THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Jan 12 2022

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No.: 2021-001136

Rasheed Glover, 367438, Petitioner,

vs.

State of South Carolina, Respondent.

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

1. Whether the lower court erred for failing to find counsel provided ineffective assistance during sentencing and post-trial motion hearings and that prejudice resulted.

STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact but deference is not given to conclusions of law. *Smalls v. State*, 810 S.E.2d 836 (2018). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling on findings of fact. *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984). Questions of law are reviewed *de novo*, and the appellate court "will reverse the decision of the PCR court when it is controlled by an error of law." *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Horry County Clerk of Court. During the March 2015 term of the Horry County Grand Jury, Petitioner was indicted for armed robbery (2015-GS-26-01237). App. p. 217.

On October 12, 2015, trial proceeded against Petitioner *in absentia* before the Honorable R. Ferrell Cothran and a jury. App. p. 1. Petitioner was represented by Johnny Gardner, Esquire. The State was represented by Lauree Richardson, Assistant Solicitor, and Thomas G. Terrell, III, Assistant Solicitor. On October 13, 2015, the jury found Petitioner guilty as indicted. App. p. 202. The Honorable R. Ferrell Cothran issued and sealed Petitioner's sentence. App. p. 203.

On March 15, 2016, Petitioner appeared in front of the Honorable Steven H. John at the Horry County Courthouse. App. p. 205. Petitioner was represented by Jarrrett Bouchette, Esquire. Respondent was represented by Lauree Richardson, Assistant Solicitor. After Judge John unsealed Petitioner's twenty-five year sentence, Mr. Bouchette stated that the defense had no motions. App. pp. 207-208. Thereafter, the court indicated that he appreciated Mr. Bouchette's response, but he determined that the matter should be held in abeyance until Mr. Gardner could be present. App. pp. 208-209.

On March 17, 2016, the matter was resumed in front of the Honorable Steven H. John at the Horry County Courthouse. App. p. 209. Petitioner was present and was presented by Johnny Gardner, Esquire. Respondent was represented by Lauree Richardson, Assistant Solicitor. After addressing the abeyance due to Mr. Gardner's absence while in trial, the court heard from both sides. The court noted that he did not

have a transcript and was not the trial judge before declining to reduce the sentence imposed by Judge Cothran or grant a new trial. App. pp. 213-214.

A timely notice of appeal was filed on Petitioner's behalf and Katherine H. Hudgins, Esquire, perfected the appeal. An *Anders* Brief was submitted and addressed the following issue:

> Did the judge who unsealed and pronounced sentence following a trial in the Appellant's absence abuse his discretion in refusing to reconsider the twenty-five year sentence imposed by the trial judge when a co-defendant received a lesser sentence and the record fails to reflect on appropriate basis for the disparate sentence?

App. p. 241. On May 17, 2017, the South Carolina Court of Appeals dismissed Petitioner's appeal. *State v. Glover*, 2017-UP-210 (S.C. Ct. App. filed May 17, 2017); App. p. 255. The Remittitur was issued on June 2, 2017. App. p. 257.

Petitioner filed an Application for Post Conviction Relief filed on May 2, 2018. App. p. 258. Respondent submitted a Return and Motion to Dismiss on August 2, 2018. App. p. 268. On February 24, 2020, Petitioner, through counsel, filed an Amendment to Application for Post Conviction Relief, which stated the following specific allegations of ineffective assistance of counsel:

1. Ineffective assistance of counsel for failure to actively negotiate a plea offer and/or ensure that Applicant had the opportunity to properly reject the opportunity to enter a guilty plea.

2. Ineffective assistance of counsel for failure to properly advise Applicant about being tried in his absence if he did not appear for trial.

3. Ineffective assistance of counsel for failure to move for a continuance prior to jury selection and/or object to the trial in Applicant's absence.

4. Ineffective assistance of counsel for failure to offer meaningful representation during the sentencing phase of Applicant's trial.

5. Ineffective assistance of counsel related to the hearing to open Applicant's sentence and for post trial motions, specifically, but not limited to: a) Failure to have knowledge of, prepare for and be present at the hearing opening Applicant's sentence. Additionally, failure to ensure that the representative that appeared on his behalf was properly prepared and advocating for Applicant; b) Ineffective assistance of counsel for failure to make an oral or written request and/or objection for additional time and/or for the trial court to hear Applicant's post trial motions; c) Ineffective assistance of counsel for failure to be properly prepared to provide information beneficial to Applicant or make arguments at the final motion hearing.

App. pp. 282. Via the Amendment, Petitioner requested "relief in the form of having his conviction and sentences vacated to allow for a new trial and/or whatever relief the Court deems proper, which may be in the form of a reconsideration hearing." App. p. 281.

On March 31, 2021, an evidentiary hearing was convened on the South Carolina Supreme Court's virtual platform in front of the Honorable Paul M. Burch. App. p. 284. Petitioner was present at Lee Correctional Institution, and he was represented virtually by Tricia A. Blanchette, Esquire.[1] Respondent was represented by William Ray, Esquire. Petitioner testified and called Johnny Gardner, Esquire, Sammantha Daley and Roslyn Glover to the stand. Petitioner introduced two exhibits. The court also had before him a copy of the records stemming from Petitioner's underlying trial and appeal.

At the close of the evidentiary hearing, the court requested proposed orders from both parties and allowed Petitioner's counsel time to obtain the evidentiary hearing transcript. Upon receipt of the requested orders, the Honorable Paul M. Burch issued an Order of Dismissal on May 7, 2021, which was filed on May 11, 2021. App. p. 373.

