THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Jul 25 2022

S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Brian M. Gibbons, Circuit Court Judge

App. Case No.: 2022-000026

Brandon Berry, 352671, Petitioner,

vs.

State of South Carolina, Respondent.

PETITION FOR WRIT OF CERTIORARI

Tricia A. Blanchette
S.C. Bar No. 74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266
Attorney for Petitioner

INDEX

ISSUES PRESENTED....ii

STANDARD OF REVIEW....iii

STATEMENT OF THE CASE....1

ARGUMENT....3

TRIAL AND EVIDENTIARY HEARING SUMMARIES....3

SUMMARY OF RELEVANT PORTIONS OF TRIAL TRANSCRIPT....3

SUMMARY OF THE EVIDENTIARY HEARING TESTIMONY....9

DISCUSSION OF THE ISSUES....15

THE LOWER COURT ERRED BY FINDING TRIAL COUNSEL EFFECTIVE AND NO RESULTING PREJUDICE WHEN THE RECORD ESTABLISHES THAT SHE FAILED TO ENSURE THAT PETITIONER WAS AWARE OF THE STATE'S EVIDENCE AND PROPERLY ADVISED PRIOR TO THE REJECTION OF THE FINAL PLEA OFFER....15

THE LOWER COURT ERRED BY NOT FINDING THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO MAKE A PROPER RECORD AND MOVE FOR A CONTINUANCE DUE TO THE MATTERS OF THE RECORDED PHONE CALLS AND ISSUES INVOLVING WITNESS WALLACE....22

CONCLUSION....25

ISSUES PRESENTED

1. Whether the lower court erred by finding trial counsel effective and no resulting prejudice when the record establishes that she failed to ensure that Petitioner was aware of the State's evidence and properly advised prior to the rejection of the final plea offer.

2. Whether the lower court erred by not finding that trial counsel rendered ineffective assistance for failing to make a proper record and move for a continuance due to the matters of the recorded phone calls and issues involving witness Wallace.

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 Richland County Clerk of Court. During the February 2015 term of the Richland County Grand Jury, Petitioner was indicted for attempted murder, resisting arrest, unlawful carrying of a pistol and unlawful conduct towards a child. During the September 2015 term of the Richland County Grand Jury, Petitioner was indicted for attempted armed robbery.

On November 30, 2015, trial proceeded against Petitioner at the Richland County Courthouse in front of the Honorable Howard P. King and a jury. App. p. 1. Petitioner was represented by Aimee J. Zmroczek, Esquire. The State was represented by Luck Campbell, Assistant Solicitor, Meghan Walker, Assistant Solicitor, and John W. Steadman, Assistant Solicitor. On December 4, 2015, the jury found Petitioner guilty as indicted. App. p. 202. The Honorable Howard P. King sentenced Petitioner to concurrent terms of twenty years for attempted murder and attempted armed robbery, concurrent terms of one year for resisting arrest and the weapons charge, and a consecutive term of five years for unlawful conduct towards a child. The aggregate sentence was a term of twenty-five years. App. pp. 731-732.

A direct appeal was filed, and it was perfected by Laura M. Caudy, Appellate Defender. The convictions and sentences were affirmed on October 18, 2017. *State v. Berry*, Op. No. 2017-UP-380 (S.C. Ct. App. filed October 18, 2017). App. pp. 814-816.

Petitioner filed an Application for Post Conviction Relief on December 14, 2017. On or about May 8, 2018, Respondent filed a Return and Motion for More Definite Statement of Allegations. Tricia A. Blanchette, Esquire, was substituted in as counsel via

Order dated October 4, 2018. On October 4, 2019, an Amendment to Application for Post Conviction Relief was filed and set forth specific allegations of ineffective assistance of trial and appellate counsel. App. pp. 848-849.

On October 30, 2019, an evidentiary hearing was conducted at the Richland County Courthouse in front of the Honorable Brian M. Gibbons. App. p. 850. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Lindsey A. McCallister, Assistant Deputy Attorney General. Prior to the offering of testimony at the evidentiary hearing, Petitioner submitted a Memorandum, which was admitted as Court's exhibit one, and informed the Court that Petitioner was not going forward on issue number one from the Amendment. App. pp. 855-856.

During the course of the evidentiary hearing, Petitioner took the stand, along with Aimee J. Zmrocek, Esquire, and Laura M. Caudy, Esquire. Petitioner admitted two exhibits. At the conclusion of the hearing, the court took the matter under advisement.

On November 18, 2019, the court notified the parties of his intent to dismiss the application and asked Respondent to submit a proposed Order. On March 22, 2021, Respondent submitted a proposed Order. Thereafter, the court issued an Order of Dismissal on April 19, 2021, which was filed on May 10, 2021. Petitioner timely filed a Rule 59, SCRCP, Motion, and a hearing was held on November 22, 2021. App. pp. 1006, 1013. An Order Denying Motion was signed by the Honorable Brian M. Gibbons on November 29, 2021, which was filed on December 9, 2021. Thereafter, a timely Notice of Intent to Appeal was filed, from which this Petition follows.

