

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Honorable Paul M. Burch, Circuit Court Judge

EDWARD BONILLA,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2024-000765

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. Counsel's decision to reveal the location of the body was unreasonable, and Petitioner's consent to that strategy is irrelevant.

In its return the state recognizes pretrial counsel knew the risks of disclosure were high, as he testified at the PCR hearing:

[T]he upside was if there was physical evidence to support his story, we could avoid a murder charge, maybe not even be tried on a murder charge, but that if what he told me was false, was painted to make him look better, was, in fact not what happened, that disclosure of the body could also be a huge evidentiary and forensic find for the authorities to support their theory that he had committed murder.

App. 823:8-12; Return to Pet. at 7. There are two primary problems with pretrial counsel's belief and the state's analysis that followed. First—and unaddressed by the state—is the risk that even if Petitioner's memory and description were accurate, the state would *still* be gifted (1) virtually conclusive evidence that Petitioner did kill Pegram, and (2) powerful evidence the killing was done with malice and intent. As argued in the initial petition, the solicitor would always be able to use the autopsy to argue this admittedly violent homicide was intentional and malicious. Pet. at 9-10. Based on his testimony, pretrial counsel apparently failed to consider this possibility at all, and that alone renders his assistance deficient because the risk is so obviously high.¹

Second, and importantly, the evidence available to pretrial counsel at the time should have indicated Petitioner's description was incomplete or confused because counsel *already knew about*

¹ In addition, pretrial counsel was virtually pleading guilty to desecration of human remains for Petitioner. Even if the state found the body in such a condition as to lead it to consider dismissing the murder charge—something that was impossible because an autopsy could never prove accident, Pet. at 9-12—counsel *still* condemned Petitioner to a sentence of up to ten years. S.C. Code Ann. § 16-17-600. Had he done so as part of a negotiated agreement for some legitimate, tangible benefit, that would be indisputably reasonable. But it was ridiculous to do so with nothing more than the hope of grace based on an unreasonable gamble about the condition of the body.

the blood spatter, as he testified at the PCR hearing. App. 818:9-17. This should have indicated to counsel that perhaps Petitioner's memory or description of the events following the admitted homicide were not perfectly accurate. As counsel agreed, it is "not unusual at all for defendants to have an elevated view of their own case" or "to view with rosy-colored glasses the evidence." App. 828:2-11. Given that, and counsel's testimony he knew "it could be devastating" if the body was not in the condition as described, App 825:1-4, it was objectively unreasonable to disclose the location because the risks were too high.

Pretrial counsel took an unacceptable gamble with huge risks and virtually nonexistent upsides—something the state does not attempt to refute. That gambling is technically a strategy does not render his representation above reproach. *See Stone v. State*, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017) ("[C]ounsel's decision to employ a certain strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound."). No amount of deference to this decision could save it from the conclusion pretrial counsel's strategy was altogether unreasonable.

The state also insists that because Petitioner consented to the disclosure he is now foreclosed from complaint. Return to Pet. at 13. This is absurd. First, on direct appeal the Court of Appeals already held this matter is appropriate for an ineffective assistance claim. *State v. Bonilla*, 429 S.C. 253, 273, 838 S.E.2d 1, 11 (Ct. App. 2019) ("[B]ecause Bonilla is challenging the actions of his attorney, his claim regarding Rule 1.6 would best be addressed in an action for ineffective assistance of counsel"). Second, disclosure was a decision about legal strategy, and a lay defendant's consent cannot foreclose challenging that strategy, particularly where the consent was based on counsel's unreasonable advice. In evaluating ineffectiveness claims,

the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such. If counsel is a

reasonably effective advocate, he meets constitutional standards irrespective of his client's evaluation of his performance. It is for this reason that we attach no weight to either [the defendant]'s expression of satisfaction with counsel's performance at the time of his trial, or to his later expression of dissatisfaction.

United States v. Cronin, 466 U.S. 648, 657 (1984) (internal citations omitted); see *Hughes v. United States*, 258 F.3d 453, 462 (6th Cir. 2001) ("The government offers no authority in support of denying an ineffective assistance of counsel claim on grounds that defendant approved of his counsel's strategy . . .").

