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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Clifton Newman, Circuit Court Judge

Case No. 2022-001151

Herbert Smalls,..Petitioner,

vs.

State of South Carolina,... Respondent.

PETITIONER'S BRIEF

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TABLE OF CONTENTS

Table of Authorities 2

Issues Presented 4

Statement of Case 5

Analysis 13

I. The Circuit Court Erred in Finding the Plea Transcript was Sufficiently Reconstructed. 13

II. The PCR Court Erred in Concluding Petitioner's Guilty Plea was Knowingly and Voluntarily Given, and his Plea Counsel was not Ineffective. 17

III. Whether Judge Young's order found the plea hearing record had been sufficiently reconstructed was immediately appealable. 23

Conclusion 25

TABLE OF AUTHORITIES

Cases:

Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000) 18

Boykin v. Alabama, 395 U.S. 238, 243 (1969) 16

Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009) 6, 19

Garren v. State, 423 S.C. 1, 14–15, 813 S.E.2d 704, 711 (2018) 18

Godinez v. Moran, 509 U.S. 389, 400 (1993) 18, 20, 22

Kolle v. State, 386 S.C. 578, 588, 690 S.E.2d 73, 78 (2010) 18

Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004) 13

Mack v. State, 433 S.C. 267, 272, 858 S.E.2d 160, 162 (2021) 17

Mid-State Distrib., Inc. v. Century Imp., Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993) 24

Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000) 17

Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) 18

State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981) 19

State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) 13

State v. Isaac, 405 S.C. 177, 747 S.E.2d 677 (2013) 24

State v. Ladson, 373 S.C. 320, 325, 644 S.E.2d 271, 274 (Ct. App. 2007) 13-15

State v. Rearick, 417 S.C. 391, 790 S.E.2d 192 (2016) 23

State v. Wilson, 387 S.C. 597, 599, 693 S.E.2d 923, 924 (2010) 23

Strickland v. Washington, 466 U.S. 668, 686 (1984) 19

Thompson v. State, 423 S.C. 235, 239, 814 S.E.2d 487, 489 (2018) 18

United States v. Savinon-Acosta, 232 F.3d 265, 268 (1st Cir. 2000) 18

State Rules:

Rule 203 (d)(1)(B)(iv) 5, 6

Rule 243(c) 6

State Statutes:

S.C. Code Ann. § 14-3-330 .... 23, 24

S.C. Code Ann. § 16-3-20 5

U.S. Constitution:

U. S. Const. amend. V 16

U. S. Const. amend. XIV 16

ISSUES PRESENTED

I. Whether the circuit court erred in finding the plea transcript was sufficiently reconstructed.

II. The PCR Court Erred in Concluding Petitioner's Guilty Plea was Knowingly and Voluntarily Given, and his Plea Counsel was not Ineffective.

III. Whether Judge Young's order found the plea hearing record had been sufficiently reconstructed was immediately appealable.

STATEMENT OF CASE

The convoluted procedural background of this case is remarkable. In 2007, Petitioner was indicted on unrelated charges of murder and attempted armed robbery. He was represented by Alex Apostolou on the attempted armed robbery and David Horton was appointed to represent him on the murder. App. 192, 217. He ultimately pled guilty to the murder[1] on August 2, 2010, before the Honorable Roger M. Young. App. 10. Judge Young sentenced him to forty years' incarceration. App. 10. Through plea counsel, he filed a timely notice of appeal and a written explanation pursuant to Rule 203 (d)(1)(B)(iv) arguing the language of Section 16-3-20 of the South Carolina Code did not allow a range of punishment but mandated a sentence of either life imprisonment or thirty years' imprisonment. App. 32–37. The court of appeals dismissed the appeal by order dated October 14, 2010, on issue preservation grounds. App. 38–39. Remittitur was sent November 8, 2010. App. 14.

Apparently unaware this appeal had occurred, Petitioner filed a pro se application for post-conviction relief (PCR) September 10, 2013, alleging plea counsel failed to file an appeal on his behalf and he had not voluntarily waived his right to an appeal. App. 2-3. He subsequently amended his application March 7, 2014, to add the following additional claims:

1) Counsel's failure to advise applicant that upon the Court's acceptance of a guilty plea applicant waives the right to attack his conviction on grounds of insufficient evidence; and to all non-jurisdictional defects and defenses. Including an assertion that he is innocent; that an admission of guilt was coerced; that any claim of a search was unconstitutional or was denied a right to a speedy trial.
2) Counsel's failure to "object" to the State's presentation of Indictment No: 2007-GS-10-13708, for said document does not support a finding that – twelve (12) grand jurors reviewed and voted to "TRUE BILL" the document.

