THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2007-CP-40-7163

Brandon Pinkard, 280309,

Petitioner,

v.

State of South Carolina,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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I. **TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY EVALUATE A PLEA OFFER FROM THE STATE AND FOR FAILING TO PROPERLY ADVISE PETITIONER ON THE PLEA OFFER.**

II. **TRIAL COUNSEL WAS INEFFECTIVE FOR OFFERING NO DEFENSE AT TRIAL AND FAILING TO PROPERLY PREPARE FOR TRIAL.**

STATEMENT OF THE CASE

Petitioner Brandon Pinkard was indicted in the Richland County Court of General Sessions for murder on October 18, 2000. (App. p. 1-2) He was tried by a jury and convicted. (App. p. 537, ll. 7-25) After hearing some argument on sentencing, the Honorable James R. Barber, Jr., elected to defer sentencing and requested a pre-sentence report. (App. p. 547, ll. 15-23) Pinkard was ultimately sentenced on December 3, 2001, to 24 years in prison. (App. p. 565, ll. 6-10)

Pinkard appealed his conviction to the South Carolina Court of Appeals. (App. p. 567-615) The Court of Appeals affirmed his conviction on June 27, 2005. (App. p. 616-617) A petition for rehearing was denied August 26, 2005. (App. p. 618) The South Carolina Supreme Court denied a petition for a writ of certiorari on January 4, 2007.

Pinkard filed an application for post-conviction relief on October 26, 2007. (App. p. 620-646) A hearing was held January 12, 2009. (App. p. 654) The Honorable Alison Lee dismissed Pinkard's application on September 1, 2011. Pinkard filed a motion to reconsider that order which was denied on October 5, 2011.

The specific facts relevant to this petition are set out in the argument portions of the petition.

ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY EVALUATE A PLEA OFFER FROM THE STATE AND FOR FAILING TO PROPERLY ADVISE PETITIONER ON THE PLEA OFFER.

Petitioner was charged with murder, which carries a sentencing range of 30 years to life in prison, with the sentence to be served day-for-day. In his application for post-conviction relief (PCR), Petitioner alleged his trial counsel ineffectively represented him by failing to properly evaluate the plea offer and advise him on the plea offer. Specifically, the Petitioner argues he was offered a very favorable plea offer before trial and trial counsel did not properly evaluate the value of the plea in relation to his chances at trial.

Former assistant solicitor Matthew Bodman, who partially handled the prosecution of Petitioner, testified at the PCR hearing. (App. p. 670) Though Bodman could not initially remember the specifics of a plea offer, he remembered an offer of a plea to voluntary manslaughter. (App. p. 674, ll. 13-15) On cross-examination, Bodman reviewed an offer letter and agreed a plea involving a 20-year cap was extended on August 16, 2001, approximately one month before trial. (App. p. 678, ll. 18-22) The letter also expressed a willingness to negotiate a specific sentence in order to avoid trial. (App. p. 678, ll. 22-25) Bodman testified he was surprised at the decision to go to trial, as the State felt it had a very strong case against Petitioner. (App. p. 675, ll. 17-21)

Collette Pinkard, Petitioner's mother, testified regarding her knowledge of the plea offer extended to Petitioner. In early September, about a week before the scheduled jury trial, Ms. Pinkard was approached by trial counsel and informed there was a plea offer in the case of twelve years. (App. p. 693, ll. 13-23) Ms. Pinkard testified trial counsel informed her he had a 75% chance of winning the case, based on a strong

misidentification defense, and the plea offer was not worth accepting. (App. p. 694, ll. 11-22) Ms. Pinkard told Petitioner to take the advice of trial counsel, who had told them he had a "sure shot" of an acquittal. (App. p. 695, ll. 6-18)

Joe Ryan, the Petitioner's stepfather, testified he did not discuss a plea offer with trial counsel, but did discuss the strength of the defense's case. (App. p. 708, ll. 9-23) Trial counsel informed Ryan the State "did not have a case" based on a false identification. (App. p. 708, ll. 21-23)

