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**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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On Petition for Writ of Certiorari from Richland County  
DeAndrea G. Benjamin, Trial Judge  
Michael S. Holt, Post-Conviction Relief Judge

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Appellate Case No.: 2023-001269

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EMMANUEL B. ELLEBY, #275057,..... Respondent,

v.

STATE OF SOUTH CAROLINA,.....Petitioner

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**RETURN PETITION FOR WRIT OF CERTIORARI**

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## **STATEMENT OF THE ISSUES ON APPEAL**

- I. Did the post-conviction relief court err by finding counsel was constitutionally ineffective for failing to fully investigate Elleby's hospitalization as Counsel's performance fell below prevailing professional standards and as a result the outcome of the resolution of his charges would have been different?
- II. Did the post-conviction relief court err by granting relief because Counsel was constitutionally deficient based on prevailing professional standards for failing to fully investigate Elleby's medical issue that led to his absence from court proceedings?
- III. Did the post-conviction relief court err by granting relief because Elleby met his burden of showing prejudice from Counsel's deficient performance in fully investigating Elleby's medical issue that led to his absence from court proceedings

## STATEMENT OF THE CASE

During its November 2014 term, the Richland County Grand Jury indicted Respondent Emmanuel B. Elleby for armed robbery (2014-GS-40-7355) and kidnapping (2014-GS40-7364) following an incident on August 22, 2014, involving the robbery of a Dollar General Store and an individual named Kenneth C. Gardner. (App. pp. 543-544; 546-547). Elleby was represented by Assistant Public Defender Adam S. Ruffin of the Fifth Circuit Public Defenders Office ("Counsel"). Fifth Circuit Deputy Solicitor April W. Sampson prosecuted the case. The State called the case for trial during the September 14-17, 2015 term of court.

Several weeks prior to the date, Elleby was served notice of the State's intent to seek a sentence of Life Without Parole. On the morning of trial, Elleby accepted the State's plea deal for a negotiated sentence of twenty years imprisonment. (App. p. 22). At the call of the case, the State informed the trial court it would delay calling Elleby's case because earlier that day, when Counsel was "signing him up" for the plea, Elleby "fell out [and] perhaps had a seizure." (App. p. 15). Elleby was subsequently taken to the hospital by ambulance, and the State informed the court that it would be delaying the calling of the case until the following day, with the trial court noting that if he were still in the hospital the following day, it would continue the case. (App. pp. 15-16). The following morning, Elleby failed to appear, but Counsel informed the court that his client was on the way, and he requested an extension of the plea deal until 2:00 p.m. that day because his client had indicated he would accept the offer. (App. pp. 20-21). The State agreed; however, by 2:00 p.m., Elleby still had not appeared. (App. p. 27).

Counsel objected to Respondent being tried in his absence, arguing that Elleby would be prejudiced by denying him the opportunity to accept the plea deal. (App. pp. 31-35). Counsel asked the trial court to issue a bench warrant instead of trying Elleby in his absence since this

was a mandatory life without parole case. In response, the Solicitor clarified she "said the offer was only good through 2:00 [] because [they] all had to be [there] to start the trial. . . . The offer is now - we are here at trial. The offer is gone. We are at trial." (App. pp. 35-37). Nevertheless, the trial court delayed the trial until the following morning, and the Solicitor agreed to extend the plea offer until then. (App. pp. 49; 172).

The following morning, Elleby still had not been located. (App. p. 173). Counsel again moved for a continuance based on his "objections to this being a TIA." (App. pp. 173-174). Following a proper inquiry on the record to ensure Elleby was informed of his right to be present at trial and of the trial date, the Honorable DeAndrea G. Benjamin determined that the trial would proceed in Elleby's absence. Elleby was convicted as indicted and sentenced to life without the possibility of parole as a recidivist offender pursuant to S.C. Code Ann. § 17-25-45. (App. pp. 533-535).

Thereafter, Counsel filed a motion to reconsider Elleby's sentence, arguing S.C. Code Ann. § 17-25-45 was unconstitutional and Elleby should be resentenced. Judge Benjamin heard that motion on November 12, 2015, and denied that motion on December 15, 2015. (App. pp. 518519; 530-32).

Elleby filed a timely notice of appeal, and an appeal was perfected on his behalf by Assistant Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense-Office of Appellate Defense, who presented the following issue:

Did the trial judge abuse her discretion in denying the motion for continuance and proceeding with a jury trial in Appellant's absence with the State seeking a sentence of life without parole pursuant to S.C. Code §17-25-45 when the State had offered to allow Appellant to plead guilty for a negotiated twenty-year sentence and Appellant had indicated that he would accept the plea offer?

Following briefing, the Court of Appeals affirmed Elleby's convictions and sentences. *State v. Elleby*, 2017-UP-420 (filed Nov. 8, 2017). (App. pp. 591-592). The Remittitur was returned on November 30, 2017. (App. p. 593).

