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**Aug 09 2023**

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
In The Supreme Court

CERTIORARI TO RICHLAND COUNTY  
Court of Common Pleas  
Michael S. Holt, Post-Conviction Relief Court Judge

Case No. 2018-CP-40-00591

Emmanuel B. Elleby, SCDC #275057, ..... Respondent,  
v.  
State of South Carolina, ..... Petitioner.

**NOTICE OF APPEAL**

The State of South Carolina appeals the Honorable Michael S. Holt's order granting post-conviction relief filed on November 18, 2021. Respondent filed a timely motion to reconsider, alter, or amend pursuant to Rule 59(e), SCRCP, which was denied by Judge Holt on July 5, 2023. Counsel for Respondent received written notice of the entry of this order on July 20, 2023. A copy of the order granting post-conviction relief and the order denying the Respondent's motion to reconsider, alter, or amend is attached hereto.

August 9, 2023

Respectfully submitted,

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Attorney General

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By:   
Attorneys for Petitioner

Other counsel of record:  
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Attorney for Respondent

cc: Honorable Jeanette W. McBride, Richland County Clerk of Court

STATE OF SOUTH CAROLINA  
COUNTY OF ~~DARLINGTON~~  
RICHLAND

IN THE COURT OF COMMON PLEAS  
FOURTH JUDICIAL CIRCUIT  
C/A NO: 2018-CP-40-00591

STATE OF SOUTH CAROLINA,  
Plaintiff,

-vs-

EMMANUEL BASHAN ELLEBY,  
Defendants.

**ORDER DENYING MOTION TO  
RECONSIDER**

2023 JUL -5 AM 10:14  
FILED  
RICHLAND COUNTY

COMES NOW State of South Carolina, on its Rule 59 Motion for Reconsideration from the decision of the Court to grant Post Conviction Relief (PCR) on behalf of the Applicant Emmanuel Bashan Elleby.

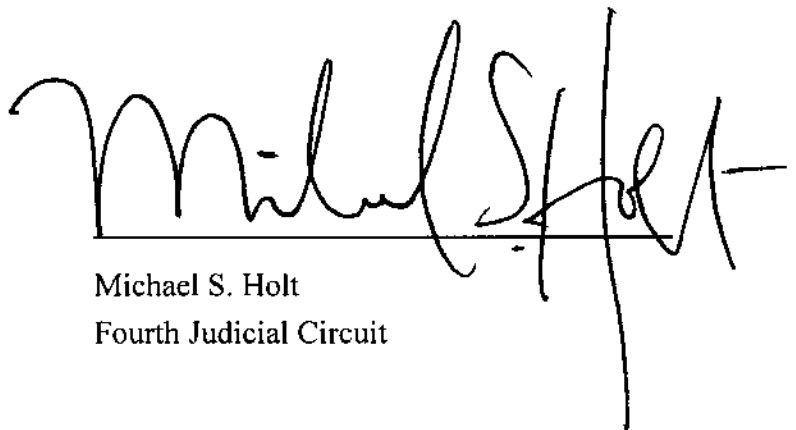
The Court granted PCR on behalf of the Applicant on November 3, 2021, and the State filed this motion shortly thereafter.

The Court respectfully denies the State's Motion for Reconsideration.

**CONCLUSION**

**WHEREFORE**, State of South Carolina's Motion for Summary Judgment is hereby DENIED.

**IT IS SO ORDERED!**



Michael S. Holt  
Fourth Judicial Circuit

June 26, 2023  
Darlington, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

Emmanuel Elleby, SCDC #27507,  
Applicant,  
Vs.  
State of South Carolina,  
Respondent.

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

Case No.: 2018-CP-40-591-91

ORDER GRANTING POST  
CONVICTION RELIEF

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RICHLAND COUNTY  
CLERK OF COURT

This matter comes before the Court pursuant to an Application for Post-Conviction Relief (PCR) filed January 29, 2018. Respondent made its Return on May 31, 2018, requesting an evidentiary hearing to be convened. Jonathan D. Waller, Esquire, was appointed by the Richland County Clerk of Court to represent the Applicant in this matter. An evidentiary hearing was held on July 15, 2021 at the Richland County Courthouse. Applicant was present and represented by Counsel Waller. Michael Davidson of the South Carolina Office of Attorney General represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying was Applicant's trial counsel, Adam Ruffin. The Court had before it the Richland County Clerk of Court's records, Applicant's South Carolina Department of Corrections records, the PCR Application, with amendments, the Return, and the trial transcript.