Deborah Thomas, the mother of Petitioner's child, testified at the PCR hearing. She had no discussions with trial counsel about a plea offer, but did hear trial counsel predict he had a 75% chance of winning the case. (App. p. 718, ll. 12-17) Under questioning by the PCR court, Thomas testified there was a plea offer extended the day trial began, before any proceedings began. (App. p. 724, ll. 8-23)

The Petitioner testified on his own behalf at the PCR hearing. Trial counsel discussed a plea offer with him about a month before trial. (App. p. 743, ll. 5-7) However, the discussion regarding the plea offer was cursory. Trial counsel informed him there was a plea offer but he had a 75% chance of winning the case and there was no need to accept the plea offer. (App. p. 744, ll. 19-20) Trial counsel also informed Petitioner he had investigated the State's witnesses and obtained defense witnesses. (App. p. 744, ll. 17-18) This was untrue, as trial counsel testified at the PCR hearing he had not actually interviewed any witnesses. (App. p. 787, ll. 13-21)

Trial counsel testified he tried to talk Petitioner into accepting the plea offer, but his mother would not allow him to have this discussion with Petitioner. (App. p. 770, ll. 12-23) Petitioner's mother disputed this, testifying she was unaware trial counsel was not meeting with her son without her. (App. p. 698, ll. 4-16)

An attorney can be ineffective for advising a defendant to reject a plea agreement. *Judge v. State,* 321 S.C. 554, 561-562, 471 S.E.2d 146, 150 (1996). The South Carolina Supreme Court recognized counsel's advice to reject a plea agreement does not fall below the reasonableness standard just because the advice was wrong or the trial tactics backfired. *Id.* at 561. The Court quoted a federal district court opinion in agreeing that advising a defendant to reject a plea offer is ineffective if counsel's action was "so patently unreasonable no competent attorney would have chosen it or it was so 'ill-chosen' as to render counsel's overall representation constitutionally defective." *Id,* quoting *Turner v. Tennessee,* 664 F.Supp. 1113, 1121 (M.D. Tenn. 1987). It is this unreasonable decision that defines the first prong of ineffective assistance of counsel in a case where a plea offer was rejected.

The second prong involves whether there was any prejudice from the advice to reject the plea offer. Because there is evidence in the record Petitioner would have taken the deal if not for his lawyer's advice, prejudice is established in this matter. Petitioner's testimony he would have taken the plea deal had he been aware of the facts relevant to his case is sufficient evidence for the Court to grant relief. *Jackson v. State,* 342 S.C. 95, 535 S.E.2d 926 (2000). The Petitioner testified if he had known more about the material facts and legal issues his case involved, he would have pled guilty. (App. p. 755, ll. 4-15) The facts developed at the PCR hearing reveal Petitioner was unable to make an informed decision in his case, based on his trial counsel's deficient performance.

Petitioner was informed trial counsel was pursuing an identification issue which would prevent witnesses from testifying against him. (App. p. 745, ll. 2-15) Trial counsel testified the identification issue was the only issue he could rely on in defending the case. (App. p. 797, ll. 7-11)

Trial counsel moved for a pretrial hearing regarding identification before the jury trial began. A review of this hearing reveals trial counsel had no legitimate strategy, nor any chance of actually winning the hearing.

The State informed the trial judge it had several witnesses who identified Petitioner as being present at the scene of the crime. (App. p. 9, ll. 14-18) Trial counsel conceded Petitioner's presence at the scene of the crime. (App. p. 9, ll. 20-21) Two of the witnesses personally knew the Petitioner before their identification of him, making it unnecessary to hold a hearing on their identification of the Petitioner. (App. p. 10, ll. 12-25) Trial counsel also conceded this point. (App. p. 11, ll. 1-2)

Trial counsel described his "identification issue" to the court before the hearing was held. Apparently there was one photo lineup that had an attached affidavit stating which picture was chosen, but the actual photo lineup had no markings on it. (App. p. 11, ll. 3-9) The State presented a number of witnesses who identified Petitioner as being present at the crime scene and picked him out of photographic lineups. After the State's presentation, trial counsel made a puzzling argument to suppress the identifications.

