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**Dec 19 2022**

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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On Petition for Writ of Certiorari to Orangeburg County  
Court of Common Pleas  
The Honorable Edgar W. Dickson, Circuit Court Judge

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Appellate Case No. 2022-000132

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JUSTIN BRADLEY, #307820,

PETITIONER,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ALAN WILSON  
Attorney General

SAMANTHA J. WEIDAUER  
S.C. Bar No. 104833  
Assistant Attorney General

Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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## **STATEMENTS OF ISSUE ON PETITION FOR WRIT OF CERTIORARI**

### **Petitioner's Statement of Issue on Petition for Writ of Certiorari**

Whether PCR judge erred in signing the order of dismissal that made findings of fact, conclusions of law, and credibility determinations, where the judge was a successor judge who did not preside over the PCR hearing and did not comply with the requirements of Rule 63, SCRCP, prior to signing the order?

### **Respondent's Counterstatement of Issue on Petition for Writ of Certiorari**

Whether the lower court properly signed the Order of Dismissal, because the successor judge certified familiarity of a complete record, and the Petitioner's failure to request recall of witnesses, or in any way object the successor judge's assignment, effectively constituted a waiver of right to present evidence and to a new trial.

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Petitioner was indicted at the November 2015 term of the Orangeburg County Grand Jury for armed robbery (2016-GS-38-0198)<sup>1</sup>. Petitioner was represented by Minh Wyman, Esquire. Josh Edwards of the First Circuit Solicitor's Office prosecuted the case.

This charge arose out of an incident occurring on November 16, 2015, in which Applicant approached victim, Aleric Cann (Cann), at a gas station and asked for a ride to a house a few blocks away. (App. p. 7). When Cann pulled up to the house, Petitioner offered to show him a dog for sale in the back yard. (App. p. 8). After Cann exited the car, Petitioner approached Cann and asked Cann if he had any change on him. (App. p. 8). Cann replied he did not have anything for Petitioner. (App. p. 8). Petitioner then pulled out a revolver and took Cann's money and cellphone. (App. p. 8). Cann returned to the gas station and called police. (App. p. 8). The clerk at the gas station identified Petitioner by his alias, and investigators eventually learned Petitioner's real name – Justin Bradley. (App. p. 8). Investigators prepared a photo lineup from which Cann identified Petitioner as the robber. (App. p. 8). Petitioner was arrested at his home one month later, at which time officers discovered a small quantity of cocaine in his bedroom. (App. pp. 8, 12).

On May 24, 2016, Petitioner pleaded guilty to the charge of armed robbery pursuant to *Alford v. North Carolina*,<sup>2</sup> without negotiation or recommendation. (App. pp. 1, 3-5). Petitioner was also charged with possession of cocaine, but the charge was dismissed as a result of his plea.

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<sup>1</sup> Petitioner was also charged with possession of cocaine. Based on the records available on the Orangeburg County Public Index, Respondent does not believe Applicant was ever indicted by the Grand Jury on that charge.

<sup>2</sup> 400 U.S. 25 (1970).

(App. p. 12). On May 24, 2016, Petitioner was sentenced by the Honorable Craig D. Brown to eighteen years with credit for time served. (App. p. 13).

A timely notice of appeal was filed on Petitioner's behalf. By Order dated July 22, 2016, the South Carolina Court of Appeals dismissed Petitioner's appeal, for failure to provide sufficient explanation as required by Rule 203(d)(1)(B)(iv). *State v. Bradley*, Case No. 2016-001166 (S.C. Ct. App. Filed July 22, 2016). The remittitur was returned to the circuit court on August 10, 2016.

Petitioner filed an application for post-conviction relief on April 10, 2017. In his application, Applicant alleged counsel was ineffective for failing to investigate the relevant facts and circumstances of his case – “that this was a drug deal and that [Applicant] was being robbed” and “counsel did not object to nor preserve anything for appeal.” At the evidentiary hearing, Applicant proceeded on the allegation regarding counsel's failure to investigate. Because Applicant did not present any evidence or testimony that counsel failed to object or preserved any issues for appeal, the lower court dismissed that allegation.

