THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Robert J. Bonds, Circuit Court Judge

App. Case No.: 2023-001432

Tyrone D. Ellison, Petitioner,

vs.

State of South Carolina, Respondent.

AMENDED PETITION FOR WRIT OF CERTIORARI

Tricia A. Blanchette
S.C. Bar No. 74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266
Attorney for Petitioner

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STATEMENT OF THE ISSUES

I. Whether the lower court erred by failing to properly address the matters raised in the Rule 59, SCRCP, Motion; therefore, a remand is necessary to ensure that specific findings of fact and conclusions of law were entered on each issue raised and that the record before the court and the testimony of each witness was properly addressed.

II. Whether the lower court erred by not finding that counsel failed to properly prepare prior to trial and advise Petitioner regarding the strength of the State's evidence and the available defenses, which resulted in counsel's failure to effectively negotiate a guilty plea, a guilty plea not being entered and ineffective assistance at trial. The following that arose prior to and during trial demonstrate counsel's ineffective assistance: a) utilization of a defense strategy that had been fully discussed on recorded phone calls provided to the defense in discovery; b) utilization of Petitioner's mother as a defense witness to support said defense, with knowledge that she was subject to questioning regarding her audio interviews and recorded phone calls; c) utilization of an expert that bolstered the State's case and failed to offer an advantageous opinion; d) utilization of defense witnesses regarding employment and/or alibi, when it was known that the State could refute said witnesses; and e) failure to consider or address the matter of double jeopardy.

A. Whether the lower court erred since trial counsel failed to properly prepare prior to trial and advise Petitioner regarding the strength of the State's evidence and the available defenses, which resulted in counsel failing to effectively negotiate a guilty plea and a guilty plea not being entered.

B. Whether the lower court must be reversed since counsel failed to properly prepare prior to trial and advise Petitioner regarding the strength of the State's evidence and the available defenses. The following that arose prior to and during trial demonstrate counsel's ineffective assistance: a) utilization of a defense strategy that had been fully discussed on recorded phone calls provided to the defense in discovery; b) utilization of Petitioner's mother as a defense witness to support said defense, with knowledge that she was subject to questioning regarding her audio interviews and recorded phone calls; c) utilization of an expert that bolstered the State's case and failed to offer an advantageous opinion; d) utilization of defense witnesses regarding employment and/or alibi, when it was known that the State could refute said witnesses; and e) failure to consider or address the matter of double jeopardy.

III. Whether the lower court erred for failing to find that relief is required under *Cronic* due to a complete breakdown in the adversarial process.

STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact but deference is not given to conclusions of law. *Smalls v. State*, 810 S.E.2d 836 (2018). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling on findings of fact. *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984). Questions of law are reviewed *de novo*, and the appellate court "will reverse the decision of the PCR 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).

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Dorchester County Clerk of Court. Petitioner was indicted at the December 2013 term of the Dorchester County Grand Jury for entering a bank, depository, or building and loan association with intent to steal (2013-GS-18-1271). Petitioner was also indicted at the April 2014 term of the Dorchester County Grand Jury for armed robbery (2014-GS-18-0325). The indictments stemmed from a robbery of a Suntrust bank on April 1, 2013.

On August 4, 2014, Petitioner appeared in front of the Honorable R. Knox McMahon at the Dorchester County Courthouse for a trial on Indictment No. 2013-GS-18-1271 and 2014-GS-18-0325. Petitioner was represented by Michael Tommy Bolus, Esquire. Assistant Solicitors Don Sorenson, Esquire, and Phil Giese, Esquire, represented the State. After hearing a pre-trial matter regarding DNA, the trial was continued to allow for DNA testing by Petitioner's expert.

On October 20-24, 2016, Petitioner proceeded to trial in front of the Honorable D. Craig Brown and a jury. Petitioner was present and represented by James K. Falk, Esquire. Assistant Solicitors Don Sorenson and Phil Giese represented the State. Petitioner was found guilty as

indicted, and he was sentenced to life imprisonment for Indictment No. 2014-GS-18-0325 and a concurrent thirty years for Indictment No. 2013-GS-18-1271.

A timely notice of appeal was filed and David Alexander, Esquire, perfected the appeal. On January 11, 2017, the South Carolina Court of Appeals affirmed. *State v. Ellison*, 2017-UP-014 (S.C. Ct. App. filed January 11, 2017). The Remittitur was issued on February 7, 2017.

On January 11, 2018, an Application for Post Conviction Relief was filed. The State submitted a Return on April 23, 2018. On May 8, 2018, Petitioner filed a Motion for Consolidation and Discovery, which also addressed Petitioner's Post Conviction Relief Application stemming from the entry of a guilty plea (Docket No. 2016-CP-18-0017).[1] A motion hearing was conducted at the Dorchester County Courthouse on July 12, 2018 in front of the Honorable Robin B. Stilwell. On July 23, 2018, an Order for Consolidation and Discovery was filed on July 26, 2018.

On July 26, 2021, Petitioner filed an Amendment, which alleged the following:

> In general, Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during counsel's representation that culminated in trial, conviction and subsequent guilty plea. Applicant would further amend his Application for Post Conviction Relief to contain the following specific allegations of ineffective assistance of trial and appellate:
>
> 1. Failure to properly prepare prior to trial and advise Applicant regarding strength of the State's evidence and the available defenses, which resulted in counsel's failure to effectively negotiate a guilty plea and the following matters that arose prior to and during trial:
>
>   a. Utilization of a defense strategy that had been fully discussed on recorded phone calls provided to the defense in discovery.

