ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Williamsburg County

Honorable Steven H. John, Circuit Court Judge

ANTWINE MATTHEWS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000048

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Whether the PCR court erred in finding trial counsel was effective where trial counsel failed to object to a change in the presiding judge midway through the trial?

II. Whether the PCR court erred in finding that trial counsel was effective where trial counsel failed to properly advise Petitioner regarding the ten-year plea offer and Petitioner was ultimately sentenced to a total of twenty years incarceration?

III. Whether the PCR court erred in finding appellate counsel was effective where they failed to file a motion to reconstruct the important missing portions of the trial transcript and by the time of the PCR hearing trial counsel's memory had faded and the Clerk's office had lost or misplaced all of the trial exhibits?

IV. Whether the PCR court erred in finding that Petitioner could not prove prejudice as to any of his allegations due to overwhelming evidence of guilt?

V. Whether the PCR court erred in denying Petitioner's Motion to Alter or Amend where the court failed to set forth specific findings of fact and conclusions of law relating to the allegation that trial counsel was ineffective in failing to object to the Court's response to the jury's questions and recharge of the jury?

STATEMENT OF THE CASE

Introduction

Shortly after midnight on December 31, 2008, Petitioner's co-defendants, Jeffrey Dawkins and Melvin Segars, went into Ervin Cooper's grocery store in Williamsburg County.[1] Petitioner Matthews went into the store a few minutes after them. App. 65, ll. 7-15; App. 461, l. 18 – 470, l. 18. One of the individuals asked Cooper for some "three-cent candy" and placed eighteen cents on the counter for it. According to Cooper, while he was turned around getting the candy, he heard a pop and felt a bullet pass by his ear. He admitted that he did not see anyone fire a weapon but he assumed that the sound he heard came from inside the store. App. 28, l. 12 – 32, l. 15; App. 42, l. 2 – 44, l. 15; App. 53, ll. 2-18.

Cooper fell behind the counter, got his .38 caliber revolver, and began shooting at the young men. Cooper continued to shoot at them through the store window as they ran away. One of the bullets struck Matthews. App. 32, l. 16 – 34, l. 9; App. 138, l. 1 – 140, l. 9; App. 221, ll. 2-8. The defense's theory at trial was that no crime was committed, no shot having been fired and no demand for money or goods having been made. To the extent any crime was committed, defense counsel argued that Matthews was merely present and not a part of any conspiracy. App. 307, l. 11 – 313, l. 23.

Matthews did not testify at his trial, but at the PCR hearing he said that he went into the store only after Dawkins and Segars had been inside for a couple of minutes. Matthews had dropped them by the store to buy candy on the way to take them home. Cooper started shooting almost as soon as Matthews walked inside and Matthews was struck with a bullet as he ran away. Matthews was able to drive a short distance to the house of Segar's brother, Charles Bishop.

[1] In the trial transcript, Jeffrey Dawkins is also referred to by his nickname "Powder." Melvin Segars is also referred to by his nickname "Vinny." App. 65, ll. 16-19; App. 93, l. 23 – 94, l. 1.

Bishop called for an ambulance and Matthews was taken to the hospital. App. 461, l. 18 – 470, l. 18.

Indictment and Trial

On May 11, 2009, the Williamsburg County Grand Jury indicted Petitioner Antwine Matthews for assault with intent to kill, attempted armed robbery, possession of a weapon during a violent crime, and criminal conspiracy. The indictment was also against Matthews' co-defendants, Jeffrey Dawkins and Melvin Segars. App. 700.

On May 12-14, 2010, Matthews proceeded to trial before the Honorable Clifton Newman and a jury. App. 1. Matthews was represented by Charles Barr, and the State was represented by assistant solicitor Kimberly Barr. App. 1; App. 134; App. 284. On the second day of trial, May 13, 2010, Judge Newman announced that the Honorable D. Craig Brown, would take over presiding in the case. App. 195, l. 15 – 196, l. 24. Judge Brown was recently elected and had been sitting with Judge Newman during the trial. App. 560; App. 594, l. 9 – 596, l. 14. Judge Newman then left the courtroom. App. 479, ll. 1-5; App. 490, ll. 2-14; App. 540, l. 24 – 541, l. 7; App. 596, ll. 5-14.

The jury found Matthews guilty of attempted armed robbery and conspiracy but acquitted him of the other two charges. App. 338, l. 23 – 339, l. 4. Judge Brown sentenced Matthews to consecutive sentences of fifteen years for attempted armed robbery and five years for criminal conspiracy, for a total of twenty years incarceration. App. 343, ll. 1-10.

Direct Appeal

On direct appeal, Matthews was represented by appellate defenders Tristan Shaffer and Susan Hackett. App. 345. Portions of the trial transcript were missing either because the tape was inaudible or otherwise malfunctioned. They important portions that were missing included

the testimony of Kim Hanna, the judge's jury charge on conspiracy, and two portions of the discussion of the jury's questions. App. 126, ll. 23-24; App. 330, ll. 10-15; App. 330, l. 25 – 331, l. 1; App. 334, l. 6; see also App. 132, ll. 13-15. Appellate counsel did not file any motion to reconstruct the missing portions of the record. Rather, counsel filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). On September 5, 2012, the Court of Appeals dismissed the appeal following the Anders procedure. App. 356. The remittitur was issued on September 21, 2012. App. 358.

PCR Application and Evidentiary Hearing

On January 8, 2013, Matthews filed an application for post-conviction relief (PCR). App. 359. The State filed its Return on June 17, 2013. App. 368. On June 12, 2015, Matthews, through counsel, filed an Amendment to his application. App. 336.

On July 16, 2015, an evidentiary hearing was held before the Honorable Steven H. John. Matthews was represented by Tricia Blanchette. The State was represented by Assistant Attorney General Daniel Gourley. App. 374. Matthews, trial counsel Charles Barr, and Matthew's mother, Abigail Cooper, all testified at the hearing. App. 375.

