

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.

APPENDIX
VOLUME III OF III

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S.C. SUPREME COURT

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1 So let's just break for 10 minutes, because I don't want to break
2 for lunch and be gone an hour and then we only have 15 or 20
3 minutes left. So let's just take a break. If you can grab a
4 snack, great. If not, we'll get back in here, and hopefully not
5 spend -- but I want everybody to take their time. It's an
6 important day, sir.

7 THE DEFENDANT: Yes.

8 THE COURT: And at the same time, I don't want to keep
9 people an extra hour if we don't have to.

10 (Court recessed at 1:09 p.m. and reconvened at 1:21, with
11 defendant present.)

12 (Defendant retakes the witness stand.)

13 THE COURT: All right. We're ready to proceed?

14 ATTORNEY WEIDAUER: Yes, Your Honor.

15 THE COURT: Go right ahead.

16 BY ATTORNEY WEIDAUER:

17 Q All right. I would like now to switch gears and discuss the
18 application following the subsequent plea, okay. And, for the
19 record, that's 2016-CP-18-00017. You said you were appointed to
20 this plea; correct?

21 A That's right.

22 Q And were you already familiar, prior to being appointed,
23 with the facts and evidence the state had?

24 A Yes.

25 Q And had you already, in any capacity, discussed the case,

1 the state's case, with applicant?

2 A Maybe only in passing. I mean, I don't think we had that
3 much -- I mean, there might have been a conversation that related
4 to it, but not really.

5 Q And prior to his plea, did you have the opportunity to
6 discuss the elements of each of those eight indictments that he
7 pled to with him?

8 A Yes.

9 Q Okay. And you would have discussed the plea offer with him?

10 A Yes.

11 Q Okay. What was his inclination when you told him there was
12 a plea offer on the table?

13 A He pushed back.

14 Q He pushed back?

15 A (Nods in the affirmative.)

16 Q And you told him that he had the right -- or, did you tell
17 him that he had a right to go to trial instead of pleading that
18 day?

19 A Yes.

20 Q And did he understand there was no rush, he had time to sit
21 back and think about it, or ---

22 A Well, I think they wanted an answer today.

23 Q Oh that day, rather, that he pled?

24 A Yeah, that day he pled. But that case was not scheduled for
25 trial. That's absolutely not true.

1 Q Was there any discussion of him taking the plea offer off
2 the table should he not plead that day?

3 A No.

4 Q Okay. So ---

5 A I do not recall that discussion. I don't believe there was.
6 I'd just like to say I don't recall that. He was just appearing
7 ---

8 Q So he was just being brought to court to inform the Court
9 whether, pursuant to this plea offer, he wanted to plea or
10 whether he wanted to proceed to trial?

11 A Yes.

12 Q Okay. And can you just summarize the state's evidence in
13 this case? And it was presented in the plea.

14 A I mean, I know it's another bank robbery case. I know that
15 there were some videos. I don't -- I didn't look -- I didn't
16 review that part of this last night, so I don't know. I mean, I
17 know it's another bank robbery case. I know there was an
18 accident. I know there was another -- I think it was a --
19 codefendant. There was a codefendant in that case. I'm not sure
20 if he was cooperating or not. I know he made some statements to
21 law enforcement. I'm sorry. I don't have more than that.

22 Q That's all right. I just want to clarify, you don't have an
23 independent recollection of it today because you didn't prepare
24 for that line of questioning last night?

25 A Right.

1 Q But you would have known what the state's evidence was at
2 the time that he pled?

3 A Oh, yeah. Yes.

4 Q Okay, just to clarify. Did applicant -- you said he gave
5 you some pushback. So, what does that mean? He explicitly said
6 like he did in the first case, No, we're going to trial?

7 A No. He said I hadn't seen the evidence.

8 Q So what is reflected in the plea, he also raised that
9 concern with you?

10 A Yes.

11 Q And what was your response then, if you recall?

12 A I then tried to explain to him that this was a way that --
13 if the appeal was successful, this was a way to keep one of the
14 LWOPs off the table.

15 Q And if his appeal from trial was successful?

16 A Exactly.

17 Q So to summarize, if he was successful on his appeal from his
18 trial case, this would limit his exposure to that LWOP, so even
19 if his appeal was granted, if he went to trial and received LWOP
20 here, it didn't matter, essentially?

21 A I guess there was also an assumption that if they got a
22 30-year on this and the appeal was successful, they wouldn't try
23 that case again.

24 Q Understood.

25 A And again, they had two shots at LWOP.

1 Q And when exactly did you communicate that plea offer to
2 applicant?

3 A I think it was that day.

4 Q That day, okay.

5 A But it wasn't ten minutes.

6 Q Your conversation was longer or shorter?

7 A Longer.

8 Q Okay. Do you remember what else was involved in that
9 conversation?

10 A Just this conversation.

11 Q Okay. And you would have informed him of the consequences
12 of pleading guilty?

13 A Yes.

14 Q And just to clarify, you mentioned before you were familiar
15 with the state's case but were not necessarily probably prepared
16 to proceed to trial because trial wasn't -- it was just for a
17 plea that day?

18 A Exactly.

19 Q There was no pressure for trial?

20 A No.

21 Q And applicant knew that?

22 A Yes. I don't know what he knew, but I, mean, you know, we
23 hadn't picked a jury. We were just in the courtroom that day.

24 Q Do you remember explaining that to him?

25 A I don't know where he would have gotten the idea that we

1 were going to trial that day.

2 Q Okay. And you stand by that, counsel, that you provided ---

3 A Yes.

4 Q And you still feel like a plea was in applicant's best
5 interest?

6 A Yes.

7 Q Applicant testified during the plea hearing that he felt
8 that this was the safest option for him and the best option for
9 him. Did he ever indicate to you that that was his inclination
10 on why he was pleading guilty?

11 A I suggested the benefits of pleading guilty, and those were
12 some of my -- why I thought it made some sense. When he agreed
13 to plead guilty, I'm assuming he was agreeing with me.

14 Q And you never questioned any of your discussions with him or
15 his understanding of those discussions?

16 A No.

17 ATTORNEY WEIDAUER: Thank you, Your Honor.

18 THE COURT: All right. Any redirect?

19 ATTORNEY BLANCHETTE: I do have redirect, your Honor. Yes,
20 I do.

21 ATTORNEY BLANCHETTE: Your Honor, it's my understanding
22 that -- I don't know if there should be a stipulation, but during
23 Mr. Falk's testimony he referenced CDs that are sitting here on
24 my table. I have counted those CDs. There's 58 in total. I
25 didn't know if the Court would agree. I believe the state's not

1 opposed to putting that into the record, that he was referencing
2 58 CDs in an envelope on my table.

3 ATTORNEY WEIDAUER: No objection.

4 THE COURT: Sure. That's fine.

5 ATTORNEY BLANCHETTE: Thank you, Your Honor. With that
6 information, I'll proceed with my redirect.

7 **REDIRECT EXAMINATION**

8 BY ATTORNEY BLANCHETTE:

9 Q Mr. Falk, this morning you had an opportunity to look at a
10 stack of CDs that we just put in the record as 58 CDs, plus the
11 two that have been admitted. So that would be a total of 60 CDs;
12 is that correct?

13 A Yes. I'm sorry.

14 Q That's okay. The court reporter can't get a nod. Now, I
15 was just a little confused by your cross-examination. Were you
16 stating you had no CDs? You didn't have all of the CDs? What?

17 A Well, I had some of the CDs. I mean, obviously I had the
18 CDs because I had the CDs showing the security cam videos for the
19 bank. And I had other CDs. And I know there was a lengthy CD
20 that related to the second trial where I think his mother almost
21 talked him into confessing to the second one. I was going to
22 have some problems if we ever got there. So, I mean, I just
23 don't remember the stack of jail CDs, jail call CDs.

24 Q So you don't recall ever even having jail call CDs?

25 A That's correct.

1 Q Okay. When those came out at the trial, and especially when
2 you were subsequently representing him on the second case, did
3 you raise that concern to the Court?

4 A No.

5 Q Did you raise that concern to the solicitor's office?

6 A No.

7 Q Is that something that you should have raised in the course
8 of your representation?

9 A I don't know. I was embarrassed that that came up, you
10 know. There was more -- and I don't know if they should have
11 been supplied. It was more to the posture that I was embarrassed
12 by the jail call.

13 Q So you were embarrassed when that came out at trial?

14 A Yes.

15 Q And what was the source of that embarrassment?

16 A That the case blew up right then.

17 Q And it was something you were completely unaware of?

18 A That's correct.

19 Q And it was something you had not advised Mr. Ellison about?

20 A No. And I was also frustrated, because I was misled by his
21 mother. So I should be -- maybe embarrassed isn't the right
22 term, but concerned.

23 Q Now, the state asked you about the statements such as a fair
24 and impartial trial.

25 A Yes.

1 Q I just have a follow-up question on that. Does the state
2 have the right to a fair and impartial trial?

3 A I don't know. I don't know what the answer to that is. I
4 would assume that we're supposed to have fair trials.

5 Q I'm going to turn to your testimony about the plea PCR case.
6 I'm going to show you, again, what's been marked as Applicant's
7 Exhibit 6. Does it say on what date the plea offer expires?

8 A Oh, it does.

9 Q And what's that date?

10 A August 13th.

11 Q And you would agree that the date of his plea was one day
12 prior, August 12th, 2015?

13 A Yes.

14 Q So it appears the offer that we've been discussing that was
15 accepted and was the source of the plea expired the very next
16 day?

17 A Yes.

18 Q And I believe you said on cross-examination that you didn't
19 have any idea why he would have felt pressured or where he was
20 getting it from that the state was ready to proceed.

21 In the plea transcript, right after on page 8, beginning on
22 line 18, there's a discussion going back and forth between Judge
23 Dickson and the defendant at that point, and he says, Today's the
24 only time we really talked about this case right here, and it's
25 just really now or never for me, so I really feel like I'm just

1 -- this is the best option I got as far as me, know what I'm
2 saying, going over the -- I mean, they're saying it's either this
3 or trial, so, I mean, I feel like this is the safest option for
4 me. In response, on line 25, the Court says, Well, I mean, from
5 what I understand, they're going to be ready to try these cases
6 unless you plead guilty.

7 Do you recall that conversation between your client and the
8 Court?

9 A Yeah. I mean, I know there was some pushback, and so I'm
10 not sure I recall the exact words. But when Judge Dickson said
11 they were going to try these cases, that meant that they were
12 going to eventually try these cases, not that they were going to
13 try them that day.

14 Q But you do agree that the plea offer expired the next day?

15 A Yeah. And I wasn't aware of that when -- I didn't notice
16 that. I don't really recall that it expired that day or it would
17 be forever off the table.

18 Q And that's why I want to be fair to you and show you that
19 document, to make sure your testimony was clear on that, and
20 point this out in the transcript to see if that triggered any
21 memory of the case actually being ready to be called to trial.

22 A I just know that eventually the case would be called to
23 trial, but it was not -- there was no discussion it was going to
24 be on a particular trial term.

25 Q Okay.

1 A I mean, by that time it was obviously an older case.

2 ATTORNEY BLANCHETTE: Your Honor, I have no further
3 questions.

4 THE COURT: All right. Any redirect?

5 ATTORNEY WEIDAUER: No redirect, Your Honor.

6 THE COURT: Okay. You can call your next -- or, do you have
7 any other witnesses?

8 ATTORNEY BLANCHETTE: I do not, Your Honor. I just have
9 several cases that have been referenced today, and then a couple
10 additional cases. And that will conclude the applicant's case.

11 THE COURT: And so do you have any witnesses?

12 ATTORNEY WEIDAUER: No, Your Honor.

13 THE COURT: All right. Well, I'm happy to hear from you.
14 You can step down, Mr. Falk. Thank you, sir.

15 I'm happy to hear from you if there's anything you want to
16 hand up or ---

17 THE WITNESS: Am I excused?

18 THE COURT: Sure. That's fine. Or any summation, I'm happy
19 to hear that. And I'll give them an opportunity to respond. And
20 I'll give you a final word, since you've got the burden.

21 ATTORNEY BLANCHETTE: Yes, Your Honor. And to be honest, I
22 typically don't do a summation unless that's helpful to the
23 Court. I've noticed Your Honor has taken notes throughout the
24 course of the day. You've been tracking with us. You've asked
25 your own questions at times. I believe we presented a lot of

1 information for the Court to assess. And I wanted to provide,
2 most importantly, some of the cases that were referenced today
3 throughout the course. Also, and I'll mention why, and for each
4 one, and then hand them up in total, if that's okay.

5 THE COURT: All right.

6 ATTORNEY BLANCHETTE: But the first case that I have is
7 *State v. Green*. That is the case that was referenced by the
8 applicant regarding the double jeopardy issue. That case was
9 brought up by Attorney Rockwise out of Greenwood.

10 THE COURT: Do you have stickies?

11 ATTORNEY BLANCHETTE: Do I have stickies?

12 THE COURT: Yeah. Do you have, like, what that case -- like
13 that case relates to the double jeopardy?

14 ATTORNEY BLANCHETTE: I have it written in pencil right
15 here, if you'd like my copy.

16 THE COURT: I don't have to have your copy. What I need you
17 to do is, each one, I just want you to put what it is, because
18 otherwise I'm going to have to write every one down.

19 ATTORNEY BLANCHETTE: That why I have it written in pencil.
20 I don't mine. I can give you this one.

21 THE COURT: That's fine. That's fine.

22 ATTORNEY BLANCHETTE: So, this one relates to double
23 jeopardy. And I can hand them up to your clerk, too, if your
24 clerk wants to make another note.

25 Your Honor, the other two cases -- and these deal with the

1 issue of search for the truth, and the true and just and
2 impartial trial for both parties.

3 *State v. Daniels* was essentially the first case in these
4 line of cases, and that was decided in 2012. And to just be fair
5 and accurate, I pulled what I believe is the most recent case,
6 the *Patterson* case that was decided in 2019. So that came out
7 even post maybe than counsel referred to. But I grabbed a copy
8 of both of those just to kind've show where it started and where
9 it's at today as far as that issue is concerned. And I have a
10 copy of these for the state as well.

11 THE COURT: Thank you.

12 ATTORNEY BLANCHETTE: And then on the issue of individually
13 questioning the jurors, that issue comes up in the case of *State*
14 *v. Bantan*, which was decided in 2010, and so I have a copy of
15 that case.

16 THE COURT: All right. Thank you.

17 ATTORNEY BLANCHETTE: Your Honor, in addition to what is in
18 the amendment as far as case law cited -- and obviously the
19 applicable large body of case law from *Strickland v. Washington*
20 to *Hill v. Padilla*, I did not intend to go through that, but what
21 I did want to point out at the conclusion of our case is that the
22 Sixth Amendment guarantees the defendant's right to have counsel
23 at all critical stages. And here in South Carolina and in the
24 United States, it has been recognized that that includes plea
25 negotiations and rejection and acceptance of plea offers.

1 Specifically, in *Lafer v. Cooper*, which was a 2012 case,
2 U.S. Supreme Court addressed the situation of when ineffective
3 assistance of counsel leads to the rejection of a plea offer.
4 And I felt that was applicable to what we're discussing today,
5 because in *Hill v. Lockhart*, you have the framework that was set
6 forth applying *Strickland* to guilty plea places. And, in *Hill*,
7 the standard was set forth that counsel's representation, you
8 must show that it fell below an objective standard of
9 reasonableness, and that there's a reasonable probability that
10 but for counsel errors, applicant would not have pled guilty but
11 would have gone to trial.

12 In *Lafer*, the Court addressed the question of how to apply
13 *Strickland's* prejudice test where ineffective assistance results
14 in a rejection of a plea offer and the defendant is convicted at
15 the ensuing trial. So it's a situation similar to what we have
16 today, where he rejects that plea offer; goes to trial. In fact,
17 I thought it would be instructive and potentially helpful to the
18 Court to provide this case. The case is rather lengthy. It goes
19 through -- which I don't disagree with -- there's no right to a
20 plea deal, but once there had been one extended, what is the
21 representation that needs to be afforded before one chooses to go
22 to trial. It also goes back and forth and does a very
23 interesting *Strickland* analysis. And then it invokes *Chronic*.

24 And *Chronic* is the case that we have that addresses when
25 there's a complete breakdown of the adversarial process and, as a

1 result, prejudice can be presumed. And in the amendment, I did
2 raise *Chronic* because this case is unique, and I don't think it
3 falls into the typical framework. So that's why I wanted to
4 provide these cases to the Court. I have *Lafer v. Cooper*, as I
5 stated. I have *Judge* and *Davie*, which are two South Carolina
6 cases. *Judge* came out pre-*Lafer*; *Davie* came out afterwards, but
7 they both establish that counsel can be ineffective in his advice
8 and his assistance offered in the plea process and before you
9 even get to trial. There it says that we must show was counsel
10 deficient, and was there actual prejudice?

11 And as a result of those two cases, I would say our standard
12 in South Carolina for that prejudice is that it can be a
13 self-serving statement alone, and you can look at the difference
14 in the amount of time that one got from proceeding in the way
15 that they did versus what would have happened if they would have
16 accepted the guilty plea.

17 And, specifically, *Judge* makes it very clear that, in South
18 Carolina, we recognize that the Sixth Amendment protects criminal
19 defendants against ineffective assistance of counsel during the
20 plea-bargaining process itself even if that plea, which is what
21 it was here, is ultimately rejected. So I have a copy of *Lafer*,
22 *Judge*, *Davie*, and then the *Chronic* case, as well, for Your Honor.
23 And I will provide, or can provide, those to the state as well.

24 THE COURT: Okay.

25 ATTORNEY BLANCHETTE: Your Honor, it's my typical

1 practice -- and I obviously will do whatever the Court
2 instructs -- to ask for the opportunity to get the transcript so
3 that we can have, in writing, all the testimony that was provided
4 today. So that if the Court would like a memorandum, a proposed
5 order, or whatever further from me, I do have that as a resource
6 to provide to the Court and make sure everything that I submit is
7 accurate.

8 THE COURT: All right.

9 ATTORNEY BLANCHETTE: Your Honor, I apologize. I have
10 *Jackson*. It overrules *Judge*, in part, so I thought it would be
11 prudent to provide that.

12 THE COURT: Okay.

13 ATTORNEY BLANCHETTE: And here are those cases that I
14 referenced at the end.

15 Your Honor, that concludes the testimony, the evidence, and
16 the case law that the applicant would like to submit at this
17 time. Is there anything further that I can offer to aid the
18 Court in reaching his decision in this matter?

19 THE COURT: No, ma'am.

20 ATTORNEY BLANCHETTE: Thank you, Your Honor.

21 THE COURT: Attorney General, I'm happy to hear from you.

22 ATTORNEY WEIDAUER: Yes, Your Honor. Ms. Blanchette and I
23 discussed this, and I am in agreement that, in lieu of closing
24 arguments, if Your Honor would request post-hearing briefs at
25 anytime, I'd like the opportunity to possibly address some of the

1 case law that she's put on the record today, if Your Honor feels
2 necessary. Other than that, we have no problem with
3 Ms. Blanchette ordering the transcript. We would just like the
4 opportunity to view it before any proposed orders are signed.

5 THE COURT: All right. I think that the transcript will be
6 appropriate in this case given the issues and the testimony that
7 has been provided, because I think we're going to need an
8 extremely accurate -- we're going to need that, as an order is
9 crafted.

10 Normally what I would want is just a proposed order from
11 each of you. I will give you 30 days to provide me with that
12 order.

13 So what I'd like to do, in the meantime, is go ahead. You
14 can speak with the court reporter and order the transcript. Then
15 once you get the transcript, if you would notify me, perhaps
16 provide me with a copy of the transcript so that I can review it.
17 And then 30 days after you get the transcript, provide me with a
18 proposed order.

19 I will begin looking at these cases. She'll begin looking
20 at these cases. That's what I mean. So if questions come up
21 concerning the cases and there's information that we would need,
22 some type of brief or clarification, we'll ask and we'll go and
23 y'all can copy each other's, but for right now I'm not going
24 request that. We'll look at these cases, and I think we'll
25 probably be able to distinguish them. But if a question comes up

1 concerning that, we'll let you know. All right.

2 So, all right. Anything else?

3 ATTORNEY BLANCHETTE: I do not believe so, Your Honor.

4 THE COURT: Anything else from the state?

5 ATTORNEY WEIDAUER: Nothing further, Your Honor.

6 THE COURT: All right, good. Thank y'all. We'll be
7 adjourned.

8 (End of Transcript of Record)

CERTIFICATE OF REPORTER

I, Cathy J. Provost, Official Court Reporter for the Fourteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial/proceedings of the captioned case in the Court of Common Pleas for Dorchester County, South Carolina, on the 20th day of May, 2022.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Date: June 24, 2022

/s/ Cathy J. Provost
Cathy J. Provost, RMR
Official Circuit Reporter

CERTIFIED COPY

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF DORCHESTER) FIRST JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA) GSC Indictment#2013-GS-18-1813

Plaintiff,)
COUNTY

-versus-

TYRONE ELLISON

MOTION FOR BOND REDUCTION

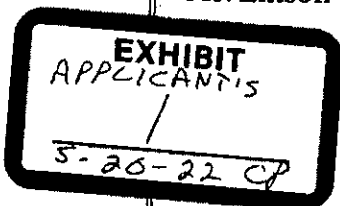
Charges: Armed Robbery (LWOP),
Failure To Stop For A Blue Light 1st
Offense, (2 Counts) Robbery-Entering a
Bank with Intent to Steal, (2 Counts)
Possession of a Weapon During Violent
Crime, (2 Counts) Hit and Run With
Great Bodily Injury
Warrant No.s: 2013A102100427,
2013A102100428, 2013A102100431,
2013A102100429, 2013A102100430,
2013A1810100110 & 2013A1810100111
Date of Arrest: 07/03/13 & 07/18/13
Defendant.

2014 MAR 31 PM 12:28
CLERK OF COURT
DORCHESTER COUNTY

TO: ASSISTANT SOLICITOR DON SORENSON, 1ST JUDICIAL CIRCUIT

YOU WILL PLEASE TAKE NOTICE that the Defendant, by and through his undersigned attorney, will move before the Presiding Judge of the Dorchester County Court of General Sessions, First Judicial Circuit, in St. George, South Carolina at a time convenient to the Court for an Order reducing the present bond of 1.75 million dollars relative to the charges presently pending against the Defendant.

The basis for the Motion is that a change of circumstances has occurred in that the Defendant's attorney has been able to locate and interview an alibi witness who indicated that Mr. Ellison was working at a Burger King restaurant during the times involving the April 1, 2013 Armed Robbery at SunTrust Bank on Dorchester Road, in Dorchester County, South Carolina. Another alibi witness, Demetrius Robinson, indicates in his Affidavit that Mr. Ellison was with him a few minutes before the alleged robbery at the same bank on July



1, 2013, and his alibi seriously militates against the Defendant being involved in the July 1, 2014 robbery or if he was involved, his involvement would be far less serious than what is alleged in what is alleged in the warrants and in Indictments pending in this matter.

Furthermore, a Co-Defendant of the within Defendant has repudiated his statements to the police wherein he involved the within Defendant, Tyrone Ellison in a July 1, 2013 bank robbery. *(The Defendant's attorney is attaching copies of the alibi witness' Affidavits and letters from Co-Defendant Christopher Colburn for the Court's review.)*

The Defendant has been incarcerated since July 2, 2013, which is almost 9 months. He is currently under 1.75 million dollar bond. The Defendant is informed and believes that he is entitled to have his bond reduced to a reasonable amount, which in his attorney's opinion, should be in the range of \$250,000.00 surety bond.

Respectfully submitted,



Date: 3/27, 2014
North Charleston, South Carolina

Michael Tommy Bolus
Attorney for Defendant
2127 Dorchester Road
N. Charleston, SC 29405

CERTIFIED COPY
STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF DORCHESTER) FIRST JUDICIAL CIRCUIT
2013 DEC -3) GSC Indictment#2013-GS-18-1813

STATE OF SOUTH CAROLINA,
Plaintiff,
DORCHESTER COUNTY

-versus-

TYRONE ELLISON

Charges: Armed Robbery (LWOP),
Failure To Stop For A Blue Light 1st
Offense, (2 Counts) Robbery-Entering a
Bank with Intent to Steal, (2 Counts)
Possession of a Weapon During Violent
Crime, (2 Counts) Hit and Run With
Great Bodily Injury
Warrant No.s: 2013A1021001427,
2013A1021001428, 2013A1021001431,
2013A1021001429, 2013A1021001430,
2013A1810100110 & 2013A1810100111
Date of Arrest: 07/03/13 & 07/18/13
Defendant.

AFFIDAVIT OF
DEMETRIUS ROBINSON
ALIBI WITNESS

FILED-RECORDED
2014 MAR 31 PM 12:29
CLERK OF COURT
DORCHESTER COUNTY

PERSONALLY APPEARED before me, Demetrius Robinson, who being duly deposed
says as follows:

1. He was born on _____ and resides at _____ e, Summerville,
South Carolina, 29485. His phone number is 843-864-9584. He lives with his
mother, Lisa Robinson. He has lived there approximately two to two and a half
years;
2. The Affiant knows Tyrone Ellison, who he understands is currently incarcerated in
the Dorchester County Jail on charges of Armed Robbery of a bank and other
charges. The Affiant has known Tyrone for around 12 years. They attended
Morningside Middle School and North Charleston High School. The Affiant has
socialized with Tyrone on numerous occasions and he considers Tyrone a good
friend;

3. The Affiant and his mother live just one street over and one or two blocks down from Dennis and Annette McKinney, the parents of Tyrone Ellison. On July 1, 2013, the Affiant knows that Tyrone was still living with his mother and father;
4. The Affiant is giving this Affidavit in the law office of Michael Tommy Bolus, the attorney representing Tyrone Ellison on various charges, including the alleged Armed Robbery of Suntrust Bank at 8610 Dorchester Road in Dorchester County, South Carolina. The Affiant knows where the bank is located but has never been inside the bank. The Affiant understands that the Suntrust Bank in question is approximately 6.3 miles, by normal vehicular traffic, from the Affiant's address;
5. The Affiant was with Tyrone from approximately 11:00 a.m. until about 4:45 p.m. on July 1, 2013. Tyrone never left the Affiant's house between those hours and spent time in the Affiant's yard, hanging out, chilling out, and smoking a little bit of marijuana, which belonged to Tyrone. The Affiant and Tyrone also watched a little sports on ESPN, but mainly just messed around and talked all day;
6. The Affiant does not know Christopher Colburn or Ronald Lance, who he has been informed are Co-Defendants of the alleged bank robbery with Tyrone;
7. The Affiant recalls that around 4:45 p.m., Tyrone received a call from someone and after receiving the call, Tyrone told the Affiant that he "had to go". Tyrone also stated to the Affiant that he was meeting someone who owed him some money for some marijuana he had sold to him. The Affiant did not know at that time where Tyrone was going. Tyrone walked away after the phone call, and the Affiant remained in his home;
8. Within approximately 10 minutes, the Affiant received a phone call from Tyrone. Tyrone was calling from his cell phone to the Affiant's cell phone. The Affiant was still inside his home. Tyrone informed him that he was in an automobile with Chris

Colburn and that Tyrone had drugs on him and the police were chasing the car. The Affiant does not know who was driving Chris Coburn's car, but after a couple more minutes, the Affiant stepped out of his house and heard police cars and saw and heard a helicopter. When he looked up into the sky, he saw a police helicopter circling the area;

9. The Affiant welcomes any opportunity to talk to law enforcement or a representative of the prosecutor's office, as he firmly believes that Tyrone had nothing to do with the robbery, simply because there was not enough time for the robbery to occur, considering that Tyrone left the Affiant's house and just a few minutes later he heard police sirens and saw police helicopters. There is no way that Tyrone could have walked the distance, which is over 6 miles away, or even driven there, because it would have taken at least 10 or 15 minutes to drive to the bank under normal circumstances. The Affiant had driven in that direction and passed the bank on numerous occasions and knows that it takes about 10 minutes if you are doing the speed limit to drive to the bank from his neighborhood. Also, the traffic being the way it is at rush hour at around 4:30 - 5:30 p.m., there is just no possible way a person could make it to the bank in less than 20 minutes driving.