Petitioner's case was heard on December 12, 2017, by the Honorable Kristi L. Harrington. Petitioner was present at the hearing and represented by Arthur Aiken, Esquire. Plea counsel Minh Wyman, Esquire, was also present and testified. Following the evidentiary hearing, the case was taken under advisement and a proposed order was requested by Judge Harrington. By agreement of the parties, the proposed Order was sent to the Honorable Edgar W. Dickson, in his capacity as Chief Administrative Judge. The Order of Dismissal was signed by Judge Dickson on December 23, 2021 and filed with the Orangeburg County Clerk of Court on the same date.

On February 9, 2022, this Court received the notice of appeal from Judge Dickson's Order. On August 3, 2022, Petitioner filed a Petition for Writ of Certiorari. This Return follows.

## **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, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. *Smalls*, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). 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

**The lower court properly signed the Order of Dismissal, because the successor judge certified familiarity of a complete record, and the Petitioner’s failure to request recall of witnesses, or in any way object to the successor judge’s assignment, effectively constituted a waiver of right to present evidence and to a new trial.**

Judges who begin a trial or evidentiary hearing may not always be the judge who completes the trial, because of death, illness, retirement, disqualification, or other cause. Judge's Inability to Proceed, 2 Federal Rules of Civil Procedure, Rules and Commentary Rule 63. To promote efficiency in court proceedings but also ensure completeness when it comes to individual cases, Rule 63 of the South Carolina Rules of Civil Procedure was established. Rule 63 states:

“If at any time after a trial or hearing has been commenced, but before the final order or judgment has been *issued*, the judge is unable to proceed, a successor judge shall be assigned. The successor judge may proceed upon *certifying familiarity* with the record and determining that the proceeding may be completed *without prejudice to the parties*. In a hearing or a trial without a jury, the successor judge shall, *at the request of a party*, recall any witness whose testimony is *material or disputed* and who is available to testify without undue burden. A successor judge *may* also provide for the recall of any witnesses.”

Rule 63, SCRCF, *emphasis added*.

### ***Change in Language of Rule 63 from Filed to Issued***

As an initial matter, Rule 63 has been amended since the ruling in *Christy*,<sup>3</sup> which Petitioner relies on, conforming with the requirements of the federal rule, which is more permissive<sup>4</sup>. The

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<sup>3</sup> The South Carolina Rules of Civil Procedure under *Christy*, “If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then the resident judge of the circuit or any other judge having jurisdiction in the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.”; Rule 63’s language was amended in 2004 to conform with Rule 63; Fed. R. Civ. P. 63.

<sup>4</sup> The only time Rule 63, SCRCF, has been addressed since *Christy*, was in *Hammer v. Hammer*, an unpublished opinion, No. 2008-MO-012, 2008 WL 9881724, at \*2 (S.C. Mar. 10, 2008).

federal rule was amended in 1991, expanding the scope of the rule to allow successor judges to complete an incomplete bench trial or jury trial without expense of a full retrial or rehearing. Judge's Inability to Proceed, 2 Federal Rules of Civil Procedure, Rules and Commentary Rule 63.

Under *Christy*, a new trial would be required where, if no exceptions applied, no written order has been filed with the clerk of court by the original presiding judge. *Christy v. Christy*, 347 S.C 503, 556 S.E.2d 701 (S.C. Ct. App. 2001). The amended rule replaces *filed* with *issued*, which resulted in a significant departure from the old rule in place at the time of *Christy*. Under the previous language of Rule 63, successor judges could only step in when findings of fact and conclusions of law were filed, and only through the consent of the parties could this bar be overcome. *Townsend v. Gray Line Bus Co.*, 767 F.2d 11, 17, 2 Fed. R. Serv. 3d 412 (1st Cir. 1985). Through this amended language, the court found the purpose of the rule was to ensure a case started was completed, and gave successor judges more authority to fulfill this purpose.

