

RECEIVED

Oct 04 2021

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Pickens County

Honorable Edward W. Miller, Circuit Court Judge

---

GARY Z. THOMAS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-001569

---

PETITION FOR WRIT OF CERTIORARI

---

VICTOR R SEEGER  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX .....i

ISSUE PRESENTED.....1

STATEMENT.....2

ARGUMENT

1.

**The post-conviction relief court erred when it denied Petitioner’s PCR application where Petitioner showed his guilty plea was entered involuntarily as it was induced by plea counsel’s insufficient investigation into his case. ....4**

**Relevant Facts .....4**

**Discussion .....9**

2.

**The PCR court erred in not allowing Petitioner to question the complaining witness at his PCR hearing because Petitioner demonstrated her testimony was relevant to prove his PCR allegation that plea counsel’s ineffective assistance of counsel induced Petitioner to enter his guilty plea involuntarily..... 15**

**Relevant Facts .....15**

**Discussion .....17**

CONCLUSION.....22

## **ISSUES PRESENTED**

1. Whether the post-conviction relief court erred when it denied Petitioner's PCR application where Petitioner showed his guilty plea was entered involuntarily as it was induced by plea counsel's insufficient investigation into his case?
  
2. Whether the PCR court erred in not enforcing the subpoena on the complaining witness to allow Petitioner to question her at his PCR hearing where Petitioner demonstrated her testimony was relevant to prove his PCR allegation that plea counsel's ineffective assistance of counsel induced him to enter his guilty plea involuntarily?

## STATEMENT

During the May 2017, term the Pickens County Grand Jury indicted Petitioner for domestic violence in the second degree. App. 263 – 265.

On December 1st, 2017, Petitioner pled guilty before the Honorable Letitia Verdin. App. 5. John Gravlee represented Petitioner. Id. Durham Hill represented the state. Id. Petitioner was sentenced to three years' imprisonment, suspended on five years' probation. App. 11, ll. 2 – 11. Petitioner was ordered to make restitution as well as to complete a twenty-six-week batterer's treatment program. Id. He was also ordered to be randomly drug and alcohol tested and to make no contact with the complaining witness. Id.

On November 30th, 2018, Petitioner filed an application for post-conviction relief (PCR). App. 13 – 20. Petitioner alleged that he was deprived of his right to represent himself, the solicitor controlled the docket and his attorney failed to object to the solicitor's control, his five-year probation sentence exceeded the maximum sentence of three years' imprisonment and his attorney failed to object to that illegal sentence, and his guilty plea was entered involuntarily. Id. On February 8th, 2019, the stated filed its return and motion to dismiss. App. 21 – 30.

On April 16th, 2019, Petitioner's initial PCR hearing was held before the Honorable Alex Kinlaw, Jr. App. 31. Don A. Thompson represented Petitioner. Id. Taylor Z. Smith represented the state. Id.

At the outset of the hearing Petitioner moved to proceed *pro se*. App. 33, ll. 6 – 9. The PCR court granted Petitioner's motion to proceed *pro se*. App. 47, ll. 3 – 7. The state then moved for a continuance, and the PCR court granted the motion for a continuance. App. 47, ll. 11 – 17; App. 50, l. 1 – 52, l. 14.

On July 22nd, 2019, Petitioner filed a supplemental PCR application alleging that he pled guilty without knowing the nature of the charges against him because “the plea hearing [was] void of colloquy indicative the defendant’s understanding of the nature of the charges.” App. 54 – 55. The state filed a return and motion to dismiss for Petitioner’s amended PCR application on October 8th, 2019. App. 56 – 65.

On October 22nd, 2019, Petitioner’s PCR hearing was held before the Honorable Edward W. Miller. App. 67. Petitioner represented himself. Id. Taylor Z. Smith represented the state. Id. At the end of the PCR hearing, the PCR court made an oral pronouncement denying Petitioner’s application. App. 167, l. 24 – 168, l. 11. In an order filed on January 22nd, 2020, the PCR court dismissed Petitioner’s PCR application. App. 170 – 196.

On February 14th, 2020, Petitioner filed a motion to amend or alter judgment. App. 197 – 210. On March 2nd, 2020, Petitioner filed an amended motion to amend or alter judgment. App. 211 – 236. On May 29th, 2020, the state filed a return to the amended motion to amend or alter judgment. App. 237 – 256.

