

No.18-5071

In the Supreme Court of the United States

JUAN CARLOS VAZQUEZ,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of South Carolina

BRIEF IN OPPOSITION

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RESPONDENT'S ARGUMENT WHY CERTIORARI SHOULD BE DENIED

The Court should deny certiorari to review the Supreme Court of South Carolina's denial of Petitioner's petition for a writ for habeas corpus where Petitioner's claims of constitutionally ineffective counsel, involuntary guilty plea, and prosecutorial misconduct were previously adjudicated and properly denied by the state courts during his post-conviction relief action and federal courts during his habeas corpus action.

The Respondent State of South Carolina requests this Court deny the petition for a writ of certiorari.

RESPONDENT'S STATEMENT OF THE CASE

A. Factual History

On January 24, 2009, Petitioner Juan Carlos Vazquez, an admitted drug dealer in the upstate region of South Carolina, became concerned that his close friend and business associate, Hugo del Carmen Lugo-Hernandez, had stolen fifty-thousand dollars from him. (App. 24-25).¹ In response, he contacted his associate Yesenia Cortez Ramirez, who then drove to Spartanburg County, South Carolina, from Atlanta, Georgia, with Jose Reyes Arevalos, Edgar Pineda, Miguel Lopez, Rudis Ventura, Jose Del Angel Gomez, and Lewis Perez, in an effort to help Petitioner recover the money he believed Lugo-Hernandez had stolen. The group then traveled to Lugo-Hernandez's home in Greer, South Carolina, that he shared with Teresa De Jesus Avilla-Martinez. (App. 24-25). Once there, several members of the group broke in the front door to the residence and killed Lugo-Hernandez and Avilla-Martinez. (App. 25). While investigating the homicides, law enforcement obtained and executed a search warrant for a residence where they recovered large quantities of marijuana, cocaine, and crack cocaine. (App. 25-26). Petitioner gave statements to law

¹ Respondent cites to the Appendix filed in the appeal of Petitioner's state court post-conviction relief action using the abbreviation "App." See Appendix for Juan Carlos Vazquez v. State, Appellate Case No. 2015-000057, on file with the South Carolina Supreme Court and found at the following website: <https://ctrack.sccourts.org/public/caseView.do?csIID=58501>. It appears Petitioner has also cited to this Appendix in his petition using the same "App." abbreviation.

enforcement wherein he admitted the illegal drugs were his and implicated himself in the homicides. (App. 25-27).

B. State General Sessions (Criminal) Proceedings

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. During its May 2009 term, the Spartanburg County Grand Jury indicted Petitioner for trafficking in cocaine more than 400 grams and possession with intent to distribute marijuana. Thereafter, during its May 2010 term, the Spartanburg County Grand Jury indicted Petitioner for two counts of accessory before the fact to murder and one count of accessory before the fact to first-degree burglary. Petitioner was represented by H. Chase Harbin, Esquire. Barry J. Barnette, Esquire, of the Seventh Circuit Solicitor's Office, prosecuted the case.

On July 12, 2010, Petitioner, alongside counsel Harbin, appeared in the Spartanburg County Court of General Sessions before the Honorable J. Derham Cole, circuit court judge, to plead guilty to all offenses as indicted. A court-approved language interpreter, Ruby Stephens, was present at the guilty plea to provide interpretation for Petitioner. The court questioned Ms. Stephens, who advised the court she was at least eighteen years of age, was not related to Petitioner, had educational training or experience that enabled her to speak fluently in foreign language and interpret the language of another person, had previously served as an interpreter in the circuit court in South Carolina, and was on the court-approved list with South Carolina Court Administration to provide interpretations. She further

advised the court that she spoke with Petitioner and his counsel that morning and did not perceive any difficulties in translation or in understanding the language that Petitioner speaks. The court then advised Petitioner to inform the court if he had any difficulty whatsoever in understanding the proceedings or interpretations provided and Petitioner responded affirmatively; Petitioner never informed the court of any such difficulties throughout the duration of his guilty plea. (App. 1-34).

The plea proceeding continued, with the interpreter acting as a conduit for Petitioner. Petitioner advised the court he had plenty of time to speak with counsel about his case, including his decision to plead guilty. Petitioner further advised the court that counsel had reviewed each indictment with him, explained what the State would be required to prove for a jury to find him guilty, and the potential sentences he faced for each offense. When the court asked Petitioner if he and counsel had discussed possible defenses to the offenses, Petitioner originally responded, “What do you mean? I don’t understand?” before eventually answering affirmatively after further clarification from the court. The court then reviewed each indictment with Petitioner separately, reading the indictment and the potential sentences, and Petitioner affirmed he understood the charge and potential sentence for each offense. Petitioner again affirmed he wanted to plead guilty. (App. 7-14).

