won't expedite it but that hearing really comes only after he's convicted because there is no question at this point it has to be an interpretation that for the life without parole to apply. If he says no, he can sentence him in accordance with penalties that he is facing for these crimes, okay.

App 48.

Judge Dennis further explained to McClain that he could receive a *de facto* life sentence based on the severity of his charges and the term of years he could receive for each conviction, but still deferred to the discretion of sentencing judge and did not rule on the merits. App 49.

On March 13, 2021, McClain proceeded to trial in front the Honorable Clifton Newman, circuit court judge. After three days of testimony, McClain pleaded guilty to all charges. Assistant Solicitor Osborne subsequently revoked the consideration of life without the possibility of parole pursuant to Section 17-25-45. Judge Newman immediately began sentencing and asked the State to read McClain's extensive criminal history, including the federal aiding and abetting carjacking. Judge Newman stated for the record that carjacking was a most serious offense and that if McClain was found guilty of any of those charges and he determined the federal carjacking equated to the South Carolina equivalent, that McClain would automatically face life without parole pursuant to Section 17-25-45. He continued by saying "He's pled guilty of all charges but the State is no longer contending that the federal carjacking automatically makes it mandatory for him to get life without the possibility of parole. So he got that out the deal." App 566. Judge Newman sentenced McClain to confinement for twenty-two years for the armed robbery, twenty-two years for kidnapping, five

years for each count of pointing and presenting and five years for possession of a firearm during a violent crime, to be served concurrently. McClain did not appeal his conviction or sentence.

McClain filed his application for post-conviction relief on September 19, 2018. The State filed its return on April 23, 2018, and requested an evidentiary hearing. McClain later filed an amended application. An evidentiary hearing in the matter was held before the Honorable Bentley Price ("PCR Court) via WebEx Virtual Platform. McClain was represented by Tommy Thomas, Esquire. By written order on November 12, 2021, the PCR Court issued an order granting post-conviction relief to McClain on the basis that trial counsel was ineffective because he was deficient in failing to provide adequate information surrounding the State's intention to seek life without parole and failed to argue that issue on McClain behalf. Additionally, the Court found that McClain was prejudiced by trial counsel's actions because he plead guilty without negotiation to avoid risking receiving a life without parole sentence. Furthermore, the Court found that McClain pled guilty involuntarily because of the prejudice of the alleged erroneous advice of counsel. On November 22, 2021, the State submitted a motion to alter or amend the judgment, stating that the PCR court erred in ruling trial counsel was ineffective because the State's intention to seek life without parole pursuant to S.C. Code Ann §17-25-45 was proper, thus McClain failed to show constitutional deficiency. Furthermore, the State argues that McClain's plea was not involuntary because trial counsel was not constitutionally ineffective, and McClain testified that he would've pled and admitted guilty. On December 9, 2021, PCR court denied the State's motion to alter or amend the judgement without any consideration of the merits of the State's claims. This appeal follows.

STATEMENT OF FACTS

On June 1, 2015, Anthony McClain drove his vehicle in Downtown Charleston. McClain proceeded to an intersection, he slowed his vehicle and allegedly asked to take a picture with several College of Charleston students. App. 153. One member of the group of students refused and when they refused, he placed a gun to the back of one of their heads and to the forehead of another. App. 169; App. 183. The students ran and two proceeded to scream, "He has a gun." App. 154. The students ran back to an apartment and proceeded to call the police and file a report.

When McClain left that incident, he then drove two blocks and saw the second victim, Jennifer Johnson. He slowed his vehicle and asked the victim for directions to North Charleston. App. 370. Johnson gave McClain the directions and proceeded to get in her vehicle. *Id.* McClain walked up to Johnson's vehicle and got in the doorway, preventing her from closing her door. *Id*. After preventing her from closing the door, McClain pulled a gun on the victim and told her "Sweetheart, I need you to give me everything you've got." *Id*; App. 372. Johnson explained to the McClain that she only had three dollars after paying a daycare bill to her daughter. *Id* .McClain asked Johnson did she have any credit or debit cards, which the Johnson denied although she had access to her mother's card for emergencies. App. 372-373. Johnson gave McClain three dollars, and he began to walk away. App. 374. McClain walked back to the Johnson's car and demanded that he be let back into the car. App. 375. Once inside, he placed a gun to the Johnson's head. *Id.* McClain then demanded that she take him to a corner store. App 376. He further threated Johnson by saying that she did not need to do anything stupid, because he had someone following her. *Id*. Johnson obliged McClain and bought him a can of beer. App. 377.

