

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Richland County

Honorable Perry H. Gravely, Circuit Court Judge

MARIE ASSA'AD-FALTAS,

RESPONDENT

V.

STATE OF SOUTH CAROLINA (2),

PETITIONER

APPELLATE CASE NO 2019-000708

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTION PRESENTED

I.

Did the PCR court err by granting summary judgment in concluding the CMC conviction for contempt of court on May 18, 2011, was invalid and the CMC had no authority to issue any conditions relating to psychiatric treatment because trial court error is not a valid claim for PCR?

II.

Did the PCR court erroneously find there was no evidence in the record showing that Faltas accepted the conditions of the bond despite the circuit court's order finding Faltas agreed to the conditions of the bond was in the record?

III.

Did the PCR court err in granting summary judgment by relying on a prior PCR hearing record where a previous PCR court vacated its order granting relief issued after that hearing because the previous PCR court did not allow the State to cross-examine the one witness presented or allow the State to present any defense to the allegations and incorrectly applied the prejudice analysis?

RESPONDENT'S COUNTER-QUESTION PRESENTED

Whether the PCR Court properly considered a valid PCR claim and granted summary judgment to Respondent by concluding (1) that the CMC did not have subject matter jurisdiction and therefore exceeded its statutory authority when it issued non-monetary conditions of bond and found Respondent had violated those conditions; (2) that Respondent did not agree to the conditions of bond improperly imposed upon her by the CMC; (3) that evidence existed in the record to support a finding of ineffective assistance of counsel; and (4) that Respondent was prejudiced by counsel's ineffective assistance?

STATEMENT OF THE CASE

In an order dated October 13, 2010, Columbia Municipal Court (CMC) Judge Marion O. Hanna restricted Respondent's access to the CMC, court personnel, and the City of Columbia attorney's office. App. 13-14. On March 28, 2011, at the request of then city attorney David Fernandez, a rule to show cause hearing was convened to determine if Respondent had violated the terms of the October order. App. 1-2. CMC Judge Hanna found that Respondent had violated the October order by contacting the city attorney's office via email and telephone on two separate occasions. Judge Hanna further found that Respondent's conduct during the hearing warranted a finding of contempt of court. Respondent was sentenced to ten days incarceration for contempt of court and fifteen days incarceration on contempt of the October order. App. 25-27.

Respondent filed a notice of appeal on March 30, 2011, challenging the two contempt convictions. App. 33-38. Respondent simultaneously filed for a stay of the contempt sentences while the appeal was pending. Id. A hearing was held on April 6, 2011, before CMC Judge Hanna to set a "bond pending [Respondent's] appeal." App. 43-57. Respondent was transferred from the detention center to the CMC for the bond hearing but purportedly waived her presence once she had arrived at the courthouse. App. 43; App. 74. Respondent was represented by Orin Briggs during the hearing. Id.

Prior to the start of the hearing Briggs and city attorney Fernandez met with Judge Hanna in chambers to discuss the bond matter. App. 51-52. The result of the meeting in chambers was a proposed order reflecting the conditions of bond required by CMC Judge Hanna. App. 43, ll. 12-14. At the hearing Briggs did not object to the conditions of bond but did place on the record that Respondent "cannot and would not agree to those conditions on the bond, that is, she would

not consent to those...her preference would be the court just not issue a bond based upon her unwillingness to cooperate.” App. 51, ll. 8-13. CMC Judge Hanna ruled that Respondent’s agreement was not necessary, that “she was still asking for a bond” and so a bond was set. App. 54, ll. 1-3.

An order setting a monetary bond of \$1,000 was issued on April 11, 2011. The order found Respondent to be a flight risk “due to her status as a resident immigrant” with “no familial ties to this area.” App. 74. CMC Judge Hanna imposed three additional conditions of bond: 1) that Respondent attend weekly sessions with a psychiatrist for a period of one year, or until the conclusion of the pending appeal, whichever came first; 2) that Respondent must abide by the October 6, 2010, order of the CMC which placed restrictions on Respondent’s access to the City of Columbia buildings and personnel; and 3) that Respondent immediately surrender possession of her passport to the CMC pending the conclusion of her appeal. App. 75.

