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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Robert J. Bonds, Circuit Court Judge

App. Case No.: 2023-001429

Tyrone D. Ellison, Petitioner,

vs.

State of South Carolina, Respondent.

PETITION FOR WRIT OF CERTIORARI

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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 for failing to find that counsel did provide ineffective assistance that rendered Petitioner's guilty plea involuntary due to counsel's failure to properly prepare with and represent Petitioner prior to his trial, during his trial and prior to the entry of the guilty plea. The lower court also erred for failing to find prejudice when there was no benefit from the guilty plea and counsel's failures left Petitioner with no viable option of proceeding to trial.

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 and a systematic failure whereby prejudice must be presumed.

STANDARD OF REVIEW

On 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 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 by the Dorchester County Grand Jury for failure to stop for a blue light (2013-GS-18-1267), entering a bank, depository, or building and loan association with intent to steal (2013-GS-18-1268), 2 counts of hit and run involving great bodily injury (2013-GS-18-1354, 1355), and armed robbery (2013-GS-18-1813). These indictments stemmed from a bank robbery at a Suntrust bank on July 1, 2013. Petitioner was also indicted by the Dorchester County Grandy Jury for intimidation of court officials, jurors or witnesses (2015-GS-18-0024), obstructing justice (2015-GS-18-0025), and criminal conspiracy (2015-GS-18-0026).[1]

On August 12, 2015, Petitioner entered a negotiated guilty plea in front of the Honorable Edgar W. Dickson at the Dorchester County Courthouse. Petitioner was represented by James K. Falk, Esquire. Assistant Solicitors Don Sorenson and Phil Giese

[1] These indictments stemmed a trial on Indictment No. 2013-GS-18-1271, 2014-GS-18-325 in front of the Honorable D. Craig Brown on October 20-24, 2016, where he was represented by James K. Falk, Esquire.

represented the State. Petitioner was sentenced concurrently as follows: time served for failure to stop for a blue light (2013-GS-18-1267), 30 years for entering a bank, depository, or building and loan association with intent to steal (2013-GS-18-1268), 10 years for each count of hit and run involving great bodily injury (2013-GS-18-1354, 1355), 30 years for armed robbery (2013-GS-18-1813), time served for attempting to influence court officials, jurors or witnesses (2015-GS-18-0024), 10 years for obstructing justice (2015-GS-18-0025), and 5 years for criminal conspiracy (2015-GS-18-0026). Petitioner did not appeal his plea or sentences.

On January 7, 2016, an Application for Post Conviction Relief was filed. Respondent filed a Return on July 12, 2016. On May 8, 2018, Petitioner, through counsel, filed a Motion for Consolidation and Discovery, which also addressed Petitioner's Post Conviction Relief Application stemming from a trial.[2] On July 12, 2018, a motion hearing was conducted at the Dorchester County Courthouse in front of the Honorable Robin B. Stilwell. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Christian Saville, Assistant Attorney General. An Order for Consolidation and Discovery was issued on July 23, 2018.

On July 26, 2021, Petitioner, through counsel, filed an Amendment to his Application. 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

[2] On January 11, 2018, Petitioner filed an Application for Post Conviction Relief in Dorchester County (Docket No. 2018-CP-18-0047) stemming from his trial in front of the Honorable D. Craig Brown. He was represented by James K. Falk, Esquire. As a result of the consolidated evidentiary hearing, the lower court had a copy of the records from the trial, appeal, and PCR Application.

J. Weidauer, Assistant Attorney General. The matter of consolidation with his other pending Application was addressed, and the court proceeded with a consolidated hearing and took the records from both matters into consideration. At the conclusion, the court requested that the parties submit a proposed Order. Both parties submitted a proposed Order, and an Order of Dismissal was issued on September 19, 2022, filed on October 5, 2022 and entered on October 6, 2022. Petitioner, through counsel, filed a timely Motion Pursuant to Rule 59 (a) & (e), SCRCP. On December 8, 2022, a motion hearing was conducted via WebEx. An Order denying the motion was issued on December 8, 2022 and filed on August 4, 2023, from which this Petition follows.

ARGUMENT

I. Summary of the Relevant Evidentiary Hearing Testimony

At the evidentiary hearing, Petitioner took the stand and called James K. Falk, Esquire, to the stand. When Petitioner took the stand, he acknowledged the filing of the instant PCR Application, the allegations and requested relief. App. pp. 865-868. He also acknowledged the Order allowing for consolidation of the evidentiary hearing with his subsequently filed PCR Application (Docket No. 2018-CP-18-0047). App. p. 869.