Matthews testified that the solicitor made a plea offer of ten years both prior to trial and again on the second day of trial, prior to Judge Newman turning the case over to Judge Brown to preside. App. 392, l. 17 – 393, l. 3; App. 394, l. 20 – 395, l. 1; App. 396, ll. 1-21; App. 435, ll. 4-23. He and trial counsel discussed the offer, but trial counsel advised him that he "felt very strong about the case" and "[did not] see the judge giving [him] any more than fifteen years; so it's worth a five-year gamble." App. 393, ll. 3-13. It was Matthews understanding that trial counsel based his advice on his experience practicing before Judge Newman. Had Smith known that Judge Brown, with whom trial counsel had no experience, would have been his sentencing

judge, he would have accepted the State's plea offer. App. 395, ll. 2-7; App. 399, l. 15 – 400, l. 5; App. 452, ll. 11-15.

Trial counsel testified that you "always" consider who the judge will be when talking to a client about a plea offer. App. 487, ll. 12-17. He admitted that his only experience was with Judge Newman, as Judge Brown was newly elected. Trial counsel was surprised that Judge Brown ran Matthews' five year sentence consecutive to the other sentence. App. 487, l. 19 – 488, l. 18; App. 493, ll. 13-17. While trial counsel could not recall the specific plea offer extended to Matthews, he testified that it was Matthews' decision to "go ahead and roll the dice." He did not encourage Matthews to accept the plea because he thought that they had a good chance of success at trial. App. 486, l. 2 – 487, l. 10; App. 526, ll. 6-10.

Matthew's mother, Abigail Cooper, was present throughout Matthew's trial and privy to his conversation with counsel about the plea offer. App. 538, l. 1 – 539, l. 2. Ms. Cooper said that trial counsel led them to believe that Clifton Newman was going to be "the judge" and was confused when Judge Newman left the courtroom. App. 539, ll. 13-22; App. 540, ll. 5-23.

Order of Dismissal and Post-Judgment Motion

On September 16, 2015, Judge John filed an Order of Dismissal, denying Matthews' PCR application. App. 655 – 689. The Findings and Conclusions section began with a finding that Matthews could not show prejudice stemming from any of his allegations because there was "clear evidence of overwhelming guilt." App. 668 – 670. The Court then ruled on the thirteen of Petitioner's allegations. App. 670 – 689. Though the Order recognizes that PCR counsel amended the application to include "an additional claim of ineffective assistance counsel for failing to object to the recharge of the jury," that allegation was not ruled upon in the Order of Dismissal. App. 657.

On October 30, 2015, PCR counsel Tricia Blanchette filed a Motion to Reconsider or to Alter or Amend pursuant to Rule 59(e), SCRCP, on Matthew's behalf. She cited to the Court's failure to rule upon the allegation raised by oral amendment, specifically ineffective assistance of counsel for failure to object to the Court's response to the jury's questions and recharge. PCR counsel also argued that the Court's threshold finding of overwhelming evidence of guilt as to all allegations raised was improper. App. 690 – 694. The State filed its Return to the motion on November 13, 2015, alleging that the PCR court "properly ruled on all issues presented at the post-conviction relief hearing and Applicant's motion should be denied." App. 695 – 698.

On November 30, 2015, Judge John filed an Order denying the Motion and reaffirmed its prior Order of Dismissal. App. 699.

This appeal follows.

ARGUMENT

I. The PCR court erred in finding trial counsel was effective where trial counsel failed to object to a change in the presiding judge midway through the trial.

Relevant Facts

Both Judge Newman and Judge Brown presided over portions of Matthews' trial. App. 1; App. 134; App. 284. Judge Clifton Newman was the judge assigned for General Sessions court in Williamsburg County the week of May 10, 2010, when Matthews' trial took place. App. 560. While there were no assignments for Judge Brown, Judge Newman's assignment included a notation "Sitting With: Brown, D." App. 560; App. 561; see S.C. CONST Art. V, § 4 ("The Chief Justice shall set the terms of any court and shall have the power to assign any judge to sit in any court within the unified judicial system."). According to trial counsel, it is common to see a new judge, like Judge Brown at the time, sit with a more experienced judge when first elected.[2] App. 488, l. 19 – 489, l. 10; App. 493, l. 23 – 494, l. 2; see also App. 594, l. 9 – 596, l. 14.

After the parties returned from their lunch break at 2:15 p.m. on the second day of trial, Judge Newman announced that Judge Brown would "take over presiding." App. 195, l. 15 – 196, l. 14. Judge Newman asked if there was "[a]ny objection by the state or defense." App. 196, ll. 1-2. Trial counsel responded: "None from the Defense." App. 196, l. 4. Judge Newman told the jury: "Ladies and gentlemen, you have witnessed two judges here presiding this week. I explained it all to the members of the jury panel earlier in the week during the course of the orientation. Judge Brown is going to now take over presiding in this case." App. 196, ll. 19-24.

At the PCR hearing, trial counsel did not recall whether Judge Newman remained in the courtroom thereafter. However, both Matthews and his mother, Abigail Cooper, testified that Judge Newman left after stating that Judge Brown would "take over." App. 479, ll. 1-5; App.

[2] Judge D. Craig Brown was elected by the General Assembly to the position of Circuit Judge, At-Large, Seat Number 8 on February 3, 2010.

490, ll. 2-14; App. 540, l. 24 – 541, l. 7. Ms. Cooper said that Judge Newman was the only judge presiding during the initial jury selection but that the second judge appeared during or after voir dire. She was confused when Judge Newman left. App. 539, ll. 3-19; App. 540, ll. 5-23.

The PCR judge ruled that the allegation that trial counsel was deficient in failing to object to the switch in the presiding judge was "wholly meritless" and that Matthews failed to show how he was prejudiced "by Judge Brown presiding over his trial." App. 673-74.

Discussion

While the change in the presiding change may ordinarily be inconsequential, it was important in this case, where trial counsel advised Matthews to reject to the State's plea offer based on his experience with Judge Newman. See discussion infra, Issue II. Trial counsel testified to the obvious, which is that who the sentencing judge is going to be matters in advising your client whether to accept a plea offer. App. 487, ll. 12-17. Thus, beyond just the influence that the change in presiding judges may have had on the jurors, Matthews was prejudiced because trial counsel's advice that he was only risking an additional five years if convicted was premised upon Judge Newman acting as the sentencing judge. Judge Brown sentenced Matthews to a total of twenty years, double the time that Matthews would have received had he accepted the State's ten-year plea offer.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). Courts

evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668).