[1] The attempted armed robbery charge was nolle-prosequied. App. 202.

3) Counsel's failure to advise applicant that upon his entered plea of guilty, he waives any and all potential double jeopardy claims for his plea to be valid.
4) Counsel's failure to request a competence hearing prior to applicant's plea.
5) APPELLATE counsel ineffective for failing to request, trial transcripts and court documents in appellate procedures, but instead, chose to informed the appeal's court, on appeal that: "There is no issue under Rule 203(B)(IV), SCACR which counsel can identify as a basis for the appeal."

App. 22–23 (citations omitted). The State filed its return and motion to dismiss the application as untimely on March 12, 2014. App. 27. On March 13, 2014, the Honorable Stephanie P. McDonald signed a conditional order of dismissal finding the application untimely and allotting twenty days for Petitioner to show why the order should not become final. App. 80–83. Petitioner filed an "Objection to Conditional Order of Dismissal" March 31, 2014, followed by a "Motion for Summary Judgment" June 12, 2014. App. 85–95. The Honorable R. Markley Dennis issued a final order filed January 22, 2015, denying and dismissing the application. App. 103-106.

Petitioner filed a pro se notice of appeal in the Supreme Court of South Carolina and an explanation pursuant to Rule 243(c), SCACR as to why his application should not have been dismissed as untimely. App. 107, 113–128. By order dated April 28, 2015, the Supreme Court dismissed the appeal and remanded for a hearing pursuant to *Ferguson v. State*, 382 S.C. 615, 677 S.E.2d 600 (2009), to determine whether his incapacity prevented him for timely filing his application. App. 141. Pursuant to this order, the Honorable Michael G. Nettles held a *Ferguson* hearing December 7, 2017. Evidence presented at the *Ferguson* hearing was that when tested at fifteen, Petitioner had an intelligence quotient of between forty-eight and fifty-two. App. 148. Although the forensic psychologist indicated his perception of Petitioner during his interview for the 2017 hearing was likely now somewhere north of fifty, he was also not entirely convinced of

Petitioner's literacy. App. 153, 158. Judge Nettles concluded Petitioner's "intellectual deficiencies and mood disorder would impair his capacity to recognize deadlines, execute a legal document and meet the deadlines for executing the legal instruments" and observed that Petitioner is "a moderately retarded individual who is heavily medicated on Depakote and Risperdal." App. 171. He denied the State's motion to dismiss Petitioner's application and ordered an evidentiary hearing by order filed February 1, 2018. App. 175–79.

Through counsel, Petitioner again amended his PCR application June 25, 2018 alleging:

> Applicant's guilty plea was not entered knowingly and voluntarily. Trial counsel was on notice that Applicant had diminished intellectual capabilities. Trial counsel provided ineffective assistance of counsel in failing to ensure that Defendant: fully understood the State's Rule 5 disclosures; fully understood his trial rights; fully understood the rights he would waive [by] pleading guilty; and, fully understood the consequences of his guilty plea. Trial counsel was on notice that Applicant had diminished intellectual capabilities.

App. 183. He simultaneously filed a motion to reconstruct the guilty plea transcript. App. 182. Judge Young granted the motion to reconstruct the transcript July 6, 2018. App. 184–187. A hearing was held before Judge Young to reconstruct the plea on February 9, 2021, after which Judge Young issued an order finding the transcript sufficiently reconstructed to allow meaningful appellate and collateral review. App. 233–37. An evidentiary hearing was then held before the Honorable Clifton Newman on March 22, 2021. Judge Newman ultimately denied and dismissed the application for PCR by order filed August 2, 2022. App. 336–39. This Court granted Petitioner's petition for a writ of certiorari on March 19, 2024. This Petitioner's Brief timely follows.