Petitioner testified that he originally retained Tommy Bolus, Esquire, to represent him and Attorney Bolus obtained Dr. Bennett, DNA expert. 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.[3] App. 871 p. 33, lns. 14-25.

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

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.

Regarding the hearing on August 4, 2014, Petitioner said he thought he was going to trial, but a motion hearing was conducted involving 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 day and retained Attorney Falk. App. p. 875.

Prior to hig 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 that about either recording before calling his mother as a defense witness at his trial. 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.[4] 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 joint plea deal. App. p. 885. He asserted 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 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 said that he thought his testimony was going to be favorable to the defense, 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.

[4] 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.

App. pp. 889-891.[5] When asked about the State's summary of Dr. Bennett's testimony and the court's ruling, he 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 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.

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 to 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 his work alibi. App. p. 897. When asked about counsel's closing 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

[5] 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.

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 joint guilty plea. App. p. 898.

Regarding the time prior to his plea, Petitioner testified that he did not have a discussion with Attorney Falk regarding his remaining charges nor did he come see him at McCormick Correctional Institution. App. pp. 904-906. He recalled being transferred to Dorchester County, and counsel informing him about the plea offer for a negotiated 30 years. App. p. 905. He recalled counsel advising him to accept the plea offer and questioning counsel about not reviewing the video or going over any arguments and evidence with him. App. pp. 906, 935, 937. When asked to explain, Petitioner responded: "I really felt like I was under duress during that time because we haven't talked about anything, and he just – he's basically telling me to take this plea, and he hadn't even went over the evidence with me or anything. And that's basically just where the conversation was, at a standstill." App. p. 906, ln. 23 – p. 907, ln. 2. He recalled counsel obtaining the video of the bank from the Solicitor's Office and reviewing it with him right before his plea. App. pp. 911-912, 932-933. On cross-examination, he testified that it was his understanding that he was up for trial if he did not accept the plea. App. pp. 933-934.

After being asked about the portion of the transcript where he informed the plea court that he was not satisfied with counsel, he explained: "I felt I had no choice because this was – my lawyer was advising me, and the judge wasn't trying to hear what I was saying at that time." App. pp. 746-749, 907, 908, lns. 2-4, 936-937. Petitioner agreed that what happened at his trial factored into his decision to enter a guilty plea. App. p. 908,

lns. 5-7. He explained: "I mean, I felt I wasn't fairly represented. And if he wanted me to take a plea agreement, it should have been before trial." App. pp. 908, lns. 5-11, 939. On cross-examination, he explained that he agreed that the plea was his best option on the record "[b]ecause I felt like I didn't really have an attorney on my side. It was me against the whole courthouse." App. p. 938, lns. 14-19.

When asked about the terms of the plea agreement, he testified that that there was essentially no benefit from the State not seeking life without parole since he had already received a life sentence at trial. App. p. 909. He agreed that the damage had been done from the trial. App. p. 909.

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.

Further in 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. Later, a stipulation was entered that the CDs on the table referenced totaled 58. App. p. 984, ln. 21 – p. 147, ln. 2. 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.[6] 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 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.

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

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." [7] App. p. 949, lns. 6-7. He could not recall advising Petitioner about the evidence being suppressed, and he responded that he did not know if he discussed trying to get a spoilation charge with him. 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 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

[7] 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.

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.

When he was asked about the double jeopardy argument raised by Petitioner, 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 was not prepared to answer about the strength of the issue. App. p. 954. He did agree that if the State would have tried him on 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.

Turning to his continued representation of Petitioner post-trial that culminated in Petitioner's guilty plea, Attorney Falk recalled being appointed to represent Petitioner on his remaining charges. App. p. 957. He recalled receiving the plea offer for a negotiated 30 years, and he recalled it was the only offer received. App. pp. 957-958. He recalled Petitioner being transported to Dorchester County Courthouse to discuss the plea offer shortly after he was appointed. App. p. 958.