McClain demanded that Johnson go to another store, where he made her purchase a loose cigarette for him. App. 378. McClain directed Johnson to drive more places, including a motel.

App. 391. McClain left Johnson unattended but took her keys and phone with him while he left. App 391-392. Once McClain returned to the car, Johnson testified that McClain commanded that she either have sex with him or get more money for him. App. 398. Johnson admitted that she had a bank card. See App. 402-403. Ultimately, McClain began driving the car. App. 405. While searching for her bank card, she discovered a spare key. App 401. The victim withdrew $100 from an ATM that she gave to McClain. App. 404. McClain drove to a trailer park, where he made Johnson exit the vehicle and then told her to get back in the vehicle. App 410. Once McClain was out of her view, she used the spare key she found in her purse, got in the driver's seat of the car, and escaped. App. 411.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); *Smalls,* at 180-81, 810 S.E.2d at 839-40 (citations omitted). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Id.* Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

III. The post-conviction relief court erred as a matter of law in granting post-conviction relief and awarding a new trial to McClain based on a claim that counsel was constitutionally ineffective for failing to adequately challenge the State's notice of intent to seek life without parole pursuant to S.C. Code Ann. § 17-25-45 because the State's notice was proper and valid, and, accordingly, McClain cannot establish any deficiency of counsel nor any prejudice.

The PCR court erred as a matter of law in finding McClain's defense attorney was constitutionally ineffective for failing to provide information regarding McClain's risk for being sentenced to life without parole. The PCR court's finding of ineffectiveness is premised upon its erroneous finding that trial counsel failed to appropriately argue the issue of life without parole during his trial; however, since McClain was eligible for a mandatory life without parole sentence pursuant to S.C. Code §17-25-45, the alleged ineffectiveness of counsel for failing to argue the issues is of no importance.

Moreover, although the PCR court found that trial counsel was ineffective for failing to adequately challenge and argue on McClain's behalf against the State's intention to seek life without parole, the PCR Court fails at conducting the most basic inquiry into determining whether the life without parole notice was proper. However, since McClain was eligible for life without parole, the claim must fail as a matter of law because counsel cannot be deficient nor can McClain be prejudiced because he was properly noticed of the State's intention to seek life without parole pursuant to S.C. Code Ann. § 17-45-25. Accordingly, this court should grant a writ of certiorari to correct the PCR's courts error as it is inconsistent with the record and case law.

McClain's defense attorney was not ineffective for failing to provide information regarding McClain's risk for being sentenced to life without parole. In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. *State v. Woods*, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); *see State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The

Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Pursuant to that right, the defendant is entitled to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970); *see Strickland v. Washington*, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). Significantly though, effective assistance of counsel does *not* mean perfect or mistake-free representation. *See Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.' " (citation omitted)); *Burt v. Titlow*, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"); *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. *Strickland*, 466 U.S. at 687-688. Meanwhile, counsel's assistance is considered to be constitutionally ineffective only when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686; *see Harrington v. Richter*, 562 U.S. 86, 110 (2011) ("Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." (citation and internal quotations omitted)).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). When faced with a claim of ineffective assistance of counsel, a reviewing court

must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of counsel claim must establish: (1) counsel's representation fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); *see United States v. Balzano*, 916 F.2d 1273, 1292 (7th Cir. 1990) (characterizing the required showing a defendant must make in order to successfully establish an ineffective assistance of counsel claim as a "high mountain a defendant must climb"); *Stone v. State*, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (instructing "the law requires [a reviewing court to] presume counsel rendered adequate assistance and exercised reasonable professional judgment" and only find to the contrary when the applicant has overcome that presumption by establishing both deficiency and prejudice); *see also Weaver*, 137 S. Ct. at 1912 (explaining "the rules governing ineffective-assistance claims must be applied with *scrupulous care*" (emphasis added and citation and internal quotations omitted)).