Date: 2-27-, 2014
North Charleston, South Carolina

Demetrius Robinson
DEMETRIUS ROBINSON
Affiant/Alibi Witness

SWORN before me on the

27th day of Feb., 2014

[Signature]
Notary Public for South Carolina
Commission Expires: 5-18-2022

CERTIFIED COPY

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF DORCHESTER) FIRST JUDICIAL CIRCUIT
GSC Indictment #2013-GS-18-1813

STATE OF SOUTH CAROLINA,
Plaintiff,

-versus-

TYRONE ELLISON

**AFFIDAVIT OF
CANDIDA HOCOG-PAYNE**

Charges: Armed Robbery (LWOP),
Failure To Stop For A Blue Light 1st
Offense, (2 Counts) Robbery-Entering a
Bank with Intent to Steal, (2 Counts)
Possession of a Weapon During Violent
Crime, (2 Counts) Hit and Run With
Great Bodily Injury
Warrant No.s: 2013A1021001427,
2013A1021001428, 2013A1021001431,
2013A1021001429, 2013A1021001430,
2013A1810100110 & 2013A1810100111
Date of Arrest: 07/03/13 & 07/18/13
Defendant.

FILED-RECORDED
2014 MAR 31 PM 12:29
CHERYL GAVIN
CLERK OF COURT
DORCHESTER COUNTY

PERSONALLY APPEARED before me, CANDIDA HOCOG-PAYNE, who being duly
deposed says as follows:

1. She was born on _____ in Guam, U.S. Territory. The Affiant resides at _____, North Charleston, South Carolina, 29418, and her roommate is Earl Brice;
2. She is giving this Affidavit in the law office of Michael Tommy Bolus, who she knows is the attorney for Tyrone Ellison, who is charged with bank robbery concerning a Sun Trust Bank located on Dorchester Road. The alleged event occurred on April 1, 2013;
3. The Affiant works at the Burger King restaurant located at 3262 Dorchester Road, North Charleston, South Carolina, 29418. She has been working there for approximately 2 years. She knows the Defendant in this matter, Tyrone Ellison. Her

- manager for the past two years has been Chuntee Green;
4. The Affiant's job duties are as a prepper and cook. She does not help unload trucks or put up stock from the trucks;
 5. At the Burger King where she works, the trucks which deliver supplies and stock for the restaurant usually arrive on Mondays and Wednesdays of each week;
 6. On April 1, 2013, the Affiant was at work from 7:00 a.m. until approximately 4:00 p.m. During that period of time, the Affiant was working every day to earn money. She does not work every day at this point in time;
 7. The Affiant came in to work on April Fool's Day 2013 at approximately 7:00 a.m. The delivery truck arrived shortly before she came to work. When she came to work, Tyrone Ellison was already at work putting stock away. The truck had already been unloaded and Tyrone and Chris Colburn were both working. Tyrone was putting away the stock and Chris Colburn was changing the grease when she arrived;
 8. The morning shift on which Tyrone worked lasted until at least 3:00 or 4:00 p.m. Lunch hour at Burger King starts at 10:30 a.m. and goes through all the way to closing;
 9. The Affiant and Tyrone worked through the breakfast and lunch shifts. Tyrone was responsible for putting away the stock and also helping her in the kitchen. The Affiant and Tyrone are both cooks and preppers, but they do not run the cash register;
 10. The Affiant knows that she and Tyrone were together in the same area of the kitchen from the time the Affiant arrived at work and began the breakfast through the full lunch shift, which ended around 3:00 or 4:00 p.m.;
 11. The Affiant also knows that she was working April 1, 2013 because it is April Fool's Day and she remembers playing jokes on people. She remembers Tyrone taking her

home in a black Ford Taurus automobile;

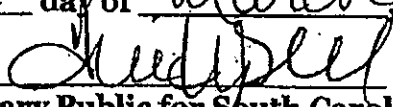
12. The Affiant also remembers getting cigarettes from Chris Colburn because she always acts like she has no cigarettes and she fools Chris and the other employees into giving her cigarettes.

Date: 3-19-, 2014
North Charleston, South Carolina


CANDIDA HOCOG-PAYNE
Affiant

SWORN before me on the

19th day of March, 2014


Notary Public for South Carolina
Commission Expires: 5/18/22

Hello Mrs. McInney I would like to say to
you that I'm sorry for some things that was said on
the first statement I was scared & didn't handle the situation
well. I'm not trying bring your son down in any way
I'm tryin to help out the situation I'm working on that
and I just wanted you to know personally that I'm
deeply sorry for hurting you. and I would understand
if you didn't except this letter, but I'm tryin to make
things right so things can get straighten out.

Chigee Joe
Coburn

ORIGINAL COPY
FILED-RECORDED
2014 MAR 31 PM 12:29
CLERK OF COURT
DORCHESTER COUNTY

CERTIFIED COPY

FILED-RECORDED
2014 MAR 31 PM 12:29
CLERK OF COURT
JACKSON COUNTY

I Chris Ceburn ^{2010 MAR -3 PM 3:24} and Williamly ^{2010 MAR -3 PM 3:24} voluntarily
This statement in reference to the incident that occurred
July 1st 2013 where the Suntrust Bank was robbed by first Audio 911
I made was false also I was high and under Major Pressure during the time
the truth is days prior before the incident on July 1st I stopped by
suspect ~~tyrone~~ ^{tyrone} ~~Elison~~ ^{Elison} girlfriend's house on Dorchester Road to pay some
Money I owed him for a loan some days when I pulled up I spotted
Elison and later to find out Gerald I saw something on the porch
Elison then walked to the driver side of my car to retrieve
his money. A verbal altercation broke out between us behind his money
Elison threatened to kill me or harm my family if I didn't come
up with the rest of his money in the next couple of days. Prior
of the leaving Lance came to my car and asked for a ride home
for some gas money when I took Lance home he ask me what
I have been so hot about I then went on to explain that I
owe him over a thousand dollars and that I needed to pay
him before he try to strike at me or my family. Lance then
told me I can get you the money I just need someone with
transportation I then took Lance phone number. The morning
of July 1st I received more verbal threats from Elison
I then got up with Lance who had another person with
him who goes by B-money I remembered Lance calling
Elison to get some weed Elison told Lance he was at
his Cousin Demetrius house in Westcott I know where
Elison was located because that's where he usually sells
weed at if not at his girlfriend's house that afternoon me
Lance and B-money stopped by Elison Cousin house to
buy some weed I promised Elison I would have his money
real soon at that time I still had no knowledge of what
Lance & B-money had in mind after we smoke we ending
up at the Suntrust Bank. Lance & B-money went in the bank
after they went in I proceeded to leave from the whole
situation when Lance & B-money came running to my car

They pressured me into fleeing the scene and I did
my first ~~choice~~ option was to go get up with Ellison
and give him the money as we drove to Wescott B-money
then said something about a tracking device as he made
me stop then he jumped out with what I believe
the majority of the money when I got to Ellison's cousin
house Ellison was sitting in a gold color car I beep
the horn at him and Ellison got inside and I told
him we need to go to his house to get out of my
car. I knew Ellison lived right down the street
but I miss the turn from being so nervous by this
time WCPD flashed the blue lights on us Ellison
told me to keep driving because he had a lot of
drugs on him I jumped out to surrender not playing
any part in the incidents as Ellison drove off
The reason why I placed Ellison as the suspect was
because I would have felt safer with him in jail
knowing what he could be capable of doing to my family
but he did not have any knowledge of the robbery at
the time B-money is about 5'9 light brown skinned if
placed in a photo line up I could positively identify
him but I have no knowledge of his real name I
just know he be an ashley phosphate Rd. This is
a sworn statement from Chris Colburn Chicago Police Colburn

Donald Sorenson

From: Donald Sorenson <dsorenson@scsolicitor1.org>
Sent: Thursday, May 15, 2014 4:36 PM
To: 'Michael Tommy Bolus, Attorney and/or Tina M. Bell, Paralegal'
Subject: RE: State vs. Ellison

Tommy,

Apparently NCPD would like to have me present when they release the evidence to Dr. Bennett. We need to coordinate a time next week when this can be done. I will be up in Orangeburg on Monday.

I would also like to discuss with you any possible resolutions given our brief discussion after the bond hearing Tuesday. If there is a chance we can work this out I would like to do it before putting the State through the added expense of further DNA testing. I would be willing to plead him to a range of 25-30 years on 2 cts. Of Entering a Bank with Intent to Steal, Failure to Stop for Blue Lights and 2 cts. Leaving Scene with GBI. I would dismiss the 2 cts. Of Armed Robbery. If you twist my arm I would probably do a negotiated 27 years.

Let me know what you think.

Thanks,

Don

From: Michael Tommy Bolus, Attorney and/or Tina M. Bell, Paralegal [mailto:chasshark@bellsouth.net]
Sent: Thursday, May 08, 2014 1:41 PM
To: 'Donald Sorenson'
Subject: State vs. Ellison

Michael Tommy Bolus
ATTORNEY AT LAW
2127 DORCHESTER ROAD
NORTH CHARLESTON, SOUTH CAROLINA
OFFICE (843) 747-1828 FAX (843) 747-1825 HOME
E-mail: chasshark@bellsouth.net Website: www.tommybolus.com

May 8, 2014

VIA EMAIL TO: dsorenson@scsolicitor1.org

Don Sorenson, Assistant Solicitor
Dorchester County Solicitor's Office-Summerville
140 N. Main St; Ste. 102
Summerville, SC 29483

RE: State of South Carolina vs. Tyrone Ellison

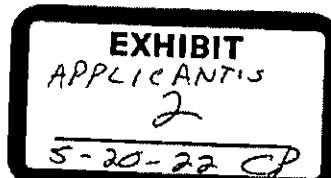
Charges: Armed Robbery (LWOP), Failure To Stop For A Blue Light 1st Offense, (2 Counts) Robbery-Entering a Bank with Intent to Steal, (2 Counts) Possession of a Weapon During a Violent Crime, (2 Counts) Hit and Run With Great Bodily Injury

Indictment No.: 2013-GS-18-1813

Warrant No.s: 2013A102100427, 2013A102100428, 2013A102100431,
2013A102100429, 2013A102100430, 2013A1810100110 & 2013A1810100111

Date of Arrest: 07/03/2013 & 07/18/2013

GSC Indictment # 2013-GS-18-1813



Dear Don:

As per our phone conversation of Thursday, April 30, 2014, enclosed please find a proposed Order, along with Dr. Bennett's letter indicating his qualifications and the fact that he needs to perform an independent laboratory analysis of the wig and the visor in order to verify and validate the results. He is in possession of the SLED analysis reports, but he says that without being allowed access to the evidence, he cannot confirm whether Mr. Ellison's DNA is on the wig. Can you please advise Ms. Kubisko and/or Anita Moore of the North Charleston Police Department that Dr. Bennett will need access to the wig and to the visor pertaining to the April 1, 2013 bank robbery, and that you will serve Mr. Ellison with another LWOP Indictment on the other bank robbery. I understand you will sign the Consent Order and Judge Dickson will sign the Order allowing Dr. Bennett access to the evidence.

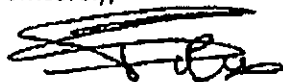
My client has instructed me to go ahead and still have the bond reduction hearing in spite of the DNA results and the fact that you have indicated to me that you are in receipt of corporate records of Burger King, indicating that he was not at work on April 1, 2013. He insists that he was at work on that date and that the records are erroneous.

I would appreciate receiving any additional Discovery next Tuesday from you pertaining to the corporate records and/or any other DNA results that you may have in your possession.

If you see the need for any corrections on the Order, please alert me in advance and I can send you another Order, as per your modifications. Also, I sent this to Dr. Bennett yesterday, asking for his advice on the Order. He may let me know about changes to the Order, but he is preparing a CLE for 80 attorneys tomorrow morning and cannot get back to me until Monday morning. If he makes any changes, I will go ahead and put them in the Order and email them to you by Monday afternoon.

Thanking you, with kindest personal regards, I remain,

Sincerely,



Michael Tommy Bolus

MTB/tmb

Enclosures: proposed Consent Order

cc: Tyrone Ellis INMATE #036111793
Block C - 6
Dorchester County Detention Center
100 Sears St.
St. George, SC 29477
(DELIVERED BY HAND w/letter to Dr. Bennett, letter to Don Sorensen, SLED DNA results, etc.)

Annette McKinney, mother of Defendant

Summerville, SC 29485

Robert Bennett, Ph.D. via fax only

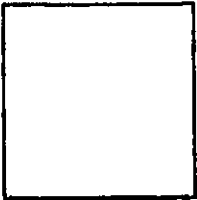
Charleston, SC 29407

file

Tina M. Bell

Paralegal to Michael Tommy Bolus
Attorney at Law
2127 Dorchester Road
North Charleston, SC 20405
(843) 747-1323 office
(843) 747-1325 fax
chasshark@bellsouth.net

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STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

STATE OF SOUTH CAROLINA

PLAINTIFF,

v.

TYRONE ELLISON

DEFENDANT,

IN THE COURT OF GENERAL SESSIONS
FIRST JUDICIAL CIRCUIT

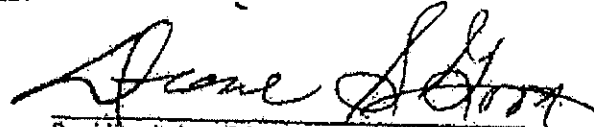
CASE NO.: 2013-GS-18-1271;
2014-GS-18-0325

CONSENT ORDER FOR
SUBSTITUTION OF COUNSEL

FILED-RECORDED
9-5-2014
Cheryl Graham
Clerk of Court
Dorchester County

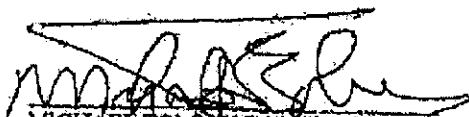
THIS MATTER comes before me upon the Petition of James K. Falk, Esquire, that he be substituted as Attorney for the Defendant, Tyrone Ellison, in the place of Michael Tommy Bolus, Esquire. For good cause shown, it is hereby ordered that James K. Falk, Esquire is substituted as Attorney for the Defendant, Tyrone Ellison in the place of Michael Tommy Bolus, Esquire. Michael Tommy Bolus, Esquire is hereby relieved as counsel of record in this matter.

AND IT IS SO ORDERED.


Presiding Judge of the Court of General Sessions
First Judicial Circuit

Dorchester, South Carolina
September 5, 2014

WE SO MOVE:


MICHAEL TOMMY BOLUS, ESQUIRE
Attorney for Defendant, Tyrone Ellison


JAMES K. FALK, ESQUIRE
Attorney for Defendant, Tyrone Ellison

Cheryl Graham
CLERK OF COURT
DORCHESTER COUNTY

2014 OCT 20 AM 9:47

RECEIVED



The State of South Carolina

OFFICE OF SOLICITOR
First Judicial Circuit

140 N. Main St., Suite 102
Summerville, SC 29484
(843) 871-2640
FAX (843) 871-2643
PTI (843) 873-7842



Courthouse, Amella Street
Post Office Box 1525
Orangeburg, SC 29116
(803) 533-6252
FAX (803) 533-6004
PTI (803) 533-6137

DAVID M. PASCOE
Solicitor

PLEA OFFER

DATE

7/16/15

DEFENDANT

TYRONE DARIUS ELLSON

ASSISTANT SOLICITOR

DON SORENSON

DEFENSE ATTORNEY

JIM FALK

PENDING CHARGES

Armed Robbery, Ent. Bank w/ Int to Steal,

Fail. to Stop Blue Lights, Hit and Run w/ GB

2 counts, Intim. of Juror, Obstruct of Justice
and Criminal Conspiracy

PLEA OFFER

Negotiated 30 years concurrent

OFFER EXPIRES

Thurs. August 13, 2015

EXHIBIT
APPLICANTS

3-20-22 CP

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

Tyrone Ellison, SCDC #324947,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Case No.: 2016-CP-18-0017

ORDER OF DISMISSAL

ORIGINAL COPY

This matter comes before this Court by way of post-conviction relief (PCR) action commenced by Tyrone Ellison on January 7, 2016. The State requested an evidentiary hearing through its return filed July 14, 2016. An evidentiary hearing into the matter convened before the undersigned on May 20, 2022, at the Orangeburg County Courthouse. Applicant was present and represented by Tricia A. Blanchette, Esquire. Assistant Attorney General Samantha J. Weidauer represented the State. Applicant testified on his own behalf at the hearing. Plea counsel, James K. Falk, Esquire, also testified.

In addition to the pleadings in this action, this Court had before it a copy of the Dorchester County Clerk of Court records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the plea transcript, and the records regarding this post-conviction relief action.

After hearing the testimony at the PCR hearing and a full review of the record, this Court finds Applicant's allegations regarding ineffective assistance of counsel and involuntary guilty plea are without merit. Therefore, for the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Dorchester County. Applicant was indicted by the Dorchester County Grand Jury for one count of failure to stop for a blue light (2013-GS-18-1267), one count of entering a bank with intent to steal (2013-GS-18-1268), two counts of hit and run involving great bodily injury (2013-GS-18-1354, 2013-GS-18-1355), one count of armed robbery (2013-GS-18-1813), one count of obstructing justice (2015-GS-18-0025), one count of criminal conspiracy (2015-GS-18-0026), and one count of intimidation of court officials, jurors or witnesses (2015-GS-18-0024).

On August 12, 2015, Applicant pleaded guilty to all charges before the Honorable Edgar W. Dickson pursuant to a negotiated plea. Applicant pled as indicted to all charges other than the intimidation of court officials charge, which was pled down to attempting to influence a juror by written or oral communication. James Falk, Esquire, represented Applicant. Don Sorenson of the First Circuit Solicitor's Office prosecuted the case. Judge Dickson sentenced Applicant to concurrent sentences of time served for the failure to stop for a blue light charge, thirty years for entering a bank with intent to steal, ten years for each of the hit and run involving great bodily injury charges, thirty years for the armed robbery charge, ten years for the obstructing justice charge, five years for the criminal conspiracy charge, and time served for the lesser-included attempting to influence a juror charge. Applicant did not appeal his convictions or sentences.

II. Facts Giving Rise to the Plea

The facts for this indictment were articulated by the State at Applicant's plea hearing as follows:

The first handful of charges, the bank robbery, the entering -- the armed robbery, the entering the bank with intent to steal and then the failure to stop and the two hit and runs, those five indictments all stem out of basically the same set of facts. That

would be on the afternoon of July 1st of 2013, about 4:45 or so in the evening, or afternoon, at 8610 Dorchester Road in North Charleston, which is in Dorchester County, it's a Sun Trust Bank, two individuals came in, had their faces covered, with guns, ended up robbing the bank of several thousand dollars. There was several employees and I believe a customer that were in the bank at the time. The State would allege that, as I said, there were two of them. The codefendant in this case that came in the bank's a man by the name of Ronald Lance. Mr. Lance basically held the bank manager, Mr. Baker, on the floor at gunpoint, while Mr. Ellison took another employee over to the teller counter and held her at gunpoint, while making the teller behind -- they'd put up bullet proof glass shortly before this, to provide the money.

The two of them end up fleeing the bank. During the process of that Mr. Baker had run over to lock the door and observed a white Hyundai Sonata that appeared to have just pulled out of the bank parking lot and was actually behind a car at a traffic light and saw the two robbers go and hop into that car. They end up taking off. North Charleston Police Department and Dorchester County Sheriff's Office respond. They have a description, they have also gotten, in the money that was provided they had put a GPS tracker which they began tracking at that point in time. It was coming up back in a nearby neighborhood, Wescott Plantation, kind of the back part of that neighborhood.

As a result of that officers with North Charleston started coming into that area. Ultimately a couple of the officers came up behind a white Hyundai Sonata that was stopped, was pulling up to a stop signs. The officers got behind that vehicle. They had -- their cameras were on at that point in time, when they observed an individual basically come flying out of the driver's side, the driver's seat of that vehicle, landing in the middle of the roadway. He was taken into custody at that point in time. He was a young man by the name of Christopher Coburn. At that point in time you see somebody slide over, reach out and close the driver's side door. And a chase then ensues which leads ultimately out to Dorchester Road, down Dorchester Road, takes a left onto Highway 17 and ultimately onto I believe it's Highway 61, basically out into the Givhans area. That chase is captured by several patrol car vehicles exceeding, you know, I think almost close to 100 miles an hour down Dorchester Road at rush hour, which is an area pretty close to where I live, so I'm pretty familiar with the traffic; and looking at the video, there are literally hundreds of vehicles that this chase passes during the course of it.

It ultimately comes to -- they actually had lost sight of the vehicle, and officers ultimately come upon where this Hyundai Sonata has wrecked with a vehicle driven by a couple, Mr. and Mrs. Campbell. They were pulling out and ultimately ended up getting hit by this vehicle. By the time the patrol cars got there, the two suspects that had been in that vehicle still had fled on foot and ultimately had gotten away. They attempted to bring K-9 units and other officers out there, but unfortunately shortly after that wreck there was a pretty heavy rainstorm that came through that area. They ultimately found in the field nearby some money with I believe some blood on it. They ultimately found some clothing items, including the jacket that, looking at the video it appears this defendant was wearing, in a field nearby. But ultimately they did not locate either one of them that evening.

Mr. Coburn, meanwhile, was brought back, was taken into custody and ultimately gave a statement implicating the two individuals involved, this Mr. Ellison and Mr. Lance, that evening. The following morning then, July 2nd, fairly close to where this accident occurred, a couple had gotten up and were getting ready to do some stuff and ultimately came out, I believe it was the wife, and discovered two individuals pretty much passed out on her front porch. The codefendant, Mr. Lance, I believe actually had suffered a broken arm, I believe it was, and they were both fairly beat up looking, consistent with having been involved in a fairly violent accident.

They were taken into custody at that point in time by law enforcement without any problems. At that point in time Mr. Ellison -- Mr. Lance gave a statement admitting to his involvement in the bank robbery, basically indicating he wasn't going to say anything more about anybody else's involvement but did admit his involvement in the bank robbery. This defendant, Mr. Ellison, gave a statement admitting he was the one actually driving the car at the time of the accident through the chase and the accident, admitted to that but denied any involvement in the bank robbery. Mr. and Mrs. Campbell, the two of them both suffered some pretty substantial injuries which led to the great bodily injury charges. I think that would basically be the facts, Your Honor. Mr. Lance plead guilty to this bank robbery several months back and received a 30-year sentence. Mr. Coburn, who had been the getaway driver, and that's what he admitted to being was the driver, plead guilty to entering a bank with intent to steal and I believe received an eight-year sentence.

Additionally, Your Honor, and this hadn't really come out yet in any of the colloquy, Mr. Ellison was subsequently, kind of through this investigation of this bank robbery, ultimately charged with a previous robbery of that same bank that had occurred three months earlier on April 1st of 2013. He was convicted of that armed robbery and entering a bank with intent to steal back in October of last year and ultimately received a life sentence, so he's currently, as you can see, in the Department of Corrections serving that sentence that is currently on appeal.

It was during the course of that trial, the week of October 20th of last year, that the other series of indictments came to rise. We tried that case, and Mr. Falk was his lawyer for that trial. Put up all the evidence Monday, Tuesday and Wednesday and ultimately had Thursday where Judge Brown, who was presiding, had some other engagement that he had scheduled, so we didn't have Court on Thursday; and it's that Thursday afternoon that one of our jurors, Mr. White, answered a knock at his door at his residence about 4:00 or so in the afternoon, 4:30 in the afternoon, and ultimately indicated that there was a young black male at his door that ultimately offered him \$500 to basically hang the jury.

He came in the following morning, unfortunately did not contact law enforcement or anybody that night, came in the following morning, ultimately told the rest of the jurors about it and also the courtroom bailiffs about it. That ultimately led to him being shown a lineup with a guy by the name of David Jeter, who is a friend of Mr. Ellison's, who was actually on his witness list, who we knew he had been communicating with from the jail by way of telephone calls pretty frequently, and Mr. White picked Mr. Jeter out of that lineup.

Subsequent investigation showed multiple phone calls the week of the trial culminating in a phone call that Thursday afternoon, about two hours prior to the juror being approached, from Mr. Ellison to Mr. Jeter, where through a code he gives Mr. Jeter the juror's address and indicated that he had gotten it from somebody at the jail that was familiar with the juror and lived in that neighborhood. There is a subsequent call then that Friday morning at about 7:30 or so before court from another inmate on behalf of this defendant to his mother, Mr. Ellison's mother, basically where she verifies that that thing that he had asked Little D, who's David Jeter, to do the evening before had been taken care of and that everything should be good. So that ultimately led to all three of them, David Jeter, Mr. Ellison, and his mother, Ms. Annette McKinney, all being charged with criminal conspiracy, obstructing justice, and this charge dealing with tampering with a jury.

(Plea Tr. 10-16).

III. Issues Before This Court

In his original application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on:

1. Ineffective Assistance of Counsel
 - a. "Counsel advised was wrong [*sic*] and I should not have pled guilty;" and
2. Involuntary Guilty Plea.

Pursuant to Rule 71.1, SCRCP, on March 10, 2016, Applicant filed an amendment to his application to include the following allegations:

1. "The Applicant guilty plea for armed robbery was not knowingly and intelligently made to the court;"
2. "Counsel was ineffective before my guilty plea;" and
3. "Prosecutor Misconduct."

