RECEIVED
Jun 13 2024
S.C. SUPREME COURT

EXHIBIT A

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Jun 13 2024

S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Hon. G.D. Morgan, Jr., Circuit Court Judge

Lower Court Case No.: 2018-CP-42-03680
Appellant Case No. 2023 – 001011

Stepheno Alston ……. Petitioner,

v.

The State of South Carolina……..……. Respondent.

AMENDED PETITION FOR WRIT OF CERTIORARI

Stepheno Alston, # 357159
Pro-se

Ridgeland Correctional Institution
P.O. Box # 2036
Ridgeland, S.C. 29936

SELF-REPRESENTATION

TABLE OF CONTENTS

TABLE OF AUTHORITY

Cases:

State Constitution:

U.S. Constitution:

QUESTIONS PRESENTED

I. Did the PCR Judge erred in refusing to find trial counsel was ineffective for failing to object to the trial proceeding in Petitioner's absence based on a violation of his Sixth Amendment right to be present at every stage of his trial proceedings, as well as the failure to meet the requirements of Rule – 16, SCRCrimP, and failing to object to Petitioner being tried in his absent, then moving for a continuance so that Petitioner, could be properly notified to be present for his trial.

II. Did the PCR Judge abuse his discretion in issuing an order denying Petitioner post-conviction relief and denying his Rule – 59(e) Motion, fails to adequately address the merits of Petitioner's Exhibits One, Two, and Three: The CAD/Traffic Stop Report, the warning citation, and the Video in light of the testimony presented at the PCR hearing about the cumulative effect of Trial Counsel's errors, due to failure to utilize and to properly present those Exhibits during his presentation of Petitioner's Motion to Suppress hearing and trial proceedings was done by arbitrary and capricious means in light of the evidence that was presented before the PCR Court.

III. Did the PCR Judge overlook the trial court's transcript and the testimony evidence that was presented at the PCR hearing concerning Petitioner's challenges to his indictment being amended during his trial, was an abuse of discretion.

STATEMENT OF THE CASE

The following pertinent procedural and factual history is necessary to understand the issues presented by Petitioner for Post-Conviction Relief. Petitioner who is presently confined in the South Carolina Department of Corrections pursuant to an Order of commitment of the Spartanburg County Clerk of Court.

On March 28, 2011, Petitioner was arrest and charged with trafficking in cocaine. In June of 2011, the Spartanburg County Grand Jury indicted Petitioner, for trafficking in cocaine, indictment # 2011-GS-42-3090. (See App. pp. 283 – 284). On March 18, 2013, the case was called for jury trial before trial before Circuit Judge, J. Derham Cole. Petitioner was not properly notified of his trial date and was not present for trial. Attorney, Andrew J. Johnston represented Petitioner at trial. Asst. Solicitor, J. Edward Hunter prosecuted the case. A jury found Petitioner guilty. On September 19, 2013, Petitioner appeared before Judge Cole for sentencing. Attorney, Andrew J. Johnston, again represented Petitioner and Asst. Solicitor, J. Edward Hunter, again represented the State. The judge announced a twenty-five year sentence that was imposed after trial. (See App. p. 285).

A timely notice of intent to appeal was filed and a direct appeal was perfected. On July 29, 2015, the South Carolina Court of Appeals, after hearing oral argument, affirmed Petitioner's conviction and sentence. See *State v. Alston*, Op. No. 2015-UP- 381 (S.C. Ct. App. filed July 29, 2015). A timely petition for rehearing was filed and then denied on September 15, 2015. On October 26, 2015, a petition for writ of certiorari was filed with the South Carolina Supreme Court. The State filed a return on November 24, 2015. On July 18, 2016, the Court granted the petition for writ of certiorari and additional briefs were filed. (See App. pp. 286 – 367). On March 7, 2018, after hearing oral argument, the South Carolina Supreme Court affirmed as modified the

opinion by the Court of Appeals. See *State v. Alston*, 422 S.C. 270, 811 S.E.2d 747 (2018). (See App. pp. 368 – 385). A petition for writ of certiorari was filed with the Supreme Court of the United States. On October 1, 2018, the Court denied the petition for writ of certiorari.

