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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The 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.

APPENDIX
VOLUME III of III

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evidence accordingly in its discussion below. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's appellate records, and the legal arguments made by the attorneys. This Court finds the combined record of the trial transcript and the testimony from the evidentiary hearing establishes Applicant received effective assistance of counsel, and this application should be denied. Set forth below are the relevant findings of fact and conclusion of law as required by section 17-27-80 of the South Carolina Code of Laws.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 300 S.C. 115. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 300 S.C. 115.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

This Court finds Applicant has failed to prove his trial or appellate counsel's performance was deficient in any way, nor was Applicant prejudiced. This Court finds, despite multiple plea offers from the State, Applicant ultimately chose to proceed to trial and contest the State's versions of events. Therefore, for the reasons stated below, the Court denies relief and dismisses the allegations with prejudice.

Ineffective assistance of counsel for failing to ensure Applicant was aware of the State's evidence prior to the on-the-record rejection of the plea offer

Applicant argues Counsel was constitutionally ineffective for failing to ensure Applicant was sufficiently aware of the State's evidence before he rejected the second plea offer, immediately prior to the start of the trial. The evidence Applicant asserts Counsel failed to adequately review and discuss with him is a series of three phone calls made from and recorded by the detention center between Applicant and Kayla, his girlfriend, and Applicant and Wallace. Applicant does not deny he is the person speaking on the recordings. Nonetheless, Applicant claims he was not sufficiently apprised of the content of the recordings to make a decision as to whether to accept or reject the plea offer, and Applicant testified at the evidentiary hearing that he would have accepted the offer had he known what was said on the calls.

This Court has reviewed the trial transcript and heard the testimony of the witnesses at the evidentiary hearing and finds this allegation is without merit. Applicant was present in the courtroom and participated in a lengthy discussion between the trial court, Counsel, and the solicitors regarding the plea offer and the State's recent discovery of an additional phone call it intended to introduce at trial, which the State specifically noted was made by Applicant using another inmate's PIN or account. Tr. pp. 189-95. Applicant claims he did not have sufficient time to review the new evidence with Counsel before determining whether to reject or accept the offer. However, the record reflects Applicant was at least on notice of the State's intention to use the newly discovered call at the time he rejected the second fifteen-to-twenty year plea offer. Tr. pp. 189-92. Additionally, Applicant has never denied he is in fact the person speaking on the call. Tr. p. 575. Despite having the opportunity to speak directly to the trial court, he never informed the court he needed more time to make his decision, that he had not heard the call or calls and wanted the opportunity to do so before deciding whether to accept or reject the offer, or that he felt Counsel had not properly advised him on this issue. Tr. pp. 191-92.

Moreover, the State has the right to withdraw its plea offer at any time, absent a showing of detrimental reliance on the offer by Applicant, which is not the issue in this case. Reed v. Becka, 333 S.C. 676, 690, 511 S.E.2d 396, 404 (Ct. App. 1999) ("We adopt the rule the State may withdraw a plea bargain offer before a defendant pleads guilty, provided the defendant has not detrimentally relied on the offer."). "[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced. However, a defendant has no constitutional right to plea bargain." Id. at 685, 511 S.E. 2d at 401. Thus, the State was under no obligation to hold the offer open, or even to make any offer at all. Applicant was aware of the State's offer and of the fact the State had just discovered

at least one phone call the State considered beneficial to its case and which it would use against him, should Applicant choose to proceed to trial. As Applicant admitted at the evidentiary hearing he made all three of the phone calls ultimately admitted, Applicant clearly had knowledge of their content at the time the State extended the offer and he rejected it.

Accordingly, the Court finds Applicant's testimony he would have accepted the offer had he known the content of the call to be not credible. The Court further finds Applicant has failed to meet his burden of proof as to either deficiency or prejudice and denies relief. This allegation shall be dismissed with prejudice.

Ineffective assistance of counsel for failure to move for a continuance or move to suppress or to effectively object to phone calls admitted at trial and unavailability of witness Wallace

Applicant asserts Counsel failed to properly handle the issue of the phone calls and the decision of Applicant's co-defendant, Wallace, to invoke his Fifth Amendment right and choose not to testify. Specifically, Applicant argues Counsel should have moved for a continuance to have more time to review the phone calls, or she should have argued more effectively to keep the phone calls out of evidence. Applicant asserts Counsel failed to properly argue the issue of authentication of the Wallace phone call, which was made from another inmate's account.

Based on this Court's review of the transcript, it appears the parties initially expected Wallace to testify for the State. However, the night before trial, Wallace and his attorney notified the parties of Wallace's intention to invoke his Fifth Amendment right against self-incrimination. The State then discovered a phone call between Applicant and Wallace from the previous day in which Applicant asked Wallace to invoke the Fifth Amendment in order not to testify against him. Tr. p. 195. The parties agreed not to mention Wallace in opening statements or until they figured out what he was going to do, and Counsel testified she did not feel this decision prejudiced the defense.

The State proffered Wallace's testimony in camera, arguing the testimony it was seeking was not incriminating, but Wallace invoked the Fifth Amendment on the basis that requiring him to admit he was with Applicant would potentially open him up to additional grounds for revocation of his probation. Tr. p. 332-33, 335-38. Counsel argued Wallace could not selectively invoke the Fifth Amendment because allowing him to do so would hamper the defense's ability to cross-examine him, particularly if the State was allowed to enter the post-Miranda statement he had previously given to law enforcement. Tr. pp. 337-38, 340-42, 450. The trial court, however, disagreed and indicated it understood the law to be that the witness was allowed to determine what questions or information he deemed incriminating and decide when to assert the privilege, although the State could not call him to the witness stand simply for the purpose of having him invoke his right in front of the jury. Tr. pp. 344-45, 449. The State further asserted Wallace's decision was based on his conversation with Applicant, in which Applicant encouraged Wallace not to testify against him. The trial court then requested a transcript of the call and indicated the parties would listen to the call together the next morning prior to the jury arriving for the day, and the trial court would rule on Wallace's right to invoke the Fifth, as well how the State would be allowed to use the phone calls. Tr. p. 346.