Petitioner, through counsel, timely filed a Rule 59, SCRCP, Motion on July 2, 2021, which incorporated his proposed Order. App. p. 404. The Honorable Paul M. Burch issued an Order Denying Applicant's Motion Pursuant to Rule 59(a) and (e),

[1] Petitioner and his counsel communicated privately via telephone during the evidentiary hearing.

SCRCP on August 30, 2021, which was filed on September 1, 2021. App. p. 445. A Notice of Appeal was filed on October 7, 2021, from which this Petition follows.

ARGUMENT

The Sixth and Fourteenth Amendments of the United States Constitution guarantee criminal defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). This guarantee of effective assistance carries through to sentencing proceedings. *See Lafler v. Cooper*, 566 U.S. 156, 132 S.Ct. 1376, *Glover v. United States,* 531 U.S. 198, 203–204, 121 S.Ct. 696, 604 (2001), *Mempa v. Rhay,* 389 U.S. 128, 88 S.Ct. 254 (1967), *Wiggins v. Smith,* 539 U.S. 510, 538, 123 S.Ct. 2527 (2003), and *Locklear v. Harvey*, 254 S.E.2d 293, 273 S.C. 58 (1979).

Where an application for post conviction relief alleges ineffective assistance of counsel 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." *Id.* 466 U.S. at 686; *see Butler v. State*, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 691. The applicant must overcome this presumption to receive relief. *Bell v. State*, 321 S.C. 238 (1996); *see also Cherry v. State*, 300 S.C. 238 (1989); Rule 71.1(e), SCRCP.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's

performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117 (citing *Strickland*, 466 U.S. at 688). 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." *Cherry,* 300 S.C. at 117–18. Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in *Strickland* prejudice because "any amount of [additional] jail time has Sixth Amendment significance." *Glover,* 531 U.S. at 203, 121 S.Ct. 696.

I. The lower court erred for failing to find counsel provided ineffective assistance during sentencing and post-trial motion hearings and that prejudice resulted.

By way of his Amendment, Petitioner made the following allegations regarding trial counsel's performance at sentencing, the opening of his sentence and post-trial motions:

1. Ineffective assistance of counsel for failure to offer meaningful representation during the sentencing phase of Applicant's trial.

2. Ineffective assistance of counsel related to the hearing to open Applicant's sentence and for post trial motions, specifically, but not limited to: a) Failure to have knowledge of, prepare for and be present at the hearing opening Applicant's sentence. Additionally, failure to ensure that the representative that appeared on his behalf was properly prepared and advocating for Applicant; b) Ineffective assistance of counsel for failure to make an oral or written request and/or objection for additional time and/or for the trial court to hear Applicant's post trial motions; c) Ineffective assistance of counsel for failure to be properly prepared to provide information beneficial to Applicant or make arguments at the final motion hearing.

As is argued in the Rule 59, SCRCP, Motion, the lower court failed to fully address the allegations related to counsel's representation during sentencing and the post trial motions as addressed in the Amendment and at the evidentiary hearing. In reliance

on *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007), Petitioner requested that the lower court make specific findings of fact and state expressly the conclusions of law to each issue presented at the evidentiary hearing and Petitioner noted areas of specific concern in the Order. In denying the Rule 59, SCRCP, Motion, the lower court declined to alter or amend the Order, properly address the issues as raised prior to and at the evidentiary hearing, and make findings supported by the record. Therefore, Petitioner urges this Court to consider the issues as addressed herein and address the failure of the lower court to make proper findings of fact and conclusions of law. [2] Petitioner submits that if such is done, relief should be granted.

Upon review of the record, Petitioner urges this Court to find that the lower court must be reversed since Petitioner did not receive effective assistance during sentencing and the post-trial motion hearings and prejudice resulted. Here, the lower court's reliance on Petitioner absence from trial and the jury's verdict to preclude a finding of prejudice is contrary to the holding in *Glover* that ineffective assistance of counsel during a sentencing hearing can result in *Strickland* prejudice because "any amount of [additional] jail time has Sixth Amendment significance." *Glover,* 531 U.S. at 203, 121 S.Ct. 696. Here, the length of Petitioner's sentence, along with the failure to have it properly

[2] *See Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992) (Remanding and explaining the Court's concern with PCR orders that fail to address the issues raised at a PCR hearing, which result in depriving parties of rulings on the issues, make review by the appellate court and the workload of the appellate court more difficult, and require remand for new hearings and/or orders.); *Reese v. State*, 425 S.C. 108, 820 S.E.2d 376 (2018) (Granting the request for remand by both parties as result of the "patent inadequacies" of the PCR court's order.); *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019) (Remanding for the PCR court to make adequate findings of fact and conclusions of law regarding an unaddressed PCR claim despite a Rule 59, SCRCP, motion not being filed.). *See also Smalls v. State*, 422 S.C. 174, 195, 810 S.E.2d 836, 847 (2018), *Ramirez v. State*, 419 S.C. 14, 21 n.6, 795 S.E.2d 841, 845 n.6 (2017), *Simmons v. State*, 416 S.C. 584, 592, 788 S.E.2d 220, 225 (2016), *Tappeiner v. State*, 416 S.C. 239, 249 n.5, 785 S.E.2d 471, 476 n.5 (2016), *Hall v. Catoe*, 360 S.C. 353, 364-65, 601 S.E.2d 335, 341 (2004), *Bryson v. State*, 328 S.C. 236, 236-37, 493 S.E.2d 500, 500 (1997), *McCullough v. State*, 320 S.C. 270, 272, 464 S.E.2d 340, 341 (1995), *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991).

reconsidered, speaks directly to the prejudice that resulted from counsel's admitted ineffective assistance.

