STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Kristi F. Curtis, Circuit Court Judge

MICHAEL ORLANDO BROWN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2019-001677

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

Did the post-conviction relief (PCR) judge err by finding Petitioner was not prejudiced by trial counsel's deficient performance where counsel failed to contemporaneously object to the admission of Petitioner's alleged statements to law enforcement in which Petitioner allegedly offered to plead guilty to a lesser offense after counsel moved pretrial to suppress the statements pursuant to Rule 403, SCRE, since there is a reasonable probability Petitioner would have prevailed on appeal had trial counsel properly preserved the issue for appeal?

2.

Did the post-conviction relief (PCR) judge err by finding Petitioner was not prejudiced by trial counsel's deficient performance where counsel failed to contemporaneously object to the admission of Petitioner's statements to law enforcement in which Petitioner allegedly admitted the state's DNA evidence would convict him and offered to plead guilty to a lesser offense after counsel moved pretrial to suppress the statements arguing the statements were made after Petitioner had invoked his Fifth Amendment right against self-incrimination and right to counsel, since there is a reasonable probability Petitioner would have prevailed on appeal had trial counsel properly preserved the issue for appeal?

STATEMENT OF THE CASE

The state alleged at trial that Petitioner attempted to rob a Chuck E. Cheese in Columbia shortly before it closed on January 3, 2013. An armed black man wearing a brown wig and a red bandana around his neck entered the establishment at 9:38 pm. App. 172, ll. 16-18. While there were no patrons inside at the time of the offense, there were four employees who were preparing to close for the evening. Kadeshia Green and Kyrie Green were breaking down the salad bar. App. 171, ll. 1-10. Ronnie Kennedy-Martin, the manager, was in the back office. App. 174, ll. 11-12. Finally, a woman only identified as Anna was working in the kitchen. App. 171, ll. 11-14; App. 186, ll. 11-12.

Kadeshia, who saw the armed man as he entered the front door, ran to the office and alerted Ronnie. App. 173, l. 21 – 174, l. 10. The man then grabbed Kyrie, put a gun to his back, and told him to walk to the back. App. 190, l. 9 – 192, l. 20; App. 174, ll. 14-24. As the man and Kyrie were walking toward the kitchen, the man demanded Kyrie take him to the money. App. 192, ll. 21-24. However, once the robber saw Ronnie and Kadeshia coming out of the office, he pushed Kyrie to the side, turned, and fled out the front door. App. 193, ll. 3-17

Ronnie called the police. The patrol officer who responded requested the assistance of a K-9 to attempt to track the suspect. The police dog allegedly tracked a scent from the entrance of the Chuck E. Cheese to an area behind the nearby El Toro restaurant, where a wig and bandana were located. App. 156, l. 6 – 159, l. 16. The wig and bandana were both tested for DNA. Though no DNA was found on the wig, Petitioner's DNA was allegedly found as the major contributor on the bandana. App. 300, l. 18 -301, l. 12; App. 305, l. 17 – 306, l. 18.

Despite the presence of two other individuals' DNA on the bandana, Petitioner was arrested on March 14, 2013. App. 304, l. 13 – 305, l. 7; App. 260, ll. 22-23. A Richland County Grand Jury

ultimately indicted Petitioner on April 9, 2014 for attempted armed robbery. App. 708-709. His case was called to trial on August 4, 2014 before the Honorable James R. Barber, and a jury. App. 1. Assistant Solicitors Luck Campbell, Meghan Walker, and Sandra Moser represented the state. App. 1. Anastasia Walker and Alicia Goode represented Petitioner. App. 1.

Petitioner moved pretrial to suppress the oral statement he allegedly made to Investigator Robert Martin shortly after his arrest. Specifically, Petitioner sought to exclude his alleged statements offering to plead guilty to a lesser offense and his alleged statement that "DNA will convict me." App. 70, l. 23 – 76, l. 23; App. 78, l. 7 – 79, l. 16; App. 93, l. 17 – 100, l. 11.