On October 20th, 2020, the PCR Court issued an order<sup>1</sup> denying Petitioner’s motion and amended motion to amend or alter judgement because they were filed untimely. App. 257 – 260. The PCR Court noted that the initial order of dismissal was issued on January 22nd, 2020, while Petitioner’s initial motion to amend or alter judgment was filed on February 14th, 2020 and his amended motion to amend or alter judgment was filed on March 2nd, 2020. App 259. Accordingly, they were filed after the ten-day deadline expired. Id.

This petition follows.

---

<sup>1</sup> On the same day, the PCR court filed a supplemental order correcting a clerical filing error of the order denying applicant’s amended motion to alter or amend judgment. App. 261 – 265.

## ARGUMENT

1. The post-conviction relief court erred when it denied Petitioner's PCR application where Petitioner showed his guilty plea was entered involuntarily as it was induced by plea counsel's insufficient investigation into his case.

### **Relevant Facts**

On April 26, 2017, the complaining witness, Diane Phillips, called the police and alleged that Petitioner, "threw her on the couch and punched her." App. 9, l. 25 – 10, l. 9. Petitioner was charged with second-degree domestic violence and paid his bond to be released from jail. App. 78, ll. 10 – 12; App. 125, ll. 9 – 11.

After that alleged event, a second incident occurred where the complaining witness arrived at, Petitioner's new girlfriend, Ferris Harvley's apartment and tried to force herself into the apartment while Petitioner was inside. App. 111, l. 15 – 115, l. 5. Harvley tried to keep the complaining witness from pushing into the apartment, but as the complaining witness got through the doorway Petitioner came to the doorway and pushed her out. Id. The complaining witness fell over on the ground outside. Id.; App. 124, l. 23 – 125, l. 4. The complaining witness then reported to police that Petitioner attacked her. App. 111, l. 15 – 115, l. 5.

After Petitioner was arrested for the second incident, he was charged with first degree domestic violence and his bond was set for \$15,000. App. 2, ll. 17 – 21. While awaiting a bond reduction hearing, Petitioner informed plea counsel Gravlee of multiple leads for his defense which Petitioner believed would result in the first-degree domestic violence charge being dismissed. App. 117, l. 1 – 118, l. 2; App. 153, l. 4 – 162, l. 20.

Petitioner provided<sup>2</sup> plea counsel a USB flash drive with a voicemail recording on it of a phone call from the complaining witness to Petitioner. App. 117, l. 1 – 118, l. 2. According to Petitioner, on the voicemail the complaining witness admitted that she fabricated the allegations against him. App. 81, ll. 15 – 24; App. 136, l. 5 – 138, l. 24.

Petitioner also provided plea counsel the credentials to Petitioner's email account for plea counsel to log onto to access emails sent from the complaining witness to Petitioner that showed the complaining witness repeatedly sent aggressive and threatening messages to Petitioner and his new girlfriend Harvley. App. 147, l. 17 – 148, l. 11. Petitioner was still incarcerated at the time so he could not access the email account himself. Id. According to Petitioner, these messages coupled with the voicemail recording established his argument that his actions towards the complaining witness were made in self-defense. App. 153, l. 4 – 162, l. 20.

Petitioner's argument that plea counsel's deficient investigation led to his involuntary guilty plea has a few logical steps such that it is helpful to parse his argument out before discussing the evidence presented at the PCR hearing. Petitioner argued plea counsel's insufficient investigation caused him to unnecessarily languish in the Pickens County detention center and he pled guilty to relieve himself of the inhumane conditions at the detention center. App. 16; App. 40, l. 10 – 41, l. 22; App. 76, l. 23 – 77, l. 8; App. 144, ll. 21 – 23; App. 153, l. 4 – 162, l. 20.

Petitioner explained plea counsel failed to investigate into Petitioner's email account that had emails sent from the complaining witness to Petitioner and his girlfriend Harvley. App. 153, l. 4 – 154, l. 2. The emails saved on Petitioner's email account supported his argument that he was defending himself and his girlfriend from the aggressor complaining witness. Id. Petitioner

---

<sup>2</sup> Petitioner mistakenly sent the USB flash drive to the solicitor in this case. However, the solicitor promptly delivered the USB flash drive to plea counsel. App. 148, l. 24 – 149, l. 20.

also argued that plea counsel failed to make a reasonable investigation to access the voicemail recording on the USB flash drive to undermine the complaining witness' accusations. App. App. 136, l. 5 – 138, l. 24. Moreover, plea counsel failed to interview the complaining witness to ascertain what she would testify to at the bond reduction hearing and to notify her that the bond hearing date was moved up. App. 77, l. 11 – 78, l. 11; App. 82, l. 17 – 84, l. 23.