As addressed above, Petitioner was tried in his absence before the Honorable R. Ferrell Cothran and a jury on October 12, 2015. App. p. 1. Petitioner was represented by Johnny Gardner, Esquire. Respondent was represented by Lauree Richardson, Assistant Solicitor, and Thomas G. Terrell, III, Assistant Solicitor. On October 13, 2015, the jury found Petitioner guilty as indicted. App. p. 202. The Honorable R. Ferrell Cothran issued and sealed Petitioner's sentence. App. p. 203.

On March 15, 2016, Petitioner appeared in front of the Honorable Steven H. John at the Horry County Courthouse. Petitioner was represented by Jarrrett Bouchette, Esquire. Respondent was represented by Lauree Richardson, Assistant Solicitor. At the beginning of the hearing, Ms. Richardson stated that Petitioner was tried in his absence and his sentence was sealed by Judge Cothran. App. p. 207, lns. 2-9. She further stated: "We are before you today to reveal that sealed sentence." App. p. 207, lns. 8-9. Thereafter, Judge John asked if Mr. Gardner was trial counsel. The State responded that Mr. Gardner was in trial, but a representative from his office was present. App. p. 207.

After Judge John unsealed and pronounced Petitioner's twenty-five year sentence, Mr. Bouchette spoke for the first time and stated that the defense had no motions. App. p. 208, ln. 1. In response, Judge John stated:

> All right, sir. Well, I appreciate it but and that's probably one of the reasons I was asking if Mr. Gardner was to be present. If you want to – want me to hold this in abeyance for a – until Mr. Gardner is available this particular week, you understand should have any objections to the sentence, you want the sentence modified in any way, if you want to ask the Court to change it in any way, you need to do that while this matter is now open. You have the ability to do so. The Supreme Court has said so in more than one case. But now is the time to do that.

App. p. 208, lns. 2-11. Mr. Bouchette responded he had been informed about the hearing that afternoon. He requested that the matter be held in abeyance until Mr. Gardner could be present since he was not at Petitioner's trial. App. p. 208, lns. 12-17. After the State informed the court that the trial should conclude on Wednesday, Judge John determined that the matter would reconvene on Thursday morning. App. pp. 208-209.

On March 17, 2016, the matter was reconvened in front of Judge John at the Horry County Courthouse. App. p. 209. Petitioner was presented by Johnny Gardner, Esquire. Respondent was represented by Lauree Richardson, Assistant Solicitor.

At the beginning of the hearing, Judge John stated that he had unsealed the sentence and had continued the matter since Mr. Gardner was "unavailable to make any motions." App. p. 209, lns. 10-17. He stated: "You understand that once the Court opens the sealed sentence, that is the time for the Defense if they have any issues as to the prior matter to bring those to the Court's attention." App. p. 209, lns. 17-20. Mr. Gardner responded that he "would make our standard post trial motions" and that he believed the court had the power to reconsider the sentence. App. pp. 209-210. He explained that he had been in the middle of another trial and had done a little research regarding the "power" of the court. App. p. 210, lns. 1-4. Judge John responded that despite some "logical inconsistencies with it" the Supreme Court had found that "whoever opens the sealed sentence has the authority to change the prior sentence." App. p. 210, lns. 5-9. Then, he invited Mr. Gardner to argue against the prior sentence. App. p. 210, lns. 9-11.

In response, Mr. Gardner stated that to the "best of his information" Petitioner did not have a prior record, but he acknowledged the current conviction was a "big one." App. p. 210, lns. 12-15. He also stated that he believed that the co-defendant's all got ten

and "the ten-year mark is probably fair." App. p. 210, lns. 15-19. He added that Petitioner was twenty, was not married, had no children and lives in Horry County. App. p. 210, lns. 21-22.

After being asked to make her argument, Ms. Richardson stated that Mr. Gardner was correct about the co-defendant's sentences, and she took the opportunity to address the roles of each and summarize the facts presented at trial. App. pp. 211-212. She argued that it was a "very, very serious crime" at a time when "a lot of clerks were getting killed" and the victim clerk was "very fearful" to testify at trial. App. p. 212, lns. 4-7. She concluded by arguing: "The State would oppose any reduction in sentence just based upon the fact that Judge Cothran was the sentencing judge. He's the trial judge, he's the one that heard the facts in the case." App. p. 212, lns. 7-10. In response, Mr. Gardner asked the court to consider a ten-to-fifteen-year sentence. App. p. 212, lns. 22-24.

In his ruling declining to change the sentence or grant a new trial, Judge John first noted that he did not have the transcript to review and he was not the judge who listened to the testimony in the matter. App. p. 213. He noted that he was basing his ruling on the classification of armed robbery as a violent and most serious offense. He also noted that he was taking into consideration the facts and circumstances addressed by the State. He concluded his ruling by stating: "I respectfully decline to grant the request of the Defense to change the sentence of Judge Cothran." App. p. 213, lns. 17-18.[3]

Turning to the testimony elicited at the evidentiary hearing, Petitioner acknowledged that he made a decision to not attend trial because he was afraid. App. pp.