On October 22, 2018, Petitioner filed an application for post-conviction relief (PCR). (See App. pp. 386 – 399). The State filed a return on February 25, 2019. (See App. pp. 400 – 420). On July 6, 2021, Petitioner filed an amended PCR application. (See App. pp. 421 – 424). On April 15, 2022, Petitioner would filed a second amended PCR application. (See App. pp. 425 – 427). On April 20, 2022, an evidentiary hearing was held before the Honorable G.D. Morgan. Attorney, Susannah Ross represented Petitioner at the PCR hearing. Asst. Att'y. General, Chelsey Marto represented the State. In a written order signed March 16, 2023, Judge Morgan denied relief and dismissed the application. (See App. pp. 516 – 538). A timely motion to alter or amend was served on April 7, 2023. (See App. pp. 539 – 550). The State served a return on May 5, 2023. (See App. pp. 551 – 562). On June 7, 2023, Judge Morgan denied the motion to alter or amend. (See App. p. 563). A timely notice of intent to appeal was served on June 23, 2023. This petition for writ of certiorari follows.

STANDARD OF REVIEW

This Court's original jurisdiction sits as both the finders of facts and finders of law. See S.C. Code Ann. § 14-3-340; also see *Sanford v. S.C. State Ethics Comm'n*., 385 S.C. 483, 497, 685 S.E.2d 600, 607, *opinion clarified*, 386 S.C. 274, 688 S.E.2d 120 (2009). The burden is on the applicant in a PCR proceeding to prove the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). On certiorari in a PCR action, this Court applies an "any evidence" standard of review. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

Accordingly, the Court will affirm if any evidence of probative value in the record exists to support the finding of the PCR court. *Id*. at 119, 386 S.E.2d at 626.

"[A] Rule – 59(e) motion must be filed if issues are not adequately addressed in [the] order to preserve the issues for appellate review." *Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266 (2007). "Pursuant to S.C. Code Ann. § 17-27-80 (2003), the PCR judge must make specific finding of fact[s] and state expressly the conclusions of law relating to each issue presented." *Id*. "The purpose of Rule – 59(e), SCRCP, to alter or amend the judgment [,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.' " *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (quoting *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 200, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988)).

ARGUMENT

I.

THE PCR JUDGE ERRED IN REFUSING TO FIND TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL PROCEEDING IN PETITIONER'S ABSENCE BASED ON A VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO BE PRESENT AT EVERY STAGE OF HIS TRIAL PROCEEDINGS, AS WELL AS THE FAILURE TO MEET THE REQUIREMENTS OF RULE – 16, SCRCRIMP, AND FAILING TO OBJECT TO PETITIONER BEING TRIED IN HIS ABSENT AND THEN FAILING TO MOVE FOR A CONTINUANCE SO THAT PETITIONER COULD BE PROPERLY NOTIFIED TO BE PRESENT FOR HIS TRIAL.

A. Notice and Trial *In Absentia*

Petitioner argues that the trial court erred in holding his trial in his absence, where the State failed to show: (1) he received notice of his right to be present; and (2) he was warned the trial would proceed in his absence.

Although the Sixth Amendment of the Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived. *State v. Ravenell*, 387 S.C. 449, 455 – 56, 692 S.E.2d 554, 557 - 58 (Ct. App. 2010); *Ellis v. State*, 267 S.C. 257, 260, 227 S.E.2d 304, 305 (1976). Rule – 16 of the South Carolina Rules of Criminal Procedure provides:

> [A] person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court.

Rule – 16, SCRCrimP.

However, a waiver of such an important right is permitted only in limited circumstances. See *City of Aiken v. Koontz*, 368 S.C. 542, 547, 629 S.E.2d 686, 689 (2006). Therefore, before Petitioner Alston may be tried *in absentia*, the trial court must determine if Petitioner Alston voluntarily waived his right to be present at trial, making a finding of fact on the record that Petitioner Alston (1) received notice of his right to be present and (2) was warned that the trial would proceed in his absence. *Id*.

1. Failure to Notify Petitioner of Trial Date

"Notice of the term of court for which the trial is set constitutes sufficient notice to enable a criminal defendant to make an effective waiver of his right to be present." *Koontz*, 368 S.C. at 547, 629 S.E.2d at 689. However, if the record "does not include evidence to support a finding that [Petitioner Alston] was afforded notice of his trial, the resulting conviction *in absentia* cannot stand." See *State v. Jackson*, 290 S.C. 435, 436, 351 S.E.2d 167, 167 (1986).