First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. "A defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id.

Here, the PCR court's finding that "trial counsel's testimony that Judge Brown presided over the entire trial" was credible has no support in the record. App. 673. At most, trial counsel testified that Judge Brown was consistently in the courtroom, but certainly not that Judge Brown was taking an active role as a presiding judge throughout the trial. App. 490, ll. 2-14. While the trial transcript does not specify which judge was speaking, trial counsel specifically referenced Judge Newman's preliminary instructions twice during the trial. App. 17, ll. 19-22; App. 300, ll. 17-19. Further, Judge Newman's statement that Judge Brown would **"take over presiding"** is indicative of the fact that Judge Newman was the judge actively presiding over the case while Judge Brown observed. App. 195, l. 15 – 196, l. 24. This is further supported by the testimony of Matthews and his mother that they thought Judge Newman was "the judge." App. 394, l. 24 – 395, l. 7; App. 396, l. 19 – 397, l. 24; App. 479, ll. 1-3; App. 539, ll. 3-23.

Additionally, the parties appeared before Judge Newman at a discovery motions hearing held September 10, 2014, related to Matthew's PCR action. App. 589. A transcript of that hearing was introduced at the PCR hearing as Applicant's Exhibit 3, without objection. App. 400, l. 6 – 403, l. 5; App. 589. At the motions hearing, Judge Newman recalled his involvement in Matthews' trial and said:

> Looking at the record on appeal, it say[s] appeal from Williamsburg County, Clifton Newman and D. Craig Brown. I recall that when Judge Brown was -- during his first few weeks on the bench, he sat with me in Williamsburg County during his initial observation period, you might say, and also during that time took the lead in some of the cases.
>
> So, I believe that space on this transcript, that I would have been the lead trial judge, you might say. So, this is not a case that I would hear as far as making any rulings, in fact, in the interest of anyone, including Mr. Matthews, since I was the trial judge.

App. 594, ll. 9-20. Judge Newman said: "We'll take charge. When they seem that they have their footing, we say okay, you're on your own." App. 595, ll. 1-3. When PCR counsel said that she assumed that Judge Newman was probably sitting with Judge Brown because he was a newer judge, Judge Newman corrected her, saying "He was sitting with me. I wasn't sitting with him." App. 595, ll. 4-10; see App. 402, ll. 5-19. Matthews said then that Judge Newman "sat for, like, two days and **then the Judge Brown took over**." App. 596, ll. 5-12. The amendment to Matthew's PCR application, which added the allegation that trial counsel was ineffective in failing to object to the judge in the presiding judge, was not filed until June 12, 2015. App. 366 – 367. Matthews was certainly not tailoring his response to Judge Newman at the discovery motions hearing in anticipation of a PCR allegation not raised until nine months later, adding credence to his recollection of the roles of the two judges articulated at the motions hearing.

Though factually distinguishable because it involved the absence of the sole presiding judge, the Illinois Supreme Court's decision in People v. Vargas, 673 N.E.2d 1037 (Ill. 1996). The trial

judge in Vargas excused himself from the courtroom during the defense's cross-examination of a State's witness regarding a statement allegedly made by the defendant. Id. at 1039. The Vargas court noted that "a judge's active presence on the bench during a criminal jury trial is an essential safeguard which aids in providing a defendant with a fair trial." Id. at 1041. The court also said that "a judge's absence from the bench might unduly influence the attitude of jurors so as to deny defendant an impartial trial." Id.

Regarding the potential influence upon the jury, the Vargas court explained that "jurors are ever watchful of the attitude of the trial judge and his influence upon them is necessarily and properly of great weight, thus his lightest word or intimation is received with deference and may prove controlling." Id. at 1042. The Vargas court also discussed Durden v. People, 61 N.E. 317, 322 (Ill. 1901), in which a judge who had no prior involvement with the case substituted as the presiding judge during the defense's closing arguments. 673 N.E.2d at 1042. The Durden Court wrote: "It is impossible for us to say that no injury resulted to [defendant] from the substitution, in the manner heretofore indicated, of one judge for another during the trial of the cause . . . . It cannot be known what impression this change may have made upon the minds of the jury to the prejudice of [defendant]." 61 N.E. at 322.

In the present case, it is not disputed that Judge Brown was present in the courtroom throughout Matthews' trial, with the potential exception of a portion of the voir dire. App. 396, ll. 1-21; App. 539, ll. 3-19; App. 540, ll. 5-23. However, it was Judge Newman who was actively presiding over the trial through lunchtime on the second day of trial. App. 17, ll. 19-22; App. 195, l. 15 – 196, l. 24; App. 300, ll. 17-19; App. 595, l. 4 – 596, l. 14. The trial continued an additional day and a half, during which Judge Newman was absent from the courtroom. As such, Judge Newman was unable to provide any guidance to the newly elected Judge Brown

regarding ruling on motions, jury charges, or sentencing. Though Petitioner was acquitted of assault with intent to kill, it is notable that the jury charges where so disorganized that the attempted armed robbery charge was given in the middle of the charge on assault with intent to kill. See App. 325, l. 6 – 328, l. 25; App. 547, l. 10 – 551, l. 10. Further, Judge Brown did not read the jury questions into the record,[3] instead making them Court's exhibits, which were subsequently lost by the Clerk's office. App. 332, ll. 23-24; App. 334, ll. 19-22.

Additionally, Judge Newman's absence from the courtroom may have been confusing to the jury, just as it was confusing to Matthew's family, or given the perception that Judge Newman no longer thought Matthews' case was important. Further, as will be discussed more fully *infra* in Issue II, trial counsel based his advice regarding the solicitor's plea offer upon his experience with Judge Newman as a sentencing judge. If nothing else, he should have objected to the change in judges on that basis, or at the very least requested a recess to consult further with Matthews regarding the plea offer.

Therefore, trial counsel was deficient in failing to object to the change in the presiding judge midway through the trial. Matthews was prejudiced because Judge Newman was not there to safeguard the fairness of the trial, his absence likely influenced the attitude of the jury, and Matthews' decision to proceed to trial rather than accept the plea offer was premised upon trial counsel's averment of his likely sentence from Judge Newman of fifteen years.

