THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge

Appellate Case No. 2020-001171

Michael Clayton, Jr. Petitioner,

v.

State of South Carolina, Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the PCR Court err in finding Plea Counsel provided effective assistance of counsel when Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation for trial by not attempting to interview or subpoena material or character witnesses?

II. Did the PCR Court err in finding Petitioner knowingly and voluntarily pled guilty when Plea Counsel failed to adequately prepare for trial based on an unreasonable trial strategy, provided coercive advice to plead guilty on the morning of trial, and failed to fully advise Petitioner of the sentencing consequences?

III. Did the PCR Court violate the separation of powers doctrine by adopting the State's proposed order of dismissal when this independent judicial function cannot be delegated to an executive agency without providing specific rationale for denying each claim and for omitting relevant testimony, findings of fact, and conclusions of law?

STATEMENT OF THE CASE

Indictments

On August 21 and October 16, 2018, the Fairfield County Grand Jury issued indictments against Petitioner for two counts of Criminal Sexual Conduct with a Minor, Second Degree (2018-GS-20-00181 and 00265). The Sixth Circuit Solicitor's Office subsequently presented an amended indictment to the Grand Jury for Indictment No. 2018-GS-20-00181 on June 19, 2018. (App. 329 – 334).

Morning of Trial / Plea Hearing

On August 27, 2018, Petitioner initially proceeded to trial but ultimately appeared before the Honorable John C. Hayes, III, and pled guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). (App. 1 – 19). George Speedy, Esq., represented Petitioner at the plea hearing, and Assistant Solicitor Julie Hall appeared on behalf of the State. The Plea Court imposed concurrent sentences of five (5) years imprisonment, suspended upon five (5) years of probation for each conviction. (App. 17, line 23 – 18, line 3; App. 335 – 336).

Petitioner did not file a Notice of Appeal.

PCR Applications and the State's Return

On March 19, 2019, Petitioner filed his first application requesting Post-Conviction Relief (PCR) (2019-CP-20-0109). (App. 20 – 28). The South Carolina Attorney General's Office filed a Return to the PCR application on July 8, 2019. (App. 29 – 34). Petitioner subsequently filed Amended PCR applications on January 16 and 22, 2020. (App. 35 – 44; App. 45 – 54). Petitioner raised the following allegations without objection from the State:

(1) Petitioner did not voluntarily, knowingly, or intelligently plead guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970);

(2) Plea Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Petitioner's defense;

(3) Plea Counsel failed to adequately prepare for trial by not interviewing witnesses who could have testified regarding Petitioner's good character and reputation when it was reasonable and necessary to present this evidence at trial and request a jury instruction on good character and reputation.

(4) Plea Counsel failed to conduct a reasonable investigation for not interviewing the law enforcement officer who received the report filed in Newberry County by the victim's biological father and for not conducting any further investigation into this complaint when this law enforcement agency did not pursue charges against Petitioner.

(5) Petitioner involuntarily pled guilty based on Plea Counsel's failure to adequately prepare for trial, Counsel's decision to change his unreasonable trial strategy immediately before trial, and Counsel's erroneous and unduly coercive advice to plead guilty the morning of trial.

(6) Petitioner involuntarily pled guilty based on Plea Counsel's failure to advise him regarding all the sentencing consequences of his guilty plea. Specifically, Petitioner pled guilty under *North Carolina v. Alford*, 400 U.S. 25 (1970) to offenses that required him to be on the sex offender registry, which also required that Petitioner comply with specific conditions of supervision and attend specific treatment demanding he accept responsibility for the offenses with polygraph testing (despite that he maintained his innocence at the plea hearing pursuant to the *Alford* plea). Plea Counsel did not review the specific conditions of sex offender registry with Petitioner nor did Counsel tell him about the specific treatment requiring him to accept responsibility.

(7) Plea Counsel failed to interview Lt. Garrett Lominack and Inv. Robert Dennis of the Newberry County Sheriff's Office regarding the complaint filed by the victim's biological father, and their investigation into the complaint.

(8) Plea Counsel failed to interview Investigator Castles of the Fairfield County Sheriff's Office regarding his investigation in this case.

(9) Plea Counsel failed to interview Tova Clayton, Meredith Suber, Cindy Long, and Roger Long, regarding the allegations of the victim's disclosure of Petitioner's sexual abuse.

(10) Plea Counsel abandoned his role as defense counsel by failing to conduct a reasonable investigation and adequately prepare for trial.