When asked about the meeting at the courthouse, he recalled advising Petitioner that the 30 year offer "made sense" due to his pending appeal following his trial. App. p. 958, lns. 14-24. He explained: "I thought if his appeal was successful, they could come back and try to LWOP him again on another trial, so that's why I thought it made sense." App. p. 958, lns. 22-24. Regarding whether he advised Petitioner to take the plea, he

responded: "I never advise anybody to enter the guilty plea. I just explain what I think the benefit would be for entering it." App. p. 959, lns. 4-7. On cross-examination, he recalled Petitioner's initial reaction to the plea was that Petitioner "pushed back." App. p. 980, lns. 11-15. Later he explained that the pushback from Petitioner was due to him not reviewing the evidence as Petitioner referenced during the plea. App. p. 982.

When asked again about his review of the evidence with Petitioner, he explained that he did not review the evidence with Petitioner, but he thought Petitioner knew both cases "pretty well" from the period of time when Attorney Bolus represented him. App. p. 959. He did recall reviewing the video with Petitioner in the courtroom, and he reviewed "some of the videos, all of the police reports" without Petitioner. App. p. 959, lns. 15-21. When asked on cross-examination if he had already discussed the case with Petitioner during his prior representation, he responded: "Maybe only in passing. I mean, I don't think we had that much – I mean, there might have been a conversation that related to it, but not really." App. p. 979, ln. 25 – p. 980, ln. 4.

After discussing the review of the evidence, the following testimony was elicited:

Question: Were the options limited by what happened with the trial? Was the plea the best track because of the trial?

Answer: Yes.

Question: In getting that offer, was there any negotiation back and forth?

Answer: Obviously I had tried to go under, but it was pretty clear that it was going to be the 30. I mean, that's what the deal was. And if he wanted to take it, it was fine. And we were not on – that case was not set for the trial that day. That's absolutely not true. They just brought him in there to see if he wanted to take this plea. We were not going to trial that day.

App. p. 122, lns. 1-12. He ended his direct examination by saying, "If he didn't want to plea, he wouldn't have pled." App. p. 961, lns. 1-2.

On cross-examination, he recalled that Petitioner had to make a decision on the plea offer that day, but it was not true that the case was scheduled for trial. App. p. 980, lns. 20-25. He also did not recall there being any discussion of the plea coming off the table if Petitioner did not plea that day. App. p. 981, lns. 1-11. At the close of his cross-examination, he stated: "I don't know where he would have gotten the idea that we were going to trial that day." App. p. 983, ln. 25 – p. 984, ln. 1.

On redirect, he reviewed the plea offer and agreed that the plea offer expired the day after the plea was entered. App. p. 987. When asked to review the transcript and the court's comments that the case was going to trial if Petitioner did not plead guilty, he explained that he took the comments to mean that the case would go to trial eventually but not that day. App. pp. 748-749, 987-988.

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. 1072. In support of the Motion, Petitioner addressed specific areas of concern and provided a proposed order previously given to the court. App. pp. 1072-1104. 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. 1076. Additionally, Petitioner made argument regarding the same at the hearing held on December 8, 2022. App. pp. 1141.

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 or failure of counsel to file a Rule 59, SCRCP, motion. *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. 1170. 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. 1069. 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 for failing to find that counsel did provide ineffective assistance that rendered Petitioner's guilty plea involuntary due to counsel's failure to properly prepare with and represent Petitioner prior to his trial, during his trial and prior to the entry of the guilty plea. The lower court also erred for failing to find prejudice when there was no benefit from the guilty plea and counsel's failures left Petitioner with no viable option of proceeding to trial.

It is well established that a guilty plea may not be accepted unless it is voluntarily and understandingly made. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709 (1969). In South Carolina, courts have consistently held that that a defendant must have a full understanding of the consequences of his plea and the charges against him. *Smith v. State*, 329 S.C. 280, 494 S.E.2d 626 (1997), *Simpson v. State*, (317 S.C. 506, 455 S.E.2d 175 (1995). Additionally, a defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution.[8] *See Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). In examining the assistance provided by counsel, "There is a strong presumption that counsel rendered adequate assistance and

[8] 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).

exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

In a PCR stemming from a guilty plea, an applicant alleging a constitutional violation must frame the issue as one of ineffective assistance of counsel. *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (1999). Therefore, an applicant that entered a plea on the advice of counsel may only attack the voluntary nature of that plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, applicant would not have pled guilty and insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366 (1985), *Jackson v. State*, 342 S.C. 95, 535 S.E.2d 926 (2000). In *Hill*, the Supreme Court of the United States made it clear that the "voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." 474 U.S. at 57, 106 S.Ct. at 369.

