THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No.: 2014-001651
Case No.: 2012-CP-02-0321

Russell Jackson,.....Petitioner,

vs.

State of South Carolina,.....Respondent.

AMENDED PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUE

Whether the lower court erred in finding counsel was properly prepared to proceed with a trial and that counsel did not render ineffective assistance that resulted in Petitioner falsely admitting his guilt and entering an involuntary guilty plea.

STANDARD OF REVIEW

The reviewing court will uphold the findings of the PCR court if there is any evidence of probative value to support those findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, if no probative evidence supports those findings, the reviewing court will not uphold the findings of the PCR court. Jackson v. State, 355 S.C. 568, 570, 586 S.E.2d 562, 563 (2003). However, questions of law are reviewed *de novo*, and the appellate court "will reverse the decision of the PCR court when it is controlled by an error of law." Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Aiken County Clerk of Court. Petitioner was indicted during the September 2010 term of the Aiken County Grand Jury for Criminal Sexual Conduct with a Minor, Second Degree (2010-GS-02-01523). App. pp. 36(a)-37. Petitioner was represented by P. Andrew Anderson, Esquire. On May 23, 2011, Petitioner pled guilty as indicted, before the Honorable Doyet A. Early, III. App. p. 17. Judge Early sentenced Applicant to eleven and one half (11.5) years imprisonment. App. p. 38. Petitioner did not appeal his conviction and sentence.

On February 7, 2012, Petitioner filed an Application for Post Conviction Relief. App. p. 39. Respondent made its Return on May 30, 2012. App. p. 46. On May 28, 2013 an Amendment to the Application for Post Conviction Relief was filed. App. p. 52. An evidentiary hearing was held at the Aiken County Courthouse in front of the Honorable R. Ferrell Cothran, Jr., on July

11, 2013. App. p. 56. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by David Spencer, Senior Assistant Attorney General.

At the conclusion of the evidentiary hearing, Judge Cothran took the matter under advisement. Thereafter, he instructed Respondent to submit a proposed Order. Upon receipt of Respondent's proposed Order, PCR counsel wrote to Judge Cothran expressing her concerns with the proposed Order on August 16, 2013. App. pp. 290-1.

On August 26, 2013, the Honorable R. Ferrell Cothran, Jr., issued an Order of Dismissal, which was filed on August 29, 2013. App. p. 292. PCR counsel did not receive a copy of the signed Order prior to filing. After finding an entry on the Aiken County Clerk of Court's online records that the Order had been filed, PCR counsel contacted David Spencer. As a result, Mr. Spencer received a signed and filed copy of the Order from the Aiken County Clerk of Court's Office and served a copy, via mail, on PCR counsel. Petitioner, through counsel, received written notice of the entry of the Order on October 10, 2013.

A timely Motion Pursuant to Rule 59, SCRCP, was filed on Petitioner's behalf. App. p. 304. In response, Respondent submitted a proposed Order denying Petitioner's motion. App. p. 310. An Order denying Petitioner's motion was issued on June 26, 2014, and it was filed on June 30, 2014. App. p. 313. On July, 7, 2014, Petitioner, through counsel, received notice of the entry of the Order. A Notice of Intent to Appeal was filed on August 1, 2014, from which this Petition follows.

ARGUMENT

THE LOWER COURT ERRED IN FINDING COUNSEL WAS PROPERLY PREPARED TO PROCEED WITH A TRIAL AND THAT COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE THAT RESULTED IN PETITIONER FALSELY ADMITTING HIS GUILT AND ENTERING AN INVOLUNTARY GUILTY PLEA.

I. Discussion of the Record

A. Guilty Plea Hearing

On May 23, 2011, Petitioner, along with counsel, appeared in front of the Honorable Doyet A. Early, III, and entered a guilty plea to the indicted charge of criminal sexual conduct with a victim under the age of sixteen, second degree.[1] App. p. 17. The State was represented by Brenda Brisbin, Assistant Solicitor. App. p. 17. When asked how the Petitioner wished to plead and about the negotiations, the parties put the following on the record:

> Defense: Guilty, Your Honor, in light of our negotiations.
>
> Court: And the negotiations are, what?
>
> State: Eleven and a half years incarceration. I know. It sounds strange. That was – we went through a lot of negotiations and that was the bottom line. It was a one-time incident, according to the victim. And the victim had recanted several times and really did not want to testify. And it was only because of that we agreed to something less than 20 years.

App. p. 21, lns. 4-18.

Prior to the State providing a recitation of the facts, the plea court went through the plea colloquy culminating in the following questions:

> Court: Did you here in Aiken County on or about April 5 of last year, 2010, have sexual intercourse with your daughter, who was 15 at the time?
>
> Petitioner: Yes, sir.

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[1] The plea hearing began with the following discussion:

> Court: This is the case we discussed last week in chamber? This is his daughter?
> State: Oh, that's right. It's not his stepdaughter. It's his biological daughter.
> Court: Biological. Another situation.
> State: Yes, sir.
> Defense: Not as bad as the earlier case though, Judge.
> Court: Well, sexual intercourse with his daughter.
> Defense: It's not good.
> Court: No, it's not good. I don't know if you can put a degree on when they start doing this stuff.