Counsel testified at the evidentiary hearing that although she anticipated Wallace would have been a friendly witness for the defense, his expected testimony was not exculpatory for Applicant. She also testified she realized the argument she was making regarding Wallace's ability to selectively invoke the Fifth Amendment, if successful, would render Wallace totally unavailable as a witness, but she felt it was important to prevent the defense from being thwarted on cross-examination. Ultimately, Wallace did not testify in front of the jury, and the court found the phone call between Wallace and Applicant was admissible. Tr. pp. 2-4, 11, 542. Counsel testified, and

stated on the record at trial, that she agreed portions of the phone calls were relevant and admissible. Tr. p. 454.

Before the State introduced the phone calls, the parties made further arguments to the trial court. Counsel objected to the admission of the Wallace call on hearsay grounds, but the trial court ruled hearsay was inapplicable because Wallace was unavailable as a witness. Tr. pp. 532-33. Counsel did not object to a four-minute phone call between Applicant and his girlfriend, Kayla. However, she objected to portions a fifteen-minute phone call between Applicant and Kayla on the grounds of relevance and prejudice, particularly Applicant's statement about needing to consult an attorney. Tr. pp. 534-37. The State argued the statements were an admission or an acknowledgment of guilt. Tr. p. 535. The trial court ruled the entire call was admissible. Tr. pp. 538-39. All three phone calls were admitted and played for the jury. Tr. pp. 542-43, 546.

The record reflects at least one of the phone calls – the one between Applicant and Wallace – was not made from Applicant's PIN or account, but from another inmate's. Tr. pp. 190, 575-76. The State introduced the recordings through a witness from the detention center, who testified the recordings were made and kept in the jail's regular course of business. Tr. pp. 540-543. Applicant argues, however, since the Wallace call was not made from his account, Counsel should have further argued "authentication" or that the State did not prove it was Applicant on the call.

Again, Applicant admits he is the other person on the phone call with Wallace. Moreover, Counsel testified she felt, ethically, she could not make the argument it was not Applicant on the call, and ultimately, the defense conceded it was him in an effort to lessen the damage to the defense's case. The Court finds this testimony credible.

This Court has had the opportunity to listen to the recordings and finds Counsel's decision not to challenge the identity of the second person as Wallace was reasonable. As the investigator

testified at trial, it is clear Applicant and Wallace are discussing the facts of this case during the phone call. Tr. p. 593. This Court finds the statements Applicant makes in the phone calls are admissions or acknowledgments of guilt admissible as statements against interest. Rule 804(b)(3). Moreover, it was uncontested at trial that at least one of the phone calls to Kayla was made by Applicant from Applicant's PIN or account, and Applicant not argued *that* phone was not properly authenticated. The jury could therefore authenticate or identify Applicant's voice themselves by comparing that call to the others. See State v. Vice, 259 S.C. 30, 190 S.E.2d 510 (1972) (comparison between recorded phone call and recording of defendant's voice made during trial sufficient for identification); Rule 901(b)(3) (comparison by trier of fact sufficient for authentication or identification).

Accordingly, this Court finds Counsel was not deficient for not objecting or not properly preserving her objection, nor was Applicant prejudiced by Counsel's performance, as to authentication because the call at issue – the Wallace call – was properly authenticated by the combination of the testimony of the officer from the detention center and the comparison to at least one other call which was undisputedly made by Applicant. Counsel cannot be deficient for failing to make a non-meritorious objection, nor can Applicant be prejudiced by such a "failure." Additionally, the Court finds Counsel was not deficient for not moving for a continuance as such a motion was unlikely to be successful where the record reflects Counsel had at least two days before the phone call was introduced into evidence to listen to it, and a transcript of the call was prepared for the parties and the Court to review as well. This Court therefore denies relief and finds this allegation shall be dismissed with prejudice.

Ineffective assistance of counsel for failing to object to "search for the truth" language in jury instruction

Applicant contends Counsel was ineffective for failing to object to the trial court's use of "search for the truth" language in its reasonable doubt jury instruction. Applicant points to the trial court's instruction that "[a] reasonable doubt is a doubt which makes an honest, sincere, conscientious juror in search of the truth hesitate to act." Tr. p. 674. As support Applicant cites State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018), although that case was decided several years after Applicant's trial. Counsel acknowledged she was on notice as to the objectionable phrasing before Beaty, but she testified she was simply not focused on this issue and missed the objection.

This Court finds, although the "searching for the truth" language was objectionable, Applicant has failed to prove he was prejudiced by Counsel's missed objection. Immediately following this sentence, the trial court gave the correct instruction defining reasonable doubt as "proof which leaves you firmly convinced of the Defendant's guilt." Tr. p. 674. Moreover, the trial court repeatedly emphasized throughout the instructions that the State has the burden of proof beyond a reasonable doubt, and any reasonable doubt should be resolved in the defendant's favor. Tr. pp. 670-95. As the Supreme Court explained in State v. Aleksey, "[j]ury instructions on reasonable doubt which charge the jury to "seek the truth" are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to a defendant.'" 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000) (internal citations omitted). However, jury instructions are also to be "considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution." Id. at 27, 538 S.E.2d at 251. In reaching this holding, the Supreme Court cited to multiple cases in which nearly identical language was found

not to have unconstitutionally shifted the burden of proof the defendant. See id. at 29 n. 2, 538 S.E.2d at 252 n. 2 (listing cases in which "search for the truth" or "seek the truth" language was found not to be reversible error because it did not shift the burden of proof). Accordingly, this Court denies relief and finds this allegation should be dismissed with prejudice.

Ineffective assistance of counsel for failing to raise issues with admission of phone calls on appeal and failing to raise all meritorious issues on appeal

Applicant contends Appellate Counsel was constitutionally ineffective for failing to raise all meritorious issues on appeal, and specifically, any issues regarding the admission of the jail phone calls. This Court finds Appellate Counsel was not deficient, nor was Applicant prejudiced by her representation and denies relief.