#### ***Requirement that Successor Judge Certify Familiarity***

The requirement to certify familiarity is met when a successor judge reviews the dockets, pleadings, transcripts, or other relevant evidence pertaining to the case. *In re Reale*, 584 F.3d 27 at 32 (1st Cir. 2009). In *In re Reale*, the successor judge expressly certified he was familiar with the case through a certificate, but express certification is not necessary where the successor has indicated familiarity with relevant portions of the record. *MidWestOne Bank & Tr. v. Com. Fed. Bank*, 331 B.R. 802 (S.D. Iowa 2005); *In re Lang*, 293 B.R. 501 (B.A.P. 10th Cir. 2003) (successor judge never directly referred to Rule 63 but indicated his familiarity orally and in his final judgment stating he, “carefully considered the evidence produced, argument of counsel, and...applicable case law...”).

Additionally, once a successor certifies familiarity, the successor has the discretion to determine “if the proceeding may be completed without prejudice to the parties”. Rule 63, SCRCrimP. Normally, successor judges cannot make credibility determinations, even with a complete record, but where a successor makes credibility determinations which have no effect on the outcome—not resulting in prejudice to the parties—a successor does not err by relying on prior records to make that determination. *Hoyt v. CollaborativeMed, LLC*, No. 2019-000965, 2022 WL 2156226, at \*1 (S.C. Ct. App. June 15, 2022).

Here, though Judge Dickson does not explicitly cite to Rule 63, SCRCP, he certifies familiarity with the record in the Order of Dismissal that states:

“As Judge Harrington is no longer on the bench, this Order was sent to the undersigned for signature in the undersigned’s capacity as Chief Administrative Judge by agreement of the parties. As noted above, the Court has reviewed the transcript of the evidentiary hearing, at which no exhibits were introduced and only two witnesses testified. The Court has also thoroughly reviewed the records in this case including the application, the State’s return, and the guilty plea transcript, and Applicant’s appellate records. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies relief.

(App. p. 52).

As evident by the excerpt from the Order of Dismissal above, Judge Dickson indicated his familiarity with the record as required by Rule 63, SCRCP. Thus, Petitioner’s contention that Judge Dickson did not comply with the requirements of Rule 63 is without merit. Petitioner’s reliance on *Christy*, a family court case that was decided before South Carolina amended Rule 63 to conform with the federal rule. Based on the rule’s present interpretation, and more recent and relevant case law, Judge Dickson had discretion to make findings of fact, conclusions of law, and credibility determinations where he certified familiarity and determined no prejudice would result to any of the parties. Though Judge Dickson did not issue a formal certificate stating he is familiar

with the prior records, as mentioned above and further evidenced in the signed Order of Dismissal, Judge Dickson finds, “This Court has reviewed the evidence presented at the evidentiary hearing, observed witnesses, evaluated credibility, and weighed the testimony evidence according to the discussion below.” (App. p. 55). Judge Dickson reviewed the plea transcript and testimony from the PCR evidentiary hearing. (App. p. 55). This declaration by Judge Dickson in the Order of Dismissal is sufficient to fulfill the Rule 63 requirement a successor judge certified familiarity.

***Waiver of Recall of Witness(es) and  
Implicit Findings Neither Party Were Prejudiced***

As it concerns waiver, the rule places the burden on the parties to request recall of witnesses and gives the successor judge authority to recall witnesses if he or she deems it necessary. Rule 63, SCRCrimP; *Atl. Specialty Ins. Co. v. Coastal Env't Grp. Inc.*, 945 F.3d 53 (2d Cir. 2019) (“Rule 63 provides that, if any party so requests, the successor judge “must ... recall any witness whose testimony is material and disputed,” provided that witness “is available to testify again without undue burden.”); *Mergentime Corp. v. Wash. Metro. Area Transit Auth.*, 166 F.3d 1257, 1262 (D.C. Cir. 1999) (Rule 63's mandatory and discretionary recall requirements are important tools to protect against an incomplete or inadequate record).