CMC Judge Hanna also altered the original contempt sentences to be served without work or good time credit so that Respondent was required to serve a twenty-five-day sentence “day for day.” App. 75. By the time Respondent was released on bond she had served a total of sixteen days in the detention center. App. 198-199. Records obtained from the detention center appear to show that Respondent’s original release date¹ was scheduled to be on April 15, 2011, but that was changed to April 23, 2011, after Judge Hanna issued an amended commitment order on April 6, 2011, after the bond hearing. App. 62-68.

¹ Respondent was taken into custody on March 28, 2011 and spent the night in a local hospital. App. 28-29; App. 603, ll. 15-20. The jail records do not correctly reflect that she was officially in custody of the detention center as of March 28, 2011 and show her in custody date as starting on March 29, 2011, when she was transferred from the hospital to the detention center. App. 64-69. Calculating Respondent’s earned credit from the initial custody date of March 28, 2011, including her trustee status, would have made her original release date April 10, 2011. App. 603-604.

A second rule to show cause hearing was held before CMC Judge Hanna on May 18, 2011, wherein it was alleged that Respondent had violated the terms of her bond by failing to attend weekly psychiatric sessions and by failing to surrender her passport.² App. 105-106; App. 111. Respondent was again represented by Orin Briggs. During the hearing Briggs conceded that Respondent had failed to comply with the bond order despite her attempts to find a treating psychiatrist. App. 143, ll. 2-3.

CMC Judge Hanna found that Respondent had violated the conditions of her bond and again held her in contempt. Respondent was fined \$500 for failing to turn over her passport and sentenced to an additional thirty days for failure to see a psychiatrist on a weekly basis. CMC Judge Hanna allowed Respondent ten days to comply with the psychiatric condition of bond and if she successfully complied the thirty-day sentence would be purged. App. 146-148. The formal order finding Respondent in contempt was issued on June 15, 2011. App. 170-172. Respondent filed a notice of appeal of the two additional contempt sentences on May 31, 2011. App. 154-165.

The Honorable Alison R. Lee heard Respondent's appeal on May 9, 2012. App. 191. Judge Lee issued an order denying Respondent's appeal on September 17, 2012. App. 222-225. On September 27, 2012, Respondent filed a Rule 59(e), SCRCF, motion which was denied on October 19, 2012. App. 226-233. On July 9, 2013, Respondent filed a motion to appoint counsel to pursue a belated appeal or a timely PCR action. App. 239. On November 8, 2017, the Honorable Clifton Newman granted Respondent's motion to appoint counsel. Pursuant to that order Johnathan Waller was appointed to represent Respondent. App. 241-246.

² It appears from the record that this hearing was convened, sua sponte, by Judge Hanna as it was not requested by city attorney David Fernandez. App. 214.

Respondent filed the current PCR application on November 8, 2017. App. 247-251. Respondent also filed a motion to relieve Counsel Waller as her counsel on December 14, 2017. App. 252-267. The state submitted a return and motion to dismiss on January 18, 2018. App. 268-277. An amended PCR application was filed by Counsel Waller on January 23, 2018. App. 278-279. Respondent's motion to relieve Counsel Waller was granted and Respondent was permitted to proceed pro se during the PCR hearing with Chris Truluck as standby counsel. App. 281-282. A supplemental amended PCR application was filed by Counsel Truluck on March 5, 2018. App. 285-287.

An evidentiary hearing was held before the Honorable Brooks P. Goldsmith on March 22-23, 2018. App. 288. Respondent appeared pro se with Chris Truluck as standby counsel. The state was represented by Jessica Kinard and Johnny James. Notably, when the state was summarizing the procedural history of the case it conceded that Counsel Briggs did inform the CMC that Respondent opposed the conditions of bond. App. 291, l. 2-4.