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy. . . ." Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Jones, 463 U.S. at 754). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland, 337 S.C. at 616, 524 S.E.2d at 836 (1999). Thus, in this case, we ask

first whether Appellate Counsel's performance was deficient, and two, whether Applicant was prejudiced by Appellate Counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, an applicant must show that, but for Appellate Counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Here, Appellate Counsel testified she reviewed the trial transcript and took note of any objections made, then conducted legal research to determine which issues to present on appeal considering whether the objection was preserved and whether she felt the issue ultimately had merit. Appellate Counsel testified, in her opinion, the only preserved objections regarding the phone calls were the relevance and prejudice objections as to the fifteen-minute call with Kayla. Appellate Counsel testified, however, she did not believe that was a meritorious issue to raise on appeal. Instead, Appellate Counsel chose to raise the issue of the search of the apartment where Applicant's clothes were found with the victim's blood on them. Appellate Counsel testified she believed this was a good issue to raise because of the officer's references to DSS involvement if permission was not given. The Court of Appeals found this issue to be preserved and ruled on the merits of the claim.

Accordingly, this Court finds Applicant has failed to prove either deficiency or prejudice. As discussed above, this Court agrees the phone calls were admissible, and therefore, Counsel was limited as to what objections she could make. Appellate Counsel reviewed the transcript and conducted legal research before deciding to pursue the search issue rather than the issue of the phone calls. Thus, Appellate Counsel was not deficient. Applicant has not established the phone calls were inadmissible, and therefore, he was not prejudiced. This Court denies relief on these grounds and finds they should be dismissed with prejudice.

CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this _____ day of 4/19, 2021.

BRIAN M. GIBBONS
Presiding Judge
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Brandon Berry, 352671, ☒ Plaintiff v. State Of South Carolina ☐ Defendant.	))))))))))	IN THE COURT OF COMMON PLEAS CASE NO. 2017-CP-40-7548 MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
Tricia A. Blanchette, Bar No. 74904 Address: PO Box 2147 Leesville, SC 29070 phone: 803-908-3266 fax: e-mail: blanchettelaw@gmail.com other:	Lindsey Mccallister, Bar No. Address: PO Box 11549 Columbia, SC 29211 phone: 803-734-3737 fax: 803-734-4113 e-mail: other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Rule 59, SCRCP
Estimated Time Needed:30 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒Plaintiff / ☐Defendant — May 25, 2021 Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	_____ JUDGE CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

RICHLAND COUNTY FILED 2021 MAY 27 AM 10:55 JEANETTE W. McBRIDE C.C.P., G.S., & C.C.

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA) COUNTY OF RICHLAND)	IN THE COURT OF COMMON PLEAS DOCKET NO.: 2017-CP-40-7548
Brandon J. Berry, 352671,) Applicant,) v.)) State of South Carolina,) Respondent,))	MOTION PURSUANT TO RULE 59(a) & (e), SCRCP

Pursuant to Rule 59(a) and (e) of the South Carolina Rules of Civil Procedure, Applicant would move before this Court for relief as follows.

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed 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 Applicant's counsel via written Order dated October 4, 2018. On October 4, 2019, Applicant, through counsel, submitted an Amendment to Application for Post Conviction Relief, which set forth the following specific allegations of ineffective assistance of trial and appellate counsel:

1. Trial counsel rendered ineffective assistance for failing to properly handle witnesses and call necessary witnesses at trial.

2. Trial counsel rendered ineffective assistance for failing to ensure that Applicant was aware of the State's evidence prior to the on the record rejection of the plea offer. Transcript pp. 190-191.

3. Trial counsel rendered ineffective assistance for failing to move to continue, move to suppress and/or effectively object and argue regarding the recorded phone calls admitted at trial and the unavailability of witness Wallace. Ineffective assistance of appellate counsel for failing to raise issues related to the phone calls and availability of witness Wallace on appeal.

4. Trial counsel rendered ineffective assistance of for failing to object to the court's instruction to the jury to "search for the truth." Transcript p. 674.

5. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal, to include the above stated issue(s).

On October 30, 2019, an evidentiary hearing was conducted at the Richland County Courthouse in front of the Honorable Brian M. Gibbons. Applicant 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, Applicant, through counsel, submitted a Memorandum, which was admitted as Court's Exhibit one, and informed the Court that Applicant was no going forward on issue number one from the Amendment.

During the course of the evidentiary hearing, Applicant took the stand, along with Aimee J. Zmrocek, Esquire, and Laura M. Caudy, Esquire. Applicant, through counsel, 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. On May 17, 2021, Applicant's counsel received a copy of the signed and filed Order in the mail from the Richland County Clerk of Court, from which this Motion timely follows.

ARGUMENT

In *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007), the South Carolina Supreme Court made it clear that a post-conviction relief judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. See also S.C. Code Ann. § 17-27-80. Therefore, Applicant would respectfully request that the Court ensure that specific findings of fact and conclusions of law are entered on each issue raised and that the record before the Court and testimony of each witness is properly addressed in

the standing Order of Dismissal ("Order"). Additionally, Applicant would respectfully ask that the Court reconsider the Order and find that a new trial should be granted.

On March 22, 2021, Respondent complied with the instructions of the Court issued on November 18, 2019 and submitted an Order of Dismissal for the Court's review. On March 23, 2021, Applicant's counsel emailed the Court a copy of the transcript and informed the Court that she had previously raised concerns with Respondent regarding the completeness and accuracy of the references to the evidentiary hearing transcript in the Order. Therefore, she provided the Court a copy of the evidentiary hearing transcript to ensure that the Order was accurate and complete. Counsel also explained that the transcript was being provided in support of Applicant's request for the Court's reconsideration of the denial of relief.

