THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Benjamin, Circuit Court Judge

Appellate Case No. 2020-000104

Case No. 2016-CP-40-4676

David Keith McElveen,

Petitioner,

v.

The 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 and in finding Petitioner knowingly and voluntarily pled guilty when Counsel failed to review all the discovery with Petitioner?

II. Did the PCR Court err in finding Plea Counsel provided effective assistance of counsel and in finding Petitioner knowingly and voluntarily pled guilty when Counsel failed to adequately prepare for trial and move for a continuance on the morning of trial?

III. Did the PCR Court err in finding Plea Counsel provided effective assistance of counsel and in finding Petitioner knowingly and voluntarily pled guilty when Counsel failed to advise Petitioner on the State's ability to request a substantial sentence at the plea hearing?

IV. Did the PCR Court err in finding Plea Counsel provided effective assistance of counsel by failing to file a motion for reconsideration?

STATEMENT OF THE CASE

Indictments

On April 8, 2015, the Richland County Grand Jury issued indictments against Petitioner for Armed Robbery and Burglary, First Degree. (App. 151–152; App. 156–157).

Plea Hearing

On March 14, 2016, Petitioner was scheduled for trial but ultimately appeared before the Honorable Clifton Newman and pled guilty as charged. (App. 1 – 27). Mark Schnee[1] represented Petitioner at the plea hearing, and Assistant Solicitor Margaret Bodman represented the State. The Plea Court sentenced Petitioner to eighteen (18) years imprisonment for the Armed Robbery conviction and twenty-two (22) years imprisonment for the Burglary, First Degree, conviction. (App. 26, lines 3-5; App. 153; App. 158). The Plea Court ordered Petitioner to serve the sentences concurrently, and Petitioner did not file a Notice of Appeal.

PCR Applications and the State's Return

On August 3, 2016, Petitioner filed his first application requesting Post-Conviction Relief (PCR) along with a Memorandum of Law in Support of PCR (2016-CP-40-4676). (App. 28 – 54). The South Carolina Attorney General's Office filed a Return in response on May 22, 2017. (App. 55 – 60). Petitioner subsequently filed Amended PCR applications on August 22, 2017 and June 21, 2018. (App. 61 – 63; App. 64 – 68).

In his first Amended Application for PCR, Petitioner provided the following allegations of ineffective assistance of counsel that are relevant to this appeal:

(1) "[C]ounsel failed to adequately share discovery with and explain evidence to

[1] *See In re Schnee*, Op. No. 28007 (S.C. Sup. Ct. filed February 10, 2021) (disbarring attorney for "numerous instances of misconduct combined with [Schnee's] deception of his clients, the courts, and ODC[.]").

[Petitioner] and prepare [Petitioner] for the decision he needed to make regarding plea or trial.

(2) "[C]ounsel failed to investigate case and interview witnesses."

(3) "[C]ounsel failed to regularly meet with [Petitioner] and discuss his options with him and failed to relay plea offers and explain plea offer expiration. Failed to fully explain the timeline for when decisions needed to be made and the risks and consequences of his decisions."

(4) "[C]ounsel erroneously informed [Petitioner] that he would receive the minimum sentence when entering a plea."

(5) "[C]ounsel failed to object when the State and law enforcement requested a 'substantial prison sentence' greater than the minimum sentence even though this was a straight up plea without recommendations."

(6) "[C]ounsel failed to file a Motion to Reconsider or Notice of Appeal upon receiving request from [Petitioner]."

(App. 61 – 63).

In his second Amended Application for PCR, Petitioner provided the following allegations of ineffective assistance of counsel that are also relevant to this appeal:

(1) Counsel failed "to adequately advise and assist [Petitioner] during the pendency of this case."

(2) Counsel failed "to file a Motion to Reconsider as requested by[Petitioner]."

(3) "Counsel failed to review discovery with [Petitioner], . . . failed to explain strengths and weaknesses of the case, and generally failed to assist [Petitioner] in handling this case in an appropriate manner."