App. p. 19, lns. 9-25.

Court: You're pleading guilty because you are guilty?

Petitioner: Yes, sir.

Court: You're pleading guilty because you had a sexual relationship with a minor?

Petitioner: Yes, sir.

App. p. 26, lns. 2-12.

Immediately thereafter, the plea court made a finding that Petitioner's decision to plead guilty was freely, voluntarily and intelligently made. App. p. 26, lns. 13-20. After the plea was accepted, the State provided the following facts:

> Thank you, Your Honor. On April 5th of 2010, New Ellenton Police responded to Aiken Regional medical Center for a reported sexual assault on a juvenile. The victim, who was Russell Jackson's biological daughter, and was 15 years old at the time, was – had asked her mother to take her to the clinic that afternoon when she got home from work. She told her mother that she had bleeding, vaginal bleeding and it burned when she urinated. Her mother took her to the clinic. The clinic was closed. The victim then started crying, told her mother that she needed, that she really needed to go and that her father had sex with her that morning. The mother then took her to Aiken Regional Emergency Room. They did a sexual assault kit. And in that process they took the panties that she had been wearing and took vaginal swabs and they were sent to SLED for analysis. And the DNA report was that the panties had semen on the crotch area which was consistent with Mr. Jackson's DNA profile. And the chances of someone other than Mr. Jackson matching that profile were one in 23,000,000. The vaginal swabs also had semen on them. The alleles were consistent with Mr. Jackson's DNA profile as well, but there was not sufficient quantity to call it a match.

App. p. 26, ln. 23 – p. 27, ln. 22. The State further explained that Victim "has recanted several times," but the State attributed the recantation to her mother failing to support her and was prepared "for trial to start in the morning." App. p. 28, ln. 25, p. 29, lns. 7-15. In response, plea counsel informed the court: "And it's rare for me to be able to talk to the alleged victim, but I've

got to meet with Victim twice and her guardian both times and Victim told me it didn't happen." App. p. 29, lns. 18-21. After the court questioned plea counsel about the DNA evidence, counsel explained potential chain and testimonial issues with the DNA evidence, but he also informed the court that he had the evidence reviewed by an expert that "was not really no help to us." App. pp. 29-32. He also eluded to a timing issue based upon a store video and some witnesses, and he summarized: "We couldn't prove that there was no window of opportunity but the window was very, very, very brief." App. p. 31, lns. 15-24. In conclusion, plea counsel stated: "so we had a lot of issues – "But, you know it's just bad. It's a bad case." App. p. 31, ln. 25.

B. Post Conviction Relief Evidentiary Hearing

1. Testimony of Victim

During the presentation of Petitioner's case, Victim took the stand and stated that she was not under subpoena, prepared to tell the truth and testifying "under my own free will." App. p. 86, lns. 16-25. Victim acknowledged that she was fifteen at the time of the alleged incident and nineteen at present. App. p. 87, lns. 1-5. Going back to April 5, 2010, Victim explained that she had failed two classes, so she couldn't do anything" and "had to sit in the house for spring break." App. p. 87, lns. 21-24. She recalled that her father was at the house and enforcing her restrictions of no cell phone, television, computer or going anywhere. App. p. 88, lns. 2-6.

After being asked to go through the morning of April 5th, Victim recalled William (Uncle Ted) coming over and her brothers leaving with him to go eat over at their grandmother's house. App. p. 89. While they were in the process of leaving, she was headed into the only bathroom in the house to take a shower. App. p. 89. She explained that having one bathroom did not allow for a lot of privacy, so she would take her clothes in with her if anyone was in the house, which she recalled doing that day. App. p. 89-90. She put her clothes on the sink and remembered that

Petitioner had been in the bathroom right before she had entered. App. p. 90. After she got out of the bathroom, she called Tony to ask him to get beer for Petitioner, and he arrived within about five minutes. App. pp. 90-91.

She explained that Tony was someone that she would have confided in if something was wrong and he knew her well enough to be able to tell if something was wrong. App. p. 91, lns. 9-16. After making this explanation, the following testimony was elicited:

Q: Okay. Now, in the State's case and at your father's plea, they alleged that he sexually assaulted you at a time period between when you came out of the bathroom and when Tony arrived. Did that happen?

A: No, ma'am.

Q: Okay. Is today the first time you've said that did not happen?

A: No, ma'am.

App. p. 91, lns. 17-24. She further explained that if her father had assaulted her there were a number of people should could have contacted for help throughout the course of the day while her father was away from the home. App. pp. 92-3.

When asked why she would make up the allegations, she responded that she was mad at Petitioner. App. p. 94, lns. 1-13. She said she "wanted to hurt him because he didn't let me do what I wanted to." App. p. 94, lns. 9-10. Following her disclosure, she recalled that her mother was "angry at my dad" and not upset with her. App. p. 96, lns. 4-14. She affirmed that it was her decision to go stay with her grandmother. App. p. 97, lns. 5-7.

She recalled not getting to speak with anyone before giving a statement and stated: "I didn't know what was happening – I was just going with it." App. p. 95, lns. She also recounted breaking down during the forensic interview because she knew what she was saying was wrong.[2]

[2] Victim testified that she had not seen the video of the interview. The state introduced a cd containing the video of the forensic interview as Respondent's Exhibit One.