Counsel Briggs testified during the hearing that he had not requested a bond, that the city attorney had, that he had opposed the bond conditions, and that he had not consented to a finding of contempt. App. 332-333; App. 342-343. The testimony of Counsel Briggs eventually devolved into Respondent and the attorney general arguing to the court their respective positions. The court eventually granted Respondent's PCR application "on all the grounds argued and stated by the Applicant." App. 437, ll. 7-13.

The order granting post-conviction relief was filed on April 10, 2018. App. 440-447. The state filed a motion to reconsider on April 20, 2018. App. 448-456. Respondent filed a motion opposing the state's motion to reconsider on April 30, 2018. App.457-472. Judge

Goldsmith issued an order on May 12, 2018, vacating the grant of PCR based on the allegation that the state “was denied its right to present evidence.” App. 481.

Respondent filed a motion to reconsider Judge Goldsmith’s order which was denied on June 13, 2018. App. 485-491; App. 534-537. While Respondent’s motion to reconsider was pending, she filed a motion for summary judgment on May 22, 2018. App. 492-508. The state then moved for summary judgment on July 31, 2018. App. 538-562. A hearing on the cross-motions for summary judgment was held on August 10, 2018, before the Honorable Perry H. Gravely. App. 589-637. Respondent again appeared pro se with Chris Truluck as standby counsel. The state was represented by Johnny James.

Judge Gravely issued a detailed order granting Respondent summary judgment and PCR relief on November 27, 2018. App. 639-648. In the order Judge Gravely found that the CMC exceeded its statutory authority in issuing an appeal bond with conditions other than a monetary fine as required by S.C. Code Ann. § 14-25-95. App. 643-644. Judge Gravely further found that the CMC had no authority to issue any bond conditions mandating psychiatric treatment. App. 644-646. Finally, Judge Gravely found that based on the record Counsel Briggs was ineffective in “tacitly” accepting the terms of the bond or, at a minimum, failing to adequately object to the bond terms. Based on the actions of Counsel Briggs at the bond hearing, the court found that no issue of material fact existed to warrant a further evidentiary hearing. App. 646-647.

The state filed a motion to reconsider Judge Gravely’s order granting Respondent summary judgment and PCR relief on December 7, 2018. Respondent filed a memorandum in opposition to the state’s motion to reconsider on December 10, 2018. App. 657-682. On April 1, 2019, Judge Gravely issued an order denying the state’s motion to reconsider. App. 683-685. Judge Gravely ruled that whether or not the CMC had the authority to issue the conditions of

bond was properly raised in PCR as it dealt with “a cornerstone of our judicial system...i.e. subject matter jurisdiction.” App. 683. He ruled that by finding that the CMC lacked subject matter jurisdiction to issue the conditions of bond, that the remaining arguments by the state were moot, and that he was not required to address the arguments as findings of fact and conclusions of law were not required in a denial of a motion for summary judgment order.

ARGUMENT

The PCR Court properly considered a valid PCR claim and granted summary judgment to Respondent by concluding (1) that the CMC did not have subject matter jurisdiction and therefore exceeded its statutory authority when it issued non-monetary conditions of bond and found Respondent had violated those conditions; (2) that Respondent did not agree to the conditions of bond improperly imposed upon her by the CMC; (3) that evidence existed in the record to support a finding of ineffective assistance of counsel; and (4) that Respondent was prejudiced by counsel's ineffective assistance.

Subject Matter Jurisdiction

The state first argues that Respondent has not asserted a cognizable claim under the PCR Act because challenging the CMC's authority to set non-monetary conditions of bond is a trial court error that should have been raised on direct appeal. In so arguing, the state ignores that the challenge was to the CMC's authority to not only set the conditions of bond but to then find Respondent in violation of those conditions and convict her of contempt. Respondent's challenge was to the subject matter jurisdiction of the CMC to issue the sentence of contempt and to issue the conditions of bond which led to the sentence of contempt. Both of these challenges are cognizable claims under the PCR Act.