Relevant Facts

The reconstruction hearing was held February 9, 2021, over a decade after Petitioner's August 2, 2010 guilty plea. Petitioner's plea counsel, David Horton, was unavailable for the reconstruction hearing.[2] App. 192. Testimony was taken from Julie Cardillo, who had prosecuted the plea that day.[3] She stated she "[did not] recall the plea, the guilty plea hearing" and indicated she did not recall that Judge Young took the plea, or that Mr. Horton was defense counsel; she only knew that from the paperwork she had reviewed. App. 194, 195, 200. Ms. Cardillo did recall "bits and pieces" of the facts of the case about blood in the chest cavity and a bicycle, but she admitted that she was thirty weeks pregnant at the time and "would have been more of a second sit back and help as little as [she] could." App. 197–98. As to the plea, Ms. Cardillo could only speak to how Judge Young typically handled a plea, she could not recall specifics as to whether there was any mention of mental disability or whether Petitioner was asked if he was coerced into the plea, was satisfied with his attorney, or if he asked for additional time to speak with his attorney. App. 198–200, 206. She could not recall whether defense counsel offered any argument in mitigation. App. 201.

Judge Young was similarly candid in noting he "[had] no specific recollection of [the plea]." App. 209. He stated his usual practice and what he typically asked defendants during the plea colloquy and what he would generally do if there was an issue of competency or influence of

[2] Mr. Horton is no longer a member of the South Carolina Bar and it was indicated that he suffers from some mental issues that prevented him from assisting in any hearing related to these proceedings. App. 244.

[3] Gregory Voigt was the prosecutor for this case up until the plea. App. 222, 242. Ms. Cardillo stepped in because he fell ill. App. 257.

drugs. App. 209–15. Judge Young indicated he had no memory of why he sentenced Petitioner to forty years' imprisonment and acknowledged that he would typically do at least 100 pleas a week and, understandably, as a matter of self-preservation he would purposefully forget about them. App. 215–16. Judge Young recognized that "[n]obody remembers a specific thing[t]hey just remember what we usually do." App. 224.

Mr. Apostolou, who represented Petitioner on the attempted armed robbery charge pending against Petitioner when he was charged with murder, also testified at the hearing. App. 217. Mr. Apostoulo and Mr. Holton had met with Mr. Voigt about a possible plea deal and went together to speak with Petitioner, after which Mr. Horton had assumed the case was going to trial. App. 221. He indicated he had been on vacation the week prior to the plea, and went to the courthouse to offer Mr. Horton any help with the trial but was "shocked" to see Petitioner plea. App. 218, 219. Mr. Apostolou testified that he did not remember anything Mr. Horton may have said in mitigation but was really just "shocked that it had turned around in such a short period." App. 220.

In closing, Petitioner argued that the reconstruction was incomplete, and he was prejudiced in that there was no positive recollection as to whether the issues of his mental health were addressed at the plea and there was absolutely no testimony as to what Mr. Horton may have said at the plea (or not) in mediation. App. 226–27. Judge Young ultimately disagreed and stated the record was "reconstructed adequately," but based this finding on the conclusion that that this was the best reconstruction that they could do, not that the transcript was particularly accurate or informative. App. 230 ("I think it's been reconstructed. This is what I would have normally done. This is what Ms. Cardillo remembers that she would normally do and that I normally did. We don't

have Mr. Holton's availability. We don't have any other evidence so this is the reconstruction."); *see* App. 228–29 ("And I think all I can do on this is to say, let's have a transcript made up, and I will say this is what the transcript shows. This is my recollection of what happened, Ms. Cardillo's recollection of what happened, Mr. Holton is unavailable due to illness and cannot assist us, and this is what we have."); App. 231 ("I've always found these to be a little problematical because almost by definition you don't have them and everybody just kind of says, well, I don't remember. This is what I usually do. So I can't do anything more.").

The case eventually proceeded to an evidentiary hearing on Petitioner's PCR claims. At the PCR hearing, Mr. Voigt, who had been the assigned assistant solicitor on the murder case, testified that in reviewing his old file, he noticed that there were no investigative supplements or any work product from a detective. App. 248. He stated that on a murder case in North Charleston, he would have expected the work of multiple detectives working in collaboration. App. 249. Initially, another suspect had been arrested and was then "un-arrested" after he proved he had been incarcerated at the time of the murder. App. 249. Mr. Voigt discussed how in preparing for trial he learned about an attempted identification with a witness incarcerated in Greenville County that ended with the Greenville County Sheriff's Office asking the North Charleston detectives to leave without any positive identification of Petitioner. App. 250–51. Mr. Voigt stated that the evidence available in the homicide case was the codefendant's testimony inculpating Petitioner.[4] App. 260. He indicated, however, that he had never viewed the case as a trial based on Petitioner's record. App. 252. He stated he recalled Mr. Horton indicating to him that "this is

[4] Curiously, the affidavit supporting probable cause to arrest Petitioner references a signed written confession. App. 13. This was never mentioned at the hearings and instead the evidence showed Petitioner has consistently denied his involvement.

definitely a plea" and he just needed to have something to convince his client to take the plea. App. 253. Because that did not happen and the case ended up set for trial, the plea was straight up. App. 255.