The court reviewed Petitioner’s various constitutional rights with him and Petitioner advised the court counsel had reviewed these rights with him and he wished to waive these rights to enter his guilty plea. The court advised Petitioner of various sentencing provisions, statutes, and guidelines that could affect the amount

of time he must serve and Petitioner affirmed counsel had reviewed this with him. Petitioner advised the court he had not been promised anything to induce his guilty plea and likewise had not been threatened or coerced. Petitioner informed the court he was thirty-four years old and had studied for twelve years in his native Mexico City, Mexico. Petitioner advised the court he had been living in Spartanburg County for four years. He further advised the court he did not have any substance abuse or mental health concerns and understood what he was doing by entering his guilty plea. (App. 14-23). Petitioner advised the court he did not speak English but he fully understood the court's questioning through the interpreter. He further advised the court he did not have any difficulty whatsoever communicating through his interpreter. (App. 23-24).

Following the State's recitation of the facts giving rise to these charges, Petitioner advised the court he agreed with the factual recitation. He also advised the court he had discussed the two statements he made to law enforcement with counsel, affirmed that these were his statements, and that the statements were freely and voluntarily given without any threats, force, or coercion. (App. 28-30).

Counsel advised the court he had received all discovery material from the State and had reviewed the discovery with Petitioner, which was introduced as a State's exhibit during the proceeding. He further advised the court he had discussed possible defenses at length with Petitioner, he believed Petitioner did not have any viable defenses, and he thought Petitioner would likely be convicted at trial. Petitioner then advised the court again that he wanted the court to accept his guilty plea. The court

accepted Petitioner's guilty pleas and deferred sentencing. (App. 30-34).

On May 23, 2012, Petitioner alongside counsel Harbin, again appeared in the Spartanburg County Court of General Sessions for a sentencing proceeding before the Honorable J. Mark Hayes, II, circuit court judge. A court-approved language interpreter, Janet Charez, was present at the sentencing proceeding to provide interpretation for Petitioner. As had occurred at his plea proceeding, the interpreter acted as a conduit for Petitioner. Following mitigation from counsel, Petitioner addressed the court and explained it was only his intention to get his money back, not for the victims to be murdered; he also apologized to the victims' families. The court sentenced Petitioner to concurrent sentences of life for accessory before the fact to first-degree burglary and each count of accessory after the fact to murder, along with concurrent sentences of thirty years for trafficking and five years for possession with intent to distribute. (App. 36-67).

Counsel filed a motion for reconsideration on June 4, 2012, which was subsequently denied without a written order. Petitioner did not pursue a direct appeal challenging his convictions or sentences.

C. State Post-Conviction Relief Proceedings

Petitioner collaterally attacked his convictions and sentences in a state post-conviction relief proceeding filed in the Spartanburg County Court of Common Pleas by filing an application on February 4, 2013. Vazquez v. State, Civil Action No. 2013-CP-42-0518. In his application, Petitioner asserted the following grounds for relief:

- i. Ineffective assistance of counsel, in that;

1. Counsel failed to properly research and investigate the facts surrounding Applicant's case,
- ii. Involuntary guilty plea, in that;
 1. Applicant would have insisted on proceeding to trial, but for the improper actions of Counsel and the prosecution,
- iii. Prosecutorial misconduct, in that;
 1. Brady violation.

Respondent, the State of South Carolina, made its Return on March 19, 2014, requesting an evidentiary hearing be convened. (App. 69-89).

An evidentiary hearing into the matter was convened on November 4, 2014, at the Spartanburg County Courthouse before the Honorable R. Keith Kelly, circuit court judge. Janet Chavez, the same court-approved interpreter who had interpreted for Petitioner at his sentencing proceeding, was present at this evidentiary hearing to provide interpretation for Petitioner. As had occurred at his plea proceeding and sentencing proceeding, the interpreter acted as a conduit for Petitioner, and Petitioner assured the court he did not have any problems or complaints with this interpreter's services. At the hearing, in addition to the allegations enumerated in his application, Petitioner alleged his guilty pleas were involuntary because counsel failed to discuss how his guilty pleas may affect his residency in the United States and also because, although counsel always met Petitioner with an interpreter present, Counsel was ineffective for failing to get a better interpreter because Petitioner was having problems communicating or understanding the nature of the charges against him and the consequences of pleading guilty. (App. 90-145).