[1] On January 7, 2016, Petitioner filed an Application for Post Conviction Relief in Dorchester County (Docket No. 2016-CP-18-0017) stemming from the entry of a negotiated guilty plea in front of the Honorable Edgar W. Dickson and representation provided by James K. Falk, Esquire. As a result of the consolidated evidentiary hearing, the lower court had a copy of the records from the guilty plea and resulting PCR Application and took such into consideration.

b. Utilization of Applicant's mother as a defense witness to support said defense, with knowledge that she was subject to questioning regarding her audio interview with law enforcement whereby she identified Applicant, in part, and her recorded phone calls regarding the defense offered.

c. Utilization of an expert that bolstered the State's case and failed to offer an opinion advantageous to Applicant.

d. Utilization of defense witnesses regarding Applicant's employment and/or alibi, when it was known that the State could refute said witnesses.

e. Failure to address with Applicant, make an argument and/or motion regarding double jeopardy.

2. Failure to address the following matters at trial:

a. The Court's prohibited and burden shifting statements to "search for the truth in an effort to make sure that justice is done between the parties" and that both the State and Defendant get a fair and impartial trial. Transcript p. 90, lns. 21-23, p. 601, ln. 25 – p. 602, ln. 5.

b. The Court's failure to question the jurors individually on the matters involving witness intimidation. Transcript pp. 534-536.

3. Ineffective assistance of Appellate Counsel for failure to raise the motion made regarding the suppression of the gloves.

Applicant submits that these allegations as addressed at a consolidated evidentiary hearing will show that counsel's representation fell below an objective standard of reasonableness and that counsel's deficiency 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 v. State*, 300 S.C. 115, 117–18, *See Strickland v. Washington*, 466 U.S. 668 (1984). Additionally, Applicant submits that these allegations as addressed at a consolidated evidentiary hearing will show a complete breakdown in the adversarial process and a systematic failure whereby prejudice must be presumed. *See United States v. Chronic,* 466 U.S. 648, 104 S.Ct. 2039 (1984).

On May 20, 2022, an evidentiary hearing was conducted at the Orangeburg County Courthouse in front of the Honorable Robert J. Bonds. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Samantha J. Weidauer, Assistant Attorney General. At the beginning of the hearing the matter of consolidation was addressed, and the court proceeded with a consolidated hearing. At the conclusion of the hearing, the court

requested that the parties submit a proposed Order. An Order of Dismissal was issued on October 3, 2022 and filed on October 6, 2022. Petitioner filed a Rule 59, SCRCP, Motion on October 28, 2022. After conducting a hearing on December 8, 2022, the lower court issued an Order Denying Applicant's Rule 59(a) & (e) Motion on December 8, 2022, which was filed on August 4, 2023. Thereafter, this Petition timely follows.

ARGUMENT

I. Summary of the Relevant Evidentiary Hearing Testimony

At the evidentiary hearing, Petitioner testified that he originally retained Tommy Bolus, Esquire, to represent him and Attorney Bolus obtained a DNA expert (Dr. Bennett). App. pp. 869-870. Petitioner identified and admitted a Motion for Bond Reduction that was filed by Attorney Bolus. App. pp. 870-871. When asked about the Motion and exhibits attached, he responded that he did not discuss the contents of the filing with Attorney Bolus, but he understood that counsel was trying to get him a "decent" bond.[2] App. 871 p. 33, lns. 14-25.

Petitioner identified and counsel admitted an exhibit, which contained email communications from Attorney Sorenson formerly of the Solicitor's Office regarding a plea offer. App. pp. 873-874 1009. He confirmed that the plea offer was dated May 15, 2014, and the terms were a sentence of 25 to 30 years on two counts of entering a back with intent to steal, failure to stop for blue light, and 2 counts of leaving a scene with great bodily injury and dismissal of the 2 counts of armed robbery. App. pp. 873-874. He also acknowledged that the email stated that Attorney Sorenson indicated that he would agree to a negotiated term of 27 years. App. p. 874. He testified that the plea offer was communicated to him, but he informed Attorney Bolus that he did not want to accept it until he saw Dr. Bennett's results. App. p. 874.

[2] Attorney Bolus was not present to testify at the evidentiary hearing since he died on May 30, 2021.

Regarding the hearing on August 4, 2014, Petitioner testified that he thought he was going to trial, but a motion hearing was conducted regarding Dr. Bennett. App. pp. 874-875. After that hearing, he understood that Dr. Bennett was going to do "further testing to see whether DNA was going to be admitted into evidence or not." App. p. 875, lns. 5-8. He testified that he fired Attorney Bolus that same day and retained Attorney Falk. App. p. 875.

Prior to trial, he recalled meeting with Attorney Falk one time at the detention center. App. p. 877. He did not recall discussing the information contained in the Motion for Bond Reduction or reviewing the discovery, specifically, the contents of the 2 CDs admitted at the evidentiary hearing. App. pp. 878-880, Exhibits 4, 5. He testified that he had reviewed the contents of both CDs with PCR counsel. App. p. 881.