[3] Judge John also found that he had not been presented with any matters sufficient to grant a request for a new trial. App. p. 213, lns. 19-25.

302, 316. He explained that he was subsequently arrested in Horry County, and he was taken to the county detention center. App. p. 305. When asked to describe what happened on the morning of March 15, 2016, he responded:

> March 15th, transportation came and arrived at the jail and transported me to the courthouse. I didn't know exactly what was going on because I wasn't told. I just figured it had something to do with the charges. Once I arrived here I was told a lawyer would meet with you in the back if they didn't make it to the jail. I went inside the courtroom and Johnny Gardner's partner, Mr. Bouchette, was present and I was given the sentence of 25 years.

App. p. 305, lns. 13-20. He explained that he was unaware that Mr. Gardner was in trial, that he did not speak with Mr. Bouchette before the hearing, that he was not aware that Mr. Bouchette was going to be at the hearing on Mr. Gardner's behalf, and that he had not discussed the making of motions or arguments with counsel prior to the hearing. App. pp. 305-306. He further explained that he did not get to speak with Mr. Gardner after the hearing and that they only spoke briefly as they were "in a rush" to get into the courtroom for the March 17th hearing. App. pp. 306-307, 322.

When asked about the hearing on March 17, 2016, Petitioner responded that he would have wanted time with his attorney to discuss arguments to be made, people that could speak on his behalf and to be prepared to address the court himself. App. pp. 307-309, 323. He indicated that letters had been obtained and witnesses were present to address what could have been presented in 2016. App. p. 309. He also testified about what he would have wanted to tell the court. App. p. 309-310. When asked about the break taken by counsel to confer with him, he recalled asking counsel about getting a sentence in line with his co-defendants. App. p. 311.

Petitioner testified that it was not discussed with him why Judge Cothran was not present, and he responded that he would have wanted Judge Cothran to be the judge to reconsider his sentence.[4] App. p. 308. When asked about the State's argument that Judge John should not reduce his sentence simply because he was not the sentencing judge, he responded that if the State's position would have been communicated to him he would have wanted Judge Cothran to be present. App. pp. 310-311.

Regarding Judge John's comments that he did not have a transcript nor was he the trial judge, he affirmed that he would have wanted a transcript to be obtained, and he reiterated that he would have wanted the trial judge to be the one to reconsider his sentence. App. p. 311-312. He explained that he would have wanted to have the opportunity to explain to Judge Cothran why he did not show up for trial and taken ownership for that decision. App. p. 312. He testified that he would have wanted the issue regarding the disparate sentences and/or a trial tax properly addressed by counsel App. pp. 312-314.

Following the testimony of Petitioner, Sammantha Daley was called to the stand. App. p. 325. Ms. Daley explained that she had been Petitioner's friend since their freshman year in high school (2010), and he was currently her boyfriend. App. p. 325. She also explained that she assisted PCR counsel in obtaining letters from individuals that would have been willing to speak and/or provide letters in 2016. App. pp. 325-326, 368-372. She explained that she was in contact with Petitioner from the detention center in 2016, and she would have been willing to come to his hearing, speak on his behalf,

[4] The Honorable R. Ferrell Cothran, Jr. was elected as a Circuit Judge in 2006 and is currently serving in that capacity.

and/or gather letters if given notice such was needed. App. p. 327. To conclude her testimony, she read her letter for the court. App. pp. 327-328, 368.

Next, Roslyn Glover, Petitioner's mother, testified. App. p. 328. She recalled attending the hearing held by Judge John on March 17, 2016. App. p. 329. She recalled not having the opportunity to speak with Mr. Gardner prior to the hearing. App. p. 329. She also recalled not being asked to speak on her son's behalf, and she testified that she "absolutely" would have wanted to speak on his behalf. App. p. 329. To conclude her testimony, she read the letter she had prepared. App. 329-330, 369.

As his final witness, Petitioner called Johnny Gardner, Esquire, to the stand and Petitioner submits that a majority of his testimony is not properly considered or reflected in the Order of Dismissal. App. p. 330. Therefore, Petitioner will thoroughly address his testimony to include direct quotations that conflict with the lower court's findings.

On direct, Mr. Gardner testified that he had practiced law for nearly thirty years, with a focus on criminal defense. App. pp. 330-331. He recalled being appointed to represent Petitioner, and he addressed his preparation with Petitioner, to include their last meeting before the trial date. App. pp. 331-333. He addressed his shock when Petitioner did not appear for trial and how the trial proceeded in his absence. App. pp. 333-334.

When asked to address sentencing, Mr. Gardner explained that he likely did not say anything during sentencing because he was probably "trying to not make the Judge mad or any madder." App. p. 335, lns. 2-10. He recalled first hearing Petitioner was being held in the jail when he was in the middle of a trial. App. p. 335, ln. 19-21. When asked about the comments made at the March 15th hearing regarding him being in trial, he responded:

> Yeah, that makes sense. And it looks like the State treated it like administerial type perfunctory function. You know let's just get somebody to stand in and unseal this sentence and we'll move on to the next case, and that's sad, but it sounds like that's what happened. But then I hear that Judge John continued the case, presumably continued it, so I could finish the trial and then come be present for the – for whatever hearing that we were going to have.

App. p. 336, lns. 4-11.