(4) "Counsel failed to object and move to withdraw plea when the State requested a substantial prison sentence in violation of the agreement that [Petitioner] would be entering into a 'straight up plea'."

(App. 64 – 68).

PCR Evidentiary Hearing

On July 16, 2018, Petitioner appeared before the Honorable DeAndrea G. Benjamin for an evidentiary hearing on this PCR action. (App. 69 – 129). Kristy Goldberg, Esq., represented Petitioner, and Assistant Attorney General Lindsey McCallister represented the State. Petitioner and Plea Counsel testified at the evidentiary hearing.

David McElveen (Petitioner)

Petitioner testified, "The first time I ever met [Plea Counsel] or saw him was during my preliminary hearing," and "*[h]e didn't really have time to discuss my case or anything like that.*" (App. 75, lines 8-11) (emphasis added). Petitioner also testified about the second time he met with Plea Counsel, "He actually was coming to see another client of his, and I asked to speak with him, and *we talked briefly about my case.*" (App. 76, lines 1-3) (emphasis added). Petitioner further noted that he had filed a motion to relieve Plea Counsel but withdrew the motion after Counsel promised to get him a bond ("[Counsel] said he was going to get me a bond"). (App. 76, lines 12 – 77, line 2).

Petitioner then stated that Plea Counsel admitted to not having received all the discovery from the State when he consented to provide a DNA sample because of Plea Counsel's advice on October 14, 2015. (App. 79, line 18 – 80, line 11). Petitioner also testified that during his bond reconsideration hearing in January of 2016, Plea Counsel informed him that he "had a trial date set for March the 14th" and that "*he hadn't had (sic) all the discovery, so most likely, the trial date*

would be continued." (App. 80, line 23 – 82, line 4) (emphasis added). Petitioner further explained that he did not meet with Plea Counsel again until "five days before [his] trial was set to start" and was told, "my co-defendant would testify against me if I was wanting to go to trial and stated I didn't have a good chance of winning that trial, I had a 5 percent chance of winning that trial." (App. 82, line 21 – 83, line 5).

Petitioner testified that he met with Plea Counsel in the courthouse holding cell on the morning of the scheduled trial and decided to plead guilty based "*[o]n the advice of my counsel.*" (App. 84, line 19 – 85, line 21) (emphasis added). Petitioner also testified that Plea Counsel informed him that the State was not recommending anything and that he would not have pled guilty if he knew the State would request a significant sentence. (App. 86, lines 1-15). Notably, PCR Counsel asked Petitioner, "What do you think your attorney should have done differently that he didn't do?" and he replied, "*I think he should have reviewed my discovery with me, shared every strength and weakness of my case.*" (App. 86, lines 22-25) (emphasis added).

Petitioner stated that Plea Counsel "should have objected . . . when the State requested, I guess, a substantial amount of time . . . and went forward to withdraw the plea." (App. 87, lines 3-8). PCR Counsel then asked, "Was there any information that you were lacking during this whole process?" and Petitioner responded, "*Yes, ma'am . . . Just the fact that I never saw my motion [of] discovery and as far as the advice on preparing to go to trial*[.]" (App. 87, line 20 – 88, line 3) (emphasis added). Petitioner further expounded on Plea Counsel providing erroneous advice by not having reviewed all the discovery with him prior to his scheduled trial and eventual plea hearing:

> I think he could have advised me if, you know, he felt the case was weak and have a chance in trial, but like I said earlier, he didn't have no (sic) motion [of] discovery so, . . . he pretty much couldn't make a decision then. As far as making a decision, when you went to plea go to trial at that time, the case - - the case without seeing the motion [of] discovery.

(App. 88, lines 4-11). Additionally, Petitioner testified that Plea Counsel said he would file a motion for reconsideration after both co-defendants were sentenced but never filed the motion to reconsider. (App. 88, line 12 – 89, line 11).

On cross-examination, Petitioner testified that the only discovery Plea Counsel discussed with him was both co-defendant's statements and his statement to law enforcement. (App. 91, lines 3-14). The following exchange then occurred between the State (Respondent) and Petitioner:

State: And is it your contention, then, that there are other things in [the] discovery that you did not see?