App. p. 97, ln. 24 – 98, ln. 4. She remembered being provided with a therapist but that she "told them she didn't want to talk to him." App. p. 99. She acknowledged that she had recently spoken with Gaye Allen-Cook and understood that she provided therapy to children that had suffered trauma or abuse. She affirmed that speaking to someone like Gaye Allen-Cooke would have been helpful at the time the allegation was made, but defense counsel did not offer to provide such help when she met with him. App. pp. 100, lns. 6-9, 103-4.

She specifically stated that she told "Ms. Brisbin, the DSS lady, Ms. Jane and my father's attorney Mr. … Anderson" that it did not happen.[3] App. p. 99, lns. 13-18. She recounted meeting with Mr. Anderson at his office and telling him she had lied. App. pp. 99-100. After telling Ms. Brisbin that she had lied because she was mad, she recalled Ms. Brisbin telling her that the case was still going to trial. App. pp. 100-01. Then, the Victim testified, as follows:

Q: Okay. Did you convey to her whether or not you'd be a willing participant? Whether you wanted to be called as a witness at that trial?

A: I told her that I wasn't going because it didn't happen.

Q: All right. And if you would have been called as a witness at that trial, what would you have said?

A: I would have told her that it didn't happen.

p. 101, lns. 14-21.

She explained that no one, including plea counsel, helped her when she "wanted the truth to get out." App. p. 113, lns. 4-18. She recalled finding out about the plea after it occurred and calling Ms. Brisbin about it after getting a message from her mom. App. p. 102, lns. 2-5. She

[3] When asked on cross examination about Ms. Brisbin stating at the plea (without being provided a specific reference) that victim told her "it had happened," she affirmed that such a statement would be incorrect. App. p. 105, lns. 11-14.

recalled being "shocked" when Ms. Brisbin told her about her father's plea. App. p. 102, lns. 12-17.

2. Testimony of Christy Green

During the presentation of Petitioner's case, Christy Green was called to the stand. She explained that she had been in a relationship with Petitioner since she was a teenager, and they had three children together, which included Victim (her daughter). App. pp. 133-4. She recalled April 5, 2010, and Victim informing her of the allegations against Petitioner. She took her daughter to get medical treatment and explained that she was not upset with her – she was upset with Petitioner. App. p. 134. In response to testimony offered by Ms. Brisbin, she testified: "I have always been supportive of my daughter." App. p. 144, lns. 4-9.

On April 8, 2010, she took Victim for her forensic interview and remembered her recanting upon returning home. Thereafter, she embarked on her own investigation of the allegations.[4] App. p. 137. She recalled taking Victim to meet with Ms. Brisbin so she could have the opportunity to tell the Solicitor what she had to the family – the alleged incident did not happen. App. p. 138. During the initial part of the meeting, she waited outside, but she was present to hear her daughter inform Ms. Brisbin that it did not happen. App. p. 139, lns. 8-21. She was adamant that no one helped her daughter and Ms. Brisbin led them to believe that her daughter would be charged with false information or perjury if she did not standby her accusation against Petitioner. App. pp. 142-3.

Regarding plea counsel, she recalled meeting with him and providing him information regarding the day in question and information about taking her daughter for medical treatment.

[4] One issue she had with Victim's story was that she was getting dressed in her room since Victim always takes her clothes into the bathroom when showering. This fact was testified to by several of Petitioner's witnesses, as well as Victim. App. pp. 138, lns. 1-6 (Green p. 62, Patterson p. 71, Victim pp. 89-90).

She also recalled providing him with phone records to help establish when the Victim called Michael Green and that she called her boyfriend immediately thereafter which obliterated the brief window of time in which the incident could have occurred. App. pp. 144-5. On the Friday before the plea was entered, she had contacted plea counsel and set up a meeting due to concerns with Petitioner's case. App. p. 147. She recalled requesting and receiving a complete copy of Petitioner's file at that meeting. App. p. 147-8. Plea counsel also informed them that Petitioner's case would be called to trial on Monday. App. p. 148. As to the discussions regarding a plea versus a trial, she testified as follows:

A: I didn't want Mr. – Russell to plead. I wanted Mr. Anderson to fight.

Q: Okay. Did he tell you – were you part of any conversations or did he give you any information about the way – a plea versus a trial? What was your understanding regarding those? Was he leaning one way or another or trying to get you all to lean one way or another?

A: He was leaning one way and trying to get us to lean the way of Russell pleading guilty. That was the only one way.

Q: And what way were you all leaning?

A: Not pleading guilty.

Q: Okay. Now, did anything else happen that Friday, that weekend before the plea, that you'd like – that you recall?

A: Well, after that Friday, we had a meeting with him on that Sunday. And we – that's when he went over all the paperwork with us again. But he kept talking plea, kept talking plea.

App. pp. 148, ln. 11 – 149, ln. 4. She further testified that it was clear to her that counsel was not prepared to proceed with a trial. App. p. 151.

On Monday morning, she spoke with plea counsel and was told that Petitioner had one hour to get to the courthouse to enter a plea. App. pp. 149-50. Since she did not agree with the plea she did not attend. She had no knowledge of her daughter receiving notice that the plea was taking place. App. p. 150.