In the present case, the trial court failed to make the requisite factual findings, the record is devoid of any fact indicating that Petitioner had actual notice of the term of court in which his trial would occur. See *Ravenell*, 387 S.C. at 456, 692 S.E.2d at 558 ("[N]otice of the term of court in which a defendant will be tried is sufficient notice to enable the Defendant to make an effective waiver of his right to be present at his trial."). The record will show that the solicitor "inexplicably" did not send a notice to Petitioner concerning his March 18, 2013, trial date to his Georgia address nor to the bail bond man, Mr. Sterling.

The Trial Judge asked trial counsel, Johnston, if he told Petitioner that his case was being called for trial. (See App. p. 9, Ln. 15 – 16). Whereas, trial counsel obliquely responded, "I did not tell him that specifically, Your Honor, but I believe it was implicit what was happening." (see App. p. 9, Ln. 17 – 19). The Trial Judge then again asked trial counsel if he informed Petitioner that his case was being called for trial. (See App. p. 10, Ln. 5 – 6). Whereas, Trial Counsel answered, "yes, sir." (see App. p. 10, Ln. 7). But, when asked about, when Petitioner was first informed of the fact that his case was up for trial, Trail Counsel stated, "I spoke with him on the telephone last week, Your Honor, and told him he was very high on the docket." (see App. p. 10, Ln. 12 – 14). Trial Counsel, Johnston, told the judge that he believed Petitioner understood that his case was being called for trial. (See App. p. 10, Ln. 20 – 23). The Trial Judge then referenced the bond paperwork that had been signed two years earlier by Petitioner. (See App. p. 11, Ln. 12 – p. 12, Ln. 1 – 3). The bonding company was notified by a telephone call about Petitioner's March 18, 2013, trial date on the day of the trial and that the judge issued a bench warrant for Petitioner's arrest. (See App. p. 12, Ln. 4 – p. 13, Ln. 1 – 7).

Trial Counsel failed to object to the issuance of the bench warrant. Trial Counsel would also fail to object to the trial proceeding in Petitioner's absence and would fail to move for a continuance, so that his client, Stepheno Alston can be properly notified to be present for court. The trial court would then adjourn for the day, (see App. p. 10, Ln. 23 – p. 101, Ln. 1 – 5), after hearing testimony for Petitioner's Motion to Suppress, the trial judge took the matter under advisement and would resumed the trial the next day, insomuch as, Petitioner was not present. The trial judge would find that Petitioner received notice that his case was being called for trial, received notice by the bail proceeding form that he would be tried in his absence if he failed to appear, and found that Petitioner knowingly and voluntarily waived his right to be present at trial.

(See App. p. 102, Ln. 3 – p. 103, Ln. 1 – 9). Trial Counsel did not object to the findings by the judge and again did not move for a continuance. Trial Counsel was asked if he moved for a continuance at the PCR hearing and testified that, "Once the judge heard that he had been here and left, that was the end of it." (see App. p. 476, Ln. 18 – 20). Trial Counsel testified that in his opinion the judge would not have continued the case based on the fact that Petitioner appeared and then left. (See App. p. 476, Ln. 21 – p. 477, Ln. 1 – 10). When questioned about why Petitioner left, trial counsel surmised, "I guess he was scared." (see App. p. 476, Ln. 16 – 17).

During the PCR hearing Petitioner was asked what happened at the docket call when he appeared but then left. (See App. p. 454, Ln. 8 – 9). Petitioner testified, "Yes. I - when I - when I was told to come to South Carolina – because I'm from Georgia, I mean, it was basically for roll call. I didn't know I was going to trial." (see App. p. 454, Ln. 10 – 13). Petitioner also testified:

> So it was just – I mean, he – he said he mentioned it, but he didn't spascifas [sic] – sacifically (as spoken) say that it was gonna be that day, which it could've been the next day. I don't know. All I – the only thing I remember, him – me and him talking about a plea deal. He offered me a plea deal, 15 years. I told him I didn't want it. He walked off. He said something about, well, I'm the one that gotta do the time. He walked off. I left. I didn't know the trial was – I mean plus it was pretty much – it was almost afternoon, so I knew it couldn't have been no trial going on that day.

(see App. p. 454, Ln. 15 – 25).