Petitioner cites those deficiencies in plea counsel's investigation as the cause for his involuntary guilty plea. Id. Petitioner argued that had plea counsel investigated into that evidence, his first-degree domestic violence charge would have been dismissed. App. 153, l. 4 – 155, l. 17. Accordingly, there was a reasonable likelihood the cost of Petitioner's bond would have been reduced such that Petitioner would have been able to pay it. Id. Therefore, Petitioner would not have been left languishing in the Pickens County detention center and would not have felt forced to plead guilty to relieve himself of those conditions. App. 161, l. 18 – 162, l. 25.

Turning to the evidence presented at Petitioner's PCR hearing, his girlfriend, Ferris Harvley testified that Petitioner lived with her when the second incident happened and she witnessed it. App. 100, ll. 12 – 16; App. 114, l. 15 – 116, l. 13. Harvley also testified she never invited the complaining witness to her residence. App. 105, l. 18 – 106, l. 25.

The incident began when Harvley went outside of her house to smoke a cigarette where the complaining witness was waiting in the parking lot in her car. App. 111, l. 15 – 115, l. 5. The complaining witness got out of her car and approached Harvley "accusing [Petitioner] of all kinds of stuff." Id. Harvley asked the complaining witness to leave and "went to go back into the house to get away from her." Id. However, the complaining witness "began shoving on the door and pushing [Harvley] trying to force her way into the front door." Id. Harvley began yelling and attempted to prevent the complaining witness from entering the home. Id.

Petitioner came down the stairs as the complaining witness successfully pushed open the door and began entering the doorway. Id. Petitioner then, in an effort to protect himself and his new girlfriend from the intruder, “walked through [the complaining witness]” and pushed her out onto the front porch. Id. Importantly, Petitioner was out on bail at the time from the first incident and there was a no contact order issued, such that the complaining witness knew she was violating the no contact order when she initiated the confrontation at Harvley’s home. Id.

In the moments prior to Petitioner “knocking” the complaining witness out of the doorway of Harvley’s home, a “maintenance man” was at the bottom of the steps and was calling the police while the complaining witness was trying to shove her way inside. Id. The complaining witness sat up, after falling over, and asked if the maintenance man was calling the police. Id. He replied “yes” he was calling the police, so the complaining witness got in her car and fled. Id.

Plea counsel John Gravlee also testified at PCR hearing and admitted that he received the USB flash drive. App. 117, l. 6 – 118, l. 23. Plea counsel explained that Petitioner mistakenly sent the USB flash drive to the solicitor who then forwarded it to plea counsel. Id. Plea counsel “plugged [the USB flash drive] into his computer” and “attempted to open the file” but no program on his computer at the time would open it. Id. That *single* attempt to open the file was the totality of plea counsel’s investigation into the exculpatory voicemail sent from the complaining witness to Petitioner. Id. Plea counsel never attempted to reformat the audio file to make it playable on his computer nor did he try to get a different program that could support the file format of the audio recording to open it. Id.

During the PCR hearing, Petitioner requested that the USB flash drive audio file be played during the hearing. App. 98, l. 17 – 99, l. 2; App. 132, l. 6 – 133, l. 4. The PCR court

allowed Petitioner to play the recording but did not allow it to be admitted into evidence because it was not authenticated. App. 136, l. 5 – 138, l. 1. Evincing the fact that plea counsel did not make a legitimate effort to open the file, it was opened easily at the PCR hearing. Id.

After the audio was played, Petitioner argued that the file was a voicemail from complaining witness' which stated that Petitioner did not hit her as she alleged. App. 138, ll. 6 – 22. Plea counsel disagreed, stating that the audio he heard was someone saying “you didn’t hit me three times” which he interpreted to mean that Petitioner *could have* hit her less than three times. Id.