Trial counsel first stated the photo lineups were "overly suggestive." (App. p. 83, ll. 5-7) However, he offered no support for this argument and had developed no testimony to support it. He next argued the lighting at the time of the identification was insufficient. (App. p. 83, ll. 8-11) This argument is particularly troubling because there is no way trial counsel could have been aware of this fact without interviewing the witnesses who identified Petitioner. Not only was the argument weak, it only arose after trial counsel heard the pretrial testimony in the identification hearing. Finally, trial counsel argued the signatures on a separate sheet of paper rendered the lineups

insufficient, as the actual photos should have been marked by the witnesses. (App. p. 83, ll. 12-18)

None of these arguments had any hope of succeeding. There was no factual support for the suppression of the photo identifications and no legal theory to support their suppression. Counsel's reliance on an identification issue far exceeds the boundaries of ineffective assistance of counsel.

There was simply no legal issue regarding the identification in this matter. Numerous witnesses testified at the PCR hearing that trial counsel had repeatedly discussed an identification defense as a strong defense in this case. The State had numerous witnesses identifying the Petitioner. (App. p. 797, ll. 12-14) Trial counsel testified some of the witnesses gave conflicting descriptions of the Petitioner. (App. p. 797, ll. 21-23) Unfortunately, none of the inconsistencies were strong enough to allow for a legitimate defense in this case. Trial counsel would have been well aware of this fact had he interviewed the witnesses before the trial.

A criminal defendant may be denied due process by an overly suggestive identification procedure. *State v. Moore,* 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000). A suggestive lineup procedure renders a subsequent identification constitutionally impermissible. *Id.* at 288, 447. It is clear that this is not the type of information that could be developed before trial without interviewing an eyewitness. Counsel had no way of determining whether such circumstances existed because he did not interview any witnesses before trial. (App. p. 787, ll. 18-21) His pursuit of an identification defense without conducting a factual investigation is completely unreasonable and constitutes ineffective assistance of counsel.

This Court has held the failure to conduct an independent investigation of facts in a criminal case is not ineffective assistance of counsel when the allegation is supported by nothing but speculation as to the results of such an investigation. *Moorehead v. State,* 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). However, in the instant case there is significant evidence a factual investigation would have changed the outcome of this case.

All witnesses at the PCR hearing, including trial counsel, are consistent that trial counsel felt if a defense existed to this case, it was an identification defense. Even the barest investigation of the eyewitnesses for the prosecution would have revealed the glaring weaknesses in an identification defense. A simple interview would have shown there was no overly suggestive lineup procedure and the conflicting statements by the witnesses did not contain the type of inconsistencies that would support an identification defense. Trial counsel utterly failed Petitioner by failing to advise him about the realities of his case.

The PCR court stated several reasons for dismissing Petitioner's claim regarding ineffective assistance at the plea negotiation stage. The PCR court found the Petitioner rejected the State's plea agreement on several occasions. (App. p. 843) There is nothing in the record to support the assertion Petitioner was properly counseled in this stage of the proceedings. Trial counsel's failure to investigate the case in any meaningful way calls into doubt any decision made by the Petitioner.

The PCR court ruled *Turner v. Tennessee* and *Judge v. State,* two cases involving ineffective assistance of counsel at the plea negotiation stage, involved facts not present in Petitioner's case. (App. p. 843) *Turner v. Tennessee,* 664 F.Supp. 1113 (M.D. Tenn

1987); *Judge v. State,* 321 S.C. 554, 471 S.E.2d 146 (1996). This assertion is unsupported by the record.