Investigator Martin claimed during the pretrial hearing that he advised Petitioner of his Miranda rights and, after Martin read each right to Petitioner, Petitioner signed an acknowledgment of rights. App. 58, l. 3 – 60, l. 18. Martin then read the waiver of rights, which Petitioner also signed. App. 60, ll. 19 – 61, l. 24. After he advised Petitioner of his rights, Martin said he discussed with Petitioner "what he was charged with and how he came to that charge, because his DNA was left behind at the scene." App. 62, ll. 11-15. When asked if he had ever been to the Chuck E. Cheese, Petitioner said he attended a party there in 2011 or 2012, but that he had not been in the area since then. App. 62, ll. 16-20; App. 63, ll. 1-5. Petitioner denied ever having worn a wig and told Martin he could not explain why his DNA would have been found at the scene.[1] App. 62, ll. 21-25.

Martin testified Petitioner refused to provide a DNA sample and said "it [DNA] would convict [me]." App. 63, ll. 6-14. According to Martin, Petitioner "didn't really deny the evidence." App. 63, l. 19. Rather, Petitioner allegedly said he would not challenge the DNA and that "he knew

[1] Significantly, Petitioner's DNA was not found at the scene. Again, it was found on a portable object, the red bandana, that was allegedly used in the attempted robbery.

DNA would be enough to convict him." App. 63, ll. 19-22. Martin also alleged Petitioner asked if he could be charged with a less serious offense because he "knew that this carried the possibility of life."[2] App. 63, l. 23 – 64, l. 1. Martin admitted Petitioner eventually indicated he did not want to talk about his case anymore. He was then allowed to use Martin's office phone to call his girlfriend, Judy Castro. App. 64, l. 18 – 65, l. 1.

The only recording of the interview was in the form of Martin's sparse interview notes. App. 65, l. 22 – 67, l. 8. He was not sure how long the interview with Petitioner lasted. App. 65, ll. 13-21; App. 67, l. 20. He was also unable to recall when in the interview he requested Petitioner voluntarily provide a DNA sample, but said it was "either during or at the end." App. 66, ll. 10-15. When asked about it again, Martin repeated that he "[did not] remember if it was during or at the end or before he [Petitioner] made the phone call." App. 69, l. 25 – 70, l. 4.

According to Martin, in conjunction with his request to be charged with something less serious, Petitioner "said he wanted a plea in this case." App. 69, ll. 3-5. This was the only reference Martin made to discussion of a "plea" during his testimony at the suppression hearing. He admitted his notes indicate that when he asked Petitioner for a DNA sample, "he declined until he had spoken to an attorney." App. 66, ll. 16-22. Martin further admitted his notes did not mention Petitioner's alleged statement that he would not give his DNA because it would convict him. App. 66, ll. 23-25.

Martin was sitting next to Petitioner when Petitioner called Castro. Martin heard Petitioner's side of the conversation where he told Castro he did not commit the crime and was being framed. App. 67, ll. 16-17; App. 69, ll. 6-21. Afterward, Martin "attempted to explore that

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[2] Petitioner was indicted for attempted armed robbery, which carries a potential penalty of up to twenty years. S.C. Code Ann. § 16-11-330.

avenue" by asking Petitioner who would frame him, but Petitioner did not give him any information. App. 69, ll. 13-19.

Trial counsel argued Martin was unable to confirm how long the interview was or when in the interview Petitioner declined to give his DNA. This was important because the refusal to give DNA was coupled with a statement that he wanted to speak with an attorney first. Thus, any further questioning of Petitioner was in violation of his right to counsel. App. 70, l. 23 – 71, l. 17. The assistant solicitor argued Investigator Martin testified he stopped the interrogation once Petitioner said he was not going to give a DNA sample until he talked to an attorney. App. 71, l. 18-24.

The trial judge found there was no question Petitioner made a statement. The disagreement is over the content of the statement. App. 71, l, 25 – 72, l. 5. He found the statement was made voluntarily after Petitioner was advised of his rights and made a knowing waiver of those rights. App. 72, ll. 6-16. However, the judge admitted he had some concerns. App. 72, l. 17. He noted that Martin testified Petitioner made a statement "I'm not going to give a DNA sample, because it would convict me." He found Martin further testified that when Petitioner chose to exercise his right to remain silent, the interview stopped. The judge said he would take that to mean Petitioner first made the statement he was not going to give DNA because it would convict him and then at some point later said I need to talk to an attorney, which is when the questioning stopped.