Petitioner: Yes, ma'am

State: What are those things?

Petitioner: I wanted to see all the probable cause that led up to my arrest.

State: Okay. And did you tell him that you wanted to see those things?

Petitioner: Yes, ma'am.

State: Okay. And what was his answer when you said you wanted to see that?

Petitioner: He said, when he received all of the discovery, he would review it with me.

State: Okay. And you're saying that that (sic) never happened?

Petitioner: No, ma'am.

State: But you agreed to enter the plea knowing that there were things that you had asked for that you hadn't seen?

Petitioner: Yes, ma'am.

(App. 91, line 15 – 92, line 11).

Petitioner also testified that his conversation with Plea Counsel regarding his request to file a motion for reconsideration occurred "right in the courtroom right after I got sentenced." (App. 94, line 25 – 95, line 5). The State further inquired, "Did you ever follow up with [Plea Counsel] about

filing those things?" Petitioner replied, "No, ma'am. After I got in SCDC, I found out that you only had ten days to file both of these (sic) paperwork, so that's why I went ahead and filed my PCR." (App. 95, lines 6-10). The State then asked Petitioner, "[W]hen you saw [Plea Counsel] on the morning of trial, he informed you that there were no other offers and that the State was ready to proceed with trial and he reiterated that he didn't think you had a good chance or a good outcome at trial is that correct?" and Petitioner responded, "Yes, ma'am." (App. 95, lines 16-21).

Mark Schnee (Plea Counsel)

Plea Counsel testified at the hearing that he represented Petitioner for over one year. (App. 99, lines 2-6). Plea Counsel indicated that he "received discovery in various chunks" and explained, "[t]he problems that we were having with discovery is where we always have problems, deals with the forensic analysis and actually having those tested and getting the results in and having an expert go over it in a useful format." (App. 100, lines 6-17). Plea Counsel maintained that he discussed the evidence with Petitioner "*very briefly*". (App. 100, lines 21-23) (emphasis added).

The following exchange then occurred between the State (Respondent) and Plea Counsel:

State: And so the decision - - the decision to plead guilty, even though first-degree burglary was still on the table, how did that come about?

Counsel: The decision came about, essentially, [the Prosecutor] created a trial list. *The Solicitor's Office just put the case on the trial list. I absolutely fought against it because we were still missing discovery. . . .* So they're taking my client's DNA and saying we want to do a trial in 45 days or whatever it was. And I said it is not possible. I don't agree with it. I didn't agree with it. I fought it, but the Solicitor went forward anyway, at the time, he - - the judge didn't care that I was not in agreement with any trial discussions about that.

State: Okay.

Counsel: So in terms of pleading guilty, it was we plead guilty that day or we go to trial.

. . . . . .

Counsel: *That is not notice of a legitimate, lawful trial.*

(App. 104, line 12 – 105, line 19) (emphasis added).

Plea Counsel admitted that he discussed filing a motion to reconsider with Petitioner but denied promising to file the motion. (App. 106, lines 2-3; App. 107, line 23 – 108, line 1). Plea Counsel, however, maintained that he did not file the motion to reconsider based on the following rationale: "Judge Newman, in order to go forward . . . on a motion to reconsider. You have to have a good reason. Filing a motion just because, he is one of those judges that will actually sentence someone higher just because you told him you didn't like his first sentence." (App. 107, lines 3-11).

The State then inquired, "[D]id you discuss that with [Petitioner], that the State would be free to ask for what they wanted [during sentencing]?" and Plea Counsel responded, "I don't recall the exact words that were used. I had no idea what the State was going to ask for, if anything." (App. 108, lines, 19-22). Notably, Plea Counsel admitted, "*I certainly told him that I firmly believed she (sic) would get near the 15 or the 15 [years] itself, and I'm sure [Petitioner] took that into account when he made his decision.*" (App. 109, lines 12-14) (emphasis added).