"It [would] seem[] logical that for one to voluntarily fail to attend or otherwise waive his trial appearance, one must actually know when the trial is to occur." quoting *State v. Wrapp*, 421 S.C. 531, 537, 808 S.E.2d 821, 824 (Ct. App. 2017). Here, "the trial court erred in failing to make the requisite findings and the record is devoid of facts allowing [this court] to discern whether [Petitioner actually] had notice of the term of court." *Id*. (citing *State v. Jackson*, 290 S.C. 435, 436 – 37, 351 S.E.2d 167, 167 (1986) (reminding for a new trial because there was no evidence in the record that the defendant was given notice of his trial and neither defendant nor his counsel

were present at trial); *State v. Simmons*, 279 S.C. 165, 166 – 67, 303 S.E.2d 857, 858 – 59 (1983) (remanding for a new trial because the record was devoid of facts showing defendants had notice of their trial); see also *State v. Ritch*, 292 S.C. 75, 354 S.E.2d 909 (1987); *State v. Fleming*, 287 S.C. 268, 335 S.E.2d 814 (1985).

2. Failure to Request Continuance

In the PCR application Petitioner alleged ineffective assistance of counsel for failing to move for a continuance or object to the trial in Petitioner's absence. (See App. pp. 393 – 394). In the amended application Petitioner alleged that trial counsel was ineffective for "failing to request continuance after a bench warrant was issued in the case or object to a trial in absence[,] arguing that his ability to effectively try the case hinged on Mr. Alston's presence and that given the serious nature of the charge with its mandatory sentence[,] fundamental fairness and due process required allowing a continuance." (see App. p. 422). "Generally, a motion for continuance should be made at the time underlying reason for such becomes known." *State v. Nelson*, 431 S.C. 287, 304, 847 S.E.2d 480, 489 (Ct. App. 2020).

Rule – 7(b) of South Carolina Rules of Criminal Procedure governs when a continuance maybe granted based upon the absence of a witness and provides in pertinent part as follows:

> No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel, or agent to the following effect: the testimony of the witness is material to the support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; and has made use of due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that his motion is not intended for delay.

Rule – 7(b), SCRCrimP. "All components of Rule – 7(b), SCRCrimP, including that of the attestation under oath, are strictly required, and a party asking for a continuance must show due diligence in trying to procure the testimony of the witness, as well as what the party believes the

absent witness would testify to and the basis for that belief." *Nelson*, 431 S.C. at 304, 847 S.E.2d at 490 (citation omitted).

At the PCR hearing, the PCR Counsel asked trial counsel, "You've - you basically answered this already, but your testimony is that you didn't feel that it would've made a difference to tell the judge that you needed your client with you to try the case?" (see App. p. 490, Ln. 12 – 15). Trial Counsel answered, "No. In – in retrospect, I – I probably should have, but at the time, it seemed like that was – it was a foregone conclusion of what was gonna happen." (see App. p. 490, Ln. 16 – 18). On re-direct the State asked trial counsel, "And again, you don't think arguing that Mr. Alston would help you in your, I guess, trial, - - that would've made a difference when it came to Judge Cole and determining to proceed *in absentia*, correct?" (see App. p. 492, Ln. 13 – 16). Trial Counsel answered, "I'm confident that would not have made any difference, but perhaps I should've argued it for purposes of the record." (see App. p. 492, Ln. 17 – 19).

In the order of dismissal the PCR judge wrote, "Applicant claims Counsel was ineffective for failure to request a continuance. Counsel credibly testified that the judge was unwilling to continue the case because Applicant was at the courthouse and then left, seemingly knowing he was slated for trial that day. This Court finds that even if Counsel requested a continuance, it would not have been granted. Accordingly, relief is denied." (see App. p. 534). The PCR judge erred by rendering a decision that was based on Trial Counsel Johnston's speculative testimony.

The PCR Judge refused to find that trial counsel was ineffective for failing to move for a continuance. Whereas, trial counsel Johnston could not have in no way effectively represented Petitioner Alston without him being there. Insomuch as, Petitioner's case hinged on the consent to search, that was allegedly given by him. Petitioner Alston's testimony was essential for the jury's consideration of whether a consent to search was actually given, certainly that was an important

issue for Petitioner Alston to testify about. What was his intent? Was there actual consent to search? If trial counsel would have made a motion for continuance, he would have clearly made the proper showing as required under Rule – 7(b), SCRCrimP, for a continuance. Furthermore, Petitioner insists that trial counsel's failure to move for a continuance, prevented Petitioner from having his case fairly heard by the jury to hear his testimony.