The judge asked the solicitor if the state was intending to elicit testimony that Petitioner was facing life in prison, which was connected to some of the reasons for the alleged statements. The solicitor said she was not, and the judge responded that he was "not having any of that," *i.e.* that the jury could not be made aware of the potential life sentence Petitioner faced if convicted. App. 72, l. 17 – 73, l. 10. Additionally, the judge ruled the state was not allowed to reference Petitioner's refusal to provide a DNA sample. App. 73, l. 10 – 74, l. 19. However, he was "sort of inclined to

maybe" admit the portion of Petitioner's alleged statement where he said DNA would convict him, even though it was said in combination with his refusal to provide a DNA sample. App. 74, l. 22 – 76, l. 23.

Trial counsel also argued for the exclusion of Petitioner's alleged offer to plead guilty. The judge initially instructed the state that it was not allowed to elicit the fact that Petitioner offered to plead guilty. App. 78, ll. 7-14. However, the solicitor argued the statement was not a part of any formal plea negotiation between Petitioner's attorney and the solicitor's office or in response to any prompting by the investigator. App. 78, l. 15 – 79, l. 1. After the judge indicated he would "think about it," trial counsel asserted that, in addition to inadmissibility as a part of plea negotiations, the statement was more prejudicial than probative and did not amount to a confession. App. 79, ll. 2-16.

After discussing some other matters, the judge took a brief recess to allow both parties to conduct additional research in support of their positions. App. 93, l. 17 – 94, l. 25. After the break, the solicitor referred the judge to Rule 410(4), SCRE, which prohibits the use of a statement made to a prosecuting attorney during plea negotiations. App. 95, l. 17 – 97, l. 12. When asked what "exactly" Petitioner allegedly said, the solicitor asserted she understood his statement to be, "Can you help me with a plea, I want to plead guilty." App. 97, ll. 15-19. She said the "gist" of the conversation was "I don't want to plead guilty to this charge because this charge carries life but if there is something else that doesn't carry life, I can plead guilty." App. 97, l. 20 – 98, l. 7. The judge noted that if that were case, then the defendant would be pleading now.[3] App. 98, ll. 8-9. Trial counsel clarified that Martin's notes actually indicate: "Brown [Petitioner] said he was not going to fight the DNA. Brown wanted to know if he could be charged with something less serious. He said he planned on trying to plead to this charge." App. 98, l. 24 – 99, l. 4. The notes do not

[3] The judge was alluding to the state's offer to recommended a fifteen year sentence. App. 6, l. 3 – 9, l. 15.

contain a direct quotation from Petitioner, but rather Martin's interpretation of what was said. Trial counsel argued that even if Petitioner was mistaken in speaking about a plea with law enforcement rather than the solicitor, the alleged statement should still be excluded. App. 99, ll. 5-9. The judge ruled Petitioner's statement that he planned to plead guilty to the charge was admissible. App. 99, ll. 10-14. He also ruled the statement "DNA will convict me" was admissible, but could not be related to the fact that Petitioner refused to voluntarily provide a DNA sample. App. 100, ll. 5-11.

When Investigator Martin testified before the jury concerning Petitioner's alleged statements, Petitioner's trial counsel failed to contemporaneously object thereby failing to preserve the issues for appellate review. App. 217, l. 15 – 220, l. 8; App. 222, l. 5 – 225, l. 1; App. 226, l. 23 – 227, l. 17.

During her closing argument, the assistant solicitor repeatedly referenced Petitioner's alleged statement "I want to plead guilty" and argued it was direct evidence of his guilt. App. 350, ll. 3-5; App. 351, ll. 6-8; App. 358, ll. 9-10; App. 360, ll. 12-13; App. 361, l. 6. She further argued his statement reflected that "[a]t that point in time he wanted to take responsibility for his actions" and that an innocent man would not make such a statement. App. 358, ll. 16-25. The solicitor also asserted Petitioner's alleged statement that "the DNA alone is enough to convict me" was direct evidence of his guilt. App. 351, ll. 6-8.

On August 5, 2014, the jury found Petitioner guilty as indicted. App. 395, ll. 9-19. He was sentenced to life without parole pursuant to S.C. Code Ann. § 17-25-45. App. 403, ll. 12-16.

The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Brown, 2016-UP-349 (S.C. Ct. App. filed July 6, 2016); App. 504-505. On appeal, Petitioner argued the trial judge abused his discretion in admitting Petitioner's alleged offer to plead guilty where the probative value of the statement was outweighed by unfair prejudice pursuant to Rule 403, SCRE.

