

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Post Conviction Relief

S.C. SUPREME COURT

Perry H. Gravely, Circuit Court Judge

Appellate Case No.: 2018-000627

Titus L. Rouse,

Respondent,

vs.

State of South Carolina,

Petitioner.

RETURN TO PETITION FOR
WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON APPEAL

Did the PCR court err in granting Rouse post-conviction relief and remanding the matter to the Court of General Sessions for a new trial, where there is no evidence of probative value to support the PCR court's finding that Rouse's guilty plea was induced by counsel's handling of the canine evidence?

RESTATEMENT OF ISSUE ON APPEAL

Whether the Petition for Writ of Certiorari must be denied and the lower court's finding upheld since the Petition fails to properly address the evidence in the record, which was relied upon by the lower court and supports the granting of relief.

STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact but deference is not given to conclusions of law. Smalls v. State, 810 S.E.2d 836 (2018). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling on findings of fact. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984). Questions of law are reviewed *de novo*, and the appellate court "will reverse the decision of the PCR court when it is controlled by an error of law." Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

PROCEDURAL HISTORY

On May 27, 2012, Respondent was arrested for trafficking in heroin, twenty-eight grams or more, at a hotel located on McPrice Street in Greenville, South Carolina.¹ A preliminary hearing was conducted in front of the Honorable Robert Simms on July 12, 2012. Supp. App. p. 2. Respondent was present and he was represented by Richard H. Warder, Esquire. The State was represented by Brennan Townsend, Esquire, of the Thirteenth Judicial Circuit. At the conclusion of the hearing, Judge Sims found probable cause to bind the case over. Supp. App. p. 24.

Respondent was indicted for the offense of trafficking heroin by the Greenville County Grand Jury (Indictment No. 2012-GS-23-06017). App. p. 371. On August 6, 2014, Respondent was called to trial in front of the Honorable Edward W. Miller and a jury. App. p. 3. Respondent was represented by Richard H. Warder, Esquire, and C. Rauch Wise, Esquire. The State was represented by Joyce K. Monts, Assistant Solicitor.

After conducting pre-trial motions, Respondent entered a guilty plea. The plea was accepted, and Respondent was sentenced to a term of twelve years by the Honorable Edward W. Miller. App. p. 67. A direct appeal was not filed on Respondent's behalf.

On May 22, 2015, Respondent filed an Application for Post Conviction Relief. App. p. 70. On June 3, 2015, a Return was filed. App. p. 84. On February 18, 2016, Tricia A. Blanchette was substituted in as Respondent's counsel. On October 17, 2016, Respondent, through counsel, filed an Amendment to his Application, as follows:

1. Ineffective assistance of counsel for failure to properly prepare and investigate prior to trial, to include counsel's representation at the preliminary hearing, which induced an involuntary guilty plea.

¹ Respondent was also issued tickets for the offenses of habitual traffic offender and driving under suspension, which were not subject of the PCR Application or proceedings.

2. Ineffective assistance of counsel for failure to effectively make all reasonable pre-trial motions and effectively represent Applicant on pre-trial motions made prior to the entry of Applicant's guilty plea.
3. Ineffective assistance of counsel for advising Applicant to forego trial and enter a guilty plea.
4. Ineffective assistance of counsel for failure to ensure that Applicant had a full understanding of the charge he was entering a plea to and failure to ensure that the oral pronouncement of the charge matched the sentencing sheet. Additionally, ineffective assistance of counsel for failure to ensure that Applicant's plea was being made to a proper lesser include offense.
5. Pursuant to Rule 15(b), SCRPC, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

App. p. 102.

On April 5, 2017, Respondent, through counsel, submitted an additional Amendment to his Application, as follows:

1. Ineffective assistance of counsel for failure to obtain a canine expert and/or fully investigate the canine evidence and prepare to move to suppress and/or move to suppress testimony and/or evidence derived from the deployment of canines. Ineffective assistance of counsel for errantly advising Applicant regarding testimony and evidence derived from the deployment of canines, which induced an involuntary guilty plea.

App. p. 104.

On April 21, 2017, an evidentiary hearing was conducted at the Greenville County Courthouse in front of the Honorable Perry H. Gravely. App. p. 149. Respondent was present and represented by Tricia A. Blanchette, Esquire. Petitioner was represented by DeShawn H. Mitchell, Assistant Attorney General. Respondent proceeded on the allegations set forth above and called the Honorable Robert Simms, Michael Gould, Edward Cooper, C. Rauch Wise, Esquire, Richard Warder, Esquire, and Titus Rouse to the stand. Petitioner called John Redman. Respondent introduced fourteen exhibits and

provided a Memorandum of Law to the Court addressing cases involving post conviction relief stemming from a guilty plea. App. p. 337.