The *Turner* case involved an attorney who "had an inflated estimate of his own abilities, an unrealistic estimate of the probabilities of outcome at trial, and a casual attitude toward trial preparation." *Turner, supra* at 1115, n.6. While trial counsel certainly was not as egregiously unprepared as the trial counsel in the *Turner* case, his preparation leading up to trial certainly fits all three descriptions. Trial counsel repeatedly assured Petitioner and his family he had a good chance of winning the case, despite the fact there was no legitimate defense to the charges. His prediction of the outcome of the trial was unrealistic. The PCR record is consistent that trial counsel informed Petitioner and his family he had a 75% chance of winning this case. Even a cursory review of the law related to identification would have shown trial counsel this was a weak argument at best and did not support a prediction of a successful trial defense. Finally, trial counsel's casual attitude towards trial preparation is evident from his failure to take even the most basic steps to investigate the State's witnesses in this trial. Contrary to the PCR court's ruling, Petitioner's case is very similar to the situation in *Turner.*[1]

The PCR court also disregarded *Judge v. State* on the argument the *Judge* opinion found trial counsel's advice deficient because counsel had failed to review discovery material in that case. (App. p. 843) In the *Judge* opinion, while recognizing the right to effective assistance of counsel at the plea negotiation stage, the Supreme Court reversed the grant of relief because counsel did not wait to receive material they

[1] The PCR court noted the *Turner* opinion was ultimately vacated. However, it appears the United States Supreme Court vacated the opinion on different grounds than those discussed here. In any event, the reasoning in *Turner* is sound, as is the South Carolina Supreme Court's reliance on that reasoning. The South Carolina Supreme Court's opinion in *Judge* was issued well after the *Turner* opinion was vacated.

had no way of knowing existed. *Judge, supra* at 150-151. The opposite situation exists in the instant case. An investigation of the eyewitnesses involved in Petitioner's case would have found the witnesses were going to present a strong identification of Petitioner and there was little chance of successfully using the identification to support any defense of the case. Trial counsel was aware of the eyewitnesses and simply neglected to interview them. This investigation would have put counsel's only line of defense to rest, allowing trial counsel and Petitioner to make an informed decision regarding the resolution of Petitioner's case. Unlike in *Judge*, the information unknown to trial counsel was a direct result of his failure to effectively represent his client.

The PCR court also discussed the nature of plea agreements in general in reaching its decision, arguing it is impossible to "resuscitate the original opportunity" the rejected plea offer represented. (App. p. 844) The PCR court referred to the problem with requiring specific performance of a plea offer that has been rejected. (App. p. 844) The PCR court relied on the holding in *Davie v. State.* 381 S.C. 601, 675 S.E.2d 419 (2009). The *Davie* opinion offers insight into the issue in the instant case, but does not support dismissal of Petitioner's application.

The *Davie* case involved a lawyer who did not relay a plea offer to the defendant, despite the fact the defendant planned to plead guilty. The case was remanded for a new sentencing hearing. In Petitioner's case, he argues his rejection of the plea offer was based on incompetent advice from his trial counsel. *Davie* does not control this situation and does not support the PCR court's ruling.

The PCR court also supported its decision by citing the United States Supreme Court's decision in *Lockhart v. Fretwell.* 506 U.S. 364, 372, 113 S.Ct. 838, 844 (1993). The PCR court stated there was nothing unfair about imposing a sentence based on a

conviction at a fair trial after rejecting, with the assistance of counsel, a plea opportunity. (App. p. 844) This is not what the *Lockhart* opinion holds. The issue in *Lockhart* involved a defendant whose counsel failed to make an objection supported by a decision that was later overturned. *Id.* at 366. The *Lockhart* opinion recognized "the right to effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Id.* at 368, quoting *United States v. Cronic,* 466 U.S. at 658, 104 S.Ct. at 2046. In rejecting an "outcome-based" analysis of ineffective assistance of counsel, the Supreme Court focused on whether counsel's performance resulted in an unreliable trial or a fundamentally unfair proceeding. *Id.*

Rather than support the PCR court's decision, the *Lockhart* holding supports the Petitioner's argument. Petitioner clearly suffered prejudice from his counsel's incompetent assistance. Had trial counsel made any effort to investigate Petitioner's case, he would have been able to offer Petitioner the competent advice Petitioner deserved. Without this investigation, it is impossible to have any faith the proceedings in this case were reliable and fair.