A party waives their argument that a successor judge cannot make credibility determinations when they fail to request rehearing's of witnesses or fail to object to the successor judge's conduct. *Littleton v. Pilot Travel Centers, LLC*, 568 F.3d 641 (8th Cir. 2009); *In re Higginbotham*, 917 F.2d 1130, 1133 (8th Cir.1990) (A party “has no right to sit back and await decision of the case before objecting to the procedure.”). If parties believe that a witness should be recalled, then they are burdened to make the request specifically and in advance of successor judge's ruling to avoid waiver. *In re Reale*, 584 F.3d 27 at 32, 33; see also *Universal Furniture Int'l, Inc. v. Collezione Europa, USA, Inc.*, 599 F. Supp. 2d 648 (M.D.N.C. 2009), *aff'd*, 618 F.3d 417 (4th Cir. 2010), as

amended (Aug. 24, 2010) (Court noted notice of hearing advised both parties they could present evidence and argument, and Collezione chose not to present additional evidence and did not object to court proceeding, so the court found Collezione waived right to present further evidence).

Moreover, under the amended rule, the burden to request recall of witnesses is on the parties and not an affirmative duty of a successor judge. Nowhere in the record does it indicate that Petitioner requested recall of any of the witnesses, or even objected to Judge Dickson's assignment to the case after Judge Harrington resigned. In fact the Order of Dismissal states, "As Judge Harrington is no longer on the bench, this Order was sent to the undersigned [Judge Dickson] for signature in the undersigned's capacity as Chief Administrative Judge **by agreement of the parties.**" (App. p. 52). The fact there was no request for recall of any of the witnesses by Petitioner after the case was assigned to a successor judge, Petitioner did not object to such assignment, and Petitioner consented to the Order of Dismissal being sent to Judge Dickson operates as consent, which is an exception to Rule 63. Even if Petitioner's failure to object did not constitute waiver, the amended Rule 63 gives a successor Judge broad discretion to determine whether they can sit on a case or must grant a new trial.

Additionally, though not explicitly stated in the Order of Dismissal, Judge Dickson through his adoption and signing of the Order of Dismissal, determined no prejudice would result to any of the parties should he make credibility determinations. In support of that assertion, in the post-conviction relief hearing transcript, Judge Harrington asked Petitioner, "do you have any additional witnesses?", to which Petitioner answered, "That's the Applicant's case. I have no closing remarks; we stand on the record." (App. p. 22). This indicated that the record was complete, and both parties had the opportunity to present their cases fully. Most relevant for this court to consider is the effect of Petitioner's guilty plea on the PCR court's determination no prejudice to

the parties existed and the lack of material and disputed evidence to consider. In PCR, the burden is on the Applicant to prove their allegations. This is especially true where an applicant brings an ineffective assistance of counsel allegation.<sup>5</sup> Applicants are entitled to effective assistance of counsel where a guilty plea is entered, but an Applicant must specifically establish there was a reasonable probability but for counsel's error, Applicant would not have plead guilty and instead insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L.E.2d 203 (1985). An Applicant's allegation of failure to investigate or prepare for trial cannot be supported by mere speculation but requires presentation of witnesses or specific testimony additional preparation would have given applicant a defense, and thus affecting Applicant entering plea. *David v. State*, 326 S.C. 283, 486 S.E.2d 747 (1997).