The state implies Petitioner was misleading or mistaken to reference *Faretta v. California*, 422 U.S. 806 (1975), but it is Respondent that is mistaken. It wrote: "Respondent points to the very next sentence in the [*Faretta*] opinion that states, '[t]his allocation can only be justified, however, by the defendant's consent....'" Resp. Br. 13. That full sentence of *Faretta* reads, "This allocation can only be justified, however, by the defendant's consent, at the outset, *to accept counsel as his representative.*" 422 U.S. at 820-21 (emphasis added). Consent is obviously required before it is appropriate for one's authority over his own defense to be taken from him. But it does not follow that, once authority is taken, consent to a defense strategy is of any importance in evaluating the reasonableness of counsel's representation.

One of the functions of a lawyer is to give advice. When that advice is objectively unreasonable, no defendant should be faulted for agreeing to it. See *Strickland* 466 U.S. at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.")²

² The presumption of reasonableness sufficiently "captures the risk of a defendant's second-guessing of counsel strategy in hindsight," so there is no reason "to further limit the prospects of an ineffective assistance claim by placing great weight on a defendant's admission of satisfaction with counsel's performance at trial." *Hughes*, 258 F.3d at 462.

II. The evidence produced because of the disclosure was significant, so prejudice from counsel's unreasonable decision necessarily follows.

In its return, the state appears to believe the standard for prejudice is that for denying a motion for a directed verdict. Return to Pet. at 15 (citing *State v. Owens*, 293 S.C. 161, 167, 359 S.E.2d 275, 278 (1987)). This is incorrect. Prejudice requires only "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. An inquiry into the *sufficiency* of the other evidence at trial, Return to Pet. at 15, is irrelevant. Rather the court must evaluate "the specific impact counsel's error had on the outcome of the trial" while considering "the strength of the State's case." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018).

Given the proper framework, Petitioner has demonstrated there is a reasonable probability the result of his trial would have been different.³ Pretrial counsel's unreasonable disclosure provided the state with the body of its alleged murder victim, evidence she was bound by the hands and neck, facts it asserted indicated sexual assault thus providing motive, forced Petitioner to testify in an attempt to explain these circumstances, and resulted in a stipulation Petitioner knew where the body had been buried. Pet. at 15-17. It would be difficult to overstate the difference counsel's disclosure made. But for that unreasonable decision, this would have been a "no body" case without motive. It would have been based solely on circumstantial evidence a jury might

³ Petitioner and the state agree that, at this stage, the sole question is how disclosure affected the trial, not whether evidence obtained as a result of the disclosure is or should be admissible.³ Pet. at 14 & n.3; Return to Pet. at 17 n.1. But see, Robert P. Mosteller, *Admissibility of Fruits of Breached Evidentiary Privileges*, 81 Wash. U. L.Q. 961, 992 (2003), arguing "no affirmative governmental action is required" for exclusion in circumstances such as these. He argues, "When the defendant has been formally accused and Sixth Amendment protection has attached use of revelations by counsel . . . regarding the location of key evidence, should result both in reversal of the conviction and in exclusion of all direct and indirect evidence on retrial." *Id.* (footnote omitted). "In criminal cases, exclusion of fruits may be authorized under the Sixth Amendment right to counsel [resulting from] ineffective assistance . . ." *Id.* at 1010.

easily find insufficient to constitute proof of his guilt beyond a reasonable doubt. Certainly, it is not "overwhelming evidence of guilt" sufficient to disprove prejudice (or to justify denying certiorari). *See generally Smalls*, 422 S.C. at 187-95, 810 S.E.2d at 843-47 (explaining the "overwhelming evidence of guilt" standard and its application to the prejudice analysis).

Finally, the state entirely failed to respond to Petitioner's argument that he was prejudiced at sentencing. Its one-sentence assertion that such conclusion is "speculative" is insufficient. Return to Pet. at 5. The prejudice allegation is not speculative because during sentencing the trial court so expressly and heavily relied on the evidence discovered as a result of disclosure. App. 725:9-726:17. But for pretrial counsel's unreasonable disclosure, the trial court never would have known of that evidence. Yet Petitioner received the harshest punishment available, given that this was not a capital trial. Thus, there is a reasonable probability Petitioner would have received a lesser sentence without pretrial counsel's deficiency, if he was convicted at all. Therefore, at the least, Petitioner's sentence should be vacated and remanded for re-sentencing where this evidence is not considered.

CONCLUSION

There is a way in which this case is and should be simple. Trial counsel decided to disclose the location of the victim's undiscovered body to a captain in the sheriff's office. He did so without a promise of leniency in any form, simply hoping an autopsy would magically prove accident even while believing his client violently, but unintentionally, caused the death. That is unreasonable on its face.

At the least, the failure of pretrial counsel warrants granting certiorari to review the decision of the PCR court and allow full briefing on the issue.



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This 18th day of June, 2025.