Trial counsel also testified he was unable to discuss the case alone with Petitioner before trial, because his mother would not allow it. (App. p. 801, ll. 12-20) This is not a proper excuse for failing to meet with a client alone to discuss a murder case. While trial counsel was correct that he could not "forcibly throw [Petitioner's mother] down the stairs" he had an absolute duty to request Petitioner's mother leave the room so he could honestly discuss the case with his teenaged client. (App. p. 801, ll. 24-25) While there is no dispute trial counsel never met with Petitioner alone, the record reflects this was a failing on the part of trial counsel, and no one else.

The privilege between an attorney and client is a well-recognized privileged. As the Supreme Court has stated, "[t]his privilege is based upon a wise public policy that considers that the interests of society are best promoted by inviting the utmost confidence on the part of the client in disclosing his secrets to his professional advisor, under the pledge of the law that such confidence should not be abused by permitting disclosure of such communications." *State v. Love,* 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980)(quoting *South Carolina State Highway Department v. Booker,* 260 S.C. 245, 195 S.E.2d 615 (1973).

In order to develop a proper attorney-client relationship, it is critical an attorney meet with a client by themselves so they can properly discuss the issues in a case. By failing to discuss the case with Petitioner alone, trial counsel was unable to develop this relationship and offer his client competent advice on whether or not he should take a plea or go to trial. It is ridiculous to blame Petitioner's mother for this failure. It was not her that had the responsibility to properly represent Petitioner; it was trial counsel.

Trial counsel's failure to properly represent Petitioner at the plea negotiation stage of this case prejudiced Petitioner's right to effective assistance of counsel throughout the criminal process. His failure to properly advise Petitioner, a teenager at the time, calls into doubt the fairness of this process and should warrant this Court granting Petitioner relief.

II. TRIAL COUNSEL WAS INEFFECTIVE FOR OFFERING NO DEFENSE AT TRIAL AND FAILING TO PROPERLY PREPARE FOR TRIAL.

It appears the PCR court credited trial counsel for obtaining an acquittal on the murder. (App. p. 847-848) However, the verdict in this case does not offer support for a finding trial counsel was effective.

At the trial, the State presented a number of witnesses who were present at the scene of the shooting and were able to observe the events that took place. Witness Geovanni Shaffer was involved in the fight and testified at trial to the events. Shaffer testified a man named Marcus Praylow was fighting with the victim. (App. p. 164, ll. 1-3) As the fight began, Petitioner backed away. (App. p. 164, ll. 25 – App. p. 165, ll. 1-18) Shaffer later testified the two specific fights that night did not directly involve Petitioner. (App. p. 191, ll. 13-17)

Witness Prentiss Moffett testified regarding his involvement in the fight. He was not fighting with the Petitioner. (App. p. 211, ll. 12-22) Moffett also testified the Petitioner merely exchanged words with the victim and others at the scene. (App. p. 238, ll. 16-23)

Witness Adria Doctor also observed the events that night. Doctor observed a verbal altercation. (App. p. 258, ll. 22-25) She testified the victim was calm when she saw him that night. (App. p. 259, ll. 9-13) Doctor did not see any physical altercation before she went back inside her house. (App. p. 269, ll. 4-12)

The case presented by the State against Petitioner is similar to the case the Supreme Court considered in *State v. Wharton.* 381 S.C. 209, 672 S.E.2d 786 (2009). In *Wharton,* the Supreme Court considered a defendant who was found guilty in a murder trial of the lesser-included offense of voluntary manslaughter. *Id.* at 211-212,