Petitioner also testified. He stated he only met with Mr. Horton twice and the second time he saw him was right before court. App. 263. Petitioner explained they never went over any discovery, but Mr. Horton told him he was looking at a life sentence so he should plead guilty. App. 264. He said he had wanted to go to trial. and his family had asked Mr. Horton to take it to trial, but Petitioner ended up pleading because that is what his attorney told him to do. App. 264. He stated that at the plea, his sister had told the judge that she wanted him to be evaluated. App. 266. Petitioner testified he sustained a head injury when he was young, he has been on medication to treat his mental health issues since he was a child, and had been in special education all his life due to his learning disability. App. 266–67. He had only finished ninth grade because that was around when he was in the car accident that resulted in his head injury and at that point, he was homebound. App. 276.

Petitioner indicated he was not fully aware of the weakness of the case against him until his uncle filed the paperwork to get the Rule 5 disclosures. App. 270. He testified he was not sure if he obtained the information from the court or the solicitor because his family handles all his writing for him. App. 272. He stated his sister told the judge at the plea that he was on multiple medications at which point the court asked Mr. Horton if they were ready to proceed; Mr. Horton told him to go ahead and take the plea, so he did. App. 274.

Mr. Apostolou testified as well and discussed how he and Mr. Horton went to see Mr. Voigt to try to come to a resolution for both cases. App. 280. His recollection was that the murder case

was very weak, and the attempted armed robbery was the stronger case. App. 280. Mr. Apostolou recalled an offer of around twelve or fourteen years. App. 281. He testified that he and Mr. Horton went to talk to Petitioner afterwards and Petitioner responded that "he didn't do the murder and he didn't want to plead to case he didn't do" so the case was set for trial. App. 281. He reiterated multiple times that he was shocked when Petitioner pled guilty. App. 281, 284, 287. He stated that he was aware Petitioner was not a very sophisticated defendant, but he did not feel he needed to have him evaluated. App. 282–83. He noted further that he did not quite understand why Mr. Holton was not going to trial because he was a very good attorney. App. 292.

In its own questioning, the PCR court referenced Mr. Horton experiencing "troubles," and asked Mr. Apostolou, "When did he disappear or when did he begin to have his troubles or when were you made aware of his mental health issues?" App. 292. Mr. Apostolou noted that at some point during a meeting with Mr. Horton, he found out Mr. Horton had shut down his office and was meeting clients at a coffee shop. App. 292. He explained that Mr. Horton was not "around the scene" after that and he then heard Mr. Horton had stopped practicing entirely. App. 292. Although Mr. Apostolou could not remember the exact timing of his conversation with Mr. Horton, he noted his meeting may have been in the context of Petitioner's case. App. 292.

Judge Newman ultimately denied and dismissed the application for PCR by order filed August 2, 2022. App. 336–39. In it he determined he was not empowered to reconsider the adequacy of the reconstruction after Judge Young had ruled on it. App. 331. He further found that Petitioner had failed to prove his plea was involuntary or that he received ineffective assistance of counsel. This appeal followed.

ANALYSIS

I. The Circuit Court Erred in Finding the Plea Transcript was Sufficiently Reconstructed.

The trial court erred in finding that the reconstructed record was adequate for collateral review. The record is essentially a recitation of what the solicitor and the trial court would ideally have said and lacks any information on what plea counsel said or did at the hearing—information fundamental to the inquiry of whether representation was constitutionally deficient. Therefore, the record is inadequate to allow for review and Petitioner is prejudiced because of it.

"Where a transcript has been lost or destroyed, a court may remand to have the record reconstructed." *Koon v. State*, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). A reconstructed record must provide for meaningful review. *State v. Ladson*, 373 S.C. 320, 325, 644 S.E.2d 271, 274 (Ct. App. 2007). However, if the state of the transcript is so incomplete as to prevent meaningful review, the Court should remand for a new trial. *Id.*