Thereafter, the Honorable Perry H. Gravely requested Petitioner propose an Order of Dismissal. Upon receipt of the proposed Order of Dismissal, Respondent's counsel sent a letter to Judge Gravely detailing concerns with the Order on October 6, 2017. On December 1, 2017, an Order of Dismissal was signed and filed. App. p. 316. Respondent, through counsel, received notice of entry of the Order on December 11, 2017. Thereafter, Respondent, through counsel submitted a Rule 59(a) and (e), Motion via mail to the Honorable Perry H. Gravely, the Greenville County Clerk of Court and Petitioner on December 19, 2017. App. p. 332.

After careful reconsideration of Respondent's Motion, the Honorable Perry H. Gravely issued a request detailing his concerns with the standing Order and asking Respondent's counsel to propose an Order Granting Application for Post Conviction Relief. An Order was submitted as requested for the lower court's review and consideration. Thereafter, the Honorable Perry H. Gravely issued an Order Granting Application for Post Conviction Relief on March 28, 2018, which was filed on March 29, 2018. App. p. 344.

On or about April 10, 2018, Petitioner filed a Notice of Intent to Appeal. On July 23, 2018, Respondent filed a Petition for Appeal Bond, and Respondent filed a Return. On or about August 10, 2018, Petitioner filed a Petition for Writ of Certiorari and Appendix. On or about September 10, 2018, Petitioner filed a Supplemental Appendix, from which this Return follows.

ARGUMENT

- I. The Petition for Writ of Certiorari must be denied and the lower court's finding upheld since the Petition fails to properly address the evidence in the record, which was relied upon by the lower court and supports the granting of relief.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In a PCR stemming from a guilty plea, an applicant alleging a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). Therefore, an applicant that entered a plea on the advice of counsel may only attack the voluntary nature of that plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, applicant would not have pled guilty and insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985), Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000). In Hill, the Supreme Court of the United States held that the "voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." 474 U.S. at 57, 106 S.Ct. at 369.

In Hill and Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473 (2010), the Supreme Court of the United States examined the role of advising a client about a plea offer and ensuing guilty plea as was discussed in Missouri v. Frye, 132 S. Ct. 1399, 1405-06 (2012), as follows:

Hill established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in Strickland. See Hill, *supra*, at 57, 106 S. Ct. 366, 88 L. Ed. 2d 203. As noted above, in Frye's case, the Missouri Court of Appeals, applying the two part test

of Strickland, determined first that defense counsel had been ineffective and second that there was resulting prejudice.

In Hill, the decision turned on the second part of the test. There, a defendant who had entered a guilty plea claimed his counsel had misinformed him of the amount of time he would have to serve before he became eligible for parole. But the defendant had not alleged that, even if adequate advice and assistance had been given, he would have elected to plead not guilty and proceed to trial. Thus, the Court found that no prejudice from the inadequate advice had been shown or alleged. Hill, supra, at 60, 106 S. Ct. 366, 88 L. Ed. 2d 203.

In Padilla, the Court again discussed the duties of counsel in advising a client with respect to a plea offer that leads to a guilty plea. Padilla held that a guilty plea, based on a plea offer, should be set aside because counsel misinformed the defendant of the immigration consequences of the conviction. The Court made clear that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." 559 U.S., at ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284, 298. It also rejected the argument made by petitioner in this case that a knowing and voluntary plea supersedes errors by defense counsel. Cf. Brief for Respondent in Padilla v. Kentucky, O. T. 2009, No. 08-651, p. 27 (arguing Sixth Amendment's assurance of effective assistance "does not extend to collateral aspects of the prosecution" because "knowledge of the consequences that are collateral to the guilty plea is not a prerequisite to the entry of a knowing and intelligent plea").

By way of the Order Granting Application for Post Conviction Relief, the lower court held: "Counsel was ineffective for advising Applicant to enter a guilty plea due to the canine evidence when counsel did not have a full understanding nor had a prepared to defend against the canine evidence prior to trial." App. p. 366. In reaching this decision the lower court properly considered the record of the preliminary hearing, evidence offered, evidentiary hearing testimony and the record of the trial/plea proceeding.

