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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

MICHAEL ORLANDO BROWN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2019-001677

Appeal from Richland County

Kristi F. Curtis, Post-Conviction Relief Judge

Opinion No. 2024-UP-223

PETITION FOR REHEARING

On June 26, 2024, this Court affirmed the circuit court's denial of Petitioner's application for post-conviction relief (PCR). Brown v. State, 2024-UP-001677 (S.C. Ct. App. filed June 26, 2024). Pursuant to Rule 221(a), SCACR, Petitioner respectfully requests this Court rehear the matter based upon the significant points overlooked and/or misapprehended by this Court in reaching its decision.

On appeal, Petitioner argued the PCR court erred by finding Petitioner was not prejudiced by trial counsel's deficient performance where counsel failed to contemporaneously object to the admission of Petitioner's alleged statements to law enforcement in which Petitioner allegedly

offered to plead guilty to a lesser offense after counsel moved pretrial to suppress the statements pursuant to Rule 403, SCRE, since there is a reasonable probability Petitioner would have prevailed on appeal had trial counsel properly preserved the issue for appeal.

In its unpublished opinion, this Court held Petitioner was not prejudiced by trial counsel's failure to contemporaneously object to the admission of his statement to law enforcement because the probative value of Petitioner's offer to plead guilty to a lesser offense was not substantially outweighed by the danger of unfair prejudice. This Court concluded Petitioner's offer to plead guilty was "highly probative of consciousness of guilt." As to unfair prejudice, this Court determined Petitioner's statement "does not carry an undue tendency to suggest a decision on an improper basis." Despite this holding, this Court asserted, "the extent to which the statement carries such a tendency does not outweigh the statement's probative value, as would be required to warrant suppression under Rule 403." This subsequent finding acknowledges that Petitioner's statement does have some "tendency to suggest a decision on an improper basis."

This Court then addressed Rule 410(4), SCRE.[1] The Court held the PCR court correctly concluded that "a plain reading of the rule precludes its application" to Petitioner's case because (1) Petitioner's statement was given to an investigator with the Richland County Sheriff's Office and not a prosecuting attorney; and (2) Petitioner's conversation with the investigator did not constitute plea negotiations. Consequently, this Court held Petitioner failed to meet his burden of establishing a reasonable probability that the outcome of his direct appeal would have been different if trial counsel had properly preserved the argument for appeal.

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[1] Petitioner did not argue on appeal that his statements were inadmissible pursuant to Rule 410(4), SCRE, given the plain language of the rule. Rather, Petitioner argued the reasoning underlying Rule 410(4) was evidence of why any probative value of his alleged statements was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE.

For the reasons that follow, Petitioner respectfully requests this Court grant rehearing, hold the PCR court erred by finding Petitioner was not prejudiced by trial counsel's deficient performance, reverse Petitioner's convictions, and remand for a new trial.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "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." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

Our Supreme Court "has previously held that an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a PCR claim alleging ineffective assistance of counsel." McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003) and Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). Consequently, the PCR court, as this Court seemed to acknowledge, correctly found Petitioner's counsel was deficient for failing to renew her objection to the admission of Petitioner's statements.

Since the issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is proper in analyzing the prejudice prong. See McHam, 404 S.C. at 475, 746 S.E.2d at 47; Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994).

Plea negotiations occur in almost every criminal case. They benefit both the defendant and the state. However, as occurred in Petitioner's case, there are occasions where a defendant chooses to invoke his constitutional right to a jury trial and require the state to prove his guilt beyond a reasonable doubt despite prior plea discussions. Generally, those prior plea negotiations are not admissible at the defendant's trial pursuant to Rule 410(4), SCRE, which prohibits the admission against an accused of "any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn." However, even informal plea discussions that do not fall under the purview of Rule 410, SCRE, may still be excluded as unfairly prejudicial pursuant to Rule 403, SCRE.