At the hearing, Petitioner testified on his own behalf. Petitioner testified he filed his post-conviction relief action because he had problems communicating with

counsel and counsel also did not research his case sufficiently. He testified counsel never explained the elements of the offenses, the potential sentences, or anything about his case. He testified the statements he gave to law enforcement were without the advice of an attorney despite asking for one, which he told counsel once he had retained him. He also testified he had communication problems with the interpreter the sheriff's department used. He testified counsel never reviewed the discovery with him prior to his guilty plea and did not provide him with a copy of his discovery until after his plea. Petitioner further asserted the copy eventually provided by counsel was incomplete as it lacked statements from his co-defendants. Petitioner testified counsel brought an interpreter with him so they could communicate but Petitioner asked for a new interpreter because the interpreter had drug charges and did not properly interpret for him. He testified he only met with counsel four times, with each meeting lasting approximately fifteen to twenty minutes. He testified counsel never explained the drug offenses to him and instead insisted they focus on the more serious charges pertaining to murder and burglary. He testified counsel never discussed potential immigration consequences with him. Petitioner testified he felt pressured into pleading guilty. (App. 97-112).

On cross-examination, Petitioner testified he recalled his guilty plea proceeding, including informing the court he was satisfied with counsel's services and had enough time to consider his decision to plead guilty. However, he testified he responded affirmatively because counsel had instructed him to do so. He similarly testified he only responded affirmatively to the court's questioning about reviewing

the indictments, potential sentences, and his constitutional rights with counsel based on counsel's instructions. He testified he did not understand he could receive a life sentence until informed by the court but still told the court he wanted to plead guilty multiple times. He testified he wanted to proceed to trial and advised counsel of this but counsel insisted he plead guilty. He testified he lied to the court while under oath when he said his plea was entered without threats or coercion based on counsel's advice. (App. 112-118).

Following Petitioner's testimony, Respondent presented testimony from counsel Harbin. He testified he was retained to represent Petitioner and met with him four to five times. He testified he brought an interpreter to all but one of their meetings and that this one meeting without an interpreter was just a brief meeting to check-in on Petitioner. He testified Petitioner understood some English but he relied on an interpreter to discuss any substantive aspects of Petitioner's case. He testified Petitioner never expressed any concerns about the interpreters he used and denied Petitioner ever expressed concerns that one of his had a drug charge. He testified he paid for the interpreters through his retainer funds. He testified Petitioner did have complaints about the interpreters the sheriff's department used and also that Petitioner said his request for counsel had not been honored by law enforcement. He testified Petitioner did acknowledge that he had waived his rights and given a statement then asked for counsel at a later point. He testified he would have challenged the admission of the statements had Petitioner elected to proceed to trial. He testified the allegations presented by the State were that Petitioner was

owed a debt from the victim, a cohort in a drug enterprise, and hired hitmen to kill the victim. He testified Petitioner acknowledged hiring the group, but only to retrieve his money, not kill the victims. Counsel testified he was provided with an entire copy of discovery, including the co-defendants' statements, which he reviewed with Petitioner. He testified he did not provide Petitioner with a physical copy of his discovery due to concerns a fellow detainee would access the discovery and provide statements against Petitioner, which he explained to Petitioner and Petitioner agreed. He testified Petitioner never requested discovery until after he was sentenced and he complied with Petitioner's request. He testified he reviewed all portions of discovery, including the co-defendant statements and Petitioner's statements, with Petitioner prior to the plea. He testified at least one of Petitioner's co-defendants would testify against him at trial. He testified he hoped Petitioner would receive a sentence below the maximum of life without parole because he was admitting his guilt and did not enter the home and kill the victims. He testified he advised Petitioner that if he was ever released from imprisonment he would likely be deported. He testified the drug offenses were not the main focus of his discussions with Petitioner based on the severity of the other charges. He testified he did not advise Petitioner how to respond to questions, but rather, informed him to listen to the court carefully and respond accordingly with "yes" or "no" answers. Counsel testified he is comfortable that Petitioner's guilty plea was freely and voluntarily entered. Counsel testified he does not speak Spanish and relied exclusively on the interpreters to translate for Petitioner. Counsel testified it was in Petitioner's best

interest to plead guilty based on his review of the all of the evidence (including phone records and video surveillance) and conversations with Petitioner. (App. 118-145).