On January 29, 2018, Elleby filed an application for post-conviction relief (PCR) alleging the following allegations:

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

The State filed its Return on May 31, 2018, and requested an evidentiary hearing. Through counsel, Elleby filed an amended application on June 17, 2019, alleging the following:

1. Counsel was ineffective for failing to properly investigate the facts and circumstances surrounding Elleby's hospitalization, thus depriving Elleby of a continuance and presence at his trial.

An evidentiary hearing into the matter convened on July 15, 2021, at the Richland County Courthouse before the Honorable Michael S. Holt. Elleby was present at the hearing and represented by Jonathan D. Waller, Esquire. Elleby proceeded with the amended application claims. On November 3, 2021, Judge Holt granted Elleby's PCR application, finding Elleby "met his burden and shown that counsel was deficient in his representation of [Elleby] in failing to investigate his absence after suffering a seizure. [Elleby] was prejudiced when he was sentenced to a term of imprisonment [in] excess of the accepted plea agreement." (App. pp. 744-746).

On November 18, 2021, the State filed a motion to reconsider the grant of relief pursuant to Rule 59(e), SCRPC, arguing Elleby failed to establish that Counsel was deficient in his investigation of his medical issue and failed to show any prejudice from Counsel's alleged

deficiency. (App. pp. 748-764). On July 5, 2023, Judge Holt summarily denied and dismissed the State's motion without a hearing. The State then timely initiated this instant appeal. (App. p. 765).

### **STANDARD OF REVIEW**

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119,386 S.E.2d 624,626 (1989).The reviewing court "gives great deference to the postconviction relief court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005).

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed de novo without deference to the post-conviction relief court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENTS

**I. The post-conviction relief court did not err in finding counsel was constitutionally ineffective for failing to fully investigate Elleby's hospitalization as Counsel's performance fell below prevailing professional standards and as a result the outcome of the resolution of his charges would have been different.**

In granting relief, the post-conviction relief court correctly found that Counsel was ineffective for failing to adequately investigate the circumstances surrounding Elleby's medical condition. Specifically, the court found Counsel's representation fell below an objective standard of reasonableness when he "knowingly decided not to attempt to obtain [Elleby]'s medical records or present any evidence of the condition of an individual following a seizure." (App. pp. 744-746). Relying on the similar issues addressed in Bell v. State<sup>1</sup>, the court found Elleby was prejudiced by counsel and his "decision and failure to inform the trial court of information in Counsel's possession, or easily obtainable, cost [Elleby] the difference in the sentence he had already accepted and the life without the possibility of parole sentence he received." (App. p. 746).

To establish ineffective assistance of counsel, the 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. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." Watson v. State, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To establish prejudice, applicant must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

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<sup>1</sup> 410 S.C. 436, 765 S.E.2d 4 (Ct. App. 2014)

Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625. Reviewing Counsel’s actions in the limited scope of the rather unique situation of Counsel having to investigate a client’s medical condition, which has no bearing whatsoever on that client’s underlying charges, the court found that Counsel’s actions fell below an objective standard of reasonableness and that Respondent was prejudiced by his inability to consummate the plea process he had already begun.

**i. The post-conviction relief court did not err in granting relief because Counsel was constitutionally deficient based on prevailing professional standards for failing to fully investigate Elleby's medical issue that led to his absence from court proceedings.**

The court correctly found that Counsel was ineffective for failing to adequately investigate the circumstances surrounding Elleby's medical condition. While it is not in dispute that Counsel performed some level of follow up investigation to the medical situation that he witnessed, the court correctly found the Counsel’s decision not to continue his investigation, including requesting medical records and/or consulting with experts, was unsound from its beginning. Counsel testified that his immediate goal was to get a continuance of the case being called to trial and that he did not want the records to possibly contain information that would hurt that goal.

As Peititioner correctly points out, trial counsel should not face second-guessing of **valid** strategic decisions based on the ultimate outcome of that particular decision. Representation of individuals charged with crimes through the trial process is fluid, dynamic, entirely unique to the particular client and facts of their case. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 466 U.S.at 688-689. Decisions based on a solid foundation and theory should not be deemed valid or invalid based on their results, but on the analysis and investigation that forms the foundation and

precedes the decision. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690-91.