As mentioned in *Hill v. Lockhart,* 474 US 52, 106 S.Ct. 366 (1985) and also in *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.

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." *Suber v. State,* 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." *Roddy v. State,* 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000).

By way of the Amendment and at the evidentiary hearing, Petitioner alleged:

> 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 an involuntary guilty plea. Applicant would further amend his Application for Post Conviction Relief to contain the following specific allegations of ineffective assistance of counsel that rendered his guilty plea involuntary:
>
> 1. Failure to effectively represent Applicant at his prior trial, which rendered Applicant's plea involuntary as such ineffective representation was a primary contributing factor in the entry of Applicant's guilty plea.
>
> 2. Failure to properly prepare with Applicant for a trial prior to the entry of the plea, which rendered Applicant's guilty plea involuntary and led to the court convincing Applicant to plea after voicing his dissatisfaction with counsel.
>
> 3. Failure to effectively negotiate and ensure that there was a benefit from the plea bargain.

App. pp. 804.

By way of the Order of Dismissal, the lower found counsel provided effective assistance and no prejudice resulted. App. pp. 1025-1034. Petitioner submits that the

lower court erred for failing to find that counsel did provide ineffective assistance that rendered Petitioner's guilty plea involuntary due to counsel's failure to properly prepare with and represent Petitioner prior to his trial, during his trial and prior to the entry of the guilty plea. The lower court also erred for failing to find prejudice when there was no benefit from the guilty plea and counsel's failures left Petitioner with no viable option of proceeding to trial.

As was addressed by Petitioner while on the stand, counsel's representation prior to and at his trial was a contributing factor to the entry of his guilty plea. Petitioner testified that counsel did not fairly represent him at his trial and that counsel should have worked out a plea on all his charges prior to his first trial. App. pp. 908, 939. When addressing his negotiations regarding the plea, counsel admitted that the plea was the best option due to the prior trial. App. p. 960.

Furthermore, the record establishes that counsel failed to properly prepare with Petitioner for a trial prior to the entry of his guilty plea, which was a matter Petitioner attempted to address with the plea court. In contrast to his statements to the court at the guilty plea and the lower court's findings, counsel testified that he did not review all the evidence himself nor review it with Petitioner prior to the entry of the guilty plea. App. pp. 743, 959, 979-980, 982. At the evidentiary hearing, he admitted Petitioner gave "pushback" to the plea offer because he had not reviewed all of the evidence, yet at the plea he did not speak up when Petitioner tried to address his concern about not reviewing the evidence prior to his plea with the court. App. p. 748-749, 980, lns. 11-15.

It appears counsel attempted to excuse his lack of preparation when he testified repeatedly Petitioner was not facing a trial if he did not plea that day nor was the plea

coming off the table. App. pp. 960-961, 980-981, 983, 987-988. When asked about the plea offer sheet with an expiration date of the following date and the court's statement to Petitioner during the plea, counsel continued to standby his position that Petitioner was not facing a trial if he did not plead guilty on August 12, 2015. Regardless of counsel's belief, Petitioner testified and the record establishes that counsel's lack of preparation and proper representation backed Petitioner into a corner where he had to accept the plea or proceed to trial with counsel who had failed to be prepared for his first trial and was not prepared for a second trial.

At the plea, Petitioner voiced his concerns with counsel only meeting with him on that day and not reviewing the evidence with him, and Petitioner explained that the plea seemed to be his safest option since "they are saying it's either this or trial." App. p. 748, lns. 18-24. In response, the following took place:

> Court: Well, I mean, from what I understand, they are going to be ready to try these cases unless you plead guilty. I mean, that's just what happens in life when you're in a situation like you're in, you know, as I asked you; and when I asked you if he reviewed the evidence, I know you said there were some videos. But you know whether or not you're guilty of these things, Mr. Ellison, do you not?
>
> Petitioner: Yes, sir.
>
> Court: Are you in fact guilty of these charges.
>
> Petitioner: I am pleading guilty here, yes, sir.

App. p. 748, ln. 25 – p. 749, ln. 10. Clearly, the plea court affirmed Petitioner's understanding that he was facing trial if he did not plea, which stands in contrast the lower court's findings. Additionally, the plea court relied upon counsel's statement that he had reviewed all the evidence when he addressed Petitioner's concerns. As stated,

counsel's testimony from the evidentiary hearing does not line up with what was told to the plea court. Even though the lower court chose to excuse it, Petitioner urges this Court to find that the plea court was not properly informed about counsel's failure to review the evidence, properly prepare for a trial, and advise Petitioner during the discussion during the plea proceeding.