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the objectively reasonable range of competence required in criminal cases. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); *see Richter*, 562 U.S. at 110 (instructing the proper analysis "calls for an inquiry into the *objective* reasonableness of counsel's performance, not counsel's subjective state of mind" (emphasis added)). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that

presumption. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814; *see Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (noting counsel's strategic decisions are to be afforded " 'strong presumption' of reasonableness that the defendant must overcome); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, will make every effort "to eliminate the distorting effects of hindsight," and will "evaluate the conduct from counsel's perspective at the time" in light of the then-existing circumstances. *Strickland,* 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Thus, counsel's performance will be considered to be deficient only when it objectively amounted to incompetence under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." *Richter*, 562 U.S. at 105; *see State v. Woullard*, 813 N.E.2d 964, 971 (Ohio Ct. App. 2004) ("Defense counsel's strategy must have been outside the realm of legitimate trial strategy so as 'to make ordinary counsel scoff' before a conviction will be reversed on the basis of ineffective assistance." (citations omitted)). "In fact, even if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen." *Dunn,* 141 S. Ct. at 2410 (citation and internal quotation and brackets in original omitted).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding

if the error had no effect on the judgment."[5] *Strickland,* 466 U.S. at 691. In order for that burden to be met, counsel's deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. *Cherry v. State*, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989); *see Johnson v. State,* 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Richter*, 562 U.S. at 112 (emphasis added); *see Strickland*, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

Here, trial counsel was not deficient in his representation regarding the life without parole notice. Initially, he filed a pre-trial motion on McClain's behalf seeking to set aside the notice of life without parole. Furthermore, in its Order granting relief, the PCR Court denotes that because trial counsel did not argue the motion during pretrial or any other appropriate time during trial, that he was ineffective. However, there was no other appropriate time to argue Judge Dennis specifically asked Assistant Solicitor Osborne, as it was the State's burden[6], to explain how life without parole would be proper in this case. Moreover, Judge Dennis correctly determined that life without parole eligibility would not be determined until at the time of sentencing with the trial

[5] Notably, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at 697. In fact, a reviewing court ordinarily should dispose of an ineffective assistance of counsel claim on the grounds of lack of sufficient prejudice "[i]f it is easier" to do so. Id.

[6] *State v. Phillips*, 393 S.C. 407, 414. ("the State bears the burden of establishing the defendant's prior convictions for serious or most serious offenses")

judge and, accordingly, arguments on the propriety of the life without the possibly of parole notice were premature at that time. However, at the time of sentencing, McClain had changed his plea to guilty, triggering the State to withdraw its notice to seek life without parole pursuant to Section 17-25-45. Moreover, the PCR Court's finding that trial counsel for McClain was ineffective is illogical because when McClain entered into a guilty plea, the State had withdrawn its notice to seek life without parole, and, accordingly, any motion or argument counsel would have against the notice of life without parole was moot because the notice had been withdrawn.

Furthermore, trial counsel was also not deficient and McClain was not prejudiced because the State properly sought and serviced McClain with its intention to seek life without parole based on his prior convictions. In Section 17-25-45 of the South Carolina Code, a solicitor is entitled to seek an invocation of sentence of life without parole if upon a conviction of a most serious offense if that person has either one or more prior convictions of most serious offense of a *federal* or out-of-state conviction for an offense that would be classified as a most serious offense. *See* S.C. Code Ann. § 17-25-45. There are several offenses listed in the statute. However, the State argued that carjacking would be the offense closest to his 1995 aiding and abetting carjacking conviction. In South Carolina, a person is guilty of carjacking if they take or attempt to take "a motor vehicle from another person by force or violence or by intimidation while the person is operating the vehicle or while the person is in the vehicle." S.C. Code Ann. §16-3-1075. Similarly, McClain's charge of aiding abetting carjacking requires that

> "Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so" be fined or imprisoned under the guidelines of the statute."

18 U.S.C.A §2119.

Furthermore, in the federal system, a person who commits and offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as the principal. 18 U.S.C.A §2. Similarly in South Carolina, a person is guilty in of the felony of carjacking, when they take or attempt to "take a motor vehicle from another person by force and violence or by intimidation while the person is operating the vehicle or while the person is in the vehicle." S.C. Code Ann. §16-3-1075(B). Analogously, in South Carolina, "a person who aids in the commission of a felony or is an accessory before the fact in the commission of a felony… is guilty of a felony, and upon conviction, must be punished in the manner prescribed for the punishment of the principal felon." S.C. Code Ann. §16-1-40.