The court found that Counsel's reasoning for his decision to not further pursue Respondent's medical records was flawed as "Counsel would have no duty to disclose Applicant's medical records to the prosecution if those records failed to add to Counsel's argument" for continuance. (App.p. 744). In doing so, the court considered not only Counsel's incorrect identification of a risk to mitigate or guard against, but also the actions taken and information in Counsel's possession at the time the decision was made. Counsel testified that based on his conversation with a doctor (presumably one of Respondent's) that he didn't believe Respondent had a seizure. (App. p. 735). The problem with reaching that conclusion is that it is inconsistent with other testimony and evidence. He witnessed the actual incident that he described as "very scary;" (App. p. 707) the treating physician was inquiring as to Respondent stress exposure; (App. p. 708) the PCR court found that Counsel was not regularly around people who suffer seizures (App. p. 743) and therefore lacked familiarity with the symptoms; and the trial court referring to the medical condition suffered by Respondent as a "panic attack." (App. p. 39). In light of the PCR court's determination that obtaining Applicant's medical records or consulting with an expert would have potentially great upside with little to no risk; and given the inconsistent or lacking evidence regarding the medical condition Respondent suffered in the Courthouse as well as the duration or lingering effects of such conditions, there is significant probative evidence in the record to support the PCR court's finding that Counsel's decision to cease his investigation into Respondent's medical condition was not a valid strategic decision and as such, fell below the the objective standard of reasonableness.

Petitioner misconstrues the testimony of Counsel in regard to Counsel's conversations with Respondent's doctor. In both its Motion to Reconsider, Alter, or Amend Pursuant to Rule

59(e) and its Petition, Respondent claims that Respondent's doctor "said the episode could have been a panic attack." (App. p. 756, Petition p. 15). No such evidence exists in the record. Any reference to a panic attack from the doctor is noting information relayed to the doctor directly from Counsel. (Redacted Supp. App. p. 18).

Analyzing Counsel's decisions, at the time they were made, and based on information available at the time the decision was made, the PCR court correctly found Counsel to be deficient. Counsel's stated objective was to obtain a continuance of Respondent's trial in absence for the limited purpose of allowing Respondent to perfect the plea agreement he had already accepted. Petitioner's reference to later actions by Respondent at the sentencing hearing are irrelevant for that analysis. For one thing, there is no evidence in the record that the two events are linked or that Respondent's actions on the separate days are even similar. Counsel's reaction to the two events are certainly at opposite ends of the concern spectrum. (App. p. 707, App. p. 517-518). Also, Respondent received a sealed sentence at the conclusion of his trial in absence. The sentencing hearing was simply a formality where Respondent's physical presence was required, but his mental or physical ability to participate or assist Counsel in any way, was not. The PCR court correctly determined Counsel was deficient in his decision to not pursue Respondent's medical records or consult experts prior to the start of his trial.

**ii. The post-conviction relief court did not err in granting relief because Elleby met his burden of showing prejudice from Counsel's deficient performance in fully investigating Elleby's medical issue that led to his absence from court proceedings.**

The PCR court correctly determined that Counsel's decision and failure to inform the trial court of information in Counsel's possession, or easily obtainable, cost the Applicant the difference in the sentence he had already accepted and the life without the possibility of parole sentence he received." (App. p. 746). In support of its position, Petitioner cites a quote from the

trial judge discussing the fairness to Respondent in giving him until 2:00 pm on the day following his hospitalization to appear in court. (Petition pp. 18-19, citing App. pp. 38-39). The problem with relying on the statement is that, as discussed above, the trial judge was still under the uncorrected, incorrect assumption that Respondent suffered a panic attack, not a real medical incident. Counsel's failure to correct and/or educate the trial court allowed to trial court to change it's position from continuing the case if Respondent was still hospitalized or suffering from a real condition, to believing that Respondent had a panic attack and willfully and voluntarily chose not to appear.

Petitioner's discussion of the enforceability of the plea agreement falls under a similar analysis as the State also believed that Respondent suffered a panic attack and was informed by Counsel that Respondent was "on the way to court now." (App. p. 20). Both assumptions would have been corrected with further investigation by Counsel. Further, Petitioner relies on Respondent's medical records as evidence that Respondent was feigning his seizures, however no such reference is made in the records. (Redacted Supp. App. pp. 1-47). In fact, there is no "Clinical Impression" in the records and the treating physician was unable to reassess Respondent to determine his condition. (Redacted Supp. App. p. 18).

Again, reviewing the representation of Counsel, at the time and with the evidence known to Counsel, the PCR court had ample evidence to base its finding that Respondent was prejudiced by Counsel's decision not only in the loss, or potential loss, of a plea agreement, but in his trial, where he was facing a mandatory life sentence, proceeding in his absence.

Based on the foregoing, Respondent submits that the PCR court correctly granted Respondent relief in vacating his conviction and remanding his case to the court of general sessions for a new trial. Respondent requests this Court denies Petitioner's grounds and dismisses its appeal, affirming the PCR court's ruling.

**CONCLUSION**

The findings and conclusions by the trial court should be affirmed by this Court. On all issues presented, the PCR court followed precedent and had ample evidence to support its findings. The Respondent therefore respectfully requests that this Court deny Petitioner's grounds and dismiss its appeal, affirming the PCR court's ruling.

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