Upon review of the signed and filed Order of Dismissal, Applicant, through counsel, would bring the following specific examples of conflict between the Order and the evidentiary hearing transcript to the Court's attention:

1. The Order States that counsel testified that she did not review the six hundred plus phone calls received in discovery with Applicant because he was in detention center. Order p. 13. During direct examination, counsel sated that she did not have the opportunity to review the six hundred plus calls with Applicant. Thereafter, when asked if he was in the detention center, she responded that he was in the detention center. PCR p. 17, lns. 12-19. She did not state that she did not review the calls with Applicant because he was in the detention center.

2. The Order states: "Counsel testified, in hindsight, she felt she should have asked for a continuance once she had a chance to listen to the phone calls." Order p. 13. Later, the Order states: "Counsel testified she did not know why she did not move for a continuance to review the calls, she believed doing so would have been effective." Ordre p. 15. As the transcript reflects, counsel testified at length about how she should have requested a continuance due to the late receipt of discovery (the recorded phone calls) and in light of the recorded phone calls. PCR pp. 21, 23-26, 40, lns. 19-25, 41, lns. 1-12, 49-50, 70-71. Applicant submits that the Order fails to fully address counsel's testimony and that the cited portions of the Order are inconsistent with each other. Additionally, Applicant submits that counsel's testimony and admissions are not properly reflected in the findings set forth in the Order.

3. The Order fails to address counsel's explanation and admission that additional arguments regarding the suppression of the phone calls "maybe just weren't verbalized." PCR p. 40, lns. 1-3.

4. The Order states that "counsel explained there was substantial evidence against Applicant." Order p. 17. The transcript reflects that Respondent summarized the evidence and counsel responded with statements of "correct", "yes" and "consistent," but the only time counsel explained something was when she did not agree with Respondent's summary of the evidence. PCR pp. 50-56. When asked if "there's some significant evidence against Mr. Berry on these charges," counsel did respond "yes." PCR p. 56, lns. 15-17. Applicant submits that the above statement from the Order is a mischaracterization of the testimony elicited from counsel since counsel did not "explain the evidence" as reflected in the Order nor did she explain there was substantial evidence against Applicant.

5. The Order states counsel testified that Applicant knew that there were three phone calls the State wanted to enter into evidence when he rejected the plea offer. Order p. 13. The transcript reflects that counsel testified that Applicant knew the State had phone calls that she had not heard yet when he rejected the plea offer. PCR p. 56, ln. 19 – p. 57, ln. 22. She did not testify as stated in the Order regarding knowledge that the State wanted to admit three phone calls when the plea was rejected. Specifically, on redirect she testified that Applicant did not know the State intended to introduce the three phone calls when he rejected the plea offer. PCR p. 72, ln. 17 – p. 73, ln. 10.

6. The Order correctly reflects that counsel testified about the warning on jail calls that the call is being recorded, but the Order fails to address counsel full testimony that despite the warning she does not think the calls should be used as a discovery tool. Order p. 13, PCR p. 60, ln. 22 – p. 61, ln. 8, p. 73, lns. 20-25.

7. The summary of counsel's testimony regarding Mr. Wallace does not properly reflect her testimony to include the following statements: "I never knew anything about Wallace. I didn't talk to his attorney. I mean we didn't have a joint defense." Order p. 15, PCR pp. 62-63, p. 63, lns. 12-17. For example, the Order states: "Counsel explained Wallace was originally cooperating with the State...," but the transcript reflects that counsel testified that she did not have knowledge about whether Wallace was cooperating but answered questions about what it appeared the Solicitor understood from the record. PCR p. 77, lns. 9-22.

8. The Order does not properly reflect counsel's testimony regarding her concern about when the State actually discovered the phone calls. PCR pp. 64-65, 74.

9. The summary of appellate counsel's testimony fails to address her testimony regarding the "search for the truth" language and counsel's failure to address a continuance or discovery issues on the record. PCR pp. 85, 88-89.

10. The summary of Applicant's testimony is addressed in one paragraph, and Applicant submits the summary fails to address the entirety of the testimony he offered in support of his allegations. PCR pp. 91-101.

Turning to the findings of fact and conclusions of law on each issue raised, Applicant submits the Order fails to address the above noted testimony and of utmost importance counsel's admissions regarding her failure to ensure that Applicant was properly advised prior to the plea offer was rejected, her failure to raise discovery concerns on the record and her failure to request a continuance. Applicant would respectfully ask the Court to ensure that the testimony of each witness is properly addressed and in doing so reconsider the denial of relief.

CONCLUSION

In conclusion, Applicant would request that the Court review the full record, including the evidentiary hearing transcript, alter, amend or reconsider the standing Order of Dismissal and/or rehear Applicant's case pursuant to Rule 59(a) and (e), SCRCP.

I so move,

Tricia A. Blanchette
Attorney for Applicant
PO Box 2147
Leesville, SC 29070

May 25, 2021

STATE OF SOUTH CAROLINA) COUNTY OF RICHLAND)) Brandon J. Berry, 352671,) Applicant,) v.)) State of South Carolina,) Respondent.)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT 2017-CP-40-7548 CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I placed in the United States mail this 25h day of May 2021 a Motion Pursuant to Rule 59(a) & (e), SCRCP, to Lindsey McCallister of the Attorney General's Office, at:

Office of the Attorney General
Att: Lindsey McCallister, Asst. Deputy AG
P.O. Box 11549
Columbia, SC 29211-1549

Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
(803) 908-3266

May 25, 2021

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF RICHLAND) 2017-CP-40-7548

Brandon Berry,
Plaintiff,
vs.) TRANSCRIPT OF RECORD
State of South Carolina,
Defendant.

November 22, 2021
Columbia, South Carolina

B E F O R E:

THE HONORABLE BRIAN M. GIBBONS, JUDGE.

A P P E A R A N C E S:

TRICIA A. BLANCHETTE, ESQ.
Attorney for the Plaintiff

YASMEEN E. KLEIN, ASSISTANT ATTORNEY GENERAL
Attorney for the Defendant

DEBORAH M. McCURDY, RPR
Official Court Reporter

INDEX OF WITNESSES

(WHEREUPON, no witnesses were called during these proceedings.)