At the conclusion of the hearing, the post-conviction relief court took the matter under advisement to allow him time to review the record in its entirety. (App. 144). On November 26, 2014, the post-conviction relief court issued an order denying and dismissing Petitioner's application with prejudice. The court specifically found counsel's testimony credible, including that he advised Petitioner of potential deportation risks involved with pleading guilty and that Petitioner never indicated he was having problems communicating with Counsel nor requested Counsel to hire another interpreter. The court found Petitioner failed to meet his requisite burden of proof to establish that counsel was constitutionally ineffective or that his guilty plea was involuntarily entered. The court also rejected Petitioner's claim of prosecutorial misconduct. The post-conviction relief court further found the record from Petitioner's guilty plea and sentencing proceedings supported these findings. (App. 146-155).

Petitioner appealed the denial of his post-conviction relief application to the South Carolina Supreme Court. Appellate Defender Benjamin J. Tripp represented Petitioner and filed a petition for writ of certiorari pursuant to Johnson v. State,² on Applicant's behalf, arguing whether there was evidence in the record to support the

² The Supreme Court of South Carolina "has approved the withdrawal of counsel in meritless post-conviction relief appeals, provided the procedures outlined in Anders v. California, 386 U.S. 738 (1967), were followed." Johnson v. State, 294 S.C. 310, 310, 364 S.E.2d 201, 201 (1988). The state court adheres to this requirement even though the United States Supreme Court held, in Pennsylvania v. Finley, 481 U.S. 551 (1987), that such procedures are not required. Id.

post-conviction relief court's conclusion that Petitioner knowingly and voluntarily pled guilty merely because Petitioner participated in a routine guilty plea hearing when he could not understand English. Appellate counsel also filed a motion to be relieved as counsel pursuant to Johnson, stating he believed "seeking certiorari from the order of dismissal [was] without merit" based on his professional opinion. Petitioner filed a *pro se* petition on July 23, 2015. In his *pro se* response, Petitioner argued "the PCR court errored in ruling that counsel was not ineffective and that his guilty plea was knowing, voluntarily and intelligently waived." Petitioner alleged he had trouble communicating with counsel and did not know the charges to which he was pleading guilty, nor did he understand the consequences of his plea. Petitioner also alleged trial counsel did not inform him of the discovery documents until after his sentencing. Petitioner also alleged counsel failed to investigate telephone calls, failed to challenge the voluntariness of his statement to the sheriff's department, and failed to hire an adequate interpreter. Petitioner also objected to counsel's defense strategy and claimed they did not discuss the possibility of Petitioner's deportation.

By order dated September 23, 2015, the South Carolina Supreme Court denied the petition for a writ of certiorari and granted appellate counsel's request to be relieved. Vazquez v. State, Appellate Case No. 2015-000057. The remittitur was issued on October 15, 2015.

C. Federal Habeas Corpus Proceeding

Thereafter, Petitioner filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina, delivered on October 29, 2015.

(Case no. 2:15-cv-4475-BHH). In his petition, Petitioner asserted the following claims:

Ground One: ineffective assistance of counsel/Guilty plea was not knowingly, voluntarily and intelligently waive

Supporting Facts: SEE ATTACHED SHEETS
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Ground Two: Prosecutorial Misconduct

Supporting Facts: The State suppressed Petitioner's phone records
SEE: App. p 24-L23-p25-L10 and Petitioner's co-defendant's statements App. p 27 L 13 – p 29 – L6
Or never had this alleged evidence in the first place

(ECF No. 8-1 at 5, 7).

On March 4, 2016, Respondent, upon order of the Honorable Mary Gordon Baker, United States Magistrate Judge, filed a return and motion for summary judgment seeking dismissal of the petition. In response, Petitioner filed a motion to compel and shortly thereafter, a motion to stay. Respondent filed responses in opposition to both motion, to which Petitioner then filed replies. Judge Baker denied Petitioner's motion to compel and to stay, and on December 12, 2016, issued a Report and Recommendation, recommending Respondent's motion for summary judgment be granted, Petitioner's habeas petition be dismissed with prejudice, and a certificate of appealability be denied.

On February 8, 2017, the Honorable Bruce Howe Hendricks, United States District Judge, issued an order and opinion adopting the Report and Recommendation, granting Respondent's motion for summary judgment, dismissing the petition with prejudice, and denying a certificate of appealability.

Petitioner appealed the order to the United States Court of Appeals for the Fourth Circuit. In an unpublished opinion filed July 25, 2017, the Court of Appeals denied a certificate of appealability and dismissed the appeal. (Vazquez v. Warden Lerory Cartledge, Appellate Case no. 17-6429).