As to the contents of the CDs, he testified that he was not advised by counsel about the identification made by his mother during her interview by Detective Repman. App. p. 881. As to the calls with inmate Shawn Keitt, he testified that counsel did not review the calls with him or advise him regarding the contents whereby his mother discussed major components of the defense. App. pp. 881-882. He testified that counsel did not advise him about either recording before calling his mother as a defense witness. App. pp. 882-883. Petitioner also testified that he was not aware that she would be subjected to cross-examination on the contents of the recorded interviews and phone calls. App.884-885.[3] He testified that if Attorney Falk had just talked with him about the contents of the 2 CDs, he would have been talking to him about pursuing a plea deal. App. p. 885. He explained that he would have wanted to discuss a plea deal because it "would be in my best interest." App. p. 885, lns. 21-22. He testified that he would not have

[3] On cross-examination, he testified that he had discussions with his mother about whether she had identified him to law enforcement, but he was not aware of what she said to law enforcement until the State asked her about it on cross-examination. App. pp. 918-920.

wanted his mother utilized as a witness nor would he have proceeded to trial if he was properly advised. App. pp. 885-886.

Turning to Dr. Bennett, he thought that Dr. Bennett "was basically going to go against what SLED was saying because he didn't get the same results." App. p. 886, lns. 4-10. He understood that Dr. Bennett was going to be a positive witness, and he would create a "battle" between the DNA experts and/or cause the DNA to not be used. App. pp. 886-887. When asked about the pre-trial hearing regarding Dr. Bennett, he did not recall counsel advising him that there would be a pre-trial hearing or discussing any of the issues addressed at the hearing with him before trial. App. pp. 887-888. As to Dr. Bennett's testimony, he again testified that he thought his testimony was going to be favorable, and he did not understand that Dr. Bennett would testify that SLED did a thorough job, had extracted all the DNA, and he did not have an issue with their work. App. pp. 889-891.[4] When asked about the State's summary of Dr. Bennett's testimony and the court's ruling, Petitioner testified that if counsel would have informed him properly, it would have changed his decision about going to trial. He explained: "Yes. If he wasn't going to be in my defense, then I knew the DNA would kill me in a trial, so it would be no point of going to trial without a defense with the DNA." App. p. 892, lns. 16-18. When asked about Dr. Bennett's trial testimony, he testified that counsel did not discuss with him after the pre-trial hearing whether or not Dr. Bennett should be called during trial. He testified that he would not have wanted Dr. Bennett called since he corroborated and bolstered the State's expert. App. p. 893.

[4] On cross-examination, Petitioner was asked why he believed Dr. Bennett's testing would be helpful. He responded, in part: "[T]he one time he got to test them they came back inconclusive. So, from my understanding, it's a different result. It's not saying that the DNA was mine. And that's where the August 4th trial came from, the continuance, was because he had a different result and, from my understanding, it was in my favor." App. p. 923, lns. 14-22.

When asked about the remaining defense witnesses, he testified that counsel did not discuss the witnesses with him and his mother was responsible for getting the witnesses to trial, which the State brought out during the trial. App. p. 895. As for Ms. Green, he testified that counsel did not advise him that the corporate records conflicted with her testimony or that the State could get into the matter of latex gloves with her. App. p. 896. Regarding Ms. Payne, he testified that he was not advised about her criminal history, which the State asked her about at trial. App. p. 896. He also testified that he was unaware prior to trial that the State had records and a witness to refute the testimony that he was at work. App. p. 897. When asked about counsel's closing argument regarding his alibi, he testified that counsel's position was not conveyed to him prior to trial and if counsel had properly advised him about the issues with his alibi and witnesses, he would not have wanted the witnesses called, alibi presented nor proceeded to trial. App. pp. 897-898. He agreed that he was relying upon counsel to advise him about the strength/weakness of the case and to be prepared for trial. App. p. 898. He testified that if he had been properly advised, he would have wanted to pursue a guilty plea. App. p. 898.

Turning to the matter of double jeopardy, Petitioner questioned why counsel did not argue that he was being punished twice for the same crime and counsel should have argued that the State needed to "select one or another instead of trying me for both of them." App. p. 899, lns. 3-22. He testified that counsel never discussed the issue of double jeopardy with him or whether it was proper to try him for both charges. App. p. 900.

After being called to the stand, James Falk, Esquire, testified that he had been practicing law since 1984 and the primary focus of his practice was criminal cases since 1996. App. pp. 942-943. He recalled being retained by Petitioner's mother about five weeks before trial with an understanding that the case was set for trial. App. pp. 943, 961-962. He recalled obtaining the

file from Mr. Bolus and reviewing it, but he clarified: "I did not review all of the jail tapes." App. p. 944, lns. 3-13. He admitted that he did not review the call between Petitioner's mother and inmate Keitt. App. p. 944. He recalled reviewing Petitioner's mother's interview with law enforcement and believed that he discussed it with her and Petitioner. App. p. 945. He explained that he would have still called Petitioner's mother to the stand if he reviewed the phone call, but he would not have addressed the matter of a financial incentive. App. pp. 945-946.

On cross-examination, he testified that the phone call was "not great" for the case. App. p. 967, lns. 22-23. He also testified that that it was a "good identity case." App. p. 963, lns. 8-14. When asked about the cross-examination of Petitioner's mother on her identification of Petitioner during her interview, he recalled how he tried to "explain why she may have been flustered and made a bad identification." App. p. 968, lns. 4-13.

Also, during cross-examination, he referenced the stack of CDs on Petitioner's table and testified that he did not have a "stack of videos that high." App. p. 964, lns. 13-24. On redirect, the following testimony was elicited:

> Question: Now, I was just confused by your cross-examination. Were you stating that you had no CDs? You didn't have all the CDs? What?
>
> Answer: Well, I had some of the CDs. I mean, obviously, I had the CDs because showing the security cam videos for the bank. And I had other CDs. And I know there was a lengthy CD that related to the second trial where I think his mother almost talked him into confessing to the second one. I was going to have some problems if we ever got there. So, I mean, I just don't remember the stack of jail CDs, jail call CDs.
>
> Question: So you don't recall ever even having jail call CDs?
>
> Answer: That's correct.
>
> Question: Okay. When those came out at the trial, and especially when you were subsequently representing him on the second case, did you raise that concern to the Court?