A person who has been convicted of, or sentence for, a crime in South Carolina may file an application for post-conviction relief claiming that the court was without jurisdiction to impose the sentence. S.C. Code. Ann. § 17-27-10(a)(2). Further, issues relating to subject matter jurisdiction may be raised at any time. Edwards v. State, 372 S.C. 493, 496, 642 S.E.2d 738, 739 (2007). Notably, lack of subject matter jurisdiction cannot be waived as “[t]he jurisdiction of a court or of a particular judge over the subject matter of a proceeding depends

upon the authority granted by the Constitution and laws of the state and is fundamental.”
Harden v. S.C. State Highway Dep't, 266 S.C. 119, 124, 221 S.E.2d 851, 853 (1976) (citations omitted) (emphasis added).

Under S.C. Code Ann. § 14-25-95, a party appealing a ruling from a municipal court “shall enter into a *bond, payable to the municipality*, to appear and defend the appeal at the next term of the Court of Common Pleas *or shall pay the fine assessed.*” (Emphasis added). There is nothing in the Constitution or laws of South Carolina that grants a municipal court judge the authority to impose non-monetary conditions of bond. By stark contrast, S.C. Code Ann. § 17-15-10, explicitly provides a circuit court judge with the power to add non-monetary conditions of bond, including placing “restrictions on the travel, association, or place of abode of the person during the period of release” or “any other conditions deemed reasonably necessary to assure appearance as required.”

The plain meaning of S.C. Code Ann. § 14-25-95 is that a municipal court may *only* impose a monetary condition of bond. When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning. Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (citations omitted). By adding non-monetary conditions to the bond Judge Hanna far exceeded the statutory authority that the legislature had provided to the municipal courts.

Importantly, the purpose of any bond is to ensure the defendant's appearance at court upon their release from custody. See State v. Policao, 402 S.C. 547, 558, 741 S.E.2d 774, 780 (Ct. App. 2013) (The overriding purpose of requiring a criminal defendant to post bond before

his release from custody is to assure his appearance at trial); See Also State v. Workman, 274 S.C. 341, 343, 263 S.E.2d 865, 866 (1980). As this Court stated in Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 344, 713 S.E.2d 278, 284 (2011), the bond provisions of S.C. Code Ann. § 14-25-95 “serve the purpose of insuring that an appellant will *appear for the hearing before the circuit court*. If an appellant fails to comply with these provisions, the municipality may issue a bench warrant to address any delinquency on the part of the appellant.” (Emphasis added).

The non-monetary conditions placed upon Respondent, particularly the requirement for psychiatric treatment, in no way ensured Respondent’s future presence at court.³ Further, when Respondent allegedly violated the terms of the bond, the CMC should have issued a bench warrant to address the non-compliance, not held a hearing, sua sponte, and found Respondent in contempt. See Town of Mt. Pleasant, supra.

Additionally, as the PCR court stated, there is no legal authority for a municipal judge to require a person to submit to extensive psychiatric treatment. App. 645-646. The formal process for Judicial Commitment is outlined in S.C. Code Ann. § 14-17-510, et. seq. and the power to order in-patient or out-patient treatment is vested *solely* with the Probate Court. Pursuant to S.C. Code Ann. § 14-17-510, et. seq., a court may order in-patient or out-patient treatment only after a finding by clear and convincing evidence that an individual requires such treatment. That evidence *must* include “a certificate of a designated examiner stating that he has examined the person and is of the opinion that he is mentally ill.” S.C. Code Ann. § 14-17-510. If a person ordered to attend out-patient treatment does not comply, the statutory scheme provides that “the treatment facility shall report the failure to the court and the court upon notice to the respondent

³ As the lower court noted in its order granting Respondent summary judgment, Respondent’s long history with the courts of South Carolina, which CMC Judge Hanna was intimately familiar with, indicate very little risk that Respondent would not have shown up for any hearing that she was a party to. App. 644.

and his counsel shall order a supplemental hearing and may further order in-patient treatment in a designated facility as needed.” S.C. Code Ann § 14-17-580(B).