ARGUMENT

I. TRIAL AND EVIDENTIARY HEARING SUMMARIES

A. SUMMARY OF RELEVANT PORTIONS OF TRIAL TRANSCRIPT

As is addressed above, Petitioner proceeded to trial in front of the Honorable Howard P. King, and a jury, on November 30, 2015- December 4, 2015 in Richland County. Petitioner was represented by Aimee J. Zmroczek, Esquire (trial counsel). The State was represented by Luck Campbell, Assistant Solicitor, Meghan Walker, Assistant Solicitor, and John W. Steadman, Assistant Solicitor (State).

At the start of the second day, the State put on the record that trial counsel had inquired about "a possible additional plea offer" and the victim would be consulted. App. p. 188. After the lunch break, the State explained that the original plea offer was thirty years, but an offer "with a range of fifteen to twenty years" had been extended after consulting the victim. App. p. 189, ln. 24 – p. 190, ln. 3. The State informed the court: "My understanding is that he has rejected that plea offer." App. p. 190, lns. 3-4. The State went onto explain that in the course of "verifying some other information" jail calls made by Petitioner under another PIN number were discovered about "fifteen minutes ago" that would be emailed to trial counsel that afternoon. App. p. 190, lns. 5-21. Then, the court inquired of the State, Petitioner and trial counsel as to whether it was correct that the plea offer was rejected, and the offer was revoked on the record. App. p. 191.

The next day, the State informed the court that Petitioner's co-defendant (Wallace), through his attorney, initially "had indicated he wanted to testify" for the State. App. p. 193, lns. 22-25. Then, last night his counsel informed the State that Wallace would invoke the Fifth Amendment. App. p. 194, lns. 1-7. The State went onto

explain that a phone call was discovered late last night between Petitioner and Wallace whereby Petitioner "is telling him not to talk or not testify or something to that effect." App. p. 194, lns. 1-11. All agreed that both parties should not mention Wallace in opening statements and the matter of Wallace invoking the Fifth be addressed at a later juncture. App. pp. 194-5. The court also asked counsel to remind Petitioner that he was to have no direct contact with witnesses. App. p. 195, lns. 4-11. Thereafter, the jury was sworn. App. p. 196.

After the State called six witnesses and a recess was taken, the State informed the court that Wallace, through counsel, had indicated he planned to invoke the Fifth, so the State requested the opportunity to proffer his testimony. App. p. 294. Before the jury returned from lunch, the State explained the involvement and charges assigned to Wallace, and Wallace's attorney provided his client's position and his concern that taking the stand could open Wallace to the possibility of offering incriminating testimony. App. pp. 331-2. The court concluded that the best way to proceed was to proffer Wallace's testimony. App. p. 333. While being questioned, Wallace invoked the Fifth. App. pp. 333-338. Then, his counsel and the State addressed whether he had waived the right to invoke the Fifth and matters related to a probation revocation. App. pp. 333-338.

Without a clear ruling on that matter, the State began discussing the alleged phone call between Petitioner and Wallace. App. p. 339. In response, trial counsel argued that the State had provided an inaccurate reflection of the phone call, and she was in possession of six hundred and ninety-eight calls, with over a hundred between Wallace and Petitioner. App. p. 339. Trial counsel also asserted it was not "a recent communication or development." App. p. 340, ln. 3-6. After the court began asking about

the recording, the State argued that Wallace invoking the Fifth was the result of the phone call with Petitioner. App. pp. 340-41.

Regarding Wallace, the court questioned whether there were two different issues in play. App. p. 341, ln. 24. The court identified the issues, as follows: 1) "whether or not he has the right to assert the Fifth Amendment in regard to questions about where he was and who he was with and who he lent his car to," and 2) "whether or not he has been intimidated or threatened by the Defendant in this case." App. p. 342, lns. 1-7. In addition, trial counsel stated that there was a third issue involving whether the use of Wallace's "statements or what was said in…" would be admissible if he chose to not testify. App. p. 342, lns. 8-17. She asserted that if Wallace did not testify, Petitioner would be denied meaningful cross-examination, and she alluded to there being several other challenges that she could make. App. p. 342, lns. 8-17. The State responded by asking for time to research the issue and asking the court to review the call. App. p. 342, lns. 18-24. The court concluded that the State should prepare a written list of the questions they intended to ask Wallace and asked if it would be possible to obtain a transcript of the call. App. pp. 342-3. The State responded that it could be transcribed while they were in court during the afternoon. App. p. 343, lns. 24-5. Thereafter, further discussion was had regarding the court's requests and concerns. App. pp. 345-6. In response to his concerns about the phone call with Wallace, trial counsel offered her understanding that Wallace did not feel threatened or coerced. App. p. 346, lns. 2-8.

After the jury was dismissed for the day, the court summarized his understanding of the State's purpose for wanting to elicit testimony from Wallace and his understanding of the controlling case law. App. pp. 446-50. Trial counsel also expressed the following

position: "I'll put it in a brief for the Court, but my concern is obviously that I'm gonna be hamstring'd on what I can cross-examine on, and it would be our position that if he takes the Fifth on any part of his testimony that he would be unavailable for all of his testimony…" App. p. 450, lns. 17-22. The State agreed to email the call transcript during the evening, and counsel requested that the court listen to the call. App. pp. 452-3.