EXHIBITS

(WHEREUPON, no exhibits were introduced during these proceedings.)

NOVEMBER 22, 2021

(WHEREUPON, the proceedings commenced at 10:06 a.m.)

THE COURT: This is Docket 17-CP-40-7548. The matter is before the Court on a motion pursuant to Rule 59, timely filed, styled Brandon Berry v. State of South Carolina.

I issued an order signed back on April 19, 2021, following a hearing, an evidentiary hearing, held, hard to believe, a little over two years ago, I believe, here in Richland County on Mr. Berry's application for post-conviction relief.

This motion was filed and -- anyway, I am going to let the lawyers talk, and we'll go from there. Procedurally I believe everything is correct.

Do you agree, Ms. Blanchette?

MS. BLANCHETTE: I do, Your Honor.

THE COURT: All right, good.

Madam AG, do you agree procedurally?

MS. KLEIN: Yes, sir.

THE COURT: We're all good.

All right. Well, Ms. Blanchette, I don't want to cut into your thunder, but if you are comfortable taking your mask off while you are

arguing, please do. Fine with me. If you want to come up to the podium, that is fine as well. However y'all want to handle it. Okay?

I will be glad to hear from you. I have your motion up here. I have my order. And I will just hand it over to you.

MS. BLANCHETTE: Yes, Your Honor. I appreciate that.

THE COURT: Yes, ma'am.

MS. BLANCHETTE: Tricia Blanchette, here on behalf of Mr. Brandon Berry. I appreciate the opportunity to be here in front of you today.

Madam Court Reporter, if you have any problem hearing me or anything, we don't have much plexiglass between us, so just please let me know. And the Court the same.

Your Honor, I don't want to be redundant or waste your time. We did file a written motion, and I know Your Honor has reviewed it because you requested for this hearing to be set. So I didn't intend today to go back over any of the materials set forth in the motion. I was just going to simply highlight one of the major concerns addressed in the motion.

THE COURT: Yes, that is kind of what -- hit

the highlights for me because I may ask some questions --

MS. BLANCHETTE: Okay.

THE COURT: -- as I re-read through things, and then we will go from there.

MS. BLANCHETTE: Okay. That sounds great, Your Honor.

In the order I sent out, I believe that it is ten different points of concern with either the summary of the testimony or discrepancy between the evidentiary hearing transcript and the order.

Specifically, I thought it would be constructive to bring to the Court's attention that at the end of the evidentiary hearing I requested time to get the transcript, and so I had the evidentiary hearing transcript in hand.

Back on -- before Ms. McCallister submitted her proposed order, we went back and forth with emails for about two weeks because Your Honor had asked her to provide it to me and for me to make any suggestions. At that time I did, and I did indicate to her that I had concerns with the accuracy as pointed out in the 59.

Then after the order was submitted on March 23rd of 2021, I submitted the transcript to Your

Honor before the order was signed indicating that I had these concerns, not in the detail in the 59, but that was submitted before the order was signed. And once the order was signed and I knew the true content of what was going to be in the order, that is when I set forth these specific paragraphs as indicated in the motion.

As I said, these are all written out, so unless Your Honor would like me to go through them, I don't see a reason specifically to go through those.

THE COURT: I want you to make the record you think you need to make.

MS. BLANCHETTE: Okay. Well, Your Honor, the order is filed -- or the motion is filed, so that is before the Court. And as I said, there is specifically ten different sections of the order that I point to. But I think the best way to summarize that is, there are three key points I would like to make today.

It is our position -- and briefly in the order I do ask you for reconsideration. So I figure that is the point that I am going to address more fully today.

It is our position that based upon the record

before this Court, to include the evidentiary hearing, the transcript, and the exhibits, the rejection of the plea offer in this case mid-trial was not an informed decision. There was a plea offer made of 10 to 15 years. It is our position that both Amy Zmroczek's -- who was trial counsel -- testimony and my client's testimony are consistent that that was a deficient performance on her part in that process that happened mid-trial. The rejection of that was not informed and there was prejudice that resulted.

I point to these in the motion, but specifically on Page 97 of the PCR transcript, I just wanted to point your direction to some of the testimony that was elicited on these points.

THE COURT: All right.

MS. BLANCHETTE: And beginning on Page 97, looking at Line 25, this is Mr. Berry's direct testimony. And I asked him:

Sir, are you still asserting that your attorney should have properly advised you and addressed those phone calls with you before you proceeded to your trial, and, most importantly, before you rejected that plea offer, is that correct?

And he says, Correct.

And, Mr. Berry, if you would have known about those three phone calls in that evidence that the State intended to use against you and argue was an admission, would you have proceeded to trial or taken the guilty plea?

I would have taken the plea if I would have known about the calls.

I think that is very clear testimony.

And then Ms. Zmroczek, I'd like to direct Your Honor to Page 21 of her testimony.

THE COURT: All right.

MS. BLANCHETTE: And there we are talking about both the issue of the continuance, which I am going to hit on a little more next, and the rejection of the plea offer, because those became hand-in-hand.

As I'm sure Your Honor is aware, at this point in the trial the State -- and we went through this in great detail, and I submitted a memorandum, which I have another copy of today if you need -- but the State essentially offered a plea mid-trial and let counsel know there was additional evidence in the form of phone calls that they intended to produce.

And here on Page 21 I begin questioning Ms. Zmroczek. And I say, beginning on Line 7:

Now, at that point would you agree Mr. Berry hadn't had the chance to review that additional evidence? You even hadn't had the opportunity?

That's correct.

Is there any reason why you didn't tell the Court, We need a continuance because the State is turning over additional evidence?

I do not recall. I don't have any reason as to why I didn't do that.

Okay. And is there any reason that you didn't ask for that plea offer that they said you 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 so you could review the further evidence?

Not that I recall.

But you would agree that the plea rejection was affirmed after the disclosure of this additional evidence?