PCR Evidentiary Hearing

On January 30, 2020, Petitioner appeared before the Honorable Robert E. Hood at the Lancaster County Courthouse for an evidentiary hearing on this PCR action (Fairfield County PCR action). (App. 55 – 227). The undersigned Counsel represented Petitioner, and Assistant Attorney General Samuel Key appeared on behalf of the State. The following witnesses testified at the evidentiary hearing: (1) Tova Clayton, Petitioner's ex-wife; (2) Robert Dennis, Newberry County Sheriff's Office; (3) Karen Castles, Fairfield County Sheriff's Office; (4) Tiffany Drew, Petitioner's cousin; (5) Barry Glymph, Petitioner's friend; (6) Kevin Chalk, Petitioner's friend; (7) Gwen Ray, Petitioner's Aunt; (8) Marsha Valasco, Petitioner's mother; (9) Michael Clayton, Sr., Petitioner's father; (10) Dave Anatra, private investigator; (11) Michael Clayton, Jr., Petitioner; and (12) George Speedy, Esq., Plea Counsel.

At the hearing, the PCR Court admitted the following exhibits submitted by Petitioner into evidence: (1) Affidavit of Tova Clayton from the divorce proceeding; (2) Text messages between Tova and Petitioner; (3) Investigator Robert Dennis's report; (4) Minor Child 1's mental

health records under seal; (5) Video recorded interviews of Tova, Minor Child 1, and Minor Child 2 under seal; (6) Investigator Castles's initial report; (7) Investigator Castles's notes; and (8) DPPP's standard conditions of sex-offender registry. (App. 228 – 261). PCR Counsel provided the PCR Court with a separate copy of the videos for viewing in preparation of the Court's decision.

Tova Clayton (Petitioner's ex-wife)

Petitioner's ex-wife and mother of Minor Child 1 and 2, Tova Clayton, testified at the hearing about her relationship with Petitioner and the alleged disclosure of abuse. (App. 69 – 99). PCR Counsel questioned Tova regarding the timeline of the allegations, her video recorded statement with Investigator Karen Castles of the Fairfield County Sheriff's Office, and the statements contained in Minor Child 1's mental health records. (App. 70, line 6 – 81, line 15). *See* (Order for Transport of Exhibit Nos. 4 and 5, mental health records and video recorded statements filed under seal). Specifically, the testimony addressed the inconsistencies and omissions regarding Tova's alleged knowledge of and failure to report the alleged abuse, Tova seeing Petitioner leave her daughter's bedroom with an erection, her daughter's denials of the abuse, the timing of her daughter's disclosures to her and their maternal grandmother, and the living situation in the home (moving in-and-out of the home on numerous times by her, her daughters, and her family members).

Tova conceded that Petitioner wanted a divorce in 2015 because of their relationship, his infidelity, and paramour becoming pregnant. (App. 81, lines 16-18; App. 83, lines 5-10). Tova also disclosed that her divorce affidavit did not reference any allegations of sexual abuse. (App. 81, line 21 – 82, line 7). Tova attested to the following information in her affidavit: (1) "[Petitioner] was my best friend"; (2) "'[Petitioner] was like an Angel sent from God'"; (3)

wanted to have a baby with Petitioner; (4) talked with Petitioner about having her tubes untied; (5) her and Petitioner trying to have a child together; and (6) "'I [Tova] realized then that my best friend was back'". (App. 82, line 6 – 83, line 4; App. 228 – 229). Notably, Tova's affidavit occurred after the dates of the alleged abuse by Petitioner.

PCR Counsel asked Tova about the text message exchange between Petitioner and Tova when Petitioner informed Tova of his decision to get a divorce: "[W]ere you shocked that [Petitioner] wanted a divorce"?; and Tova replied under oath, "I wasn't shocked that he wanted a divorce. I know what the text messages said." (App. 84, lines 7-11). Counsel then impeached Tova's testimony by admitting text messages that occurred between her and Petitioner on January 6, 2016, into evidence:

Q: When [Petitioner] states in the text message that he would like to get divorced, what's your response?

A: "On what grounds?"

Q: And what's his response?

A: "On the grounds that we haven't had a marriage in four years."

. . .

A: "I'm shocked, actually speechless."

. . .

A: "I never expected this."

. . .

A: "Truly, I am devastated. Shocked."