He also argued the trial judge abused his discretion in admitting Petitioner's alleged statement that "DNA will convict me" and alleged offer to plead guilty since such statements were made after Petitioner had invoked his Fifth Amendment right against self-incrimination and right to counsel. App. 412. However, the Court of Appeals held these issues were not preserved for appellate review since trial counsel failed to contemporaneously object when the statements were admitted at trial. App. 504-505.

On August 3, 2016, Petitioner filed an application for post-conviction relief raising the claim argued in this petition. App. 508-515. The state filed a return to this application dated June 30, 2017. App. 516-521. An evidentiary hearing was convened on February 19, 2019 before the Honorable Kristi Curtis. App. 522. Assistant Attorney General Lindsey McAllister represented the state, and Leah Moody represented Petitioner. App. 522.

During the evidentiary hearing, Anastasia Walker, Petitioner's trial counsel, admitted she failed to contemporaneously object when Petitioner's alleged statements were admitted before the jury during Investigator Martin's testimony. She testified that she did not realize her mistake until the Court of Appeals issued its unpublished opinion asserting the arguments raised on appeal were not preserved. App. 121, ll. 16-23. Walker asserted it was "complete neglect on [her] part" for failing to object when the statements were admitted. Unfortunately, at the time, she "had not thought" to object. App. 643, ll. 1-5.

By order filed September 4, 2019, the PCR judge denied Petitioner relief. App. 682-707. While the judge found trial counsel was deficient for failing to contemporaneously object when the state presented Petitioner's alleged statements through Investigator Martin during trial thereby failing to preserve the issue for appellate review, he concluded Petitioner failed to prove prejudice because he would not have prevailed on appeal if counsel had properly objected.

The PCR judge concluded Petitioner was advised of his Miranda rights both orally and in writing before he was questioned by Investigator Martin and voluntarily waived his rights. Consequently, the PCR judge found Petitioner's alleged statement that he knew the DNA evidence would convict him was admissible as evidence of consciousness of guilt and the trial judge properly admitted the statement. App. 697. As to Petitioner's alleged statements offering to plead guilty to a lesser offense, the PCR judge likewise concluded they were properly admitted at trial as evidence of consciousness of guilt since. App. 697. The judge asserted the statements were not excluded by Rule 410, SCRE, since the statements were made to a police officer and not to a prosecuting attorney during plea negotiations. App. 697. He further found the statements were made "unprompted by law enforcement" after Petitioner had been advised of his Miranda rights. App. 697. Because the PCR judge determined the trial judge's decision to admit the statements was proper, he found Petitioner was not reasonably likely to prevail on appeal even if the issues had been preserved for appellate review. App. 697-698.

Because trial counsel's deficient performance prejudiced Petitioner since he would have prevailed on appeal had counsel contemporaneously objected to the admission of Petitioner's alleged statements thereby preserving the issues for appellate review, this petition for writ of certiorari follows.

ARGUMENT

1.

The PCR judge erred by finding Petitioner was not prejudiced by trial counsel's deficient performance where counsel failed to contemporaneously object to the admission of Petitioner's alleged statements to law enforcement in which Petitioner allegedly offered to plead guilty to a lesser offense after counsel moved pretrial to suppress the statements pursuant to Rule 403, SCRE, since there is a reasonable probability Petitioner would have prevailed on appeal had trial counsel properly preserved the issue for appeal.

While the PCR judge properly found trial counsel was deficient for failing to contemporaneously object to the admission of Petitioner's alleged statements offering to plead guilty to a lesser offense, he erred by concluding Petitioner failed to prove prejudice. If counsel had properly preserved the argument that the probative value of Petitioner's statements offering to plead guilty was substantially outweighed by the danger of unfair prejudice, there is a reasonable probability he would have prevailed on appeal and the Court of Appeals would have reversed his conviction.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable

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

"This Court has previously held that an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a PCR claim alleging ineffective assistance of counsel." McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003) and Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). In McHam, this Court found McHam's trial counsel's failure to renew his Fourth Amendment objection constituted deficient performance that satisfied the first prong of the Strickland analysis. Id. at 474, 746 S.E.2d at 46. Consequently, the PCR judge properly found trial counsel was deficient for failing to renew her objection to the admission of Petitioner's statements.