Answer: No.

Question: Did you raise that concern to the Solicitor's office?

Answer: No.

Question: Is that something that you should have raised in the course of you representation?

Answer: I don't know. I was embarrassed that that came up, you know. There was more – and I don't know if they should have been supplied. It was more to the posture that I was embarrassed by the jail call.

Question: So you were embarrassed when that came out at trial?

Answer: Yes.

Question: And what was the source of that embarrassment?

Answer: That the case blew up right then.

Question: And it was something you were completely unaware of?

Answer: That's correct.

Question: And it was something you had not advised Mr. Ellison about?

Answer: No. And I was also frustrated, because I was misled by his mother. So I should be – maybe embarrassed isn't the right term, but concerned.

App. p. 985, ln. 14 – p. 986, ln. 22.

When asked if an investigator was used prior to trial, he responded: "No. I just looked at the materials that Tommy Bolus had pulled together." App. p. 946, lns. 9-14.[5] He testified that he discussed a defensive strategy with Petitioner that he described as follows: "We were going to talk about the alibi, and then the basic lack of any kind of evidence, any kind of forensic

[5] On cross-examination, he questioned if he or Mr. Bolus had all the discovery materials obtained by PCR counsel. App. pp. 964-965.

evidence, at the scene. You know, there were no fingerprints there. You know, the lack of identity. We were going to use his alibi. And I think I talked to him about the financial thing. That came together pretty close to trial." App. p. 946, lns. 19-25. When asked about the likelihood of success at trial, he explained that there was room for doubt, and he added that Petitioner and his mother were not looking for "somebody else to come in and get another plea agreement." App. p. 947, lns. 1-9. He agreed that he did not engage in any plea negotiations prior to trial. App. p. 947. He explained that he was hired to take the case to trial, but he again admitted that he did not review all the evidence prior to trial. App. p. 947, lns. 18-21.

Turning to the utilization of Dr. Bennet, Attorney Falk said he reviewed the prior motion that was filed, but he did not have a transcript of the hearing. App. pp. 947-948. When asked about the motion hearing at the start of trial, he explained that he was trying to put the State on trial and show that the defense did not have an opportunity to test or confirm the DNA evidence and show that SLED "could have used a smaller portion of it and possibly leave other DNA" for further testing. App. p. 948, lns. 6-19. He explained that he was trying to get a spoliation charge, and he did not think suppression was possible. App. p. 948, ln. 25 – p. 949, ln. 6. He added that he was "trying to get the jury mad at the State's investigation." [6] App. p. 949, lns. 6-7. He could not recall advising Petitioner on the likelihood suppression, and he responded that he did not know if he discussed trying to get a spoilation charge with Petitioner. App. p. 950.

Regarding the alibi witnesses, he recalled speaking to them on the phone. App. p. 952. He recalled advising Petitioner that an alibi would be helpful and would create a doubt for the jury. App. pp. 952-953, 971. He believed he knew about the witness's criminal record and the

[6] On cross-examination, he testified that he was utilizing Dr. Bennett to try to create a doubt. App. pp. 968-969. Specifically, he testified: "I was just trying to put as many balls up in the air, you know, bullets up in the air, however you want to say it. I was just trying to put as many things up there that I thought a juror could have an opportunity to grab a hold of." App. p. 969, lns. 17-21.

corporate records, but he thought the alibi was needed. App. pp. 953-954. On cross-examination, he explained why he thought the records were testimonial hearsay. App. pp. 972-975.

When counsel was asked if he discussed the pros and cons of trial with Petitioner and the possible defenses, he responded that he was hired to go to trial, and it was "no surprise that the trial was going to be called on the day it was called." App. p. 951, lns. 8-16. When asked if he considered seeking a continuance or if he raised the matter of not being prepared, he responded: "Well, with the exception of the jail calls, I was properly prepared." App. p. 951, lns. 17-22.

Thereafter, he was asked about the double jeopardy argument, and he responded: "Man, I am embarrassed. No, I did not see that issue." App. p. 954, ln. 7. He responded that he had not researched it and could not answer about the strength of the issue. App. p. 954. He did agree that if the State would have tried the armed robbery and then tried to bring the charge of an entering the bank, he would have raised a double jeopardy argument. App. p. 954-955. On cross-examination, he explained that he made the argument regarding double jeopardy a lot in "theft and possession of stolen goods cases" involving the same goods and moved for an election. App. p. 975, lns. 8-16.

II. Issues Presented

A. The lower court erred by failing to properly address the matters raised in the Rule 59, SCRCP, Motion; therefore, a remand is necessary to ensure that specific findings of fact and conclusions of law were entered on each issue raised and that the record before the court and testimony of each witness was properly addressed.

Via Rule 59, SCRCP, Motion, Petitioner asked the court to "ensure that specific findings of fact and conclusions of law are entered and that the arguments and testimony of each witness is properly addressed" pursuant to South Carolina Code § 17-27-80 and *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007). App. p. 1108. In support of the Motion, Petitioner addressed specific areas of concern and provided a proposed order previously given to the court. App. pp.