On cross-examination, PCR Counsel asked Plea Counsel about when he reviewed discovery with Petitioner and Counsel claimed:

> I know, when we had talked a lot about the discovery, *more about what was missing* and what problems there were. *In terms of going page by page, I couldn't tell you. Clearly, I have not shown him every page.* I generally don't waste the time going through paperwork that has nothing to do with what's actually involved in the case. But we certainly went through all the facts and the details of the actual incident.

(App. 112, lines 9-16) (emphasis added). Plea Counsel also admitted he did not "*have any specific recollection*" of discussing whether Petitioner's statement to law enforcement could

have been suppressed. (App. 112, line 22 – 113, line 1) (emphasis added). However, Plea Counsel maintained, "I'm sure I had general discussions in terms of voluntariness and I would have asked if there was anything that, you know, would have raised a red flag to me." (App. 113, lines 4-6).

Plea Counsel acknowledged that he had not been preparing for trial despite Petitioner's case being on the trial docket. (App. 113, lines 10-13; App. 115, lines 9-12). Plea Counsel also admitted that he received the discovery "*by the last minute*" of the scheduled trial date. (App. 114, lines 15-20) (emphasis added). Plea Counsel further addressed the State's failure to timely disclose discovery:

> In fact, I - - after [Petitioner's] case, . . . the next time I had an issue like this come up, I had to file a motion to close discovery, demanding at least 30 days from the time I received either a deadline or I received the last piece of paper, at least 30 days prior to trial, which ended up being granted and ended up resulting in the State not being able to use things they wanted to turn over late. They should have turned it over much, much earlier. *So, yeah, all of it had been turned over but not in a timely fashion.*

(App. 114, line 20 – 115, line 5) (emphasis added). Notably, PCR Counsel conceded, "*I would not have been prepared to argue against any of it [the late discovery] in trial*" because "I would not have had the ability to get an expert to deal with anything if it was necessary." (App. 115, lines 9-12) (emphasis added).

When asked why he did not request a continuance, Plea Counsel claimed "[t]here were a number of discussions over email between myself and the Solicitor's Office" and "*[i]t would have been denied because the only grounds I had were late discovery and the issue of Langford and, you know, my client's constitutional right to fair notice and the Solicitor's illegal docket control.*" (App. 116, lines 3-14) (emphasis added). Plea Counsel also maintained, "Judge Newman had already ruled on that plenty of other times. He doesn't care. He didn't care then

and he still doesn't care. So that wasn't worth discussing, certainly if [Petitioner] was going to plead guilty, which he ended up doing." (App. 116, lines 14-19).

PCR Counsel inquired, "Do you recall if you actually warned [Petitioner] that the State would be asking for a lot of time or did that not come up?" and Plea Counsel remarked, "*I don't think it came up*." (App. 118, lines 22-24) (emphasis added). Plea Counsel explained that he was not sure whether he told Petitioner that the Prosecutor would be asking for more than fifteen years imprisonment. (App. 119, lines 1-8). Notably, Plea Counsel admitted he should have objected to the Prosecutor informing the Plea Court that Petitioner's case was on the trial roster:

> The only thing I probably should have objected to is the fact that [the Prosecutor] said this was a case on the trial docket. Maybe I did not make that clear. Maybe I should have objected and said, No, Judge, this is ridiculous; we have never asked for a trial. And I do think that the fact that it was on the trial list impacted [Petitioner's] sentence unfairly. But there's no legal grounds to object. It's still not a legal issue that could be preserved.

(App. 121, lines 8-16). Plea Counsel further noted that he did not file a motion for reconsideration because both co-defendants received significant prison sentences. (App. 121, line 19 – 122, line 6).

Order of Dismissal

On July 19, 2018, the PCR Court filed a Form 4 Order finding "[t]he Application for post-conviction relief is Denied" and noting a "[m]ore formal order to follow." (App. 130). The PCR Court subsequently filed an Order of Dismissal on January 7, 2020, denying each of Petitioner's allegations of ineffective assistance of counsel raised during the hearing. (App. 131 – 144). Specifically, the PCR Court found, "[Petitioner] has failed to prove Counsel's performance was deficient in any way." (App. 139).