In response to whether he met with Petitioner prior to the March 17th hearing, Mr. Gardner explained that he was in the middle of a substantial trial and if he would have taken time from the trial to meet with Petitioner, his client from that trial would have grounds to PCR him. App. pp. 336-337. He also explained his belief that there would not be finality on the motions on March 17th when he chose to not meet with Petitioner. App. p. 337, lns. 3-12. When asked what he thought was going to happen, he responded:

> So what I anticipated, why would they bring the guy from the jail that I didn't even know was at the jail to schedule him for a hearing when I'm in the middle of trial and then say well we'll just wait until your trial is over and then we'll bring him back again. I, you know, was thinking that number one, I really did not think that a non-sentencing judge would have – would be doing the consideration to amend or whatever sentence, but I did read the transcript one of ya'll sent me and I think I agree with him at the time that they could do that. That's just trial tactics. If a judge says he's got the authority to do something and you think he's going to do it in your favor, you're going to agree with him no matter what, right? Yes, sir, Your Honor, I think you can reduce the sentence if you want to. Okay. So by then I thought for sure he was going to reduce it.

App. p. 337, ln. 25 – p. 338, ln. 14.

Mr. Gardner testified that he could not imagine "any scenario that I wouldn't have ordered the transcript," and he explained that did not have notice or time to order the transcript. App. pp. 338-339. He explained that without the transcript Judge John was "doing it blind," and he should have said "look judge, we can't do anything until we get some transcripts or something." App. p. 341, lns. 3-25. He also testified that he did not

have sufficient notice or time to contact Petitioner's friends or family to speak or get letters on his behalf since he was in the middle of another trial. App. p. 339. When asked if he thought the hearing was a fair opportunity for Petitioner to have his sentence reconsidered, he responded: "Based upon the outcome, I'd have to say no." App. p. 342, lns. 1-4.

As his direct examination continued, the following testimony was elicited:

Question: And in this scenario you described to us that you walked in and you kind of questioned Judge John, can you do this and he says he can. Did you ever anticipate that both Judge John and the state would consider the fact that wasn't the sentencing judge so therefore he wouldn't change the sentence; did you see that coming at all?

Answer: Not at all that day. Not at all. I never saw that coming.

Question: And is that a concern to you that you think you should have more thoroughly addressed or even addressed, I guess?

Answer: It needs to be addressed, and I've been thinking about it while I've been sitting here for the last hour and a half and if I was the Circuit Court or the Supreme Court, I would look at this very carefully, because I cannot envision a flat line rule where you say we don't ever want a non-trial judge to do the sentence or consider the post-trial motions because there can be a time when a trial judge is not available. But if that's the case, we want it to be done properly. You can't just because you consider something, if it's not considered properly then it's not – it's not essentially being considered. So if by your own admission you say I don't have a transcript; I don't know anything about this case, but I am ready to decide post-trial motions or I am ready to decide whether or not I should reduce the sentence then I don't think it's an effective hearing. And now I'll take responsibility for that. I can't blame the judge for that, he was just trying to – to move the case along and that's his job.

App. p. 339, ln. 19- p. 340, ln. 20.

Regarding the issue raised on appeal and the matter of a "trial tax," he acknowledged that he did not raise the issue in the record, and he agreed that he was not

able to raise the issue to Judge Cothran since Judge John presided over the post trial motions. App. pp. 342-343. Specifically, as to a "trial tax" he explained: "...that's what happens. I mean every – every time I remember somebody getting sentenced at trial, with the exception of one case it's always been more than they would have got on a guilty plea." App. p. 343, lns. 6-9.

On cross-examination, he explained that he was not present to object to Judge John unsealing the sentence, and he thought "he was well within his rights to unseal the sentence." App. p. 350, lns. 5-21. But, he also explained a prior instance where a sentence had been unsealed, and then the post-trial motions were heard at a later time. App. p. 350. When asked if he had a conversation with Mr. Bouchette about preparation for the first hearing, he responded: "Probably none. I may have said go on over there and you know – probably wasn't thinking anything was going to happen so there was nothing to be done except have somebody there for him." App. p. 351, lns. 1-6. When asked about if it was beneficial that the matter was held in abeyance for him to appear, he responded: "Well, at the time it sounded like the right thing to do, but based on the outcome it really didn't change anything." App. p. 351, lns. 7-11.

To conclude cross-examination, Respondent asked a series of questions about what Judge John had to consider, and the following testimony was elicited:

Question:	Now Judge John did not have the transcript and was not the judge who presided over the trial, so he didn't see the evidence that came out at trial?
Answer:	Right.
Question:	He did not hear the evidence that Mr. Glover was the ringleader of the robbery, or the evidence that he had instructed other codefendants to dispose of evidence or anything like that; he was completely blind, right?

Answer: You know I'm not going to agree to that – I understand that there was evidence in the record supporting what your – your question, but certainly that's not the position I took. So all the more reason, I wish the judge could have been there. He could have looked at these witnesses and he could have decided who was – Judges are a little bit better at reading witnesses than jurors are and just because they are. But those witnesses were there. The typical arguments and hopefully I made them at the trial you know that they're getting something in exchange. So it would have been terrible for one of those witnesses to say that that witness was the ringleader. So you expect that; you expect them to blame it on the guy's that not there. But that's the trial. The jury spoke. I agree with the applicant's lawyer that I think the sole issue on this is the resentencing or – or the hearing for the resentencing.

Question: Okay.