Plea counsel also admitted he did not have a justification for why he failed to log into Petitioner’s email account to access the evidence of the complaining witness’ antagonistic messages to Petitioner and Harvley. App. 147, l. 17 – 148, l. 12. Plea counsel did not log onto Petitioner’s email account to access the threatening messages simply because he “did not feel comfortable” logging onto Petitioner’s email account. Id.

Petitioner testified at his PCR hearing that he pled guilty, due to plea counsel’s ineffective assistance of counsel, because pleading guilty was his only way to escape from the inhumane conditions at the Pickens County detention center. App. 144, ll. 21 – 23; App. 161, l. 22 – 163, l. 25. Petitioner was held in a cell with seven other cellmates. Id. He was forced to share a bed with another man and the cell had no running water. App. 40, l. 10 – 41, l. 22; App. 76, l. 23 – 77, l. 8. He also was attacked by multiple inmates while he was sleeping which “split [his] head.” App. 161, l. 22 – 163, l. 25 It was those inhuman conditions that motivated Petitioner’s desire to have his bond reduced. Id.

Petitioner argued that had plea counsel properly investigated into the emails on Petitioner’s email account, opened the USB flash drive voicemail file, and interviewed the

complaining witness, there was a reasonable likelihood his first-degree domestic violence charge would have been dismissed because the facts of the alleged incidents would not substantiate that charge. App. 165, l. 18 – 166, l. 6. Thus, Petitioner argued, his bond would have been reduced and he could have paid it rather than pleading guilty to relieve himself of the woeful conditions of the Pickens County detention facility. App. 144, ll. 21 – 23; App. 161, l. 22 – 163, l. 25.

The PCR court made an in-hearing ruling denying Petitioner's PCR application. App. 167, l. 24 – 168, l. 11. In the order of dismissal, the PCR court determined that plea counsel conducted a reasonable investigation. App. 185 – 189. The court found that the sequence of events showed Petitioner was aware plea counsel did not listen to the voice mail on the USB flash drive when he pled guilty. Id. The PCR court also found that Petitioner did not tell plea counsel he wanted plea counsel to investigate more before entering the guilty plea. Id.

### **Discussion**

Plea counsel conducted an insufficient investigation because he failed to investigate into the evidence Petitioner provided. Petitioner argued that insufficient investigation induced him to plead guilty involuntarily because, without the evidence Petitioner provided, plea counsel was unable to have the first-degree domestic violence charge dismissed. As a result, Petitioner's bond remained at \$15,000 and he was forced to plead guilty to relieve himself of the conditions at the Pickens County detention center. App. 144, ll. 21 – 23; App. 161, l. 22 – 163, l. 25.

Petitioner provided plea counsel evidence supporting his theory of the case that he acted in self-defense, and in defense of others, which Petitioner argued showed the complaining witness was not without blame in this case. App. 153, l. 4 – 162, l. 20; App. 139, ll. 4 – 15. Plea counsel failed to conduct a reasonable investigation into the multiple leads that were provided to

him by Petitioner such that Petitioner believed he had no other choice than to plead guilty. App. 82, l. 17 – 85, l. 14

In a PCR action, “[t]he burden of proof is on the applicant 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), SCRPC). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant 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.” Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). “The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases.” Butler, 286 S.C. at 442, 334 S.E.2d at 814.

First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. 668, 688 (1984)). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 117-118, 386 S.E.2d at 625. Specifically, “[a] reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694 (1984)); see also Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625 (1989).

Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Strickland, 466 U.S. at 691 (1984). Thus, “[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) (emphasis added).

“[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” Ard v. Catoe, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (internal quotation marks omitted) (emphasis omitted). “[C]ounsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions...” Strickland, 466 U.S. at 691. “[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.” Id. at 690.

In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008) this Court held that Lounds’ attorney provided ineffective assistance when he failed to adequately prepare for trial. Lounds, at 463, 670 S.E.2d at 463. Lounds was convicted of kidnapping and sentenced to life without parole. Id. at 457, 670 S.E.2d at 647. During his trial, Lounds’ testified in his own defense that he did not kidnap the victim and force the victim to give him money. Instead, Lounds met up with the victim because of an outstanding debt and that the victim volunteered to go to a relative’s home to ask for money to pay Lounds back. Id. at 458, 670 S.E.2d at 648.