[3] There is a portion of the transcript missing, at which time admittedly the judge may have read the questions aloud for the record. App. 333, l. 1.

II. The PCR erred in finding that trial counsel was effective where trial counsel failed to properly advise Petitioner regarding the ten-year plea offer and Petitioner was ultimately sentenced to a total of twenty years incarceration.

Relevant Facts

Matthews testified that the solicitor made a plea offer of ten years both prior to trial and again on the second day of trial, prior to Judge Newman turning the case over to Judge Brown to preside. App. 392, l. 17 – 393, l. 3; App. 394, l. 20 – 395, l. 1; App. 396, ll. 1-21; App. 435, ll. 4-23. Matthews said that he and trial counsel discussed the offer, but that trial counsel advised him that he "felt very strong about the case" and "[did not] see the judge giving [him] any more than fifteen years; so it's worth a five-year gamble." App. 393, ll. 3-13. It was Matthews understanding that trial counsel based his advice on his experience practicing before Judge Newman. They did not discuss trial counsel's experience with Judge Brown. Matthews testified that his decision to accept or reject the plea offer would have been influenced had he known that Judge Brown may have been the sentencing judge. He could have anticipated that there was potential that the sentence would be harsher than what his attorney expected from Judge Newman. App. 395, ll. 2-7; App. 399, l. 15 – 400, l. 5. Had he been properly informed, Matthews said that he would have accepted the State's plea offer. App. 452, ll. 11-15.

Trial counsel testified that you "always" consider who the judge will be when talking to a client about a plea offer. App. 487, ll. 12-17. He said that he has "tried enough cases that [he] know[s] the style of most of the judges." App. 487, ll. 19-20. However, he admitted that Judge Brown had just recently become a judge, such that his only experience with him was a private practitioner. Trial counsel thought that either judge would have given Matthews a fair trial, but he was surprised that Judge Brown ran Matthews' five year sentence consecutive to the other

sentence. But, he said that was the judge's "prerogative." App. 487, l. 20 – 488, l. 18; App. 493, ll. 13-17.

While trial counsel could not recall the specific plea offer extended to Matthews, he testified that it was Matthews' decision to "go ahead and roll the dice." He did not encourage Matthews to accept the plea because he thought that they had a good chance of success at trial. App. 486, l. 2 – 487, l. 10; App. 526, ll. 6-10. Trial counsel said: "In this case, Mr. Matthews could have easily – he could have easily gotten out of it. Probably it turned out one way and it probably should have gone another way, but that's . . . all part of trying cases." App. 486, ll. 22-25.

Matthew's mother, Abigail Cooper, was present throughout Matthew's trial and privy to his conversation with counsel about the plea offer. App. 538, l. 1 – 539, l. 2. Ms. Cooper said that trial counsel led them to believe that Clifton Newman was going to be "the judge." App. 539, ll. 20-22.

Discussion

This Court has held that "the Sixth Amendment protects criminal defendants against ineffective assistance of counsel during the plea bargaining process, even if the plea offered ultimately is rejected." Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), *overruled on other grounds,* Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); see also Davie v. State, 381 S.C. 601, 607, 675 S.E.2d 416, 419 (2009). In Missouri v. Frye, the United States Supreme Court noted that plea bargaining can benefit both parties by providing "[t]he potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing." 132 S.Ct. 1399, 1407 (2012). The Frye Court further stated that "[i]n order that these benefits can be realized, however, criminal defendants require effective

counsel during plea negotiations." Id. at 1407-08. "Anything less might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him." Id. at 1408 (internal citations and quotations omitted).

Here, trial counsel met the bare minimum requirement that he communicate the offer to Matthews. See Frye, 132 S.Ct. at 1408 ("[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."); see also Davie, 381 S.C. at 609, 675 S.E.2d at 420 (2009). The PCR judge aptly found that Matthews "acknowledged that he was offered a ten year plea offer and chose to reject the offer based off of the advice of Trial Counsel." App. 673. It is trial counsel's advice regarding whether to accept or reject that offer that Matthews' argues was deficient.

In Judge v. State, this Court rejected the argument that "petitioners should not be entitled to post conviction relief based on claims of ineffective assistance of counsel during the plea bargaining stage, when the plea bargain ultimately is rejected and the defendant proceeds to trial." 321 S.C. 554, 558, 471 S.E.2d 146, 148-49 (1996). The Judge Court discussed Turner v. Tennessee, 664 F.Supp. 1113, 1119 (M.D. Tenn. 1987), *aff'd,* 858 F.2d 1201 (6th Cir.1988), *vacated on other grounds,* 492 U.S. 902, 109 S.Ct. 3208 (1989), quoting the following:

> This narrow view of the right to counsel has at least two flaws. One is that Sixth Amendment protection of the ineffectively counseled decision to plead guilty, but non-protection of the ineffectively counseled decision to go to trial, would ignore the reality that these two decisions are alternative outcomes of the same attorney-client interaction . . . .
>
> To accept or reject a plea offer presents a binary choice at a fork in the road; providing constitutional protection against an incompetent shove in one direction, but not against an equally incompetent shove in the other, may produce unwanted

> skewing of the results. Like the character in the short story, criminal defendants facing this choice under asymmetrical constitutional protection may begin to see one alternative as the lady and the other as the tiger. Unforeseeable and undesirable effects on the overall functioning of the plea-negotiation process could ensue.
>
> The second flaw in the asymmetrical approach is that it ignores the full implications of an ineffectively counseled decision to go to trial. A defendant in Turner's position has not merely rejected a plea offer; he has made a decision to go to trial "with **a grave misconception as to the** very nature of the proceeding and **possible consequences**."
>
> The plea-rejection process thus necessarily implies a corollary election to go to trial. **If the adversary system of plea negotiation has worked well, defense counsel's advice on the "choice among the alternative courses of action open to the defendant," has reflected a balancing of the more certain outcome under a guilty plea, the degree of uncertainty of result at trial, *and the worst possible penalties that could result from trial.***

Id. at 559-60, 471 S.E.2d at 149 (quoting Turner, 664 F.Supp. at 1120 (citations omitted) (emphasis added). In Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 486 (1991), this Court held that reversal is required where counsel provides erroneous sentencing advice that induces the client's guilty plea. A logical reciprocal holding, in light of Judge, would be that reversal is required where counsel provides erroneous sentencing advice that induces the client to reject a plea offer and proceed to trial.