Absolutely.

Now, Your Honor, I didn't ask him a clear question there, but I think that shows exactly what I'm arguing, that counsel did not have an

opportunity to review the evidence, didn't have the opportunity to fully inform him when he rejected that plea offer.

Both Davie and Judge, which are cases that I handed up at the evidentiary hearing, establish that counsel can be ineffective in advice or assistance offered in rejecting a plea.

And it is my position based upon the case law that we have to show, one, she was deficient in the assistance she provided, and we must show actual prejudice. And based upon Davie and the line of cases after Judge, that can be in the form of a self-serving statement, and it also can be shown in the difference in the amount of time received between the 10 to 15 years offered.

The Harris case that is cited in the Davie case by our courts, and Harris is a case, it is out of Florida, I handed that up to Your Honor at the prior hearing, but I just wanted to read one section of it. And here it says:

The Defendant must be sufficiently informed so that he or she understands the consequences of the plea. An inherent prejudice results from a Defendant's inability due to counsel's neglect to make an informed decision whether to plea.

And I submit that is what we have here.

Your Honor, I touched on the issue of the continuance because those were hand-in-hand and we talked about them throughout the testimony in the hearing together. Again, I submit, unlike the order signed, that both my client and Ms. Zmroczek's testimony was consistent that a continuance was needed.

I previously handed up Your Honor the case of State v. Skeen that deals with ineffective assistance of counsel for failure to request a continuance. And there he was denied relief because the Court found it was unclear what additional preparation or time would have yielded. Here I submit the record is clear. There was more that needed to be done.

I would direct your attention back to that portion of Ms. Zmroczek's testimony that I already read into the record on Page 21. She also says on Page 41, Line 24 through 25, she doesn't know why she didn't ask for a continuance.

And on Pages 49 through 50, as addressed in the motion, she indicates that the calls that she found out about when she didn't ask for a continuance were prejudicial to Mr. Berry.

And, furthermore, as I addressed with appellate counsel at the hearing, if she would have asked for a continuance and it would have been denied, it could have been raised on appeal. I know that is a very hard issue to win on appeal because that sits solely in the discretion of the trial court, but it still is an issue that was not preserved or ruled upon.

And then the final issue that I did not go into in detail in the motion was the issue that we raised regarding the search for the truth language.

I would just like to point out that in the order it just cites to the Beaty case. It indicates that that case was decided after trial. I have provided the Court a copy of the Daniels case, which was decided well in advance of trial. That was decided in 2012. Beaty was just more recent as far as reiterating what was in Daniels, but that wasn't known at the time of trial, and I would submit that counsel did not give a reason for not objecting to that language. And, again, appellate counsel testified that there was no objection, and an objection would need to be made for that to be preserved for appeal.

Your Honor, I appreciate you allowing me to

make a record, but I would, as I said already, rely upon the lengthy motion I have already filed, but I am happy to answer any questions or be of, you know, any assistance that I can to the Court at this time.

THE COURT: All right. I'll come back to you if I need to.

Yes, ma'am?

MS. KLEIN: Thank you, Your Honor. May it please the Court? My name is Yasmeen Klein, on behalf of the State.

Your Honor, the State would contend that this order is sufficient. There are reasonable findings of fact and conclusions of law.

In the motion that Ms. Blanchette has filed, she raises primarily testimony summarization issues, and should the Court require that the order be strengthened, I would be happy to amend to kind of modify some of the language she has objections with, but the foundation of the order is strong.

Ms. Blanchette raised several issues in her request for reconsideration that I think this Court got correct the first time that it reviewed the PCR transcript, and primarily concerning that Ms. Zmroczek was not ineffective when she did not

move or request a continuance on these phone calls.

Ms. Blanchette has alleged that -- and I believe that Mr. Berry additionally testified that he was not aware of what the content of these phone calls were, but he admitted that he made these phone calls. These phone calls occurred very recently in time prior to the trial. They happened, I believe the Solicitors discovered a couple of days before trial while the trial was ongoing. So these were not calls that he made over a long period of time that he would have disregarded the content of.

And with regards to their admission, these were statements to the phone calls where he called his girlfriend at the time, used his own pin, and he made statements where he admitted to some of the conduct that he was being accused of committing. Those statements would have been admissible. The calls were found to be admissible. And so the argument that he was -- he would have pled guilty or had he known the content he would have made a decision to not reject the offer is inconsistent with the fact that he made the calls and he knew what the calls were about.

At the time that he rejected the second plea

offer, he had already rejected the first plea offer of 30 years. At that point it was not reasonable to assume that he intended to discuss a plea, he intended to go to trial. And at the time that he rejected the second plea offer of 15 to 20 years, he also knew the substantial evidence that the State was going to present against him at trial.

In honesty, Your Honor, the State views these phone calls and the admission of the phone calls and the discussion about whether there should be a continuance to be irrelevant because in the grand scheme of the evidence facing the Applicant at trial, the phone calls were insignificant. There was substantial DNA evidence regarding the blood of the victim that was found on his clothing. There was the evidence that he discarded after the police chase and the stop. There are several things that were connecting him to these events that he knew well in advance of the trial and he was prepared to go to trial on. And so alleging that Ms. Zmroczek was ineffective and it was prejudicial to him because of this one thing ignores the broader scope of Strickland and what Strickland is there intending to protect.

I believe that Ms. Blanchette also raised

certain portions of the transcript with regards to Beaty and what Ms. Caudy testified to as appellate counsel specifically with regards to the continuance. And Your Honor did actually engage in direct examination with Ms. Caudy in the transcript reflecting that she admitted that this was not an issue that they would have ever raised in Appellate Defense, that that is not successful.

And ultimately I think that the order is proper in just discussing what the actual allegations against Appellate Defense were. She raised the most appropriate argument that she could based off of the testimony, and she can't be held ineffective for that either.