Trial Counsel was ineffective for failing to object to the trial proceeding in Petitioner's absence and failing to move for a continuance so that Petitioner could be properly notified to be present for his trial. cf. *Ravenell*, 387 S.C. at 456 – 57, 692 S.E.2d at 558 (addressing the merits when trial counsel moved for a continuance but did not specifically object to a trial in absentia and never asserted that his client failed to receive adequate notice or warnings). Petitioner was prejudice by trial counsel's deficient performance.

3. Failure to Object to Trial *In Absentia*

As to whether Petitioner was notified that he could be tried in his absence, trial counsel testified:

> Now, whether or not he understood the concept of could he be tried in the absence, I have – I can't say about that. There are some letters in my file. I don't know if I make reference to that specifically in my letters to him. I do know that from time when I send out letters notifying people of trial, I do say that if you don't appear, you can get a bench warrant – or a bench warrant may be issued for you, or you may be tried in your absence. But I'd have to review my file and see – see specifically what was said to him about that. The – I – and I would not have given those letters to the court unless ordered to.

(See App. p. 477, Ln. 12 – 23).

Trial Counsel did not testify, however, that he sent Petitioner a letter notifying him of his trial date or that he could be tried in his absence if he did not appear. Trial Counsel testified that the judge relied on the bond paperwork from two years earlier but testified, "Now, I can tell you from many experiences over the past that people don't understand all of the stuff contained in a

bond paper. So what he knew and recognized about being tried in the absence, I can't say. He may have been on notice, but whether or not he really knew or understood that concept, I can't say." (see App. p. 478, Ln. 3 – 8). At trial, trial counsel Johnston, however, failed to object based on Petitioner not understanding that he could be tried in his absence.

Petitioner did not waive his right to be present at trial. While the trial judge found that Petitioner had been properly put on noticed that his case was being called for trial, Petitioner testified that he did not know his case was being called for trial. Trial Counsel first testified that he did not tell Petitioner specifically that his case was being called for trial. (See App. p. 9, Ln. 17 – 19). Trial Counsel only told the judge that he informed Petitioner that his case was being called for trial that morning after a second questioning by the judge. (See App. p. 10, Ln. 5 – 6). Trial Counsel told the judge that he "believe" Petitioner understood that his case was being called for trial. (See App. p. 10, Ln. 20 – 23). But also told the judge that he only told Petitioner that his case was "very high on the docket." (see App. p. 10, Ln. 12 – 14). The record fails to show that Petitioner was given notice of the term of court in which he would be tried.

The present case is distinguished from *State v. Ravenell*, 387 S.C. 449, 692 S.E.2d 554 (Ct. App. 2010), where the Court of Appeals found that *Ravenell* clearly received notice of his right to be present at trial, because the record showed *Ravenell* was subpoenaed to appear for that particular week of court. There is nothing in this record that shows that Petitioner was subpoenaed to appear for that particular week of court. Petitioner was not provided notice of his right to be present for trial as is required by Rule – 16, SCRCrimP. Trial Counsel was ineffective for failing to object to the trial proceeding in Petitioner's absence based on lack of notice and failing to move for a continuance so that Petitioner could be properly notified that he is to be present for his trial.

Additionally, Petitioner was not warned that he could be tried in his absence as required by Rule – 16. The bond paperwork, signed two years earlier, was not sufficient to warn Petitioner that he would be tried in his absence if he did not appear for court when Petitioner was not given proper notice of when his case would be called for trial. This case is distinguished from *State v. Fairey*, 374 S.C. 92, 646 S.E.2d 445 (Ct. App. 2007), and *Ravenell* because, again, Petitioner was not subpoenaed to appear for a particular week of court. Trial Counsel testified that based on his experience clients do not always understand all of the information in the bond paperwork. (see App. p. 478, Ln. 3 – 8). Trial Counsel admitted that he should have objected to proceeding in Petitioner's absence. (See App. p. 490, Ln. 16 – 18; App. p. 492, Ln. 17 – 19). Petitioner was prejudice by trial Counsel's failure to object as it prevented Petitioner from exercising his Sixth Amendment right to be present at all stages of his trial. There is a reasonable probability that, but for trial counsel's deficient performance, the outcome of the proceedings, either the trial or direct appeal, would have been different.