This Court has cautioned that advice to reject a plea agreement is not deficient "simply because, in hindsight, the advice was wrong or the attorney's trial tactics backfired." Judge, 321 S.C. at 561, 471 S.E.2d at 150. But, it when on to say that "[e]ven employing this deferential standard, however, courts occasionally will find that attorneys rendered ineffective assistance in advising a defendant to reject a plea agreement." Id. For example, in Turner, the court found that counsel was ineffective in advising defendant to reject offer of guilty plea to a felony with a two-year sentence, where original charges were for first degree murder and two counts

of aggravated kidnapping and where at PCR hearing other lawyers testified that the decision to go to trial was "ludicrous." Id. at 561-62.

In the present case, trial counsel told Matthews that he thought the highest sentence Judge Newman would impose was fifteen years, just five years over the State's plea offer. App. 393, ll. 3-13. Trial counsel confirmed that he did not advise Matthews to accept the plea offer, thinking that they had a good chance at success. App. 486, l. 2 – 487, l. 10; App. 526, ll. 6-10. Interestingly, trial counsel later alleged that Matthews confessed to him that he shot at Mr. Cooper's head and missed him in defense of why counsel did not challenge the admission of the bullet recovered from Cooper's store. App. 505, l. 15 – 506, l. 11. If Matthews truly made such a confession, it is incompressible why counsel would advise him against accepting the ten year offer.

If trial counsel was aware that Judge Brown may take over as the actively presiding judge at any point, he should have articulated that to Matthews and told him the Judge Brown was new to the bench such that he had no frame of reference for how he may sentence Matthews in the event of a conviction. If he was unaware of the possible change in the presiding judge when he originally spoke to Matthews, counsel should have recognized the import of the change in judges when Judge Newman announced that Judge Brown would be taking over as the presiding judge. App. 195, l. 15 – 196, l. 24. At that point, the circumstances had changed and trial counsel should have requested a recess so that Matthews could reevaluate whether to accept the plea offer.

Ultimately, Matthews' trial continued and he was sentenced to a total of twenty years because Judge Brown ran the sentence for the weapons offense consecutive to sentence for attempted armed robbery. App. 343, ll. 1-10. While trial counsel noted his surprise at the

consecutive sentencing, he said that it was the judge's "prerogative." App. 488, l. 4-10. Yet, trial counsel never articulated the possibility of consecutive sentencing to Matthews.

But for trial counsel's erroneous advice that Matthews would receive a maximum fifteen-year sentence if he was convicted after a trial, Matthews would have accepted the plea offer of ten years. Matthews was prejudiced in that he was sentenced to five years in excess of the sentence that trial counsel said he would receive if he was convicted after a trial.

III. The PCR court erred in finding appellate counsel was effective where they failed to file a motion to reconstruct the important missing portions of the trial transcript and by the time of the PCR hearing trial counsel's memory had faded and the Clerk's office had lost or misplaced all of the trial exhibits.

Relevant Facts

There are portions of the trial transcript which were not transcribed due to a purported error in the tape or because the recording was inaudible. The relevant omissions occurred during the testimony of Kim Hanna, the judge's jury charge on conspiracy, and twice during the discussion of the jury's questions. App. 126, ll. 23-24; App. 330, ll. 10-15; App. 330, l. 25 – 331, l. 1; App. 334, l. 6; see also App. 132, ll. 13-15. These portions of the transcript were important because there was a dispute as to whether Hanna saw Matthews holding a gun earlier in the day, the jury charge contained other errors raising a serious question over whether the proper conspiracy charge was given, and Matthews raised an allegation that trial counsel was ineffective in failing to object to the recharge of the jury in response to the jury questions. Appellate counsel did not file a motion to reconstruct the missing portions of the transcript before filing an Anders brief in Matthew's direct appeal. See discussion *supra*, Issue III; App. 345.

PCR counsel made efforts to obtain copies of the jury questions that were made Court's Exhibits at the trial and the written charge given to the jury, but they had been lost or misplaced by the Clerk's office. App. 332, l. 21; App. 380, ll. 5-21; App. 535, l. 15 – 536, l. 5. Appellate defender Susan Hackett was contacted during a break in the PCR hearing and PCR counsel proffered that Hackett did not see a copy of the Court's Exhibits in Matthew's scanned appellate file. App. 536, l. 13 – 537, l.

The PCR court ruled that Matthews failed to present evidence "that the information missing from the transcript was somehow prejudicial in ether the trial or appellate process." App. 676 – 677. The PCR court found that while Matthews pointed to the excerpts missing from the transcript, he did not present any evidence of what actually took place during the portions that were missing. App. 677; App. 684. The court also noted that appellate counsel did not testify at the PCR hearing and that appellate counsel did submit an Anders brief. App. 684.

Discussion

When portions or all of a trial transcript have been lost or destroyed, the Court may remand to have the record reconstructed. China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968); Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002); Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 383, 418 S.E.2d 319, 321 (Ct. App. 1992); State v. Ladson, 373 S.C. 320, 324-25, 644 S.E.2d 271, 273-274 (Ct. App. 2007). "The authority of the trial court in South Carolina to reconstruct the record for appellate purposes aligns our state with the majority of jurisdictions that hold 'the inability to prepare a complete verbatim transcript, in and of itself, does not necessarily present a sufficient ground for reversal.'" Ladson, 373 S.C. at 324, 644 S.E.2d at 273. However, a new trial is properly granted "if the appellant establishes that the incomplete

nature of the transcript prevents the appellate court from conducting a meaningful appellate review." Id. at 325, 644 S.E.2d at 274 (internal quotations omitted).