3. Testimony of Marathesisa Jackson

When Marathesisa (T.J.) Jackson took the stand during the presentation of Petitioner's case, she explained that Petitioner was her younger brother. App. p. 182, lns. 1-5. She testified that she never discussed the details of the incident with Victim, but she had a lot of interaction with her while providing her rides to and from team sporting events with her daughter. She recalled asking Victim twice about the incident, and she testified, as follows:

A: The first time was after we left a meeting with Andy. And I left Andy's office and went to her home. And I called her outside and we sat in the car. And I said, you know, "I never asked you but did he do it, never questioned you about it," I said, "but I need to hear from you own mouth because, you know, I have small children. And I need to know what I need to do to protect my kids." I said, "I don't believe he did it, but I need you to tell me if he did it or not. I don't want you to tell me what you think I want to hear. I need you to tell me the truth.

Q: And at that time did she confirm it happened or did she deny it happened?

A: She said, "Auntie, I swear he did not do it."

Q: And what was the second time that you addressed the incident with her?

A: The second time was actually at a meeting at Andy's office. It was Andy, her guardian ad litem, her, and myself. They had just left, I think, Ms. Brisby's (verbatim) office, went from Ms. Brisby's to Andy's. And it was the four of us there and then she stopped talking. And I said, "Are you okay?" And she said, "No." And I said, "Do you want to talk to me alone." So Andy and the guardian ad litem excused themselves. It was just she and I in the office.

Q: Okay. And again, you had the opportunity to confront her as to whether or not this happened; is that correct?

A: That would have been the second time, yes.

App. pp. 183, ln. 7 – 184, ln. 10.

She acknowledged that she had been a victim herself. When asked about supporting her niece, she responded that she did "everything I could" to support her. App. p. 192, lns. 18-25.

While on the stand, she recounted her numerous interactions with plea counsel, which included the preliminary hearing, meetings and phone calls. App. pp. 185-7,193. She explained that she was concerned about counsel's representation over the course of her interactions with him. App. p. 189. She recalled sharing her concerns with her brother and that he had similar concerns. App. p. 192.

4. Testimony of Gaye Allen-Cook

Gaye Allen-Cook (Cook) was called to the stand and explained that she was a clinical children and family therapist that specializes in trauma and abuse. App. p. 153, lns. 5-6. Previously, she worked at Durant's Children Center in Florence and conducted forensic interviews while employed there. App. p. 153, 12-15. Currently, she has her own practice where she primarily does therapy, consultation, and provides expert testimony. She explained that her career has been "state oriented" but she had been working with defense attorneys in conducting reviews and providing assistance over the last year and a half. App. p. 162, lns. 13-21. She acknowledged that she is called on by the court to conduct a forensic interview from time to time, but when asked by the court if she was testifying as a forensic interviewer, she responded: "No, sir." App. p. 157, lns. 8-11. PCR counsel offered her up as an expert with the following title: "Clinical Child and Family Therapist, with specialization in trauma and abuse." App. p. 157, lns. 305. When asked to define that expert title by Respondent, Cook responded:

A: I guess for me it's pretty self-explanatory. I practice as a therapist. I do child and family work. I currently am qualified in the State of South

> Carolina as an expert in trauma and abuse. I diagnose that. I treat that. I offer consultation. I've done so many times for the state, for defense, in lots of child sexual abuse cases. As for my day-to-day activities in the office, I treat many, many children, probably 25-30 a week in a typical week who have been through trauma and abuse. I use the state approved model, which I'm also a supervisor in and travel the nation teaching that model.

App. p. 157, ln. 23 – p. 158, ln. 8.

At the conclusion of Respondent's questioning, PCR counsel moved to have Cook qualified, and Respondent interjected that the State has been qualifying experts in the area "called child abuse assessment" and surmised that the "Supreme Court is going to listen to me on another hearing to say, yes, that's about her area of expertise." App. p. 161, lns. 5-11. Thereafter, the court qualified Cook as an expert in "child abuse and assessment" and commented that "we'll run that by the Court of Appeals." App. p. 161, lns. 12-14.

In the instant case, Cook explained that she had reviewed the transcript, forensic interview and had meetings with the victim and Petitioner. Thereafter, the following took place:

> PCR Counsel: And let me go back to your meeting with Victim. What was your assessment based upon that interview?
>
> Cook: Well, basically, like I said, she –
>
> State: Your Honor, and I just want to make sure, I mean – the issue we have – of course, Your Honor is the probably aware of CROMA, Your Honor is familiar with this issue. I – I'm concerned about any sort of bolstering – first of all a bolstering situation, bolstering recantation, but nonetheless, I just want to make sure we're not headed down a road vouching for a person she interviewed.
>
> PCR Counsel: And, Your Honor, if you'd like for me to respond, I'm going into what were her findings and then if she would have been retained in this capacity would she have conveyed those to trial counsel to help prepare for this trial.

State: And I guess in this – I mean I'm anticipating what would be – the findings would be that the victim or this person has recanted her former statements and that she did convey that. And I think anything beyond that would be getting close to kind of a bolstering situation.

Court: Well, the only way I know is just to proceed and then if you think she's bolstering, I'll make that decision. I understand.