1109-1140. In conclusion, Petitioner requested that the court "review the full record, including the evidentiary hearing transcript, alter, amend or reconsider the standing Order of Dismissal, and/or rehear Applicant's case pursuant to Rule 59(a) and (e), SCRCP." App. p. 1110. Additionally, Petitioner, through counsel, made argument regarding the same at the hearing held on December 8, 2022. App. pp. 1141-1169.

As discussed in Petitioner's Rule 59, SCRCP, Motion, *Marlar* and its progeny have resulted from the lower courts' repeated failure to adequately address issues raised at an evidentiary hearing in final orders. *See Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992) (Remanding and explaining the Court's concern with PCR orders that fail to address the issues raised at a PCR hearing, which result in depriving parties of rulings on the issues, make review by the appellate court and the workload of the appellate court more difficult, and require remand for new hearings and/or orders.); *Reese v. State*, 425 S.C. 108, 820 S.E.2d 376 (2018) (Granting the request for remand by both parties as result of the "patent inadequacies" of the PCR court's order.); *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019) (Remanding for the PCR court to make adequate findings of fact and conclusions of law regarding an unaddressed PCR claim despite a Rule 59, SCRCP, motion not being filed.).

Clearly, these cases have resulted from the failure of the lower courts to address issues raised at evidentiary hearings in final orders, which has required the appellate courts to remand and/or rule upon issues not properly addressed in a final order or in a Rule 59, SCRCP, motion. Here, Petitioner filed a detailed Rule 59, SCRCP, Motion, and hearing was held yet the court issued a blanket denial without addressing the substance of Petitioner's motion. App. p. 1171. Petitioner submits that a remand is necessary for the reasons addressed in the Rule 59, SCRCP, Motion, which is included in the record before this Court and incorporated by reference herein.

App. p. 1105. Alternatively, if this Court finds that a remand is not required, Petitioner would ask the Court to review the issues raised via Amendment, at the hearing, via proposed Order, contained in the Order of Dismissal and addressed via the Rule 59, SCRCP, Motion, and hearing.

B. The lower court erred by not finding that counsel failed to properly prepare prior to trial and advise Petitioner regarding the strength of the State's evidence and the available defenses, which resulted in counsel's failure to effectively negotiate a guilty plea, a guilty plea not being entered, and ineffective assistance at trial. The following that arose prior to and during trial demonstrate counsel's ineffective assistance: a) utilization of a defense strategy that had been fully discussed on recorded phone calls provided to the defense in discovery; b) utilization of Petitioner's mother as a defense witness to support said defense, with knowledge that she was subject to questioning regarding her audio interviews and recorded phone calls; c) utilization of an expert that bolstered the State's case and failed to offer an advantageous opinion; d) utilization of defense witnesses regarding employment and/or alibi, when it was known that the State could refute said witnesses; and e) failure to consider or address the matter of double jeopardy.

1. The lower court erred since trial counsel failed to properly prepare prior to trial and advise Petitioner regarding the strength of the State's evidence and the available defenses, which resulted in counsel failing to effectively negotiate a guilty plea and a guilty plea not being entered.

As was argued in the written Rule 59, SCRCP, motion and at the motion hearing, Petitioner submits that the lower court did not fully and properly address whether counsel provided ineffective assistance that resulted in Petitioner not entering a guilty plea and proceeding to trial with a much less favorable outcome. App. pp. 1110, 1145-1147, 1151, 1156-1157. Since the court briefly addressed it in the Order of Dismissal and Petitioner has further preserved it via Rule 59, SCRCP Motion, and hearing, Petitioner urges this Court to find that the trial court erred in finding counsel effective and denying relief.

At the evidentiary hearing, Petitioner repeatedly testified that if he had been properly advised regarding the evidence and witnesses, he would not have proceeded to trial and accepted a guilty plea. The "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." *Montejo* v. *Louisiana*, 556 U.S. 778, 786, 129 S.

Ct. 2079, 173 L. Ed. 2d 955 (2009) (quoting *United States* v. *Wade*, 388 U.S. 218, 227-228, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)). Critical stages include arraignment, post-indictment interrogations, post-indictment lineups, negotiation and the entry of a guilty plea. See *Hamilton* v. *Alabama*, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961) (arraignment); *Massiah* v. *United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964) (postindictment interrogation); *Wade*, *supra* (postindictment lineup); *Padilla v. Kentucky*, 559 U. S. 356, 130 S.Ct. 1473 (2010) (*Argersinger* v.*Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972) (guilty plea).

In *Hill v. Lockhart,* 474 US 52, 106 S.Ct. 366 (1985) and *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010), the Supreme Court of the United States examined the role of advising a client about a plea offer and ensuing guilty plea and the proper application of the *Strickland* standard. *See also Missouri v. Frye*, 132 S. Ct. 1399, 1405-06 (2012) In *Padilla*, the Court discussed the duties of counsel in advising a client with respect to a plea offer that leads to a guilty plea. *Padilla* held that a guilty plea, based on a plea offer, should be set aside because counsel misinformed the defendant of the immigration consequences of the conviction. The Court made clear that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." 559 U.S., at ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284, 298.

Additionally, the Supreme Court of the United States issued opinions in *Frye* and *Lafler v. Cooper*, 566 U.S. 156, 132 S.Ct. 1376 (2012) on the same day and addressed the situation of when ineffective assistance of counsel led to the rejection of a plea offer in contrast to the issue of ineffective assistance of counsel in accepting a plea offer which was addressed in *Hill*. In *Lafler*, the Court addressed the appropriate remedy "when inadequate assistance of counsel

caused non-acceptance of a plea offer and further proceedings led to a less favorable outcome."