In Ladson, the Court of Appeals held that the attempts at reconstruction were insufficient, especially in light of our State's issue preservation rules. Id. at 326-27, 644 S.E.2d at 274-75. Much of the difficulty in reconstructing the record in Ladson stemmed from the length of time – more than one year – that passed between the trial and reconstruction hearing. Id. The court also noted that the trial was multiple days and fact-intensive. Id. Had Matthews' appellate counsel on direct appeal made a timely request for reconstruction, the court could have promptly convened a hearing while the memories of the judges and attorneys were still fresh. In Whitehead, the Court ordered that the reconstruction hearing be held within forty-five days of the Court's remand Order. 352 S.C. at 221, 574 S.E.2d at 203. The Clerk's office may also have had possession of the trial exhibits and written charge at that point in time. Instead, the first discussion of what happened during the missing portions of the trial transcript occurred at the PCR hearing, **over three years after Matthews' trial**. Trial counsel's responses regarding the un-transcribed portions of the trial were repeatedly that he did not remember. App. 500, l. 6 – 502, l. 25; App. 514, l. 23 – 520, l. 14.

The PCR court erred in essentially requiring Matthews to successfully reconstruct the record to be successful on his PCR claim against appellate counsel. This would be an almost impossible burden for any defendant three years after the trial. Rather, the inability to reconstruct the record demonstrates the inability to conduct meaningful appellate review, which evidences how Matthews is prejudiced by appellate counsel's deficient conduct. See Langford, supra. Further, contrary to the PCR court's insinuation that the filing of an Anders brief cuts against Matthews' claim, it further evidences the need for appellate counsel to seek out any

meritorious issues for direct appeal. See Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967) ("[A defense attorney's] role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, **after a conscientious examination of it**, he should so advise the court and request permission to withdraw." (emphasis added)). The failure of appellate counsel to testify at the PCR hearing is also of little consequence, as there is no strategic reason not to pursue a motion to reconstruct where the gaps in the transcript were substantial and obvious, like the present case. Cf. Stacey v. Solem, 801 F.2d 1048, 1051 (8th Cir. 1986) (noting "that labeling counsel's actions as 'trial strategy' does not 'automatically immunize an attorney's performance from Sixth Amendment challenges'" (quoting Kellogg v. Scurr, 741 F.2d 1099, 1102 (8th Cir. 1984)).

Therefore, appellate counsel was deficient in failing to file a motion to reconstruct the missing portions of the trial transcript. Matthews was prejudiced because reconstruction was not possible at the PCR hearing in order effectuate meaningful appellate review.

IV. The PCR court erred in finding that Petitioner could not prove prejudice as to any of his allegations due to overwhelming evidence of guilt.

The PCR court imposed too high of a burden upon Matthews. To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is **a reasonable probability the result at trial would have been different**. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Strickland v. Washington, 466 U.S. 668 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Strickland, 466 U.S. at 694. The United States Supreme Court specifically ruled that "a

defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id.

The "Findings of Fact and Conclusions of Law" section of the PCR court's Order of Dismissal begins with a section titled "Overwhelming Evidence." App. 668. Therein, the court "note[d] that Applicant can show no resulting prejudice stemming from any allegations of ineffective assistance of counsel as there is clear evidence of overwhelming guilt." App. 668; see App. 670. Notably, the PCR court repeatedly refers to the crime as an "armed robbery" despite the fact that Matthews was convicted of only **attempted** armed robbery. App. 668 – 669. In the Rule 59(e) motion filed by PCR counsel, she argued that it was an error of law to make such a finding as to *all* of the allegations raised. App. 691 – 692. She further argued that finding was inapplicable to his case as a whole. App. 692.

Notably, Matthews was acquitted on two counts of the indictment – assault with intent to kill and possession of a weapon during a violent crime. Yet, Matthews was convicted of attempted armed and possession of a weapon during the commission of a violent crime. While this Court held in State v. Alexander, 303 S.C. 377, 382-83, 401 S.E.2d 146, 149-50 (1991), that inconsistent verdicts are not a sufficient reason to overturn a conviction, they certainly point to the absence of overwhelming evidence of guilt.

Regarding the "facts" cited in the Order of Dismissal, it is true that Cooper identified Matthews as one of the three young men who entered his store that night. App. 40, l. 18 – 41, l. 10. The bullet removed from Matthew's abdomen the night of the incident was also consistent with the caliber of gun that Cooper used to shoot at the young men, though it could have been another .38 caliber gun. App. 221, ll. 2 – 222, l. 3. Additionally, it is true that Dawkins said that Matthews was a part of an attempt to rob Cooper's store. App. 58, ll. 13-15; App. 71, ll. 7-12;

App. 75, ll. 6-13; App. 90, ll. 10-15. However, Dawkins also said that he never heard Matthews and Segars discuss any such plan. App. 69, ll. 1-3. Further, Dawkins reluctantly admitted that he had plead guilty in exchange for a recommendation of ten years but was still awaiting sentencing. Part of Dawkins' deal with the solicitor was that he had to testify against Matthews. App. 84, l. 10 – 86, l. 24; App. 95, l. 18 – 96, l. 11. Undoubtedly, the solicitor would not be satisfied that Dawkins had upheld his part of the bargain unless his testimony inculpated Matthews, evidencing Dawkins' motive to lie. See, e.g., Smith v. State, 407 S.C. 270, 754 S.E.2d 900 (Ct. App. 2014).

At most, all that evidence did was place Matthews' at Cooper's store during the time of the robbery, if believed by the jury. Matthews' defense at trial was **mere presence**. Further, Matthew's attorney pointed to the fact that the eighteen cents for the penny candy was placed on the counter and that the young men made no other demand for goods or money. App. 42, l. 18 - 43, l. 2. Cooper said that Matthews did not say anything while he was in the store. App. 45, ll. 20-23. He further elicited testimony that Cooper may have been mistaken in thinking that what he heard was actually a gunshot and that it was from inside of the store. App. 43, l. 3 – 45, l. 15. Kim Hanna's testimony was merely that she had seen Matthew's with a gun earlier in day, which was of little weight in light of Dawkins' earlier testimony that he saw Segars with a gun just outside of Cooper's store moments before that went inside. App. 68, ll. 10-25; App. 109, l. 17 – 110, l. 9; App. 113, ll. 1-7; App. 117, ll. 2-11.