Specifically, "[Petitioner] allege[d] Counsel was ineffective for failing to review discovery with him, . . . "failing to explain the strengths and weaknesses of the case, and generally failing to assist [Petitioner] in handling this case in an appropriate manner", and the PCR Court found "Counsel provided effective assistance in this case." (App. 139). The PCR Court also found Petitioner's testimony credible that he originally rejected the State's plea offer when "they had not yet seen all the discovery at that time[.]" (App. 140).

Despite Plea Counsel's vague and inconsistent testimony at the hearing, the PCR Court found "credible Counsel's testimony he reviewed [Petitioner's] constitutional rights, the State's evidence, the potential strengths and weaknesses of each side's case, and the possible penalties with [Petitioner] prior to the plea." (App. 140). Again, contradictory to Counsel's testimony, the PCR Court found "Counsel met with [Petitioner] on multiple occasions to review discovery, discuss the facts of the case, and explain [Petitioner's] constitutional rights and options for resolving the case." (App. 141). The PCR Court further noted the plea transcript reflects [Petitioner] entered into the guilty plea freely and voluntarily" and "dismisse[d] this allegation with prejudice." (App. 141).

"[Petitioner] also allege[d] Counsel was ineffective for failing to file a motion to reconsider or a notice of appeal after [Petitioner] requested he do so." "Specifically, [Petitioner] testified he and Counsel discussed the options of filing a motion to reconsider and/or notice of appeal, and Counsel told him he would file them 'later'". (App. 143). "Counsel recalled telling [Petitioner] he would review the file after the plea to ensure the solicitor had not misrepresented any facts, which Counsel testified he did and determined there was no basis for the motion." (App. 143).

The PCR Court found "[Petitioner] has failed to meet his burden of proof as to ineffective assistance of counsel for failure to file a motion to reconsider or a notice of appeal" by "find[ing] credible Counsel's assertion he reviewed the file after the plea and could not discern any basis to file

a motion to reconsider." (App. 143). The PCR Court thus ruled "[t]his allegation shall be denied and dismissed with prejudice." (App 143).

The PCR Court ultimately held, "the Court finds and concludes [Petitioner] has not established any constitutional violations or deprivations that would require this court to grant relief" and "Counsel was not deficient in any manner, nor was [Petitioner] prejudiced by Counsel's representation." (App. 144). Petitioner timely filed a Notice of Appeal on February 7, 2020. (App. 145 – 148).

Relief Sought

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

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 AND IN FINDING PETITIONER KNOWINGLY AND VOLUNTARILY PLED GUILTY BECAUSE OF COUNSEL'S FAILURE TO REVIEW ALL THE DISCOVERY WITH PETITIONER.

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, Plea Counsel's performance was deficient, as it fell below an objective standard of reasonableness because Counsel failed to review all the discovery with Petitioner prior

to his scheduled trial and eventual guilty plea. *Hill*, 474 U.S. at 57-59. (App. App. 75, lines 8-11; App. 76, lines 1-3; App. 79, line 18 – 80, line 11; App. 80, line 23 – 82, line 4; App. 86, lines 22-25). At the evidentiary hearing, PCR Counsel asked Petitioner, "Was there any information that you were lacking during this whole process?" and Petitioner replied, "*Yes, ma'am . . . I never saw my motion [of] discovery and as far as the advice on preparing to go to trial*[.]" (App. 87, line 20 – 88, line 3) (emphasis added). *See Boykin*, 395 U.S. 238. Petitioner also testified that the only discovery Plea Counsel discussed with him was both co-defendant's statements and his statement to law enforcement. (App. 91, lines 3-14).