Respondent was not afforded the process to determine if there was any need for treatment as set out in S.C. Code Ann. § 14-17-510, et. seq. Instead, a municipal judge greatly surpassed her statutory authority and designed a treatment program to “help her [Respondent] with her problems of not being able to act in her own best interests.” App. 46, ll. 10-15. The CMC even went so far as to explicitly reject the notion that Respondent should be evaluated prior to any treatment being ordered because if the court asked for an evaluation “we’ll get a perfunctory thing that you always get these days. She’s oriented to time and place and this and that and its not going to help her.” App. 47, ll. 2-17.

CMC Judge Hanna repeatedly exceeded the statutorily granted subject matter jurisdiction of the municipal court. Judge Hanna lacked the authority to set the non-monetary conditions of bond. It followed that every action the CMC took after it exceeded its limited authority with the bond conditions was outside the bounds of its subject matter jurisdiction. Setting the conditions of bond and finding Respondent in contempt for the alleged violations of the bond conditions went beyond the jurisdiction of the CMC as there is no authority granted by the Constitution or laws of this state that allow such actions to be taken by a municipal court. Accordingly, Petitioner’s writ of certiorari should be denied.

Respondent Never Agreed to the Terms of the Bond

The state next argues that Respondent agreed to the terms of the bond and cites specifically to Judge Lee’s order denying Respondent’s appeal wherein Judge Lee found that “it appears from the transcript of the hearing that the parties agreed to all of the conditions at the time the court issued the appeal bond.” App. 225. The state now argues that this constitutes

evidence in the record that Respondent accepted the conditions of the bond. However, there are multiple instances in the record where it was made clear that Respondent did not accept the terms of the bond.

At the April 6, 2011, hearing where CMC Judge Hanna set the conditions of bond Counsel Briggs stated, unequivocally, that Respondent did not accept the conditions of the bond. Counsel Briggs informed the CMC that Respondent “cannot and would not” agree to the conditions of the bond and that Respondent’s preference would be that the court not issue a bond given the terms it sought to impose upon her. App. 51, ll. 8-15. Importantly, CMC Judge Hanna acknowledged that Respondent did not consent to the terms of the bond. Judge Hanna clarified, “it was somehow my understanding that the defendant had agreed to them [the terms of bond] *but she has not. However, her agreement is not necessary.* She still is asking for a bond and so we will set the bond.” App. 53, l. 25-App. 54, l. 3. (Emphasis added). The record shows from the outset that Respondent did not agree to the terms of the bond.

Remarkably, the state, in various earlier filings and hearings, repeatedly conceded that Respondent did not agree to the bond conditions. The state’s return to Respondent’s PCR application, dated January 18, 2018, stated that “the terms of the bond were discussed and Orin Briggs, Esquire, argued that the bond should not have conditions, as *Applicant opposed them.*” App. 268. (Emphasis added). When the state called the PCR case before Judge Goldsmith, it again stated that Counsel Briggs “argued the bond should not have conditions as *Dr. Faltas opposed them.*” App. 291, ll. 2-4. (Emphasis added).

In the state’s motion to reconsider, filed after the PCR hearing where Judge Goldsmith granted Respondent relief, the state argued, rather vehemently, that Counsel Briggs did not agree to the terms of the bond, despite the ruling of Judge Lee. The state contended that Counsel

Briggs only worked with the city attorney to produce an order that encompassed the desires expressed by Judge Hanna. It acknowledged that Counsel Briggs “clearly and unequivocally” informed the CMC that *Respondent refused the terms of the bond*. App. 451. For the state to now claim that the record supports the contention that Respondent accepted the terms of the bond conditions, when it relied on the exact opposite argument to advance its earlier position, is untenable.

