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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2020-CP-36-00432
Appellate Case No. 2026-000676

Reginald Scurry,

Petitioner,

v.

State of South Carolina,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. Did the circuit court err in holding that Petitioner's trial counsel was not ineffective for failing to advise that statements made in direct plea discussions with the prosecutors were inadmissible?

STATEMENT OF THE CASE

On April 5, 2018, Petitioner was convicted of Trafficking in Cocaine Third Offense and Failure to Stop for Law Enforcement Signal and was sentenced to Twenty-Five (25) Years imprisonment. Petitioner's appeal was dismissed by the Court of Appeals per *Anders v. California*, 386 U.S. 738 (1967). *State v. Reginald Rodezere Scurry*, 2020-UP-051 (Ct. App. filed February 19, 2020).

Petitioner then brought this action seeking post-conviction relief in Newberry County on October 12, 2020. (2020-CP-36-00432). The circuit court denied the application on January 8, 2026. The Order was received by the undersigned counsel on February 17, 2026, and a notice of appeal was served on March 13, 2026. Petitioner now seeks a writ of certiorari to review this denial. He alleges, in pertinent part, that his trial counsel was ineffective as he failed to advise Rule 410(4)¹, SCRE, that statements made during pre-trial direct plea discussions with the prosecutors could not be used against him at trial. Without such knowledge, Petitioner sat in silence instead of proactively engaging in the pre-trial plea discussions² instigated by the prosecutors themselves. (App. p. 73-75) The PCR Court found that trial counsel was not defective, but even if he was, prejudice was not found. (App. p. 112).

¹ Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(4) 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for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

² The plea discussions took place (Prosecutor, Defense Counsel, Petitioner) in the office the Public Defender has behind the court room. (App. p. 44-45, lines 20-25, 1-17)

STANDARD OF REVIEW

“In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application.” *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). “The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.” Rule 71.1(e), SCRPC. “[An appellate court] gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them.” *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). “Questions of law are reviewed de novo, and [an appellate court] will reverse the PCR court's decision when it is controlled by an error of law.” *Id.*

BURDEN OF PROOF

“In order to establish a claim for ineffective assistance of counsel, the applicant must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel’s deficient performance prejudiced the applicant’s case.” *Speaks*, 377 S.C. at 399, 660 S.E.2d at 514. “Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.” *Strickland v. Washington*, 466 U.S. 668, 700, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Trial counsel's performance “is measured by an objective standard of reasonableness.” *Taylor*, 404 S.C. at 359, 745 S.E.2d at 102. “A fair assessment of attorney’s performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. “The court must ... determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” *Id.* at 690, 104 S.Ct. 2052. Further, “[trial c]ounsel’s performance is accorded a favorable presumption, and a reviewing court proceeds from the

rebuttable presumption that counsel ‘rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.’” *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052).

LAW/ARGUMENT

I. COUNSEL WAS INEFFECTIVE IN FAILING TO ADVISE THAT STATEMENTS MADE IN DIRECT PLEA DISCUSSIONS WITH THE PROSECUTORS WERE INADMISSABLE.

a. The Sixth Amendment Right Extends to the Plea-Bargaining Process.

The Sixth Amendment to the U.S. Constitution, along with all its protections, via the ‘Due Process’ clause of the Fourteenth Amendment, is applicable to the states. See *Gideon v. Wainwright*, 372 US 335 (1963). One of those protections is well settled, found under the ‘critical’³ stages of the criminal proceedings test, the Sixth Amendment right to the assistance of counsel extends to the plea-bargaining process. See *Missouri v. Frye*, 566 U.S. 134, 132 S.Ct. 1399, 1405, 182 L.Ed.2d 379 (2012). Therefore, criminal defendants are “entitled to the effective assistance of competent counsel” during that process. *Lafler v. Cooper*, 566 U.S. 156, 132 S.Ct. 1376, 1384, 182 L.Ed.2d 398 (2012).

In the 2012 U.S. Supreme Court opinion of *Missouri v. Frye*, Justice Kennedy lays out in overwhelming statistical terms regarding how crucial a role the plea-bargain process is in the American judicial system.

“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. See Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 5.22.2009, http://www.albany.edu/sourcebook/pdf/t_5222009.pdf (all Internet

³ The “Sixth Amendment guarantees a defendant the right to have counsel present at all ‘critical’ stages of the criminal proceedings.” *Montejo v. Louisiana*, 556 U.S. 778, 786, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009) (quoting *United States v. Wade*, 388 U.S. 218, 227-228, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967)). “A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution.” *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013).

materials as visited Mar. 1, 2012, and available in Clerk of Court's case file); Dept. of Justice, Bureau of Justice Statistics, S. Rosenmerkel, M. Durose, & D. Farole, *Felony Sentences in State Courts, 2006-Statistical Tables*, p. 1 (NCJ226846, rev. Nov. 2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf>; Padilla, 559 U.S., at 372, 130 S.Ct., at 1485-1486 (recognizing pleas account for nearly 95% of all criminal convictions).

Justice Kennedy, armed with this statistical evidence, hammers home the vital importance of competent legal counsel in this critical stage of the process, stating:

“The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours *“is for the most part a system of pleas, not a system of trials,”* See *Missouri v. Frye* at 1407 (referencing *Lafler*, post, at 1388, 132 S.Ct. 1376) (*emphasis added*). To note the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties. In order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations. “Anything less ... might deny a defendant ‘effective representation by counsel at the only stage when legal aid and advice would help him.’” See *Missouri v. Frye* at 1407,1408 citing *Massiah*, 377 U.S., at 204, 84 S.Ct. 1199 (quoting *Spano v. New York*, 360 U.S. 315, 326, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959) (Douglas, J., concurring)).

b. Day Before Trial – Prosecutors’ In-Person Plea Offer.