In this case, Investigator Martin testified at the suppression hearing that Petitioner wanted to know if he could be charged with something less serious and wanted to enter a guilty plea. App. 63, l. 23 – 64, l. 1; App. 69, ll. 3-5. Trial counsel argued the statements regarding a plea were more prejudicial than probative and that it does not amount to confession. App. 79, ll. 14-16. She also noted that the alleged "offers" to plead guilty were made in response to Martin's mischaracterizations of the evidence against Petitioner. Tr. 79, ll. 2-13. Nonetheless, the trial judge ruled that the statements were admissible. App. 99, ll. 13-14.

Before the jury, the state elicited testimony from Martin that Petitioner said: "he wanted to discuss a plea" (App. 219, ll. 3-5); "he wanted to plead guilty" (App. 219, ll. 10-12; App. 228, 19-21; App. 224, l. 24 – 225, l. 1); "he wanted to see if he could negotiate some kind of plea or get a plea negotiated on his behalf" (App. 219, l. 25 – 220, l. 2); and he "went back into trying to

negotiate a plea and if I could offer him a plea or help him with a plea" (App. 227, ll. 10-12). The admission of these statements penalized Petitioner for even mentioning a plea when facing interrogation by an officer who was mischaracterizing the weight of the evidence against him and emphasizing the long potential sentence ahead. A policy of allowing such statements or inquiries to be used against a defendant offends the presumption of innocence and requirement that the state bear the burden of proving a defendant's guilt beyond a reasonable doubt.

Petitioner's alleged offer to plead guilty to a lesser offense did not amount to a confession. There are many strategic reasons that a defendant considers in determining whether to enter a plea or proceed to trial. "The defendant who opts to go to trial rather than negotiating a plea runs the risk of a harsher sentence than he would have received by pleading guilty." State v. Brouwer, 346 S.C. 375, 391, 550 S.E.2d 915, 924 (Ct. App. 2001) (quoting United States v. Quejada–Zurique, 708 F.2d 857 (1st Cir. 1983)).

In Brady v. United States, 397 U.S. 742 (1970), the United States Supreme Court acknowledged: "For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated." 397 U.S. at 751-752.

In United States v. Robertson, 582 F.2d 1356, 1365 (5th Cir. 1978), the Fifth Circuit Court of Appeals noted that "not every discussion between an accused and agents for the government is a plea negotiation." However, the purpose of Rule 410 of the Federal Rules of Evidence, after which the South Carolina rule is modeled, is "to serve both as an incentive and as a prophylactic; the rule both encourages and protects a free plea dialogue between the accused and the government." Id. at 1366. The court in Robertson held that in determining admissibility

of statements purportedly made during plea negotiations, a court must determine "first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances." Id. (citations omitted).

Providing guidance as to how to employ this inquiry, the court in Robertson wrote:

> The initial inquiry into the accused's subjective state of mind must be made with care to distinguish between those discussions in which the accused was merely making an admission and those discussions in which the accused was seeking to negotiate a plea agreement. The trial court must appreciate the tenor of the conversation. **In those situations in which the accused's subjective intent is clear and the objective circumstances show that a plea bargain expectation was reasonable, the inquiry may end. For example, if the accused unilaterally offers to "plead guilty," or to "take the blame," in exchange for a government concession, then the policy underlying Fed.R.Crim.P. 11(e)(6) and Fed.R.Evid. 410 is served only if the discussions are held inadmissible.** That is not to say that we require a preamble explicitly demarcating the beginning of plea discussions. Yet, when such a preamble is delivered, it cannot be ignored. Indeed, even when such nascent overtures are completely ignored by the government, such express unilateral offers ought to be held inadmissible, if the context is consistent.

Id. at 1367 (internal citations and quotations marks omitted) (emphasis added).