II.

THE PCR JUDGE ABUSE HIS DISCRETION BY ISSUING AN ORDER DENYING PETITIONER POST-CONVICTION RELIEF AND DENYING HIS RULE – 59(e) MOTION, THAT FAILS TO ADEQUATELY ADDRESS THE MERITS OF PETITIONER'S EXHIBITS ONE, TWO AND THREE: THE CAD/TRAFFIC STOP REPORT, THE WARNING CITATION, AND THE VIDEO IN LIGHT OF THE TESTIMONY PRESENTED AT THE PCR HEARING ABOUT THE CUMULATIVE EFFECT OF TRIAL COUNSEL'S ERRORS DUE TO HIS FAILURE TO UTILIZE AND TO PROPERLY PRESENT THOSE EXHIBITS DURING HIS PRESENTATION OF PETITIONER'S MOTION TO SUPPRESS HEARING AND TRIAL PROCEEDINGS, WAS DONE BY ARBITRARY AND CAPRICIOUS MEANS IN LIGHT OF THE EVIDENCE THAT WAS PRESENTED BEFORE THE PCR COURT.

A. Ineffective Assistance of Counsel Due to Failure to Utilize and to Properly Present Exhibits One, Two, and Three During the Presentation of Petitioner's Motion to Suppress Hearing and Trial Proceedings

Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. *Strickland v. Washington*, 466 U.S. 668, 691, 104

S.Ct. 2052 (1984). Thus, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (citation omitted). In reviewing a claim that defense counsel failed to properly investigate a defense to a crime, a court's principle concern is whether the investigation "was itself reasonable." *Wiggins v. Smith*, 539 U.S. 510, 522 – 23, 123 S.Ct. 2527 (2003) (emphasis in original) (citation omitted). Moreover, Counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. *Simpson v. Moore*, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006).

Here, in Petitioner's case prior to trial and during trial, Trial Counsel has failed to utilize and to properly present exhibits one, two, and three. Which stems from Trial Counsel's failure to reasonably investigate the facts and the law that was to be applied to Petitioner's case. Trial Counsel's failure to present those exhibits during his presentation of Petitioner's Motion to Suppress hearing and trial proceedings are ineffective assistance of counsel, that's in violation of Petitioner's Six Amendment right to counsel, pursuant to the United States Constitution.

1. Motion to Suppress Hearing and Trial Proceedings

During Petitioner suppression hearing and trial. Trial Counsel fail to argue how Officer Gilbert did not give Petitioner the warning ticket, which is a violation of S.C. Code Ann. § 56-7-35 and by not giving the warning ticket to Petitioner at the time of the traffic stop. Officer Gilbert prolonged the traffic stop in violation of Petitioner's right to privacy that he is protected under, pursuant to S.C. Const. Art. I, § 10.

The Petitioner also argues, that trial counsel's failure to argue that the CAD/Traffic Report showed that his driver's license was cleared by dispatch six minutes into the stop. (See App. p.

512). This is confirmed by the video of the stop, which then showed that eight minutes into the traffic stop, the warning citation was fully completed and was visible in the video at marker 1:03:03. (See State's Exhibit # 2, Recording of Traffic Stop). The citation was entered as Petitioner's exhibit two, (see App. p. 515), for comparison as it is the same ticket as seen in the video.

Had trial counsel and appellate counsel not adopted the wrong timeline finding, that the purpose of the traffic stop was completed fourteen minutes into the traffic stop, when the video shows Officer Gilbert actually tear the citation off the pad rather at minute eight, when the warning ticket was seen to be completed. Trial Counsel and Appellate counsel's testimony at the PCR hearing did not contravene the Petitioner's argument regarding the time-line. (See App. p. 475, Ln. 18 – 25); (also see App. pp. 498 - 499, Ln. 23 – 25, 11 - 14). Trial Counsel testified that he should have use the CAD report in his argument admittingly. (See App. p. 485, Ln. 19 - 22). Whereas, Trial counsel testified, that "the six-minute difference [was] significant." (See App. pp. 475, 491, Ln. 25, 6 – 16). Appellate Counsel testified, that she did not have the CAD report and thought it may have made a difference in the case. (See App. p. 498, Ln. 23 - 25). Trial Counsel's failure to argue that the video of the traffic stop showed the officer continued to question the Petitioner after the warning ticket was completely filled out and the purpose of the traffic stop was completed. (See State's Exhibit # 2, Recording of Traffic Stop).