Pursuant to Rule 71.1, SCRCP, on July 26, 2021, Applicant, through PCR counsel, filed a second amendment to his application to include the following allegations:

1. "Failure to effectively represent Applicant at this 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 let to the court convincing Applicant to plea after voicing his dissatisfaction with counsel;" and
3. "Failure to effectively negotiate and ensure that there was a benefit from the plea bargain."

To the extent the allegations set forth in Applicant's original application and amended applications can be construed as separate grounds for relief from the grounds stated at the PCR hearing, this Court finds those claims were voluntarily waived and abandoned, and those claims are therefore denied and dismissed with prejudice. S.C. Code Ann. § 17-27-90.

IV. Testimony Presented at Evidentiary Hearing¹

Applicant Tyrone Ellison's Testimony

Applicant testified James Falk (Counsel) represented him at his guilty plea as well as his prior trial². Applicant testified Counsel did not meet with him prior to his plea and posited he was under duress prior to pleading guilty because Counsel had not adequately discussed his case with him, had not addressed trial arguments with him, and had not reviewed discovery with Applicant. Specifically, Applicant testified he informed Counsel he had not reviewed any videos from the bank that were in discovery. Applicant testified immediately prior to his plea, he and Counsel watched the videos together. Applicant testified that after viewing the video, Counsel indicated to Applicant he did not believe Applicant was the perpetrator in the video and told him the State would have to prove it was Applicant in the video. Applicant testified that prior to pleading guilty, he knew he had not viewed some of the evidence; specifically, Applicant testified there were some videos he knew had not been presented to him. Applicant contended his decision to plead guilty was not based on any evidence he had viewed, rather Applicant testified his decision to plead was based on Counsel's advice. Contradictory to Applicant's assertion he relied on Counsel's advice

¹ This PCR action stems from Applicant's 2015 guilty plea. The evidentiary hearings for this PCR action and for Applicant's PCR action stemming from his 2014 trial were consolidated in the interest of judicial economy. At Applicant's PCR hearing on the two PCR actions, this Court clarified the consolidation was solely for purpose of the record and denied to merge the cases – finding two separate Orders and two separate findings were appropriate. This Court notes Applicant has requested the two applications be considered together pursuant to *United States v. Cronin*, 466 U.S. 648, 658 (1984).

² Applicant testified he retained Counsel after firing prior defense counsel, Tommy Bolus, Esquire.

when making his decision to plead, Applicant testified he had doubts regarding Counsel's ability to represent him as Counsel had represented him at his previous trial. Applicant further postited he was mistrustful of Counsel.

Regarding possible trial defenses, Applicant testified he believed there was an alibi witness that could have testified on his behalf should he have proceeded to trial. Applicant testified he had not discussed the alibi witness with Counsel, but understood that by pleading guilty he waived the right to have witnesses testify on his behalf. Applicant additionally testified he understood the plea court's questions regarding the rights he was waiving as he had already been tried for seperate charges. Applicant also testified he understood that by pleading guilty he was waiving his rights, including his right to a trial. Applicant agreed he testified during his plea that he believed pleading was his best and safest option.

Applicant testified he indicated to the plea court he was not satisfied with Counsel's representation and attempted to communicate his concerns to the plea court. Applicant testified he did not feel he had an option regarding whether or not to proceed with his guilty plea – adding, Counsel had advised him to plead guilty and asserted the plea judge did not hear his concerns. In response to the State's inquiry regarding why Applicant indicated to the plea court no one threatened or forced him to plead guilty, Applicant testified: "I mean, it was a court proceeding. Like, I didn't want to sound crazy in the courtroom." Applicant asserted he tried to speak up at his plea but felt as though he wasn't heard. Applicant further testified he did not raise any concerns to Counsel regarding Counsel's representation.

Regarding plea negotiations, Applicant testified Counsel informed him about the plea offer for a negotiated 30 year sentence and advised him to take the offer. Applicant contends Counsel did not convey the plea offer to him until the date of the plea. Applicant further testified Counsel

advised him a plea on his remaining charges was in his best interest. Applicant additionally asserted he did not feel fairly represented and believed he should have been advised to take the plea offer that was extended by the State and conveyed to his previous defense counsel, Tommy Bolus, before his trial prior to this guilty plea. Applicant contended that by failing to plead prior to his trial, he missed his to plead guilty in a way that was beneficial to him – Applicant testified he did not believe there was any benefit to him via the instant negotiated plea as he had already received a life sentence at trial.

Plea Counsel James K. Falk's Testimony

Counsel testified he has been licensed as an attorney since 1984 and has primarily practiced criminal law since 1996. Counsel testified he was retained to represent Applicant roughly five weeks before Applicant's trial prior to the plea from which this application arises. Counsel testified he was thereafter appointed to represent Applicant on the subject charges Applicant pleaded guilty to. Counsel testified he was familiar with the evidence the State had prior to his appointment to Applicant's case. Regarding Counsel's communications with Applicant, Counsel testified his appointment to the case was close in time to Applicant's guilty plea.

Regarding Counsel's review of Applicant's case with Applicant, Counsel testified Applicant was aware of the evidence the State had against him. Counsel testified Applicant's case had previously been called for trial. Counsel testified Applicant gave "pushback" when he informed Applicant a plea offer was on the table. Specifically, Counsel testified Applicant told him he had not seen the evidence in this case. In response to Applicant's assertion he had not reviewed all evidence in this case, Counsel testified he explained to Applicant that pleading guilty "was a way to keep one of the LWOPs off the table" should Applicant's appeal from his trial be

successful. Counsel testified he informed Applicant of the plea offer on the date of Applicant's plea and informed Applicant of the consequences of pleading guilty.

Counsel further testified he discussed the elements of each of the eight indictments with Applicant prior to his plea and discussed the State's plea offer³. Counsel testified he informed Applicant of the benefits of the plea and stated he believed pleading guilty was in Applicant's best interest. Counsel testified he told Applicant he had a right to proceed to trial instead of pleading guilty. Counsel further testified the case was not set for trial on the date of Applicant's plea and the State had not indicated they would revoke their offer should Applicant choose not to plead⁴. Counsel testified he did not believe Applicant was forced to plead guilty and testified Applicant understood what he was pleading to. Counsel additionally testified there was no pressure on Applicant to plead guilty on the date of his plea as the case was not set for trial at that time.

V. Standard of Review

An applicant may seek PCR upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

³ Counsel testified Solicitor Sorenson was "concerned" with a juror intimidation issue that had occurred at Applicant's trial and therefore offered the plea as "some kind of backstop" should Applicant's conviction be overturned on appeal.

⁴ After review of the written plea agreement (Applicant's Exhibit #6), Counsel conceded on re-direct examination the written plea offer expired on August 13, 2015, the day after Applicant's plea.

6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. *See generally* S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel’s conduct “was so ineffective as to require reversal” of the applicant’s conviction. *Strickland v. Washington*, 466 U.S. 668 at 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel’s performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel’s deficient performance. *Id.* at 687–88; *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that “[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the

proceeding unreliable” (citation and internal quotation marks omitted)).

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, *Hill v. Lockhart*, 474 U.S. 52 (1985), extended the two-part *Strickland* test to challenge guilty pleas based on ineffective assistance of counsel. See *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (recognizing that the guilty plea process is a “critical phase of litigation” for purposes of the Sixth Amendment right to effective assistance of counsel). The analysis of counsel’s performance under the first prong of *Strickland* remains unchanged—the applicant must show that counsel’s representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases. *Hill*, 474 U.S. at 58–59; accord *Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000).

An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel’s advice to plead guilty was not “within the competence demanded of attorneys in criminal cases.” *Hill*, 474 U.S. at 56. The second, or “prejudice” prong, however, “focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.” *Id.* at 58–59. Specifically, when an applicant claims counsel’s deficient performance caused him to accept a plea, the applicant “must show that there is a reasonable probability that, but for [plea] counsel’s [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial.” *Id.* at 59.

This inquiry “focuses on a defendant’s decisionmaking” and does not turn on the outcome of a defendant’s actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. *Lee v. United States*, 582 U.S. ___, 137 S. Ct. 1958, 1966 (2017). However, an applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. *Padilla*, 559 U.S. at 372. The question here is whether the applicant, if

correctly informed of circumstances surrounding the plea, would have pleaded guilty—not whether counsel would have still advised him or her to plead guilty. *Turner v. State*, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

VI. Findings of Fact & Conclusions of Law

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsels, as well as the record in this action incorporated by way of the State's return, this Court proceeds to the claims raised at the evidentiary and finds each to be without merit. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

The issue before this Court is whether Applicant received ineffective assistance of counsel, rendering his guilty plea involuntary. This Court disagrees, and finds the combined record from the plea hearing and the evidentiary hearing establishes Applicant freely, knowingly, and voluntarily pleaded guilty.

Applicant's Allegations Asserting His Plea was Involuntary Entered Because Counsel was Ineffective for Failing to Properly Prepare Applicant for a Trial and Ineffective for Failing to Effectively Negotiate and Ensure a Benefit from the Plea Bargain

Applicant alleges Counsel was ineffective for failing to adequately prepare Applicant for a trial prior to the entry of a plea and was ineffective for failing to effectively negotiate and ensure there was a benefit to Applicant's plea bargain. Additionally, at the evidentiary hearing, Applicant contended he was under duress at the time he pleaded guilty. Applicant testified he had not reviewed the discovery materials in full with Counsel. Applicant testified he had doubts regarding Counsel's ability to represent him and testified he felt he had no other choice to plead after the

concerns he raised to the plea court regarding Counsel's representation went unheard. This Court disagrees, and finds Applicant knew the nature of the charges against him and the consequences of pleading guilty pursuant to the requirements of *Boykin* and *Pittman*. The plea transcript reflects Applicant entered his plea knowingly and voluntarily, engaged in an intelligent colloquy with the plea court, and gave appropriate responses to the court's questions.

"[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." *Reed v. Becka*, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). Accordingly, because a criminal defendant waives several constitutional rights by pleading guilty, the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999). To be intelligent, a plea must be made by a mentally competent defendant who understands both the charges against him and the consequences of his plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). To be voluntary, a plea must be free of threats or other coercion that would impermissibly distort the defendant's choice. *Id.* at 755; *see also United States v. Smith*, 440 F.2d 521, 528-529 (7th Cir.) (Stevens, J., dissenting) (explaining that voluntariness relates to the trustworthiness of the admission of guilt and binding character of the waiver of the constitutional protections which would be available to the accused if he elected to stand trial).

Before a court can accept a guilty plea, the defendant must be advised of the constitutional rights he or she is waiving; the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. *Boykin*, 395 U.S. at 243. Additionally, the defendant "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." *Pittman v. State*, 337

S.C. 597, 599, 524 S.E.2d 623, 624 (1999). The defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993); *See also Wolfe v. State*, 326 S.C. 158, 485 S.E.2d 367 (1997) (guilty plea not involuntary where the colloquy demonstrated the trial judge asked defendant twice whether he understood there were no promises and that no sentencing recommendations were binding on the judge). To ensure the defendant understands the consequences of his guilty plea, the plea judge "usually questions the defendant about the facts surrounding the crime and punishment that could be imposed." *Dover v. State*, 304 S.C. 433, 434-35, 405 S.E.2d 391, 392 (1991). However, the plea judge "does not have to direct the defendant's attention to every consequence of his plea provided the record reveals affirmative awareness of the consequences of a guilty plea." *Carter v. State*, 329 S.C. 355, 362, 495 S.E.2d 773, 776 (1998).

The test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). It is "well established that a guilty plea is not rendered invalid because it represents a compromise by defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment." *United States v. Cox*, 464 F.2d 937, 942 (6th Cir. 1972) (citing *Brady*, 397 U.S. 742). The State may properly encourage guilty pleas either by being more lenient to those who enter such pleas, *Brady*, 397 U.S. at 750-753, or by increasing the risks of punishment on those who do not. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

Nonetheless, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual . . . , a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." *Dalton v. State*, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App.

2007) (citing *Blackledge v. Allison*, 431 U.S. 63, 74 (1977); see also *Jamison v. State*, 410 S.C. 456, 469–71, 765 S.E.2d 123, 129–30 (2014) (observing that “guilty plea[s] must be treated as final in the vast majority of cases” and instructing that caution must be exercised so as not to “undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea”). Indeed, admissions made during a guilty plea should be considered conclusive unless an applicant presents valid reasons why he should be allowed to depart from the truth of his statements.” *Dalton*, 376 S.C. at 137–38, 654 S.E.2d at 874 (internal citations and quotation marks omitted); cf. *Blackledge*, 431 U.S. at 73–74 (pointing out that representations made by a defendant, his lawyer, and the prosecutor at a guilty plea hearing, as well as any findings made by the judge accepting the plea, constitute a “formidable barrier in any subsequent collateral proceedings”).

The voluntariness of a guilty plea, however, “is not determined by an examination of the 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 the record of the post-conviction hearing.” *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). An applicant who enters a plea on the advice of counsel may “only attack voluntary, knowing and intelligent character of the plea by showing that plea counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s errors, the [applicant] would not have pled guilty, but would have insisted on going to trial.” *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

In evaluating an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. *Wolfe*, 326 S.C. at 165, 485 S.E.2d at 370; cf. *Rayford v. State*, 314 S.C. 46, 443 S.E.2d 805 (1994) (finding

that, where the transcript of the guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, granting PCR was inappropriate notwithstanding applicant's claim his lawyer misadvised him).

Surmounting *Strickland's* high bar is never an easy task, and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." *Lee*, 582 U.S. ___, 137 S. Ct. at 1967 (internal citations and quotation marks omitted); *cf. Hill*, 474 U.S. at 58 ("[R]equiring a 'prejudice' showing from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel 'will serve the fundamental interest in the finality of guilty pleas.' "). Reviewing "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Lee*, 582 U.S. ___, 137 S. Ct. at 1967. Rather, judges should "look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.* Thus, in determining whether a guilty plea was taken in accordance with constitutional standards, the reviewing judge must analyze and consider the entire record, including the transcript of the guilty plea and the evidence presented at the PCR hearing. *Harres*, 282 S.C. at 134, 318 S.E.2d at 361.

This Court finds the plea court entered into a thorough colloquy with Applicant. Judge Dickson explained to Applicant the constitutional rights he waived by pleading guilty, including the right to: remain silent, challenge the State's evidence, present defenses, and the right to a jury trial. (Plea Tr. 7). Applicant further informed the plea court he understood the State would seek life without parole on Applicant's armed robbery charge should he proceed to trial but had withdrawn LWOP as a condition of Applicant's plea. (Plea Tr. 6). Applicant further informed the plea court that though he had not reviewed all evidence in this case, he was willing to plead guilty. (Plea Tr. 6). Though Applicant represented to the plea court he was dissatisfied with Counsel's

representation, he stated he understood he could either plead to the charges or proceed to trial. (Plea Tr. 8). Applicant further stated he believed pleading guilty was the safest option for him and wished to plead guilty. (Plea Tr. 8, 10). Applicant confirmed to the plea court he had not been promised anything in exchange for his plea, nor had he been threatened or forced to plead. (Plea Tr. 8). Applicant indicated to the plea court he understood all conversations with Counsel. (Plea Tr. 8).

Applicant testified at the evidentiary hearing his decision to plead guilty was not based on the State's case against him, but rather, based on Counsel's advice to plead. This Court finds Applicant's assertion not credible and wholly self-serving as Applicant also testified, he had doubts regarding Counsel's ability to represent him following his prior trial. This Court finds Applicant's inconsistent testimony telling. Specifically, Applicant indicated to the plea court he believed pleading was the safest option for him, indicated he understood he could proceed to trial, indicated he understood the State had withdraw their intention to seek life without parole as a condition of the negotiated guilty plea, and represented to the Court that though he had not reviewed all of the evidence in this case, he wished to plead guilty.

Additionally, though Applicant contends Counsel failed to properly prepare Applicant for trial, this Court finds Counsel credibly testified the case was not yet set for a trial at the time of Applicant's plea. Counsel testified he informed Applicant of the benefits of pleading guilty and informed Applicant he had a right to proceed to trial instead of pleading guilty. Though Counsel and Applicant agree Applicant had not reviewed all discovery in this case, Counsel credibly testified he explained the benefits of pleading guilty to Applicant -- specifically, that by pleading guilty Applicant could "keep one of the LWOPs off the table" benefitting Applicant should Applicant's appeal from his prior trial and LWOP sentence be successful. Additionally, though

Counsel testified Applicant gave “pushback” when informed the State had conveyed a plea offer, Counsel testified he believed Applicant understood what he was pleading guilty to and did not believe Applicant felt pressured to plead guilty. This Court finds Counsel’s advice to plead guilty and “keep one of the LWOPs off the table” was strategic and reasonable based on Applicant’s prior sentence and pending appeal from his trial. This Court finds Applicant did receive a benefit from the plea as he did not receive a second sentence of life without parole, the sentence the State would have sought should Applicant proceeded to trial. Thus, this Court disagrees with Applicant’s allegations, and finds the combined record from the plea hearing and the evidentiary hearing establishes Applicant freely, knowingly, and voluntarily pleaded guilty.

Therefore, this Court finds Applicant has failed to meet his burden and finds no deficiency on the part of Counsel nor prejudice therefrom in regard to these allegations. Accordingly, Applicant’s request for relief by way of this allegation is **DENIED**.

Applicant’s Allegation Counsel was Ineffective for Failing to Effectively Represent Applicant at His Prior Trial Rendering Applicant’s Plea Involuntary

Applicant alleges Counsel’s failure to effectively represent Applicant at his prior trial rendered Applicant’s plea involuntary as Counsel’s alleged prior ineffective representation was a primary factor in the entry of Applicant’s guilty plea.

“[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has in the ability of the accused to receive a fair trial.” *United States v. Cronin*, 466 U.S. 648, 658 (1984). Further, “[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.” *Id.* The burden of proof still remains on Applicant to demonstrate a constitutional violation, though there are “circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.” *Id.* Among these are “if the accused is denied counsel at

a critical stage of his trial”, “if counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing”, and circumstances in which “although counsel is available to assist the accused during a trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” *Id.* at 659-60.

In South Carolina, structural issues, as addressed in *Cronic*, have been found sparingly and typically in the most egregious of cases. See *Nance v. Ozmint*, 367 S.C. 547, 555, 626 S.E.2d 878, 882 (2006) (finding ineffective assistance of counsel under *Cronic* when lead counsel was ill and on heavy medication and co-counsel had only practiced law for eighteen months, for failure to communicate to the jail to stop anti-psychotic medication when claiming mental illness in court, for clearly communicating to the jury that the defense attorneys did not want to be at the trial, for failure to qualify the defense expert when asserting a defense of guilty but mentally ill, and for failure to present adaptability evidence at the sentencing hearing); *McKnight v. State*, 320 S.C. 356, 359-60, 465 S.E.2d 352, 354 (1995) (finding ineffectiveness under *Cronic* when trial counsel was absent during the testimony of a victim at trial).

This Court finds Applicant’s case does not fit any of the structural errors or circumstances as delineated by the Court in *Cronic* and its progeny. Counsel was present for the entirety of the guilty plea, was professional and otherwise adequately did his job, and properly advised Applicant of his options prior to the plea. Thus, a structural error is not present, and prejudice cannot be presumed. This Court further finds any prior representation of Counsel was non-prejudicial to Applicant’s decision to plead guilty. The plea hearing transcript itself reflects that the plea was entered freely, knowingly, intelligently, and voluntarily. Applicant informed the Court he wanted to plead to the eight charges. (Plea Tr. 21). Applicant stated he was not on any

substances impacting his ability to understand the plea. (Plea Tr. 5-6). He stated he was not promised or threatened into pleading, that the plea was free and voluntary, and that he understood the rights he was waiving by pleading. (Plea Tr. 7-8). This Court finds Applicant understood what he was pleading to. Though Applicant asserts his plea was involuntary, he has failed to establish any prejudice on this ground as the record reflects Applicant understood the plea proceedings, did not want to proceed to trial, understood he could be sentenced to life without parole should he proceed to trial and be found guilty, and believed pleading guilty was in his best interest. Thus, no prejudice has been established in this instance. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

VII. Conclusion

Based on the evidence presented at the PCR hearing and the record of the plea proceeding, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant her application for post-conviction relief. This Court finds Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation. This Court finds Applicant freely, knowingly, and voluntarily pleaded guilty and further failed to present any justification as to why the statements he made during the guilty plea hearing should not be considered conclusive. Therefore, based on the foregoing, this Court denies relief on all allegations and dismisses this PCR action with prejudice.

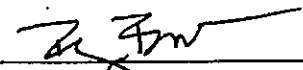
Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a

notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of the State.

AND IT IS SO ORDERED this 19 day of Sept, 2022.



ROBERT J. BONDS
Presiding Circuit Court Judge
First Judicial Circuit

Wallerboro, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS

Tyrone Ellison, #324947,

Applicant,

v.

State of South Carolina,

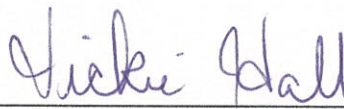
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Order of Dismissal has been served upon the applicant by mailing one copy in the United States mail, postage prepaid, addressed to:

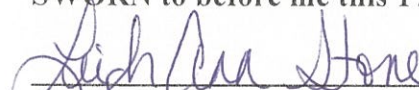
Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette, LLC
Post Office Box 2147
Leesville, SC 29070

This 17th day of October, 2022.



Vickie Hall
Legal Assistant for Respondent

SWORN to before me this 17th day of October, 2022.


Notary Public for South Carolina.
My Commission Expires: May 16, 2029

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

Tyrone D. Ellison, SCDC #324947,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Case No. 2018-CP-18-00047

ORDER OF DISMISSAL

This matter comes before the Court by way of a post-conviction relief (PCR) action commenced by Tyrone D. Ellison (Applicant) on January 11, 2018, alleging he is entitled to post-conviction relief based on constitutionally ineffective assistance of trial counsel. The State requested an evidentiary hearing through its return on April 23, 2018. A hearing into the matter convened before the undersigned on May 20, 2022¹, at the Orangeburg County Courthouse. Applicant was present and represented by Tricia A. Blanchette, Esquire. Assistant Attorney General Samantha J. Weidauer represented the State. Applicant testified on his own behalf at the hearing, as did his trial counsel, James K. Falk, Esquire.

In addition to the pleadings in this action, this Court had before it a copy of the Dorchester County Clerk of Court records regarding the subject convictions; Applicant's records from the

¹ This PCR actions stems from Applicant's 2014 trial. The evidentiary hearings for this PCR action and for Applicant's PCR action stemming from his 2015 guilty plea were consolidated in the interest of judicial economy. At Applicant's PCR hearing on the two separate PCR actions, this Court clarified the consolidation of the hearing was solely for purpose of the record and denied to merge the cases – finding two separate orders and two separate findings were appropriate. This Court notes Applicant has requested the two applications be considered together pursuant to *United States v. Cronin*, 466 U.S. 648, 658 (1984). However, this Court denies Applicant's request and considers them as two separate and distinct actions.

South Carolina Department of Corrections; a full and complete record of Applicant's direct appeal, including the trial transcript; and the records of the current PCR action.

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to post-conviction relief. For the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Dorchester County Clerk of Court. In July of 2013, Applicant was arrested following an investigation into the armed robbery of a Sun Trust Bank in North Charleston. In December of 2013, the Dorchester County Grand Jury indicted Applicant for entering a bank, depository, or building and loan association with the intent to steal (2013-GS-18-1271). The Dorchester County Grand Jury additionally indicted Applicant for armed robbery in April of 2014. (2014-GS-18-0325).

On May 13, 2014, the First Circuit Solicitor's Office timely served Applicant with its notice of intent to seek life without parole (LWOP) pursuant to section 17-25-45 of the South Carolina Code based on a 2007 conviction for assault and battery with intent to kill (ABWIK).² On October 20, 2014, Applicant proceeded to a jury trial before the Honorable D. Craig Brown. James K. Falk,

² ABWIK and armed robbery are both classified as a "most serious offense" under section 17-25-45(C)(1). Section 17-25-45(A)(1)(a) requires a person with one or more convictions of a most serious offense be sentenced to LWOP.

Esquire, represented Applicant on these charges. Assistant Solicitors Don Sorenson and Phil Giese prosecuted the case.

At the conclusion of the multi-day trial, the jury convicted Applicant as indicted. Following the verdict, Judge Brown sentenced Applicant to life without parole pursuant to S.C. Code Ann. § 17-25-45 for armed robbery along with a concurrent term of imprisonment of thirty years for entering a bank, depository, or building and loan association with the intent to steal. Applicant subsequently filed a timely filed a notice of appeal.

Appellate Defender David Alexander perfected Applicant's appeal by filing a brief with the Court of Appeals on the following issues:

- I. During an overnight recess, a juror was approached by a man he believed was related to [Applicant] and asked to vote for [Applicant]. The juror told the rest of the jury about the attempted influence and told them to be careful. Did the trial court err in refusing to grant [Applicant]'s motion for a mistrial because the [Applicant]'s right to a fair and impartial jury was violated after the communication to the entire jury about the attempted influence and that they needed to be careful?
- II. When determining whether to declare a mistrial because of outside influences on the jury, does the Sixth Amendment allow a trial judge to consider the weight of the evidence against a criminal defendant as a factor in his decision?

Following briefing and oral argument, the Court of Appeals affirmed Applicant's convictions. *State v. Ellison*, Op. No. 2017-UP-014 (S.C. Ct. App. filed Jan. 11, 2017). The case was remitted back to the circuit court on February 7, 2017.

II. Summary of the Facts

Around 10:30 a.m. on the morning of Monday, April 1, 2013, a man wearing a long black wig, a black visor, and sunglasses entered the SunTrust Bank located on Dorchester Road in North Charleston, South Carolina, and quickly pulled a gun out of his pocket while holding it with a



white latex glove. (R. pp. 42-44; pp. 55-57; pp. 63-65; p. 68; pp. 76-77; p. 79; pp. 90-91; p. 170). The man then demanded the bank's money at gunpoint and forced the tellers to give him the cash contained in the bank drawers. (R. pp. 44-45; pp. 57-58). After that, the robber rapidly fled from the bank with over \$6,000 in stolen funds before running into a nearby wooded area. (R. pp. 45-46; p. 58; p. 71; p. 83; p. 85).

Once the robber fled, David Lewis, a customer inside the bank during the robbery, quickly ran outside, got into his truck, and pursued the robber. (R. p. 72; p. 75; pp. 90-92). During his pursuit, Lewis noticed an older, green Honda vehicle that was in poor condition and "didn't fit the spot" driving in close proximity to the scene of the robbery. (R. pp. 93-94). Suspicious, Lewis followed the car to a nearby apartment complex and watched as the robber ran out of the wooded area he had fled into and jumped into the waiting Honda without his disguise. (R. pp. 92-95). After that, the suspicious car sped off, and Lewis chased after it until it began to weave in and out of traffic at speeds of nearly one-hundred miles per hour. (R. p. 93; pp. 97-98). At that point, Lewis decided to cease his pursuit and returned to the bank. (R. pp. 97-98).