### **PROCEDURAL HISTORY**

Applicant was indicted during the November 2014 term of the Richland County Grand Jury for armed robbery (2014-GS-40-7355) and kidnapping (2014-OS40-7364). Applicant was represented by Assistant Public Defender Adam Ruffin of the Richland County Public Defender's Office. The case was prosecuted by Assistant Solicitor April Sampson of the Fifth Circuit Solicitor's Office. Applicant failed to appear for trial and was tried in his absence before the Honorable DeAndrea G. Benjamin, circuit court judge. The jury convicted Applicant as charged and Judge Benjamin sealed her sentence.

On October 16, 2015, all parties appeared for a sentencing hearing, during which Judge Benjamin sentenced to life without possibility of parole on both charges pursuant to Section 17-25-45 of the South Carolina Code (2014). Thereafter, counsel filed a motion to reconsider Applicant's sentence, which was heard and denied by Judge Benjamin on November 12, 2015. Applicant filed a timely notice of appeal and an appeal was perfected on his behalf by Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense-Division of Appellate Defense. Following briefing, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences by unpublished opinion tiled November 8, 2017. State v.

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Elleby, Op. No. 2017-UP-420 (S.C. Ct. App. filed November 8, 2017). The remittitur was returned to the circuit court on November 30, 2017.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
  - a. "Counsel failed to research."
  - b. "Counsel failed to interview witnesses."
  - c. "Counsel failed to prepare for trial."
  - d. "Counsel failed to investigate or to locate or interview witnesses."
  - e. "Counsel failed to put agreement in writing or the record."

In his requested relief, Applicant states he is seeking for his convictions to be vacated.

On June 17, 2019, Applicant filed an Amendment to Application for Post Conviction Relief in which he added claims of ineffective assistance of counsel, alleging that "Counsel was ineffective for failing to properly investigate the facts and circumstances surrounding Applicant's hospitalization, thus depriving Applicant of a continuance and presence at his trial."

Prior to the commencement of the PCR hearing, Applicant, through counsel, indicated that he intended to proceed under the claims raised in his Amendment to Application for Post Conviction Relief. The remaining allegations of his original Application were thereby waived.

### SUMMARY OF TESTIMONY

At an evidentiary hearing held July 15, 2021, at the Richland County Courthouse, both Applicant and trial counsel, Adam Ruffin, testified as to the facts and circumstances surrounding Mr. Ruffin's representation of Applicant. At the beginning of Applicant's testimony, he testified that he and Mr. Ruffin had met on several occasions that he and counsel had discussed some of the evidence against Applicant, but that Applicant was never provided with additional evidence that the State purported to possess.

Applicant testified that he believed that he was appearing in court for a roll call only when counsel informed him of both the State's plea offer as well as the fact that Applicant's trial was to commence the following week should Applicant reject the State's plea offer.

Applicant testified that he has suffered from epilepsy since he was a child and that he suffers multiple seizures per month. He further testified that stressful situations cause the onset of seizure activity to become more frequent and that at the time he met with Counsel and agreed to accept the State's plea offer, that his stress level was elevated. Applicant testified that he reluctantly accepted the State's plea offer because he felt that counsel was not ready to proceed to trial and that in the moments after signing the plea paperwork, he suffered a seizure which caused him to be taken to the hospital. Applicant testified that his reluctance to accept the State's plea was due in part to his lack of understanding his court appearance.



Applicant testified that following a seizure, he suffers from diminished mental clarity and other aftereffects that last several days. He further testified that he regained consciousness in the hospital with no recollection of the events after he agreed to the State's plea offer. Applicant testified that he was suffering the aftereffects of the seizure when he left the hospital and returned home. He further testified that he left the hospital because he knew what the recovery from an event that was commonplace to him, would entail. Applicant testified that he assumed that Counsel would make contact with him to reschedule the plea and that he did not think that there was any problem since he had accepted the State's offer.