The Order of Dismissal also referenced Matthews apology at the sentencing hearing. App. 669-70. Matthews said: "I'm just sorry for everything that happened. I've learned my lesson from the mistakes I made. I feel like since I got out of the hospital that I have to change my life, and I will. When I do get back home, I won't make the same mistakes again." App. 341, l. 24 –

342, l. 3. However, Matthews clarified during the PCR hearing that his statements were referencing his regret for hanging out with the wrong crowd, not an admission of guilt. App. 474, l. 7 – 475, l. 17. Thus, based on the foregoing, there was not overwhelming evidence of guilt.

Beyond the lack of merit to the overwhelming evidence finding, the PCR court erred as a matter of law in making such a finding as to all of the Petitioner's allegations. This Court has said that in deciding the prejudice prong in some PCR actions, the factors to be examined "are the same ones analyzed in deciding on direct appeal whether a similar error is harmless beyond a reasonable doubt." Edmond v. State, 341 S.C. 340, 348, 534 S.E.2d 682, 686 (2000); Vaughn v. State, 362 S.C. 163, 171 n. 3, 607 S.E.2d 72, 76 n. 3 (2004). However, the Edmond Court explained that in a direct appeal, it is "trial error[s]" that are subject to harmless error analysis. 341 S.C. at 346, 534 S.E.2d at 685. As the United States Supreme Court articulated in Arizona v. Fulminante, a "trial error" occurs "during the presentation of case to the jury and is amenable to harmless-error analysis, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." 499 U.S. 279, 307-08, 111 S.Ct. 1246, 1264 (1991). On the contrary, "structural defects in the constitution of the trial mechanism . . . defy harmless error analysis." Id. at 309, 111 S.Ct. at 1265. Recently, a majority of this Court noted in State v. Chavis that "there are some errors, particularly errors of law, which **cannot** be rendered harmless by overwhelming evidence." 412 S.C. 101 n.7, 771 S.E.2d 336 n. 7 (2015) (emphasis added).

Here, Matthews continues to pursue allegations that trial counsel was deficient in the failing to object to the change in the presiding judge, affecting the fairness of his trial; was deficient in his advice regarding the State's plea offer, rendering his decision to go trial

unintelligent; and that appellate counsel was deficient in failing to move to reconstruct the missing portions of the trial transcript such that he was unable to obtain meaningful appellate review on direct appeal and PCR. See discussion *supra*, Issues I, II, and III. None of those claims could be affected by the purported overwhelming evidence of guilt.

Therefore, the PCR court erred both in its finding of overwhelming evidence of guilt and in its application of that finding to all of Matthews' PCR allegations.

V. The PCR court erred in denying Petitioner's Motion to Alter or Amend where the court failed to set forth specific findings of fact and conclusions of law relating to the allegation that trial counsel was ineffective in failing to object to the Court's response to the jury's questions and recharge of the jury.

Relevant Facts

At the beginning of the evidentiary hearing, PCR counsel made an oral motion to amend the application to add an allegation that trial counsel was ineffective in failing to object to the Court's response to the jury's questions and recharge. The Attorney General's Office did not oppose the amendment, noting that PCR counsel had emailed the assistant attorney general regarding the amendment a couple of weeks prior to the hearing. The PCR judge accepted the amendment. App. 378, l. 21 – 379, l. 16.

During its deliberations in Matthew's trial, the jury sent two notes out with questions, neither of which were read into the record. They were instead made court's exhibits. App. 332, l. 21. The Clerk's office was unable to locate the exhibits from Matthew's trial when requested for the PCR hearing and they were not in the appellate defenders' file. App. 380, ll. 5-21; App. 535, l. 15 – 537, l. 8. However, Judge Brown read all or a portion of the second question later on, saying "Beginning with question two, which was if the hand of one law would apply to all charges or just to assault with intent to kill." App. 334, ll. 7-9.

Additionally, portions of the transcript during the discussion of the jury questions were unable to be transcribed. App. 332, l. 23 – 333, l. 1; App. 334, l. 6. Nonetheless, the PCR court had the portions of the trial transcript regarding the jury questions and recharge that were transcribed. App. 332, l. 23 – 338, l. 4; App. 549, ll. 6-21; see Smith v. State, 386 S.C. 562, 568-69, 689 S.E.2d 629, 633 (2010) (finding applicant was prejudiced by trial counsel's deficient performance after "carefully reviewing the entire transcript of the underlying trial"); see also Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) ("In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing.").

Following a portion of the proceedings that was not audible, trial counsel said:

> [T]he first question is regarding a group and it raises an issue of fact. While I would not oppose -- of course, they've got the charge so if you give them a recharge I don't know it would be any different. They have the charge in there with them.
>
> So I would be, you know, in favor of -- the Defense's position would be that they need to take another look at the charge, as opposed to the Court addressing specifically the question raised, because the question raised the question itself suggests something.
>
> That concerns me, and it would seem to me that if you address the question directly, it is to some degree inferring that there was a conspiracy or that there was a group and he was in the group.

App. 333, ll. 1-16. The solicitor had no objection to the Court's proposed instruction "regarding the weapons charge." App. 333, ll. 19-24. Regarding the second charge, the solicitor proposed that the Court recharge "hand of one, hand of all." App. 333, l. 25 – 334, l. 2.

Judge Brown responded that he thought the law he gave was sufficient but was not opposed to re-reading the "hand of one, hand of all charge." App. 334, ll. 3-5. The transcript then reflects that a portion of the tape was not audible. App. 334, l. 6. Judge Brown then said that, with respect to the second question: "[T]he hand of one charge which was defined for the jury applies to assault with intent to kill, attempted armed robbery and possession of a weapon during the

commission of a violent crime. However, I do not think that you can convict this young man of criminal conspiracy under that theory." App. 334, ll. 7-15. Trial counsel said: "I would agree, Your Honor." App. 334, l. 16. The jury then was brought back into the courtroom. App. 334, ll. 17-24. Judge Brown gave a charge on constructive possession of a firearm and re-read the charge on "hand of one, hand of all." App. 334, l. 25 – 337, l. 23.