(App. 85, line 1 – 87, line 24; App. 230 – 236). Tova admitted that she was "crying like a baby" after Petitioner informed her of his intent to get divorced. Tova also admitted she had never told the police that Minor Child 1 and Minor Child 2 initially denied the allegations. (App. 87, line

25 – 88, line 5). Tova further admitted that the affidavit from their divorce failed to mention any abuse, based the grounds for divorce on adultery (Petitioner cheated on her and had a child with another woman), and noted Petitioner was like an Angel sent from God and could not have asked for a better partner. (App. 88, lines 20-23; App. 228 – 229).

Tova acknowledged that she knew Minor Child 2 had filed a complaint with the Fairfield County Sheriff's Office on June 23, 2016, just two days after the divorce decree was issued on June 21, 2016, and at no point did she ever call the police to report these allegations against Petitioner (App. 89, lines 3-22). Tova also conceded that after these allegations allegedly occurred and were disclosed, she and her adult daughters would subsequently stay and visit the residence. (App. 94, line 14 – 95, line 23). Tova further disclosed that she asked for $900 per month in alimony during the divorce proceedings but was not awarded the money. (App. 97, line 8-12). Notably, Tova admitted that she was not present on the morning of the scheduled trial and eventual plea hearing. (App. 99, lines 6-7).

Robert Dennis (Newberry County Sheriff's Office)

Robert Dennis of the Newberry County Sheriff's Office testified at the hearing regarding the complaint filed in Newberry County. (App. 99, line 22 – 108, line 7). Specifically, Officer Dennis testified that the biological father of Minor Child 1, Kevin Harclerode, filed a complaint on December 07, 2011, alleging that Petitioner sexually abused his daughter. (App. 100, line 11 – 101, line 25; App. 237). Notably, Officer Dennis ultimately determined the complaint was unfounded and closed the investigation. (App. 105, lines 1-25).

Karen Castles (Fairfield County Sheriff's Office)

Investigator Karen Castles of the Fairfield County Sheriff's Office testified at the hearing regarding her investigation. (App. 108, line 16 – 124, line 1). Specifically, Investigator Castles

acknowledged the list of witness statements she obtained during her investigation. (App. 111, lines 4-17). Investigator Castles acknowledged that she interrogated Petitioner twice and he denied the allegations. Investigator Castles also admitted that Tova never told her about the allegation of seeing Petitioner with an erection after coming out of the Minor Child's room during their interview. (App. 111, line 18 – 112, line 5).

Investigator Castles acknowledged that she knew Minor Child 2 had filed the complaint with the Fairfield County Sheriff's Office on June 23, 2016 (two days after the divorce decree was issued). (App. 108, lines 25 – 109, line 21). Investigator Castles also agreed that she knew Minor Child 2 was angry at Petitioner for having a sexual encounter with her adult friend, Meredith Suber, prior to filing the criminal complaint against Petitioner. (App. 119, line 10 – 120, line 14; App. 238 – 260). Investigator Castles further conceded she had been told about Minor Child 1's mental health treatment, which contained inconsistencies with Tova's recorded interview and PCR testimony. (App. 115, line 17 – 117, line 6). *See* (Order for Transport of Exhibit Nos. 4 and 5, mental health records and video recorded statements filed under seal).

Tiffany Drew (Petitioner's cousin)

Petitioner's cousin, Tiffany Drew, testified at the hearing regarding her relationship with Petitioner and the Minor Children. (App. 124, line 6 – 132, line 18). Specifically, Ms. Drew testified that she had lived next door and spent a lot of time with the Minor Child 1 and Minor Child 2 and that Petitioner was an "excellent" father. (App. 124, line 12 – 127, line 7). Ms. Drew also testified that Minor Child 1 and Drew had a reputation for lying and getting people into trouble. (App. 127, lines 19-23). She further testified that Petitioner was the only disciplinarian for the Minor Children and that the girls did not like him for punishing them due to not following the rules. (App. 130, lines 1-12). Notably, Ms. Drew testified that Petitioner had a

reputation as a truthful person. (App. 130, lines 13-21).

Barry Glymph (Petitioner's friend)

Petitioner's co-worker and friend, Barry Glymph, testified about Petitioner's character. (App. 133 – 135). Specifically, Mr. Glymph testified that he had known Petitioner for 20 years and observed Petitioner as a stepfather to the Minor Children. (App. 133, line 17 – 134, line 25). Mr. Glymph also testified that Petitioner was a good father and that he trusted Petitioner. (App. 134, line 9 – 135, line 4). Notably, Mr. Glymph testified that he trusted Petitioner enough to let Petitioner watch his children. (App. 135, lines 17-20).