App. p. 352, ln. 12 – p. 70, ln. 10. On redirect, when asked about the State giving Judge John a summary of their position or view of the evidence, he responded:

> Well, I don't -- I don't remember that exactly, but I'm not going to dispute it. I did read the transcript the other day in preparation for this and that makes sense. They normally, I mean I would have expected them to do that. I think the point that I was – wanted to make if I may, is that **this was a hearing unlike any other. I think Judge Burch got this right at the very beginning of this hearing.**[5] This is something new you know. We're not expecting this. They're going to be cases where a non-trial judge opens up a sentence and the trial judge is no longer there, and he do whatever he wants to do. You know I did a case one time in a different courtroom where the presiding judge was deceased and we had a new judge come in and issue a *nunc pro tunc* order. I'm not saying that's what we need to be doing here, but in the future we need to have a mechanism for if the trial judge is not there what can we do and then what we do we need to be prepared to do it, **because having a hearing that nobody is prepared for is not having a hearing.**

App. p. 353, ln. 23 – p. 354, ln. 15 (emphasis added). When asked about the State

[5] At the beginning of the hearing, Judge Burch asked Respondent if they would consider an agreement to remand the matter to Judge Cothran for a review of the sentence since he was the sentencing judge. App. pp. 292-293. Respondent indicated: "We would oppose that," and the lower court responded that he had wondered if anything could be worked out. App. p. 293, lns. 5-17.

opposing a reduction simply because Judge John was not the trial judge, he stated:

> If I would have known that was their position, I would have said they're agreeing with me that we should have it continued; we should have the trial judge here. What they're saying is let's have the hearing, but don't change it because you weren't the trial judge that heard it. We don't want it any less than 20 or less or whatever they said, and the reason is because you're not the trial judge. So you may – and that fits with what I was saying. You may have the authority as a Circuit Court Judge to open up the sentence and hear motions, but if you're not prepared and at the same time if the other side is arguing you can't change it because you weren't the trial judge, then you really have no discretion. So it puts that judge in a bad – in a bad place.

App. p. 354, ln. 16 – p. 355, ln. 10. He further responded: "If a judge has no discretion then he can't exercise discretion. If the State says, Judge, you can't go less than 20 because you weren't the trial judge, then he has no discretion. **So you know if you can't do it because the State says you don't have the discretion, then we can't have the hearing, it wasn't proper.**" App. p. 355, lns. 14-17 (emphasis added). He concluded that the absence of a transcript also made it impossible for the hearing to be proper and that "nobody was prepared" and he would "take the hit for it." App. p. 355, lns. 19-23.

As a threshold matter, Petitioner does not dispute Judge John's position that he had jurisdiction to open the sealed sentence and preside over motions pursuant to precedent. *See State v. Smith*, 276 S.C. 494, 280 S.E.2d 200 (1981). The primary issue here is not jurisdiction, but the inability of Judge John to be able to exercise discretion due to the admitted failure of counsel to be properly prepared and effectively advocate on Petitioners' behalf and the failure of counsel to request that the trial judge preside over the motions.

In *State v. Smith*, Smith was similarly tried *in absentia*. In contrast, Smith's sentence was published by the trial judge and his post trial motions were heard on a later

date. 276 S.C. at 496, 280 S.E.2d at 201. At that hearing, the trial judge determined that he no longer had jurisdiction to change the sentence. This Court reversed and remanded for reconsideration of the motion to alter, amend or change the sentence. 276 S.C. at 498, 280 S.E.2d at 202. In so holding, this Court reasoned:

> A sealed sentence does not become the judgment of the court until it is opened and read to the defendant. *Lytle v. Miller*, 157 S.C. 332, 154 S.E. 225 (1930).
>
> Here the sentence was published to the appellant on April 29, 1980 and although the motions were not heard until much later, they were marked heard by the trial judge on that date. The motion was made within the term of court at which the Page 202 sentence became the judgment of the court, to the sentencing judge, and he had jurisdiction to alter, amend or modify. *State v. Best, supra*, 257 S.C. at 369, 186 S.E.2d 272; 24 C.J.S. Criminal Law 1587b; *State v. Cagle*, 241 N.C. 134, 84 S.E.2d 649, 653 (1954).
>
> We hold the authority to change a sentence rests solely and exclusively in the hands of the sentencing judge within the exercise of his discretion. *State v. Cagle, supra.* It is apparent here the sentencing judge did not exercise any discretion but based his ruling on an erroneous view of the law. It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly. We call to the attention of the bench and bar that the mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. It should be stated on what basis the discretion was exercised. *Calloway v. Ford Motor Co.*, 281 N.C. 496, 189 S.E.2d 484 (1972); *State Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E.2d 22 (1967).

Smith, 276 S.C. at 498, 280 S.E.2d at 201-202.

When asked about Judge John's ruling in light of *Smith*, Mr. Gardner agreed that it appeared to him that Judge John was not exercising discretion, but he did not pick up on it at the time. App. pp. 340-341. Similarly to *Smith*, the State's position, along with counsel's failure to be properly prepared and advocate, put Judge John in the "bad" situation described by trial counsel whereby he could not properly exercise discretion. App. p. 354, ln. 16, - p. 355, ln. 10. Clearly, the lower court ignored the following

summation made by trial counsel: "If a judge has no discretion then he can't exercise discretion. If the State says, Judge, you can't go less than 20 because you weren't the trial judge, then he has no discretion. **So you know if you can't do it because the State says you don't have the discretion, then we can't have the hearing, it wasn't proper.**" App. p. 355, lns. 14-17 (emphasis added).