State: It's just kind of hard to keep from – I'm not sure when we're getting to that point.

Court: I'm not either, but I'm not a jury either. It's a bigger danger if it's in front of a jury. And if it gets to where you think she's crossed the line, you object and I'll deal with it. But we'll go from there and see what happens.

State: Thank you.

PCR Counsel: Ms. Cook, let me rephrase the question that I'm asking you. After meeting with the Victim what assessment were you able to make and provide to me for preparation of my case or would have been able to provide to the defense attorney?

Cook: That she was clear that the statements that she made were not true; that she was angry with her father; and that once she decided that she was strong enough to go and tell the truth, she went and told that she lied. So I guess if you want to use the word recantation, she recanted the statements that she had made.

App. p. 162, ln. 22 – p. 164, ln. 16.

When asked about her experience with recantation, Cook explained that she had treated children who recanted and done forensic interviews of children that recanted. She further explained: "It is not atypical for a teenage girl to recant... I often expect it, especially if that child has made allegations following some type of discipline by a parent figure." App. pp. 164, ln. 22 – 165, ln. 1. She acknowledged that she has been called upon by the prosecutor when

faced with a recanting victim to help the prosecutor assess the situation. App. p. 165, lns. 10-23. She responded that she was "surprised" that someone in her capacity was not utilized to help assess the Victim's recantation. App. pp. 165, ln. 24 – 166, ln. 2.

After being asked if she would have been willing to accept the case from the defense standpoint, she responded: "Yes, this would have been a case that I probably would have gotten excited about accepting because recantation is something that I've done for quite some time." App. p. 166, lns. 21-4. She also explained that she used tools within her area of expertise to gauge the victim's truthfulness with her, and she could have done a similar assessment and shared her positive findings with defense counsel. App. pp. 168-9. She stated that she would have been willing to testify for the defense at trial and/or in mitigation. App. p. 167.

On cross-examination, Respondent undertook a line of questioning that pertained mostly to forensic interviews and the methods used in conducting forensic interviews.[5] Counsel repeatedly interjected comments about Kromah (phonetically Croma) and that he would be arguing it to the Supreme Court.[6] App. pp. 161, lns. 1-15, 169. Several objections were made by PCR counsel.

5. Testimony of Petitioner (Russell Jackson)

When Petitioner took the stand, he recounted the events of the day in question. App. pp. 196-199. He recalled being told by his grandmamma that Victim was at the hospital and had made accusations against him. App. p. 200. He explained how he voluntarily (despite being under the influence of alcohol) went to the police department and provided a DNA sample

[5] The Order of Dismissal errantly addresses only Respondent's line of questioning, this error was raised to the PCR court via Petitioner's Rule 59, SCRCP, Motion, which stated: 1(e) The Order includes a detailed discussion of the RATAC method and Finding Words, which appears to be irrelevant since Applicant did not allege that the forensic interview was improperly conducted nor anything regarding the roles of forensic interviewing in criminal prosecutions. Applicant submits that this detailed discussion regarding the forensic interviewing process is not in line with Applicant's allegations and is generated from the State's cross-examination on the topic. App. p. 306.

[6] It appears counsel was referencing State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2012).

because "I didn't do what they was saying I did. I didn't do anything wrong." App. pp. 200 – 201, lns. 12-15, 215-216. He was not formally charged until June. App. p. 201.

After being charged, he retained plea counsel and met with him six to seven times while out on bond. App. p. 202. He affirmed that he told plea counsel about every detail of his day, which included the witnesses that counsel would need to talk to prior to trial.[7] App. pp. 202.-3. When his witnesses spoke with counsel, he recalled both telling him: "If that's your attorney, you're going to jail." App. p. 201, lns. 23-5. He provided counsel with phone records to refute the alleged time period and raised a concern that no investigation was done, by either side, at his home. App. pp. 208-9. Counsel provided him a copy of the preliminary hearing transcript and discovery materials the weekend before he entered his guilty plea. App. p. 203.

On the Friday before his plea, counsel informed him that he was not prepared for trial, and counsel told him, "Come Monday morning, you're going to jail whether you plead guilty or take a trial." App. p. 219, lns. 7-23. When he asked counsel to get a continuance, counsel

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[7] William Green and Michael Patterson both testified at the evidentiary hearing. The testimony offered is summarized as follows:

William Green testified that he went to get Petitioner's children around 10:30 or 10:40 on the morning of April 5, 2010 because his mother (children's grandmother) wanted them to come over and get something to eat. App. p. 61. He recalled seeing Victim going into the shower with her clothes on her arm as he was leaving with her brother. App. p. 62. He explained that he passed Michael Patterson when he left the house. App. p. 63-4. He recalled speaking with plea counsel and being willing to testify at trial, if needed. App. p. 64.

Michael Patterson testified that he received a call from Victim and he went to pick up beer for Petitioner as a result of that conversation. App. p. 67. He recalled getting in his car at 11:01 a.m. and seeing William Green in passing. App. p. 67. He further recalled seeing Victim at the computer when he arrived to Petitioner's home and she "appeared to look good." App. p. 68, lns. 15-21. He recounted being with Petitioner until 7:00 p.m. and based upon knowing Petitioner well did not observe anything abnormal with him. App. pp. 69-70. He also explained that he was very close to Victim and she would have been comfortable in telling him and he would have gotten her help. App. p. 70. He observed nothing wrong with her that day. App. p. 70. He said that when he typically saw Victim go take a shower, she would have her clothes on her arm. App. p. 71, lns. 13-15. He acknowledged that it was alleged that the sexual abuse took place between 11:30 and 12:00 p.m. and he was with Petitioner during that time period. App. p. 70-1.