Kevin Chalk (Petitioner's friend)

Petitioner's co-worker and friend, Kevin Chalk, testified about Petitioner's character. (App. 136 – 139). Specifically, Mr. Chalk testified that he was roommates with Petitioner before the divorce and attested to Petitioner's good character. (App. 138, lines 12-25). Mr. Chalk also testified that he trusted Petitioner enough to let Petitioner watch his children, and that Plea Counsel never spoke to him in preparation for trial. (App. 139, lines 3-13).

Gwen Ray (Petitioner's Aunt)

Petitioner's aunt, Gwen Ray, testified about Petitioner's character and his relationship with Tova and the Minor Children. (App. 140 – 143). Specifically, Ms. Ray testified that Petitioner was a strict disciplinarian to the children. (App. 142, lines 1-6). Ms. Ray also testified as to where Tova and the children stayed in the home (i.e., which bedrooms). Ms. Ray further testified that Petitioner was rarely alone with the children, she trusted Petitioner around her children, and Petitioner had "incredible character". (App. 142, line 8 – 143, line 4).

Marsha Valasco (Petitioner's mother)

Petitioner's mother, Marsha Valasco, testified about her time living in the home with

Tova and the children. (App. 144 – 147). Specifically, Ms. Valasco testified that she lived with Petitioner, Tova, and the children in 2005. Ms. Valasco also corroborated that Petitioner was the only disciplinarian to the children. (App. 146, lines 19-22). She also testified that Tova's relationship with Petitioner was related to money and had negative things to say about Tova. (App. 147, lines 17-25).

Michael Clayton, Sr. (Petitioner's father)

Petitioner's father, Michael Clayton, Sr., testified about the conversations he witnessed between Petitioner and Plea Counsel on the morning of the scheduled trial and eventual plea hearing. (App. 148 – 154). Specifically, Mr. Clayton, Sr., testified that Plea Counsel seemed unprepared because he changed his strategy from not presenting any testimony to preserve last argument, then to having Petitioner testify without any preparation or character witnesses to testify. (App. 149, line 15 – 150, line 21; App. 151, lines 1-22). Clayton, Sr., also testified that Plea Counsel did not explain the specific conditions or required treatment of the sex offender registry, and that Petitioner felt pressured into pleading guilty. (App. 152, lines 1-17).

Dave Anatra (private investigator)

Private investigator, Dave Anatra, testified about the investigation he conducted for this PCR action. (App. 154 – 166). Specifically, Investigator Anatra testified that he interviewed Meredith Suber and confirmed that Minor Child 2 had a falling out with her based on a relationship she had with Petitioner when she was 18 years old prior to Minor Child 2 filing the complaint with the Fairfield County Sheriff's Department. (App. 162, line 17 – 163, line 15; App. 165, line 16 – 166, line 8).

Michael Clayton, Jr. (Petitioner)

Petitioner, Michael Clayton, Jr., testified that Plea Counsel failed to interview the

witnesses, failed to prepare him to testify, changed his trial strategy on the morning of trial, never recommended hiring a private investigator, and never discussed the conditions or the required treatment of the sex offender registry. (App. 166 – 195). Petitioner also testified that Plea Counsel had maintained his strategy was to not present any evidence at trial and that Plea Counsel failed to interview character witnesses who could have testified on his behalf despite Petitioner's participation prior to trial. (App. 170, line 22 – 171, line 15). Petitioner further testified that Plea Counsel never prepared him to testify. (App. 173, lines 2-7).

Furthermore, Petitioner also testified that Plea Counsel indirectly coerced him into pleading guilty under *Alford* by not having any witnesses subpoenaed for trial, changing his trial strategy of not presenting evidence on the morning of trial when he had not been prepared to testify, and focusing on his infant daughter and potential prison sentence. (App. 173, line 9 – 176, line 4). Notably, Petitioner maintained his innocence and testified that had Plea Counsel conducted a reasonable investigation, subpoenaed witnesses, and adequately prepared for trial, and not pressured him on the morning of trial to accept the plea deal, he would not have pled guilty and would have proceeded with the trial. (App. 176, line 5 – 177, line 7).