As recounted by Petitioner’s testimony at the Post Conviction Relief Hearing, he describes what transpired the day before trial when he met closed door with his trial counsel. (App. p. 73-75). He describes meeting with his attorney in an office across from the holding cell in the back of the courthouse. They discussed the case, door shut, and two guys “just popped up” (App. p. 74, lines 13-15). Petitioner stated that at first he had no idea who the two guys were but when they started talking about the plea, figured they must be the solicitors (App. p. 74, lines 16-22). At no time prior to or during the solicitors’ unannounced delivery of a plea offer, did Petitioner’s attorney advise that anything said to the prosecutors during plea discussions could

not be used against him (App. p. 74-75, lines 23-25, 1-2). For context, if convicted at trial, Petitioner was facing twenty-five (25) years mandatory minimum for Trafficking in Cocaine Third Offense. The plea the solicitors were offering was to a Second Offense with a wide sentencing range of seven to twenty-five (7 – 25) years. Important to note, trial counsel had no specific notes or recollection of the solicitors directly communicating the plea offer or whether he communicated the inadmissibility of the plea discussions. (App. p. 48, lines 11-23). In fact, he only testified to what he states he normally does by habit. (App. p. 48, lines 17-23). The key takeaway from this testimony is trial counsel only testified to what he normally does if he knows the prosecutors want to directly discuss a plea ahead of time; not to the specific case/situation.

“I would, *if the prosecutors were coming in*, I almost always will tell my client I don’t want you to talk about who did what, where, why, when. (App. p. 47, lines 16-18) (emphasis added) ... I usually kind of frame it as I don’t want you to tell them more than they already know, like, tip off our defense. (App. p. 47, lines 19-21) ... I would tell them, you know, you can talk about numbers, what you will do, what you won’t do, but I typically don’t let the prosecutors go into factual questions of what happened. It’s strictly just a no romance numbers talk.” (App. p. 47, lines 24-25; App. p. 48, lines 1-3).

It begs the question, so what if prosecutors walk in unannounced (as in this case)? With trial counsel having no specific recollection, it makes Petitioner’s version of the encounter solid fact. There is no indication that the prosecutors gave any prior notice to trial counsel other than they “just popped up”. That would make Mr. Scurry’s testimony more convincing that trial counsel never informed him that plea discussions were inadmissible. And with that, when the solicitors told Petitioner to take the 7-30 years, Mr. Scurry was fearful that anything he said would be used against him in trial and therefore, said nothing in response. (App. p. 74-75, lines 23-25, 1-2; App. p. 79, lines 6-18). However, had he known it wasn’t going to hurt him at trial, he would have tried to negotiate a specific number of years in a negotiated plea (App. p. 79, lines 6-16).

The PCR Court held there is no requirement that defense counsel ensures that Defendant

clearly understands Rule 410(4), SCRE; that his statements made during plea negotiations cannot be used against him at trial. "...[T]his Court hesitates to adopt a new rule requiring defense attorneys to affirmatively ascertain and correct their clients' unspoken misconceptions about the law" (App. p. 111, lines 21-22). But shouldn't defendants across this state at the very least be advised they have a right under the rules of evidence, without hurting their case, to freely and openly communicate in plea negotiations with a prosecutor, upon that prosecutor's instigation of plea discussions? That is the "bright line" rule the undersigned submits this Supreme Court should rule, henceforth.

c. Trial Counsel's Deficiency Prejudiced Petitioner.

In the instant case, the challenge is not to the advice pertaining to the plea offer that was not accepted but rather to the course of legal representation that preceded it with respect to other potential pleas and plea offers. Trial counsel's failure caused Petitioner to sit in silence rather than negotiate a numbers of years on the sentence in response to the prosecutors' plea offer. That was the only time for Mr. Scurry to directly negotiate, or what trial counsel described as "haggling". (App. . 44, line 13-16)

"Now, sometimes when you are haggling a case with the prosecutors, the prosecutors will come in and it will be with the client and me talking directly to a prosecutor and basically haggling, you know, what will you take on a plea." (App. P. 44 line 13-16). At some point, I might go back and forth between them or at some point the prosecutor will come in and he will, you know, consider counteroffers and the client can participate in it and I would participate in it, but we would just talk basically about plea numbers." (App. P. 45 lines 9-13).

While Missouri v. Frye deals with a plea offer expiring and never being communicated ruled as ineffective counsel who caused prejudice, the same prejudice analysis can be used with the case at present. It follows that to establish prejudice, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to

a lesser charge or a sentence of less prison time. See Frye at 1409, Cf. Glover v. United States, 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001) ("[A]ny amount of [additional] jail time has Sixth Amendment significance").

This exercise normally requires speculation and a lot of “what ifs”. However, this matter is unique. This Petitioner, facing the identical criminal charges in Cherokee County just months later, accepted a negotiated sentence to nineteen (19) years. (App. p. 27 - Applicant Exhibit 3; App. p. 97-102 - Cherokee County 5/17/2018 plea sheet and Public Index). Therefore, Petitioner, not knowing he could freely negotiate with Newberry prosecutors prejudiced him with more jail time from a conviction he has proven he would have otherwise negotiated and pleaded to a lesser charge. This evidence presented but discounted by the PCR Court proves a reasonable probability that but for trial counsel’s deficiency, the end result of the criminal process would have been more favorable for Petitioner by reason of a plea to a lesser charge or a sentence of less prison time.

CONCLUSION

For the reasons stated, Petitioner asks this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

April 15, 2026

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