He recalled meeting with plea counsel and providing him the details of the day in question, along with phone records to substantiate the times. App. pp. 72-75. He stated that he was willing to testify at a trial, but he conveyed his concerns to Petitioner that counsel was "seemed more like he was being a prosecutor than a lawyer." App. p. 76.

responded that the judge would not allow it. App. pp. 219, ln. 24 – 220, ln.1, 245. Petitioner explained that he wanted a trial because he was not guilty. Yet, he entered a guilty plea because his attorney, who he had repeatedly informed that he was not guilty, left him with no other option. App. pp. 219-220, 222-224, 231, 234, 242-45. He even explained that he had previously turned down a prior plea offer simply because he was not guilty and wanted a trial. App. p. 219, lns. 1-3.

When asked about why he lied to the court when he conveyed satisfaction with his counsel and admitted his guilt during the plea, Petitioner answered that he was following the advice and instructions of his counsel, that counsel never advised him to tell the truth and that he felt that he had no other option. App. pp. 239-45. When asked on direct if his plea was voluntary, Petitioner testified: "It wasn't voluntary because I feel like I was pressured into pleading guilty. I didn't have a choice." App. p. 223, lns. 6-8.

Regarding Victim, Petitioner testified that counsel did not review the forensic interview with him. App. pp. 209-10. He acknowledged that he was aware that his daughter had recanted, and he had provided counsel a letter she wrote to her mother / his wife about her motive for the allegation. App. pp. 211-12. He recalled informing counsel about Victim's motive. App. p. 212. When asked if counsel ever proposed having him or Victim speak with a professional in the capacity of Cook, he explained counsel did not and he would have wanted to utilize her services as part of his defense. App. p. 211-12.

6. Testimony of P. Andrew Anderson, Esquire

When plea counsel took the stand, he surmised that Petitioner's case was "arduous" but "the facts and issues were pretty simple." App. p. 249, lns. 6-10. Thereafter, the following testimony was elicited:

> Well, you know, I did not believe – I don't want to say anything bad about the young lady since she's sitting here. She's a sweet young lady. I didn't believe she was raped, but there was about a 20-minute window where something could have happened. And she says it did. Then she recanted. Then she un-recants. Then she recants. And she had a guardian that really liked her who felt like she was getting manipulated by everybody. And my fear – I mean, it's simply this. There's this DNA evidence that I can't keep out. And there's no telling what this girl's going to say. And that's what – I did think he should plead.

App. p. 249, ln. 13 – p. 250, ln. 1. He concluded that he wished he had tried the case because "it wouldn't have been that hard of a trial." App. p. 266, lns. 1-2.

As to trial preparation, counsel did not provide a clear answer as to whether he was preparing the case for trial versus a plea, but he did testify that he assumed it was going to be a plea. App. p. 260-1. He surmised that he "didn't know the victims position at any time" or if she would testify at trial. App. p. 270. Regarding the assistance Cook could have provided with assessing Victim, counsel admitted that she could have "helped". App. p. 262. He also admitted that Cook could have assisted with his failed strategy of offering an apology. App. p. 270-71. When asked, counsel responded that it would not have hurt to have her assistance in assessing Petitioner and Victim. App. pp. 250, 252. He further added that she "was a great witness." App. p. 250, ln. 6.

Regarding Petitioner's guilty plea, counsel candidly admitted, "If that's grounds for a PCR then I think one should be granted because I did encourage him to plead." App. p. 251, lns. 1-2.[8] He also acknowledged that he recommended and advised Petitioner to plead guilty even though Petitioner had specifically told him he was innocent. App. pp. 251, lns. 5-9, 259, ln. 16. When asked about why he stood by while Petitioner told the plea court he was guilty in light of

[8] Interestingly, in the Order of Dismissal, counsel's admissions that are favorable to Applicant's position are discounted as post hoc remorse due to pressure from Applicant's family, which is absolutely absent support in the record. App. p. 299.

knowing Petitioner was adamant that he was innocent, counsel responded that very few defendants admit their guilt and he would not "have been surprised if the plea colloquy had fallen through." App. pp. 251-2.

II. Discussion of the Law

A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). In South Carolina, the courts have consistently held that that a defendant must have a full understanding of the consequences of his plea and the charges against him. Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997), Simpson v. State, (317 S.C. 506, 455 S.E.2d 175 (1995). Additionally, a defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the assistance provided by counsel, "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

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

attorneys in criminal cases." 474 U.S. at 57, 106 S.Ct. at 369. In Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009), the South Carolina Supreme Court reiterated the prejudice requirement set forth in Hill. The Court reasoned that for Stalk to meet the prejudice requirement, he needed to show "some evidence that had counsel done an investigation he would have found a witness or evidence that was helpful" to him and that would have affected either counsel's advice or his decision to take the plea. Id.