As the lower court found, there was no evidence in the record that Respondent expressly or impliedly accepted the terms of the bond. In justifying its ruling the lower court pointed to S.C. Code Ann. § 17-15-40, which required that a “person released shall acknowledge his understanding of the terms and conditions of his release and the penalties and forfeitures applicable in the event of violation thereof on a form to be prescribed by the Attorney General.” The lower court reasoned that for terms and conditions of bond to be applicable, there must be a clear showing that the defendant acknowledged their understanding and acceptance of the terms. Without such acknowledgment, the terms and conditions would violate the statute governing bond conditions and would be null and void. The lower court found no such acknowledgment⁴ in this case.

It must again be noted that the question of whether Respondent accepted the terms and conditions of the bond was rendered moot when the lower court found that the CMC lacked subject matter jurisdiction. The order imposing the terms and conditions of the bond, because it was issued outside of the authority of the CMC, was void from the beginning. Thus, Respondent’s alleged acceptance or opposition would not matter because an order issued without

⁴ In the order granting Respondent summary judgment, the court references a receipt showing Respondent paid the bond. However, the receipt was for the \$500 fine that was assessed against Respondent for alleged failure to surrender her passport. The record shows that Counsel Briggs, not Respondent, posted the \$1,000 bond. App. 605, ll. 15-16; App. 616, ll. 6-14.

subject matter jurisdiction is, from its beginning, null and void and lacks any legal consequence. See Gainey v. Gainey, 382 S.C. 414, 675 S.E.2d 792 (Ct. App. 2009) (A judgment of a court without subject matter jurisdiction is void); Katzburg v. Katzburg, 410 S.C. 184, 187, 764 S.E.2d 3, 5 (Ct. App. 2014) (A void judgment is one that, from its inception, is a complete nullity and is without legal effect). Accordingly, Petitioner's writ of certiorari should be denied.

The Lower Court Properly Found Ineffective Assistance of Counsel

The state argues that the lower court based its summary judgment ruling on the PCR hearing before Judge Goldsmith where the state was denied its right to present evidence. In the states' motion to reconsider Judge Goldsmith's grant of PCR it argued that it had a due process right to be heard and present evidence. While the state may have a statutory right to be heard, it does not have a due process right. "The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court." South Carolina v. Katzenbach, 383 U.S. 301, 323-24 (1966).

Further, the state only has a statutory right to present evidence at a PCR hearing *if there is a "genuine issue of material fact."* S.C. Code Ann. § 17-27-70(c). If the court finds there is not a genuine issue of material fact the court may, based on the filings and the record before it, grant either party a motion for summary judgment. Id. Notably, by filing a cross-motion for summary judgment, the state agreed that there was no genuine issue of material fact and that the case should be decided on the entire record before the court as a matter of law. See D.R. Horton, Inc., v. Builders FirstSource-Southeast Group, LLC 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018); Rule 56(c), SCRPC.

Here, the lower court found that no issue of material fact existed that required the further presentation of evidence. Based on its reading of the entire record and the arguments that were presented at the hearing on the summary judgment motions, the court found that Respondent was entitled to summary judgment. That grant of summary judgment properly included a finding of ineffective assistance of counsel. As stated in the order granting Respondent summary judgment

“Upon review of the record, there appears to be some confusion on how the conditions on the bond came about – whether there was some initial consent by Applicant’s attorney or not, *but clearly, Applicant’s counsel did not assert proper objections to the conditions except to state that Applicant did not consent to the conditions.* The Court finds that *counsel’s acceptance or failure to adequately object to the improper terms of the Appeal Bond is clearly ineffective and not within prevailing professional norms.*”

App. 647. (Emphasis added).