Petitioner testified that Plea Counsel did not inform him of the specific conditions of the sex offender or the treatment (and the conditions of treatment). (App. 177, line 15 – 179, line 22; App. 180, lines 4-22; App. 261). Petitioner further testified that he did not feel Plea Counsel was prepared to proceed with trial because Counsel had not attempted to interview any witnesses related to the case or any character witnesses who were available and ready to assist with his defense. (App. 181, line 12 – 182, line 14)

George Speedy, Esq. (Plea Counsel).

Plea Counsel, George Speedy, Esq., testified regarding his representation of Petitioner.

(App. 195 – 225). Plea Counsel admitted that he failed to interview or subpoena any witnesses in preparation for trial except for speaking with Investigator Castles and an investigator at the Solicitor's Office. (App. 224, lines 15-19). Plea Counsel also acknowledged that Tova was material to the State's case because of the inconsistencies (e.g., "She was going to be there, I was confident. I was told who the witnesses would be." and "You're assuming she didn't testify, I'm going to assume she was going to testify). (App. 200, lines 15-18; App. 202, line 24 – 203, line 2). In response to why he had not obtained character evidence, Plea Counsel stated, "You know, in this case if you didn't - - if they believed those two girls then it didn't matter what you did after that, you were dead in the water, because that's the meat of this case." (App. 202, lines 14-18). Plea Counsel maintained that he did not believe any further investigation was necessary.

Memorandums in Support and Opposition of PCR

At the close of evidence, the PCR Court took the matter under advisement and allowed the parties to submit briefs instead of presenting closing arguments. Respondent submitted its Memorandum in Opposition to PCR via email on May 8, 2020, and Petitioner filed its Memorandum in Support of Granting PCR on May 12, 2020. (App. 262 – 280).

Order of Dismissal

On August 3, 2020, the PCR Court filed an Order of Dismissal, finding Petitioner failed to prove that Plea Counsel provided ineffective assistance of counsel and that Petitioner knowingly and voluntarily pled guilty. (App. 281 – 314). The PCR Court denied each of Petitioner's allegations raised during the hearing and argued in the memorandum in support of granting PCR.

Petitioner's Motion to Alter or Amend and Order Denying Petitioner Motion to Alter or Amend

On August 10, 2020, Petitioner filed a Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRCP. (App. 315 – 322). The PCR Court then filed an Order Denying the Motion to Alter

or Amend via a Form 4 Order on August 17, 2020. (App. 323 – 324).

Petitioner timely filed a Notice of Appeal. (App. 325 – 326).

Relief Sought

Petitioner seeks a writ of certiorari for this Court to review his denial of PCR.

STANDARD OF REVIEW

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *See Hill v. Lockhart*, 474 U.S. 52 (1985) (applying the *Strickland v. Washington*, 466 U.S. 668 (1984) standard to guilty plea challenges of ineffective assistance of counsel and finding ineffective assistance of counsel from a guilty plea where: (1) counsel's advice was not within the range of competence demanded of attorneys in criminal cases; and (2) "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial")); *see also Missouri v. Frye*, 566 U.S. ____, 132 S.Ct. 1399 (2012) (finding the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected, and reaffirming *Hill v. Lockhart*); *see generally Jamison v. State*, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014) (finding "we must reject the State's claim that the waiver of trial and admission of guilt encompassed in a guilty plea necessarily preclude post-conviction relief in *all* cases", and holding "a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.") (emphasis in original).

To establish ineffective assistance of counsel, a Petitioner must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims). "First, a [Petitioner] must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). "The second prong of the *Strickland* test requires a

showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, a Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result" when seeking relief based on ineffective assistance of counsel. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

In a PCR action, "[t]he burden of proof is on the Petitioner to prove his allegations by a preponderance of the evidence." *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Strategic "[d]ecisions made [by counsel] in ignorance of relevant, available information cannot be characterized as strategic." *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014). "Ordinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Smalls v. State*, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018). Notably, "for the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability . . . the factfinder would have had a reasonable doubt' cannot possibly be met." *Id.* 422 S.C. at 191, 810 S.E.2d at 845.

As to appellate review, "this Court will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them." *Thompson v. State*, 423 S.C. 235, 239, 814 S.E.2d 487, 489 (2018), reh'g denied, (June 12, 2018). This Court also reviews questions of law de novo and will reverse if the PCR court's decision is controlled by an error of

law. *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018), reh'g denied, (March 29, 2018)..