Since the issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong. See McHam, 404 S.C. at 475, 746 S.E.2d at 47; Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded.").

Plea negotiations occur in almost every criminal case. They benefit both the defendant and the state. However, as occurred in Petitioner's case, there are occasions where a defendant chooses to invoke his constitutional right to a jury trial and require the state to prove its case against him.

Generally, those prior plea negotiations are not admissible at the defendant's trial pursuant to Rule 410(4), SCRE, which prohibits the admission against an accused of "any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn." However, even informal plea discussions that do not fall under the purview of Rule 410, SCRE, may still be excluded as unfairly prejudicial pursuant to Rule 403, SCRE.

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

At trial, the state introduced testimony from Martin that Petitioner said "he wanted to discuss a plea," App. 219, ll. 3-5, App. 224, l. 24 – 225, l. 1; "he wanted to plead guilty," App. 219, ll. 10-12, App. 228, 19-21; "wanted to see if he could negotiate some kind of plea or get a plea negotiated on his behalf," App. 219, l. 25 – 220, l. 2; and "went back into trying to negotiate a plea and if I could offer him a plea or help him with a plea." App. 227, ll. 10-12. The admission of these statements punished Petitioner for even mentioning a plea offer when facing interrogation by an officer who was mischaracterizing the weight of the evidence against him and emphasizing the long potential sentence ahead. A policy of allowing such indefinite statements or inquiries to be used against a defendant offends the presumption of innocence and requirement that the state bear the burden of proving its case beyond a reasonable doubt.

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

In Brady v. United States, the United States Supreme Court stated:

> The issue we deal with is inherent in the criminal law and its administration because guilty pleas are not constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law. ***For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious-his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated.*** For the State there are also advantages-the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof. It is this mutuality of advantage which perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury.
>
> ***Of course, that the prevalence of guilty pleas is explainable does not necessarily validate those pleas nor the system which produces them.*** But we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind which affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

397 U.S. 742, 751-52 (1970) (emphasis added). The Court in Brady recognized that a contrary holding would forbid guilty pleas, require no discretion in sentencing, or require sentencing

proceedings occur before a separate authority with no knowledge of the manner in which the conviction in each case was obtained. Id.

In United States v. Robertson, 582 F.2d 1356, 1365 (5th Cir. 1978), the Fifth Circuit Court of Appeals noted that "not every discussion between an accused and agents for the government is a plea negotiation." However, the purpose of Fed. R. Evid. 410, after which the South Carolina rule is modeled, is "to serve both as an incentive and as a prophylactic; the rule both encourages and protects a free plea dialogue between the accused and the government." Id. at 1366. The court in Robertson held that in determining admissibility of statements purportedly made during plea negotiations, a court must determine "first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances." Id. (citations omitted).

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

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

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

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

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

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

One of the few respects in which Martin's testimony was consistent was that Petitioner's statements regarding pleading guilty were coupled with his request to plead to something less

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

Here, Petitioner made no admission that he had been anywhere near the Chuck E. Cheese since attending a birthday party there in 2011 or 2012. App. 62, ll. 16-20; App. 63, ll. 1-5. He also did not admit to having ever worn a wig. Tr. 62, ll. 21-25. Though Petitioner inquired about what type of DNA evidence Martin was referring to, Martin never told Petitioner it was from skin cells on a red bandana found behind another establishment or that there were other DNA contributors on the bandana. App. 217, ll. 17-20; App. 218, ll. 17-22. Based on the information Petitioner was given, namely that there was definitive DNA evidence against him and that he was facing life imprisonment, it is not difficult to understand why Petitioner would have inquired about the possibility of a plea or stated that he intended to plead guilty at the time of his interrogation despite being innocent of the attempted robbery. This cannot amount to a confession as it is not evidence of a consciousness of guilt.

As is evident from the record, Petitioner did not ultimately accept a plea offer in this case and instead invoked his right to trial. Nonetheless, the state wanted to use Petitioner's inquiry regarding a plea offer and his alleged statement that he wanted to plead guilty against him at the trial where he had pled not guilty. Unquestionably, had the prosecutor been present during the interview, or formal negotiations occurred between trial counsel and the solicitor, any discussion

of a plea would have been inadmissible pursuant to Rule 410(4), SCRE. However, even if Petitioner's statements are not inadmissible under the express provisions of Rule 410, the Court must still engage in a Rule 403 analysis. App. 79, ll. 14-16.