Your Honor, there is quite a bit that is included. I just want to make sure that I am not taking up too much of your time, but, again, portions of this motion are generally objecting to the way that testimony was phrased. And the order can be strengthened and that can be summarized differently, but that does not mean that the finding of the order is inconsistent or incorrect with the facts that were presented during the PCR and evidentiary hearing.

And, Your Honor, the Respondent would

respectfully request that the Court deny the motion and uphold the order.

THE COURT: All right. Thank you, ma'am. Any reply briefly before I go look at this case?

MS. BLANCHETTE: Very briefly, Your Honor. I would just submit that it is our position that you would need to find that the testimony of Ms. Zmroczek was not credible to deny relief in this case because it is our position that her testimony was consistent with finding that we have met deficiency and prejudice, specifically as to the plea offer, and I would also submit as to the continuance issue.

I believe the State has actually made an argument, even though they are saying this new evidence was not consequential in light of the weight of the evidence, it is -- it was new evidence, and it was new evidence that was not discussed before the rejection of the plea offer.

THE COURT: The prejudice prong of Strickland, does that go towards guilt or innocence or does that go more for result? Do you understand kind of what I'm asking?

I understand what you are saying. I mean, you know, he was offered during mid-trial, you know,

what some would call a, quote, sweetheart deal, end quote. Okay? Not to put any -- maybe that is not a very good connotation, but you understand what I mean? As a trial attorney, that is a pretty good deal with the evidence that the State said they had. Okay?

And, you know, maybe he, through his lawyer, made a strategic decision not to take the plea offer and to take it to a trial, but -- do you see where I'm coming from?

MS. BLANCHETTE: And I think that is what we are missing in this case, Your Honor, is he didn't have the chance to make that informed decision. And counsel admits that.

And one thing -- I think maybe -- I even want to say at the evidentiary hearing we were both struggling with the same thing too. What is the relief that I'm asking for? What is the prejudice we have to show? And what would be the relief in this type of case? And so I have spent some time --

THE COURT: Well, we all know what the relief would be, it would be a brand new trial.

MS. BLANCHETTE: Well, and I even questioned him, though, because in the Davie case they offered

the opportunity for him to plead to any less time that he was serving. And so I do have a copy of Lafler v. Cooper, which is a Supreme Court case. There the Supreme Court of the United States struggled with in that instance he rejected a plea offer before the trial even started, so it is a different set of circumstances. And they struggled with, How do we evaluate this under Strickland when it was rejected before he went forward with the trial and he was convicted by a jury? Where is the prejudice in that? And so I do have a copy of Lafler.

THE COURT: Yes. If you don't mind handing that up, that would be great.

MS. BLANCHETTE: Okay. Because I found that to be, even though it is not directly on point, it kind of helped me flesh through the issue a little bit more.

THE COURT: Thank you.

MS. BLANCHETTE: And, Your Honor, though, when I read through it, I went back to our line of cases under Davie and Judge, that essentially we need to show deficiency. And then under Davie, we can show in the current line of cases, those that actually reversed Judge, A self-serving statement is enough

in a guilty plea case to say, I would have taken the guilty plea. We did have a line of cases that existed for a number of years where that was not enough. Specifically when you are talking about now where you are mid-trial, you have to show that, I would have taken the guilty plea and I would have been successful at trial.

Recently our Supreme Court said that standard is too much. We can just -- we have to establish that he would have taken the guilty plea, we don't have to get into the weight of the evidence at trial and whether or not he would have been successful at that trial.

THE COURT: And you are not aware of any South Carolina case law on point where the failure to take a guilty plea in lieu of going -- continuing with the trial was found to be prejudicial?

MS. BLANCHETTE: Well, the Judge case --

THE COURT: Do you see what I'm asking?

MS. BLANCHETTE: Yes, I know what you are saying, the fact scenario.

THE COURT: Coming right down to the heart of the issue here, which is, you know -- go ahead.

MS. BLANCHETTE: Yes, it is this mid-trial decision.

THE COURT: Right.

MS. BLANCHETTE: Our cases typically deal -- and Davie deals with -- and we have a line of cases that follow Davie where you are not advised of a plea offer, and so you get to, once you establish at the PCR hearing that you didn't know about it, then you get the relief that is crafted under Davie.

THE COURT: But in this case he knew of the plea offer?

MS. BLANCHETTE: He did.

THE COURT: Correct?

MS. BLANCHETTE: He did.

THE COURT: But he decided not to take it. And then in hindsight, Ms. Zmroczek, of course, I guess, had, you know, 20/20 vision.

MS. BLANCHETTE: Well, and that is -- the order focuses on hindsight, and I don't think it is hindsight. I think it is evidentiary and she admitted, I should have said, We need to review this evidence, he needs to be informed before we reject this plea offer.

THE COURT: Okay.

MS. BLANCHETTE: She admitted. And that is why I cited to Harris, which comes from Davie,

which is a South Carolina case, that says that --

THE COURT: Hold on. Let me interrupt. I am going to let you go into that.

MS. BLANCHETTE: Okay.

THE COURT: Remind me, because it has been a while, was there an evidentiary hearing on the issue of the phone calls coming in?

MS. BLANCHETTE: Was there like a motion to suppress as to whether or not the phone calls --

THE COURT: Right.

MS. BLANCHETTE: Your Honor, I was trying to do a nice summary of that, and I kept going back to the memorandum that we used in court and I requested all the witnesses off of, because it pops up like throughout the whole course of the hearing, and ultimately they do rule, as the State said, that some of the phone calls can come in. Throughout the course of the hearing she made different objections on hearsay. And since it was evidence turned over mid-trial, it was kind of something -- it wasn't your typical like motion in limine or motion to suppress, then we have a ruling, then it is renewed and preserved, that type of thing. Because this comes up mid-trial along with this plea offer, it is addressed kind of

throughout.

THE COURT: Okay.

MS. BLANCHETTE: There is not like an opportunity to do briefs and submit case law.

THE COURT: I remember that now.