At Lounds’ PCR hearing he claimed he was provided ineffective assistance of counsel because Lounds’ trial attorney failed to call witnesses that would have testified in support of Lounds’ testimony. Id. This Court agreed with Lounds and held that his trial counsel had a duty to, “at a minimum... interview potential witnesses.” Id.; quoting Ard v. Catoe, 372 S.C. 318, 321, 642 S.E.2d 590, 597 (2007).

In State v. Bagwell, 410 S.C. 259, 763 S.E.2d 630 (Ct. App. 2014) the Court of Appeals held that Bagwell's trial counsel was ineffective for failing to request for DNA testing of blood found at the crime scene. Id. at 268, 763 S.E.2d at 635. In Bagwell, there was an alleged burglary committed where the glass patio door was shattered and there was blood on the broken glass. Id. at 261 – 62, 763 S.E.2d at 631 – 32. The homeowner testified he saw Bagwell shortly after the alleged burglary and Bagwell was bleeding from his face. Id. Bagwell was convicted of first-degree burglary and sentenced to twenty years' imprisonment. Id. at 263, 763 S.E.2d at 632.

At Bagwell's PCR hearing, he argued that his attorney was ineffective for not testing the DNA from the blood at the scene to compare to Bagwell's DNA. Id. Bagwell testified that his attorney never informed him that the state had blood samples to compare to at the time of his trial. Id. Additionally, Bagwell presented blood samples at his PCR hearing that showed his blood did not match the blood found at the scene. Id. Trial counsel testified at Bagwell's PCR hearing that he did not pursue further investigation into the DNA evidence because the state "decided not to follow through with testing." Id.

The Court of Appeals held Bagwell's attorney provided ineffective assistance of counsel because, "the State used the [bloody] glass as circumstantial evidence of Bagwell's guilt." Id. at 266, 763 S.E.2d at 634. The Court of Appeals also held Bagwell was prejudiced by counsel's ineffective assistance because, "the only direct evidence linking Bagwell to the burglary was Armstrong's testimony that he saw Bagwell exiting the apartment through the glass door... [and] the State referenced the broken glass door several times at trial to corroborate Armstrong's testimony and infer Bagwell was inside the victims' apartment." Id. at 267, 763 S.E.2d at 634.

In the present case, Petitioner showed plea counsel failed to adequately investigate into his case. Plea counsel failed to access the emails on Petitioner's email account showing the

complaining witness threatening Petitioner and Harvley simply because plea counsel “did not feel comfortable” accessing it. App. 147, l. 17 – 148, l. 12; App. 153, l. 4 – 162, l. 20. Plea counsel also did not conduct a reasonable investigation into the voicemail on the USB flash drive because his entire investigation consisted of a *single* attempt at opening the audio file. App. 117, l. 6 – 118, l. 23; App. 153, l. 4 – 162, l. 20. Tellingly, the file was easily accessed during the PCR hearing and played before the court. App. 136, l. 5 – 138, l. 1. Lastly, plea counsel failed to interview the complaining witness about what she would have testified to at the bond reduction hearing and failed to notify her that the bond reduction hearing date had changed. App. 82, l. 17 – 85, l. 14.

Petitioner argued that had plea counsel investigated into that evidence and notified the complaining witness about the bond hearing date being changed from October 20, 2017 to October 19, 2017, he could have presented it to the bond reduction court which would have created a reasonable likelihood that Petitioner’s first-degree domestic violence charge would have been dismissed. App. 156, l. 2 – 162, l. 25. That dismissal would have lowered Petitioner’s bond such that he could have paid it and been able to escape the terrible conditions of the Pickens County detention center rather than pleading guilty. App. 144, ll. 21 – 23; App. 161, l. 22 – 163, l. 25.

The order of dismissal found that Petitioner pled guilty voluntarily because he knew that plea counsel was not going to open the USB flash drive audio file and because Petitioner did not request plea counsel to further investigate before he pled guilty. App. 185 – 189. However, both of those contentions could be construed as supporting his argument that he pled guilty involuntarily. Petitioner was on notice that plea counsel was refusing to access the evidence that Petitioner provided and Petitioner already requested that he investigate into it. Therefore,

Petitioner was aware that plea counsel would not conduct a proper investigation and he would be left languishing in the Pickens County detention center until trial, which could take over a year. Since Petitioner pled guilty to relieve himself from the conditions at the Pickens County detention center, plea counsel's ineffective assistance of counsel induced Petitioner to plead guilty involuntarily. App. 82, l. 17 – 85, l. 14. Accordingly, Petitioner's guilty plea should be withdrawn, and he should be granted a new trial.