Meanwhile, the bank's stunned employees alerted the authorities of the robbery, and officers from the North Charleston Police Department quickly responded to the bank, secured the scene, and spoke with the witnesses at that location. (R. p. 46; p. 59; p. 70; p. 84; pp. 100-103; p. 265). Through those actions, the officers obtained a description of the suspect and learned he fled in an older, green Honda vehicle with a South Carolina license plate partially containing the numbers 1-5-3 or 1-9-3. (R. p. 98; p. 266). Furthermore, the officers ascertained the direction in which the robber fled on foot and deployed a police tracking dog to follow his scent. (R. p. 103; p. 108). While tracking the scent, the police dog led the officers away from the bank into a wooded area. (R. pp. 103-105; pp. 108-111). In the wooded area, the police dog tracked the suspect's scent

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to a location where a black visor, a black wig, a latex glove, and a .380-caliber handgun had been abandoned, and that evidence was secured in light of the fact it was consistent with the items the robber had used during the bank robbery. (R. p. 111; p. 173; p. 177). The police dog then continued on the suspect's trail until it reached a location next to the apartment complex where the suspicious car had been observed by Lewis. (R. pp. 92-95; pp. 104-105; pp. 111-112).

As the investigation into the bank robbery continued, officers reviewed the bank's surveillance footage, observed the vehicle in which the robber had fled in that footage, and determined the vehicle was a 1999 to 2001 Honda Civic. (R. pp. 271-272). However, during a subsequent search, they were unable to locate a vehicle that fit the description of the robber's getaway car. (R. pp. 271-272). From that point on, the identity of the bank robber remained unknown until Applicant Tyrone Darius Ellison was apprehended in July of 2013 after he participated in another robbery of the same bank, led law enforcement officers on a high speed chase, and crashed his vehicle during that chase. (R. pp. 272-273; pp. 560-561).

After Applicant was captured, officers discovered his skin tone, physical build, and facial hair were wholly consistent with the skin tone, physical build, and facial hair of the robber who committed the armed robbery at the SunTrust Bank a few months earlier. (R. pp. 274-275). As a result, the officers contacted Applicant's mother, Annette McKinney, and spoke with her about the earlier bank robbery. (R. p. 333). During the ensuing conversation, McKinney indicated she believed Applicant had owned a green Honda Civic for a few weeks, and she stated she was 75% certain Applicant was the robber depicted in footage from the April bank robbery. (R. pp. 335-337; p. 350).

Thereafter, a buccal swab was collected from Applicant and submitted for analysis along with the evidence recovered during the investigation into the robbery. (R. pp. 158-159; pp. 171-

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172; pp. 178-183; p. 185). Agent Catherine Leisy, a forensic scientist at S.L.E.D. and an expert in the field of D.N.A. analysis, then developed a D.N.A. profile for Applicant and compared it to D.N.A. profiles developed from the black wig, the black visor, the latex glove, and the gun. (R. pp. 219-220; pp. 227-228; p. 230; p. 232; pp. 234-235). Upon analysis, she conclusively determined Applicant was the major contributor of the D.N.A. located on the wig, visor, and glove but was not a contributor of the D.N.A. located on the gun. (R. p. 230; pp. 232-236).

Subsequently, Applicant was indicted for armed robbery and entering a bank, depository, or building and loan association with the intent to steal, and he proceeded to trial. (R. pp. 9-10; pp. 565-569). At the outset of trial, the trial judge presented preliminary instructions to the jurors and explained to them they were required to decide Applicant's case based on "the testimony [they] hear and the other evidence introduced in court." (R. pp. 26-34).

Thereafter, during trial, numerous witnesses testified for the State in regard to the evidence linking Applicant to the April bank robbery of the SunTrust Bank. (R. pp. 42-46; pp. 55-59; pp. 64-72; pp. 76-85; pp. 89-98; pp. 100-118; pp. 122-135; pp. 153-154; pp. 193-194; pp. 230-236; pp. 265-275; pp. 292-294). Specifically, the witnesses present during the robbery discussed the physical characteristics of the bank robber, and those details were fully consistent with the physical characteristics of Applicant. (R. pp. 43-44; p. 57; p. 72; p. 92; pp. 274-275). Additionally, the investigating officers testified about their discovery of the items used by the robber during the bank robbery, and Agent Leisy confirmed she conclusively determined Applicant's D.N.A. was on the robber's wig, visor, and latex glove.³ (R. p. 111; p. 173; p. 177; pp. 228-236). Furthermore, Lewis testified about his pursuit of the robber's getaway vehicle, which was an older, green Honda

³ During her testimony, Agent Leisy further explained the odds of randomly selecting an unrelated individual with a matching D.N.A. profile was one in over two quintillion. (R. p. 230; p. 232; p. 235).

Civic with a South Carolina license plate partially containing the numbers 1-5-3 or 1-9-3, and testimony was presented establishing Applicant purchased and insured an older, green Honda Civic roughly a week before the robbery, also possessed a South Carolina license plate containing the numbers 1-5-3 at that time, and did not surrender the license plate or cancel his insurance on the Honda Civic until a few weeks after the robbery. (R. pp. 93-95; p. 98; pp. 153-154; pp. 193-194; p. 197; pp. 292-295). Notably, Terrance Bryant, an acquaintance of Applicant, also stated Applicant was in possession of a green Honda Civic on the day of the robbery, sold it to him on the evening of April 1, 2013, and subsequently provided him with an incorrect bill of sale that wholly omitted Applicant's name from the vehicle's purchase history. (R. pp. 122-135).

Following the presentation of that testimony and evidence, the State rested its case, and defense counsel offered the testimony of several witnesses in Applicant's defense. (R. pp. 306-364; pp. 370-400; pp. 404-410; pp. 412-419). Through that testimony, Applicant's mother, McKinney, indicated she purchased a Honda Civic for Applicant on March 23, 2013, but claimed he told her he sold it shortly thereafter and no longer had the vehicle on March 25, 2013.⁴ (R. pp. 306-309; p. 331; p. 333). However, she conceded she told a detective investigating the robbery Applicant had the Honda Civic for a few weeks after he purchased it and she personally took the vehicle to get its windows tinted a few days after it was bought.⁵ (R. pp. 335-337; pp. 341-343). Additionally, Dr. Robert Bennett, an expert in forensic science, testified he analyzed the items

⁴ Subsequently, Applicant's stepfather, Dennis McKinney, offered similar testimony, stating Applicant's mother purchased a car for Applicant at some point in March of 2013, and indicated he no longer saw Applicant with that car a few days later. (R. pp. 423-424).

⁵ As part of her testimony, McKinney also stated she had deposited \$20,000 into Applicant's bank account several months before the bank robbery while claiming Applicant was still in possession of that money at the time of the robbery. (R. pp. 313-315; p. 323). However, she also acknowledged Applicant was not initially aware the money had been transferred into his account and admitted she told him about it for the first time after he had been arrested and incarcerated for the bank robbery. (R. pp. 323-235; pp. 327-329).

discovered after the robbery but was unable to obtain a sufficient D.N.A. profile to make a comparison because the S.L.E.D. analyst had done an “overly thorough” job in analyzing the items. (R. pp. 371-379; p. 393). However, he conceded the S.L.E.D. analyst did nothing wrong or improper in conducting her analysis. (R. pp. 399-400). Furthermore, Chunte Green, a shift manager at the Burger King restaurant where Applicant worked, claimed Applicant had to have been working on April 1, 2013, and stated he was the only male that worked at the restaurant at the time. (R. pp. 404-407). However, Green acknowledged she was not personally present at work on April 1, 2013, conceded she had no firsthand knowledge in regard to whether Applicant actually worked that day, and indicated her testimony was based on the fact Applicant typically handled the restaurant’s deliveries, which were made every Monday at some time between 6:00 a.m. and midnight, coupled with the fact a delivery was received on April 1, 2013.⁶ (R. pp. 405-407; p. 409). Similarly, Candida Payne, another Burger King employee, stated she worked at the restaurant from 11:43 a.m. to 4:30 p.m. on April 1, 2013, and claimed she remembered Applicant working there that day.⁷ (R. pp. 412-413; p. 416). However, she could not remember the names of the other employees who worked on that date, and she alleged Applicant took her home from work in a vehicle he did not purchase or insure until several weeks later.⁸ (R. p. 195; p. 295; p. 413; pp. 416-417; p. 419).

⁶ On cross-examination, Chunte further conceded several other male employees actually did work at the restaurant, including individuals named Tyrone Bailey and Christopher Coburn. (R. pp. 409-410).

⁷ Subsequently, Samuel Powers, an employee of the company that owned the Burger King franchise for which Applicant worked, offered rebuttal testimony and indicated the company had no record of Applicant working on April 1, 2013. (R. pp. 426-427; pp. 455-456).

⁸ During her testimony, Payne also acknowledged she had previously been convicted of numerous crimes, including defrauding a hotel or restaurant, financial transaction card fraud, making a false statement to obtain a license, and six counts of shoplifting. (R. pp. 414-416).

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Thereafter, at the conclusion of the evidentiary phase of trial, the trial judge adjourned court for the day, canceled the trial for the following day due to a prior engagement, and ordered the jurors to return for duty on the upcoming Friday. (R. pp. 460-461; p. 463). Subsequently, when the trial resumed on Friday morning, the trial judge cleared the courtroom and asked for Juror # 151, William White, to be brought out to discuss a matter that had been called to the trial judge's attention. (R. pp. 464-465). The trial judge then questioned White, and White revealed under oath he had been approached at his home on the preceding day by an individual he believed was related to Applicant who asked him to vote in a certain way during the trial. (R. pp. 464-465). White further revealed he quickly told the person to leave his property, and he indicated he did not believe he could remain impartial in light on that encounter. (R. pp. 464-467). The trial judge then inquired if White had mentioned the encounter to the other jurors, and White responded he simply let all the other jurors know he was approached while advising them to be careful. (R. pp. 466-467; p. 469).

In response to White's statements, the trial judge excused White from further service in Applicant's case. (R. p. 467). Thereafter, he asked for the remaining jurors to be brought into the courtroom before asking them if White had advised them he had been approached about the case on the preceding day, and the jurors all responded affirmatively. (R. pp. 470-471). The trial judge then asked the jurors if any of them did not believe they could be fair and impartial or decide the case based solely upon the evidence presented during trial, and no juror responded. (R. p. 471). After that, the trial judge inquired if any of the remaining jurors had been approached or contacted in any way in regard to the case, and, again, no jurors responded. (R. pp. 471-472). The trial judge then asked the jurors for a second time if any of them could not be fair and impartial or decide the

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case based solely upon the evidence and testimony presented during trial, and, once again, none of the jurors responded. (R. p. 472).

Following the questioning of the jury panel, the jurors retired to the jury room, and defense counsel moved for a mistrial. (R. pp. 472-473). In support of that motion, defense counsel argued the remaining jurors might “in the back[s] of their mind[s] somewhere” believe Applicant was guilty based on the actions of one of his apparent agents despite the fact those jurors all responded they could remain fair and impartial under the circumstances. (R. p. 473). In response, the solicitor asserted the grant of a mistrial would simply reward Applicant’s improper behavior while noting Applicant was recorded calling someone from the jail on the preceding day and asking them to “tak[e] care of something” on the street upon which the juror who was subsequently contacted on Applicant’s behalf lived. (R. pp. 473-474). At that point, neither defense counsel nor Applicant disputed or challenged the solicitor’s representations. (R. pp. 474-475). Instead, defense counsel simply asserted he did not personally believe Applicant “had the wherewithal” to know his actions could have resulted in a mistrial if they were discovered while further contending the grant of mistrial would not actually be beneficial to Applicant. (R. p. 474).

After considering the issue, the trial judge denied the mistrial motion. (R. p. 475). In support of that decision, the trial judge noted all the jurors were exposed by White to the misconduct but determined a mistrial was nonetheless inappropriate under the circumstances in light of the fact all the jurors unequivocally indicated they could remain fair and impartial when he questioned them coupled with the fact the evidence establishing Applicant’s guilt was substantial. (R. pp. 476-478). The trial judge then inquired of the parties if they had any further arguments in regard to the mistrial motion, and both the solicitor and the defense counsel indicated they did not. (R. p. 478).

Subsequently, the trial proceeded forward, the parties presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (R. pp. 483-553). During his jury instructions, the trial judge again reminded the jurors they could only consider the testimony and evidence presented during trial when determining whether the State had met its burden of proof. (R. p. 541). Thereafter, at the conclusion of trial, the jury convicted Applicant as indicted. (R. p. 555). The trial judge then sentenced Applicant to an aggregate sentence of life imprisonment without the possibility of parole based on Applicant's prior conviction for a "most serious" offense. (R. p. 561; p. 563).

III. Issues Before This Court

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

1. Ineffective assistance of trial counsel
 - a. Failure to properly communicate all plea offers
 - b. Failure to properly prepare Applicant for trial
2. Ineffective assistance of appellate counsel
 - a. Failure to raise all meritorious issues on appeal

The State requested an evidentiary hearing through its return on April 23, 2018.

On July 26, 2021, pursuant to Rule 71.1, counsel filed an amended application on Applicant's behalf to include both general and specific allegations of ineffective assistance of trial and appellate counsel.

At the start of the hearing before this Court, PCR counsel indicated Applicant would be proceeding only on the following claims:

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.
 - 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.

IV. Standard of Review

The Uniform Post-Conviction Procedure Act⁹ (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;

⁹ S.C. Code Ann. §§ 17-27-10 to -160.



3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973)..

The reviewing court applies the two-part test outlined by the United States Supreme Court in *Strickland v. Washington* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing *Strickland*, 466 U.S. 668). The applicant bears the heavy burden of establishing both prongs of the *Strickland* standard, and failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRCPP; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and

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prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable” (citation and internal quotation marks omitted)). Significantly, “the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Strickland*, 466 U.S. at 696.

The first prong—constitutional deficiency—is “necessarily linked to the practice and expectations of the legal community.” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). An applicant making a claim of ineffective assistance “must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment.” *Strickland*, 466 U.S. at 690 (emphasis added). The reviewing court must then “determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance” demanded of attorneys in criminal cases. *Id.*

The second, or “prejudice” prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. 466 U.S. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel’s deficient performance 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, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *see id.* at 695 (explaining that, where a defendant challenges his conviction, he must show that there exists “a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt”).

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When evaluating this probability, the reviewing court must “consider the specific impact counsel’s error had on the outcome of the trial” coupled with “the strength of the State’s case in light of . . . the [totality of the] evidence presented to the jury.” *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018); *Strickland*, 466 U.S. at 695–96. It is not sufficient “to show [counsel’s] errors had some conceivable effect” on the outcome of the proceeding—counsel’s errors must be “so serious as to *deprive the defendant of a fair trial*.” *Strickland*, 466 U.S. at 687 (emphasis added). In general, “the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice.” *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843 (citing *Strickland*, 466 U.S. at 696) (stating “a verdict . . . only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support”). Accordingly, “[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland*, 466 U.S. at 691. Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

The *Strickland* standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. The applicant’s burden of proving both *Strickland* components is heavy in light of the strong presumption that counsel’s conduct fell within the range of reasonable professional legal assistance. *Id.* at 690. Representation is constitutionally ineffective only if counsel’s conduct “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair proceeding. *Id.* at 686; *cf. United States v. Morrow*, 977 F.2d 222, 229

(6th Cir. 1992) (“[T]he threshold issue is not whether [the applicant’s] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.”)

V. Findings of Fact & Conclusions of Law

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsel, as well as the record in this action incorporated by way of the State’s return, this Court proceeds to the claims of ineffective assistance of counsel articulated at the start of the hearing and finds each to be without merit. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

1. *Allegation Prejudice Must be Presumed under Chronic*¹⁰

Applicant alleges Counsel’s failure to effectively represent Applicant at his trial resulted in a complete breakdown in the adversarial process and therefore prejudice must be presumed.

“[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has in the ability of the accused to receive a fair trial.” *United States v. Chronic*, 466 U.S. 648, 658 (1984). Further, “[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.” *Id.* The burden of proof still remains on Applicant to demonstrate a constitutional violation, though there are “circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.” *Id.* Among these are “if the accused is denied counsel at a critical stage of his trial”, “if counsel entirely fails to subject the prosecution’s case to meaningful

¹⁰ *United States v. Chronic*, 466 U.S. 648, 658 (1984).



adversarial testing”, and circumstances in which “although counsel is available to assist the accused during a trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” *Id.* at 659-60.

In South Carolina, structural issues, as addressed in *Cronic*, have been found sparingly and typically in the most egregious of cases. *See Nance v. Ozmint*, 367 S.C. 547, 555, 626 S.E.2d 878, 882 (2006) (finding ineffective assistance of counsel under *Cronic* when lead counsel was ill and on heavy medication and co-counsel had only practiced law for eighteen months, for failure to communicate to the jail to stop anti-psychotic medication when claiming mental illness in court, for clearly communicating to the jury that the defense attorneys did not want to be at the trial, for failure to qualify the defense expert when asserting a defense of guilty but mentally ill, and for failure to present adaptability evidence at the sentencing hearing); *McKnight v. State*, 320 S.C. 356, 359-60, 465 S.E.2d 352, 354 (1995) (finding ineffectiveness under *Cronic* when trial counsel was absent during the testimony of a victim at trial).

This Court finds Applicant’s case does not fit one of the structural errors or circumstances as delineated by the Court in *Cronic* and its progeny. 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. Therefore, this Court finds *Cronic* is not appropriate in the instant matter and inquiry into the actual conduct of the trial and alleged deficiencies of trial counsel is necessary.

2. Defense Strategy

Applicant also raises a series of claims alleging Counsel was ineffective based on his alleged failure to properly prepare prior to trial and advise Applicant regarding the strength of the State’s

evidence and available defenses. Applicant contends Counsel failed to effectively negotiate a guilty plea and investigate and develop certain matters that arose prior to and during trial. Specifically, Applicant points to alleged deficiencies pertaining to Counsel's utilization of a defense strategy that had been discussed on recorded jail calls; utilization of Applicant's mother as a defense witness; utilization of a DNA expert that Applicant alleges bolstered the State's case; and utilization of defense witnesses regarding Applicant's employment and/or alibi.

This Court disagrees, and finds Applicant has failed to overcome the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment in his representation of Applicant at all stages of Applicant's trial. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). "The burden of rebutting this presumption 'rests squarely on the defendant,' and '[i]t should go without saying that the absence of evidence cannot overcome [i]t.'" *Dunn v. Reeves*, 594 U.S. ___, ___, 141 S. Ct. 2405, 2410 (2021) (alteration in original) (quoting *Burt v. Titlow*, 571 U.S. 12, 22–23 (2013)). In fact, "even if there is reason to think that counsel's conduct 'was far from exemplary,' a court still may not grant relief if '[t]he record does not reveal' that counsel took an approach that *no competent lawyer would have chosen*." *Id.* (alteration in original) (emphasis added) (quoting *Titlow*, 571 U.S. at 23–24). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686; see *Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding").

"When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The reviewing

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court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). Further, “even if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough*, 540 U.S. at 6; *see also* *Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”).

Review of counsel’s actions is hallmarked by deference, as “it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Strickland*, 466 U.S. at 689. No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Id.* at 688–89; *cf. id.* at 691 (“Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.”). “Defense lawyers have ‘limited’ time and resources, and so must choose from among ‘countless’ strategic options.” *Dunn*, 594 U.S. ___, 141 S. Ct. at 2410 (quoting *Harrington*, 562 U.S. at 106–07). “Such decisions are particularly difficult because certain tactics carry the risk of ‘harm[ing] the defense’ by undermining credibility with the jury or distracting from more important issues.” *Id.* (quoting *Harrington*, 562 U.S. at 108).

Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. *Strickland*, 466 U.S.

at 689; *see Mazzell v. Evatt*, 88 F.3d 263, 269 (4th Cir. 1996) (declining “to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial”). The ultimate question is not whether counsel’s actions were reasonable, but whether there is any reasonable argument counsel satisfied *Strickland*’s deferential standard.

Allegation Counsel was Ineffective for Utilizing a Defense Strategy that had been Fully Discussed on Recorded Phone Calls provided to the Defense in Discovery

This Court finds Counsel credibly testified he was retained to represent Applicant approximately five weeks prior to Applicant’s trial. Counsel testified he has been licensed as an attorney since 1984 and has primarily practiced criminal law since 1996. Counsel testified he expressed concerns to Applicant and Applicant’s mother regarding the limited preparation time prior to trial and Applicant was aware of the tight turnaround between the time Counsel was retained and the date trial was scheduled to begin. Counsel testified he discussed with both Applicant and Applicant’s mother the pitfalls of trying to prepare for a trial in five weeks. Counsel testified in the five weeks leading up to trial, roughly 80% of his time was used to prepare Applicant’s case for trial.

In preparation for trial, Counsel testified he obtained Applicant’s file from Applicant’s prior trial counsel, Tommy Bolus.¹¹ Counsel testified he reviewed the Rule 5 materials provided by the State, conceding he did not review all of the recorded jail calls. Specifically, Counsel conceded at the evidentiary hearing he did not review the phone call between Applicant’s mother

¹¹ Applicant testified he retained Counsel after firing prior defense counsel, Tommy Bolus, Esquire.

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and inmate Shawn Keitt¹² (Applicant's #4 – CD (Call from Mr. Keitt to Ms. McKinney)) prior to trial, citing his limited preparation time. Regarding whether Counsel would have called Applicant's mother as a witness if he would have listened to the jail calls prior to trial, Counsel testified he would have called her as a witness but would not have questioned her about Applicant's alleged lack of financial incentive in committing the crimes. Counsel claimed he did not foresee Applicant's mother lying to him.

This Court finds Counsel did not take an approach no competent lawyer would have taken. This Court further recognizes the distorting effect of hindsight, recognizes the circumstances of counsel's challenged conduct, and fails to find deficiency in Counsel's perspective and strategy at the time of trial. Though Counsel testified he had limited time to prepare for trial and conceded he did not review all of the recorded jail calls prior to trial, this Court finds Counsel credibly testified that even if he would have listened to all of the jail calls in discovery, he still would have called Applicant's mother as a defense witness as she was necessary to Applicant's defense for multiple other reasons including discussing the sale of Applicant's car on the same date as the incident.

Additionally, this Court finds Applicant was not prejudiced by Counsel's decision to ask Applicant's mother about his lack of financial incentive in committing the crimes. Though the State was able to cross-examine Applicant's mother regarding her prior recorded jail calls at trial, Applicant's mother maintained during cross-examination Applicant was aware of the bank account prior to date of the incident for which he was charged. (R. 323-331).

¹² In summary, during the recorded jail call, Applicant's mother discusses her belief reasonable doubt exists in Applicant's case. Specifically, Applicant's mother posits during the call that Applicant can create reasonable doubt by way of lack of financial incentive as he has \$20,000 in a savings account. Applicant's mother further states during the phone call Applicant is not aware of the savings account.

Moreover, this Court finds Applicant's testimony at the evidentiary hearing regarding this allegation unbelievable. Specifically, Applicant testified at the evidentiary hearing that should Counsel have reviewed the recorded jail call with him prior to trial, he would not have wished to proceed to trial and instead, would have wished to discuss a plea deal. This Court finds Applicant's assertion unbelievable as Counsel credibly testified he was hired to take Applicant's case to trial specifically because Applicant was not interested in pleading guilty. Therefore, this allegation is **DENIED**.

Allegation Counsel was Ineffective for Utilizing Applicant's Mother as a Defense Witness with the Knowledge She was Subject to Questioning Regarding her Audio Interview with Law Enforcement

This Court finds Counsel credibly testified he reviewed the audio interview between Applicant's mother and Detective Repman (Applicant's #5 – CD (Interview with Annette McKinney) in preparation for trial and discussed the subject audio interview in advance of the trial with both Applicant and Applicant's mother. At the evidentiary hearing, Counsel confirmed Applicant's mother stated during her audio interview with law enforcement she was 75 percent certain the photo she was shown by law enforcement during her interview was Applicant. Specifically, this Court finds the following testimony was adduced at trial during the State's cross-examination of Applicant's mother:

A. The photograph that he showed me, the single photograph he showed me, sir, prior to him recording me, after – when he showed me the single photograph, my thing is that is 50 percent could be my son. And he said why do I say 50 percent? Because I said he's black. And that's before he recorded me, because he had showed me so many other pictures, and it's like, it was a young black guy, so 50 percent, you're black. If it was a white person, that's a 0 percent. 50 percent, I said, "Well, he's black."

Q. Okay. Well, the fact of the matter is there's a little more to your description in your explanation to him; is that correct, Ms. McKinney?

A. This is prior to him recording me. We had a conversation. And once -- once I had told him things before he said, "Now I'm going to record you," because --

Q. Well, let's talk about the recording, because that's what I have a recording of.

A. Mm-hmm, yes, sir.

Q. The fact of the matter is when he was recording you, what did you tell him about the person in that photograph?

A. What I remember when he asked can he record me now, he pulled the photo out that he had at that time, and I looked. I said -- I don't remember exactly the words, but I -- something like, "I don't know." I was looking at it kind of hard, and I said, "Well," because all the hair and stuff. He said, "Well, just" -- I think he said something about just try to -- I think he told me, "Well, that's a wig," or something when I was saying about some dreads or something. I believe he told me that was -- that's a wig. And then he said, "Just look closely."

And I said, "I'm not sure."

And finally he was kind of like pointing around different things on the picture, like you know, "Look here and there."

And eventually I said, "It could be him."

And he said, "well, how sure are you?"

And I said 75 percent, the 50 percent being that he was black.

Q. And the fact of the matter is the way that conversation went is that he asked you, made the comment, "This is a photo from a bank robbery," and your response -- do you admit or deny that your response to that question was, "That resembles my son's mouth and nose. I don't know what he was wearing, but that resembles my son right there"? Do you admit telling him that?

A. If he has that recorded for that picture that he showed me, it wasn't these photos, but the picture that he showed me, if he had that recorded, we didn't -- there was one photo he showed me in particular, when I finally looked at it, I said it could be 75 percent, the 50 percent being it was a young black guy, the 25 percent there were some features, as there were with the other photos I was shown.

(R. 348-350).

This Court finds Applicant's assertion Counsel was ineffective for utilizing Applicant's mother as a defense witness with the knowledge she was subject to questioning regarding her audio interview with law enforcement without merit. Specifically, this Court finds Counsel credibly testified he attempted to address Applicant's mother's identification of Applicant to law

enforcement during his examination of her and explain why she may been flustered during her identification to law enforcement and made a bad identification. Counsel also testified he attempted to elicit testimony from Applicant's mother to show that at the time of her identification she believed her son had been in an automobile accident. Counsel recalled his strategy was to attempt to point out to the jury that mothers do not indicate they are only 75 percent sure a picture is their child; rather, Counsel posited mothers either know a picture is or is not their child.