Prior to the jury coming in the next morning, the only mention of Wallace or the phone call matter occurred when counsel informed the court that prior to the calls being introduced, she had relevance arguments to make. App. p. 454. Thereafter, the jury entered the courtroom, and the State called their next witness. App. p. 455.

At the conclusion of Tricia Collins Odom's testimony, the State informed the court there was an evidentiary matter that needed to be discussed, and the jury was excused. App. pp. 530-1. Following a bench conference, the court put on the record that it was his understanding that the State intended to call a witness to introduce three jail calls, and he questioned if he was correct that the defense objected to two of the three calls. App. p. 531. Trial counsel began addressing her objections and her understanding of the court's position and agreed that her hearsay objection regarding Wallace was not viable since he was unavailable. App. pp. 532-3. The court agreed the call between Wallace and Petitioner was admissible since the "hearsay objection is not applicable because Mr. Wallace is unavailable." App. p. 533, lns. 7-10.

Regarding the remaining two calls, trial counsel addressed her relevance arguments regarding those calls, and the State provided a response, which included an argument that the call amounted to an admission on the part of Petitioner. App. pp. 533-535, p. 535, lns. 13-22. Counsel stated that she had two additional grounds, one being

that it was impermissible since Petitioner talked about his need for a lawyer and that it was prejudicial. App. p. 536, ln. 5. When questioned by the court if she was "changing horses," trial counsel responded that she maintained her relevance argument and she was simply moving onto the second test, that it was more prejudicial than probative. App. pp. 536-537. Regarding the prejudicial impact, trial counsel argued that "it almost forces him to give up his Fifth Amendment right to get up and explain" the calls, and she asked for redactions. App. p. 537, lns. 15-22, pp. 537-538. The court ruled that the entirety of the "tape" would be admitted and overruled the objection on the "grounds of 401, relevance, and also it would be overruled on the fact that the probative value is not substantially outweighed by the prejudicial effect." App. p. 538, ln. 9 – p. 539, ln. 6. The court asked if Petitioner had any question about the authentication, and counsel responded that there was a witness present to authenticate. App. p. 539, lns. 7-15. The court responded that they would move forward with authentication. App. p. 539, ln. 12-16.

After the jury returned, Lt. Friedly, from Alvin S. Glenn Detention Center, was called to authenticate the recordings. App. p. 540. Lt. Friedly explained how calls are placed and recorded, and she explained how inmates use other inmates PIN numbers to disguise their calls. App. p. 541-2. She confirmed that the three calls were made from Alvin S. Glenn Detention Center and were kept in the regular course of business. App. p. 542, lns. 6-14. Subject to the "previous objections," the calls were admitted in to evidence and published to the jury. App. p. 542, lns. 15-22.

When Sgt. Carwell, of the Richland County Sheriff's Department, was on the stand he addressed the three calls and matters regarding the timing of the calls and significance of the calls. App. p. 574-6. He testified that he was familiar with the call

system at the jail. App. p. 575. He further testified that the first two calls were not made with the number assigned to Petitioner since "he used the PIN number of another inmate trying to disguise his phone call." App. p. 575, ln. 25 – p. 576, ln. 3. Then he was asked, "On the last phone call?," to which he responded "yes." App. p. 576, lns. 4-5.

Prior to closing arguments, several matters were discussed outside the presence of the jury. App. pp. 614-618. Counsel was granted the opportunity to address in closing Petitioner's statements in the call regarding a plea offer and the amount of time he would take. App. p. 616. Both parties also requested that the court instruct the jury that "they aren't to be concerned with any sentencing." App. p. 617, lns. 1-8.

During closing argument, the State referenced the phone call with Wallace and argued that Petitioner was in charge of Wallace. App. p. 642. Thereafter, the State went into a detailed argument regarding the calls, which included the assertions that the calls amounted to a confession and Petitioner's discussion regarding taking a plea showed he was guilty. App. pp. 652-655, p. 653, ln. 21.

At the outset of her closing argument, trial counsel conceded that the phone calls allowed the jury to hear a little from Petitioner, but she argued the calls were being used for the sole purpose of convincing the jury to dislike or hate Petitioner. App. pp. 657-8, p. 658, lns. 16-20. When she referenced the calls next, she argued that the State did not play the six hundred plus available calls, and her greatest fear was that the jury would "only base your decision and your opinion on those phone calls and who they want to show Brandon Berry is." App. p. 661, lns. 15-24.

After the jury started deliberating, they sent out a question asking for the transcripts of the three calls or the recordings if the transcripts were not available. App. p.

700, lns. 11-16. The court acknowledged that the transcripts were not admitted and asked the parties how they wanted to handle it. App. p. 700. All agreed the disc and a computer would be provided to the jury to listen to the recordings. App. pp. 700-701.

Following additional questions, the jury returned a guilty verdict. App. p. 713. Trial counsel moved to have the verdict set aside based upon prior motions. App. p. 722. The only specific ground she elaborated on was that the jury asked to rehear the three phone calls that she had objected to coming in. App. p. 722, lns. 13-22. The trial court denied the motion. App. pp. 722-23.