Importantly, the lower court based its ruling on a review of the entire record and the arguments of the parties at the hearing on the cross-motions for summary judgment, not only on the PCR hearing before Judge Goldsmith. While Counsel Briggs testified at the PCR hearing that he had not requested a bond, that he had opposed the conditions of bond and that he had not conceded to a finding of contempt, the record of the bond hearing, the contempt hearing, and letters sent by Counsel Briggs to the court requesting to set a bond, directly contradicted his testimony. App. 39-56; App. 111-151. Based on Counsel Briggs failures at the bond hearing and the subsequent contempt hearing, the court correctly found ineffective assistance of counsel.

At the April 6, 2011, hearing Counsel Briggs represented Respondent. A fair reading of the record from that hearing shows that Counsel Briggs only placed *Respondent’s* disagreement with the terms of the bond on the record. At no point did Counsel Briggs object to the terms of the bond nor did he object to the CMC exceeding its statutory authority in issuing non-monetary

conditions of bond. Counsel Briggs instead worked with the city attorney to fashion an order containing the conditions of bond that CMC Judge Hanna demanded be imposed upon Respondent. Most notably, Counsel Briggs expressed that Respondent would prefer that the CMC not issue a bond because of her disagreement with the conditions but he *failed to withdrawal the actual request for bond*. This is reflected in the transcript when CMC Judge Hanna stated that because Respondent was asking for a bond, despite her disagreement with the terms, a bond would be set.

Counsel Briggs had direction from Respondent that she would not consent to the conditions of bond, and therefore, she did not want a bond. App. 386, ll. 20-23. Knowing Respondent's position, the duty fell to Counsel Briggs to, at a minimum, object to the setting of conditions outside the scope of the CMC's authority. His failure to object was ineffective assistance of counsel.

Counsel Briggs was also ineffective at the hearing on May 18, 2011, that resulted in Respondent being convicted of two additional counts of contempt of court. While Counsel Briggs finally argued that the municipal bond statute was silent about the CMC's ability to set additional conditions of bond, he did not argue that the CMC was in fact without subject matter jurisdiction to impose the conditions of bond and thus that the bond order was void. Further, instead of arguing that Respondent had attempted a good faith effort to comply with the improperly imposed conditions, Counsel Briggs stated that Respondent "didn't try hard enough" and "didn't comply" with the bond conditions, essentially telling the CMC that Respondent should be found guilty of contempt. App. 142-143.

Additionally, Counsel Briggs was ineffective when he failed to argue that it was impossible for Respondent to comply with the psychiatric treatment condition of the bond and

thus, she was excused from performance under the law. At its core, a bond is contractual in nature. See State v. Simring, 230 S.C. 49, 94 S.E.2d 9 (1956). A party to a contract can be excused from performance on the theory of impossibility if performance of the thing to be done is rendered impossible by an act of God, the law, or by a third party. See V.E. Amick & Assocs., LLC v. Palmetto Env'tl. Grp., Inc., 394 S.C. 538, 716 S.E.2d 295 (Ct. App. 2011).

Respondent attempted compliance with the improper psychiatric condition of bond imposed upon her by seeking treatment at Columbia Area Mental Health. App. 126; App. 182. After a thorough screening process, the medical professionals at that facility determined that Respondent did not meet the qualifications for treatment there as they only provided treatment for “people who have a chronic and severe mental illness.” App. 182. After being found in contempt of the bond order, Respondent further attempted compliance but was turned away from various facilities because they too felt that she did not need psychiatric treatment. App. 183-189. The record reflects that Respondent was not able to find a psychiatrist to conduct the weekly sessions despite her attempts. Here, a third party – the court mandated psychiatrist – prevented Respondent from complying with the condition of bond. The failure of Counsel Briggs to argue this basic and fundamental cornerstone of contract law was also ineffective assistance of counsel.

Counsel Briggs was further ineffective in failing to object when CMC Judge Hanna again exceeded her authority by improperly and retroactively revoking Respondent’s good time and work credits with regard to Respondent’s sentence for the original contempt violation. Judge Hanna sent a new order of commitment to the detention center on April 6, 2011, which had the effect of removing good time and work credits. App. 66. However, Judge Hanna lacked the authority to revoke those credits once they had been earned by Respondent.