Additionally, this Court finds Applicant's testimony at the evidentiary hearing contradictory and not credible. Specifically, on direct examination, Applicant alleged he was not aware of the recording taken by law enforcement of his mother prior to his mother's testimony at trial. In contradiction to that testimony, on cross-examination, Applicant testified he was aware law enforcement had interviewed his mother prior to trial.

Furthermore, as mentioned above, this Court finds Counsel credibly testified he required Applicants mother as a defense witness as she was necessary to Applicant's defense for multiple other reasons including discussing the sale of Applicant's car on the same date as the incident. Thus, because Counsel credibly testified he reviewed the audio interview with Applicant prior to trial, because Counsel strategically attempted to elicit testimony during his examination of Applicant's mother that would undermine the State's contention Applicant's mother made a positive identification of him, and for the other above-mentioned reasons, this Court fails to find Counsel's utilization of Applicant's mother as a defense witness deficient and finds Applicant was not prejudiced by Counsel's decision to call her. Therefore, this allegation is **DENIED**.

Allegation Counsel was Ineffective for Utilizing an Expert that Bolstered the State's Case and Failed to Offer an Opinion Advantageous to Applicant

Applicant additionally contends Counsel was ineffective for failing to utilize Dr. Bennett as an expert when Dr. Bennett bolstered the State's case and failed to offer an opinion that was

advantageous to Applicant. At the evidentiary hearing, Applicant testified he was not willing to plead guilty prior to the completion of Dr. Robert Bennett's DNA analysis. Applicant further testified he believed Dr. Bennett's testimony would help his defense. Applicant posited Dr. Bennett's results came back inconclusive, creating a different result than the DNA result found by SLED. Applicant testified that because SLED produced the only DNA results and no independent tests were able to be conducted, Counsel had the ability to shed doubt of the accuracy of SLED's results.

Counsel further testified at the evidentiary hearing that though he did not have a transcript of the pre-trial transcript (Applicant's Exhibit #1 – Motion for Bond Reduction) to review prior to Dr. Bennett testimony, he spoke with Dr. Bennett prior to trial. Counsel testified he utilized Dr. Bennett as a witness at trial to “put the state on trial” as Applicant did not have an opportunity to independently confirm the DNA results because all potential DNA evidence was consumed through SLED's testing. Counsel further contended that despite Dr. Bennett's testifying to SLED's thoroughness, he attempted to establish SLED could have used a smaller portion of the DNA for testing. Counsel testified that through Dr. Bennett's testimony he attempted to receive a spoliation charge. Counsel stated his strategy was to raise some kind of doubt regarding the accuracy of the DNA evidence. Counsel posited he believed the jury would convict Applicant on the DNA evidence alone unless he put up some type of response to the State's DNA evidence. Counsel testified he discussed Dr. Bennett's anticipated testimony thoroughly with him prior to calling him as a defense witness.

This Court finds Counsel was not deficient. This Court finds should Counsel not have called Dr. Bennett to testify, the jury would have solely had SLED's results to consider and would not have learned further testing was performed that reached unsuccessful results. Additionally,



Counsel credibly testified Dr. Bennett was the most advantageous opinion regarding the DNA evidence he could find. Counsel testified he called Dr. Bennett to create doubt in the jurors' minds and "put as many balls in the air" for the jury as possible. This Court finds Counsel's decision to call Dr. Bennett was a reasonable strategic decision and did not prejudice Applicant as Dr. Bennett did not testify in agreement with the State's DNA findings. Therefore, this allegation is **DENIED**.

Allegation Counsel was Ineffective for Utilizing Defense Witnesses Regarding Applicant's Employment and/or Alibi as the State Could Refute Said Witnesses

Applicant further contends Counsel was ineffective for utilizing defense witnesses regarding Applicant's employment and alibi as the State could refute the witnesses' testimony. At the evidentiary hearing, Counsel credibly testified he was aware of the business records the State had prior to trial and knew the State would attempt to admit them to refute Applicant's alibi witnesses' testimony. Counsel posited he decided to put up the two eyewitnesses regardless as they were willing to testify Applicant was at work at the time of the incident. Counsel testified the incident occurred on April 1st -- April Fools' Day, suggesting that the date made the witnesses' testimony more credible and explained why the witnesses could remember Applicant was at work that day.

Counsel testified he discussed the case with both witnesses prior to trial and stated both witnesses testified at trial as he expected them to. Counsel agreed these witnesses were called to create further doubt in the minds of the jurors. Counsel testified he did not believe Exhibit #49 or Exhibit #50 admitted by the State at trial were admissible as they were testimonial hearsay and argued such at trial. Counsel further testified at the evidentiary hearing he believed he had a strong argument to keep out the business records; however, the court admitted them over objection.

This Court finds Counsel's decision to call the two witnesses was a reasonable strategic decision and did not prejudice Applicant as both witnesses testimony placed Applicant at work



during the incident despite the business records suggesting otherwise. Therefore, this Court finds Applicant was not prejudiced as the jury could have reasonably found their testimony credible and shed doubt on the State's contention Applicant committed these crimes. Therefore, this allegation is **DENIED**.

3. *Failure to Address with Applicant and Make an Argument and/or Motion Regarding Double Jeopardy*

Applicant next contends Counsel provided ineffective assistance of counsel for failing to discuss double jeopardy with him, and further for failing to make a double jeopardy argument. This Court disagrees.

The "Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction, and protects against multiple punishments for the same offense." *State v. Brandt*, 393 S.C. 526, 538, 713 S.E.2d 591, 597 (2011) (quoting *Stevenson v. State*, 335 S.C. 193, 198, 516 S.E.2d 434, 436 (1999)). In *Blockburger v. United States*, the United States Supreme Court clarified "[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. 299, 304 (1932). In other words, "*a single act may be an offense against two statutes*; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." *Id.* (emphasis added); accord. *State v. Moyd*, 321 S.C. 256, 258, 468 S.E.2d 7, 9 (Ct. App. 1996) ("A defendant may be severally indicted and punished for separate offenses without being placed in double jeopardy *where a single act consists of two 'distinct' offenses.*") (emphasis added).

As an initial matter, this Court finds Applicant's claim regarding an alleged double jeopardy fails as a matter of law because entering a bank with the intent to steal and armed robbery are clearly involve distinct elements. *Compare* S.C. Code Ann. § 16-11-330 (A) (A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony . . .”), *with* S.C. Code Ann. § 16-11-380 (A) (“It is unlawful for a person to enter a building or part of a building occupied as a bank, depository, or building and loan association with intent to steal money, securities for money, or property, either by force, intimidation, or threats.”).

At the PCR hearing, Applicant testified Counsel never discussed with whether the entering a bank with the intent to steal and armed robbery are considered two separate offenses. Applicant further stated that, by charging him with both entering a bank with the intent to steal and armed robbery, the State was “punishing [him] twice for the same crime.” Applicant further stated Counsel “should have told the judge that they should be able to select one or the other instead of trying [him] for both of them.”

Applicant cited *State v. Greene* in support of his contention that he was subjected to double jeopardy and Counsel was consequently ineffective for failing to raise the issue at or before trial. 423 S.C. 263, 814 S.E.2d 496 (2018). In *Greene*, the defendant was charged, convicted, and sentenced for both homicide by child abuse and involuntary manslaughter for the death of her infant daughter. Our Supreme Court ultimately affirmed the homicide by child abuse conviction and sentence but vacated the involuntary manslaughter conviction and sentence. Specifically, the Court noted the well-established principle that “[m]ultiple offenses, including multiple homicide



offenses, may be prosecuted in a single trial, but principles inherent in double jeopardy and due process preclude multiple punishments for the same offense.” *Id.* at 279, 814 S.E.2d at 505. The Court found that, while the legislature “has manifestly authorized multiple homicide charges for a single homicide,” it found “no expression of legislative intent authorizing multiple homicide *punishments* for a single homicide committed by a single defendant. *Id.* at 280, 814 S.E.2d at 505. Accordingly, the Court stated it would follow the prevailing rule that “one homicide is limited to one homicide punishment per defendant.” *Id.*

This Court finds *Greene* is inapplicable here because it’s holding is expressly limited to homicide offenses and punishments.¹³ *See also Basham v. United States*, 109 F. Supp. 3d 753, 776 (D.S.C. 2013) (noting that “[i]t is axiomatic that if the claim or claims that counsel failed to raise are devoid of legal merit, a defendant suffers no prejudice and cannot establish a claim of ineffective assistance of counsel” (citing *Strickland*, 466 U.S. at 687)), *aff’d*, 789 F.3d 358 (4th Cir. 2015). Further, even if *Greene* was comparable to Applicant’s case, it was decided well after Applicant’s trial. It is well-established that the *Strickland* standard does not require counsel to be clairvoyant or anticipate changes in the law. *See, e.g., Thornes v. State*, 310 S.C. 306, 309–10, 426 S.E.2d 764, 765 (1993) (noting that “[t]his Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial”); *Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (noting that “[t]his Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law”); *accord. Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995) (“[T]he case law is clear that an attorney’s assistance is not rendered ineffective because he

¹³ Notably, the Court specified that it was overruling *State v. Easler*, 327 S.C. 121, 489 S.E.2d 617 (1997) only “to the extent it authorizes multiple *homicide* punishments involving only one *homicide*.” *Greene*, 423 S.C. at 283, 814 S.E.2d at 507 (emphasis added).

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failed to anticipate a new rule of law.”). Accordingly, Applicant’s request for relief by way of this allegation is **DENIED**.

4. *Failure to Challenge the Alleged Burden-Shifting Statements Made by the Trial Judge in His Preliminary and Closing Remarks to the Jury*

Applicant next contends Counsel was ineffective for failing to challenge or object to two statements made by the trial judge, which Applicant characterizes as prohibited and improperly burden-shifting. Specifically, Applicant claims the trial judge’s opening remarks regarding a trial being a “search for the truth in an effort to make sure that justice is done between the parties” and the trial judge’s comment in his closing remarks that “both the State and Defendant get a fair and impartial trial” both improperly diluted or shifted the burden of proving guilt beyond a reasonable doubt. This Court disagrees.

On this precise issue, our Supreme Court had cautioned by the time of Applicant’s trial that “[j]ury instructions on reasonable doubt which charge the jury to ‘seek the truth’ are disfavored because they ‘[run] the risk of unconstitutionally shifting the burden of proof to the defendant.’” *State v. Aleksey*, 343 S.C. 20, 26–27, 538 S.E.2d 248, 251 (2000) (emphasis added). However, the *Aleksey* court went on to hold that because the “truth-seeking” instruction in that case was “given in the context of the jury’s role in determining the credibility of witnesses” there was “not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt.” *Id.* at 28–29, 538 S.E.2d at 252. That court cautioned the circuit courts to abandon the truth-seeking language in future charges, but held that the instruction as a whole in that case was a correct statement of law and found no basis for reversal on that ground. *Id.*

A more recent opinion, *State v. Beaty*, revisited the *Aleksey* decision and held that a preliminary instruction using the phrases “search for the truth,” “true facts,” and “just verdict”



were delivered in error but caused no prejudice warranting reversal where the instruction appeared in the preliminary remarks to the jury and, again, did not speak to the State's burden of proof. 423 S.C. 26, 33, 813 S.E.2d 502, 506 (2018). In that case—decided after Applicant's trial—the Court instructed trial judges to avoid these terms but agreed with the trial judge that “the disputed comments can be distinguished from *Aleksey* because they were a mere statement to the jury and not a charge on the law. Further, the remarks were not linked to either the reasonable doubt or the circumstantial evidence charges as was condemned in *Aleksey*.” *Id.* at 34, 813 S.E.2d at 506. The Court found the comments were harmless error because, based on a review of the entire trial record and the full opening comments to the jury, there was no prejudice sufficient to warrant reversal. *Id.*

Here, the trial judge presented preliminary remarks at the outset of trial that were nearly identical to those given in *Beaty*. The “search for the truth” language was given in an effort to explain the trial process and its importance to the jury. (R. 90–98). As his remarks continued, the trial judge instructed the jurors the State had the burden of proving Applicant's guilt beyond a reasonable doubt and specifically informed the jurors it was their duty “to decide whether the State has met that burden.” (R. 92). *See generally Moore v. State*, 283 Ga. 151, 155, 656 S.E.2d 796, 801 (Ga. 2008) (“[T]he pattern charge's mention of jurors ‘seeking the truth’ does not . . . dilute or cause confusion over the State's burden of proof and the role of the jury by suggesting that the jurors embark on ‘their own intuitive search for the truth.’ In criminal cases, the factfinder does have the task of seeking the truth. But, the jury is to determine the truth in view of the evidence, considered in light of the court's instructions. The court's instructions properly focused the jurors on their consideration of the evidence presented at trial.” (citations omitted)). Thereafter, at the conclusion of trial several days later, the trial judge fully and accurately instructed the jury on the

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applicable law through his jury charge; reiterated to the jury Applicant was “ways presumed innocent;” emphasized repeatedly that the burden is on the State to prove Applicant’s guilty beyond a reasonable doubt; that Applicant had no burden to prove alibi; and thoroughly defined reasonable doubt for the jury. (R. 538, 539, 540, 541, 544, 546, 547, 548, 549, 550).

This Court therefore finds that the limited nature of the “search for truth” comment and remark regarding the State and Defendant both being entitled to a fair and impartial trial imparted no duty upon Counsel to object in light of the *Aleksey* decision, which existed at the time of trial, and the failure to object to this limited phrase did not render Counsel’s performance deficient. Further, even if those two statements were considered improper such that Counsel was deficient for failing to object, our Supreme Court has refused to reverse a conviction where the instructions as a whole properly informed the fact-finders that a criminal defendant is presumed innocent unless the State is able to prove his guilt beyond a reasonable doubt. *Aleksey*, 343 S.C. at 26–27, 538 S.E.2d at 251; *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012). Accordingly, Applicant’s request for relief by way of this allegation is **DENIED**.

5. *Failure to Request the Trial Judge Question the Jurors Individually on Matters involving Witness Intimidation.*

Finally, Applicant contends Counsel was ineffective for failing to request the trial court question the jurors individually about witness intimidation rather than as a group. This Court disagrees, and finds Applicant failed to meet his burden in this regard. Counsel testified that he did not have a concern with the procedure utilized and Applicant has failed to show any resulting prejudice from the failure to question the jurors individually. Accordingly, Applicant’s request for relief by way of this allegation is **DENIED**.

VI. Conclusion

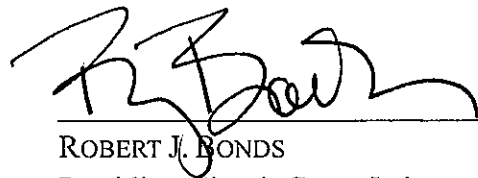
Based on all the foregoing, this Court finds Applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief is **denied and dismissed with prejudice.**

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has the right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

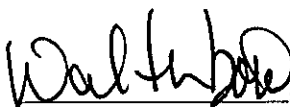
IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of the State.

AND IT IS SO ORDERED this 3 day of Oct, 2022.



ROBERT J. BONDS
Presiding Circuit Court Judge
First Judicial Circuit

, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

Tyrone D. Ellison, 324947,

☒ Plaintiff

v.

State Of South Carolina

☐ Defendant.

IN THE COURT OF COMMON PLEAS

OCT 28 PM 2:38

CASE NO.
2016-CP-18-0017

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

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Defendant's Attorney:
Sammie Weidauer, Bar No.
Address:
PO Box 11549
Columbia, SC 29211
phone: 803-734-3737 fax: 803-734-4113
e-mail: other:

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

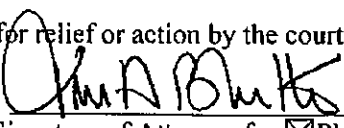
Nature of Motion: Rule 59, SCRPC

Estimated Time Needed: 1 hour Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☒ Plaintiff / ☐ Defendant

October 25, 2022

Date submitted

SECTION III: Motion Fee

- ☐ PAID - AMOUNT:
☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by: _____

Date Filed:

- ☐ MOTION FEE COLLECTED: _____
☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
)
Tyrone D. Ellison, #324947,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

2016-CP-18-0017

MOTION PURSUANT TO
RULE 59(a) & (e)

2017 OCT 28 PM 2:38

Pursuant to Rule 59 (a) and (e) of the South Carolina Rules of Civil Procedure,
Applicant would move before this Court for relief as follows.

This matter comes before the Court pursuant to an Application for Post
Conviction Relief filed on January 7, 2016. The State filed a Return on July 12, 2016. On
February 27, 2018, Tricia A. Blanchette, Esquire, was substituted in as Applicant's
counsel.

On January 11, 2018, Applicant, through counsel, filed an Application for Post
Conviction Relief docketed at 2018-CP-18-47 in Dorchester County. This Application
addresses Applicant's convictions following a trial on October 20-24, 2014 (Indictment
No. 2013-GS-18-1271, 2014-GS-18-325).

On May 8, 2018, Applicant, through counsel, filed a Motion for Consolidation
and Discovery. A motion hearing was conducted at the Dorchester County Courthouse on
July 12, 2018 in front of the Honorable Robin B. Stilwell. Applicant was present and
represented by Tricia A. Blanchette, Esquire. Respondent was represented by Christian
Saville, Assistant Attorney General. On July 23, 2018, an Order for Consolidation and
Discovery was issued, which was filed on July 26, 2018.

On July 26, 2021, Applicant, through counsel, amended his Application, as
follows:

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 let 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.

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 there is a reasonable probability that, but for counsel's errors, applicant would not have pled guilty and insisted on going to trial. *See 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). Additionally, Applicant submits that these allegations as addressed at a consolidated evidentiary hearing will show a complete breakdown in the adversarial process. *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. Applicant 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. In response, Applicant's counsel requested time to obtain the evidentiary hearing transcript before submitting a proposed Order. Both parties submitted a proposed

Order, and the Court issued an Order of Dismissal on September 19, 2022, which was filed on October 5, 2022 and entered on October 6, 2022. Applicant, through counsel, received written notice of the entry of the Order on October 17, 2022, from which this Motion timely follows.

ARGUMENT

In *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007), the South Carolina Supreme Court made it clear that a post-conviction relief judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. *See also* S.C. Code Ann. § 17-27-80. Therefore, Applicant would respectfully request that the Court ensure that specific findings of fact and conclusions of law are entered on each issue raised and that the record before the Court and testimony of each witness is properly addressed in the standing Order of Dismissal ("Order"). Additionally, Applicant would respectfully ask that the Court reconsider the Order and find that a new trial should be granted.

As a threshold matter, Applicant would ask the Court to review the record, to include the evidentiary hearing transcript and exhibits, and ensure the accuracy and completeness of the standing Order and/or reconsider the denial of relief. Applicant would also ask the Court to reconsider the facts, reasonings and findings set forth in the Applicant's proposed Order, which is attached herein and incorporated by reference, and grant relief.

Specifically, Applicant would also submit the following in support of this Motion:

The section entitled “Testimony Presented at the Evidentiary Hearing” fails to give citations to the transcript from the evidentiary hearing despite direct quotations being utilized as evidenced by quotation marks. Applicant urges this Court to reference and review the proposed Order Granting Application for Post Conviction Relief, which properly reflects the testimony offered at the consolidated hearing and gives citations to the record for the same. Applicant submits that the summary of the testimony in the standing Order is incomplete and does not properly cite to the record.

Turning to the section entitled “Findings of Fact & Conclusions of Law,” heading one fails to properly reflect the issues listed as two and three in Applicant’s Amendment and listed above. In the discussion of the merged issue, the Order fails to properly address and/or improperly excuses counsel’s admission that he did not review the evidence with Applicant prior to the entry of his guilty plea as is addressed in Applicant’s proposed Order. PCR pp. 121, 141-142, 144. It appears the Order focuses on the thoroughness of the colloquy conducted by the plea court instead of the matter of counsel’s deficient performance.

In *Hill v. Lockhart*, 474 U.S. 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 as was discussed in *Missouri v. Frye*, 132 S. Ct. 1399, 1405-06 (2012), as follows:

Hill established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in Strickland. See *Hill, supra*, at 57, 106 S. Ct. 366, 88 L. Ed. 2d 203. As noted above, in *Frye*’s case, the Missouri Court of Appeals, applying the two part test of Strickland, determined first that defense counsel had been ineffective and second that there was resulting prejudice.

In *Hill*, the decision turned on the second part of the test. There, a defendant who had entered a guilty plea claimed his counsel had misinformed him of the amount of time he would have to serve before he became eligible for parole. But the defendant had not alleged that, even if adequate advice and assistance had been given, he would have elected to plead not guilty and proceed to trial. Thus, the Court found that no prejudice from the inadequate advice had been shown or alleged. *Hill, supra*, at 60, 106 S. Ct. 366, 88 L. Ed. 2d 203.

In *Padilla*, the Court again 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. It also rejected the argument made by petitioner in this case that a knowing and voluntary plea supersedes errors by defense counsel. Cf. Brief for Respondent in *Padilla v. Kentucky*, O. T. 2009, No. 08-651, p. 27 (arguing Sixth Amendment's assurance of effective assistance "does not extend to collateral aspects of the prosecution" because "knowledge of the consequences that are collateral to the guilty plea is not a prerequisite to the entry of a knowing and intelligent plea").

As discussed by the Supreme Court of the United States in *Missouri v. Frye*, Applicant asks the Court to reconsider the findings that seem to hold that a voluntary plea supersedes admitted deficiencies by counsel, such as failing to review the evidence. Here counsel's failure's prejudiced Applicant and led to a complete breakdown of the adversarial process.

Additionally, Applicant submits that the Order is in error in finding counsel's testimony credible that the case was not set for trial. This finding is in conflict with the record, which is addressed in Applicant's proposed Order.

Applicant's Exhibit 6, Plea pp. 8-9.

Finally, Applicant submits the proposed Order does not properly address how counsel's performance in Applicant's trial impacted the entry of his guilty plea.¹ Despite listing Applicant's claim in a bolded headed, the Order fails to address the claim as stated above and launches into a denial pursuant to *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984). Therefore, Applicant submits that the Order lacks proper findings of fact and conclusions of law on the issue as alleged via Amendment and at the evidentiary hearing.

Additionally, Applicant submits that Order improperly denies relief under *Cronic*.² As set forth in Applicant's proposed Order, Applicant asks this Court to consider the following:

Here, counsel appeared as if he was advocating for Applicant 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 Applicant, review the evidence, conduct an investigation, or prepare for trial. Counsel's inaction after appointment denied Applicant the opportunity to have meaningful assistance from an attorney acting in the role of an advocate to ensure a fair adversarial process.

Applicant's Proposed Order p. 26. Applicant submits that this Court erred in failing to find that prejudice is presumed under *Cronic* and Applicant's plea and sentences must be set aside.

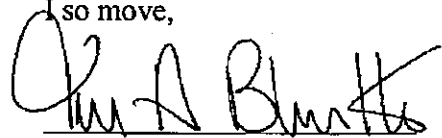
¹ At the consolidated evidentiary hearing, PCR counsel explained how this issue intertwined the two PCR Applications at issue in the consolidated evidentiary hearing (2016-CP-18-0017 & 2018-CP-18-00047). PCR pp. 8-9. As stated, the Order fails to make proper findings of fact and conclusions of law on this issue. The only discussion, which is imbedded in the Court's discussion of *Cronic*, states: "This Court further finds that any prior representation of Counsel was non-prejudicial to Applicant's decision to plead guilty." Order p. 19.

² Pursuant to *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007) and *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019), Applicant submits that if this Court fails to properly address this issue the matter of relief in the form of a remand will have to be raised on appeal.

CONCLUSION

In conclusion, Applicant would request 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.

I so move,

A handwritten signature in black ink, appearing to read "Tricia A. Blanchette", written over a horizontal line.

Tricia A. Blanchette
Attorney for Applicant
PO Box 2147
Leesville, SC 29070

October 25, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
	)	
Tyrone D. Ellison, #324947,	)	2016-CP-18-0017
Applicant,	)	
v.	)	
	)	ORDER GRANTING APPLICATION
State of South Carolina,	)	FOR POST CONVICTION RELIEF
<u>Respondent.</u>	)	

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on January 7, 2016. The State filed a Return on July 12, 2016. On February 27, 2018, Tricia A. Blanchette, Esquire, was substituted in as Applicant's counsel.

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GENERAL SESSIONS PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Dorchester County Clerk of Court. Applicant 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), two 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. Applicant was also indicted by the Dorchester County Grand 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). These indictments stemmed from Applicant's trial that was conducted on October 20-24, 2014.

On August 12, 2015, Applicant entered a negotiated guilty plea in front of the Honorable Edgar W. Dickson at the Dorchester County Courthouse. Applicant was represented by James K. Falk, Esquire. Assistant Solicitors Don Sorenson and Phil Giese represented the State. Applicant was sentenced as follows: time served for failure to stop for a blue light (2013-GS-18-1267), thirty years for entering a bank, depository, or building and loan association with intent to steal (2013-GS-18-1268), ten years for each count of hit and run involving great bodily injury (2013-GS-18-1354, 1355), thirty years for armed robbery (2013-GS-18-1813), time served for attempting to influence court officials, jurors or witnesses (2015-GS-18-0024)¹, ten years for obstructing justice (2015-

¹ This charge was pled down from intimidation of court officials, jurors or witnesses.

GS-18-0025), and five years for criminal conspiracy (2015-GS-18-0026). All sentences were ordered to run concurrently. Applicant did not appeal his plea or sentences.

SUMMARY OF THE EVIDENTIARY HEARING TRANSCRIPT

At the evidentiary hearing, Applicant took the stand and called James K. Falk, Esquire, to the stand. When Applicant took the stand, he acknowledged the filing of the instant PCR Application, the allegations and requested relief. PCR pp. 27-30. He also acknowledged the Order allowing for consolidation of the evidentiary hearing with his other PCR Application (Docket No. 2018-CP-18-0047). PCR p. 31.

This Court will address the entirety of the testimony offered in the consolidated hearing since Attorney Falk represented Applicant at his trial prior and guilty plea. Furthermore, the plea offers made and discovery received related to both sets of charges, and Applicant has raised claims that incorporate counsel's performance prior to and at his trial.

Applicant testified that he originally retained Tommy Bolus, Esquire, to represent him and Attorney Bolus obtained a DNA expert (Dr. Bennett). PCR p. 31-32. Applicant identified and admitted a Motion for Bond Reduction that was filed by Attorney Bolus. PCR pp. 32-33. 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 PCR p. 33, lns. 14-25.