He testified that he lives with his mother and had been residing with her for the entirety of Mr. Ruffin's representation. Applicant further testified that he is the only other individual who resides with his mother and that he has no knowledge of who the "uncle" is that spoke with the investigator for the public defender's office. Applicant testified that the next time he saw Counsel, it was following his arrest on the bench warrant issued at the outset of the trial.

Following Applicant's testimony, Counsel for Applicant, Adam Ruffin, testified as to his representation of Mr. Elleby. Mr. Ruffin testified that he was appointed to represent Mr. Elleby as part of his employment with the Richland County Public Defender's Office. Mr. Ruffin testified that he had been practicing in the area of criminal law for a number of years and that when he initially met with Mr. Elleby, he discussed his constitutional rights, the charges he was facing, the potential penalties, and the State's position on the evidence in the case, based on the limited discovery he had at the time. Counsel further testified that he obtained contact information for Mr. Elleby and some potential witnesses Mr. Elleby asked him to investigate.

Counsel testified that the witnesses Mr. Elleby asked him to speak to were either represented by counsel, in the case of his co-defendant, refused to cooperate, or were not helpful in providing a defense for Mr. Elleby. Counsel testified that the State alleged, and Mr. Elleby was ultimately convicted, of an armed robbery in which a money and particularly change, as well as cigarettes were stolen from a Dollar General store in Richland County. Counsel further testified that Mr. Elleby was identified through a combination of anonymous tip and the fact that he was being monitored by the South Carolina Department of Probation, Parole, and Pardon. Counsel testified that there was video of the robbery that did not show Mr. Elleby specifically, but that showed uniquely identifiable items such as a bag that were located upon the service of a search warrant at Mr. Elleby's residence. Counsel testified that Mr. Elleby's co-defendant had given law enforcement a statement implicating Mr. Elleby in the robbery and detailing that they had met at the probation office.

Counsel testified that Mr. Elleby had rejected an initial plea offer by the State and that immediately after the rejection, was served with an additional indictment for kidnapping as well as Notice of Intent to Seek Life Without Parole (LWOP) pursuant to §17-25-45, S.C. Code. Counsel testified that he believed that the State serving Mr. Elleby with an LWOP notice was intended to force a plea of the matter, which obviously worked since Mr. Elleby accepted the State's plea prior to suffering a seizure.

Counsel testified that he and Mr. Elleby had just finished discussing the State's plea offer and Mr. Elleby had just signed the plea paperwork when he collapsed in Counsel's presence. Counsel

testified that it was a scary moment as he was not regularly around individuals who suffer seizures. Counsel further testified that after Mr. Elleby suffered the seizure, Counsel had to appear in Court to inform the Judge of the situation and request that the case be continued.

Counsel stated that after Mr. Elleby was transported to the hospital by ambulance, and after Counsel's responsibility in court for the day, Counsel traveled to the hospital to inquire about his condition. Counsel stated that while he was at the hospital he attempted to speak with Mr. Elleby who was unresponsive to his communications. Counsel testified that he spoke with a doctor who was attending to Mr. Elleby's condition who informed Counsel that Mr. Elleby had been admitted for seizure activity. Counsel testified that he did not make an attempt to obtain any records from the hospital where Mr. Elleby was treating.

Counsel testified that once the trial commenced in Mr. Elleby's absence, Counsel had to be physically present in the courtroom and was unable to conduct any investigation into his whereabouts personally. Counsel further testified that the in-house investigator for the public defender's office travelled to Mr. Elleby's home in an attempt to locate him and was told by his uncle that Mr. Elleby was on his way to court. Upon questioning, Counsel was unable to provide a name of the uncle or to what address that the investigator went. Counsel testified that his strategy behind not attempting to obtain Mr. Elleby's medical records was that his goal was to get a continuance in the case and that he did not want the records to possibly contain information that would hurt that goal. Counsel testified that he did not believe that Mr. Elleby actually suffered from a medical condition.

#### APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance on counsel is alleged as a ground for relief, the Applicant must prove that "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." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decision in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. at 2065). 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 117-118, 386 S.E.2d at 625.

## FINDING OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the sentencing portion of the plea transcript, the probation revocation hearing transcript, Applicant's records from the South Carolina Department of Corrections, the Application for post-conviction relief, exhibits presented during the hearing, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

Applicant's case is unique in that he contends that Counsel has a duty to investigate matters outside of his defense to the alleged crimes; specifically, that Counsel had a duty to investigate why he was not present to plead guilty after indicating his intent to do so and then requiring medical intervention. This court finds that in failing to conduct adequate investigation into Applicant's whereabouts, Counsel essentially caused Applicant to be denied the opportunity to go forward with the guilty plea. Absent some capacity issue, upon proper notice to a criminal defendant to appear in court, Counsel would not have any extra duty to ensure his client's attendance.

However, given the circumstances of this case, and in light of Counsel's arguments to the trial court in request of a continuance, the Court finds that Counsel failed to adequately investigate Applicant's circumstances following his medical issue, which was witnessed both by Counsel as well as indirectly by the Assistant Solicitor. Transcript, at 7. Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Strickland, 466 U.S. at 691, 104 S.Ct. 2052. While investigation as contemplated by Strickland and other cases, tends to be related to investigation of the offense, such investigation is not limited to a defendant's guilt. As Strickland points out, reasonable investigation is required unless a decision is made that "renders a particular investigation unnecessary." Id.

In the case at hand, Counsel knowingly decided not to attempt to obtain Applicant's medical records or present any evidence of the condition of an individual following a seizure. By making such a decision, the Court must then inquire as to whether or not to undertake such investigation was reasonable. In reviewing a claim that defense counsel failed to properly investigate a defense to a crime, a court's principle concern is whether the investigation "*was itself reasonable.*" See, Wiggins v. Smith, 539 U.S. 510, 522-23, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (emphasis in original) (citation omitted). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). The Court finds that Counsel's decision not to obtain records, subpoena medical staff, consult with an expert, or otherwise investigate mitigating circumstances to why Applicant failed to appear in court fell below the minimum standard required of defense counsel. Counsel testified that he didn't obtain medical records<sup>1</sup> because he didn't want to potentially have his own disbelief of Applicant confirmed is without basis. Counsel would have no duty to disclose Applicant's medical records to the prosecution if those records failed to add to Counsel's argument. This Court finds that Counsel's decision and

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<sup>1</sup> Admitted into evidence as Applicant's Exhibit #1

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failure to investigate why Applicant did not appear in court fell below the standard required of defense counsel.

The Court must now turn its review to the second prong of Strickland and review the record for prejudice to Applicant. In the case at hand, the Court finds that Counsel's decision to not investigate Applicant's whereabouts following his medical episode did in fact prejudice Applicant. Counsel moved before the trial court for a continuance when Applicant did not appear the day following the scheduled plea/trial. The trial court had been informed of Applicant's medical emergency and had no issue continuing the case to the next day pending an update on Applicant's health. Transcript, at 6-10. The Court was not clearly advised of what medical issue Applicant suffered, believing it to possibly be a panic attack without being told otherwise. The trial court further stated that the case would be continued with documentation from a doctor that Applicant could not be present. Transcript, at 29-30. Counsel was the sole representative of Applicant in a position to present the trial court with such information or documentation but chose not to attempt to obtain any of the information. To do so deprived Applicant of the opportunity to continue to plead guilty pursuant to agreed upon terms. These decisions are similar to failing to communicate a plea offer to a criminal defendant in that the defendant does not have the option to enter a plea based solely on Counsel's conduct.