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

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

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

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

> We think the majority view is sound and more consonant with our concept of the constitutional rights of an accused. Where the plea of guilty is withdrawn, the

> defendant stands for trial upon a plea of not guilty, and is entitled to all the safeguards and presumptions of innocence which the humanity of the law extends to an individual whose life or liberty is at stake. One such right is that he is presumed to be innocent until proved guilty beyond a reasonable doubt, and the state has the burden of proving that guilt.

Allowing statements that Petitioner allegedly intended to plead guilty or inquired about plea negotiations during his interrogation risks the same recklessness by the jury in its consideration of the other evidence. To the extent that such statements are less prejudicial than the actual entry of a guilty plea, the distinction is marginal. The solicitor certainly emphasized the alleged statements in her closing argument to the jury. Additionally, the public interest in encouraging settlement of criminal cases without necessity of trial similarly favors permitting an accused to discuss the possibility of pleading guilty to the offense charged without prejudicing his position if he instead chooses to go to trial.

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

Respectfully, this Court should grant certiorari, hold trial counsel's deficient performance prejudiced Petitioner, and remand for a new trial.

2.

The PCR judge erred by finding Petitioner was not prejudiced by trial counsel's deficient performance where counsel failed to contemporaneously object to the admission of Petitioner's statements to law enforcement in which Petitioner allegedly admitted the state's DNA evidence would convict him and offered to plead guilty to a lesser offense after counsel moved pretrial to suppress the statements arguing the statements were made after Petitioner had invoked his Fifth Amendment right against self-incrimination and right to counsel, since there is a reasonable probability Petitioner would have prevailed on appeal had trial counsel properly preserved the issue for appeal.

While the PCR judge properly found trial counsel was deficient for failing to contemporaneously object to the admission of Petitioner's alleged statement that the DNA evidence would convict him and his statements offering to plead guilty to a lesser offense, he erred by concluding Petitioner failed to prove prejudice. If counsel had properly preserved the argument that Petitioner's statements were made after Petitioner had invoked his Fifth Amendment rights against self-incrimination and right to counsel, there is a reasonable probability he would have prevailed on appeal and the Court of Appeals would have reversed his conviction.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686; Butler 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688. A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below

reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry, 300 S.C. at 117-118, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson, 325 S.C. at 186, 480 S.E.2d at 735 (citing Strickland, 466 U.S. at 668).

"This Court has previously held that an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a PCR claim alleging ineffective assistance of counsel." McHam, 404 S.C. at 475, 746 S.E.2d at 47 (citing McLaughlin, 352 S.C. 476, 575 S.E.2d 841 and Foye, 335 S.C. 586, 518 S.E.2d 265). In McHam, this Court found McHam's trial counsel's failure to renew his Fourth Amendment objection constituted deficient performance that satisfied the first prong of the Strickland analysis. Id. at 474, 746 S.E.2d at 46. Consequently, the PCR judge properly found trial counsel was deficient for failing to renew her objection to the admission of Petitioner's statements. Since the issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong. See McHam, 404 S.C. at 475, 746 S.E.2d at 47; Sikes, 323 S.C. at 30, 448 S.E.2d at 562.

Petitioner was advised of his Miranda rights at the outset of the interview and signed a written waiver of rights. App. 57, ll. 4-7. However, at some point during the interview, he declined to give a DNA sample until he spoke with an attorney and said that he no longer wished to talk about his case. These assertions of Petitioner's Fifth Amendment right against self-incrimination and right to counsel necessitated the immediate stop of his interrogation. Any statements made after that were inadmissible. Because Investigator Martin was unable to provide a precise timeline of the interview, and in fact, testified to questioning he engaged in after the interview had unquestionably

been terminated by Petitioner, the trial judge abused his discretion in admitting Petitioner's alleged statement that "DNA will convict me." The testimony did not support the trial judge's finding that Petitioner said "I'm not going to give DNA because it will convict me" prior to the assertion of his constitutional rights. App. 72, l. 22 – 73, l. 2.