In considering whether the reconstructed transcript allowed for meaningful review, *State v. Ladson*, is instructive. Although *Ladson* involved the reconstruction of a trial, not a guilty plea, the critical challenges that obviated the production of an adequate record are similar. In *Ladson*, the defendant was convicted of first-degree burglary after a three-day trial and timely appealed and requested a copy of the transcript. 373 S.C. at 321, 644 S.E.2d at 271. Ten months later, the court reporter disclosed that there was no record of the proceeding to produce the transcript. *Id.* The Court of Appeals remanded the case for a reconstruction and the trial court convened a hearing over a year later to reconstruct the record. *Id.* At the hearing, "[t]he information provided by the State was conclusory" and the trial court no longer had his written notes but instead deferred

entirely to the State's summations. *Id.* at 322, 644 S.E.2d at 272. However, the State's recollection was imperfect and entirely forgot about one of its witnesses. *Id.* There was even disagreement about whether the defendant testified, with the defendant saying he did not, and the trial court convinced he had and that his testimony was not credible. *Id.* at 322–23, 644 S.E.2d at 272. The trial court also incorrectly remembered that the verdict was delivered the same day deliberations began, but the State showed that the jury verdict was signed the next day. *Id.* at 232, 644 S.E.2d at 272.

In determining the record on appeal was insufficient for review, the Court of Appeals first observed that "[d]espite these good faith efforts, the reconstructed record is largely conclusory, with testimony, objections, and the like recalled only in summary fashion." *Id.* It then turned to the question of whether the defendant suffered prejudice from the inadequacies of the record and concluded that "[t]o hold this record is sufficient would guarantee the affirmance of Ladson's conviction and twenty-five-year non-parolable sentence without a genuine review." *Id.* at 327, 644 S.E.2d at 274. Accepting a record lacking "the completeness and reliability necessary for this court to engage in meaningful appellate review," the Court would be "constrained to affirm" and the defendant would be effectively precluded from pursuing any subsequent collateral review. *Id.* at 327–28, 644 S.E.2d at 274–75.

As in *Ladson*, the entirety of the proceeding here was missing. Over a decade had elapsed since the plea and the solicitor and trial court did not simply have poor recollection, they had no memory of the proceeding. Both merely offered suppositions and generalizations at how it probably would have flowed given how they generally handled pleas. No one remembered what plea counsel said at the hearing or if he addressed Petitioner's mental health issues to the court—

not even Mr. Apostolou, who was the only person at the reconstruction who had any memory of the event. App. 219–220. As such, the reconstructed transcript is the product of mere guesswork, which Judge Young recognized, he simply decided it was all they could do.

To be clear, the trial court's conclusion that the plea was adequately reconstructed does not even rest on that court's belief that the transcript is sufficiently detailed and accurate. As discussed about, at the close of the hearing the trial court merely states that this was the best they could do, so that must be enough. That may be so, but simply because there was no hope for a better or more accurate transcript does not mean that the transcript produced was sufficient to provide meaningful review—it means a new trial must be granted. *Ladson*, 373 S.C. at 325, 644 S.E.2d at 274. The written order on the sufficiency of the reconstruction is no more illuminating, containing no legal discussion beyond a string cite of cases that indicate a trial court has the authority to reconstruct a hearing. App. 236. There was never a question of whether remand for a plea reconstruction was appropriate. The question is whether what that hearing produced allows for review and whether its deficiencies prejudicially ensure affirmance. Petitioner has argued his plea was involuntary and plea counsel was deficient in failing to ensure Petitioner understood his rights and the impact of the consequences of his guilty plea. Absent any indication of what was discussed by plea counsel at the hearing, there is no assurance counsel addressed the issues of his mental health to Judge Young so that both took care to ensure Petitioner's plea was knowing and voluntary, not the result of coercion or insufficient information.

As in *Ladson*, accepting the bareboned reconstruction guarantees affirmance, not meaningful review. At the evidentiary hearing, the PCR court noted the clear deficiencies of the reconstruction and how that would specifically prejudice Petitioner's ability to address the

allegations of his PCR application. App. 311 ("[H]ow could we have a meaningful PCR record in this case, Mr. Apostolou provided some meaningful information, but he wasn't representing the client and the test is where the lawyer's performance was deficient and resulting in prejudice."). It observed that the adequacy of the transcript was a paramount consideration in its determination of whether Petitioner had met his burden. App. 322 ("So, whether or not the transcript is adequate then that's an important component and everything.").

These sentiments bore out in the subsequent order of dismissal. Initially, the PCR court determined it did not have the authority to review the adequacy of the reconstruction. App. 331. In concluding Petitioner had not met his burden of proof, the PCR court relied on the trial court's explanation of its "typical" and "formulaic" practice. App. 336–37. It is hard to imagine a judge who would not state that as a rule, he asks all the appropriate questions and is careful not accept an involuntary plea.