Our supreme court has also held "a defendant has the right to effective assistance of counsel during the plea-bargaining process." *Davie*, 381 S.C. at 607, 675 S.E.2d at 419. Although not directly on point, the Court of Appeals addressed similar issues in Bell v. State, 410 S.C. 436, 765 S.E.2d 4 (S.C. App. 2014), stating:

In *Davie*, counsel testified the State mailed him a written plea offer while he was in the process of changing his address. 381 S.C. at 606, 675 S.E.2d at 419. He testified he did not receive the offer until after the expiration of the offer, and if he had been aware of it, he would have communicated it to Davie. *Id.* Davie pled guilty to numerous charges without negotiation or recommendation from the State other than the dismissal of other charges that would have made him eligible for a sentence of life imprisonment without the possibility parole. *Id.* at 605, 675 S.E.2d at 418. He was sentenced to twenty-seven years in prison. *Id.* The supreme court found "plea counsel's failure to convey the State's initial plea offer to [Davie] constituted deficient performance." *Id.* at 610, 675 S.E.2d at 421. The court further found,

Even if counsel is given the benefit of the doubt that he was not aware of the plea offer until after the expiration date, we find counsel was deficient in not objecting at the plea hearing. During the plea hearing, the solicitor informed the circuit court judge that "[t]he original plea offer in this matter has not been accepted by the due date of September 11th of this year, and so we told the defendant we were ready to go to trial." In view of the solicitor's statement, it

was incumbent upon plea counsel to object or in some way indicate to the court that he had no knowledge of the original plea offer. Had counsel done so, he might have been able to convince the solicitor to reinstate this plea offer or persuade the circuit court judge to impose a fifteen-year sentence. Because counsel failed to make any attempt to protect Petitioner's interests regarding this significantly lower sentence, we conclude counsel's performance fell below the prevailing professional norms and, thus, constituted deficient performance.

*Id.* at 610–11, 675 S.E.2d at 421. The case at hand is similar in this Court's view in that Counsel's decision and failure to inform the trial court of information in Counsel's possession, or easily obtainable, cost the Applicant the difference in the sentence he had already accepted and the life without the possibility of parole sentence he received. "The difference is evidence of his prejudice." *See, Id.* There is no question that Applicant indicated to Counsel that he would accept the State's plea offer. By failing to ensure Applicant was able to go through with that decision, Counsel prejudiced Applicant.

As to any and all other allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

### CONCLUSION

Based upon the foregoing, the Court finds and concludes that Applicant has met his burden and shown that counsel was deficient in his representation of Applicant in failing to investigate his absence after suffering a seizure. Applicant was prejudiced when he was sentenced to a term of imprisonment excess of the accepted plea agreement. Accordingly, Applicant's sentence is vacated, and the case is hereby remanded to the General Sessions court for further proceedings.

THEREFORE, the Applicant's Application for post-conviction relief is hereby granted and remanded to the Court of General Sessions for further proceedings consistent with this Order.

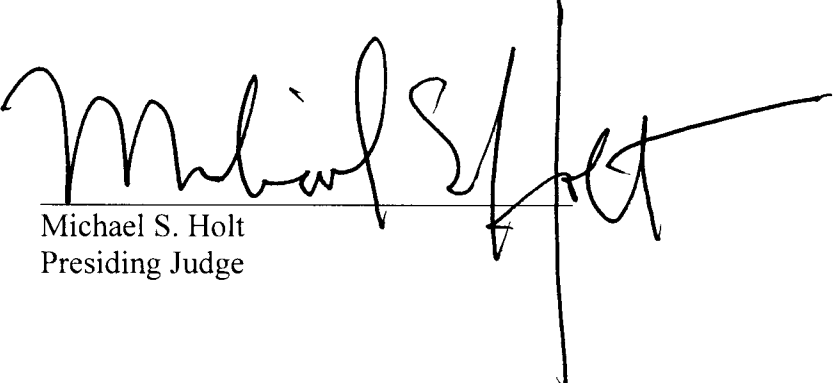
IT IS THEREFORE ORDERED THAT:

1. The Application for Post Conviction Relief is hereby granted, and Applicant's criminal case is hereby remanded to the Court of General Sessions; and
2. Applicant will be released from the South Carolina Department of Corrections and transported to the Richland County Detention Center for further proceedings consistent with this Order.

AND IT IS SO ORDERED this 30<sup>th</sup> day of SEPTEMBER, 2021.

MSH

DARLINGTON South Carolina



Michael S. Holt  
Presiding Judge