However, in Davie v. State, 381 S.C. 601, 613, 675 S.E.2d 416, 422-23 (2009), the South Carolina Supreme Court reasoned that it is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant's self-serving statement may be sufficient to establish actual prejudice. See Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000) (Rejecting objective evidence requirement established in Judge and finding Petitioner proved he was prejudiced by counsel's deficient performance in failing to properly advise the Petitioner that he was pleading to a felony rather than a misdemeanor where Petitioner's uncontradicted testimony established that he would not have pled had he known the charge was a felony), overruling Judge v. State, 321 S.C. 554, 562, 471 S.E.2d 146, 150 (1996) ("The second prong of the ineffective assistance inquiry--prejudice--is shown by demonstrating through objective evidence . . . [the existence of] a reasonable probability that, but for counsel's advice, [the defendant] would have accepted the plea. Mere statements by the PCR petitioner that he would have accepted the plea agreement but for counsel's incompetence are insufficient to show prejudice because they are self-serving and inherently unreliable.") (citation omitted); See also Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) ("The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would

not have pled guilty."), Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000) (Holding that there was enough evidence to demonstrate that there was a reasonable probability that defendant would not have pled guilty even though defendant did not specifically testify that he would have insisted upon going to trial if he had known the solicitor was going to make a recommendation.).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but **is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing.**" Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000) (emphasis added). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L. Ed. 2d 162 (1970)).

Here, plea counsel testified that he assumed the case would result in a plea, and he advised Petitioner to enter a plea. App. p. 251, lns. 7-9, 260, lns. 22-25. He even admitted that he thought the plea may fall through based upon Petitioner's claims of innocence, and he did not know what would have happened if he would have been required to proceed to trial. App. pp. 251-2, 270. Nevertheless, the lower court errantly found that trial counsel was prepared to proceed to trial and supported this finding with counsel's testimony elicited regarding his overall trial experience. Simply put, this reasoning is flawed. The number of trials counsel has handled in no way means that he was prepared to proceed to trial with Petitioner on May 23, 2011. Furthermore, counsel's experience also does not magically qualify Petitioner's plea as a

"voluntary and intelligent choice among the alternative courses of action open to the defendant." See Hill, 474 U.S. 52, 106 S.Ct. 366 (1985).

In stark contrast to the lower court's reasoning, the testimony of Petitioner and several of the evidentiary hearing witnesses detailed above, was that they were concerned that counsel was not prepared for trial.[9] Counsel failed to refute Petitioner and Christy Green's testimony that he met with them on the Friday before the plea and it was the first time Petitioner was provided a copy of his file to review. Nor did counsel refute the testimony that he failed to review the forensic interview with Petitioner or investigate the evidence (phone records) provided to him.

Additionally, the testimony regarding lack of notice for the trial date and/or plea proceeding demonstrates counsel's inept preparation for trial and makes it clear that Petitioner did not have a viable option to proceed with a trial at the time of his plea. Counsel did not refute the testimony that he contacted Christy Green on Monday morning and provided Petitioner one hour notice to get to the courthouse and enter his plea. Plea counsel nor Ms. Brisbin's telephonic testimony refuted Victim's testimony that she was not given any form of notice of the plea and/or trial that was to begin on Monday. Additionally, the trial witnesses that counsel was allegedly prepared to call testified that they were not given notice of trial and counsel failed to answer if he had them under subpoena. App. pp. 64, 76, 270, lns. 3-12.

Not only did counsel advise Applicant to enter a plea, but he essentially failed to do the slightest thing to make trial an option for Petitioner. As Petitioner stated, he felt that he "didn't have a choice" and his plea was not voluntary. App. p. 223, lns. 6-8. When asked if he would have proceeded to trial if his attorney was prepared, he answered: "Yes, ma'am. Without a

[9] See the above summary of the testimony of Christy Green, T.J. Jackson, and Michael Patterson. As was raised in Petitioner's Rule 59, SCRCP Motion, the lower court failed to address the testimony and assess the credibility of these witnesses. App. p. 307.

doubt." App. p. 223, lns. 9-11. As already discussed, the lower court errantly found that trial counsel was prepared despite counsel failing to prepare favorable witnesses and evidence, providing Petitioner limited notice of his plea and failing to determine if Victim had notice of the proceedings and would be present. Additionally, counsel failed to ascertain Victim's position prior to advising Petitioner to plead guilty and standing by him as he plead guilty to a charge made by a victim that trial counsel found to be unbelievable. App. p. 249, lns. 13-16.

It must be noted that the lower court made the threshold finding that counsel's testimony was highly credible, so the lower court must have chosen to simply ignore counsel's testimony that he "didn't know the victim's position really at any time." App. p. 270, lns. 6-7. Counsel admitted that he did not have Victim at court the day of the plea to assess her position. App. p. 270, lns. 6-12. He candidly admitted: "I don't know what would have happened if we didn't do the plea. I really don't." App. p. 270, lns. 11-12. Despite these admissions, the lower court found that trial counsel was not ineffective in failing to utilize an expert such as Gaye Allen-Cook to help assess Victim and the matter of her recantation. Beyond admitting his lack of knowledge regarding Victim's position, including the day of the plea or would be trial, plea counsel made several admissions that Cook's expertise would have aided the defense.