ARGUMENT

I. THE PCR COURT ERRED IN FINDING PLEA COUNSEL PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL FAILED TO CONDUCT A REASONABLE INVESTIGATION AND TO DEVELOP ALL AVAILABLE, RELEVANT, AND ADMISSIBLE OR MITIGATING EVIDENCE IN PREPARATION FOR TRIAL BY NOT ATTEMPTING TO INTERVIEW OR SUBPOENA MATERIAL OR CHARACTER WITNESSES.

The United States Supreme Court has held, "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691; *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003). "In assessing the reasonableness of an attorney's investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. Notably, this Court has held, "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008).

Furthermore, "while the scope of a reasonable investigation depends on a number of issues, ***at a minimum***, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Lounds v. State*, 380 S.C. 454, 460, 670 S.C. 646, 649 (2008) (quoting *Ard*, 372 S.C. at 331-32, 642 S.E.2d at 597) (emphasis added). This Court has also found it "was not objectively reasonable given the defense theory of the case" for counsel not to call witnesses who would have "added significantly to the credibility of petitioner's case". *Lounds*, 380 S.C. at 462, 670 S.E.2d at 650.

See generally Hicks v. State, 314 S.C. 280, 443 S.E.2d 907 (1994) (finding ineffective assistance of counsel when there is a reasonable probability the result would have been different had counsel introduced relevant and favorable evidence at trial).

Deficient Performance

In this case, Plea Counsel's performance was deficient, as it fell below an objective standard of reasonableness. *Hill*, 474 U.S. at 57-59; *See generally Praylow v. Martin*, 761 F.2d 179 (4th Cir. 1985) (provides that a defendant's stated interest in pleading guilty does not relieve counsel of his duty to investigate possible defenses). Specifically, Plea Counsel admitted that he never attempted to interview or subpoena material or character witnesses in preparation of Petitioner's defense. (App. 224, lines 15-19). *See Wiggins*, 539 U.S. 510; *McKnight*, 378 S.C. at 46, 661 S.E.2d at 360. Plea Counsel's failure to attempt contact or subpoena material and character witnesses "was not objectively reasonable given the defense theory of the case" when Counsel admitted that the alleged victim's credibility was the lynchpin of the Prosecution's case and key factor in the jury's determination of Petitioner's guilt, and when evidence of good character and reputation would have "added significantly to the credibility of petitioner's case". (App. 202, lines 14-18). *See Lounds*, 380 S.C. at 462, 670 S.E.2d at 650; *See Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness").

As Petitioner's ex-wife and mother of the alleged victims, Tova's testimony at the PCR hearing contained critical omissions, inconsistencies, and would have undermined the State's evidence based on her video recorded statement with Investigator Karen Castles of the Fairfield County Sheriff's Office and Minor Child 1's statements in her mental health records. (App. 69 –

99). *See* (Order for Transport of Exhibit Nos. 4 and 5, mental health records and video recorded statements filed under seal). This critical impeachment and credibility evidence included Petitioner's adultery and decision to divorce Tova, her wanting a baby with Petitioner and finding out Petitioner's paramour was pregnant, Tova's reaction to Petitioner wanting a divorce, Tova's alleged knowledge of and failure to report the alleged abuse, Tova allegedly seeing Petitioner leave her daughter's bedroom with an erection, her daughter's initial denials of the abuse, the timing of her daughter's alleged disclosures to her and their maternal grandmother, and the living situation in the home (moving in-and-out of the home on numerous times by her, her daughters, and her family members).

Plea Counsel also failed to conduct a reasonable investigation by not attempting to interview Investigator Robert Dennis of the Newberry County Sheriff's Office who received the report filed in Newberry County by the victim's biological father and for not conducting any further investigation into this complaint when this law enforcement agency did not pursue charges against Petitioner ("unfounded").

Plea Counsel's failure to interview and subpoena character witnesses in preparation for trial would have prevented the opportunity of calling these witnesses at trial and requesting a jury instruction on good character and reputation. *See State v. Harrison*, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000); *Cf. Stalk v. State*, 383 S.C. 559, 681 S.E.2d 592 (2009); *see also Pantovich v. State*, 427 S.C. 555, 562-64, 832 S.E.2d 596, 600, 601 (2019), *reh'g denied*, (September 27, 2019) (finding for an ineffective assistance claim, the PCR court must "determine whether counsel was ineffective *at the time of the alleged error*. . . Thus, the court must consider the law as it existed at the time of trial and "not as it has evolved today . . . .").