The Petition for Writ of Certiorari should be denied and the lower court's finding upheld since the Petition fails to properly address the evidence in the record, which was relied upon by the lower court and supports the granting of relief. In arguing that

probative evidence does not support the lower court's finding, Petitioner seems to rely upon limited portions of the testimony of Richard Warder, Esquire, takes a response offered by Respondent out of context and ignores clear testimony offered by Respondent and Rauch Wise, Esquire. In contrast, the lower court's ruling exceeds the any evidence standard of review and should be upheld.² Therefore, it is imperative for this Court to examine, but not conduct a *de novo* review of the evidence considered by the lower court in reaching his decision to grant relief.

As addressed by the lower court, Respondent was represented by Mr. Warder at the preliminary hearing. During the hearing, Deputy Michael Giovanni testified. He acknowledged the tip that was received and the surveillance conducted on May 27, 2012. Supp. App. pp. 6-7. He saw a white Mercedes pull into the hotel location, decided to check the tag, circled back around the parking lot and found the car had been abandoned. Supp. App. pp. 8-9. He requested additional officers and a canine unit to respond to the scene. Supp. App. p. 9.

Thereafter, additional officers arrived, including a canine unit that began a track. Supp. App. p. 9. In contrast to the Petitioner's argument, he explained that he did not see Respondent jump out of the car. Supp. App. p. 9. About fifteen minutes into the track, he saw Respondent with a towel around his neck heading into the hotel office area, and he saw the canine officer speaking with Respondent during the track near the pool area. Supp. App. p. 10, 18, Ins. 14-21.

² It appears Petitioner does not allege the lower court committed an error of law. If such an allegation is interpreted as being made, Respondent submits that the lower court did not commit an error of law; therefore, the applicable standard of review is the "any evidence" standard of review.

About fifteen minutes into the track, he recalled the drugs being located. Supp. App. p. 17. He explained where the drugs were found and that “the narcotics were left there in a bag, and his slippers were also there.” Supp. App. p. 12, ln. 17- p. 13, ln. 12. He obtained a search warrant for Respondent’s hotel room, and no evidence was found in the room. Supp. App. p. 12.

When cross-examined, by Mr. Warder, about his testimony on direct that Respondent claimed ownership of the slippers, he testified: “He did not admit possession of those particular slippers. He said that he had run out of his slippers, and, of course, he denied having any association with narcotics directly to me. Now what he told the narcotics investigator or anybody else, I don’t know.” Supp. App. p. 18, lns. 4-11. He also testified that he did not show the slippers to Respondent. Supp. App. p. 17, ln. 20 – p. 18, ln. 1. At the conclusion of the hearing, Judge Sims found probable cause to bind the case over. Supp. App. p. 24.

Thereafter, Respondent was indicted for the offense of trafficking heroin by the Greenville County Grand Jury (Indictment No. 2012-GS-23-06017). On August 6, 2014, Respondent was called to trial in front of the Honorable Edward W. Miller and a jury. App. p. 3. After the jury was selected and sworn, a Jackson v. Denno hearing was conducted. App. p. 27. During the Jackson v. Denno hearing, the State called Michael Giovanni, John White, and John Cannon to the stand. The hearing concluded with the following discussion:

Court: Well, anything you want to tell me? What is it you want to suppress?

Mr. Wise: The statement we, originally, thought that was in custody we thought was originally more damning than what they testified to.

The Court: I didn't really hear a confession.

Mr. Wise: Well, I don't think it necessarily has to be a confession. But it just was not as we originally thought it was.

The Court: So, you don't have any objection?

Mr. Wise: No.

App. p. 53, ln. 21 – p. 54, ln. 7.

Following the Jackson v. Denno hearing, the State agreed to exclude character evidence and a discussion was put on the record regarding “the tip.” App. pp. 54-56. After a bench conference was conducted, counsel requested the opportunity to speak with the Solicitor and Respondent. App. p. 57. After going back on the record, Judge Miller spoke to Respondent, and the guilty plea proceeding took place. App. pp. 58-9.

During the plea proceeding, the Assistant Solicitor stated:

Officers did run a K9 around the car, which alerted, but they didn't find anything inside the car. The tracking dog did follow the Defendant's trail around the apartment -- hotel complex, and did end up where the cocaine – excuse me, heroin and slippers were.

App. p. 62, lns. 15-19.