Distinguishing between a defendant's offer of cooperation and an offer to plead guilty, the Second Circuit Court of Appeals wrote in United States v. Levy, 578 F.2d 896, 901 (2nd Cir. 1978) that "an offer by the defendant must, in some way, express the hope that a concession to reduce the punishment will come to pass. A silent hope, if uncommunicated, gives the officer or prosecutor no chance to reject a confession he did not seek." However, that must be balanced against the purpose of the inadmissibility of plea negotiations, which is "to encourage plea bargaining, a system thought by many, though others disagree, to be desirable." Id. Thus, the court in Levy held an "accused is required, at least, to make manifest his intention to seek a plea bargain before he takes the route of self-incrimination." Id.

Notably, the statements admitted during Petitioner's trial were not incriminating statements made in a vain effort to obtain a favorable plea agreement. Because the interview with Petitioner was not audio or visually recorded, the content of Petitioner's alleged statements was evidenced from Martin's scant notes and his varying recollection. In essence, Martin testified that Petitioner made the statements "I want to discuss a plea" and "I want to plead guilty" and asked the questions "can I negotiate a plea" or "can someone negotiate a plea on behalf." App. 219, l. 3 – 220, l. 2; App. 224, l. 24 – 225, l. 1; App. 227, ll. 10-12; App. 228, 19-21.

Rule 403, SCRE, provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The policy considerations in favor of plea agreements and common sense weigh in favor of the exclusion of Petitioner's alleged statements pursuant to Rule 403.

One of the few respects in which Martin's testimony was consistent was that Petitioner's statements regarding pleading guilty were coupled with his request to plead to something less serious because he understood he faced a potential life sentence. Therefore, Petitioner made clear that it was his desire to enter into plea negotiations. Martin testified that he then informed Petitioner he could not help him with any kind of plea and such negotiations would instead be between Petitioner's attorney and the solicitor assigned to the case. The idea that any statement regarding interest in a plea offer can be used against a defendant, even where no plea offer results and no accompanying incriminating information is provided, is contrary to the policy in favor of plea negotiations.

Here, Petitioner made no admission that he had been anywhere near the Chuck E. Cheese since attending a birthday party there in 2011 or 2012. App. 62, ll. 16-20; App. 63, ll. 1-5. He

also did not admit to having ever worn a wig. App. 62, ll. 21-25. Though Petitioner inquired about what type of DNA evidence Martin was referring to, Martin never told Petitioner it was from skin cells on a red bandana found behind another establishment or that there were other contributors to the mixture of DNA found on the bandana. App. 217, ll. 17-20; App. 218, ll. 17-22. Based on the information Petitioner was given, namely that there was definitive DNA evidence against him and that he was facing life imprisonment, it is not difficult to understand why Petitioner would have inquired about the possibility of a plea or stated that he wanted to plead guilty to a lesser offense at the time of his interrogation *despite being innocent of the attempted robbery*. This does not amount to a confession nor is it evidence of a consciousness of guilt, unlike this Court found. Consequently, the evidence had absolutely no probative value.

As is evident from the record, Petitioner did not ultimately accept a plea offer in this case and instead invoked his right to a jury trial. Nonetheless, the state wanted to use Petitioner's inquiry regarding a plea offer and his alleged statement that he wanted to plead guilty against him at the trial where he had pled not guilty. Unquestionably, had the prosecutor been present during the interview, or formal negotiations had occurred between trial counsel and the solicitor, any discussion of a plea would have been inadmissible pursuant to Rule 410(4), SCRE. However, even if Petitioner's statements are not inadmissible under the express provisions of Rule 410, the Court must still engage in a Rule 403 analysis. App. 79, ll. 14-16.