As the United States clarified decades ago, because a guilty plea requires the waiver of a number of fundamental rights, a conclusion that those rights were waived is impermissible on a silent record. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) ("Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Second, is the right to trial by jury. Third, is the right to confront one's accusers. We cannot presume a waiver of these three important federal rights from a silent record." (citations omitted)). The record here is not just silent—it is entirely blank. The only suggested filler is language specifically designed to preclude the advancement of Petitioner's claims. If it was simply safe to assume that good judges and good

attorneys never made errors, there would be no need for appellate or collateral review. However, our General Assembly enacted the Uniform Post-Conviction Relief Act to ensure convicted persons in our state who believe their conviction was obtained in violation of their constitutional rights are afforded meaningful review of that claim. Assuming away Petitioner's claims with generalized testimony unravels this intent.

Despite best efforts, the hearing participants were understandably unable to reconstruct the record of a plea over a decade later and because he can obtain no meaningful review, Petitioner's case should be remanded for trial.

II. The PCR Court Erred in Concluding Petitioner's Guilty Plea was Knowingly and Voluntarily Given, and his Plea Counsel was not Ineffective.

Even accepting the reconstructed transcript as adequate, the PCR court erred in concluding that Petitioner failed to meet his burden of proving his guilty plea was involuntarily made and he received ineffective assistance of plea counsel. The PCR court's order confuses the allegations in Petitioner's amended applications and therefore misapplies the relevant analysis. The relevant issue is whether the plea was involuntarily made considering Petitioner's diminished intellectual capabilities and the circumstances of the plea, and whether plea counsel was ineffective within that process. The evidence indicates both and therefore even if this Court determined the reconstruction of the record was adequate, a new trial should be ordered.

"In a PCR case, this Court will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them." *Mack v. State*, 433 S.C. 267, 272, 858 S.E.2d 160, 162 (2021). Conversely, the Court "will not uphold the findings when there is no probative evidence to support them[and] will reverse the PCR judge's decision when it is controlled by an error of law." *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

"The Due Process Clause requires guilty pleas be entered into voluntarily, knowingly, and intelligently." *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000). "[A] defendant entering a guilty plea 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." *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000). "That the plea be voluntary is not only a requirement of due process, but a premise of the defendant's meaningful participation in the plea process." *Garren v. State*, 423 S.C. 1, 14–15, 813 S.E.2d 704, 711 (2018) (quoting *United States v. Savinon-Acosta*, 232 F.3d 265, 268 (1st Cir. 2000)). "A finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel." *Godinez v. Moran*, 509 U.S. 389, 400 (1993). "In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary." *Id.*

"To establish ineffective assistance of counsel, the 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." *Thompson v. State*, 423 S.C. 235, 239, 814 S.E.2d 487, 489 (2018). "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the 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, the defendant would not have pled guilty, but would have insisted on going to trial." *Kolle v. State*, 386 S.C. 578, 588, 690 S.E.2d 73, 78 (2010), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). "The 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." *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

As an initial matter, the order is imprecise[5] (or incorrect)[6] in enumerating Petitioner's allegations and its resultant analysis fails to capture the thrust of Petitioner's claims. In his application amendment through counsel, Petitioner argues his diminished intellectual faculties affected his ability to enter a plea voluntarily because he did not understand the rights he was waiving or the consequences of his plea. App. 183. This point was reiterated at the hearing, with PCR counsel clarifying that he was "not saying that [Petitioner] would have failed a *Blair*[[7]] Hearing at that time." App. 318. Instead, he argued that Petitioner has significant mental deficiencies, which were explored in detain in the *Ferguson* hearing, that would have impacted his ability to enter a knowing and voluntary plea because he would be susceptible to the persuasion of

[5] Specifically, the order's list of PCR allegations do not reflect the contents of either of Petitioner's pro se applications. *Compare* App. 329, *with* App. 2–3, *and* App. 22–23. The order then states "Applicant, through counsel then filed an amended application, stating:" with nothing following. App. 329. The analysis is therefore confusing when it then states "Applicant amended his application to include an allegation that he was mentally incompetent at the time of the plea and therefore did not knowingly enter his guilty plea." App. 337. His amendment through counsel does not allege that. App. 183. The closest Petitioner comes to what the PCR court discusses is that in his first amended application, he alleges ineffective assistance of counsel based on plea counsel's failure to order a competency examination, App. 23, but the order never references a pro se amended application, either in the discussion of grounds presented of in the procedural history. Furthermore, as discussed *infra*, competency to plea and voluntariness of a plea are not the same thing.