At the evidentiary hearing, Respondent testified, and Respondent, through counsel, called the Honorable Robert Sims, Michael Gould, Edward Cooper, C. Rauch Wise, Esquire, and Richard Warder Esquire.

At the start of the evidentiary hearing, Michael Gould was called to the stand and qualified as an expert in the area of canine procedure and deployment.³ App. pp. 168, 168. Even though the Petition fails to address Mr. Gould's testimony, it is a basis on

³ Mr. Gold provided internet testimony via prior court order, and he was qualified over the State's objection. PCR pp. 19-20.

which the lower court rendered his decision that a new trial was warranted and a basis on which the lower court's order should be upheld.

After being qualified, Mr. Gould identified the materials he had been provided and addressed the photographs. App. pp. 169-172. Mr. Gould acknowledged that he reviewed all law enforcement reports from the case, and he provided the following general opinion:

So, I saw a very contaminated scene. Not only was it contaminated by humans, but another dog. And, frankly, one thing I want to say, I don't think that anything that I have read, including a training record, I don't think anybody intentionally did anything wrong, but I see a crime scene, as I said, that was chaotic and confused. And things should have been slowed down a little bit.

App. p. 173, lns. 6-12. He explained his concerns with the contamination of the scene.

App. pp. 174, 178, 180, 184. He opined: "So dogs can be confused just like humans can be confused." App. p. 184, lns. 24-25.

Mr. Gould addressed the two dogs utilized (Nero and Duke), and explained that Nero was a utility or multi-purpose dog and Duke was a single purpose human scent detection dog. App. p. 173. He expressed concerns with the presence of two canines at the scene, the handling of the canines and the reports generated from the scene. App. pp. 176-178, 181, 190-191. He explained how a canine is ultimately a scientific instrument and even though the canines are capable of "amazing things" they have "definite limitations." App. p. 175. He further explained that a canine's value is really tapped into in a nighttime scene. App. pp. 175-76.

Throughout his testimony, Mr. Gould explained that he found no connection or nexus between the canine, Respondent, and the drugs that were located by the officer. App. pp. 176, 188-89. He addressed the drop scent procedure that was utilized and the

dogs trail; he opined that he could not determine what the dog was trailing. App. pp. 183-87. He noted that the drugs were found in a natural path and he found nothing in Officer Redman's report that the dog's behavior changed or of an alert. App. pp. 186, 188. He opined that the track was not reliable. App. p. 189. In sum, he found no value the canines brought to the scene, he stated: "My overall conclusion that the K-9 teams, both K-9 teams, didn't add value or scientific evidence to the entire scene." App. pp. 192, 193, lns. 15-18.

He agreed that he would have been willing to provide his services to counsel if contacted prior to Respondent's trial, and he would have shared with counsel and/or testified to the same opinions. App. pp. 192-93. When asked about the Assistant Solicitor's statement about the the canine track during the plea proceeding, and, specifically, if he agreed that the canine tracked from Respondent to the drugs, he simply stated: "No." App. p. 195, lns. 11-19.

As is also reflected in the record and Order but mostly absent from the Petition, C. Rauch Wise, Esquire, testified at the evidentiary hearing regarding his representation of Respondent. He recalled being hired by Respondent well in advance of trial to join Mr. Warder. App. p. 227. When asked, he responded that most of his cases go to trial, and it was his understanding that he was brought on for trial and "appeal if necessary too." App. p. 231, lns. 7-13. He was adamant that they were preparing the case for trial, and recalled a plea was never seriously discussed until the day it was entered. App. p. 231.

He identified a letter he wrote Mr. Warder, which he had sent with a brief he had written in a case involving circumstantial evidence that was not sufficient to convict. App. pp. 227-28. He explained that he sent Mr. Warder the brief because he found it

analogous to the slipper evidence and lack of DNA evidence. App. p. 229, 231. He stated that he was now aware that he only received a portion of the discovery from Mr. Warder, but he was previously aware that no matches to Respondent's prints were found on the drugs and no DNA was reported on the slippers. App. pp. 231, 250, 260-61.

Prior to trial, he remembered meeting with Respondent and Mr. Warder for several hours, but the canine evidence was not discussed. App. pp. 233-34. He recalled that he first heard about the canine evidence the day of trial when the Assistant Solicitor told him "that the drug dog had tracked from the car to where the drugs were." App. p. 234, lns. 8-14. He explained that the Solicitor's statement was a game changer. App. p. 234, lns. 21-25. As a result, he thought the jury would believe that Respondent had the drugs. App. p. 234, lns. 21-25.