566 U.S. at 160, 132 S.Ct. at 1383. The Court explained:

> In contrast to *Hill*, here the ineffective advice led not to an offer's acceptance but to its rejection. Having to stand trial, not choosing to waive it, is the prejudice alleged. In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. Here, the Court of Appeals for the Sixth Circuit agreed with that test for *Strickland* prejudice in the context of a rejected plea bargain.

Lafler, 566 U.S. at 163-164, 132 S. Ct. at 1385. Turning to facts, the Court further explained:

> In the instant case respondent went to trial rather than accept a plea deal, and it is conceded this was the result of ineffective assistance during the plea negotiation process. Respondent received a more severe sentence at trial, one 3 ½ times more severe than he likely would have received by pleading guilty. Far from curing the error, the trial caused the injury from the error. Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence.

Lafler, 566 U.S. at 166 , 132 S. Ct. at 1386.

Finally, in *Lafler*, the Court addressed the State's argument that purpose of the Sixth Amendment is to ensure the reliability of a conviction following trial. In addressing this argument, the Court held:

> This argument, too, fails to comprehend the full scope of the Sixth Amendment's protections; and it is refuted by precedent. Strickland recognized "[t]he benchmark for judging any claim of ineffectiveness must be whether 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." 466 U.S., at 686, 104 S.Ct. 2052. The goal of a just result is not divorced from the reliability of a conviction, *see United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) ; but here the question is not the fairness or reliability of the trial but the

> fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance.

Lafler, 566 U.S. at 168-169, 132 S. Ct. at 1387-1388.

Prior to *Lafler*, this Court addressed whether counsel offered ineffective assistance for advice rendered in rejecting a plea offer in *Judge v. State*, 471 S.E.2d 146 (1996). Similarly to *Lafler*, this Court held: "The Sixth Amendment protects criminal defendants against ineffective assistance of counsel during the plea bargaining process, even if the plea offered ultimately is rejected." This Court also held that "a petitioner still must prove both ineffective assistance in counsel's advice to reject a plea agreement, as well as prejudice resulting from that ineffectiveness." 321 S.C. 560, 471 S.E.2d at 149. In *Lafler*, counsel's ineffectiveness was not disputed, but it was in *Judge*.

While addressing the standard of attorney competence during plea negotiations, this Court reasoned that "counsel's advice to reject a plea agreement does not fall below the reasonably effective assistance standard simply because, in hindsight, the advice was wrong or the attorney's trial tactics backfired." *Judge*, 321 S.C. 560, 471 S.E.2d 150. In reversing the grant of post conviction relief, this Court addressed the facts of the case, which consisted of counsel's failure to wait to receive certain *Brady* materials before advising Judge on whether to accept a plea to voluntary manslaughter. The record before the Court established that Judge's counsel were not aware of the additional *Brady* materials and thought the prosecution had provided all *Brady* materials. Therefore, the Court concluded: "Counsel cannot be held incompetent for failing to wait to receive material they had no reason to know existed." 321 S.C. at 563, 471 S.E.2d at 151. Additionally, this Court found that there was not reasonable evidence to establish prejudice since no evidence was presented at the PCR hearing about how the additional *Brady*

materials would have affected counsel's advice concerning the plea offer. 321 S.C. at 562-563, 471 S.E.2d at 151. Following *Judge*, the Court's ruling was overruled to the extent it could "be read to hold that a petitioner's statement is insufficient evidence to satisfy the prejudice prong." *Jackson v. State*, 342 S.C. 95, 535 S.E.2d 926, fn. 2 (Reversing the denial of post conviction relief and finding that petitioner's self-serving statement that he would not have pled guilty but for counsel's advice was sufficient to establish prejudice.); *see also Smith v. State*, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) ("The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty.").

Thereafter, in *Davie v. State*, 381 S.C. 601, 675 S.E.2d 416 (2009), this Court addressed the matter of deficient performance resulting from counsel not communicating a more favorable plea offer. After applying the principles set forth in *Jackson* and *Smith*, this Court concluded "that the difference in the sentence Petitioner received and the plea offer is proof of prejudice." 381 S.C. at 614, 675 S.E.2d at 423.

In the instant case, Petitioner testified that he would have accepted a guilty plea and not proceeded to trial if counsel had properly prepared and advised him prior to trial. Admittedly, the record before this Court establishes that Attorney Falk understood he was hired to quickly prepare and proceed with a trial; he was not hired with the intention of negotiating a guilty plea. Despite Attorney Fallk's understanding, he should not be relieved of his duty to provide effective representation. Here, effective representation would at a minimum require Attorney Falk to ensure that he had all the evidence, reviewed it and properly advised Petitioner regarding proceeding to trial or pursuing a guilty plea. Here, Attorney Falk completely failed in this regard. He candidly admitted that he did not have all the discovery, did not review it with Petitioner, and

the only investigation conducted was reviewing what prior counsel had put together. App. pp. 946, 964-965, 985-986. Additionally, the record shows that Petitioner was not properly advised regarding the purpose and potential impact of calling his expert or lay witnesses at trial.

Counsel testified that he was embarrassed by the State's utilization of the jail calls during the cross-examination of Petitioner's mother at trial. App. pp. 985-986. When asked about the source of his embarrassment, he candidly admitted that the case "blew up right then" due to something he was completely unaware of going into trial. App. p. 986, lns. 15-18. If counsel was unaware and embarrassed, how could counsel have properly advised Petitioner prior to trial? Additionally, counsel admitted the impact his failure had on the trial.