2. The PCR court erred in not allowing Petitioner to question the complaining witness at his PCR hearing because Petitioner demonstrated her testimony was relevant to prove his PCR allegation that plea counsel's ineffective assistance of counsel induced Petitioner to enter his guilty plea involuntarily.

### **Relevant Facts**

At the beginning of Petitioner's October 22nd, 2019 PCR hearing, Bailey, a victim's advocate for the complaining witness, moved to quash the subpoena served on the complaining witness obligating her to testify at the PCR hearing. App. 70, l. 3 – 71, l. 8. Without providing evidence of her claim, the victim's advocate argued that the complaining witness was subpoenaed as a means to harass her. *Id.* She also claimed that the notice to the complaining witness was insufficient as the subpoena was served two days prior to the PCR hearing<sup>3</sup>. *Id.*

Petitioner explained that the service to the complaining witness took longer to accomplish than expected because a third party needed serve the subpoena on the complaining witness as Petitioner was not allowed to contact her pursuant the no contact order in place. App. 80, ll. 2 – 23. Petitioner further explained that her testimony was relevant to his PCR allegations and he was not subpoenaing the complaining witness to harass her. *Id.*; App. 81, l. 25 – 83, l. 24.

The PCR court was "inclined to quash the subpoena" and inquired as to how the complaining witness' testimony was relevant to Petitioner's PCR allegations. App. 76, ll. 17 – 18. The PCR court stated Petitioner would need to present a prima facie case showing how the complaining witness' testimony was relevant before he would enforce the subpoena. App. 86, l. 23 – 87, l. 5; App. 87, ll. 10 – 12. Petitioner's explanation, which served as a proffer of the

---

<sup>3</sup> As far as undersigned counsel is aware Rule 45 of the South Carolina Rules of Civil Procedure has a notice requirement only for subpoenas duces tecum and there is no notice requirement for subpoenas ad testificandum. Rule 45(a)(4) SCRPC; Scott Moïse, *Subpoenas Revisited*, S.C. Law., January 2017, at 52, 54.

complaining witness' testimony, was that the testimony would establish his allegation that he pled guilty involuntarily because of plea counsel's ineffective assistance of counsel. App. 74, l. 12 – 76, l. 10.

Petitioner explained he was forced to plead guilty to escape the woeful conditions at the Pickens County detention center. App. 161, l. 22 – 162, l. 25. Petitioner's PCR claim was that plea counsel's insufficient investigation left Petitioner unable to have the first-degree domestic violence charge against him dismissed. App. 156, l. 2 – 162, l. 25. As a result, his bond was not reduced, and he was forced to plead guilty to get out of the jail rather than pay his bond to get out. Id.

Petitioner explained that at the outset of plea counsel's representation of him, his main concern was bonding out of jail. App. 76, l. 23 – 79, l. 6. Accordingly, he informed the PCR court that the October 19th, 2017 date of his bond reduction hearing was crucial. Id.

Petitioner stated that the complaining witness would have testified at his bond reduction hearing that she fabricated the allegations against him. App. 74, l. 15 – 75, l. 1. However, plea counsel failed to notify the complaining witness that the bond reduction hearing was moved up from October 20th, 2017 to October 19th, 2017. App. 77, l. 11 – 78, l. 15. As a result, the complaining witness was not present to testify that Petitioner never struck her. Id. Consequently, Petitioner's first-degree domestic violence charge was not dismissed, and his bond was not reduced. This left Petitioner languishing in the Pickens County detention center under the terrible conditions that forced him to plead guilty to escape from that environment.

Another point of relevance for the complaining witness' testimony was the voicemail audio recording from the USB flash drive that Petitioner played at the PCR hearing and the emails on Petitioner's email account because plea counsel failed to access the file on the USB

flash drive and refused to access Petitioner's email account to listen to the voicemail because "he was uncomfortable" logging onto Petitioner's email account despite Petitioner giving him express consent. App. 132, l. 12 – 133, l. 1; App. 147, l. 17 – 148, l. 12. Thus, Petitioner needed the complaining witness' testimony to explain her statements in the voicemail audio recording and the email messages on his email account. App. 74, l. 15 – 75, l. 1.