D. State Habeas Corpus Action

After the denial of his federal habeas corpus petition, Petitioner filed a “Petition for Writ of Habeas Corpus in the Original Jurisdiction of the South Carolina Supreme Court,” which was served on Respondent on December 19, 2017. (Appellate Case No. 2017-002631). In this petition, Petitioner argued:

“Argument 1: Evidence in the record that Petitioner does not understand English plainly shows that any admission at the guilty plea could not reliably indicate that Petitioner’s plea was knowing and voluntary.”

“Argument 2: Plea hearing counsel was ineffective for failing to advise the petitioner that if he pleads guilty he would be deported. Counsel’s failure denied the petitioner due process.”

“Argument 3: The prosecutor’s conduct in this case amounted to prosecutorial misconduct, which denied Petitioner due process of law.”

All three claims had already been raised and ruled upon by the post-conviction relief court and the federal courts. On February 7, 2018, Respondent filed its Return to the Petition for Writ of Habeas Corpus and incorporated by reference the appendix to Petitioner’s post-conviction relief appeal. By order dated April 11, 2018, the South Carolina Supreme Court denied the petition, finding Petitioner failed to “make out a prima facie case showing a constitutional violation which, in the setting, construed a denial of fundamental fairness shocking to the universal sense of justice and entitling him to relief,” citing Gibson v. State, 329 S.C. 37, 495 S.E.2d 426 (1998).

ARGUMENT WHY CERTIORARI SHOULD BE DENIED

Petitioner has failed to establish a compelling reason why this Court should grant certiorari to review the South Carolina Supreme Court's denial of his petition for a writ for habeas corpus where Petitioner's assertions of constitutionally ineffective counsel, involuntary guilty plea, and prosecutorial misconduct were all previously adjudicated and properly denied by the state court during his post-conviction relief action, which was affirmed on appeal, and federal courts during his habeas corpus action.

Petitioner contends this Court should grant certiorari to review the South Carolina Supreme Court's denial of his state habeas corpus petition, which raised issues that were fully adjudicated during his state post-conviction relief action, which was affirmed on appeal by the South Carolina Supreme Court, and his federal habeas corpus action. Petitioner fails to present an extraordinary or compelling reason why this Court should grant certiorari. Rather, Petitioner merely argues the factual findings of the post-conviction relief court were erroneous based on his own interpretation of the record—claims that were already rejected by the South Carolina Supreme Court and federal courts during his federal habeas corpus proceeding. Certiorari should be denied.

A. Petitioner has failed to establish that the South Carolina Supreme Court improperly denied his petition.

In South Carolina, a petition for a writ of habeas corpus was historically was a common-law writ for relief and was only available to attack the jurisdiction of the court that imposed the sentence. See Williams v. Ozmint, 380 S.C. 473, 476, 671 S.E.2d 600, 601 (2008) (citing Ex parte Klugh, 132 S.C. 199, 128 S.E. 882 (1925) and recognizing that habeas corpus is a collateral remedy and calls in question only the

jurisdiction of the court whose judgment is challenged). “The great and central office of the writ of habeas corpus is to test the legality of a prisoner’s current detention.” Butler v. State, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) (quoting Walker v. Wainwright, 390 U.S. 335, 336 (1968)). The enactment of the Uniform Post-Conviction Procedure Act³, however, “drastically limited the availability of habeas corpus.” Id. (citation omitted). Post-conviction relief was intended to include all “relief available under the common law writ of habeas corpus, the relief available under the expansion of the writ, and the relief available by collateral attack under any common law, statutory or other writ, motion, petition, proceeding, or remedy.” Simpson v. State, 329 S.C. 43, 46, 495 S.E.2d 429, 430 (1998). Habeas corpus writs cannot be used as a substitute for appeal or other remedial procedure which a criminal defendant had an opportunity to avail himself, and a matter cognizable under the Uniform Post-Conviction Procedure Act may not be raised by a petitioner for writ of habeas corpus in the circuit court or other lower state courts. Tyler v. State, 247 S.C. 34, 145 S.E.2d 434 (1965); see also S.C. Code Ann. § 17-27-20(b) (2003) (noting post-conviction relief “comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence”).

Regardless, the South Carolina Constitution provides for the possibility of habeas corpus relief in the original jurisdiction of the South Carolina Supreme Court.

³ S.C. Code Ann. §§ 17-27-10, *et. seq.* (2003).