B. SUMMARY OF THE EVIDENTIARY HEARING TESTIMONY

As was addressed in the filed Rule 59, SCRCP, Motion and at the Motion hearing, Petitioner submits that the Order of Dismissal does not properly reflect the testimony elicited at the evidentiary hearing. Below is a summary of the relevant portions of the evidentiary hearing transcript, and Petitioner would direct the Court's attention to the Rule 59, SCRCP, Motion regarding the specific matters in conflict between the transcript and the evidentiary hearing transcript. App. pp. 1007-1011, 1017-1024, 1029-1031.

At the evidentiary hearing, Aimee Zmorzcek, Esquire, recalled her representation of Petitioner. When asked about receipt of discovery from the Solicitor's Office, she responded: "As – as per typical with that regime of the Fifth Circuit Solicitor's Office, it was piecemeal, if at all. I never believe that I have full discovery when dealing with the Fifth Circuit Solicitor's Office." App. p. 865, ln. 25- p. 866, ln. 3. After referencing the additional phone calls turned over during trial, counsel was asked about phone calls she

received prior to trial. She recalled receiving over six hundred phone calls right before trial, which she did not review with Petitioner.[1]

Referencing the trial transcript, counsel was asked about plea negotiations before and during trial, she explained:

> As the trial got closer, it – there were discussions between myself and the client about – him counter-offering their thirty years, and so I remember approaching that. I know that I put everything on – on the record, especially because – so I remember after the trial – I think we had picked a jury and then Meghan Walker started sending me emails with jail calls attached to them that I didn't even have an opportunity to listen to, but she indicated that those were from another PIN number and that were not going to be anything that was going to be beneficial to my client, and so at that point I started to try and negotiate a more reasonable plea offer.

App. p. 867, ln. 13- p. 868, ln. 1. After being directed to the on the record plea rejection and discussion of additional phone calls, counsel agreed that she nor Petitioner had the opportunity to review the additional calls before the rejection of the plea offer. App. 189-191, App. pp. 869-870, 905-906. Thereafter, the following testimony was elicited:

> Question: Is there any reason why you didn't tell the Court we need a continuance because the State is turning over additional evidence?
>
> Answer: I do not recall. I do not have any reasons as to why I didn't do that.
>
> Question: Okay. Is there any reason that you didn't ask for that plea offer that they said he rejected, but it wasn't – the revocation wasn't affirmed until after the jail calls were disclosed. Is there any reason you didn't ask for that to remain open until you could review the further evidence?
>
> Answer: Not that I recall.
>
> Question: But you would agree that the plea rejection was affirmed after the disclosure of this additional evidence?

[1] As argued in the Rule 59, SCRCP, Motion, the Order is in error when it misconstrues her testimony to be that she did not review the calls with Petitioner because he was in the detention center. App. p. 1009.

Answer: Absolutely.

App. p. 870, lns. 11-25. On redirect, she agreed that it was her responsibility to go over the evidence with Petitioner and help him make an informed decision about accepting or rejecting a plea offer. App. p. 923, lns. 21-25.

Addressing the Memorandum, which was admitted as Court's exhibit one and the corresponding portions of the transcript, counsel recalled being informed on the third day of trial that Petitioner's co-defendant Wallace intended to invoke the Fifth Amendment when called to testify, and she affirmed that she had no prior notice. App. p. 871. She further recalled being told that the State had discovered an additional call, which the State alleged amounted to witness intimidation by Petitioner of Wallace, but she had not been provided the call at that juncture. App. pp. 871-872.[2] She recalled raising discovery concerns, but she agreed that she did not move for a continuance or formally raise discovery concerns on the record. App. pp. 872-875. She agreed that if she would have asked for a continuance prior to the jury being sworn, jeopardy would not have attached and there may have been more leeway. App. p. 875.

Regarding the matters involving Wallace, counsel recalled the court determining that there was no evidence of witness intimidation, and she recalled identifying foundation issues with the calls if Wallace invoked the Fifth Amendment. App. p. 876. She addressed her concern with the State using inmate calls as a discovery tool, and she also took issue with the late receipt and identified foundation issues regarding authentication as the State would need to show "whose PIN number it was and then also

[2] On cross-examination, she was asked about the State turning over the calls upon receipt. She responded that the State has real time access to jail calls and she did not know when the State discovered the calls. App. pp. 912-913.

show who was talking on the phone." [3] App. p. 876, ln. 2 – p. 877, ln. 2. When asked, she agreed that she did not make an argument about authentication on the record. App. pp. 877-880, 887-888.

On cross-examination, counsel explained that prior to trial she anticipated Wallace's testimony to be vague, and she thought Wallace was "doing his best to not try to get his friend in trouble." App. p. 911, lns. 10-14. When further asked about the matter of intimidation and her understanding of Wallace, she responded: "I never knew anything about Wallace. I didn't talk to his attorney. I mean, we didn't have a joint defense. I don't – I don't know if he was telling the State he was going to cooperate and then not cooperate or – I have no idea about any of that." App. p. 912, lns. 3-17.