Notably, the following exchange occurred between the State (Respondent) and Petitioner on cross-examination:

State:	And is it your contention, then, that there are other things in [the] discovery that you did not see?
Petitioner:	Yes, ma'am
State:	What are those things?
Petitioner:	I wanted to see all the probable cause that led up to my arrest.
State:	Okay. And did you tell him that you wanted to see those things?
Petitioner:	Yes, ma'am.
State:	Okay. And what was his answer when you said you wanted to see that?
Petitioner:	He said, when he received all of the discovery, he would review it with me.
State:	Okay. And you're saying that that (sic) never happened?
Petitioner:	No, ma'am.

(App. 91, line 15 – 92, line 11). Plea Counsel admitted that he failed to review all the discovery with Petitioner and that they talked "*more about what was missing . . . In terms of going page by*

page, I couldn't tell you. Clearly, I have not shown him every page." (App. 112, lines 9-16) (emphasis added). Additionally, the PCR Court's finding that Plea Counsel reviewed all the discovery with Petitioner is inconsistent with the testimony presented at the hearing and is similar to the facts presented in the recent opinion disbarring Counsel. *See In re Schnee*, Op. No. 28007 (S.C. Sup. Ct. filed February 10, 2021) (disbarring attorney for "numerous instances of misconduct combined with [Schnee's] deception of his clients, the courts, and ODC[.]").

Prejudice

As to prejudice, Plea Counsel acknowledged that he had not been preparing for trial despite Petitioner's case being on the trial docket and conceded, "*I would not have been prepared to argue against any of it [the late discovery] in trial*". (App. 113, lines 10-13; App. 115, lines 9-12) (emphasis added). Petitioner testified that he met with Plea Counsel in the courthouse holding cell on the morning of the scheduled trial and decided to plead guilty based "*[o]n the advice of my counsel.*" (App. 84, line 19 – 85, line 21) (emphasis added). Petitioner further expounded on Plea Counsel providing erroneous advice by not reviewing the discovery:

> I think he could have advised me if, you know, he felt the case was weak and have a chance in trial, but like I said earlier, he didn't have no (sic) motion [of] discovery so, . . . he pretty much couldn't make a decision then. As far as making a decision, when you went to plea go to trial at that time, the case - - the case without seeing the motion [of] discovery.

(App. 88, lines 4-11). *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).

Plea Counsel also admitted that he did not "*have any specific recollection*" of discussing whether Petitioner's statement to law enforcement could have been suppressed at trial. (App.

112, line 22 – 113, line 1) (emphasis added). *See generally Shirley v. State*, 306 S.C. 241, 411 S.E.2d 215 (1991) (When a defendant is represented by counsel during the plea process and enters his plea on the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was withing the range of competency demanded of attorneys in criminal cases).

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*, 474 U.S. 52 (applying the *Strickland*, 466 U.S. 66 standard to guilty plea challenges of ineffective assistance of counsel). Therefore, the PCR Court erred in finding Plea Counsel provided effective assistance of counsel and in finding Petitioner knowingly and voluntarily pled guilty because Counsel failed to review all the discovery with Petitioner. *See* U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6).

II. THE PCR COURT ERRED IN FINDING PLEA COUNSEL PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL AND IN FINDING PETITIONER KNOWINGLY AND VOLUNTARILY PLED GUILTY BECAUSE OF COUNSEL'S FAILURE TO ADEQUATELY PREPARE FOR TRIAL AND MOVE FOR A CONTINUANCE ON THE MORNING OF TRIAL.

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. 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). Notably, "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).

Additionally, an applicant must show what benefits would accrue from additional preparation to prove that counsel was ineffective for failing to move for a continuance. *See Skeen v. State*, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

Discussion

In this case, Plea Counsel's performance was deficient, as it fell below an objective standard of reasonableness because he admittedly failed to prepare for trial and move for a continuance on the morning of trial. *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 acknowledged that he had not been preparing for trial despite Petitioner's case being on the trial docket and conceded, "*I would not have been prepared to argue against any of it [the late discovery] in trial*". (App. 113, lines 10-13; App. 115, lines 9-12) (emphasis added). *See Lounds*, 380 S.C. at 462, 670 S.E.2d at 650; *Cf. 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").