Pursuant to S.C. Code Ann. § 24-13-210(C) an inmate “is entitled to a deduction from the term of his sentence beginning with the day on which the service of his sentence commences to run, computed at the rate of one day for every two days served.” Furthermore, only the “local official having charge of the inmate” can make a decision to withhold credits and only if the inmate commits an “offense or violates one of the rules of the local detention facility” during their term of imprisonment. S.C. Code Ann. § 24-13-125 (B). There was no authority in the state statutory scheme or Constitution that gave a municipal judge the power to retroactively deny an inmate good time or work credits.

Importantly, if Counsel Briggs had properly objected to the denial of good time and work credits, Respondent *would not have needed a bond because her sentence would have been served in full by the time the bond order was issued.* As noted above, good behavior credits are calculated at the rate of one day deducted from the sentence upon the service of every two days. The detention center records indicated that Respondent’s sentence started on March 29, 2011 and calculated an initial release date of April 15, 2011. App. 64. With Respondent’s trustee status she her release date was changed to April 11, 2011. App. 64; App. 603-604. However, Respondent was entitled to an additional day of service as she was in custody as of March 28, 2011. This would have made her release date, prior to the revocation of the good time and work credits, April 10, 2011. App. 64-69; App. 603-604. Counsel Briggs’ failure to object to the improper revocation of good time and work credits exposed Respondent to not only a longer sentence on the underlying contempt conviction but subjected Respondent to the onerous and improper bond conditions that directly prejudiced her.

The lower court ruled that Respondent’s conviction of the subsequent contempt charges was proof that Respondent was prejudiced. The state argues that Respondent cannot be

prejudiced because it was her actions, not those of counsel, which led to the contempt conviction. However, the state's arguments again fail to take into account that the bond order was void from the beginning. As the Court of Appeals stated in Kosciusko v. Parham, 428 S.C. 481, 491–92, 836 S.E.2d 362, 367–68 (Ct. App. 2019), reh'g denied (Dec. 19, 2019), “[c]ontempt results from the willful disobedience of an order of the court. However, it is well settled that *a party may not be held in contempt for violation of a void order*” (internal citations omitted) (emphasis added). The only reason that Respondent faced the contempt charges was because Counsel Briggs failed to argue against the validity of the order. Without this failure, there would not have been a conviction for contempt. Therefore, Respondent was prejudiced as a direct result of Counsel Briggs' ineffective assistance.

Petitioner's arguments ignore the fundamental issue before this Court – that the CMC lacked the subject matter jurisdiction to enter the conditions of bond and therefore lacked the authority to enforce those illegal conditions. The CMC went beyond its statutory authority when it imposed non-monetary conditions of bond. The municipal bond statute plainly states that the bond during an appeal shall be monetary only. Nowhere in the statutory scheme is the CMC given the power to issue non-monetary conditions of bond. Further, those conditions of bond did nothing to ensure Respondent's appearance at court. The CMC far exceeded its subject matter jurisdiction in issuing the bond order and then finding Respondent in contempt of that void order, resulting in a “downward spiral of constitutional deprivations” that prejudiced Respondent. App. 647.

There is ample evidence in the record that supports the lower courts grant of summary judgment and finding of ineffective assistance of counsel. As noted above, Defense Counsel repeatedly acted against the wishes of Respondent and failed to act in her best interests. His

actions, and often his inactions, fell below the prevailing professional norms. The state's petition for writ of certiorari should be denied given the "any evidence" standard set forth by this Court in Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

CONCLUSION

Based on the foregoing, certiorari should be denied. If this Court grants the state's petition, Respondent respectfully requests the opportunity to fully brief the issues presented.

Respectfully Submitted,

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR RESPONDENT

This 9th day of July, 2020.