Here, the cumulative effect of trial counsel and appellant counsel's errors was deficient and has prejudiced the Petitioner to the degree that "there is a reasonable probability that, but for trial and appellant counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989); *Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318 (S.C. 2002).

2. The Cumulative Effect of Trial Counsel's Errors

"The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial." *State v. Beekman*, 405 S.C. 225, 237, 745 S.E.2d 483, 490 (2016). "An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground." *Id*.

Petitioner asserts the trial court erred in trying him in his absence, when the cumulative effect of the errors were so prejudicial as to deprive him of a fair trial. Here, the facts of this case do support a finding that cumulative errors warrant reversal. While the admission of the trial court's amendment to the indictment during a motion for direct verdict and right before the State's closing argument was prejudicial error, the error of trial counsel's failure to move for a continuance, his failure to notify Petitioner of his trial date, his failure to challenge the amendment to the indictment, and his failure to argue the communication report was prejudicial and the failure to argue consent to search was an error. Petitioner has demonstrated more than error in order to qualify for reversal on this ground. Whereas, the errors has adversely affected his right to a fair trial. See *Tennant v. Marion Healthcare Foundation*, 194 W.Va. 97, 459 S.E.2d 374 (1995) (cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial). Petitioner has showed that he suffered prejudice warranting a new trial based on cumulative trial error. Compare with *State v. Peterson*, 287 S.C. 244, 335 S.E.2d 800 (1985) (although court held cumulation of errors warranted reversal, each error caused prejudice against appellant); *State v. Freeman*, 319 S.C. 110,

459 S.E.2d 867 (Ct. App. 1995) (finding the cumulative effect of the trial conduct, not trial errors, warranted reversal).

B. The PCR Judge's Abuse of Discretion

The admission or exclusion of evidence is within the discretion of the trial court, and its decision will not be disturbed on appeal absent an abuse of discretion. *State v. Winkler*, 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010). "The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling [on such] will be disturbed only upon a showing of an abuse of discretion." *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). "An abuse of discretion occurs when a trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious." See *State v. Allen*, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006).

Here, the Order of Dismissal lacks any type of evidence to support the decision that was rendered and it fails to adequately address Petitioner's exhibits one, two, and three: the CAD/Traffic Stop Report, the warning citation, and the video in light of the testimony that was presented at the PCR hearing. The PCR Judge's Order of Dismissal denying Petitioner's Post-Conviction Relief and his Rule – 59(e) Motion is being imposed in an arbitrary and capricious manner.

III.

THE PCR JUDGE HAS OVERLOOKED THE TRIAL COURT'S TRANSCRIPT AND THE TESTIMONY EVIDENCE THAT WAS PRESENTED AT THE PCR HEARING CONCERNING PETITIONER'S CHALLENGES TO HIS INDICTMENT BEING AMENDED DURING HIS TRIAL, WAS AN ABUSE OF DISCRETION.

A. Amendment of Indictment

South Carolina Code Ann. Section 17-19-100 (1985), states in pertinent part:

> "If (a) there be any defect in form in any indictments or (b) on the trial of any case there shall appear to be any variance between the allegations of the indictment and the evidence offered in proof thereof, the court before which the trial shall be had may amend the indictment (according to the proof, if the amendment be because of a variance) if such amendment does not change the nature of the offense charged. After such amendment the trial shall proceed in all respects and with the same consequences as if the indictment had originally been returned as so amended, unless such amendment shall operate as a surprise to the defendant, in which case the defendant shall be entitled, upon demand, to a continuance of the cause."

"An indictment may be amended provided such amendment does not change the nature of the offense charged." (citing *State v. Guthrie*, 352 S.C. 103, 109, 572 S.E.2d 309, 312 (Ct. App. 2002) (citations omitted). "[A] finding that['s], under § 17-19-100, an indictment may be amended at trial only if amendment does not change nature of offense charged. For example, an amendment which changes an offense to one with increased punishment deprives the circuit court of subject matter jurisdiction. *Id*. However, an amendment may deprive the circuit court of jurisdiction even if it does not change the penalty. *Id*.