[6] The order also references in quotation marks that Petitioner states he is "seeking, 'Reverse and Remand.'" App. 329. That phrase is never so spoken in his application. *See* App. 6 (stating requested relief as "conviction should be reversed and his case remanded for a new trial or acquittal").

[7] *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981).

his plea counsel—who was himself suffering from mental disturbance and apparently working to close his practice. App. 318–19.

The only consideration the PCR court gave to Petitioner's intellectual disabilities is in its discussion of his *competency* not how it affected the *voluntariness* of his plea. Those are not the same inquires. As the United State Supreme Court has explained, "[t]he focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings" and "[t]he purpose of the 'knowing and voluntary' inquiry, by contrast, is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced." *Godinez v. Moran*, 509 U.S. at 401 n. 12.

Regardless of a competency determination, the evidence shows Petitioner has diminished intellectual capabilities that would affect his understanding of the implications of pleading guilty. Although the PCR court complained there was no evidence addressed to Petitioner's mental condition at the time of his plea, this conclusion overlooks the fact that Petitioner's mental infirmities have been the struggle of his entire life. Petitioner suffers from bipolar disorder and has an intelligence quotient indicating he is mildly to moderately intellectual disability. App. 156. Those infirmities are not fleeting. He has been medicated since childhood for his mood disorder and his learning disability kept in in special education classes until he dropped out after a head injury around ninth grade. App. 155, 266, 276.

The PCR court also relied on testimony of Mr. Apostolou in disregarding Petitioner's claim, finding Mr. Apostolou "testified at the reconstruction hearing that he never had any concerns regarding Mr. Small's competency and that he understood his discussion of a plea offer

that he conveyed to him with Mr. Holton." App. 338. This holding is not a fair reading of the evidence. At the reconstruction hearing, Mr. Apostolou noted, in response to questioning about whether he knew if Petitioner could read or write, he responded that he knew Petitioner "wasn't the most sophisticated defendant for sure" and continued by explain how he and Mr. Holton met with Mr. Voigt about a possible plea deal and afterward they went to speak with Petitioner.[8] App. 221. Discussing why he accompanied Mr. Holton, Mr. Apostolou explained his "participation being because [Mr. Holton] -- because [he] had known [Petitioner] before, and [Mr. Holton] asked [Mr. Apostolou] to go with him to communicate that. So [he] know that [they] went to the jail and [they] had a conversation with Herbert about the offer at the time." App. 221. His testimony indicated Mr. Horton had concerns about communicating with Petitioner and therefore asked for Mr. Apostolou's assistance.[9] He never specifically stated Petitioner understood the plea he rejected. Furthermore, Mr. Apostolou certainly did not state that he "never had any concerns" but testified at both hearings about Petitioner's lack of sophistication. App. 221, 282. He stated, of course, that he would have had a competency hearing if he thought Petitioner was incompetent, but also observed that this was and "unfortunately, very low standard." App. 283. Mr. Apostolou testimony indicates that in his estimation, Petitioner would pass the low bar of competency to stand trial, but he was by no means sophisticated in his comprehension.

The PCR court's other holdings on the voluntariness of Petitioner's plea are similarly unsupported by the evidence. The PCR court found

[8] The evidence suggests Petitioner indeed has literacy problems. He testified all his family does all his writing. App. 272.

[9] Of course, this PCR is not necessarily about what Mr. Apostolou thought because it is not his representation that is being challenged as ineffective.

> Applicant acknowledged his counsel discussed the case with him prior to the plea, he understood his Constitutional rights. Applicant acknowledged he understood the charges he was facing and that he could either plead guilty or not guilty. Applicant also pleaded guilty and agreed with the facts read by the trial court. Applicant acknowledged the Constitutional rights he would have if he proceeded to trial and that he would be surrendering those rights if he plead [sic] guilty.

App. 336. In support of these statements, it cites to the testimony of Ms. Cardillo at the reconstruction hearing. However, Ms. Cardillo was clear that she had no specific recollection of the plea—and therefore could offer no definitive testimonial evidence as to what in fact Petitioner may or may not have said at the hearing (or anyone else for that matter). App. 193–94, 203. Accepting the reconstructed record as adequate does not transform the character of the testimony offered from what the participants thought probably happened to what actually happened. The order otherwise just references Judge Young's statements about his formulaic process for guilty pleas. App. 337. At best, the PCR court can conclude the nature of the colloquy Petitioner *probably* had before Judge Young. No one remembers him actually having the colloquy and no one knows if plea counsel ensured that his intellectually disabled client understood the import of the proceedings.