Regarding Wallace invoking the Fifth Amendment, she acknowledged the arguments she made on the record and explained her position that she could not have meaningful cross-examination if the calls were utilized without calling Wallace. App. pp. 881-884. She could not recall if she provided a brief as requested by the trial court. App. p. 885. She also attempted to explain the "convoluted" record involving her hearsay objections, which she also recalled being discussed via bench conference. App. pp. 886-887. Regarding her additional arguments involving relevance and prejudice, she agreed that she was trying to come up with arguments on the fly since the evidence was turned over during the course of the trial. App. pp. 888-889. She concluded: "And I honestly don't know why I didn't ask for a continuance." App. p. 889, lns. 24-25. In response, counsel was asked if she thought it would have been effective representation for her to request a continuance, and she replied:

[3] On cross-examination, she agreed that there is notice on the calls that the calls are being recorded, but she still did not believe the calls should be used as a discovery tool. App. p. 909, ln. 22 – 910, ln. 8.

> Well, yes, now that I know what was on this tape. Like before I didn't know all of the things that were on the calls because I didn't have them. So, yes, I probably should have asked for a continuance, but then once I get into it – you know, I think I probably did need a continuance, but I don't know why I didn't ask for one.

App. p. 890, lns. 1-12.

On cross-examination, she testified that she could not ethically argue that it was not Petitioner on the calls. App. pp. 920. She also agreed theoretically that he would know the content of the calls, but when asked if he knew what was on the calls, she responded: "Well, I don't know if he knew or remembered what was on them, but I know he made the calls." App. p. 921, lns. 1-2. On redirect, she agreed that even if Petitioner knew what was on the calls, she did know the contents nor could she properly advise him regarding the calls. App. p. 921, lns. 10-16.

Regarding the references to the phone calls in closing arguments, she agreed that the State's closing argument, in conjunction with the calls themselves, were damaging to Petitioner. App. p. 894. She agreed that the State argued that the calls amounted to an admission, and she had no notice of the contents of calls or this argument prior to trial or rejection of the plea offer. App. pp. 921-922. She explained that she likely conceded that the jury heard from Petitioner via the calls in her closing to "lessen the blow," but she could not specifically recall her intention. App. p. 894, lns. 16-23. She agreed that the calls were also being used as bad character evidence against Petitioner. App. pp. 895-896.

After Laura M. Caudey, Esquire, took the stand, she explained her experience as a lawyer and recalled her appellate representation of Petitioner. App. pp. 927-928. She explained the process she took to draft and complete the Brief. App. pp. 928-929, 934-937. When asked about her consideration of any issues related to Wallace invoking the

Fifth Amendment, she explained that she was not aware of any "motion or objection that was raised by trial counsel." App. p. 930, lns. 2-9, pp. 930-931. Regarding the phone calls, she discussed her notes from reviewing the record and reasons for not raising any appellate issues regarding the phone calls. App. pp. 931-933. After agreeing the record was very confusing regarding the phone calls and the issues were hard to assess, she explained:

> Largely the confusion to me had to do with what the objections were and what was still preserved and not waived, so it was kind of all over the place and it's not clear what telephone conversation they're referring to or what the actual objection is. So, like I said, when it came down to it the only objections that I felt that were preserved were relevance and 403 only for that third conversation.

App. p. 933, lns. 7-21. Regarding a continuance, she responded that she did not see a request in the record or counsel raising any concerns with discovery. She responded that, she would have raised the issue of a continuance if it had appeared in the record. App. p. 934, lns. 10-19. When questioned by the lower court, she responded that the appellate court never overturns the denial of a continuance request, and it is an issue her office rarely raises. App. p. 938, lns. 6-18.

When Petitioner took the stand, he addressed his application and the relief he was seeking. App. pp. 939-941. He recalled retaining trial counsel and meeting with her at the detention center and after he was out on bond. App. pp. 941-942. He did not recall counsel providing him or reviewing the six hundred plus phone calls with him. He recalled rejecting the thirty-year plea offer with the advice of counsel. App. p. 942. When asked about the plea offer during trial, he testified that counsel did not discuss the additional phone calls with him nor advise him that she had not reviewed the additional evidence before he rejected the plea offer. He responded affirmatively that he would have

wanted to be properly advised regarding all the evidence before rejecting the plea offer, he would have wanted counsel to request a continuance due to the new evidence and/or request that the plea offer be extended. App. pp. 943-945.

Petitioner testified that he was unaware of the phone calls regarding Wallace, the issue of witness intimidation, and Wallace invoking the Fifth when he rejected the plea offer. App. p. 945. Thereafter, the following testimony was elicited:

> Question: Okay. Mr. Berry, if you would have known about the additional calls, if you would have known about this issue that developed with Mr. Wallace, and essentially these phone calls that your attorney argues were used to make the jury hate you and the State argues were an admission, would you have taken the plea of fifteen to twenty years.
>
> Answer: I most definitely would have taken the plea. I would have actually felt like I didn't have a chance had I known that information, so I would have taken the plea.

App. p. 945, lns. 11-19. Petitioner acknowledged it was his voice on the calls at issue, but he agreed that his attorney should have reviewed the phone calls with him in order to properly advise him and that he would have taken the plea if properly advised. App. pp. 946-947. On cross-examination, he again acknowledged it was his voice on the calls, but he explained that he did not remember everything that he said on all his calls. App. pp. 948-949.

II. Discussion of the Issues

A. The lower court erred by finding trial counsel effective and no resulting prejudice when the record establishes that she failed to ensure that Petitioner was aware of the State's evidence and properly advised prior to the rejection of the final plea offer.