Amendments to an indictment are permissible if: 1.) they do not change the nature of the offense; 2.) the charge is a lesser included offense of the crime charged on the indictment; or 3.) the defendant waives presentment to the grand jury and pleads guilty. *Id*. at 313. Here in this case, Petitioner did not waive presentment to the grand jury and did not plead guilty. The amendment to Petitioner's indictment was done right before the closing of the State's case during his trial.

B. Amendment of Indictment Before the Closing of the State's Case

Petitioner argues that the PCR Judge has overlooked the trial court's transcript and testimony evidence that was presented at the PCR hearing concerning Petitioner's challenge to his indictment being amended right before the closing of the State's case. Whereas, the PCR Judge has erroneously ruled in his order of dismissal on Petitioner's "Failure to Challenge Indictment" issue, that:

> "This Court has been provided with no evidence that the indictments were deficient. This is substantiated by Counsel's credible assertion that he saw no issues with the indictments. Further, even if, issues exited, challenges to the indictment have been waived. Accordingly, relief is denied on this ground."

(See App. p. 535).

Here, on this particular issue that was presented to the PCR Court. Petitioner Alston was originally indicted for trafficking in cocaine, pursuant to S.C. Code Ann. § 44-53-370. At Petitioner's trial proceedings right before the closing of the State's case, trial counsel had moved for a direct verdict, pursuant to Rule – 19, SCRCrimP, arguing that the State had failed to prove all the elements of the charge as alleged in the indictment, pursuant to S.C. Code Ann. § 44-53-370. (See App. pp. 228 – 233, Ln. 23 – 14).

In response to trial counsel's argument, the trial court directed the State to amend the indictment to remove all means of violating the trafficking statue with the exception of "the two specific allegations that are pertinent that are contained in the statute are that he did bring into the State or did knowingly have in his constructive possession." (see App. p. 231, Ln. 1 – 4); **(also see Motion to Supplement Record) (Exhibit – 2, the amended indictment)).** The Motion for Direct Verdict was made, because the State could not prove all the elements of the indictment, pursuant to S.C. Code Ann. § 44-53-370 and could not over come a motion of a directed verdict. (See App. pp. 231 – 232, Ln. 24 – , 1 – 5). The Trial Judge committed an error by not ruling on Petitioner's

motion for direct verdict and instructing the State to amend the indictment to insure that Petitioner was convicted of trafficking in cocaine by the State. "The amend[ment] [to Petitioner's] indictment was neither [resubmitted or] presented to the grand jury, nor [was it ever] waived," by the Petitioner, pursuant to S.C. Code Ann. § 17-19-100. quoting *Murdock v. State*, 308 S.C. 143, 144, 417 S.E.2d 543 (S.C. 1992).

The record will show that Petitioner Alston testified about the indictment being amended and how it prejudice him "by broadening the reach of [his] indictment by removing elements of the offense as originally charged by the Grand Jury." (see App. p. 453, Ln. 3 – 11). Whereas, the State admitted that it could not prove all the elements of the indictment as it was presently presented before the court as originally in the indictment. See *Ibid*. Trial Counsel was ineffective for agreeing with the trial court as to the amending of the indictment without seeking a continuance to have it properly presented and resubmitted to the grand jury, pursuant to S.C. Code Ann. § 17-19-100 (1985). The State would fail to response to Petitioner's challenges to his indictment being amended and would default on this issue during the PCR hearing by not responding to it and by not questioning the Petitioner or his trial counsel about the amendment to Petitioner's indictment. Therefore, the PCR Judge's order of dismissal has misapprehended and mischaracterized the fact that, it "has been provided with no evidence that the indictments were deficient." Insomuch as, trial counsel never testified about Petitioner's indictments during the PCR hearing.

Nevertheless, trial counsel should have objected to the trial court's amendment of the indictment, which prejudiced Petitioner during his trial proceedings by broadening the reach of Petitioner's indictment by removing elements of the offense as originally charged by the grand jury. Thus, the PCR Judge's abuse of discretion, has erroneously denied Petitioner's PCR

application and has violated his due process, pursuant to U.S. Const. Amend. XIV and his right to proper judicial review, pursuant to S.C. Const. Art. I, § 22.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, this Honorable Court is respectfully urged to grant the Petitioner's Petition for Writ of Certiorari to allow further briefing on the issues.

DATED: June 13, 2024

Stepheno Alston, # 357159, Pro-se
Ridgeland Correctional Institution
P.O. Box # 2039
Ridgeland, S.C., 29936