At the evidentiary hearing, PCR counsel elicited testimony from Matthews that the jury came back with two questions and that trial counsel failed to object to the jury being recharged. App. 440, l. 3 – 441, l. 12. Trial counsel had no specific recollection of the jury questions and recharge. App. 500, l. 6 – 502, l. 25. It is unclear from the transcript whether trial counsel objected or ultimately acquiesced to the recharge of hand of one, hand of all. See App. 334, l. 16. If he objected and presented further argument during the untranscribed portions of the trial, then arguably the issue could have been raised on direct appeal. However, if he ultimately acquiesced, then the proper forum for review would be PCR, as the recharge was arguably not responsive to the jury question and placed an undue emphasis on the State's theory of the case.

The Order of Dismissal references the oral amendment made at the PCR hearing "to allege an additional allegation of ineffective assistance of counsel for failing to object to the recharge of the jury." App. 657. Nonetheless, there is no enumerated section in the Order of Dismissal where the PCR court makes any specific findings and conclusions regarding that allegation. See App. 668 – 687. There is a general paragraph related to the abandonment of allegations about which "the Applicant failed to present any testimony, argument, or evidence." App. 687. However, as discussed *supra*, PCR counsel did elicit testimony regarding trial counsel's ineffectiveness related to the jury questions and recharge.

PCR counsel filed a timely motion pursuant to Rule 59(e), SCACR, in which she argued that the Order failed to address the verbal amendment made at the evidentiary hearing, citing this

Court's opinion in Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007). App. 690-91. Specifically, PCR counsel requested that court address the allegation of "ineffective assistance of counsel for failure to object to the Court's response to the jury's questions and recharge." App. 691. Counsel requested that the court obtain the transcript of the evidentiary hearing so that the court could consider the testimony offered at the evidentiary hearing in order to make its findings related to the omitted allegation. App. 691.

The State filed a Return in which it generally alleged that "this Court's Order of Dismissal contains the required findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976) and Rule 52(a) SCRCP" and "ruled on all issues presented at the post-conviction relief hearing." App. 696.

On November 30, 2015, Judge John filed an Order denying the post-trial motion, finding that the Order of Dismissal complied with S.C. CODE ANN. § 17-27-80 (1976) and Rule 52(a) SCRCP. App. 699.

Discussion

The Uniform Post-Conviction Procedure Act provides that the PCR court "**shall** make specific findings of fact, and state expressly its conclusions of law, relating to **each issue** presented." S.C. CODE ANN. § 17-27-80 (emphasis added). In McCrary v. State, this Court wrote that "S.C. Code Ann. § 17-27-80 (1976), **requires** the PCR court to 'make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.'" 305 S.C. 329, 330, 408 S.E.2d 241 (1991) (emphasis added). Without such findings, the Order is "insufficient for appellate review" and "fail[s] to meet the standard set forth in the statute." Id. The McCrary Court remanded the case for a new PCR hearing. Id.

Just over a year later, in Pruitt v. State, this Court again remanded a case to the circuit court because the PCR judge failed to address in his Order the allegations raised in the PCR application and about which evidence was presented at the PCR hearing. 310 S.C. 254, 255, 423 S.E.2d 127, 127-28 (1992). Noting that such a remand was an extraordinary remedy, this Court said that it was "not abandoning the general rule that issues must be raised to, and ruled on by, the post-conviction judge to be preserved for appellate review" but found remand necessary because its opinion in McCrary was not being followed. Id. 255 n. 2, 423 S.E.2d at 128 n. 2. In Marlar v. State, this Court reiterated that "(1) specific findings of fact and conclusions of law were required [under the PCR statute]; and (2) a Rule 59(e) [SCRCP] motion must be filed if issues are not adequately addressed in order to preserve the issues for appellate review." 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007).

The Order of Dismissal in Marlar also included a generic paragraph related to "any allegations . . . not specifically addressed," similar to the one included in the Order of Dismissal issued by the PCR court in the instant case. Id. at 409, 653 S.E.2d at 266; App. 687. The Court held that such a paragraph "does not constitute a sufficient ruling on any issues since it does not set forth specific findings of fact and conclusions of law." Id. Rather, such language should only be included in a PCR order where there are allegations contained in the application or mentioned at the PCR hearing about which absolutely no evidence is presented. Id. at 409, 653 S.E.2d at 266-67. As discussed *supra*, Matthews presented evidence about the allegation related to the jury questions and recharge such that the "all other allegations" paragraph was not sufficient to rule upon the allegation. See App. 332, l. 23 – 338, l. 4; App. 440, l. 3 – 441, l. 12; App. 500, l. 6 – 502, l. 25; App. 549, ll. 6-21.

Here, PCR counsel heeded this Court's admonitions that she file a motion pursuant to Rule 59(e) and request that the Court make a specific finding on the allegation not addressed in the Order of Dismissal. See App. 690. The purpose of this procedure is obviously to call the PCR court's attention to the failure to rule prior to the appeal from the Order of Dismissal and provide an opportunity for an amended or supplemental order to be filed. See Pruitt, 310 S.C. at 255-56, 423 S.E.2d at 128. Yet, the State opposed the motion and the Court denied it. Notably, neither the Return nor the Order denying the post-trial motion pointed to where the allegation was ruled upon in the Order of Dismissal. See App. 695, App. 699. Without an articulated ruling on the allegation related to the jury's recharge in the Order, Matthews cannot argue whether and how the judge's findings were in error. See McCrary, 305 S.C. at 330, 408 S.E.2d at 241; Marlar, 375 S.C. 408, 653 S.E.2d at 266.

Therefore, the PCR court erred in failing to set forth the requisite specific findings regarding the orally amended allegation and in denying Matthew's Rule 59(e) motion.

CONCLUSION

Based on the foregoing, Petitioner Antwine Matthews respectfully requests that this Court grant certiorari and order further briefing on the issues raised herein. Matthews would then request that this Court reverse his conviction and grant him a new trial (Issues I-IV) and/or remand his case to the circuit court to make specific findings of fact as to all allegations raised at the evidentiary hearing (Issue V).

Respectfully submitted,

Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

This 12th day of August, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Williamsburg County
Honorable Steven H. John, Circuit Court Judge

ANTWINE MATTHEWS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case have been served on Julie Coleman, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Antwine Matthews, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 12th day of August, 2016.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day of August, 2016.

(L.S.)
Notary Public for South Carolina
My Commission Expires: April 27, 2026.