Furthermore, Plea Counsel failed to move for a continuance when it was reasonable and necessary to do so because Counsel needed additional time to prepare for trial, review all the discovery with Petitioner, explain all the potential legal defenses to Petitioner (e.g., moving to suppress Petitioner's and co-defendant's statements to law enforcement), and retain an expert witness to evaluate the DNA evidence. *Hill*, 474 U.S. at 57-59. Plea Counsel also admitted that he received the discovery "*by the last minute*" before the scheduled trial. (App. 114, lines 15-20) (emphasis added). Plea Counsel did address the State's failure to timely disclose discovery: "They should have turned it over much, much earlier. *So, yeah, all of it had been turned over but not in a timely fashion.*" (App. 114, line 20 – 115, line 5) (emphasis added).

When asked why he did not request a continuance, Plea Counsel claimed "*[i]t would have been denied because the only grounds I had were late discovery and the issue of Langford and, you know, my client's constitutional right to fair notice and the Solicitor's illegal docket control.*" (App. 116, lines 3-14) (emphasis added). Plea Counsel also maintained, "Judge Newman had already ruled on that plenty of other times. He doesn't care. He didn't care then and he still doesn't care. So that wasn't worth discussing, certainly if [Petitioner] was going to plead guilty, which he ended up doing." (App. 116, lines 14-19).

Prejudice

Here, Plea Counsel abandoned his role as defense counsel by failing to prepare for trial and to conduct a reasonable investigation. *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*, 351 S.C. at 196, 569 S.E.2d at 324 (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"). Notably, Plea Counsel's pattern of misconduct in this case is akin to the cases referenced in the recent opinion disbarring Counsel. *See In re Schnee*, Op. No. 28007 (S.C. Sup. Ct. filed February 10, 2021) (disbarring attorney for "numerous instances of misconduct combined with [Schnee's] deception of his clients, the courts, and ODC[.]").

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 erroneously advised Petitioner to plead guilty without reviewing all the discovery with Petitioner, advising Petitioner of all his potential legal defenses, or retaining an independent expert witness to review the DNA evidence. *See Boykin*, 395 U.S. 238; *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).

PCR Counsel conceded, "*I would not have been prepared to argue against any of it [the late discovery] in trial*" because "I would not have had the ability to get an expert to deal with anything if it was necessary." (App. 115, lines 9-12) (emphasis added). 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*, 474 U.S. 52 (applying the *Strickland*, 466 U.S. 66 standard to guilty plea challenges of ineffective assistance of counsel). Therefore, the PCR Court erred in finding Plea Counsel provided effective assistance of counsel and in finding Petitioner knowingly and

voluntarily pled guilty because Counsel failed to prepare for trial. *See* U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6).

III. THE PCR COURT ERRED IN FINDING PLEA COUNSEL PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL AND IN FINDING PETITIONER KNOWINGLY AND VOLUNTARILY PLED GUILTY BECAUSE OF COUNSEL'S FAILURE TO ADVISE PETITIONER OF THE STATE'S ABILITY TO REQUEST A SUBSTANTIAL SENTENCE AT THE PLEA HEARING.

In *Richardson v. State*, 310 S.C. 360, 363, 426 S.E.2d 795, 797 (1993), this Court found a defendant who pleads guilty upon advice of counsel may only attack the voluntary and intelligent character of the plea by showing that advice he received from counsel was not within range of competence demanded of attorneys in criminal cases.

In this case, Plea Counsel's performance was deficient, as it fell below an objective standard of reasonableness because he failed to adequately advise Petitioner of the State's ability to request a substantial sentence at the plea hearing. *Hill*, 474 U.S. at 57-59. Specifically, Petitioner testified that Plea Counsel informed him that the State was not recommending anything and that he would not have pled guilty if he knew the State would request a significant sentence. (App. 86, lines 1-15). Petitioner also testified that Plea Counsel "should have objected . . . when the State requested, I guess, a substantial amount of time . . . and went forward to withdraw the plea." (App. 87, lines 3-8).