Despite having jurisdiction, Judge John was limited by counsel's ineffective assistance and Peitioner was prejudiced as a result. It is well established that Petitioner is entitled to effective assistance during his sentencing and post trial motion hearings. In *Lafler v. Cooper*, 566 U.S. 156, 164–65, 132 S. Ct. 1376, 1385–86, the Supreme Court of the United States held:

> The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. Its protections are not designed simply to protect the trial, even though "counsel's absence [in these stages] may derogate from the accused's right to a fair trial." *United States v. Wade,* 388 U.S. 218, 226, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice... The precedents also establish that there exists a right to counsel during sentencing in both noncapital, *see Glover v. United States,* 531 U.S. 198, 203–204, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001); *Mempa v. Rhay,* 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), and capital cases, see *Wiggins v. Smith,* 539 U.S. 510, 538, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in *Strickland* prejudice because "any amount of [additional] jail time has Sixth Amendment significance." *Glover, supra,* at 203, 121 S.Ct. 696.

In the 1970's, this Court recognized the Sixth Amendment right to effective counsel at sentencing in *State v. McGuinn*, 268 S.C. 112, 232 S.E.2d 229 (1977) and in *Locklear v. State*, 273 S.C. 58, 254 S.E.2d 293 (1979). In *McGuinn*, this Court found that the exclusion of defendant's counsel during a conversation regarding sentencing

amounted to the denial of his right to counsel at sentencing and remanded for a new sentencing hearing. 268 S.C. 112, 232 S.E.2d 229.

In *Locklear*, this Court addressed an off the record meeting that occurred while the jury was deliberating and reversed the PCR court's finding that the meeting did not disadvantage Locklear; therefore, no prejudice was demonstrated. 273 S.C. 58, 254 S.E.2d 293. In remanding for a resentencing hearing, this Court reasoned:

> Because defense counsel was excluded from the meeting, and because the discussion was off the record, this Court has no way of knowing whether the rights of appellant were prejudiced. While it is unlikely that anything improper was said, it is the possibility of prejudice that we are concerned with.
>
> Under the principles of *State v. McGuinn*, 268 S.C. 112, 232 S.E.2d 229 (1977), it is clear that appellant's sixth amendment right to counsel at sentencing was effectively denied him. Accordingly, we remand to the lower court for the purpose of resentencing. Any other circuit judge having jurisdiction in the trial circuits is authorized to impose the sentence.

Locklear, 273 S.C. 58, 59-60, 254 S.E.2d 292.

In *Strickland*, the Supreme Court of the United States fashioned the two-prong standard addressed above while considering if counsel had provided ineffective assistance during the sentencing phase of a capital murder trial. 466 U.S. 668. After addressing both the performance and prejudice components of the ineffectiveness inquiry, the Court concluded: "Respondent has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process cause by deficiencies in counsel's assistance. Respondent's sentencing proceeding was not fundamentally unfair." 466 U.S. at 700. Here, Mr. Gardner explained, "...having a hearing that nobody is prepared for is not having a hearing." App. p. 354, lns. 14-15. Based upon the record, a finding must be made contrary to the finding in *Strickland* since

here the sentencing proceedings and post-trial motion hearings were fundamentally unfair and there was a breakdown in the adversarial process caused by Mr. Gardner's admitted deficiencies.

As the record reflects but is omitted from the Order, Mr. Gardner did not speak at the sentencing hearing held in front of Judge Cothran. He explained that he planned to argue at post trial proceedings, when Petitioner was present, for a lesser sentence. But, when those post trial proceedings commenced on March 15, 2016 hearing, Mr. Gardner was not present and did not prepare his associate to properly represent Petitioner. It appears that Judge John recognized the problematic situation when Mr. Bouchette stated that the defense had no motions; thus, he continued the matter. Unfortunately, the brief continuance did not cure the problem and allow for effective representation.

As Mr. Gardner candidly admitted, he was in the middle of another trial and did not have time to meet with Petitioner, conduct research, prepare an argument, obtain the transcript, or contact friends or family members to speak on Petitioner's behalf. As Mr. Gardner also admitted, he chose to go along with the hearing and not ask for more time because of Judge John's opening remarks at the hearing. He also explained his unfounded belief that if Judge John and the State wanted to go forward with the hearing in such an expeditious manner, there would be a benefit to Petitioner, such as a reduction in sentence. Mr. Gardner honestly admitted that he did not provide effective assistance, yet the lower court erroneously found he exercised reasonable trial tactics and strategy. App. p. 396.

Additionally, Mr. Gardner was adamant that he never imagined that the State would argue against a reduction in sentence on the basis that Judge John was not the trial

judge. At the evidentiary hearing, Mr. Gardner addressed Judge John's ruling and concluded that discretion was not exercised. Petitioner submits that the record supports a finding that Mr. Gardner's deficient performance created a "bad" situation whereby Judge John was not equipped to exercise proper discretion and he was denied a fair hearing. As Mr. Gardner said – a hearing where no one is prepared is no hearing at all. Clearly, the lower court erred in attributing counsel's clear admissions and conclusions in his testimony to mere hindsight and erred by deeming his performance "legitimate, reasonable strategy for the sentencing hearings." App. pp. 396-397.