Regarding the report on the canine track, he recalled seeing it for the first time on the day of trial. App. pp. 235, 260-61. He further recalled reviewing it, in conjunction with a map, in his office with PCR counsel and determining that the track was not a direct route from the car to the drugs, which was in conflict with what he believed when Respondent pled guilty. App. pp. 265-36. He explained he would have raised the issue to Mr. Warder and Respondent if he had reviewed the report prior to the day of trial, and he would have pursued getting a canine expert. App. p. 237. He acknowledged being present for Mr. Gould's testimony and stated that he would have utilized him as an expert at trial. He addressed his current concern that the canine possibly was not even tracking Respondent's scent, and he added that he did not get a clear impression from hearing Mr. Redman's testimony at the evidentiary hearing that the dog tracked to the drugs. App. p. 237, ln. 24 – p. 238, ln. 16.

It appears Petitioner's argument is based in part upon a letter Mr. Wise sent Respondent shortly after his plea. When Mr. Wise was on the stand, he explained that the letter reiterated the information he was provided by the Solicitor and his belief that due to the canine evidence, as he understood it prior to and during the plea, Respondent was likely to be convicted. App. pp. 239-241. Notably absent from Petitioner's argument, he further explained that based upon the expert testimony and his current understanding of the canine evidence, the case was much more "defensible" and he could "easily defend his (Respondent's) decision to go to trial." App. p. 241, ln. 4 – p. 242, ln. 18.

Unlike the Petitioner's summary of Mr. Warder's position, Mr. Wise stated the canine evidence was the "key thing in the whole thing." App. p. 244, lns. 2-3. When asked about abandoning the Jackson v. Denno hearing, he explained that he was not aware of that canine evidence at that juncture or he would not have abandoned it. In contrast to the State's argument, he further explained his interpretation of the importance of the slipper and canine evidence, as follows:

It was a combination of the testimony that the tracking dog went to the drugs and the admission of the slippers were his, those two factors together clearly, I think, gets it to the jury and makes it a very difficult case to win. Eliminate the dog, the slippers are just not that important.

App. p. 255, lns. 18-22.

On cross-examination, Mr. Wise was asked if he would have advised Respondent differently, and he responded: "I would probably advise him differently." App. p. 263, lns. 13-16. He explained that the dog tracking "is not as strong as I was led to believe." App. p. 263, lns. 17-19. He also reiterated his prior testimony regarding the weakness of the slipper evidence standing alone, he explained: "I can deal with the slippers. I am not worried about that – Slippers coupled with dog tracking does concern me." App. p. 263,

Ins. 20-25. He also explained that he was confident the tip was not going to come in as evidence. App. p. 264. Most importantly, on redirect, he conceded that he was not prepared on the day of trial to defend against the purported canine evidence. App. p. 265.

When Richard Warder, Esquire, took the stand, he explained that he proposed a plea to Respondent, but Respondent wanted to go to trial and wanted a second opinion. App. p. 267. So, Mr. Warder recommended Mr. Wise. App. pp. 267-68.

Regarding the Jackson v. Denno hearing, he indicated that he could not remember why they chose to not make a further objection. App. pp. 275-76. He followed up by explaining he had a “standard seventy three year old memory.” App. p. 276, Ins. 3-8.⁴

He explained that the trial strategy was to “get a directed verdict because of the lack of direct evidence and it was a circumstantial case.” App. p. 272, Ins. 9-11. He recalled that the case turned in the direction of a plea following a bench conference where the Judge recommended that they speak with the Solicitor. Following that conference, he advised Respondent it was “time to fold them” and take a plea. App. p. 273, Ins. 7-11. He recalled the Assistant Solicitor stating “that her officer that day was going to say that he trailed – the dog trailed him right to my client.” App. p. 274, Ins. 13-15. He admitted he had not obtained the dog records nor had he prepared to cross-examine the officer. App. pp. 274-75.

As it not properly addressed in the Petition, Respondent took the stand and recalled his limited interactions with Mr. Warder prior to the retainer of Mr. Wise. App.

⁴ It must be noted that Petitioner’s argument is based largely in part on Mr. Warder’s memory and testimony, which he candidly admitted was limited. Whereas, the argument seems to ignore the testimony of Mr. Wise, which was not limited by recall issues.

pp. 284-85. During a joint meeting with his attorneys, he remembered reviewing some discovery items. App. p. 285. He recalled Mr. Wise did most of the talking. App. p. 285.