Unfortunately, counsel's failure went beyond not reviewing the jail calls and advising Petitioner regarding the same. Petitioner testified that he was not properly advised regarding the identification his mother gave or that the State had a complete preview of his defense via the jail calls. Petitioner made it clear that if counsel had just talked with him about the contents of the 2 CDs admitted at the evidentiary hearing, he would have been asking about a plea deal. App. p. 885. Petitioner also testified that he would not have wanted his mother called as a witness nor proceeded with a trial if he had been properly advised regarding the evidence. App. pp. 885-886.

Turning to the expert witness (Dr. Bennett), the lower court erred by excusing and finding no deficiency when counsel could not recall reviewing the prior transcript involving Dr. Bennett, when counsel did not have a clear strategy regarding the utilization of Dr. Bennett nor could he recall discussing with Petitioner the likelihood of suppression or the strategy of getting a spoilation charge. When asked about the State's summary of Dr. Bennett's testimony and the court's ruling, Petitioner testified that if counsel would have informed him properly it would have changed his decision to proceed to trial. He explained: "Yes. If he wasn't going to be in my

defense, then I knew the DNA would kill me in a trial, so it would be no point of going to trial without a defense with the DNA." App. p. 892, lns. 16-18.

Turning to the matter of the alibi witnesses and the records the State introduced to refute the witnesses, counsel's statement in closing after addressing the issues with Petitioner's alibi witnesses speaks volumes:

> When you ask yourself to consider that my client has an alibi, I mean I'm sure he'd rather have a much better alibi. I'm sure that three months, when he's trying to explain what going on three months later, I'm sure he much rather would have been playing softball with his parish priest, but he wasn't.

App. p. 572, lns. 11-16. Here, counsel conceded it was a poor alibi to the jury, but he failed to effectively convey the same to Petitioner prior to trial. At the evidentiary hearing, Petitioner testified that counsel's position in closing was not conveyed to him prior trial and if counsel had properly advised him about the issues with his alibi and witnesses, he would not have wanted the witnesses called, alibi presented nor proceeded to trial. App. pp. 897-898.

Finally, counsel again admitted embarrassment for missing the potential double jeopardy issue, and he explained that it is an issue he is familiar with raising. App. pp. 954-955, 975 Clearly, counsel's failure to consider an issue he expressed familiarity with further demonstrates his ineffective preparation prior to trial.

Here, the plea offer made was 25 to 30 years and Petitioner received a sentence of life. Petitioner made it clear to the lower court that if counsel would have properly advised him regarding the evidence and witnesses he would not have proceeded to trial and would have entered a guilty plea. Petitioner urges this Court to find that counsel's preparation prior to trial and performance at trial were clearly deficient and the prejudiced suffered by Petitioner was the resulting conviction and inability to pursue a plea for a more favorable sentence.

2. The lower court must be reversed since counsel failed to properly prepare prior to trial and advise Petitioner regarding the strength of the State's evidence and the available defenses. The following that arose prior to and during trial demonstrate counsel's ineffective assistance: a) utilization of a defense strategy that had been fully discussed on recorded phone calls provided to the defense in discovery; b) utilization of Petitioner's mother as a defense witness to support said defense, with knowledge that she was subject to questioning regarding her audio interviews and recorded phone calls; c) utilization of an expert that bolstered the State's case and failed to offer an advantageous opinion; d) utilization of defense witnesses regarding employment and/or alibi, when it was known that the State could refute said witnesses; and e) failure to consider or address the matter of double jeopardy.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Where an application for post conviction relief 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 the trial cannot be relied upon as having produced a just result." *Id.* 466 U.S. at 686; *see Butler v. State*, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. *Bell v. State*, 321 S.C. 238 (1996); *see also Cherry v. State*, 300 S.C. 238 (1989); Rule 71.1(e), SCRCP.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117 (citing *Strickland*, 466 U.S. at 688). 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.

The lower court erred in finding that both counsel's preparation and strategy for trial to be reasonable. It is well established that a criminal defense attorney has a duty to investigate, but that duty is limited to a reasonable investigation. When evaluating the reasonableness of counsel's conduct, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). Moreover, while the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. *Id.*

In *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008), this Court reversed the lower court and granted PCR relief when counsel failed to conduct a reasonable investigation. This Court held that a reasonable investigation includes interviewing witnesses and conducting an independent investigation of the facts of the case. *Lounds*, 380 S.C. at 460, 670 S.E.2d at 649, *See Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). In *McKnight*, this Court held: "This Court has recognized that strategic choices made by counsel after an incomplete investigation are reasonable 'only to the extent that reasonable professional judgment supports the limitations on the investigation.'" *McKnight v. State*, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (*quoting Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)).

Here, counsel's admitted failure to obtain and review discovery that was utilized by the State was not just an "embarrassment" but counsel's overall performance prior to and during trial undermined the proper functioning of the adversarial process as was also addressed in *Lafler*:

> Strickland recognized "[t]he benchmark for judging any claim of ineffectiveness must be whether 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." 466 U.S., at 686, 104 S.Ct. 2052. The goal of a just result is not divorced from the reliability of a conviction, *see United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) ; but here the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance.

Lafler, 566 U.S. at 168-169, 132 S.Ct. at 1387-1388.