Applicant identified and counsel admitted Applicant's Exhibit 2, which contained email communications from Attorney Sorenson formerly of the Solicitor's Office regarding a plea offer. PCR pp. 35-36. He confirmed that the plea offer was dated May

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

15, 2014 and the terms were a sentence of twenty-five to thirty years on two counts of entering a back with intent to steal, failure to stop for blue light, and two counts of leaving a scene with great bodily injury and dismissal of the two counts of armed robbery. PCR pp. 35-36. He also acknowledged that the email stated that Attorney Sorenson indicated that he would agree to a negotiated term of twenty-seven years. PCR p. 36. He testified that the plea offer was communicated to him, but he informed Attorney Bolus that he did not want to accept until he saw Dr. Bennett's results. PCR p. 36.

After counsel referenced the transcript from the proceeding held in front of Judge McMahon on August 4, 2014, Applicant testified that it was his understanding that he was going to trial that day, but a motion was conducted regarding Dr. Bennett. App. pp. 36-37. Following 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." PCR p. 37, lns. 5-8. He testified that he fired Attorney Bolus that same day and retained Attorney Falk. PCR p. 37.

Prior to trial, he recalled meeting with Attorney Falk one time at the detention center. PCR p. 39. He did not recall discussing the information contained in the Motion for Bond Reduction or the strength of either parties case with counsel. PCR p. 40. He also did not recall reviewing the discovery, specifically, the contents of the two cds admitted as Applicant's 4 & 5. PCR pp. 41-42. Applicant acknowledged that he had reviewed the contents of both cds with PCR counsel. PCR p. 43.

Regarding the interview of his mother by Detective Repman, he testified that he was unaware and not advised by counsel about the identification made by his mother. PCR p. 43. 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. PCR pp. 43-44. He testified that Mr. Falk did not advise him that his mother was on either recording before calling her to the stand as a defense witness. PCR pp. 44-45. When asked about the cross-examination of his mother, Applicant testified that he was not aware that should be subjected to cross-examination on the contents of the recorded interviews and phone calls. PCR pp. 46-47.³ He testified that if Attorney Falk had just talked with him about the contents of the two cds, he would have been talking to him about pursuing a plea deal. PCR p. 47. He explained that he would have wanted to discuss a plea deal because it “would be in my best interest.” PCR p. 47, lns. 21-22. He also 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. PCR pp. 47-48.

Turning to Dr. Bennett, he explained that he thought that Dr. Bennett “was basically going to go against what SLED was saying because he didn’t get the same results.” PCR p. 48, lns. 4-10. He affirmed that he thought Dr. Bennett was going to be a positive witness and create a “battle” between the DNA experts and/or cause the DNA to not be used. PCR pp. 48-49. 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 therein with him before trial. PCR pp. 49-50. As to Dr. Bennett’s findings discussed in the testimony, he again testified 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

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. PCR pp. 80-82.

did not have an issue with their work. PCR pp. 51-53.⁴ When asked about the State's summary of Dr. Bennett's testimony and the court's ruling, Applicant testified that if counsel would have informed him properly it would have changed the outcome. 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." PCR p. 54, 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. PCR p. 55.

When asked about the remaining defense witnesses, he testified that counsel did not discuss the witnesses with counsel and his mother was responsible for getting them to the trial, which came out during their trial testimony. PCR p. 57. As to Chunte 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. PCR p. 58. Regarding Ms. Payne, Applicant testified that he was not advised about her criminal history, which the State asked her about at trial. PCR p. 58. He also testified that he was unaware prior to trial that the State had records and a witness to refute the testimony offered by his witnesses that he was at work on the day in question. PCR p. 59. 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

⁴ On cross-examination, Applicant 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." PCR p. 85, lns. 14-22.

about the issues with his alibi and witnesses, he would not have wanted the witnesses called, alibi presented nor proceeded to trial. PCR pp. 59-60. He affirmed that he was relying upon counsel to advise him regarding the strength/weakness of the case and to be prepared for trial. PCR p. 60. He testified that if he had been properly advised, he would have wanted to pursue a guilty plea. PCR p. 60.

Turning to the double jeopardy issue set forth in his Amendment, Applicant explained that he thought counsel should have argued 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.” PCR p. 61, Ins. 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. PCR p. 62.

Regarding the issue of counsel’s failure to object to burden shifting statements by the court and the State, he testified that he had reviewed the relevant case and he was alleging that his attorney should have objected. PCR p. 63.

As to the issue involving the questioning of the jury, he explained the he was alleging that counsel should have requested that each juror be questioned individually instead of as a group. PCR p. 64. He explained his concern with the procedure utilized. PCR p. 64, Ins. 19-24, pp. 92-93. He also agreed that their individual answers were not reviewed on appeal since the jurors only answered collectively as a group. PCR pp. 64-65.

Turning to the time following trial and prior to his plea, Applicant testified that he did not have a discussion with Attorney Falk regarding his remaining charges nor did he come see him at McCormick. PCR pp. 66-68. He recalled being transferred to Dorchester

County, and counsel informing him about the plea offer for a negotiated thirty years. PCR p. 67. 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. PCR pp. 68, 97, 99. When asked to explain, Applicant 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." PCR p. 68, ln. 23 – p. 69, 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. PCR pp. 73-74, 94-95. On cross-examination, he testified that he was up for trial if he did not accept the plea. PCR pp. 95-96.

After referencing the portion of the transcript where he informed the plea court that he was not satisfied with counsel, PCR counsel asked him about going forward with the plea, and Applicant responded: "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." PCR p. 69, ln. 7 – 4, p. 98-99, Plea pp. 6-9. Applicant also agreed that what happened at his trial factored into his decision to enter a guilty plea. PCR p. 70, 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." PCR pp. 70, 101. 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." PCR p. 100, 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. PCR p. 71. He agreed that the damage had been done from the trial. PCR P. 71.

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. PCR pp. 104-105. He recalled being retained by Applicant's mother about five weeks before trial with an understanding that the case was set for trial. PCR pp. 105, 123-124. He recalled obtaining the file from Mr. Bolus and reviewing the Rule Five materials, but he clarified: "I did not review all of the jail tapes." PCR p. 106, lns. 3-13. Specifically, he admitted that he did not review the call between Applicant's mother and inmate Keitt that was previously admitted into the record. PCR p. 106. He recalled reviewing Applicant's mother's recorded interview with law enforcement and believed that he discussed it with her and Applicant. PCR p. 107. He explained that he would have still called Applicant's mother to the stand if he reviewed the phone call, but he would not have addressed the matter of a financial incentive. PCR pp. 107-108.

On cross-examination, he testified that the phone call was "not great" for the case. PCR p. 129, lns. 22-23. He also testified that that it was a "good identity case." PCR p. 125, lns. 8-14. When asked about the State questioning Applicant's mother about her identification of Applicant during her interview, he explained how he tried to "explain why she may have been flustered and made a bad identification." PCR p. 130, lns. 4-13.

During cross-examination, he also referenced the stack of cds on the table of Applicant's counsel and testified that he did not have a "stack of videos that high." PCR p. 126, lns. 13-24. Later, a stipulation was entered that the CDs on the table referenced

totaled fifty-eight. PCR p. 146, 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 your 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.

PCR p. 147, ln. 14 – p. 148, 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." PCR p. 108, lns. 9-14.⁵ He testified that he discussed a defensive strategy with Applicant 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.

PCR p. 108, lns. 19-25. In response to his assessment of the likelihood of success at trial, he responded that he thought there was room for doubt, and he added that Applicant and his mother were not looking for "somebody else to come in and get another plea agreement." PCR p. 109, lns. 1-9. He agreed that he did not engage in any plea negotiations prior to trial. PCR p. 109. 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. PCR p. 109.

⁵ On cross-examination, he questioned if he or Mr. Bolus had all the discovery materials obtained by Applicant's counsel. PCR pp. 126-127.

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 involving Dr. Bennett. PCR pp. 109-110. 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. PCR p. 110, lns. 6-19. He further explained that he was trying to get a spoliation charge, and he did not think suppression was possible. PCR p. 110, ln. 25 – p. 111, ln. 6. He added that he was "trying to get the jury mad at the State's investigation." ⁶ PCR p. 111, lns. 6-7. He could not recall if he advised Applicant about the likelihood of the evidence being suppressed, and he responded that he did not know if he discussed trying to get a spoliation charge with him. PCR p. 112.

Regarding the alibi witnesses, he recalled speaking to them on the phone. PCR p. 114. He recalled advising Applicant that an alibi would be helpful and would create a doubt for the jury. PCR pp. 114-115, 133. He believed he knew about the witness's criminal record and the corporate records and still believed that they needed an alibi. PCR pp. 115-116. On cross-examination, he explained why he thought the records were testimonial hearsay. PCR pp. 134-136.

When counsel was asked if he discussed the pros and cons of trial with Applicant and the possible defenses, he responded that he was hired with the plan to go to trial, and it was "no surprise that the trial was going to be called on the day it was called." PCR p.

⁶ On cross-examination, he testified that he was utilizing Dr. Bennett to try to create a doubt. PCR pp. 130-131. 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." PCR p. 131, lns. 17-21.

113, 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.” PCR p. 113, lns. 17-22.

Thereafter, he was asked about the double jeopardy argument raised by Applicant, and he responded: “Man, I am embarrassed. No, I did not see that issue.” He further responded that he had not researched it and was not prepared to answer about the strength of the issue. PCR p. 117. But, 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. PCR p. 117. 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. PCR p. 137, lns. 8-16.

Regarding the allegation that he failed to object to the “search for the truth” language, he testified that he was familiar with the *Beaty*⁷ case but not with *State v. Daniels*⁸ decided in 2012. PCR pp. 117-118. He explained that he was not aware of an objection that could be entered at the time of trial, and he noted that the court used the standard language he had been hearing for “so long.” PCR p. 118, lns. 3-9. On cross-examination, he testified that he has raised a similar allegation numerous times in the PCR cases he has handled post-*Beaty*, but he did not raise it before. He added: “I mean, I know the argument’s there, and I look for it now. I did not know it then.” PCR p. 138, lns. 2-3.

⁷ *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018).

⁸ *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012).

Turning to Applicant's allegations that counsel failed to ensure that the jurors were individually questioned regarding the juror intimidation matter, counsel recalled moving for a mistrial. PCR p. 118. When asked about the procedure utilized to question the jurors, he responded that he did not see an issue with the procedure utilized and did not anticipate that the jurors would have responded differently if individually questioned. PCR pp. 118-119.

Regarding his representation that culminated in Applicant's guilty plea, Attorney Falk recalled being appointed to represent Applicant on his remaining charges. PCR p. 119. He recalled receiving the plea offer for a negotiated thirty years, and he recalled it was the only offer received. PCR pp. 119-120. He further recalled Applicant being transported to Dorchester County Courthouse to discuss the plea offer shortly after he was appointed. PCR p. 120.

When asked what he discussed with Applicant during the meeting at the courthouse, he recalled advising Applicant that the thirty-year offer "made sense" due to his pending appeal following his trial. PCR p. 120, 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." PCR p. 120, lns. 22-24. Regarding whether he advised Applicant 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." PCR p. 121, lns. 4-7. On cross-examination, he recalled Applicant's initial reaction to the plea was that Applicant "pushed back." PCR p. 142, lns. 11-15. Later he explained that the pushback from Applicant was due to him not reviewing the evidence as Applicant referenced during the plea. PCR p. 144.

Turning to his review of the evidence with Applicant, he explained that he did not review the evidence with Applicant, but he thought Applicant knew both cases “pretty well” from the period of time when Attorney Bolus represented him. PCR P. 121. He did recall reviewing the video with Applicant in the courtroom, and he reviewed “some of the videos, all of the police reports” without Applicant. PCR p. 121, lns. 15-21. When asked on cross-examination if he had already discussed the case with Applicant as a result of 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.” PCR p. 141, ln. 25 – p. 142, 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.

PCR p. 122, lns. 1-12. He ended his direct examination by saying, “If he didn’t want to plea, he wouldn’t have pled.” PCR p. 123, lns. 1-2. On cross-examination, he recalled that Applicant had to make a decision about the plea that day, but it was absolutely not true that the case was scheduled for trial. PCR p. 142, lns. 20-25. He also did not recall there being any discussion of the plea coming of the table if Applicant did

not plea that day. PCR p. 143, 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."

PCR p. 145, ln. 25 – p. 146, ln. 1.

On redirect, he reviewed the plea offer and agreed that the plea offer expired the day after Applicant's plea was entered. PCR p. 149. When asked to review the transcript and the court's comments that the case was going to trial if Applicant 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. PCR pp. 149-150, Plea pp. 8-9.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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, the 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.⁹ See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the

⁹ 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).

assistance provided by counsel, "There is a strong presumption that counsel rendered adequate assistance and 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.

In *Hill*, 474 US 52, 106 S.Ct. 366 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 as was discussed in *Missouri v. Frye*, 132 S. Ct. 1399, 1405-06 (2012), as follows:

Hill established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*. See *Hill, supra*, at 57, 106 S. Ct. 366, 88 L. Ed. 2d 203. As noted above, in *Frye's* case, the Missouri Court of Appeals, applying the two part test of *Strickland*, determined first that defense counsel had been ineffective and second that there was resulting prejudice.

In *Hill*, the decision turned on the second part of the test. There, a defendant who had entered a guilty plea claimed his counsel had misinformed him of the amount of time he would have to serve before he became eligible for parole. But the defendant had not alleged that, even if adequate advice and assistance had been given, he would have elected to plead not guilty and proceed to trial. Thus, the Court found that no prejudice from the inadequate advice had been shown or alleged. *Hill, supra*, at 60, 106 S. Ct. 366, 88 L. Ed. 2d 203.

In *Padilla*, the Court again 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. It also rejected the argument made by petitioner in this case that a knowing and voluntary plea supersedes errors by defense counsel. Cf. Brief for Respondent in *Padilla v. Kentucky*, O. T. 2009, No. 08-651, p. 27 (arguing Sixth Amendment's assurance of effective assistance "does not extend to collateral aspects of the prosecution" because "knowledge of the consequences that are collateral to the guilty plea is not a prerequisite to the entry of a knowing and intelligent plea").

"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); *See Moorehead v. State*, 496 S.E.2d 415 (1998).¹⁰ "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).

¹⁰ In *Moorehead v. State*, 496 S.E.2d 415 (1998), the South Carolina Supreme Court reversed the lower court's grant of PCR relief. At the evidentiary hearing, Moorehead testified that he entered his guilty plea because counsel advised him he would receive probation. Counsel did not agree with this assertion by Moorehead. *Id.* at 416. In reversing the lower court's finding that counsel misadvised Moorehead and relief was warranted, the Supreme Court reasoned that Moorehead's responses that he had not been promised anything and the plea judges statements regarding the plea negotiations did not support the granting of relief. *Id.* at 416-717.

By way of the Amendment and at the evidentiary hearing, Applicant has also submitted 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. Cronin*, 466 U.S. 648, 104 S.Ct. 2039 (1984). In *United States v. Cronin*, 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....” *Cronin*, 466 U.S. 648, 659-61.

When a systemic failure occurs in any of the three ways mentioned in *Cronin*, prejudice is presumed. First, when a defendant is “denied counsel at a critical stage,” prejudice is presumed. *Cronin*, 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. *Cronin* at 659-660, 104 S.Ct. 2047.

By way of the Amendment and at the evidentiary hearing, Applicant has 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.¹¹

As is addressed in the Order Granting Application for Post Conviction Relief on Case No. 2018-CP-18-0047, this Court has found that counsel failed to effectively represent Applicant prior to and at his trial on October 20-24, 2016, and this Court incorporates said Order and the findings therein hereby reference. This Court finds that the record supports Applicant's claim that counsel's ineffective representation prior to and at his trial was a primary contributing factor to the entry of his guilty plea. When addressing his negotiations regarding the plea, counsel admitted that the plea was the best option due to the prior trial. PCR p. 122. This Court finds that counsel's ineffective

¹¹ Regarding this issue, it appears counsel received a written offer, Applicant was transported to the courthouse, and the offer was communicated to Applicant. Counsel admitted that negotiations and/or options were limited by the outcome of Applicant's trial. PCR p. 122. As is held herein, this Court finds that counsel's overall deficient performance failed to make the adversarial process work, which encompasses this allegation.

assistance on his representation of Applicant as a whole directly contributed to the entry of Applicant's guilty plea, which must be set aside.

Furthermore, the record establishes that counsel failed to properly prepare with Applicant for a trial prior to the entry of his guilty plea, which was a matter Applicant attempted to address with the plea court. In contrast to his statements to the court at the guilty plea, counsel testified before this Court that he did not review all the evidence himself nor review it with Applicant prior to the entry of the guilty plea. Plea p. 3, PCR pp. 121, 141-142, 144. At the evidentiary hearing, he admitted that Applicant 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 Applicant tried to address his concern about not reviewing the evidence prior to his plea with the court. Plea pp. 8-9, PCR p. 142, lns. 11-15.

It appears counsel attempted to excuse his lack of preparation when he testified repeatedly that Applicant was not facing a trial if he did not plea that day nor was the plea coming off the table. PCR pp. 122-123, 142-143, 145, 149-150. When asked about the plea offer sheet with an expiration date of the following date and the court's statement to Applicant during the plea, counsel continued to standby his position that Applicant was not facing a trial if he did not plead guilty on August 12, 2015. Based upon the record, this Court does not agree with counsel's position.

At the plea, Applicant voiced his concerns with counsel only meeting with him on that day and not reviewing the evidence with him, and Applicant explained that the plea seemed to be his safest option since "they are saying it's either this or trial." Plea p. 8, 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?

Applicant: Yes, sir.

Court: Are you in fact guilty of these charges.

Applicant: I am pleading guilty here, yes, sir.

Plea p. 8, ln. 15 – p. 9, ln. 10. Clearly, the plea court affirmed Applicant's understanding that he was facing trial if he did not plea, which stands in contrast to counsel's testimony at the evidentiary hearing. Additionally, the court relied upon counsel's statement that he had reviewed all the evidence when he addressed Applicant's concerns. As stated, counsel's testimony from the evidentiary hearing does not line up with what was told to the plea court. As a result, this Court finds that counsel's testimony at the evidentiary hearing regarding Applicant's options regarding plea and trial is not supported by the record and this Court is highly concerned that the plea court was not properly informed about counsel's failure to review the evidence, properly prepare for a trial, and advise Applicant.

This Court finds counsel's conduct 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, Applicant understood and the plea court affirmed that Applicant 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 advise Applicant regarding the totality of the evidence before advising him about a guilty plea. This Court is not convinced that counsel's meeting with Applicant at the courthouse whereby he advised him of the plea offer and reviewed a video amounts to effective representation. This Court is concerned that 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, this Court finds that Applicant has established that counsel provided ineffective assistance prior to and during the entry of his guilty plea. This Court further finds that Applicant has established prejudice since counsel's ineffectiveness deprived

Applicant of the option of pursuing a trial or a joint plea with his other charges as discussed in the Order incorporated hereby reference. As Applicant stated at the plea, he was willing to enter a plea because it was his safest option when his counsel had failed to review the evidence with him. Clearly, counsel's ineffectiveness prejudiced Applicant.

This Court further finds that prejudice is presumed in this case under a *Cronic* analysis. 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." PCR p. 119, ln. 20. As addressed above, this Court finds 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 Applicant 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 Applicant, review the evidence, conduct an investigation, or prepare for trial. Counsel's inaction after appointment denied Applicant the opportunity to have meaningful assistance from an attorney acting in the role of an advocate to ensure a fair adversarial process. Therefore, this Court finds that prejudice is presumed under *Cronic* and Applicant's plea and sentences must be set aside.

CONCLUSION

As detailed above, this Court finds that Applicant has met his burden of proof as to the above addressed allegations of ineffective assistance of counsel. This Court also finds that no further issues were raised that have not been ruled upon above.

Therefore, this Court finds that the Application for Post Conviction Relief is hereby granted, as detailed above, that Applicant's plea and sentences be vacated.

Applicant shall be transferred from the custody of South Carolina Department of Corrections to the custody of Dorchester County pending the disposition of his criminal case, with normal bond proceedings.

IT IS THEREFORE ORDERED:

1. That Applicant has met his burden of proof as to his specific allegation of ineffective assistance of counsel, as detailed above;
2. That the Application for Post Conviction Relief be granted, Applicant's convictions be vacated, and Applicant be granted a new trial;
3. That Applicant be transferred from the custody of South Carolina Department of Corrections to the custody of Dorchester County pending the disposition of his criminal case, with normal bond proceedings.

AND IT IS SO ORDERED this ____ day of _____, 20____

Honorable Robert J. Bonds
Presiding Judge, First Judicial Circuit

_____, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
Tyrone D. Ellison, 324947,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

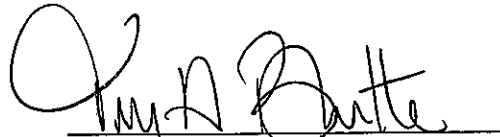
IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

2016-CP-18-0017

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that Pursuant to the Order issued by the South Carolina Supreme Court "RE: Service by E-Mail in the Trial Courts," issued on May 6, 2022, that a true copy of Motion Pursuant to Rule 59(a) & (e), SCRCP, has been served on opposing counsel this 25th day of October 2022 by sending an email to her following registered email address:

Sammie Weidauer, Assistant Attorney General
sammieweidauer@scag.gov



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STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

Tyrone D. Ellison, 324947,

☒ Plaintiff

IN THE COURT OF COMMON PLEAS

CASE NO.
2018-CP-18-0047

v.

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

State Of South Carolina

☐ Defendant.

Plaintiff's Attorney:

Tricia A. Blanchette, Bar No. 74904

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☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

SECTION I: Hearing Information

Nature of Motion: Rule 59, SCRCF

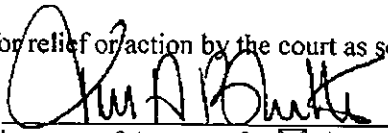
Estimated Time Needed: 1 hour Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☒ Plaintiff / ☐ Defendant

October 25, 2022

Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT:

☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support

(check reason) ☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☒ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCF)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Collected by: _____

Date Filed:

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER)	FIRST JUDICIAL CIRCUIT
Tyrone D. Ellison, #324947,)	2018-CP-18-0047
Applicant,)	
v.)	
State of South Carolina,)	MOTION PURSUANT TO
Respondent.)	RULE 59(a) & (e), SCRCF

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This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on January 11, 2018. The State submitted a Return on April 23, 2018.

On May 8, 2018, Applicant, through counsel, filed a Motion for Consolidation and Discovery, which also addressed Applicant's Post Conviction Relief Application stemming from the entry of a guilty plea (Docket No. 2016-CP-18-0017). A motion hearing was conducted at the Dorchester County Courthouse on July 12, 2018 in front of the Honorable Robin B. Stilwell. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Christian Saville, Assistant Attorney General. On July 23, 2018, an Order for Consolidation and Discovery was issued, which was filed on July 26, 2018.

On July 26, 2021, Applicant 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.
 - 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. Cronin*, 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. Applicant 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. In response, Applicant's counsel requested time to obtain the evidentiary hearing transcript before submitting a proposed Order. Both parties submitted a proposed Order, and the Court issued an Order of Dismissal on October 3, 2022, which was filed on October 5, 2022 and entered on October 6, 2022. Applicant, through counsel, received written notice of the entry of the Order on October 17, 2022, from which this Motion timely follows.

ARGUMENT

In *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007), the South Carolina Supreme Court made it clear that a post-conviction relief judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. *See also* S.C. Code Ann. § 17-27-80. Therefore, Applicant would respectfully request that the Court ensure that specific findings of fact and conclusions of law are entered on each issue raised and that the record before the Court and testimony of each witness is properly addressed in the standing Order of Dismissal ("Order"). Additionally, Applicant would respectfully ask that the Court reconsider the Order and find that a new trial should be granted.

As a threshold matter, Applicant would ask the Court to review the record, to include the evidentiary hearing transcript and exhibits, and ensure the accuracy and completeness of the standing Order and/or reconsider the denial of relief. Applicant would also ask the Court to reconsider the facts, reasonings and findings set forth in the Applicant's proposed Order, which is attached herein and incorporated by reference, and grant relief.

Applicant would also submit the following in support of this Motion:

1. Footnote one of the Order is in complete conflict with footnote one in the Order of Dismissal stemming from the PCR Application also heard at the consolidated evidentiary hearing (2016-CP-18-0017). This Order of Dismissal was signed on September 19, 2022, filed on October 5, 2022 and entered on October 6, 2022.

Footnote one of the Order is also in conflict with the Court's discussion of *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984) in the body of the Order.

Furthermore, this Court's discussion of *Cronic* under a separate heading makes it appear that a *Cronic* analysis was a standalone issue. As stated above, the Amendment included the following:

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. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984).

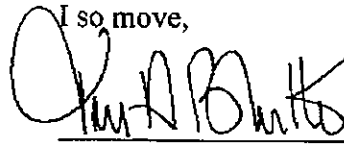
Applicant submits that he was asking the Court to address his allegations under *Strickland* and *Cronic*, which is not sufficiently done in the Order.

2. Number two, entitled "Defense Strategy," provides two sentences that appear to summarize Applicant's Issue number one listed above and sets into a discussion of each issue raised thereunder. Despite stating that Applicant alleged that counsel failed to effectively negotiate a guilty plea, this claim is absent from the discussions and findings in the Order. By way of Applicant's proposed Order, this issue is thoroughly addressed with an analysis of the applicable law. Proposed Order pp. 19-26. Additionally, Applicant's counsel made argument on this issue, with citation to legal authority, at the close of the evidentiary hearing. PCR pp. 153-155. If the Court fails to properly and completely address the allegations set forth in Issue number one and addressed at the hearing, Applicant will have to move for remand on appeal pursuant to *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007) and *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019).
3. Throughout the Order, the testimony offered at the evidentiary hearing is discussed without reference to citations from the evidentiary hearing transcript. Applicant urges this Court to reference and review the proposed Order Granting Application for Post Conviction Relief, which properly reflects the testimony offered at the consolidated hearing and gives citations to the record for the same. Applicant submits that the summary of the testimony in the standing Order is incomplete and does not properly cite to the record.
4. Under the heading "Allegation Counsel was Ineffective for Utilizing an Expert that Bolstered the State's Case and Failed to Offer an Opinion Advantageous to Applicant," the first sentence must be in error when it states: "Applicant additionally contends Counsel was ineffective for failing to utilize Dr. Bennett as an expert." This is a misstatement of Applicant's allegation and does not make sense in light of the Court's findings on the same.

CONCLUSION

In conclusion, Applicant would request 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.

October 25, 2022

I so move,


Tricia A. Blanchette
Attorney for Applicant
PO Box 2147
Leesville, SC 29070

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

Tyrone D. Ellison, 324947,)
Applicant,)

2018-CP-18-0047

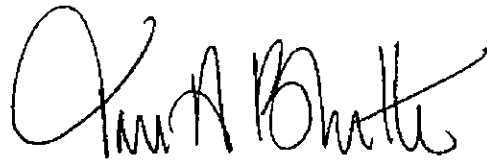
v.)

CERTIFICATE OF SERVICE

State of South Carolina,)
Respondent.)