The "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." *Montejo v. Louisiana*, 556 U.S. 778,

786, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009) (*quoting United States v. Wade*, 388 U.S. 218, 227-228, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)). Critical stages include arraignment, post-indictment interrogations, post-indictment lineups, negotiation and the entry of a guilty plea. *See Hamilton v. Alabama*, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961) (arraignment); *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964) (postindictment interrogation); *Wade, supra* (postindictment lineup); *Padilla v. Kentucky*, 559 U. S. 356, 130 S.Ct. 1473 (2010) (*Argersinger v.Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972) (guilty plea).

In *Hill v. Lockhart,* 474 US 52, 106 S.Ct. 366 (1985) and *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010), the Supreme Court of the United States examined the role of advising a client about a plea offer and ensuing guilty plea as was discussed in *Missouri v. Frye*, 132 S. Ct. 1399, 1405-06 (2012), as follows:

> *Hill* established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland. See Hill,supra*, at 57, 106 S. Ct. 366, 88 L. Ed. 2d 203. As noted above, in Frye's case, the Missouri Court of Appeals, applying the two part test of *Strickland*, determined first that defense counsel had been ineffective and second that there was resulting prejudice.
>
> In *Hill*, the decision turned on the second part of the test. There, a defendant who had entered a guilty plea claimed his counsel had misinformed him of the amount of time he would have to serve before he became eligible for parole. But the defendant had not alleged that, even if adequate advice and assistance had been given, he would have elected to plead not guilty and proceed to trial. Thus, the Court found that no prejudice from the inadequate advice had been shown or alleged. *Hill, supra*, at 60, 106 S. Ct. 366, 88 L. Ed. 2d 203.
>
> In *Padilla*, the Court again discussed the duties of counsel in advising a client with respect to a plea offer that leads to a guilty plea. *Padilla* held that a guilty plea, based on a plea offer, should be set aside because counsel misinformed the defendant of the immigration consequences of

> the conviction. The Court made clear that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." 559 U.S., at ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284, 298. It also rejected the argument made by petitioner in this case that a knowing and voluntary plea supersedes errors by defense counsel. Cf. Brief for Respondent in *Padilla v. Kentucky*, O. T. 2009, No. 08-651, p. 27 (arguing Sixth Amendment's assurance of effective assistance "does not extend to collateral aspects of the prosecution" because "knowledge of the consequences that are collateral to the guilty plea is not a prerequisite to the entry of a knowing and intelligent plea").

The Supreme Court of the United States issued opinions in *Frye* and *Lafler v. Cooper*, 566 U.S. 156, 132 S.Ct. 1376 (2012) on the same day and addressed the situation of when ineffective assistance of counsel led to the rejection of a plea offer in contrast to the issue of ineffective assistance of counsel in accepting a plea offer which was addressed in *Hill*. In *Lafler*, the Court addressed the appropriate remedy "when inadequate assistance of counsel caused non-acceptance of a plea offer and further proceedings led to a less favorable outcome." 566 U.S. at 160, 132 S.Ct. at 1383. The Court explained:

> In contrast to *Hill*, here the ineffective advice led not to an offer's acceptance but to its rejection. Having to stand trial, not choosing to waive it, is the prejudice alleged. In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. Here, the Court of Appeals for the Sixth Circuit agreed with that test for *Strickland* prejudice in the context of a rejected plea bargain.

Lafler, 566 U.S. at 163-164, 132 S. Ct. at 1385. Turning to facts, the Court further explained:

> In the instant case respondent went to trial rather than accept a plea deal, and it is conceded this was the result of ineffective assistance during the plea negotiation process. Respondent received a more severe sentence at

> trial, one 3 ½ times more severe than he likely would have received by pleading guilty. Far from curing the error, the trial caused the injury from the error. Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence.

Lafler, 566 U.S. at 166 , 132 S. Ct. at 1386.

Here, by way of the Order of Dismissal, the lower court reasoned that Petitioner had no constitutional right to a plea offer. Petitioner does not dispute this precedent, but Petitioner submits that the court's reasoning was too narrow or was "beside the point" as noted by the Court in *Lafler*. On this matter, the Court in *Lafler* reasoned:

> It is, of course, true that defendants have "no right to be offered a plea ... nor a federal right that the judge accept it." *Frye, ante*, at 1388 – 1389, 132 S.Ct. 1399. **In the circumstances here, that is beside the point.** If no plea offer is made, or a plea deal is accepted by the defendant but rejected by the judge, the issue raised here simply does not arise. Much the same reasoning guides cases that find criminal defendants have a right to effective assistance of counsel in direct appeals even though the Constitution does not require States to provide a system of appellate review at all. *See Evitts*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821; *see also Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). As in those cases, "[w]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution." *Evitts, supra*, at 401, 105 S.Ct. 830.

566 U.S. at 168, 132 S. Ct. at 1387. Finally, in *Lafler*, the Court addressed the State's argument that purpose of the Sixth Amendment is to ensure the reliability of a conviction following trial. In addressing this argument, the Court held:

> This argument, too, fails to comprehend the full scope of the Sixth Amendment's protections; and it is refuted by precedent. Strickland recognized "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S., at 686, 104 S.Ct. 2052. The goal of a just result is not divorced from the reliability of a conviction, *see United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) ; but

> here the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance.