Prejudice

Here, Plea Counsel abandoned his role as defense counsel by failing to conduct a reasonable investigation and by failing to adequately prepare for trial based on his unreasonable trial strategy. *See United States v. Cronic*, 466 U.S. 648, 659 (1984); *See Nance v. Ozmint*, 367 S.C. 547, 548-52, 626 S.E.2d 878, 878-80 (2006) (holding that "per-se prejudice occurs if there has been a constructive denial of counsel," which arises when defense counsel's deficient performance constitutes "a classic example of a complete breakdown in the adversarial process"); *see also Green v. State*, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002) (holding that although an Petitioner "must ordinarily show actual prejudice, he may be relieved of that burden if counsel's ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary").

However, if this Court does not agree with Petitioner's argument regarding the existence of "per se prejudice", Plea Counsel's deficient performance prejudiced Petitioner because he would not have pled guilty and would have proceeded with to trial as scheduled. (App. 176, line 5 – 177, line 7). *See generally Alexander*, 303 S.C. at 542-3, 402 S.E.2d at 485-86 (1991 (finding the petitioner's own testimony that he would have proceeded to trial but for counsel's misadvice as to sentencing was "the only evidence in the record on this point" and was sufficient to satisfy the prejudice prong of the *Strickland* test); *Jackson v. State*, 342 S.C. 95, 97—98, 535 S.E.2d 926, 927 (2000) (citing *Alexander* with approval and finding the petitioner satisfied the prejudice prong by simply providing testimony that he would not have pled guilty, but for trial counsel's misadvice); *Smith v. State*, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) ("The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty."). Therefore,

the PCR Court erred in finding Plea Counsel provided effective assistance of counsel because Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation for trial by not attempting to interview or subpoena material or character witnesses. *See Hill*, 474 U.S. 52 (applying the *Strickland*, 466 U.S. 668 standard to guilty plea challenges based on ineffective assistance of counsel).

Accordingly, Plea Counsel denied Petitioner's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. *See* S.C. Code § 17-27-20(A)(1), (4), and (6). Plea Counsel's unreasonably deficient performance prejudiced Petitioner because there is a reasonable probability that, but for Plea Counsel's errors, Petitioner would not have pled guilty and went to trial. *See Hill v. Lockhart*, 474 U.S. 52 (1985) (applying the *Strickland v. Washington*, 466 U.S. 668 (1984) standard to guilty plea challenges of ineffective assistance of counsel).

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II. THE PCR COURT ERRED IN FINDING PETITIONER KNOWINGLY AND VOLUNTARILY PLED GUILTY BECAUSE OF PLEA COUNSEL'S FAILURE TO ADEQUATELY PREPARE FOR TRIAL BASED ON AN UNREASONABLE TRIAL STRATEGY, COERVICE ADVICE TO PLEAD GUILTY ON THE MORNING OF TRIAL, AND FAILURE TO FULLY ADVISE PETITIONER OF THE SENTENCING CONSEQUENCES.

The United States Supreme Court has held, "Guilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results." *Brady v. United States*, 397 U.S. 742, 758 (1970). An "unsound result" occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. *See Boykin v. Alabama*, 395 U.S. 238 (1969) (finding a guilty plea is voluntarily and knowingly entered into when the accused has a full understanding of the consequences of his plea and the charges against him); *see also Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999) (finding a defendant must understand the sentencing consequences of his plea for it to be considered voluntarily given).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." *Suber v. State,* 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Specifically, "the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." *Holden v. State*, 393 S.C. 565, 572-74, 713 S.E.2d 611, 612-15 (2011).

Discussion

In this case, Petitioner did not knowingly and voluntarily plead guilty because of Plea Counsel's failure to adequately prepare for trial based on an unreasonable trial strategy, changing that strategy on the morning of trial, providing coercive advice to plead guilty, and failing to fully advise Petitioner of the sentencing consequences. Specifically, Petitioner explained that he felt coerced into pleading guilty because Counsel was not prepared for trial, changed his

unreasonable trial strategy on the morning of trial, had not prepared him to testify, and did not have any character witnesses subpoenaed to corroborate his credibility and reputation. (App. 170, line 22 – 177, line 7; App. 181, line 12 – 182, line 14).