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that Pursuant to the Order issued by the South Carolina Supreme Court "RE: Service by E-Mail in the Trial Courts," issued on May 6, 2022, that a true copy of Motion Pursuant to Rule 59(a) & (e), SCRCP, has been served on opposing counsel this 25th day of October 2022 by sending an email to her following registered email address:

Sammie Weidauer, Assistant Attorney General
sammieweidauer@scag.gov



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

2022 OCT 26 PM 2:41

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
	)	
Tyrone D. Ellison, #324947,	)	2018-CP-18-0047
Applicant,	)	
v.	)	
	)	ORDER GRANTING APPLICATION
State of South Carolina,	)	FOR POST CONVICTION RELIEF
<u>Respondent.</u>	)	

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GENERAL SESSIONS PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Dorchester County Clerk of Court. Applicant 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). Applicant 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, Applicant 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. Applicant was represented by Michael Tommy Bolus, Esquire. Respondent was represented by Don Sorenson, Esquire, and Phil Giese, Esquire, of the First Circuit Solicitor's Office. After hearing a pre-trial matter regarding DNA, the trial was continued to allow for DNA testing by Applicant's expert.

On October 20-24, 2016, Applicant proceeded to trial in front of the Honorable D. Craig Brown and a jury. Applicant was present and represented by James K. Falk, Esquire. Assistant Solicitors Don Sorenson and Phil Giese represented the State. The jury found Applicant guilty as indicted. Applicant 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 on Applicant's behalf and David Alexander, Esquire, perfected the appeal. On January 11, 2017, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences via unpublished opinion. *State v. Ellison*, 2017-UP-014 (S.C. Ct. App. filed January 11, 2017). The Remittitur was issued on February 7, 2017.

SUMMARY OF THE EVIDENTIARY HEARING TESTIMONY

At the evidentiary hearing, Applicant took the stand and called James K. Falk, Esquire, to the stand. When Applicant took the stand, he acknowledged the filing of the instant PCR Application, the allegations and requested relief. PCR pp. 27-30. He also acknowledged the Order allowing for consolidation of the evidentiary hearing with his other PCR Application (Docket No. 2016-CP-18-0017). PCR p. 31.

Applicant testified that he originally retained Tommy Bolus, Esquire, to represent him and Attorney Bolus obtained a DNA expert (Dr. Bennett). PCR p. 31-32. Applicant identified and admitted a Motion for Bond Reduction that was filed by Attorney Bolus. PCR pp. 32-33. 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.¹ PCR p. 33, Ins. 14-25.

Applicant identified and counsel admitted Applicant’s Exhibit 2, which contained email communications from Attorney Sorenson formerly of the Solicitor’s Office regarding a plea offer. PCR pp. 35-36. He confirmed that the plea offer was dated May 15, 2014 and the terms were a sentence of twenty-five to thirty years on two counts of entering a back with intent to steal, failure to stop for blue light, and two counts of leaving a scene with great bodily injury and dismissal of the two counts of armed robbery. PCR pp. 35-36. He also acknowledged that the email stated that Attorney Sorenson indicated that he would agree to a negotiated term of twenty-seven years. PCR p. 36. He testified that the plea offer was communicated to him, but he informed Attorney Bolus that he did not want to accept until he saw Dr. Bennett’s results. PCR p. 36.

After counsel referenced the transcript from the proceeding held in front of Judge McMahon on August 4, 2014, Applicant testified that it was his understanding that he was going to trial that day, but a motion was conducted regarding Dr. Bennett. App. pp. 36-37. Following 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.” PCR p. 37, Ins. 5-8. He testified that he fired Attorney Bolus that same day and retained Attorney Falk. PCR p. 37.

Prior to trial, he recalled meeting with Attorney Falk one time at the detention center. PCR p. 39. He did not recall discussing the information contained in the Motion for Bond Reduction or the strength of either parties case with counsel. PCR p. 40. He also

¹ Attorney Bolus was not present to testify at the evidentiary hearing since he died the preceding year on May 30, 2021.

did not recall reviewing the discovery, specifically, the contents of the two cds admitted as Applicant's 4 & 5. PCR pp. 41-42. Applicant acknowledged that he had reviewed the contents of both cds with PCR counsel. PCR p. 43.

Regarding the interview of his mother by Detective Repman, he testified that he was unaware and not advised by counsel about the identification made by his mother. PCR p. 43. 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. PCR pp. 43-44. He testified that Mr. Falk did not advise him that his mother was on either recording before calling her to the stand as a defense witness. PCR pp. 44-45. When asked about the cross-examination of his mother, Applicant testified that he was not aware that should be subjected to cross-examination on the contents of the recorded interviews and phone calls. PCR pp. 46-47.² He testified that if Attorney Falk had just talked with him about the contents of the two cds, he would have been talking to him about pursuing a plea deal. PCR p. 47. He explained that he would have wanted to discuss a plea deal because it "would be in my best interest." PCR p. 47, lns. 21-22. He also 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. PCR pp. 47-48.

Turning to Dr. Bennett, he explained that he thought that Dr. Bennett "was basically going to go against what SLED was saying because he didn't get the same results." PCR p. 48, lns. 4-10. He affirmed that he thought Dr. Bennett was going to be a positive witness and create a "battle" between the DNA experts and/or cause the DNA to

² 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. PCR pp. 80-82.

not be used. PCR pp. 48-49. 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 therein with him before trial. PCR pp. 49-50. As to Dr. Bennett's findings discussed in the testimony, he again testified 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. PCR pp. 51-53.³ When asked about the State's summary of Dr. Bennett's testimony and the court's ruling, Applicant testified that if counsel would have informed him properly it would have changed the outcome. 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." PCR p. 54, 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. PCR p. 55.

When asked about the remaining defense witnesses, he testified that counsel did not discuss the witnesses with counsel and his mother was responsible for getting them to the trial, which came out during their trial testimony. PCR p. 57. As to Chunte 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. PCR p. 58.

³ On cross-examination, Applicant 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." PCR p. 85, lns. 14-22.

Regarding Ms. Payne, Applicant testified that he was not advised about her criminal history, which the State asked her about at trial. PCR p. 58. He also testified that he was unaware prior to trial that the State had records and a witness to refute the testimony offered by his witnesses that he was at work on the day in question. PCR p. 59. 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. PCR pp. 59-60. He affirmed that he was relying upon counsel to advise him regarding the strength/weakness of the case and to be prepared for trial. PCR p. 60. He testified that if he had been properly advised, he would have wanted to pursue a guilty plea. PCR p. 60.

Turning to the double jeopardy issue set forth in his Amendment, Applicant explained that he thought counsel should have argued 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." PCR p. 61, Ins. 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. PCR p. 62.

Regarding the issue of counsel's failure to object to burden shifting statements by the court and the State, he testified that he had reviewed the relevant case and he was alleging that his attorney should have objected. PCR p. 63.

As to the issue involving the questioning of the jury, he explained the he was alleging that counsel should have requested that each juror be questioned individually instead of as a group. PCR p. 64. He explained his concern with the procedure utilized.

PCR p. 64, Ins. 19-24, pp. 92-93. He also agreed that their individual answers were not reviewed on appeal since the jurors only answered collectively as a group. PCR pp. 64-65.

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. PCR pp. 104-105. He recalled being retained by Applicant's mother about five weeks before trial with an understanding that the case was set for trial. PCR pp. 105, 123-124. He recalled obtaining the file from Mr. Bolus and reviewing the Rule Five materials, but he clarified: "I did not review all of the jail tapes." PCR p. 106, Ins. 3-13. Specifically, he admitted that he did not review the call between Applicant's mother and inmate Keitt that was previously admitted into the record. PCR p. 106. He recalled reviewing Applicant's mother's recorded interview with law enforcement and believed that he discussed it with her and Applicant. PCR p. 107. He explained that he would have still called Applicant's mother to the stand if he reviewed the phone call, but he would not have addressed the matter of a financial incentive. PCR pp. 107-108.

On cross-examination, he testified that the phone call was "not great" for the case. PCR p. 129, Ins. 22-23. He also testified that that it was a "good identity case." PCR p. 125, Ins. 8-14. When asked about the State questioning Applicant's mother about her identification of Applicant during her interview, he explained how he tried to "explain why she may have been flustered and made a bad identification." PCR p. 130, Ins. 4-13.

During cross-examination, he also referenced the stack of cds on the table of Applicant's counsel and testified that he did not have a "stack of videos that high." PCR p. 126, Ins. 13-24. Later, a stipulation was entered that the CDs on the table referenced

totaled fifty-eight. PCR p. 146, 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 your 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.

PCR p. 147, ln. 14 – p. 148, 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.” PCR p. 108, lns. 9-14.⁴ He testified that he discussed a defensive strategy with Applicant 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.

PCR p. 108, lns. 19-25. In response to his assessment of the likelihood of success at trial, he responded that he thought there was room for doubt, and he added that Applicant and his mother were not looking for “somebody else to come in and get another plea agreement.” PCR p. 109, lns. 1-9. He agreed that he did not engage in any plea negotiations prior to trial. PCR p. 109. 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. PCR p. 109.

⁴ On cross-examination, he questioned if he or Mr. Bolus had all the discovery materials obtained by Applicant's counsel. PCR pp. 126-127.

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 involving Dr. Bennett. PCR pp. 109-110. 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. PCR p. 110, lns. 6-19. He further explained that he was trying to get a spoliation charge, and he did not think suppression was possible. PCR p. 110, ln. 25 – p. 111, ln. 6. He added that he was “trying to get the jury mad at the State’s investigation.”⁵ PCR p. 111, lns. 6-7. He could not recall if he advised Applicant about the likelihood of the evidence being suppressed, and he responded that he did not know if he discussed trying to get a spoliation charge with him. PCR p. 112.

Regarding the alibi witnesses, he recalled speaking to them on the phone. PCR p. 114. He recalled advising Applicant that an alibi would be helpful and would create a doubt for the jury. PCR pp. 114-115, 133. He believed he knew about the witness’s criminal record and the corporate records and still believed that they needed an alibi. PCR pp. 115-116. On cross-examination, he explained why he thought the records were testimonial hearsay. PCR pp. 134-136.

When counsel was asked if he discussed the pros and cons of trial with Applicant and the possible defenses, he responded that he was hired with the plan to go to trial, and it was “no surprise that the trial was going to be called on the day it was called.” PCR p.

⁵ On cross-examination, he testified that he was utilizing Dr. Bennett to try to create a doubt. PCR pp. 130-131. 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.” PCR p. 131, lns. 17-21.

113, Ins. 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.” PCR p. 113, Ins. 17-22.

Thereafter, he was asked about the double jeopardy argument raised by Applicant, and he responded: “Man, I am embarrassed. No, I did not see that issue.” He further responded that he had not researched it and was not prepared to answer about the strength of the issue. PCR p. 117. But, 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. PCR p. 117. 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. PCR p. 137, Ins. 8-16.

Regarding the allegation that he failed to object to the “search for the truth” language, he testified that he was familiar with the *Beatty*⁶ case but not with *State v. Daniels*⁷ decided in 2012. PCR pp. 117-118. He explained that he was not aware of an objection that could be entered at the time of Applicant’s trial, and he noted that the court used the standard language he had been hearing for “so long.” PCR p. 118, Ins. 3-9. On cross-examination, he testified that he has raised a similar allegation numerous times in the PCR cases he has handled post-*Beatty*, but he did not raise it before. He added: “I mean, I know the argument’s there, and I look for it now. I did not know it then.” PCR p. 138, Ins. 2-3.

⁶ *State v. Beatty*, 423 S.C. 26, 813 S.E.2d 502 (2018).

⁷ *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 471 (2012).

Turning to Applicant's allegations that counsel failed to ensure that the jurors were individually questioned regarding the juror intimidation matter, counsel recalled moving for a mistrial. PCR p. 118. When asked about the procedure utilized to question the jurors, he responded that he did not see an issue with the procedure utilized and did not anticipate that the jurors would have responded differently if individually questioned. PCR pp. 118-119.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

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.

By way of the Amendment, Applicant has also submitted 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. Cronin*, 466 U.S. 648, 104 S.Ct. 2039 (1984). In *United States v. Cronin*, 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...." *Cronin*, 466 U.S. 648, 659-61.

When a systemic failure occurs in any of the three ways mentioned in *Cronin*, prejudice is presumed. First, when a defendant is "denied counsel at a critical stage," prejudice is presumed. *Cronin*, 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 the instant case, Applicant 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. The record before this Court establishes that Applicant hired Attorney Falk to prepare and proceed with a trial; he was not hired with the intention of negotiating a guilty plea. Nevertheless, this Court finds that Applicant’s reasoning for hiring Attorney Falk does not relieve Attorney Falk of his duty to provide effective representation. This Court finds that effective representation in this case would at a minimum require Attorney Falk to ensure that he had all the evidence, reviewed all of the evidence and properly advised Applicant regarding proceeding to trial or pursuing a guilty plea. Here, Attorney Falk completely failed in this regard. It is also abundantly clear to this Court that Applicant was not properly advised regarding the purpose and potential impact of calling his expert or lay witnesses at trial.

At the evidentiary hearing, counsel testified that he was embarrassed by the State’s utilization of the jail calls during the cross-examination of Applicant’s mother at trial. 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.⁸ If counsel was unaware and embarrassed, counsel clearly could not have properly

⁸ This Court also finds counsel’s testimony credible that he was embarrassed for missing the potential double jeopardy issue and is persuaded by his testimony that it is an issue he has previously raised. This court finds that counsel’s failure to consider and/or raise an argument regarding double jeopardy further

advised Applicant prior to trial. Additionally, counsel admitted himself the impact his failure had on Applicant's trial.

Unfortunately, counsel's failure went beyond not reviewing the jail calls and advising Applicant regarding the same. Applicant testified that he was not properly advised regarding the identification his mother gave to Detective Repman or that the State had a complete preview of his defense via the jail calls. Applicant made it clear that if counsel had just talked with him about the contents of the two cds admitted at the evidentiary hearing, he would have been asking counsel about a plea deal. PCR p. 47. Applicant 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. PCR pp. 47-48. Despite admitting that Applicant's mother's cross-examination blew up the entire case during his redirect examination, counsel testified on direct that he still would have called Applicant's mother to the stand at trial. PCR pp. 105-106, 147-148. This Court finds the testimony offered on redirect to be credible and does not find credible counsel's testimony on direct that he would have still utilized Applicant's mother. Additionally, counsel explained on direct that he thought he had a good defense with identity. PCR p. 125. This Court is not convinced that counsel's strategy to show Applicant's mother was "flustered and made a bad identification" to be a reasonable strategy. PCR p. 130, Ins. 4-13.

Regarding the expert witness, this Court is concerned that counsel could not recall reviewing the prior transcript involving Dr. Bennett, that he did not have a clear strategy regarding the utilization of Dr. Bennett nor could he recall discussing with Applicant the

demonstrates the ineffective assistance Applicant received prior to and during trial and supports this Court's finding that Applicant's convictions must be set aside as a result of counsel's ineffective assistance.

likelihood of suppression or the strategy of getting a spoliation charge. When asked about the State's summary of Dr. Bennett's testimony and the court's ruling, Applicant 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." PCR p. 54, Ins. 16-18. When asked about Dr. Bennett's trial testimony, Applicant recalled that after the pre-trial hearing counsel did not discuss with him whether or not Dr. Bennett should be called during trial. He testified that he would not have wanted Dr. Bennett called at trial since he corroborated and bolstered the State's expert. PCR p. 55. This Court finds Applicant's testimony credible and finds that Applicant would not have proceeded to trial if he had been properly advised by counsel regarding the expert witness.

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 Applicant's alibi witnesses speaks the truth:

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.

Trial p. 572, Ins. 11-16. Here, counsel conceded the issues with Applicant's alibi to the jury, but he failed to effectively convey the same to Applicant prior to trial. In contrast to his arguments in closing, counsel testified that he did not think the corporate records utilized to impeach Applicant's alibi witnesses were admissible. PCR pp. 134-136. He also testified that he thought he was aware of the issue of the witnesses criminal history

and recalled advising Applicant that an alibi would be helpful and create a doubt. PCR pp. 114-115, 133. This Court finds that counsel's testimony at the evidentiary hearing cannot be reconciled with counsel's argument to the jury whereby he conceded the issues with Applicant's alibi. As a result, this Court finds that counsel did not properly advise Applicant regarding the strength of his alibi witnesses and the records the State intended to use prior to trial. This Court finds credible Applicant's testimony 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. PCR pp. 59-60.

In sum, this Court is persuaded and finds credible Applicant's testimony that if he had been properly advised regarding the evidence and witnesses discussed herein, 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 as was discussed in *Missouri v. Frye*, 132 S. Ct. 1399, 1405-06 (2012), as follows:

Hill established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*. See *Hill, supra*, at 57, 106 S. Ct. 366, 88 L. Ed. 2d 203. As noted above, in *Frye's* case, the Missouri Court of Appeals, applying the two part test of *Strickland*, determined first that defense counsel had been ineffective and second that there was resulting prejudice.

In *Hill*, the decision turned on the second part of the test. There, a defendant who had entered a guilty plea claimed his counsel had misinformed him of the amount of time he would have to serve before he became eligible for parole. But the defendant had not alleged that, even if adequate advice and assistance had been given, he would have elected to plead not guilty and proceed to trial. Thus, the Court found that no prejudice from the inadequate advice had been shown or alleged. *Hill, supra*, at 60, 106 S. Ct. 366, 88 L. Ed. 2d 203.

In *Padilla*, the Court again 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. It also rejected the argument made by petitioner in this case that a knowing and voluntary plea supersedes errors by defense counsel. Cf. Brief for Respondent in *Padilla v. Kentucky*, O. T. 2009, No. 08-651, p. 27 (arguing Sixth Amendment's assurance of effective assistance "does not extend to collateral aspects of the prosecution" because "knowledge of the consequences that are collateral to the guilty plea is not a prerequisite to the entry of a knowing and intelligent plea").

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. Cronin*, 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*, the South Carolina Supreme 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*, the South Carolina Supreme 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." The 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 dispute, but it was in *Judge*.

While addressing the standard of attorney competence during plea negotiations, the South Carolina Supreme 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, the 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, the 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), the South Carolina Supreme 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*, the 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.

Here, the plea offer made prior to Mr. Falk's representation was twenty-five to thirty years and Applicant received a sentence of life without parole at trial. This Court finds that counsel's preparation prior to trial and performance at trial were clearly deficient and the prejudice suffered by Applicant was the resulting conviction and inability to pursue a plea for a more favorable sentence. Additionally, this Court finds that 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. Cronin*, 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.

Here, counsel failed to properly advise Applicant regarding the matters involving Applicant's mother, DNA expert, and alibi witnesses before Applicant proceeded with a trial. Additionally, counsel admitted that he failed to review all of the discovery that became highly relevant and damaging during Applicant's trial and he even 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, Ins. 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, Ins. 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, Ins. 17-19.

This Court finds both counsel's preparation and strategy for trial to be unreasonable. 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), 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 (2007). 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)).

This Court finds that counsel was deficient in the representation he provided prior to and during trial and because of his deficiency Applicant was prejudiced by not being able to pursue plea negotiations and by proceeding to a trial with a less favorable outcome. As discussed in *Lafler*, this Court finds that counsel's representation prior to trial deprived Applicant the opportunity to enter a guilty plea instead of proceeding to trial. Not only was counsel's representation deficient prior to trial, but he also failed conduct an investigation and prepare a reasonable trial strategy to effectively act as advocate and put the State's case to the test. This Court finds that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Therefore, this Court finds Applicant's convictions and sentences must be vacated.

By way of his Amendment, Applicant also alleged that counsel erred in failing to address matters of double jeopardy, burden shifting instructions and the questioning of the jury during the trial. Transcript pp. 90, 534-536, 601-602. It is interesting to this Court that counsel testified that he regularly raises arguments on double jeopardy and burden shifting instructions in other cases he handles, yet he failed to so do in Applicant's case. This Court finds counsel's failure to consider the double jeopardy issue prior to trial to be a further demonstration of the ineffective representation addressed above. Yet, this Court finds the issue of prejudice is moot as Applicant testified that he would have

accepted a plea and not proceeded to trial if properly advised by counsel. Additionally, this Court finds credible counsel's testimony that he did not find the trial court's instructions objectionable at the time nor did he know a viable argument could be made at the time of Applicant's trial. PCR pp. 117-118, 138. Finally, this Court finds that trial counsel was not ineffective when he failed to request that the trial court question the jurors individually. Counsel testified that he did not have a concern with the procedure utilized and Applicant has failed to show any resulting prejudice from the failure to question the jurors individually.

CONCLUSION

As detailed above, this Court finds that Applicant has met his burden of proof as to the above addressed allegations of ineffective assistance of trial counsel, but Applicant has failed to meet his burden of proof as to all other allegations of ineffective assistance of trial counsel. This Court also finds that no further issues were raised that have not been ruled upon above.

Therefore, this Court finds that the Application for Post Conviction Relief is hereby granted, as detailed above, that Applicant's conviction be vacated, and that Applicant be granted a new trial. Applicant shall be transferred from the custody of South Carolina Department of Corrections to the custody of Dorchester County pending the disposition of his criminal case, with normal bond proceedings.

IT IS THEREFORE ORDERED:

1. That Applicant has met his burden of proof as to his specific allegation of ineffective assistance of trial counsel, as detailed above;
2. Applicant has failed to meet his burden of proof as to all other allegations of ineffective assistance of trial counsel, as detailed above;

3. That the Application for Post Conviction Relief be granted, Applicant's convictions be vacated, and Applicant be granted a new trial;
4. That Applicant be transferred from the custody of South Carolina Department of Corrections to the custody of Dorchester County pending the disposition of his criminal case, with normal bond proceedings.

AND IT IS SO ORDRED this ____ day of _____, 20____

Honorable Robert J. Bonds
Presiding Judge, First Judicial Circuit

_____, South Carolina

1 STATE OF SOUTH CAROLINA
2 IN THE COURT OF COMMON PLEAS
3 COUNTY OF DORCHESTER

4 Tyrone D. Ellison,
5 Petitioner,

6 vs.

Transcript of Record
2016-CP-18-0017
2018-CP-18-0047

7 State of South Carolina,
8 Respondent.
9

10
11 December 8, 2022
12 Beaufort, South Carolina

13 B E F O R E:

14 The HONORABLE ROBERT BONDS
15

16 A P P E A R A N C E S:

17 Tricia Blanchette, Representing the petitioner
18 Danielle Dixon, Representing the respondent
19
20
21

22 SHARON G. HARDOON, CSR
23 Official Circuit Court Reporter, III
24
25

1 THE COURT: All right. Great. Are we ready
2 for him to come on?

3 All right. Mr. Ellison?

4 MR. ELLISON: Yes, sir.

5 THE COURT: Hey, sir. I'm doing good,
6 sir. I hope you're doing well, too.

7 All right. So this is case number
8 2016-CP-18-0017, Tyrone Ellison, Applicant, and State
9 of South Carolina, respondent. And I believe,
10 Miss Blanchette, this is your motion pursuant
11 Rule 59(a) and (e), ma'am.

12 MS. BLANCHETTE: It is, Your Honor. And
13 we have motions in both the cases that are in
14 front of Your Honor. Do you want me to put that
15 docket number on the record as well?

16 THE COURT: Please. Yes, ma'am.

17 MS. BLANCHETTE: So we would also be here
18 on 2018-CP-18-0047, and those were both heard
19 together by Your Honor but a separate issue.

20 THE COURT: All right. Yes, ma'am.

21 All right. I'm happy to hear from you,
22 ma'am.

23 MS. BLANCHETTE: Thank you, Your Honor.
24 I apologize if I talk over you at all in this
25 virtual format.

1 Your Honor, if I may start first with
2 what we, at the evidentiary hearing, called the
3 trial case, which is the 2018 PCR. I submitted a
4 written motion, which was filed back on October
5 28th in both cases. Unless Your Honor would like
6 me to, I didn't intend today to go through the
7 procedural history in the entire written motion.
8 I was just going to hit the highlights briefly and
9 see if there was anything further that Your Honor
10 wanted at this time.

11 THE COURT: Yes, ma'am. That's fine. Go
12 ahead.

13 MS. BLANCHETTE: Okay. Your Honor, I
14 would defer to the written motion that has been
15 filed in the 2018 PCR case. Just briefly in
16 support of our position under Rule 59(a) and (e),
17 point number 1 made in the order addresses how
18 *Cronic* -- *United States vs. Cronic* is addressed in
19 the standing order of dismissal. As explained
20 thoroughly on page 4 of the motion, it's our
21 position that it makes the hearing order as if
22 they used *Cronic* as a standalone issue. In the
23 motion, I do cite to the amendment where we are
24 simply asking Your Honor for a *Strickland* and
25 *Cronic* analysis.

1 THE COURT: Hold on one second. Hold on
2 one second.

3 MS. BLANCHETTE: Yes, Your Honor.

4 THE COURT: All right. Yes, ma'am.

5 MS. BLANCHETTE: And, Your Honor, one
6 thing that is raised, you know, in writing but I
7 just wanted to explain further is, we submit the
8 footnote 1 in the order of dismissal issued by
9 Your Honor is in conflict with the order in the
10 other case we'll be addressing, and is in conflict
11 with the order itself. It says that -- we've
12 asked that their case be considered under *Cronic*,
13 however this Court denies that request. It
14 considers them as to two separate actions, which I
15 agree with. They should be two separate actions.
16 I just found that footnote to be inconsistent with
17 the body of the order and with the subsequent
18 order where there is *Cronic* addressed in the
19 order. I thought that may be confusing upon
20 appellate review. And as PCR counsel, it's my
21 duty to file a 59 for any clarification, so I just
22 wanted to make sure that note was made.

23 THE COURT: Yes, ma'am.

24 MS. BLANCHETTE: Under number 2, your
25 Honor, there we are addressing the heading that's

1 found on page 17 of the order of dismissal, and
2 that is entitled defense strategy. As is
3 explained in writing there, Your Honor, under the
4 defense strategy, it does appear to summarize
5 Applicant's issue number 1 and sets out some of
6 the specific claims made in the amendment. They
7 were listed as A through E in the amendment. But
8 most importantly, it appears to fail to address
9 whether or not counsel was effective in his
10 negotiation of a guilty plea. And, as is
11 explained here, Your Honor, in the written
12 order -- we addressed this at the hearing. It's
13 also in the Applicant's proposed order. And as
14 you would see from the Applicant's proposed order,
15 we submit it's a primary issue in this case,
16 whether or not Mr. Falk was ineffective for
17 failing to negotiate a guilty plea and apprise
18 Mr. Ellison of the facts and the evidence against
19 him.

20 Your Honor, specifically --

21 THE COURT: All right. Let me just make
22 sure. This is the case that Mr. Tommy Bolus was
23 in, maybe, and then he --

24 MS. BLANCHETTE: He was --

25 THE COURT: He then since passed away.

1 But Mr. Falk took over because they wanted a
2 trial, and it was a short period of time, and then
3 there was some issue about the testimony, maybe
4 that his mom provided. Is this that case?