As discussed more fully above, counsel failed to properly advise Petitioner regarding the matters involving his mother, DNA expert, and alibi witnesses before he proceeded to trial. Counsel also candidly admitted that he failed to consider or raise the matter of double jeopardy despite familiarity with raising such an issue. Additionally, counsel admitted that he failed to review all of the discovery that became highly relevant and damaging during trial and he questioned during the evidentiary hearing if he had received all of the discovery.

Not only did counsel question if he had all the discovery, but he also admitted that he did not utilize an investigator. Specifically, when asked about utilizing an investigator, he responded: "No. I just looked at the materials that Tommy Bolus had pulled together." PCR p. 108, lns. 9-14. He recalled reaching out to the alibi witnesses via phone. PCR p. 114. Regarding a defensive strategy, counsel explained:

> We were going to talk about the alibi, and then the basic lack of any kind of evidence, any kind of forensic evidence, at the scene. You know, there were no fingerprints there. You know, the lack of identity. We were going to use his alibi. And I think I talked to him about the financial thing. That came together pretty close to trial.

PCR p. 108, lns. 19-25. When asked about his strategy in utilizing the expert witness, he responded: "I was just trying to put as many balls in the air, you know, bullets up in the air, however you want to say it." PCR p. 131, lns. 17-19.

Despite counsel's clear admissions of deficient assistance and the record establishing the same, the lower court found relief was not warranted. The lower court must be reversed since counsel failed to properly prepare prior to trial and advise Petitioner regarding the strength of the State's evidence and the available defenses. The following that arose prior to and during trial demonstrate counsel's ineffective assistance and resulting prejudice: a) utilization of a defense strategy that had been fully discussed on recorded phone calls provided to the defense in discovery; b) utilization of Petitioner's mother as a defense witness to support said defense, with knowledge that she was subject to questioning regarding her audio interviews and recorded phone calls; c) utilization of an expert that bolstered the State's case and failed to offer an advantageous opinion; d) utilization of defense witnesses regarding employment and/or alibi, when it was known that the State could refute said witnesses; and e) failure to consider or address the matter of double jeopardy. By counsel's own admissions at the evidentiary hearing, the trial blew up as a result of his failures, so the lower court's finding of no resulting prejudice cannot stand when counsel's deficient representation clearly impacted the outcome of trial.

C. The lower court erred for failing to find that relief is required under *Cronic* due to a complete breakdown in the adversarial process.

By way of the Amendment and at the proceedings, Petitioner also asked the lower court to consider whether counsel's representation amounted to a complete breakdown in the adversarial process and a systematic failure whereby prejudice must be presumed. *See United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039 (1984). In *United States v. Cronic*, the Supreme Court of the United States recognized that a systemic failure of the adversarial system occurs when policies and procedures effectively deprive an accused of counsel altogether. 466 U.S. 648, 104 S.Ct. 2039. A structural defect or systemic failure of the adversarial system is one that infects "the framework within which the trial proceeds" rather than an error in the process of the

trial itself; a structural defect contaminates the proceedings from beginning to end. *Arizona v. Fulminante*, 499 U.S. 279, 309-310, 111 S.Ct. 1246, 1264-1265 (1991). A systemic failure occurs where (1) "the accused is denied counsel at a critical stage of the trial", (2) "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing", or (3) "the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance...." *Cronic*, 466 U.S. 648, 659-61.

When a systemic failure occurs in any of the three ways mentioned in *Cronic*, prejudice is presumed. First, when a defendant is "denied counsel at a critical stage," prejudice is presumed. *Cronic*, 466 U.S. 648, 659. Second, prejudice is presumed when "the defendant was in effect denied any meaningful assistance at all." *Nielson v. Hopkins*, 58 F.3d 1331, 1335 (8th Cir. 1995). Third, where the denial of resources is such that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice without inquiry into the actual conduct" attaches. *Cronic* at 659-660, 104 S.Ct. 2047.

Here, the lower court held: "Counsel was present for the entirety of the trial, was professional and otherwise adequately did his job, and subjected the State to the required adversarial testing. Thus, a structural error is not present, and prejudice cannot be presumed." App. p. 1052. As argued above, Petitioner vehemently disagrees with the lower court's finding that counsel subjected the State to the required adversarial testing when the record establishes the following: 1) counsel did not ensure that he had all of the discovery to prepare for and utilize at trial, 2) counsel utilized a defense strategy that had been fully discussed on recorded phone calls and called Petitioner's mother without properly preparing for her to be questioned about her recorded phone calls and interview, 3) counsel did not properly prepare to utilize and prejudicially utilized an expert that bolstered the State's case, 4) counsel utilized witnesses to

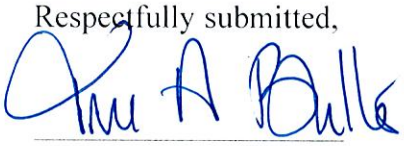
address employment and alibi that he knew could be refuted by the State, and 5) counsel failed to consider known arguments, such as arguing double jeopardy.

Alternatively to the *Strickland* arguments above, Petitioner urges this Court to grant relief under *Cronic* since counsel's performance did not amount to meaningful assistance and he failed to subject the prosecution's case to meaningful adversarial testing. Here, counsel's conduct contaminated the process from beginning to end and should not be excused as was done by the lower court. Therefore, Petitioner urges this Court to find that a new trial must be granted.

CONCLUSION

Based upon the arguments and record before this Court, Petitioner would respectfully ask that this Court remand to the lower court to enter a proper Order or alternatively grant certiorari, allow briefing of the issues addressed herein, and/or grant relief.

Respectfully submitted,



Tricia A. Blanchette
Bar #74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266

Attorney for Petitioner

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