Furthermore, in the state's return and motion to dismiss the state specifically argued that Petitioner's PCR application should be denied on the allegation that plea counsel failed to call Diane Phillips as a witness because he was "speculating" as to what the complaining witness would have testified to at his bond reduction hearing. App. 60 – 62. Accordingly, Petitioner needed to refute the state's argument that his allegation was merely speculative.

The order of dismissal found that the issue of enforcing the subpoena to compel the complaining witness to testify at Petitioner's PCR hearing was not preserved for review because Petitioner did not raise the argument again at the end of the hearing. App. 172 – 174.

## **Discussion**

The PCR court erred when it denied Petitioner's request to enforce the properly served subpoena on the complaining witness to compel her to testify during his PCR hearing where Petitioner proffered as to why her testimony was relevant to his allegations of ineffective assistance of counsel and where the issue was preserved for review as Petitioner, a *pro se* litigant, believed that further insisting that the subpoena be enforced would have been futile because he repeatedly raised the issue and the court repeatedly rebuffed<sup>4</sup> him. App. 90, ll. 5 – 24; App. 97, ll. 17 – 25; App. 98, l. 25 – 99, l. 2; App. 135, ll. 15 – 17; See State v. Passmore, 363

---

<sup>4</sup> Petitioner's motion to amend/alter judgment and amended motion to amend/alter judgment were filed out of time, but Petitioner explained he did not further object to enforce the subpoena because the PCR court told him earlier in the hearing that if he interrupted again he would receive an additional six months' imprisonment. App. 135, ll. 15 – 17; App. 225.

S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005) (“[O]ur courts have developed the doctrine of futility, which recognizes that in circumstances whe[n] it would [have] be[en] futile to raise an objection to the trial [court], failure to raise the objection will be excused.”)

Petitioner represented himself at his PCR hearing and the United States Supreme Court has stated, “we have never held *pro se* prisoners to the standards of counseled litigants.” Gonzalez v. Crosby, 545 U.S. 524, 544 (2005) (See Haines v. Kerner, 404 U.S. 519, 520 – 21 (1972)). The Court also decided that all formalities, save failure to state a claim, should be relaxed when applied to *pro se* litigants. “As the Court unanimously held in Haines v. Kerner, a *pro se* complaint, “however inartfully pleaded,” must be held to ‘less stringent standards than formal pleadings drafted by lawyers’ and can only be dismissed for failure to state a claim if it appears.” Estelle v. Gamble, 429 U.S. 97, 106 (1976).

In the present case, the order of dismissal stated that the issue of Petitioner’s subpoena on the complaining witness was rendered unpreserved because he did not raise it again at the end of the hearing. App. 172 – 174. However, the issue of enforcing the subpoena on the complaining witness was preserved for review because it was raised multiple times during hearing and the PCR court demanded Petitioner make a prima facie showing that the complaining witness’ testimony was relevant to his PCR allegations before the subpoena would be enforced. App. 71, l. 9 – 72, l. 9; App. 74, l. 15 – 76, l. 10; App. 77, l. 11 – 78, l. 11; App. 86, l. 23 – 87, l. 5; App. 87, ll. 10 – 12. Petitioner explanation as to why the complaining witness’ testimony was relevant functioned as a proffer that established the required prima facie showing that her testimony was relevant to prove his claim of ineffective assistance of plea counsel. App. 71, l. 17 – 72, l. 1; App. 74, l. 15 – 76, l. 10. Petitioner also tried to bring the issue up again, but the court cut him off and stated it had already “ruled on that.” App. 97, ll. 21 – 25; App. 98, l. 25 – 99, l. 2.

After Petitioner testified in his own defense, the court asked if there was “Anything else [to present].” App. 167, l. 19. Petitioner responded “No, your honor.” App. 167, l. 20. Then the PCR court immediately denied his PCR application. App. 167, l. 24 – 168, l. 11. Since the PCR court’s initial ruling was that it would enforce the subpoena on the complaining witness if Petitioner could present a *prima facie* case that her testimony was relevant, the court’s in-hearing denial of Petitioner’s PCR application served as a denial of Petitioner’s request to enforce the subpoena. Petitioner, especially being a *pro se* litigant, who already raised the issue multiple times earlier in the hearing, should not have been required to insist *again*, at the end of the hearing, that the subpoena compelling the complaining witness to testify be enforced. Gonzalez v. Crosby, 545 U.S. 524, 544 (2005) (See Haines v. Kerner, 404 U.S. 519, 520 – 21 (1972)). Since the complaining witness’ testimony made Petitioner’s theory of the case “more probable” it was relevant and the PCR court’s denial to enforce the subpoena on the complaining witness was an error. See State v. Caldwell, 378 S.C. 268, 286–87, 662 S.E.2d 474, 484 (Ct. App. 2008).