786. The defendant was playing cards with some friends when a verbal altercation started and the defendant became angry. *Id.* at 212, 786. After a confrontation, the defendant pulled out a gun and fired, killing the victim in the case. *Id.*

The Supreme Court found there was no evidence of sufficient legal provocation to warrant a voluntary manslaughter charge. "Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient provocation." *Id.*, quoting *State v. Pittman,* 373 S.C. 527, 572, 647 S.E.2d 144, 167 (2007). Sufficient legal provocation should spark such a sudden heat of passion an uncontrollable impulse to do violence is produced. *Id.* There must be no evidence in the record tending to reduce the crime charged from murder to manslaughter in order to properly give a charge on voluntary manslaughter. *Id.*

The Supreme Court in *Wharton* found there was no evidence the defendant was provoked by either another's possession of a weapon or hostile acts. *Id.* at 214, 788. The same situation exists in the instant case. There was no evidence in the record Petitioner was provoked into firing a weapon. Without sufficient legal provocation, Petitioner could not have acted in the sudden heat of passion required for a manslaughter conviction.

While the PCR court used the lesser-included verdict as support for finding trial counsel effective, there is no evidence in the record to support this finding. Petitioner was acquitted of murder, a crime the jury decided he did not commit. However, he was also convicted of voluntary manslaughter, a crime the law says he could not have committed. The result obtained by trial counsel supports Petitioner's argument that his attorney was unprepared for the case and failed to properly represent him.

Many of the arguments made in the preceding section support the claim trial counsel's inadequate preparation for the case prejudiced Petitioner. Most glaringly, trial counsel's failure to interview witnesses before trial prejudiced Petitioner's case in that trial counsel was unable to grasp the full picture of what occurred the night of the shooting. Trial counsel could not develop a proper defense for Petitioner without at least seeking further information regarding the events the night of the shooting.

In addition, without meaningfully consulting with his client before trial, trial counsel was unable to learn any facts from his client. Without knowing what happened at the crime scene, it is impossible for trial counsel to have effectively represented Petitioner.

By failing to make any attempt to investigate witnesses, counsel's performance was deficient. In a case of this magnitude, it is inconceivable counsel would have done nothing more than read the file. There is simply no way he could be prepared to try a murder case without interviewing any witnesses. This is apparent from his defense, which was supported by neither facts nor the law.

CONCLUSION

Petitioner has not extensively discussed the standard of review in PCR cases, as the Court is familiar with the appropriate standards. In addition, Petitioner agrees with the PCR court's recitation of the applicable law in this case. (App. p. 840) As the Court knows, Petitioner must prove that trial counsel's performance was deficient and that performance prejudiced Petitioner to such a degree the results of the proceedings would have been different if not for counsel's ineffectiveness. *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989).

The PCR court erred in finding Petitioner received effective assistance of counsel. The record is full of support for the allegations of trial counsel's failings. Trial counsel failed to conduct even a basic investigation of the facts. Trial counsel failed to properly meet with Petitioner and develop an attorney-client relationship with Petitioner. In fact, trial counsel failed to produce his case file at the PCR hearing, making it impossible to corroborate any of his claims. (App. p. 659, ll. 2-23)

The deficient performance prejudiced Petitioner in that there can be no faith in the outcome of Petitioner's proceedings. He was denied an effective attorney. Not only does the record reflect trial counsel was unprepared to try the case, the results reveal trial counsel had no idea what this case involved.

At the very least, a criminal defendant deserves counsel who will make an effort to investigate the facts, as well as build a relationship with his client. Petitioner did not receive that counsel.

Petitioner respectfully prays the Court reverse the judgment of the PCR court and grant post-conviction relief in this matter.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the *PETITION FOR A WRIT OF CERTIORARI* and *APPENDIX* on the State of South Carolina by hand delivery, on March 14, 2012, addressed to the State's attorney of record, Brian T. Petrano, South Carolina Attorney General's Office, Rembert Dennis Building, 100 Assembly Street, Room 519, Columbia, South Carolina 29201.

March 14, 2012

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