Instructive in the analysis of probative value versus unfair prejudice is the purpose behind the provisions to Rule 410. In State v. Mathis, 287 S.C. 589, 592-593, 340 S.E.2d 538, 540-541 (1986), our Supreme Court held that "the highly prejudicial potential of" of a withdrawn guilty plea "mandates its exclusion for all purposes." See Rule 410(1), SCRE; Kercheval v. United States, 274 U.S. 220 (1927); United States v. Mitchell, 633 F.3d 997, 1003 (10th Cir. 2011). The

Court in Mathis noted the reasons for exclusion of withdrawn guilty pleas articulated in other jurisdictions, including:

> (1) It is unfair to use the plea against the accused after he has been allowed to retract it. (2) Evidentiary use of a withdrawn plea denies the defendant the benefit of the presumption of innocence. (3) The public interest of encouraging settlement of criminal cases without necessity of trial favors permitting an accused to plead guilty to the offense charged without prejudicing his position if it is later withdrawn. (4) The privilege of withdrawal is illusory if evidence of the plea is allowed. (5) The highly prejudicial nature of a prior guilty plea may induce the jury to become reckless in its consideration of the other evidence, regardless of cautionary instructions.

287 S.C. at 591-592, 340 S.E.2d at 540 (internal citations omitted).

Similar reasoning counsels in favor of exclusion of the highly prejudicial statements inquiring about a plea offer or mentioning an intention to work out a guilty plea during an interrogation. A defendant has a constitutional right to trial by an impartial jury and is entitled to the presumption of innocence. U.S. Const. amend. VI; S.C. Const. Art. I, § 14; Coffin v. United States, 156 U.S. 432 (1895). In adopting the rule excluding withdrawn guilty pleas, the Louisiana Supreme Court stated in State v. Joyner, 84 So.2d 462, 463 (La. 1955):

> We think the majority view is sound and more consonant with our concept of the constitutional rights of an accused. Where the plea of guilty is withdrawn, the defendant stands for trial upon a plea of not guilty, and is entitled to all the safeguards and presumptions of innocence which the humanity of the law extends to an individual whose life or liberty is at stake. One such right is that he is presumed to be innocent until proved guilty beyond a reasonable doubt, and the state has the burden of proving that guilt.

Allowing statements that Petitioner allegedly intended to plead guilty or inquired about plea negotiations during his interrogation risks the same recklessness by the jury in its consideration of the other evidence. To the extent that such statements are less prejudicial than the actual entry of a guilty plea, the distinction is marginal. The solicitor certainly emphasized the alleged statements in her closing argument to the jury. Additionally, the public interest in

encouraging settlement of criminal cases without necessity of trial similarly favors permitting an accused to discuss the possibility of pleading guilty to the offense charged without prejudicing his position if he instead chooses to go to trial.

Consequently, the trial judge abused his discretion by admitting Petitioner's alleged statements and inquiries regarding a plea offer because the probative value of such statements was substantially outweighed by the danger of unfair prejudice. Moreover, the admission of such statements is contrary to the overwhelming policy considerations that favor confidentiality of plea negotiations. Accordingly, if trial counsel had properly preserved her objection to the admission of Petitioner's statements, there is a reasonable probability the appellate court would have reversed Petitioner's conviction and remanded the case for a new trial.

Based on the foregoing, Petitioner respectfully requests this Court rehear his case pursuant to Rule 221(a), SCACR, due to the significant legal and factual points overlooked and/or misapprehended by this Court in affirming the PCR court's denial of his application for post-conviction relief.

Respectfully Submitted,

Lara M Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of July, 2024.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Kristi F. Curtis, Post-Conviction Relief Judge

MICHAEL ORLANDO BROWN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2019-001677

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above referenced case has been served upon Mark R. Farthing, Esquire, at his primary email address listed in the Attorney Information System (AIS), this 11th day of July, 2024.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

From:	Mcinnis, Sara
To:	Mark Farthing
Cc:	ccollins@scag.gov; Caudy, Lara
Subject:	2019-001677 Michael Orlando Brown v. State Petition for Rehearing
Date:	Thursday, July 11, 2024 11:16:00 AM
Attachments:	2019-001677 - Michael Orlando Brown v. State - Petition for Rehearing.pdf

Good Morning Mr. Farthing,

Please find attached the petition for rehearing in the above-referenced case, which will be filed with the Court of Appeals today, July 11, 2024, via email filing.

Thank you!

Sara McInnis
Administrative Assistant
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(803) 734-1330