In other words, Petitioner felt his chances of winning at trial were hopeless based on Counsel's deficient performance and prejudicial representation. *Cf. Boykin v. Alabama*, 395 U.S. 238 (1969) (finding a guilty plea is voluntarily and knowingly entered when the accused has a full understanding of the consequences of his plea and the charges against him); *See Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999) (finding a defendant must understand the sentencing consequences of his plea for it to be considered voluntarily given). Notably, Petitioner has always maintained his innocence and had provided Plea Counsel with the evidence needed to prepare a defense. *See United States v. Taylor*, 659 F.3d 339, 347 (4th Cir. 2011) (noting "[a]n *Alford* plea is an arrangement in which a defendant maintains his innocence but pleads guilty for reasons of self-interest.").

Furthermore, Petitioner pled guilty under *Alford* to offenses that required him to register as a sex offender, which also required that Petitioner comply with specific conditions of supervision and attend specific treatment demanding he accept responsibility for the offenses (with polygraph testing despite that he maintained his innocence at the plea hearing pursuant to the *Alford* plea). Petitioner testified that Plea Counsel did not review the specific conditions of the sex offender registry with him nor did Counsel tell him about the specific treatment requiring him to accept responsibility. (App. 177, line 15 – 179, line 22; App. 180, lines 4-22; App. 261). Therefore, Plea Counsel's unreasonably deficient performance prejudiced Petitioner because there is a reasonable probability that, but for Counsel's errors, Petitioner would not have pled guilty and went to trial. *See Hill*, 474 U.S. 52.

Accordingly, Plea Counsel denied Petitioner's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. *See* S.C. Code § 17-27-20(A)(1), (4), and (6). Plea Counsel's unreasonably deficient performance prejudiced Petitioner because there is a reasonable probability that, but for Plea Counsel's errors, Petitioner would not have pled guilty and went to trial. *See Hill v. Lockhart*, 474 U.S. 52 (1985) (applying the *Strickland v. Washington*, 466 U.S. 668 (1984) standard to guilty plea challenges of ineffective assistance of counsel).

III. THE PCR COURT VIOLATED THE SEPARATION OF POWERS DOCTRINE BY ADOPTING THE STATE'S PROPOSED ORDER OF DISMISSAL BECAUSE THIS INDEPENDENT JUDICIAL FUNCTION CANNOT BE DELEGATED TO AN EXECUTIVE AGENCY WITHOUT PROVIDING SPECIFIC RATIONALE FOR DENYING EACH CLAIM AND FOR OMITTING RELEVANT TESTIMONY, FINDINGS OF FACT, AND CONCLUSIONS OF LAW.

Article I, Section 8 of the South Carolina Constitution provides, "In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." Section 17-27-80 of the South Carolina Code of Laws provides, in relevant part: "The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented."

Discussion

In this case, although the PCR Court allowed Petitioner to submit a memorandum in support of PCR prior to ruling on the matter, this procedure denied Petitioner an opportunity to have his claims adjudicated by an independent judicial officer in violation of the separation of powers doctrine. *See* S.C. Art. I, § 8. Specifically, the Court did not provide the State with any basis for denying Petitioner's claims other than delegating the responsibility of drafting a

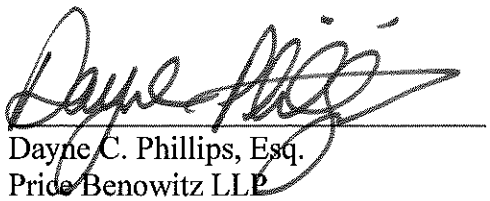
proposed order. (App. 262 – 324). The PCR Court adopted the State's adversarial proposed Order Denying Post-Conviction Relief despite that this independent judicial function cannot be delegated to an executive agency without providing specific instructions and rationale for omitting findings of fact and/or denying each claim. *See Marlar v. State*, 375 S.C. 407, 408, 653 S.E.2d 266 (2007) (holding, "Pursuant to S.C. Code Ann. § 17-27-80 . . . , the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented.").

Additionally, the Order Denying Post-Conviction Relief failed to properly summarize all the testimony presented at the hearing. Fundamental fairness necessitates the importance of an accurate summation of the testimony and arguments to ensure the Court's Order contains all the relevant findings of fact and conclusions of law to conduct an objective and independent review and to preserve all issues for appellate review. Therefore, PCR Court erred in adopting the State's adversarial memorandum in opposition of PCR in violation of the separation of powers doctrine. *See* S.C. Const. art. I, § 8; S.C. Code Ann. § 17-27-80.

CONCLUSION

Based on the foregoing reasons, Petitioner Michael Clayton respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,



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