Lafler, 566 U.S. at 168-169, 132 S. Ct. at 1387-1388.

Prior to *Lafler*, this Court addressed whether counsel offered ineffective assistance for advice rendered in rejecting a plea offer in *Judge v. State*, 471 S.E.2d 146 (1996). Similarly to *Lafler*, this Court held: "The Sixth Amendment protects criminal defendants against ineffective assistance of counsel during the plea bargaining process, even if the plea offered ultimately is rejected." The Court also held that "a petitioner still must prove both ineffective assistance in counsel's advice to reject a plea agreement, as well as prejudice resulting from that ineffectiveness." 321 S.C. 560, 471 S.E.2d at 149. In *Lafler*, counsel's ineffectiveness was not dispute, but it was in *Judge*.

While addressing the standard of attorney competence during plea negotiations, this Court reasoned that "counsel's advice to reject a plea agreement does not fall below the reasonably effective assistance standard simply because, in hindsight, the advice was wrong or the attorney's trial tactics backfired." *Judge*, 321 S.C. 560, 471 S.E.2d 150. In reversing the grant of post conviction relief, this Court addressed the facts of the case, which consisted of counsel's failure to wait to receive certain *Brady* materials before advising Judge on whether to accept a plea to voluntary manslaughter. The record before this Court established that Judge's counsel were not aware of the additional *Brady* materials and thought the prosecution had provided all *Brady* materials. Therefore, this Court concluded: "Counsel cannot be held incompetent for failing to wait to receive material they had no reason to know existed." 321 S.C. at 563, 471 S.E.2d at 151. Additionally, this Court found that there was not reasonable evidence to establish

prejudice since no evidence was presented at the PCR hearing about how the additional *Brady* materials would have affected counsel's advice concerning the plea offer. 321 S.C. at 562-563, 471 S.E.2d at 151. Following *Judge*, this Court's ruling was overruled to the extent it could "be read to hold that a petitioner's statement is insufficient evidence to satisfy the prejudice prong." *Jackson v. State*, 342 S.C. 95, 535 S.E.2d 926, fn. 2 (Reversing the denial of post conviction relief and finding that petitioner's self-serving statement that he would not have pled guilty but for counsel's advice was sufficient to establish prejudice.); *see also Smith v. State*, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) ("The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty.").

Thereafter, in *Davie v. State*, 381 S.C. 601, 675 S.E.2d 416 (2009), this Court addressed the matter of deficient performance resulting from counsel not communicating a more favorable plea offer. After applying the principles set forth in *Jackson* and *Smith*, this Court concluded "that the difference in the sentence Petitioner received and the plea offer is proof of prejudice." 381 S.C. at 614, 675 S.E.2d at 423.

Here, counsel readily admitted that she did not review the evidence (phone calls) and/or properly advise Petitioner before the on the record rejection of the plea offer. Counsel also clearly testified that it was her responsibility to review the evidence and help Petitioner make an informed decision before rejecting the plea offer. In opposition to the lower court's findings that Petitioner failed to inform the trial court that he needed more time or was not properly advised, counsel clearly testified that it was her duty to review the evidence, advise him properly and inform the court more time was needed. In

contrast to the erroneous findings by the lower court, trial counsel readily accepted responsibility for her ineffective assistance that led to the rejection of the plea offer.

Furthermore, Petitioner testified that he would have accepted the plea offer if he would have properly reviewed the calls with counsel, but the lower court found Petitioner's testimony to not be credible. This finding must be disturbed and reversed. It appears the lower court bases this finding on the admission that it was Petitioner's voice on the calls, but it ignores counsel's clear admission of ineffective assistance for not reviewing the six hundred plus phone calls with Petitioner before trial or the "newly discovered" calls with Petitioner before the rejection of the plea offer and the jury was sworn. Petitioner submits that the record, to include the lower court's finding that trial counsel was credible, contradicts the court's finding that Petitioner "clearly had knowledge of their [phone calls] content at the time the State extended the offer and he rejected it." App. p. 998. On cross-examination, counsel agreed theoretically that Petitioner would know the content of the calls, but when asked if he knew what was on the calls, she responded: "Well, I don't know if he knew or remembered what was on them, but I know he made the calls." App. p. 921, lns. 1-2. On redirect, she agreed that even if Petitioner knew what was on the calls, she did not nor could not advise him regarding the calls. App. p. 921, lns. 10-16.

As argued in the Rule 59, SCRCP, motion and proceedings, the Order of Dismissal fails to properly address the prejudice prong. Based upon the record, to include the testimony of Petitioner and trial counsel, Petitioner submits that he has established prejudice even under the heightened standard of prejudice set forth in *Judge* that was overruled in *Jackson*, *Smith* and *Davie*. Here, counsel admitted that she had not reviewed

the evidence in question and therefore could not properly advise Petitioner before the rejection of the plea offer, which was five to ten years less than the amount of time he received. Counsel also explained how the calls and the closing argument made by the State were so prejudicial that she attempted to "lessen the blow" by addressing the calls in her closing argument. App. p. 894. As was found to be a sufficient showing of prejudice in *Jackson* and *Smith*, Petitioner clearly testified that he would have accepted the plea if he would have properly reviewed the additional evidence with counsel. Additionally, Petitioner has established the prejudice found in *Davie* in that he received a more sever sentence than the plea offered.