Unlike the State's argument, he made it clear that his attorneys were well aware that he wanted a trial, and he explained that would not have hired two attorneys known for handling trials if he wanted to pursue a guilty plea. App. pp. 285-86, 304. He affirmed his intent to go forward with the trial that was begun on August 6, 2014. App. p. 286. He explained that he had just turned down a plea and the discussion of the plea seemed to come out of the blue. App. p. 304, lns. 1-14. As is ignored in the State's argument, he further explained that he entered the plea solely on the advice of counsel. App. p. 304, lns. 10-14. He stated: "I accepted their advice of telling me to plea because we couldn't win and here I am." App. p. 304, lns. 13-14.

Regarding the discovery he had reviewed on his own or with counsel prior to trial, he explained that counsel did not review the preliminary hearing transcript with him nor was he aware of the canine evidence. App. pp. 286-87. As stated by Mr. Wise, he agreed that any matters involving canines were not discussed with him prior to his trial. App. pp. 286-87. Respondent testified that he would have provided funds for a canine expert if his counsel would have told him one was needed prior to or at trial. App. pp. 299-300. He remembered seeing the canine while at the pool, but he was never approached by the canine. App. p. 302-303.

Respondent was directed to his comments during the plea, and he explained that he was trying to deny ownership of the slippers and "everything revolving around the case." App. pp. 300, 301, lns. 15-18. He explained that he admitted to ownership of the

drugs since counsel told him “you have to own up to this stuff or you not going to get your plea.” App. p. 301, lns. 15-16.

In contrast to the quote taken out of context in the State’s argument, Respondent made it clear that he did not want to plead guilty and he wanted to proceed to trial. App. pp. 306-7. He also remembered his attorneys’ outlook on trial being changed due to what was communicated by the Solicitor and entering the plea due to the advice of his attorneys on the day of the plea - not due to the advice in the letter sent after the plea. App. pp. 306-7. He referenced the subsequent letter, but he was adamant that his decision to plea guilty was induced by his attorneys’ advice on the day of his trial that culminated in a plea.

Ironically, the Petition fails to address the testimony of the State’s sole witness, John Redman. Mr. Redman’s testimony further supports the lower court’s granting of relief and the weakness of his testimony was addressed by Mr. Wise.⁵ When Mr. Redman took the stand, he explained his certification and training, along with his involvement in the case. App. pp. 204-6. He stated that he did not have his report, so he qualified his recollection as “vague.” App. p. 206. Thereafter, he identified his report, which was admitted into evidence. App. p. 209. When asked whether or not the canine alerted, he provided a lengthy response, which he concluded by saying: “There was no way he could alert to him because he wasn’t there anymore.” App. p. 210. He explained that his dog’s

⁵ The lower court held: “This Court finds the testimony of Mr. Redman credible, but this Court makes his findings with the following facts in mind. Mr. Redman admitted he had not reviewed anything pertaining to the case prior to his testimony, and the State failed to qualify Officer Redman as an expert pursuant to State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) or establish any of the White factors for the admissibility of the canine evidence he addressed. As a result, this Court is concerned with the weight that should be given to Mr. Redman’s testimony and assigns limited value to his testimony.” App. p. 359.

“true alert” would be to “either jump on the person or sit next to the person.” App. p. 212, lns. 18-24. Specifically, he stated: “He never alerted. He didn’t have the opportunity to alert. There was nothing for him to alert to.” PCR p. 77, lns. 6-7.

When asked if he was confident that his dog was trailing Respondent, he explained that he was trailing the scent from the gauze pad taken from the steering wheel of the car. App. pp. 213-14, 216. In response to why he did not obtain a scent directly from Respondent, he explained that he did not know that Respondent was on the scene. App. pp. 213-14. When asked about his interactions with the Solicitor’s Office prior to trial, he stated that he was unsure if he would have stated that his dog was “able to track from the Defendant to the drugs.” App. p. 215, lns. 8-20. He explained that he stopped the track upon location of the drugs and the dog did not trail to Respondent’s location on the scene. App. p. 216, 224.