Ironically, the lower court found that Victim's testimony that the allegation was untrue was not credible, but the lower court did not discount the testimony of Gaye Allen-Cook. Cook made it clear that she could have provided a favorable assessment to defense counsel regarding the veracity of Victim's assertion that the abuse did not occur, and she would have been excited about taking the case and providing an explanation for the basis of the recantation and her expertise in the area of recantation.[10]

[10] The lower court appears to give great weight to Brisbin's telephonic testimony that she did not recall victim's recantation, but fails to address PCR counsel's cross examination of Brisbin about her statement to the plea court

Instead of addressing the favorable testimony that was elicited from Cook, the Order of Dismissal, in a pattern similar to Respondent's irrelevant cross at the evidentiary hearing, focuses on the forensic interview and the role of forensic interviewers at trial. It is clear from the record of the pleadings and evidentiary hearing that Petitioner was not making claims about the propriety of the forensic interview or the role of forensic interviewers in the trial of cases; he simply testified that counsel failed to review the interview with him. Nevertheless, the Assistant Attorney General had a clear agenda to bolster his upcoming arguments in Kromah, which he referenced on the record, and the court allowed such to become the misguided focus of his findings. In doing so, the lower court failed to properly consider the victim's testimony at the evidentiary hearing, in conjunction with the favorable testimony offered by Cook at the evidentiary hearing.[11]

In contrast to the lower court's findings that counsel was prepared for trial, the probative evidence in the record supports a contrary finding that counsel was only ready to proceed with a plea on the Monday morning of trial when Petitioner "voluntarily" chose to forego trial and enter a guilty plea. It is apparent from the record that Petitioner had one choice on May 23, 2011, which was to follow the advice of his counsel and plead guilty when Petitioner had been clear about his innocence and his desire for a trial. App. p. 223.

When asked by Respondent about why he lied to the court when he conveyed satisfaction with his counsel and admitted his guilt during the plea, Petitioner answered that he was following the advice and instructions of his counsel, that counsel never advised him to tell the truth and that he felt that he had no other option. App. pp. 239-45. When asked on direct if his plea was

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that the victim had recanted and Brisbin's actual testimony that "I honestly don't remember for sure" if she personally recanted to her. App. pp. 130-2, 297.

[11] This matter was raised via Petitioner's Rule 59, SCRCP, Motion. App. pp. 304-8.

voluntary, Petitioner testified: "It wasn't voluntary because I feel like I was pressured into pleading guilty. I didn't have a choice." App. p. 223, lns. 6-8. Petitioner also made it very clear that he would have proceeded with a trial but for counsel's advice and lack of preparation.

In Kolle v. State, 386 S.C. 578, 592, 690 S.E.2d 73, 80 n. 5 (2010), this Court addressed the dissent and explained:

> An expression of satisfaction with plea counsel is necessarily conditional. The extent of satisfaction is dependent upon the attorney's diligence and degree of information shared with the client. Although a plea of guilty may preclude certain PCR claims, it would not preclude those that directly involve the voluntariness and knowledge with which the guilty plea was made.

Here, counsel's testimony established a lack of diligence that involuntarily backed Petitioner into a corner, but counsel's ineffective assistance was errantly excused and justified by the trial court, while deflecting the blame to Petitioner for admitting guilt and expressing satisfaction with counsel.

On cross-examination, great efforts were made to get Petitioner to admit he lied to the plea court, but the court failed to address plea counsel's admitted advice to Petitioner to lie to the court and counsel actively standing by him has he told the court he was guilty. App. pp. 238-244. When asked on cross-examination, plea counsel acknowledged that Petitioner insisted he was innocent but he advised him to plead guilty. App. p. 251, lns. 5-9. It must be noted that Petitioner did not plea pursuant to Alford but was advised by counsel to enter a guilty plea to charges involving a victim that counsel "did not believe." App. p. 249, lns. 13-16; See North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970) (Holding it was constitutional to allow a defendant to consent to imposition of a sentence, although unwilling to admit culpability, where he intelligently concluded that a guilty plea is in his best interest and the evidence strongly supports his guilt). It appears that allowing a client to plead guilty when he is adamant that he is not guilty

was not a concern to the lower court and may not be a concern to this Court, but Petitioner submits that in the interest of the integrity of the judicial system it should be. See Rollison v. State, 346 S.C. 506, 510, 552 S.E.2d 290, 292 (2001) ("A defendant may, as part of a plea bargain, agree to plead guilty to a crime for which he has been indicted (or to which he has waived grand jury presentment), but of which he is not guilty."), Berry v. State, 381 S.C. 630, 675 S.E.2d 425 (2008). Therefore, Petitioner begs this Court to attempt to reconcile plea counsel's overall actions that lead to the knowingly false admission of guilt with a finding that counsel rendered effective assistance and Petitioner was not prejudiced.

III. Conclusion

Based upon the foregoing, Petitioner would urge this Court to find that the lower court erred by failing to find that plea counsel provided ineffective assistance that rendered Petitioner's plea involuntary and resulted in prejudice to Petitioner. Petitioner submits that the lower court's ruling should be reversed as it not supported by the record and amounts to an error of law.

Respectfully submitted,

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