Via *Anders* Brief, appellate counsel argued that Judge John "abused his discretion in refusing to reconsider the twenty-five year sentence imposed by the trial judge when a co-defendant received a lesser sentence and the record fails to reflect an appropriate basis for the disparate sentence." In making this argument, the brief addressed the ten-year sentences of Petitioner's co-defendants. App. p. 247. In reliance upon *State v. Folin*, 353 S.C 235, 257-258, 573 S.E.2d 812, 824 (Ct. App. 2002), *Castro v. State*, 417 S.C. 77, 789 S.E.2d 44, 47 (2016), *Davis v. State*, 336 S.C. 329, 520 S.E.2d 801 (1999), *State v. Hazel*, 317 S.C. 368, 453 S.E.2d 879 (1995), and *State v. Brouwer*, 346 S.C. 375, 388, 550 S.E.2d 915, 922 (Ct. App. 2001), the argument was made that the record "fails to reflect an otherwise appropriate basis for Appellant's disparate sentence." App. pp. 248-249.

Despite the lower court having the complete record to include the *Anders* Brief and the cases argued therein provided by Petitioner's counsel for his review, the lower court failed to recognize that counsel's deficient performance also impacted the strength of the issue raised on appeal regarding Petitioner's disparate sentence. At the evidentiary hearing, counsel admitted that he did not raise the issue of the disparate sentences or a

"trial tax" to the trial judge, and the trial judge was the one person who needed to hear and address the argument. He also admitted, as the appellate brief notes, that Judge John did not have the opportunity to review the transcript to inform him of what occurred at trial regarding the testifying co-defendants nor did he properly address the issue with Judge John. It is no wonder that that issue failed on appeal based upon the record before the appellate court, which was created by counsel who deemed it no hearing at all. App. p. 354, lns. 14-15.

Here, Petitioner's sentence exceeded his co-defendant's sentence by fifteen years. Counsel conceded there is typically always a trial tax, but he did not properly raise the issue. App. p. 343. Petitioner submits that counsel was ineffective for failing to properly raise this issue and ensure there was a record on which the appellate court could properly review whether an abuse of discretion occurred in sentencing Petitioner to fifteen years more than his codefendants.

In sum, Petitioner urges this Court to find that the lower court erred in failing to find deficiency and resulting prejudice. In light of the complete record, to include all evidentiary hearing witnesses and exhibits, Petitioner submits that that Mr. Gardner provided ineffective assistance when he failed to properly represent him at sentencing and post-trial motion hearings. As is addressed above deficiency and prejudice are evident from the following list of factors, which is not all inclusive but a summary of the matters apparent from the record and raised to and ignored by the lower court: 1) Mr. Gardner did not speak during the sentencing hearing with Judge Cothran; 2) Mr. Gardner lacked prior notice and was in the middle of trial during the March 15, 2016 hearing; 3) Mr. Gardner did not meet with Petitioner to prepare or discuss what was going to occur

prior to the sentence being unsealed or post trial motion hearing; 4) Mr. Gardner sent a representative that was not prepared to advocate properly; 5) Mr. Gardner appeared at the March 17, 2016 hearing without preparing Petitioner to speak, without a transcript, and without character witnesses or letters, and he failed to ask for more time to be properly prepared; 6) Mr. Gardner did not raise a concern with the trial judge not presiding over the hearing or the limits being placed on the court's ability to exercise discretion; 8) Mr. Gardner did not respond to the State's argument that the sentence should not be reduced simply because Judge John was not the trial judge; 9) Mr. Gardner did not respond to the State's summary of the evidence with evidence favorable to Petitioner; and 7) Mr. Gardner did not properly preserve the issue of a disparate sentence due to a trial tax nor did he raise the issue to the trial judge.

Clearly, the lower court did not properly consider the candid testimony and admissions made by Mr. Gardner or the court would have properly found that Petitioner was denied his right to effective assistance during the sentencing and post-trial phases of his case. As was held in *Glover*, even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in *Strickland* prejudice because "any amount of [additional] jail time has Sixth Amendment significance." *Glover,* 531 U.S. at 203, 121 S.Ct. 696. Here, Petitioner's sentence and the failure of it to be properly reconsidered demonstrates the prejudice suffered.

South Carolina Code Section 17-27-80 provides: "If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to re-arraignment, retrial,

custody, bail, discharge, correction of sentence or other matters that may be necessary and proper." Here, Petitioner submits the proper relief is a new sentencing hearing and/or motion to reconsider, which will cure the errors committed by counsel in regards to sentencing and post trial motions. In requesting this specific relief, Petitioner takes guidance from the relief granted by South Carolina appellate courts when matters related to sentencing have been raised on direct appeal and when issues of ineffective assistance in sentencing have been addressed on appeal. *See State v. Smith*, 276 S.C. 494, 280 S.E.2d 200 (1981), *State v. Hazel*, 317 S.C. 368, 453 S.E.2d 879 (1995), *State v. Brouwer*, 550 S.C. 375, 550 S.E.2d 915 (Ct. App. 2001), *Castro v. State*, 417 S.C. 77, 789 S.E.2d 44 (2016), *Locklear v. Harvey*, 273 S.C. 58, 254 S.E.2d 293 (1979), *State v. McGuinn*, 268 S.C. 112, 232 S.E.2d 229 (1977). Alternatively, Petitioner would request the reversal of the Order of Dismissal and/or remand in whatever form this Court deems proper.

CONCLUSION

Based upon the above argument and record before this Court, Petitioner would respectfully ask that this Court to grant certiorari, allow briefing of the issues addressed herein, and/or reverse the denial of post conviction relief.

Respectfully submitted,

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January 12, 2022