S.C. Const. Art. 1, § 18. “Habeas relief is seldom used and acts as an ultimate ensurer of fundamental constitutional rights. For these reasons, a defendant bears a much higher burden in a habeas proceeding.” Williams, 380 S.C. at 477, 671 S.E.2d at 602. The South Carolina Supreme Court has held that not “every constitutional error at trial will justify issuance of the writ.” McWee v. State, 357 S.C. 403, 406, 593 S.E.2d 456, 457 (2004) (quoting Green v. Maynard, 349 S.C. 535, 538, 564 S.E.2d 83, 84 (2002)). The South Carolina Supreme Court will only grant a writ of habeas corpus under “unique and compelling circumstances.” Id. A writ of habeas corpus, therefore, is reserved for only the most serious of constitutional violations which—in the setting⁴—constitute a “denial of fundamental fairness shocking to the universal sense of justice.” Id. (citing Green, 349 S.C. at 538, 564 S.E.2d at 84); see also Butler, 302 S.C. at 468, 397 S.E.2d at 88. “Only when there is an extraordinary reason such as a question of significant public interest or an emergency will [the South Carolina Supreme Court] exercise its original jurisdiction.” Key v. Currie, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991).

Petitioner’s case is easily distinguishable from the few cases in which the South Carolina Supreme Court has granted the writ. For example, in Butler, the court noted Petitioner’s claim only arose after exhaustion of his state and federal reviews, and he was “seek[ing] to take advantage of constitutional principles recognized after his trial, appeal, and exhaustion of state post-conviction relief proceedings.” 302 S.C. at

⁴ The South Carolina Supreme Court has explained “in the setting” means “the totality of the facts and circumstances in the defendant’s case.” Williams, 380 S.C. at 479, n. 4, 671 S.E.2d at 603, n. 4.

468, 397 S.E.2d at 88. Further, the court noted Butler's case was unique due to his intellectual disability, which was unknown at the time of trial. Id. Similarly, in Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001), the court granted habeas relief to a petitioner after concluding his due process rights were violated by an unduly coercive Allen⁵ charge. The court found it was the combination of the constitutional violation *in addition to* the fact that the trial judge withheld information from the jury's notes which required it to grant relief. Id. at 495, 552 S.E.2d at 718.

Instead, Petitioner's case is more analogous to McWee v. State, wherein McWee argued the trial court's refusal to give a parole eligibility charge during the penalty phase of petitioner's capital trial was a constitutional violation warranting the issuance of a writ. Id. at 405, 593 S.E.2d at 457. The court noted "there ha[d] been no intervening circumstances by way of new law, after-discovered evidence, or any other alleged fact." Id. at 408, 593 S.E.2d at 458. Most importantly, the Court emphasized McWee, in his direct appeal, "could have readily challenged the jury's misconduct in considering matters contrary to the trial judge's instruction, but he did not do so." Id. Accordingly, the court found any "misconduct by petitioner's jury does not 'in the setting'—petitioner's trial and its reviews—constitute a violation shocking to the universal sense of justice," and denied the writ. Id.

Here, Petitioner raises arguments the post-conviction relief court, the South Carolina Supreme Court, the United States District Court for the District of South

⁵ Allen v. United States, 164 U.S. 492 (1896).

Carolina and the United States Court of Appeals for the Fourth Circuit have had the opportunity to review and address. Petitioner has diligently pursued these allegations and has had his “full bite of the apple” in litigating what he characterizes as constitutional violations. Petitioner has been unsuccessful in his attempts to vacate his convictions and sentences by litigating the same issues he argues in his current petition through every level of state and federal court in this state and not one has found Petitioner’s claims to be the most serious of constitutional violations which—in the setting—constitute a “denial of fundamental fairness shocking to the universal sense of justice.” Id. There are no “unique and compelling circumstances” that exist now that did not exist at the time Petitioner was exhausting his state and federal remedies based on the same allegations. Id. Further, Petitioner’s claims do not rely on a new rule of constitutional law arising since the time his direct appeal was concluded or any newly discovered fact or evidence. Further, Petitioner’s case does not implicate “a question of significant public interest or an emergency.” Key, 305 S.C. at 116, 406 S.E.2d at 357.

The South Carolina Supreme Court properly denied Petitioner’s habeas corpus petition. This Court should deny certiorari.

B. Notwithstanding the propriety of the South Carolina Supreme Court denying the petition based on the lack of “unique and compelling circumstances” to warrant the granting of the extraordinary writ of habeas corpus, the petition for writ should be denied because Petitioner’s guilty pleas were knowing and voluntary, Counsel was not ineffective, and the State did not suppress evidence.