In contrast to the findings of the lower court, Petitioner submits that counsel's performance was not reasonable under prevailing professional norms. 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), the South Carolina Supreme Court reversed the lower court and granted PCR relief when counsel failed to conduct a reasonable investigation. The 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. In *McKnight*, the 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, Petitioner understood and the plea court affirmed that he was facing a trial with a sentence of life without parole if he did not enter a guilty plea, yet counsel had not taken any steps to conduct a reasonable investigation nor address with him the totality of the evidence before advising him about a guilty plea. Petitioner urges this Court to find that counsel's meeting with him at the courthouse whereby he advised him of the plea offer and reviewed a video does not amount to effective representation. Clearly, counsel's conduct failed to make the adversarial process work in this particular case. *See Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). As a result, Petitioner urges this Court to find that counsel provided ineffective assistance prior to and during the entry of his guilty plea, which rendered his guilty plea involuntary.

Additionally, Petitioner urges this Court to find that he has established prejudice since counsel's ineffectiveness deprived him of the option of pursuing a joint plea with his other charges or feeling confident that counsel was prepared to proceed with a trial. In response to questions about his strategy in Petitioner's prior trial, counsel admitted that he was "just trying to put as many balls up in the air" and that he was embarrassed when the trial case blew up because he was unaware of jail calls that were relevant to both cases. App. p. 969, 985. Counsel admitted that the trial directly impacted the plea offered to Petitioner and the plea entered was the only option. App. p. 960. Clearly, Petitioner only entered his plea because he was backed into a corner by having to go forward with an attorney that had failed him in his first trial and failed to prepare him for a second trial. Here, the plea court and the lower court have chosen to excuse counsel's ineffective representation and allowed Petitioner's sentence of thirty years to stand despite the clear prejudice he suffered due to counsel's performance.

C. The lower court erred for failing to find that relief is required under *Cronic* due to a complete breakdown in the adversarial process and a systematic failure whereby prejudice must be presumed.

By way of the Amendment and at the evidentiary hearing, Petitioner also argued that his allegations as addressed at a consolidated evidentiary hearing would show 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.

In *Cronic*, the United States Supreme Court addressed the appointment and assistance of counsel, as follows:

> An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries." Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be "of little avail," as this Court has recognized repeatedly. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."
>
> The special value of the right to the assistance of counsel explains why "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441 1449, 25 L.Ed.2d 763 (1970). The text of the Sixth Amendment itself suggests as much. The Amendment requires not merely the provision of counsel to the accused, but "Assistance," which is to be "for his defence." Thus, "the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States v. Ash*, 413 U.S. 300, 309, 93 S.Ct. 2568 2573, 37 L.Ed.2d 619 (1973). If no actual "Assistance" "for" the accused's "defence" is provided, then the constitutional guarantee has been violated. To hold otherwise "could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." *Avery v. Alabama*, 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed. 377 (1940) (footnote omitted).

Cronic, 466 U.S. 648, 653-55 (footnotes omitted).

At the evidentiary hearing, counsel testified: "I was only appointed to represent him on the plea." App. p. 957, ln. 20. As addressed above, Petitioner submits counsel's mere appointment for the plea and the assistance he offered failed to meet the Constitutional guarantee of assistance of counsel. In *Cronic*, the United States Supreme

Court reasoned that the Constitutional guarantee of assistance of counsel "is meant to assure fairness in the adversary criminal process" and the Court further reasoned:

> Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." *Anders v. California*, 386 U.S. 738, 743, 87 S.Ct. 1396 1399, 18 L.Ed.2d 493 (1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing.

Cronic, 466 U.S. 648, 656 (footnotes omitted). Here, counsel appeared as if he was advocating for Petitioner at the guilty plea with his answers to the court, but counsel failed to tell the court the truth regarding his failure to meet with Petitioner, review the evidence, conduct an investigation, or prepare for trial. Counsel's inaction after appointment denied Petitioner the opportunity to have meaningful assistance from an attorney acting in the role of an advocate to ensure a fair adversarial process. Therefore, Petitioner urges this Court to find that prejudice must be presumed under *Cronic* and Petitioner's plea, convictions and sentences must be set aside.

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,

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