As noted in *Lafler*, the issue here is the "fairness and regularity of the processes that preceded it [trial], which caused the defendant to lose benefits he would have received in the ordinary course of but for counsel's ineffective assistance." *Lafler*, 566 U.S. at 168-169, 132 S. Ct. at 1387-1388. Petitioner submits that the lower court errantly focused on the admission that his voice was on the calls and failed to address counsel's ineffective assistance and resulting prejudice. Therefore, Petitioner submits the lower court findings regarding ineffectiveness and prejudice are not supported by the record or controlling law and must be reversed.

B. The lower court erred by not finding that trial counsel rendered ineffective assistance for failing to make a proper record and move for a continuance due to the matters of the recorded phone calls and issues involving witness Wallace.

As discussed above, Petitioner argues that counsel was ineffective for failing to properly advise him of the evidence before rejecting the plea offer and this argument is closely tied to his allegation that counsel should have moved for a continuance or made further arguments regarding the State's utilization of the newly discovered recorded

phone calls and the unavailability of Wallace. As argued in the Rule 59, SCRCP, Motion and at the hearing, the Order of Dismissal fails to properly address the testimony offered on counsel's failure to request a continuance and it fails to provide reasoning for not finding counsel ineffective in this regard. App. pp. 1009-1011, 1023-1024. As argued to the lower court, if the record is properly considered, it supports a finding that counsel was ineffective for not requesting a continuance and/or make a more complete record regarding the telephone calls and matters related to Wallace.

The allegation of ineffective assistance in failing to request a continuance was addressed by this Court in *Skeen v. State*, 481 S.C. 210, 481 S.E.2d 129 (1997) and *Collins v. State*, 422 S.C. 250, 810 S.E.2d 871 (2018). In addressing this allegation, this Court applied the two prong *Strickland* analysis and reasoned that the defendant must show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness; and (2) counsel's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. In both *Skeen* and *Collins*, this Court found that the record, to include counsels' testimony, did not support a finding of deficiency. *Skeen*, 325 S.C. 213-214, 482 S.E.2d 131-132, *Collins*, 422 S.C. 258-259, 810 S.E.2d 875-876. In contrast, here, counsel testified that she should have requested a continuance. Furthermore, in *Skeen* and *Collins*, this Court found that prejudice was not established since it was unclear what further time would have yielded or any specific testimony of how additional time would have aided the defense. *Skeen*, 325 S.C. 213-215, 482 S.E.2d 131-132, *Collins*, 422 S.C. 258-260, 810 S.E.2d 875-876. Here, both Petitioner and counsel testified here that more

time would have allowed Petitioner to be properly advised regarding the plea offer and/or have time to properly assess the weight of the evidence against him.

At the evidentiary hearing, counsel repeatedly made it clear that she should have requested a continuance before the jury was sworn and in so doing make a record of her discovery concerns. App. pp. 872-875. As discussed above, the lower court errantly put the duty on Petitioner to raise such concerns and failed to properly address counsel's failure to move for a continuance. The lower court addressed the admissibility of the phone calls, but he failed to address the admission by counsel that she needed a continuance and had no reason for not seeking one. After addressing how she attempted to attack the admission of the calls and the unavailability of Wallace, she concluded: "And I honestly don't know why I didn't ask for a continuance." App. p. 889, lns. 24-25. In response, counsel was asked if she thought it would have been effective representation for her to request a continuance, and she replied:

> Well, yes, not that I know what was on this tape. Like before I didn't know all of the things that were on the calls because I didn't have them. So, yes, I probably should have asked for a continuance, but then once I get into it – you know, I think I probably did need a continuance, but I don't know why I didn't ask for one.

App. p. 890, lns. 1-12. Despite being asked to via the Rule 59, SCRCP, proceedings, the Court did not address counsel's clear admission, which completely contradicts the findings made in denying relief.

Clearly, counsel admitted that she should have sought a continuance and was not in a position to effectively represent Petitioner regarding the admission of the phone calls and matters involving Wallace. In contrast to the lower court's focus on the admissibility of the phone calls, the issue the Court failed to properly address was counsel's

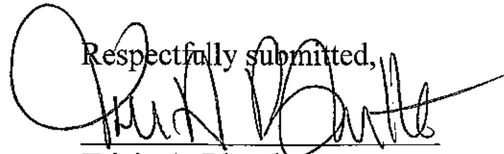
performance, which was ineffective as she was admittedly coming up with arguments on the fly. App. pp. 888-889. Appellate counsel testified that she did not raise an issue regarding the admissibility of the calls or Wallace on appeal since the record was confusing and hard to follow what the objections were and what was preserved and not raised. App. p. 933. Nevertheless, the lower court found counsel's performance was not deficient and no prejudice resulted.

Petitioner submits that the record supports a finding that counsel was ineffective in how she handled matters related to the phone calls and Wallace. Furthermore, counsel failed to cure her ineffectiveness by requesting a continuance or making a proper record. Petitioner submits that the lower court must be reversed because he was prejudiced by counsel's ineffective assistance.

CONCLUSION

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

Respectfully submitted,



Tricia A. Blanchette
Bar #74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266
Attorney for Petitioner

July 25, 2022