In his petition, Petition asserts for the sixth time the same claims previously

adjudicated by the post-conviction relief court, the South Carolina Supreme Court twice, the United States District Court for the District of South Carolina, and the United States Court of Appeals for the Fourth Circuit: (1) his guilty pleas were not knowing and voluntary because he does not understand English; (2) counsel was ineffective for failing to advise Petitioner of potential immigration consequences of his guilty pleas; and (3) the State suppressed evidence beneficial to Petitioner. Even if this Court were to consider the merits of the petition, it should deny certiorari because the record firmly establishes Petitioner's guilty pleas were knowingly and voluntarily entered with the advice of competent counsel and the assistance of qualified court-approved interpreters, counsel's performance was not constitutionally ineffective, and Petitioner failed to establish the State suppressed evidence.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). "Before deciding whether to plead guilty, a defendant is entitled to 'the effective assistance of competent counsel.' " Padilla v. Kentucky, 559 U.S. 356, 364 (2010) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970); Strickland, 466 U.S. at 686).

A post-conviction relief applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just

result.” Strickland, 466 U.S. 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland does not guarantee perfect representation, only a “‘reasonably competent attorney.’” 466 U. S. at 687 (quoting McMann, 397 U. S. at 770). Representation is constitutionally ineffective only if it “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair trial. Strickland, 466 U.S. at 686.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced the 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, 300 S.C. at 117-18, 386 S.E.2d at 625.

With respect to prejudice, an applicant must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, at 694. It is not enough “to show that the errors had some conceivable effect on the outcome of the proceeding.” Id. at 693.

“Surmounting Strickland’s high bar is never an easy task.” Padilla, 559 U.S. at 371. An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–690. Even under de novo review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings knew of materials outside the record and interacted with the client, with opposing counsel, and with the judge. It is “all too tempting” to “second-guess counsel’s assistance after conviction or adverse sentence.” Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. Strickland, 466 U.S. at 690.

In assessing prejudice under Strickland, the question is not whether a court

can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U. S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington v. Richter, 562 U.S. 86 (2011). With respect to guilty plea counsel, the 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 (1985).

Additionally, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. 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 v. State, 376 S.C. 130, 137–38, 654

S.E.2d 870, 874 (S.C. Ct. App. 2007) (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)).

1. Petitioner’s guilty pleas were knowingly and voluntarily entered with the advice of competent counsel and the assistance of qualified, court-approved interpreters.

Petitioner asserts the mere existence of a language barrier between himself and the plea should render his plea involuntary. See Petition 7 (“Evidence in the record that Petitioner does not understand English plainly shows that any admission at the guilty plea could not reliability indicate that Petitioner’s plea was knowing and voluntary.”). However, the record belies this assertion and establishes Petitioner entered his guilty pleas with the advice of competent counsel and the assistance of qualified court-approved interpreters whom Petitioner did not appear to have any trouble communicating with at any point during his plea or sentencing proceedings.

At the plea proceedings on July 12, 2010, Petitioner was assisted in his plea with the services of a qualified court-approved interpreter. (App. 5). The plea court questioned the interpreter on her qualifications: she was over eighteen years of age, she was not related to Petitioner, she had training and experience that enabled her to speak fluently in a foreign language, she had previously served as an interpreter for the circuit courts of South Carolina, and she was on the approved list of interpreters with court administration. (App. 5-6). The court asked the interpreter if

she was able to translate and understand Petitioner, and she answered affirmatively. (App. 7). The court also advised the interpreter to inform Petitioner to stop the proceedings if he had any trouble understanding or communicating with the court. (App. 7). During the plea colloquy, the court asked Petitioner if he had enough time to consult with his lawyer before making the plea. (App. 8). Petitioner indicated counsel explained the State's case against him and the elements the State needed to prove in order to be found guilty of the indicted charges. (App. 8). The court asked Petitioner if he discussed any defenses with his attorney and Petitioner said they had. (App. 10). Petitioner affirmed he understood he could be facing a life sentence for the accessory before the fact to murder charges, he faced a minimum sentence of fifteen years for the burglary in the first degree, he faced a minimum sentence of twenty-five years for trafficking in cocaine, and he faced five years for the possession of marijuana with intent to distribute. (App. 10-14). Further, Petitioner acknowledged he was entitled to certain rights, including the right to remain silent, the right to confront witnesses, and the right to a jury trial, and that by pleading guilty, he would be giving up those rights. (App. 15-17). The court also asked Petitioner if he understood the significance of his crimes being classified as violent and most serious offenses, and he explained accessory before the fact was a no parole offense. (App. 18-19). Petitioner maintained he wished to plead guilty, and affirmed no one had threatened him in any way to make that decision. (App. 20). Petitioner also told the court he had no difficulty communicating through the interpreter. (App. 23).