It is clear from Officer Redman’s testimony that his recollection of the canine evidence was not in line with the view of the evidence communicated to and understood by counsel before providing Respondent with the advice that induced his guilty plea. Not only did counsel fail to utilize an expert to address the strength of the canine evidence, but they also failed to simply review the report and discuss it with Mr. Redman before advising Respondent to plea due to concerns regarding a conviction likely resulting from the Solicitor’s view of the canine evidence.

Based upon the record and above summarized testimony, the lower court held that counsel was ineffective for advising Respondent to enter a guilty plea due to the canine evidence when counsel did not have a full understanding nor had prepared to defend against the canine evidence prior to trial. The lower court properly reasoned:

The record supports a finding that counsel was ineffective due to counsel's failure to review and discuss the canine evidence, lack of understanding regarding the canine evidence, failure to utilize a canine expert, and advice to forego trial due to the canine evidence.⁶ At the evidentiary hearing, Mr. Wise testified that he was unaware of the canine evidence until he was told about it by the Solicitor at trial, that he would have used the canine expert called, and he would not have advised Applicant to forego trial now that he had a proper understanding of the canine evidence and the case as a whole.⁷ PCR pp. 86-94, 99-100, 106-107, 113-117. Constitutionally defective performance is found when defense counsel offers erroneous advice concerning an issue that is central to the defendant's decision to plead guilty. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991).

App. p. 367.

Regarding Mr. Wise's admissions, the lower court further reasoned: "This Court cannot ignore the admitted erroneous advice that caused Applicant to abandon trial and enter a guilty plea." App. p. 367. As to the advice rendered the lower court concluded: "Plea counsel's advice, which was not based upon a proper review of the discovery or utilization of an expert but solely upon the Solicitor's view of the evidence, was not "within the range of competence demanded of attorneys in criminal cases." Hill

⁶ As summarized above and reflected in the evidentiary hearing transcript, Applicant called Michael Gould, and he was qualified as an expert in the area of canine procedure and deployment. PCR p. 20. Based upon the opinions and testimony offered by Mr. Gould, this Court is persuaded that counsel's advice was deficient and that counsel was ineffective for failing to utilize Mr. Gould to prepare to defend against the canine evidence. See Reeves v. State, 415 S.C. 366, 782 S.E.2 747 (Ct. App. 2015) (Reversing the denial of post conviction relief reasoning that trial counsel was deficient for failing to discuss with Reeves hiring a medical expert to more thoroughly challenge the State's medical evidence presented at trial and finding that trial counsel did not present a legitimate trial strategy for failing to consult with an expert before trial or call an expert at trial.). Here, counsel did not provide a trial strategy for failure to utilize an expert. On the other hand, counsel admitted that an expert should have been utilized and stated that he would have utilized Mr. Gould.

⁷As detailed above, Mr. Warder testified that he thought they went over all the discovery during the joint meeting with Applicant, but both Applicant and Mr. Wise recalled the canine evidence and reports were not discussed. Mr. Warder also explained that the Solicitor's comments about the canine evidence were different than the weight he had given the evidence, and he had not prepared to cross-examine the officers about the canine evidence. App pp. 268, 273-75.

v. Lockhart, 474 U.S. 52, 56 (1985) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)). App. pp. 367-77.

Respondent submits that the lower court's finding of deficiency amounting to ineffective assistance of counsel is fully supported by overwhelming not merely just any evidence in the record. Additionally, the State's Petition seems to overlook or misapprehend the lower court's finding of prejudice, which is followed by the evidence supporting the court's finding.

In pertinent part, the lower court held:

Turning to the prejudice prong, it is clear that Applicant wanted to proceed to trial and only chose to forego trial based upon the advice of counsel. This finding is supported by the following evidence in the record before this Court. As testified to at the evidentiary hearing, Applicant hired a second attorney (Mr. Wise) who stated that he was brought on board with the belief that the case was proceeding to trial. The case did proceed to trial, with the jury being sworn and pre-trial motions being made. The trial turned into a guilty plea only after Applicant met with his attorneys and received the advice discussed above. Most importantly, Mr. Wise, Mr. Warder and Applicant testified that Applicant wanted to proceed to trial and only chose to enter a guilty plea after their meeting regarding their discussion with the Solicitor about the canine evidence. At the evidentiary hearing, Applicant repeatedly stated that but for the advice of counsel he would have proceeded to trial and wants the opportunity to proceed to trial. PCR pp. 137-8, 156, 159. This Court finds this testimony to not be merely self-serving, but it is supported by the testimony of both attorneys and the record before this Court. Therefore, this Court finds that prejudice has sufficiently been established.