MS. BLANCHETTE: Yes. So it is a real back and forth that that is this memorandum that I had previously submitted. I do have a copy if you needed it. It turned out to be nine pages because the issues are just so interlaced throughout the course of the whole transcript.

THE COURT: I got you. All right, sorry to interrupt. What was the point you were making?

MS. BLANCHETTE: No, Your Honor, that is what I was just saying before I had given you the Alvin Harris case, which is a Florida case, and I wouldn't usually rely upon precedent from other states, but, as I said, it is cited to in the Davie case, and it kind of went down that vein of where we are at, being informed as far as the rejection of a plea offer, you know, because we don't fit into the parameters of Davie.

I did -- I reached out to many fellow friends at Appellate Defense and have picked all of their brains to see if they have ever seen this scenario,

and I will give them credit, they actually reminded me of the Lafler case that kind of talks through. And at the end of the day, I keep going back to Davie and Judge and the Harris case as far as the best precedent that I could find to provide to the Court.

THE COURT: Okay. Thank you.

Anything else from the State?

MS. KLEIN: Your Honor, with regard to -- I want to discuss your statement about hindsight. There were statements that Ms. Zmroczek said that, Yes, in retrospect, perhaps I should have moved for a continuance, but she also testified that at no point did Applicant indicate that he wasn't the person on the call. And so I think she testified that, to some degree that, you know, she -- they were aware that these calls were going to be introduced, the State told us that they had these, they sent them to me, they were not good for the Defendant, and that he still rejected the plea offer. And that she was not aware of the content, but he should have been aware, and I think that if you make the call yourself, it is reasonable to assume that you would be aware of what happened on that phone call.

And so, sure, in hindsight, anyone can say, I would have done something differently, but the standard for Strickland does not penalize attorneys for reviewing it that way.

THE COURT: Well, I guess that is my -- that kind of goes to my point. The standard of -- the prejudice standard for Strickland -- of course, you are looking at a lawyer's performance. The lawyer not listening to the calls, the substance of the calls, versus the client acknowledging that, Yes, I made those calls, but the lawyer not knowing the full extent of it, is that prejudicial? Do you see what I'm saying?

MS. KLEIN: Yes.

THE COURT: I mean, in other words, like you just said, Ms. Blanchette intimated, Yes, he knew what he said, or at least he should have known what he said because he is the one who said it. Okay? There was no dispute that he is the one that actually made the phone calls, so, you know, the lawyer is trying to strike the best deal he or she can for your client.

Anyway, again, I'm thinking out loud trying to make as good a record as I can. Anything else on the issue of prejudice?

MS. KLEIN: Your Honor, just in light of all the evidence that was presented in this case, I think focusing on this one portion of it is not so overwhelming to indicate that you should grant the relief requested.

THE COURT: Well, you don't get into the prejudice prong until there is a finding that counsel's performance was deficient.

MS. KLEIN: Correct. But you can analyze the prejudice prong prior --

THE COURT: Sure.

MS. KLEIN: And it is obvious that he would have been prejudiced because it was something that was relatively minor in lieu of all the other evidence presented, then you don't have to address deficiency, because if you can't prove prejudice, then you can't establish ineffective assistance of counsel.

THE COURT: Understood.

All right, let me do this. Here is what -- we are all here, okay? And I don't want to -- I am going to go back into my office here, review all this stuff again, and if I feel good enough about it, which I think I will, I want to put my decision on the record, okay? Because this has been a long

day coming for all involved, okay? And I don't want to further delay this and put this off, okay?

So let me -- y'all just hang tight, okay? And we'll be in recess, and then I will come back in. If I decide I'm not going to rule today or this morning, of course I will let you know and I will be back in touch, okay? But I am going to go back and read my notes, together with everything else I have, and we will go from there, okay?

Y'all give me just a moment. We'll be in recess.

MS. BLANCHETTE: Thank you, Your Honor.

THE COURT: All right, thank you.

(WHEREUPON, a break was taken at 10:32 a.m.)

(WHEREUPON, the proceedings resumed at 10:56 a.m.)

THE COURT: Thank you very much.

All right. I went over everything once again, including the case law handed up this morning, Ms. Blanchette, I went through all the points made in your motion, as well as re-read my order, which consists of some 30 pages.

Anyway, based upon the testimony and evidence submitted, and considering the arguments of

counsel, my review of the previous record, as well as the order of dismissal, which I signed and it was entered on May 10, 2021, the Court respectfully denies your Rule 59 motion, Ms. Blanchette.

As such, the Court's order of dismissal will stand as is. All right?

MS. BLANCHETTE: Thank you, Your Honor I appreciate your time.

THE COURT: Yes. That is the order of the Court. And of course you know what you need to do from this point forward.

All right, that concludes this hearing. Thank you very much to all who made it happen.

Y'all have a good day.

(WHEREUPON, the proceedings concluded at 10:57 a.m.)

(END OF TRANSCRIPT)

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Deborah M. McCurdy, Certified Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 22nd day of November, 2021.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

April 21, 2022

s/*Deborah M. McCurdy, RPR*

Deborah M. McCurdy, RPR
Certified Court Reporter

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Brandon Berry, #352671, Applicant, v. State of South Carolina, Respondent.	)	2017-CP-40-7548 **ORDER DENYING MOTION**

This matter comes before the Court by way of Applicant's Motion pursuant to Rule 59(a) & (e) filed on May 25, 2021. A hearing was scheduled on November 22, 2021, at the Richland County Courthouse before the undersigned. Applicant was present and represented by Tricia A. Blanchette, Esquire. Assistant Attorney General Yasmeen E. Klein respresented Respondent. Applicant and Respondent provided arguments supporting their respective positions. After reviewing all argument and submissions, the Court's notes, and the lower court record, this Court respectfully **denies** Applicant's motion, the Order of Dismissal dated May 10, 2021, shall stand.

AND IT IS SO ORDERED this _____ day of 11/29 **, 2021.**

BRIAN M. GIBBONS
Presiding Judge
Fifth Judicial Circuit

_____, South Carolina