The solicitor then recited the following facts that the State was prepared to

prove at Petitioner's trial and entered several statements and photographs into the record. (App. 24-27). The court asked Petitioner, "Do you agree or disagree with what he has stated?" (App. 28). Petitioner responded, "It's all correct." (App. 28.) The court asked Petitioner specifically about the statements he gave to the sheriff's department, and Petitioner affirmed he gave the statements freely, without coercion or duress. (App. 29.) The court also asked trial counsel if he had received all the discovery documents and had an opportunity to review them with his client. Counsel answered affirmatively. (App. 30). At his sentencing hearing, where Petitioner was again assisted by a qualified, court-approved interpreter, Petitioner stated, "I just want to clear up that it was never my intention for these people to be murdered, they were very good friends of mine. The intention was just to talk to 'em so they can't—so they would return the money, that was it." (App. 57).

The record firmly establishes Petitioner understood the guilty plea and sentencing proceedings. There was no appearance of misunderstanding with the interpreter, and, as the record reflects, Petitioner answered appropriately to the plea judge at his plea on July 12, 2010, as well as at the sentencing hearing twenty-two months later. Petitioner has presented no reason he should be allowed to depart from the truth of the statements he made during his guilty plea or sentencing hearing. Petitioner's claim that his guilty pleas were involuntary is without merit. Certiorari should be denied as Petitioner's plea was knowingly, voluntarily, and freely entered.

2. Counsel properly advised Petitioner of possible immigration consequences stemming from his guilty pleas.

Petitioner contends counsel was ineffective for failing to advise him of the risk of deportation as a result of his guilty pleas. However, Petitioner fails to acknowledge counsel's statements—deemed credible by the post-conviction relief court—that he advised Petitioner he would likely be deported if ever released from imprisonment. At the evidentiary hearing, counsel testified twice that he advised Petitioner he would likely be deported if he was ever released from imprisonment. (App. 124, 130). While Petitioner testified he was not aware of potential deportation as a result of his guilty plea, the post-conviction relief court specifically deemed this testimony to be not credible. (App. 107, 151).

There is a dearth of credible evidence in the record that Petitioner was not properly advised on the immigration consequences of this guilty plea as mandated by this Court in Padilla, 559 U.S. 356. Certiorari should be denied.

3. Petitioner has failed to establish the State suppressed evidence.

Petitioner asserts the State engaged in prosecutorial misconduct by suppressing statements and cell phone records of co-defendants. Petitioner offers no evidence to support this assertion, which is conclusively refuted by the record.

“In Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), this Court held that the government violates the Constitution’s Due Process Clause “if it withholds evidence that is favorable to the defense and *material* to the defendant’s guilt or punishment.” Turner v. United States, 137 S. Ct. 1885, 1888, 198 L. Ed. 2d 443 (2017) (quoting Smith v. Cain, 565 U.S. 73, 75, 132 S.Ct. 627, 181 L.Ed.2d 571

(2012) (emphasis added).

Here, there is no evidence to establish the State withheld any evidence from Petitioner. Rather, the record conclusively establishes the State fulfilled its discovery requirements. During the plea proceeding, the prosecutor entered two discs containing discovery provided to counsel. Counsel informed the plea court he had been provided with all discovery materials, including co-defendant statements, and had reviewed this material with Petitioner. At the post-conviction relief proceeding, counsel specifically recalled receiving the co-defendants' statements and discussing them with Petitioner, as well as the phone records. Petitioner has failed to establish the State suppressed evidence. Certiorari should be denied.

4. Petitioner's claims have already been adjudicated and properly rejected by state and federal courts.

Finally, this Court should deny this petition because Petitioner's claims have already been adjudicated fully and properly denied by both state and federal courts. Accordingly, there must be finality to Petitioner's convictions. This Court has explained that "the principle of finality . . . is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." Teague v. Lane, 489 U.S. 288, 309 (1989). In his concurring and dissenting opinion in Mackey v. United States, 401 U.S. 667, 691 (1971), Justice Harlan wrote that:

Finality in the criminal law is an end which must always be kept in plain view. . . . At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal

or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.

Mackey, 401 U.S. at 691 (Harlan, J., concurring in judgments in part and dissenting in part).

Numerous reviewing courts have scrupulously reviewed Petitioner's claims and have repeatedly found them to be without merit. Certiorari should be denied.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari must be denied.

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October 31, 2018