Here, trial counsel's performance was not deficient and McClain cannot establish any prejudice as required by *Strickland* because the notice of life without parole was proper. South Carolina's carjacking statute and the federal carjacking statute are strikingly similar and would be interpreted to be a most serious crime that would be enhanced by McClain pleading guilty to armed robbery, thus, he was properly served with the life without parole notice. Furthermore, while this Court points to the Assistant Solicitor admittedly saying during pre-trial motions that he was not completely sure if an LWOP notice was proper (which is a stark difference from the pre-trial brief filed with the trial court) Judge Dennis ruled that the sentencing judge should make the final determination. Additionally, Judge Newman agreed during sentencing that carjacking was a most serious crime and his conviction for armed robbery would result in an automatic sentence of life without parole under Section 17-25-45, but that was irrelevant because the State withdrew its notice of intention to seek life without parole once McClain agreed to change his plea to guilty. Accordingly, McClain cannot establish that counsel was deficient or that that he was prejudiced

by the actions of his attorney as required by *Strickland*, because the results of being eligible for life without parole would not been different but for trial counsel's alleged ineffectiveness.

Therefore, the PCR Court erred as a matter of law, because McClain cannot establish either constitutional deficiency or prejudice as a result of counsel's performance, as the State properly served him with the notice to seek life without parole. Accordingly, this court should grant the State's petition for a writ of certiorari to correct this erroneous finding.

II. The post-conviction relief court erred as a matter of law in granting post-conviction relief and awarding a new trial to McClain based on a claim that his guilty plea was rendered involuntary based on counsel's inadequate handling of his life without parole notice because the record unequivocally establishes McClain entered a knowing, intelligent, and voluntary plea after multiple days of trial because he did not want to risk a possible life sentence upon conviction based on the State's proper and valid issuance of its intention to seek life without parole pursuant to S.C. Code Ann. § 17-25-45.

The PCR Court found McClain pleaded guilty involuntarily due to "erroneous" advice given counsel regarding the possibility of life without parole. However, McClain's plea was a voluntary, knowing and intelligent guilty plea to avoid a properly served and issued notice of life without parole, or in the alternative, a de facto life sentence based on the sentencing range he faced for each charge. Accordingly, this court should grant the State's petition for writ of certiorari.

An applicant who pleads guilty with the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." *Hill*, 474 U.S. at 56. Further, "[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." *McMann v. Richardson*, 397 U.S. 759, 770 (1970). Rather, "whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." *Id.* at 771.

The record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. *Dalton v. State*, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." *Roddy v. State*, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). Further, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. *Dalton*, at 137-38, 654 S.E.2d at 874 (citing *Blackledge v. Allison*, 431 U.S. 63 (1977)). Therefore, admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." *Id.* (citing *Crawford v. United States*, 519 F.2d 347 (4th Cir. 1975); *Edmonds v. Lewis*, 546 F.2d 566 (4th Cir. 1976)). "In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing." *Id.* at 138-39, 654 S.E.2d at 874 (citing *Wolfe v. State*, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).

As noted earlier, trial counsel was not ineffective because he filed a pretrial motion to set aside the notice of life without parole and never had the opportunity to address the court regarding the life without parole notice because it was withdrawn by the State before sentencing, which would have been the appropriate time to argue on life without parole. Furthermore, McClain was not prejudiced by the alleged ineffectiveness because due to the seriousness of his prior federal charge and current charges, Judge Newman could have deemed McClain eligible for life without

parole. Furthermore, in a colloquy with Judge Dennis about his age at the pre-trial motion hearing, McClain was apprised that he may get a *de facto* life sentence due to the amount of time the armed robbery and kidnapping charges carried. Furthermore, trial counsel was not ineffective because PCR failed to undergo a prejudice analysis, and presumed prejudice based on the earlier, unfounded ruling, that counsel was ineffective without determining whether McClain was eligible for life without parole.

Furthermore, the Defendant testified multiple times that he would have pled guilty if the deemed the plea favorable to him and to accept his punishment. App. 699. Additionally, McClain denoted he was surprised when trial counsel stated he would continue to trial the following week, because he wished to plead guilty. App. 726 Furthermore, McClain testified that he decided to plead guilty because he was facing life without parole, not based on erroneous advice. App. 692; App. 702. Furthermore, at trial, McClain told Judge Newman that he was not promised anything for taking plea and wanted to plead guilty because he was guilty of the crimes he was charged with. App. 555-560.

In conclusion, McClain has failed to show how counsel was constitutionally deficient, and that his plea was involuntary due to that deficiency because his trial counsel was not ineffective, and his plea was voluntary as he would have pled and admitted guilt.

CONCLUSION

For all of the foregoing reasons, this Court should grant a writ of certiorari and reverse the PCR court's erroneous findings.

Respectfully submitted,

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