5 MS. BLANCHETTE: It is, Your Honor.
6 Mr. Falk was actually retained five weeks prior.

7 THE COURT: All right. Go ahead. Go
8 ahead. Go ahead.

9 MS. BLANCHETTE: In the PCR, we focused
10 on how he didn't review all the recordings and we
11 admitted a recording of his mother.

12 THE COURT: It was a stack of recordings.

13 MS. BLANCHETTE: What was that? He had a
14 stack of recordings.

15 THE COURT: Yes.

16 MS. BLANCHETTE: He couldn't remember if
17 he had a stack of recordings. And then
18 specifically, as is addressed in our proposed
19 order regarding the recording with his mother, he
20 admitted he didn't review it. He admitted on the
21 record it wasn't great for the case, he admitted
22 he was embarrassed when it came up, and then he
23 candidly admitted it blew up the whole case.

24 So, you know, Your Honor, our overall
25 position is, he did no investigation. He wasn't

1 aware of the evidence so he didn't apprise my
2 client of the evidence. And, if he had,
3 Mr. Ellison clearly testified in front of you at
4 the evidentiary hearing, he would have pursued a
5 guilty plea and not gone to trial.

6 So in our proposed order, we focus on the
7 lack, in the outline of cases, and that's
8 specifically in our proposed order, pages 19
9 through 26, where we focus on all the things that
10 Mr. Falk failed to do and how can that be
11 effective. Even if it's set for trial, even if
12 the client said he wants a trial, Mr. Falk has a
13 duty to go through the evidence, get ready for
14 that trial, investigate, prepare to be effective
15 so that Mr. Ellison can make the best decision
16 going forward.

17 And, in this case, there was a plea offer
18 on the table for 25 to 30, which the solicitor
19 said he would do a 27, where Mr. Ellison got a
20 life sentence.

21 Your Honor, I'm sorry I went off a little
22 bit beyond number 2 with that.

23 THE COURT: It's all right.

24 MS. BLANCHETTE: Issue number 3 just
25 deals with the fact that in my proposed order, I

1 tried to be very careful to use the transcript,
2 the PCR transcript, and cite to it. In the order
3 as it stands, there's a lot of references to
4 testimony, but there's no citations. So, as I was
5 reviewing it and trying to compare to the record,
6 I did struggle a bit to find where these things
7 were coming from that the Court was relying upon
8 because I did not give specific citations to the
9 PCR transcript.

10 And then finally, Your Honor, number 4,
11 and this is more of an issue altering and
12 amending, as well as we'd like for you to
13 reconsider on this point, but this deals with the
14 testimony of Dr. Bennett and the claim regarding
15 that. Specifically, the order states that
16 Applicant additionally contends counsel was
17 ineffective for failing to utilize Dr. Bennett as
18 an expert. We allege that he was ineffective
19 because he used him as an expert. So that
20 statement I find in opposite to what our actual
21 claim was. That was another reason why we were
22 saying he should have properly advised him. He
23 called this expert and bolstered the State's case,
24 and in no way was advantageous to Mr. Ellison.
25 And Mr. Ellison believed he was going to be

1 advantageous, otherwise he would not have wanted
2 to go forward with the trial.

3 Your Honor, just in summation, I would
4 reference, again, our proposed order.
5 Specifically, pages 24 and 26 are, kind of,
6 landing points for why we believe that you should
7 grant relief in this case. I did attach the order
8 to the 59. I did not intend to go through it in
9 great detail. I would just like to reiterate that
10 my client clearly testified that if he would have
11 been properly advised and had the opportunity to
12 go over the evidence to include the -- you know,
13 the tape that we discussed, the recording, but
14 also the delay in expert witnesses, he would have
15 not have proceeded with trial. And Mr. Falk did
16 not give him that opportunity so we submit and ask
17 Your Honor to reconsider and find he was
18 ineffective as is set forth in the proposed order.

19 If Your Honor would like, I would be
20 happy to propose any form of order granting
21 relief.

22 THE COURT: All right. Go ahead.

23 MS. BLANCHETTE: Your Honor, if you don't
24 have any questions, I can move on to the second,
25 or I didn't know if you wanted me to give the

1 State the opportunity to respond.

2 THE COURT: All right. I'll just go
3 ahead and give the State an opportunity to
4 respond, but let me make sure I understand
5 something. You outlined for me, I think, four
6 issues; is that right?

7 MS. BLANCHETTE: Yes, Your Honor, and
8 those are reflected in the written motion.

9 THE COURT: Right. And I'll be honest, I
10 reviewed the motion, actually, several weeks ago
11 when I received it, and I've just had -- I haven't
12 had an opportunity to review it this week. I've
13 had some stuff going on with court.

14 So, the fourth issue was basically he's
15 ineffective because Dr. Bennett -- he used
16 Dr. Bennett. Dr. Bennett didn't provide
17 beneficial testimony. Something about -- I don't
18 know if it's -- I don't know what it was. I can't
19 remember. The blood? Was it blood?

20 MS. BLANCHETTE: It was regarding DNA.

21 THE COURT: DNA.

22 MS. BLANCHETTE: How they extracted all
23 the DNA so he couldn't test it himself.

24 THE COURT: Right.

25 Okay. And then the third issue is the

1 PCR transcript not having citations as to where
2 certain information was coming from; is that
3 right?

4 MS. BLANCHETTE: Yeah. The order doesn't
5 give specific cites.

6 THE COURT: All right.

7 MS. BLANCHETTE: So I just wanted --
8 because, usually, here it did summarize the
9 testimony correctly and it's just difficult when
10 it doesn't get cited.

11 THE COURT: The second was the heading,
12 page 17, Defense Strategy, it summarizes issue 1
13 but fails to address effectively -- what was that?
14 I'm sorry. I apologize.

15 MS. BLANCHETTE: The major point that it
16 fails to address, it states that we allege counsel
17 failed to effectively negotiate a guilty plea
18 prior to the trial, but I don't see that discussed
19 anywhere.

20 THE COURT: All right. Yes, ma'am.

21 MS. BLANCHETTE: It doesn't discuss it.

22 THE COURT: All right. And then I got to
23 go back. I started at the bottom because I had a
24 good idea of what 4, 3, and 2 were, but for some
25 reason I don't -- I can't read my notes. What was

1 the number 1? Was that involving with footnote
2 number 1 in the conflict?

3 MS. BLANCHETTE: It does, Your Honor.

4 THE COURT: Okay. All right. All
5 right.

6 MS. BLANCHETTE: This order, it sets
7 *Cronic* out as a separate issue. And I'm not
8 trying to be critical whatsoever of how the State
9 drafted the order. I just get this one duty of
10 having obligation to 59.

11 THE COURT: All right.

12 MS. BLANCHETTE: It's my opinion, I
13 didn't see how that was consistent with how we
14 alleged it and how we argued it when we're asking
15 for a *Strickland* and *Cronic* analysis. But,
16 obviously, I would defer to Your Honor as to how
17 that needs to be best addressed.

18 THE COURT: All right.

19 Attorney General, let me -- can I just go
20 ahead and hear from you on these matters, ma'am?

21 MS. DIXON: Yes, Your Honor.

22 Briefly, I would argue that the order of
23 dismissal does contain all of the required
24 findings of facts and conclusions of law as
25 required by South Carolina Code 17-27-80. When

1 drafting it, I carefully reviewed the entire
2 record in this matter, the proposed, and submitted
3 it to Your Honor. And I don't believe that this
4 Court should find basis for altering or amending
5 its prior ruling.

6 With that being said, I'd like to just
7 briefly go through 1, 2, 3, and 4.

8 THE COURT: Yes, ma'am.

9 MS. DIXON: Number 1, I guess I disagree
10 with Miss Blanchette that there is conflicting
11 argument or conflicting statements from the
12 footnote to the body of the actual order. There
13 is a specific finding that *Cronic* is not
14 appropriate, and inquiry into the conduct of the
15 trial is necessary because that prejudice is not
16 presumed. And that's on page 16 and 17 of the
17 order. And I believe that is all that the
18 footnote is saying.

19 And if there is -- if you'd like to shed
20 more light, Miss Blanchette, on what the hang up
21 is -- because it's clear to me, but also it might
22 not be clear to you. I don't understand
23 necessarily the conflict or confusion.

24 THE COURT: I'll let her reply briefly.
25 Go ahead. I'll let her when you finish. Go

1 ahead.

2 MS. DIXON: Okay. The Court at the
3 hearing and in the order explicitly denied to
4 address *Cronic*, and so I don't think it's
5 necessary to address *Cronic* throughout. And,
6 instead, just it to be addressed in that section,
7 I think is appropriate.

8 As for number 2, I do see, that what
9 Miss Blanchette is saying because there is
10 sections for A through B. However, counsel -- the
11 allegation that counsel failed to effectively
12 negotiate a guilty plea is addressed on page 22
13 even though it's not under its own specific header
14 where the Court found, "This Court finds
15 Applicant's assertion that he would not have
16 wished to proceed to trial and instead would have
17 wished to discuss a guilty plea is not credible."
18 And it found that, "Counsel creditably testified
19 he was hired to take Applicant's case to trial
20 specifically because Applicant was not interested
21 in pleading guilty."

22 So I think that those paragraphs, which
23 are in that first paragraph on page 22, really
24 address what Miss Blanchette is referencing with
25 that allegation, with that number 2 motion.

1 As for number 3, it's atypical for there
2 to be transcript cites throughout. I don't
3 necessarily believe that it's a reason for this
4 order to be struck and an amended order of
5 dismissal to be issued. If there are any specific
6 areas that could be pointed to where the order is
7 incomplete or does not properly reference the
8 transcript or there are any inaccuracies, I would
9 be more than willing to respond to those.

10 And as for number 4 -- let's see. That's
11 on page 24. I believe what Miss Blanchette is
12 talking about is those last two paragraphs which I
13 do understand are a little bit sticky there where
14 it says, "Applicant additionally contends Counsel
15 was ineffective for failing to utilize Dr. Bennett
16 as an expert." They did utilize him as an expert.
17 Really what I believe it should say is, *Applicant*
18 *contends counsel was ineffective for failing to*
19 *utilize Dr. Bennett where he bolstered the State's*
20 *case.* I think that's kind of what we're getting
21 at.

22 The majority of this argument that
23 Miss Blanchette has just made was made and argued
24 at the PCR hearing. Specifically what
25 Mr. Ellison stated or testified to at the PCR

1 hearing and most of that, within this order of
2 dismissal, Your Honor found not credible, and
3 found the testimony of Counsel credible.

4 THE COURT: All right. Yes, ma'am.
5 Thank you, Attorney General.

6 Miss Blanchette, did you want to briefly
7 reply, ma'am?

8 MS. BLANCHETTE: Sorry, Your Honor. I
9 was muted.

10 THE COURT: That's okay.

11 MS. BLANCHETTE: Unless it would help
12 Your Honor, I think she was very straightforward.
13 She went through the same exact points.

14 THE COURT: Okay.

15 MS. BLANCHETTE: There wasn't any
16 confusion as to what I offered. I think it
17 appears there may even be an agreement on number
18 4, that it's just -- the way it's worded, it's not
19 consistent with the claim that was made.

20 THE COURT: Okay.

21 MS. DIXON: Specifically, just that
22 sentence. That first sentence, correct?

23 MS. BLANCHETTE: That's the reason I
24 quoted it. And then here, Your Honor, I said I
25 wasn't going to say anything and now I am, so I

1 apologize.

2 But as far as what was stated, I
3 appreciate her clarification because, as she
4 stated, regarding how I raised issue number 2,
5 Defense Strategy, each of the subparts did have
6 their own section, so I had a concern that the
7 appellate court may find that wasn't preserved for
8 appellate review.

9 THE COURT: Right.

10 MS. BLANCHETTE: There wasn't a specific
11 section or issue addressing his failure to
12 negotiate a guilty plea. Where it's just -- it
13 appears in those couple sentences now that she's
14 pointed that out.

15 THE COURT: Yes, ma'am. Okay.

16 All right. Well, then we want to go on to
17 the other case or other matter?

18 MS. BLANCHETTE: Yes, Your Honor. I can
19 address just -- just for the record, it's
20 2016-CP-18-0017.

21 THE COURT: 0017?

22 MS. BLANCHETTE: Yes. And this is the
23 case stemming from the guilty plea whereby
24 Mr. Falk represented Mr. Ellison.

25 THE COURT: Yes, ma'am.

1 MS. BLANCHETTE: Your Honor, again, we
2 have filed a written motion. It's extensive.

3 THE COURT: It is.

4 MS. BLANCHETTE: I won't go over it in
5 detail unless I can assist the Court in any way.

6 This one I, for some reason, wrote
7 differently, and I apologize. It's in paragraph
8 form. Turning to page 4, the first primary
9 paragraph there is also addressing this issue of
10 no cites to the evidentiary hearing transcript.
11 In this order, it's a little bit more troubling
12 though because on page 7, 8, and in the footnote
13 appearing on page 9, in the order it gives
14 specific quotes of testimony without a cite to
15 where that's found in the record. And we have a
16 very lengthy record in this case, Your Honor. So
17 I think it would be helpful if the cites are given
18 specifically when exact testimony is quoted.

19 Turning to the second paragraph there,
20 and this would be, essentially, our issue too, in
21 this section entitled findings of fact and
22 conclusion of law, it appears to merge several of
23 the issues raised in our amendment. And, as a
24 result, we submit it fails to properly address or
25 improperly --

1 THE COURT: You got to slow down for me.
2 I'm sorry.

3 MS. BLANCHETTE: I'm sorry, Your Honor.
4 Yes, and I'll be more specific too.

5 It appears to merge issue 2 and 3 from
6 the amendment.

7 THE COURT: It appears -- I'm sorry
8 again. I apologize. It appears to what?

9 MS. BLANCHETTE: To merge, like bring
10 into one.

11 THE COURT: Yes, ma'am. Okay, I just
12 didn't hear you. I'm sorry.

13 MS. BLANCHETTE: These are tricky and I
14 know my voice is tricky over virtual. So, Your
15 Honor, issue 2 and 3 in the amendment appear to be
16 merged in the findings of fact and conclusions of
17 law. Specifically -- let me turn here, I believe
18 it's on page 12 of the order of dismissal where
19 that would be found. It's the heading on page 12,
20 "Applicant's allegation asserting his plea was
21 involuntarily entered because Counsel was
22 ineffective for failing to properly prepare
23 Applicant for a trial and ineffective for failing
24 to effectively negotiate and ensure a benefit from
25 plea bargain."

1 I mean, the order can be drafted in
2 whatever style. You kind of merged those issues.
3 But our position is that in so doing, it fails to
4 properly address, or improperly excused Counsel's
5 admission that he didn't review the evidence with
6 the applicant prior to the entry of his guilty
7 plea.

8 The order does for several pages focus on
9 the thoroughness of the guilty plea and the case
10 law, and ultimately appears to land with the
11 finding that he voluntarily perceived any admitted
12 deficiencies by Counsel, and we would just ask
13 Your Honor to review the fact finding.

14 Here, Mr. Falk admitted he didn't review
15 the evidence. He didn't do anything. The client
16 got to the guilty plea and was trying to explain
17 that to the Court but went anyway, so I believe
18 that we have a plea that shows that this was --
19 I'm sorry. We have a record to show that this was
20 not a voluntary guilty plea due to the
21 deficiencies of Mr. Falk.

22 Your Honor, in the 59, I go through some
23 of the applicable case law that appears on pages 4
24 and 5 of the order, and ultimately, what we'd ask
25 you to do is reconsider, as I stated, the finding

1 that seems to hold that a voluntary plea would
2 supercede any admitted deficiencies such as we
3 have here as failing to review the evidence with
4 him prior to the guilty plea.

5 Specifically, at the bottom of page 5, I
6 would ask Your Honor to reconsider the finding
7 that Counsel's testimony was credible, that the
8 case was not set for a trial. I believe we showed
9 through the exhibits and through the testimony
10 that the case was, in fact, set for a trial, and I
11 believe that's evidenced as well in the guilty
12 plea transcript.

13 On page 6 of the motion, Your Honor, we
14 would submit that the order fails to address, and
15 this specifically would take us -- I think would
16 take us to page 18 of the order.

17 THE COURT: Yes, ma'am.

18 MS. BLANCHETTE: The order fails to
19 address how Counsel's prior ineffective assistance
20 at the trial impacted the entry of his guilty
21 plea. Now, this is kind of hard to argue because
22 I know Your Honor finds in the first order that
23 we've been discussing he wasn't ineffective.

24 THE COURT: Right.

25 MS. BLANCHETTE: But Mr. Ellison

1 testified that as a result of the representation
2 he received at the trial and as a result of the
3 representation he had prior to the guilty plea,
4 you know, he felt his only option was to plea
5 guilty as a result of Mr. Falk's deficiencies.

6 We submit that the order fails to
7 properly address this. And then it just seems to
8 launch into an analysis under *United States vs.*
9 *Cronic* in a different manner than was done in the
10 first order. And so we would just ask Your Honor
11 to revisit that, and, specifically, to review the
12 sections of the proposed order. And here in the
13 motion I point to page 26 where I address *Cronic*
14 and I address this issue in the proposed order.

15 It does appear, Your Honor -- let me look
16 at this real quick, Your Honor. On page 19,
17 there's one specific sentence where it says, you
18 know -- Your Honor, I apologize.

19 THE COURT: Yes, ma'am. Take your time.

20 MS. BLANCHETTE: Your Honor, just, I
21 would submit, in reviewing our proposed order, in
22 the 59, I point out page 26. There's also a
23 section on page 21 where we addressed Counsel's
24 failure to effectively represent Mr. Ellison at
25 his trial and how that was a primary contributing

1 factor to his guilty plea.

2 Your Honor, in our proposed order, we
3 submitted that we could show both ineffective
4 assistance under a standard analysis and under
5 *Cronic*. And if I could just for a minute, there's
6 one section -- one more section I wanted to point
7 out to Your Honor.

8 THE COURT: Sure.

9 MS. BLANCHETTE: Your Honor, if I may,
10 I'm just going to read from page 24 of our
11 proposed order.

12 THE COURT: Yes, ma'am.

13 MS. BLANCHETTE: It's, kind of, a landing
14 point. We submitted to Your Honor, "Here
15 Applicant understood and the plea court affirmed
16 that Applicant was facing a trial with a sentence
17 of life without parole if he did not enter a
18 guilty plea," yet Counsel had not taken any steps
19 to do a reasonable investigation nor advise
20 Applicant regarding the totality of the evidence
21 before advising him about a guilty plea."
22 Obviously, I'm writing this as a proposed order.
23 "This Court is not convinced that Counsel's
24 meeting with Applicant at the courthouse where he
25 advised him of the plea offer and reviewed a video

1 amounts to effective representation. This court
2 is concerned that Counsel's conduct failed to make
3 the adversarial process work in this particular
4 case."

5 And that's essentially where I'd like to
6 land, Your Honor. What Mr. Falk did is simply not
7 enough. It's not enough if he were facing simple
8 possession of marijuana, but it's definitely not
9 enough in a case where my client is serving a life
10 sentence. And I feel like the standing orders
11 dismissing -- or excuse his conduct, which I think
12 is reprehensible.

13 So I would just ask that Your Honor
14 consider our entire motion, revisit the proposed
15 order, and reconsider the denial of relief in both
16 of these cases.

17 THE COURT: All right. Thank you,
18 Miss Blanchette.

19 Attorney General, do you want to respond?

20 MS. DIXON: Yes, briefly, Your Honor.
21 Same kind of analysis for that number 1 for the
22 cites to the record as before. We do have the
23 transcript, but it is atypical and I don't think
24 that it is a reason for us to amend this order of
25 dismissal, unless there is any specific testimony

1 that is inaccurate or incomplete or does not
2 properly cite to the record. And I haven't heard
3 any of those specific pages or testimony today. I
4 think -- and I might need help with the numbers
5 because it is blocked a little bit differently
6 than the other motion.

7 I believe number 2, she speaks -- Miss
8 Blanchette rather, she's discussing the order's
9 failure to properly address or improperly excuse
10 Counsel's admission that he did not review the
11 evidence. I point you to page 17. That last
12 paragraph states, "Both Counsel and Applicant
13 agree Applicant had not reviewed all discovery in
14 this case. Counsel credibly testified he
15 explained the benefits of pleading guilty to
16 Applicant. Specifically, that by pleading guilty,
17 Applicant could keep one of the LWOPs off the
18 table benefiting Applicant should Applicant appeal
19 from his prior trial and LWOP sentence is
20 successful."

21 So, I think that that properly addresses
22 that Counsel did not fully review all of the
23 discovery, and it actually specifically says that
24 Counsel and Applicant both agree that Applicant
25 had not received all the discovery or reviewed all

1 the discovery at that point in time.

2 Number 3, I believe, is on page 5 at the
3 bottom, and, Miss Blanchette, please correct me if
4 I'm wrong here, regarding your request to
5 reconsider the findings that hold a voluntary plea
6 supercedes admitted deficiencies by Counsel.

7 I argue if you look at page -- I believe
8 it is 16 and 17, this Court found that
9 Applicant's -- let's see here. That second
10 paragraph on page 17 writing, "The Applicant
11 testified that his decision was not based on the
12 State's case against him but rather on Counsel's
13 advice." The Court found Applicant's assertion
14 was not credible and self-serving.

15 The paragraphs before that discuss -- and
16 they do discuss and go through how his plea was
17 voluntary at the guilty plea hearing and that he
18 had stated he believed pleading guilty was the
19 safest option for him, and that he did wish to
20 plead guilty, and he understood that he would
21 plead or proceed to trial, et cetera.

22 So the assertion that Counsel's failure
23 to review all the discovery with him prejudiced
24 Applicant and led to a complete breakdown of the
25 adversarial process, I just think it's a wholly

1 unfounded allegation or assertion.

2 Miss Blanchette touched briefly on the
3 fact that the order was in error in finding
4 Counsel's testimony credible that the case was not
5 set for trial. I looked at the plea. She's
6 pointed to page 8 through 9. It says that those
7 are his options, to plea or to go to trial, but I
8 don't believe it says specifically that trial was
9 set. And also, the cite here to Applicant's
10 Exhibit 8 -- or 6, excuse me, I have Applicant's
11 Exhibit 6 as just a one-page document which was a
12 plea offer that just said here's the date of the
13 plea offer. Here's the date of your plea and
14 here's when the plea expires. It doesn't
15 necessarily say, *The date this plea offer expires,*
16 *we're set for trial.*

17 So I just don't think that cites to that,
18 nor does my review of the record or memory serve
19 that it was set for trial that specific day.

20 And then the *Cronic* analysis, again, you
21 know, the motion sets out that, "The Court has
22 erred in failing to find that prejudice was
23 presumed here." I think that you can look at this
24 standing order and this is -- would be, really, my
25 argument, that prejudice should not be presumed

1 and absolutely should not be presumed when Counsel
2 was found effective at the prior trial.

3 Of course, I can answer any further
4 questions you have based on the arguments that
5 were presented in my responses, Your Honor.

6 THE COURT: All right, ma'am.

7 Any reply, Miss Blanchette?

8 MS. BLANCHETTE: No, Your Honor. I
9 didn't find any conflict about how she addressed
10 my arguments.

11 THE COURT: Okay.

12 MS. BLANCHETTE: I don't see any reason
13 to go back over them.

14 THE COURT: All right. What I'm going to
15 do is, I'll take this under advisement and I'll
16 have something -- I'll have something to you-all
17 by the first of the following week. We're in
18 chambers. Is that the week of Christmas?

19 LAW CLERK: I thought you meant the 1st.

20 THE COURT: No.

21 LAW CLERK: That would be --

22 THE COURT: We got Georgetown next week,
23 right? It will be the following week.

24 All right. The week after next, I'll
25 have something to you. I'm in Georgetown. I'll

1 be out of town most all week.

2 LAW CLERK: Should be the 19th.

3 THE COURT: Around the 19th, I'll have
4 something to you. Okay?

5 MS. BLANCHETTE: Thank you very much,
6 Your Honor.

7 MS. DIXON: Thank you, Your Honor.

8 THE COURT: Sure. Mr. Ellison, thank
9 you, sir.

10 MR. ELLISON: All right. Have a good
11 day.

12 THE COURT: Yes, sir. You-all too.

13 (The WEBEX hearing was concluded.)
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STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

IN THE COURT OF GENERAL SESSIONS
FIRST JUDICIAL CIRCUIT

CASE No: 2016-CP-18-0017

Tyrone D. Ellison #324947
Applicant,

v.

State of South Carolina,
Respondent.

CERTIFIED COPY
2023 AUG -4 PM 1:59
CLERK OF COURT
DORCHESTER COUNTY

**ORDER DENYING APPLICANT'S RULE 59(a)
& (e) MOTION**

This matter came before the Court on December 8th, 2022, upon the Applicant's Rule 59(a) & (e) Motion. The Applicant was represented by Tricia Blanchette. The Respondent was represented by Sammie Weidauer. This was held by consent in the WebEx Virtual Courtroom.

After hearing arguments of Counsel and reviewing briefs provided to me, the Court respectfully denies the Defendant's Rule 59 (a) & (e) Motion. The Court finds there is no appropriate grounds to alter or amend its October 17th, 2022 Order.

IT IS HEREBY ORDERED that the Defendant's Rule 59(a) &(e) Motion is respectfully,
DENIED.

IT IS SO ORDERED!

Dorchester County, South Carolina
December 8, 2022


The Honorable Robert J. Bonds
Presiding Judge

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

IN THE COURT OF GENERAL SESSIONS
FIRST JUDICIAL CIRCUIT

CASE No: 2018-CP-18-0047

Tyrone D. Ellison #324947
Applicant,

v.

State of South Carolina,
Respondent.

ORDER DENYING APPLICANT'S RULE 59(a)
& (e) MOTION

CERTIFIED COPY
2023 AUG -4 PM 1:57
Clayton H. Bonds
CLERK OF COURT
DORCHESTER COUNTY

This matter came before the Court on December 8th, 2022, upon the Applicant's Rule 59(a) & (e) Motion. The Applicant was represented by Tricia Blanchette. The Respondent was represented by Sammie Weidauer. This was held by consent in the WebEx Virtual Courtroom.

After hearing arguments of Counsel and reviewing briefs provided to me, the Court respectfully denies the Defendant's Rule 59 (a) & (e) Motion. The Court finds there is no appropriate grounds to alter or amend its October 17th, 2022 Order.

IT IS HEREBY ORDERED that the Defendant's Rule 59(a) &(e) Motion is respectfully,
DENIED.

IT IS SO ORDERED!

Dorchester County, South Carolina
December 8, 2022



The Honorable Robert J. Bonds
Presiding Judge