The State inquired as to Plea Counsel's advice regarding the State's ability to request a specific sentence, "[D]id you discuss that with [Petitioner], that the State would be free to ask for what they wanted [during sentencing]?" and Plea Counsel responded, "I don't recall the exact words that were used. I had no idea what the State was going to ask for, if anything." (App. 108, lines, 19-22). Notably, Plea Counsel admitted, "*I certainly told him that I firmly believed she (sic) would get near the 15 or the 15 [years] itself, and I'm sure [Petitioner] took that into*

account when he made his decision." (App. 109, lines 12-14) (emphasis added). *See Boykin*, 395 U.S. 238; *Jackson v. State*, 342 S.C. at 97—98, 535 S.E.2d at 927.

PCR Counsel also inquired on cross-examination, "Do you recall if you actually warned [Petitioner] that the State would be asking for a lot of time or did that not come up?" Plea Counsel remarked, "*I don't think it came up.*" (App. 118, lines 22-24) (emphasis added). Plea Counsel conceded that he was not sure whether he told Petitioner that the Prosecutor would be asking for more than fifteen years imprisonment. (App. 119, lines 1-8).

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*, 474 U.S. 52 (applying the *Strickland*, 466 U.S. 66 standard to guilty plea challenges of ineffective assistance of counsel). Therefore, the PCR Court erred in finding Plea Counsel provided effective assistance of counsel and in finding Petitioner knowingly and voluntarily pled guilty because Counsel failed to prepare for trial. *See* U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6).

IV. THE PCR COURT ERRED IN FINDING PLEA COUNSEL PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO FILE A MOTION FOR RECONSIDERATION.

In this case, Plea Counsel's performance was deficient, as it fell below an objective standard of reasonableness because Counsel failed to file a motion for reconsideration. *Hill*, 474 U.S. at 57-59. Petitioner testified that Plea Counsel said he would file a motion for reconsideration after both co-defendants were sentenced but never filed the motion to reconsider. (App. 88, line 12 – 89, line 11). Petitioner also testified that his conversation with Plea Counsel regarding his request to file a motion for reconsideration occurred "right in the courtroom right after I got sentenced." (App. 94, line 25 – 95, line 5). The State inquired, "Did you ever follow up with [Plea Counsel]

about filing those things?" and Petitioner replied, "No, ma'am. After I got in SCDC, I found out that you only had ten days to file both of these (sic) paperwork, so that's why I went ahead and filed my PCR." (App. 95, lines 6-10).

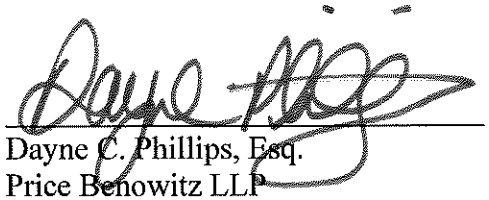
Plea Counsel admitted that he discussed filing a motion to reconsider with Petitioner but denied promising to file the motion. (App. 106, lines 2-3; App. 107, line 23 – 108, line 1). Plea Counsel, however, maintained that he did not file the motion to reconsider based on the following rationale: "Judge Newman, in order to go forward . . . on a motion to reconsider. You have to have a good reason. Filing a motion just because, he is one of those judges that will actually sentence someone higher just because you told him you didn't like his first sentence." (App. 107, lines 3-11). Plea Counsel further noted that he did not file a motion for reconsideration because both co-defendants received significant prison sentences. (App. 121, line 19 – 122, line 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*, 474 U.S. 52 (applying the *Strickland*, 466 U.S. 66 standard to guilty plea challenges of ineffective assistance of counsel). Therefore, the PCR Court erred in finding Plea Counsel provided effective assistance of counsel and in finding Petitioner knowingly and voluntarily pled guilty because Counsel failed to review all the discovery with Petitioner. *See* U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6).

CONCLUSION

Based on the foregoing reasons, Petitioner David McElveen respectfully requests that this Court grant his Petition for Writ of Certiorari. *See* U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6).

Respectfully submitted,



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