“A defendant has the procedural right to one fair bite at the apple. That is, every defendant has a right to file a direct appeal and one PCR application.” Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582–83 (2002); see also Robertson v. State, 417 S.C. 505, 513, 795 S.E.2d 29, 33 (2016) (citing Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999)). In PCR proceedings, the applicant bears the burden of proving the allegations contained in his application. See Hyman v. State, 397 S.C. 35, 42, 723 S.E.2d 375, 378 (2012) (overruled on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018)) (citing Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985)); see also Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) (citing Lomax v. State, 379 S.C. 93, 100, 665 S.E.2d 164, 167 (2008)).

In this case, Petitioner was denied his “one fair bite at the apple” when the PCR court denied his requests to enforce the subpoena on the complaining witness because Petitioner needed her testimony to prove his PCR allegations. Thus, it was incumbent upon the PCR court to enforce the subpoena on the complaining witness and compel her to testify during the “one full and fair hearing” to which Petitioner was entitled. See Robertson, *supra*.

For evidence to be admissible, it must be relevant. Rule 402, SCRE. Relevant evidence is “evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action *more probable or less probable* than it would be without the evidence.” Rule 401, SCRE (emphasis added). “Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved.” State v. Caldwell, 378 S.C. 268, 286–87, 662 S.E.2d 474, 484 (Ct. App. 2008) (citing State v. Sweat, 362 S.C. 117, 126–27, 606 S.E.2d 508, 513 (Ct. App. 2004)). “Evidence is admissible if ‘logically relevant’ to establish a material fact or element of the crime; it need not be ‘necessary’ to the State’s case in order to be admitted.” Sweat, at 127, 606 S.E.2d at 513.

To satisfy the burden of proof Petitioner had in establishing his PCR allegations, he needed the complaining witness to testify for multiple reasons. Jordan v. State, 406 S.C. 443, 449, 752 S.E.2d 538, 541 (2013) (“In a PCR proceeding, the applicant bears the burden of demonstrating that he is entitled to relief.”) First, Petitioner needed her to explain that she was planning to attend the October 20th, 2017 bond reduction hearing. Second, her testimony was necessary to prove that she was never notified by plea counsel that the date of the bond reduction hearing was moved to October 19th, 2017 and that caused her to miss the hearing. Third, it was necessary for the complaining witness to specify she would have testified at the bond reduction

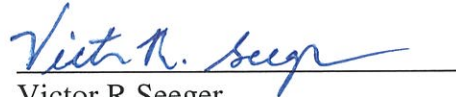
hearing that she “was lying” about the incidents between Petitioner and her. App. 160, l. 6 – 161, l. 6.

Accordingly, the complaining witness’ testimony was relevant because had she testified at the PCR hearing Petitioner could have shown that but for plea counsel’s ineffective assistance of counsel there was a reasonable likelihood his first-degree domestic violence charge would have been dismissed and his bond amount lowered such that he would have been able to pay it to leave the Pickens County detention center rather than plead guilty. Thus, Petitioner made the required prima facing showing of relevancy and the court should have enforced the subpoena compelling the complaining witness to testify.

Moreover, the state argued in its return and motion to dismiss that Petitioner’s allegation of ineffective assistance of counsel regarding what the complaining witness’ would have testified to at the bond reduction hearing was mere speculation because he did not have evidence of what her testimony would have been. App. 60 – 62. As such, Petitioner should not have been prevented from presenting her testimony because it was the evidence necessary to establish his PCR claim. Accordingly, the complaining witness’ testimony was relevant and the PCR court erred when it refused to enforce the subpoena to compel her to testify at Petitioner’s PCR hearing.

**CONCLUSION**

By reason of the foregoing arguments, Petitioner respectfully requests this Court grant certiorari to allow for full briefing on this issue.

A handwritten signature in blue ink, reading "Victor R. Seeger", is written over a horizontal line.

Victor R Seeger  
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of October, 2021.