A guilty plea is a solemn, judicial admission of truth of charges, and statements made during plea should be considered conclusive, unless the applicant presents valid reasons why he should be allowed to depart from truth. *Blackledge v. Allison*, 431 U.S. 63, 97 S. Ct. 1621 (1977); *Crawford v. U.S.*, 519 F.2d 347 (4th Cir. 1975). An applicant who enters a guilty plea on advice of counsel may only attack the voluntary and intelligent character of the plea by showing counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's errors, defendant would not have plead guilty. *Roscoe v. State*, 345 S.C. 16, 546 S.E.2d 417 (2001). *Boykin* requires that a defendant entering a guilty plea be made aware of the right to a jury trial, the privilege against self-incrimination, and the right to confront one's accusers. Additionally, the South Carolina Supreme Court requires a defendant

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<sup>5</sup> The applicant has the 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* Rule 71.1(e), SCRCPP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence." ).

entering guilty plea be made aware of the nature and crucial elements of the offense, the maximum and minimum penalty, and the nature of the constitutional rights being waived. *Pittman v. State*, 337 S.C. at 599, 524 S.E.2d 632, 624 (1999).

Here, the PCR court noted Petitioner failed to present evidence or testimony that counsel failed to object or preserve any issues for appeal, so the allegation was dismissed. This leaves Petitioner's allegation Counsel failed to investigate the relevant facts and circumstances of Petitioner's case. The record indicates that even if Judge Dickson were to find Petitioner's testimony credible, it would not change the outcome of the case. Petitioner testified he informed counsel of two potential witnesses, Germane Coulter and Veronica Fields, and trial counsel failed to properly investigate both witnesses. Veronica Fields, the store clerk, gave testimony to police at the time of the robbery, which was not favorable toward Petitioner<sup>6</sup>. (App. p. 10). Additionally, Petitioner testified Germane Coulter merely dropped him off at the store. Therefore, Coulter could only shed light regarding what Petitioner told him and not as a witness to the events that took place. (App. p. 16). Regarding counsel's investigation prior to the plea, Petitioner testified counsel informed him Germane Coulter's number was unreachable, and that counsel took steps to find Mr. Coulter by hiring an investigator. (App. p. 49). On cross-examination, Petitioner ultimately admitted these two witnesses could only shed light to the fact he and the victim left in the car together from the store. (App. p. 49). Nowhere in the record does Petitioner indicate expressly or through conduct that he would not have pled guilty should counsel had spoken with Mr. Coulter.

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<sup>6</sup> Counsel has a duty to interview potential witnesses and make an independent investigation of the facts and circumstances of the case. *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). However, counsel is not ineffective for failing to interview witness where witnesses made statements unfavorable to petitioner at time of crime. *Thornes v. State*, 310 S.C. 306, 426 S.E.2d 764 (1993).

Most importantly, Petitioner engaged in a thorough colloquy during his plea with Judge Brown, where he never indicated dissatisfaction with counsel for failing to investigate his case. (App. pp. 3-10). To the contrary, Applicant indicated he had ample time to speak with counsel, understood all their discussions, and was completely satisfied with her representation of him. (App. p. 6). Petitioner also informed the plea court he had sufficient time to decide whether he wanted to go to trial or plead guilty, and he was pleading guilty freely and voluntarily without threat or coercion. (App. pp. 6 – 7).

Even if Judge Dickson were to find Petitioner's testimony credible, it would not change the outcome of the case. Simply, Petitioner was not prejudiced by Judge Dickson's credibility determinations. Additionally, the testimony at the evidentiary hearing did not reveal material testimony of other witnesses that would be necessary for a grant of post-conviction relief. As such, Judge Dickson had no reason to recall and rehear witness testimony, especially where Petitioner failed to request such.

Therefore, Judge Dickson did not err in making findings of facts, conclusions of law, or credibility determinations when he was assigned as a successor judge to this case. Judge Dickson fulfilled all the requirements of Rule 63 and used his discretionary authority when certifying familiarity with the case. The parties consented to Judge Dickson's assignment to the case, and no objections or requests for rehearing were made by either party. Lastly, even without the parties' consent, the parties were not prejudiced by Judge Dickson's determinations as there was no disputed testimony requiring Judge Dickson to recall witnesses prior to ruling.

**CONCLUSION**

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON  
Attorney General

SAMANTHA J. WEIDAUER  
S.C. Bar No. 104833  
Assistant Attorney General

By: *s/ Samantha J. Weidauer*  
ATTORNEYS FOR PETITIONER

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

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