App. p. 368.

In Robinson v. State, 422 S.C. 78, 810 S.E.2d 32 (2018), this Court reversed the denial of PCR relief. After addressing the deficient advice counsel rendered due to his failure to recognize that the *ex post facto* clauses prohibited increased punishment for the offenses at issue, this Court reasoned that Robinson was prejudiced by counsel's deficient advice, which induced his guilty plea. This Court held:

Petitioner has demonstrated a reasonable probability that he would have rejected the plea offer and proceeded to trial but for plea counsel's incorrect advice. See Hill, 474 U.S. at 60, 106 S.Ct. 366 (explaining prejudice may be demonstrated by evidence that the accused "placed particular emphasis" on the specific incorrect advice by counsel in deciding to plead guilty).

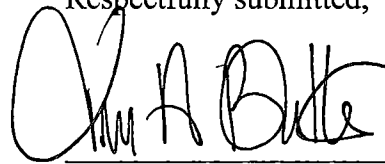
In the instant case, the lower court found resulting prejudice from counsels' advice stemming from their deficient preparation and understanding of the canine evidence that caused Respondent to abandon the trial that was underway. But for the advice that stemmed directly from the acceptance of the Solicitor's view of the canine evidence, Respondent, as well as counsel, testified that he would have proceeded with his trial and not entered a guilty plea. As a result, the record clearly establishes prejudice resulting from counsel's deficient advice, and the lower court's finding of prejudice should be upheld.

In conclusion, Respondent asks this Court to find that the Petition must be denied and the lower court's ruling upheld since the Petition only relies upon limited portions of the record and takes Respondent's testimony and counsel's letter out of context. As found by the lower court, not only did Respondent offer an expert in support of his claims of ineffective assistance, but the testimony of Attorney C. Rauch Wise amounted to an admission and the testimony of Richard C. Warder established ineffective assistance of counsel. Respondent testified and counsel affirmed that he wanted to proceed to trial, that C. Rauch Wise, Esquire, was retained to assist Richard H. Warder, Esquire, since the case was on a trial track and that trial was only abandoned after counsel rendered deficient advice as a result of their understanding of the canine evidence.

CONCLUSION

Based upon the above argument and record before this Court, Respondent would respectfully ask that this Court deny certiorari and uphold the granting of a new trial by the Honorable Perry H. Gravely.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Tricia A. Blanchette", written over a horizontal line.

Tricia A. Blanchette
PO Box 2147
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Attorney for Respondent

October 30 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Post Conviction Relief

Perry H. Gravely, Circuit Court Judge

Appellate Case No.: 2018-000627

RECEIVED

OCT 30 2018

S.C. SUPREME COURT

Titus L. Rouse,

Respondent,

vs.

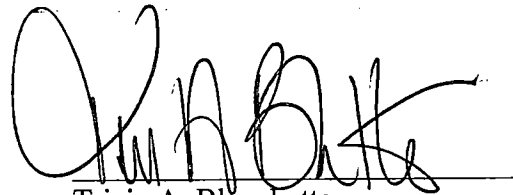
State of South Carolina,

Petitioner.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Respondent, hereby certify that I hand delivered this 30th day of October 2018 a Return to Petition for Writ of Certiorari to DeShawn Mitchell of the Attorney General's Office, at:

Office of the Attorney General
Att: DeShawn Mitchell, Assistant Attorney General
1000 Assembly Street, 5th Floor
Columbia, SC 29201



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

October 30 2018

LAW OFFICE OF
TRICIA A. BLANCHETTE

October 30, 2018

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED

OCT 30 2018

S.C. SUPREME COURT

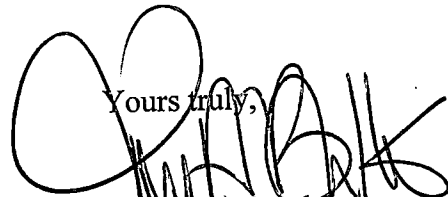
RE: State v. Titus N. Rouse; App. Case No.: 2018-000627

Dear Sir:

For filing, attached please find an original, plus six copies, of the Return to Petition for Writ of Certiorari and a Certificate of Service.

Please contact me if any additional information is needed. I appreciate your assistance with this matter.

Yours truly,



Tricia A. Blanchette
Attorney at Law

cc: DeShawn H. Mitchell, Asst. AG
Titus Rouse