Furthermore, even if Petitioner responded appropriately to a generic colloquy, the question here is whether he *actually understood* the significance of his plea and it was entered without coercion. *Godinez v. Moran*, 509 U.S. 389, 401 n.12. The facts surrounding the plea offer no comfort on that and create only questions and concern. Although everyone involved was careful not to disparage Mr. Horton, it is inescapable that something was amiss. The evidence shows that Petitioner, himself troubled by mental disorder, was being represented by an attorney going through his own battle and working to get out of the practice of law. During this representation, Petitioner somehow transitioned from adamantly *not* wanting to plea to a crime he did not commit

(and for which there was little evidence he *did* commit) to accepting a last-minute plea. Mr. Apostolou testified Petitioner was clear that he did not want to plead to something he did not do, that the case was weak, and Mr. Holton was a very capable trial advocate. App. 281, 292. Petitioner testified he had no more discussions with Mr. Holton about the case than Mr. Holton telling him to "go ahead and plead guilty." App. 264. He further testified he did not receive the Rule 5 disclosures until *after* he pled and then only through his uncle, so he was not aware of the real weakness of the State's case. App. 271. The direct evidence fails to support the finding that Petitioner's plea was knowingly and voluntarily entered and that plea counsel was not ineffective. The proceeding therefore cannot be relied on as having produced a just result, and Petitioner's case should be remanded for trial.

III. Whether Judge Young's order found the plea hearing record had been sufficiently reconstructed was immediately appealable.

In South Carolina, a criminal defendant has no constitutional right to appeal. Rather, a defendant's right to appeal is authorized by statutes and appellate court rules of procedure. *State v. Rearick*, 417 S.C. 391, 790 S.E.2d 192 (2016). *See also State v. Wilson*, 387 S.C. 597, 599, 693 S.E.2d 923, 924 (2010) ("The right of appeal arises from and is controlled by statutory law." (citation omitted)).

The General Assembly has expressly limited those decisions that are immediately appealable. S.C. Code Ann. § 14-3-330, provides, in pertinent part, that an immediate appeal may be taken from:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is

entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment.

S.C. Code Ann. §14-3-330(1), (2), (3) (1976).

An order involving the merits "must finally determine some substantial matter forming the whole or a part of some cause of action or defense." *Mid-State Distrib., Inc. v. Century Imp., Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993).

Respectfully, counsel believes that Judge Young's order holding the reconstruction was sufficient is not immediately appealable since it did not prevent a judgment from which an appeal might be taken, nor did it discontinue the action. In *State v. Isaac*, 405 S.C. 177, 747 S.E.2d 677 (2013), the South Carolina Supreme Court held that a decision denying immunity under the Protection of Persons and Property Act is not appealable because it is not an order involving the merits nor does it finally determine a substantial cause of action or defense. In other words, whether the trial court made the right decision as to whether immunity was warranted could be reviewed on appeal after the trial was concluded. The concurrence would have found that an order denying immunity would have been immediately appealable because it would be in the nature of an injunction. *Issac* at 188, 682.

Here, Judge Young's order did not prevent an appeal of the matter (although it has prolonged resolution of the issue) and given Judge Young's erroneous legal ruling as the sufficiency of the reconstruction effort, this Court respectfully should grant Petitioner a new trial. While there

are sound policy reasons for allowing an appeal when a judge concludes that a reconstruction effort is satisfactory—for instance, as in this case, to promote judicial efficiency—respectfully, counsel informs the Court that based on her research of the issue she concludes an interlocutory appeal of the issue would likely be improper.

CONCLUSION

Because an adequate transcript for meaningful review is not available, Petitioner is prejudiced in his ability to meaningfully present his application. Petitioner's ability to prove his allegations as to whether counsel was ineffective or whether his plea was voluntary was further crippled by the fact that his counsel is unavailable based on mental issues that appear to have developed during his representation of Petitioner. It is unclear how ignoring these circumstances and resting on assumptions based on what the plea participants normally do can be squared with any sense of justice. Respectfully, this Court should order a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Counsel certifies that she has provided a copy of this Petitioner's Brief on Joshua Edwards of the South Carolina Attorney General's Office via email on this date, May 22, 2024.

/s/Elizabeth Franklin-Best