Additionally, Martin testified that Petitioner made statements and/or inquiries regarding a plea offer at two different times during the interview. His notes reflected that: "Brown [Petitioner] said he was not going to fight the DNA. Brown wanted to know if he could be charged with something less serious. He said he planned on trying to plead to this charge." App. 98, l. 24 – 99, l. 4. Martin later testified, referring to his notes, that after hearing Petitioner on the phone with Ms. Castro, he asked Petitioner who would want to frame him. He said Petitioner told him that the people were "significant" and "then went back into trying to negotiate a plea and if I could offer him a plea or help him with a plea." Martin said he explained again that he could not negotiate a plea and that would occur later. The interview was then terminated. App. 227, ll. 1-17. The trial judge ultimately admitted both Petitioner's alleged statement that "DNA will convict me" and his offers to plead guilty. App. 99, ll. 10-14; App. 100, ll. 5-11.

"A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights under Miranda." State v. Aleksey, 343 S.C. 20, 30, 538 S.E.2d 248, 253 (2000). In Miranda v. Arizona, 384 U.S. 436, 479 (1966), the United States Supreme Court held the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination required custodial interrogation be preceded by advice to the defendant that he has the right to remain silent and also the right to the presence of an attorney.

The Fifth Amendment guarantees the right to speak with counsel upon request in a custodial setting. U.S. Const. amend. V; Edwards v. Arizona, 451 U.S. 477 (1981). If a suspect

invokes his right to counsel, police interrogation ***must*** cease unless the suspect himself initiates further communication with police. Id. Similarly, though not a permanent bar to police reinitiating contact with the suspect, when a suspect invokes his right to remain silent, law enforcement officers ***must*** scrupulously honor it. Michigan v. Mosley, 423 U.S. 96 (1975). While not an exclusive list, Courts interpreting Mosley have set forth five factors to analyze to ascertain whether the defendant's right to cut off questioning was "scrupulously honored": (1) whether the suspect was given Miranda warnings at the first interrogation; (2) whether police immediately ceased the interrogation when the suspect indicated he did not want to answer questions; (3) whether police resumed questioning the suspect only after the passage of a significant period of time; (4) whether police provided a fresh set of Miranda warnings before the second interrogation; and (5) whether the second interrogation was restricted to a crime that had not been a subject of the earlier interrogation. State v. Benjamin, 345 S.C. 470, 476-477, 549 S.E.2d 258, 261 (2001).

Although the solicitor argued Investigator Martin testified he stopped the interrogation once Petitioner stated he was not going to give DNA until he talked to an attorney, as discussed supra, the testimony was not so precise. App. 71, l. 18-24. Petitioner's interview with Martin was not audio or visually recorded. App. 264, ll. 3-6. Rather, Martin took notes regarding what he felt was "important" in the interview. App. 232, l. 20 – 233, l. 18; App. 264, ll. 7-10. Martin admitted his notes did not mention Petitioner's alleged statement that he would not give his DNA because it would convict him. App. 66, ll. 23-25. He was also unable to recall when during the interview the alleged incriminating statement was made. Martin said it was "either during or at the end" and later that he "[did not] remember if it was during or at the end or before he made the phone call." App. 66, ll. 10-15; App. 69, l. 25 – 70, l. 4.

Martin admitted his notes indicate that when he asked Petitioner for a DNA sample, "he declined until he had spoken to an attorney." App. 66, ll. 16-22. However, he testified he stopped the interview when Petitioner indicated "he didn't want to talk about his case anymore." Petitioner was then allowed to use Martin's phone to call his girlfriend, Castro. App. 64, l. 18 – 65, l. 1. Martin was sitting with Petitioner during the phone call and overheard him tell Castro he did not commit the crime and was being framed. App. 67, ll. 16-17; App. 69, ll. 6-21. Despite Petitioner's prior indication that he did not wish to discuss his case further, Martin asked Petitioner follow up questions regarding who would want to frame him. App. 69, ll. 13-19. It was after this line of questioning that Petitioner allegedly made a second inquiry regarding a plea offer and the interview was then actually terminated. App. 227, ll. 1-17.

In making his initial ruling on the admissibility of the "DNA will convict me" statement, the trial judge said:

> He [Martin] testified that the Defendant made a statement, I'm not going to give a DNA sample because it would convict me. And then he further testified that when the Defendant exercised his rights, he stopped.
>
> So that I take means that the Defendant made: I'm not going to give DNA because it will convict me. And then at some point in time – the inference is that at some point in time he further went on and said, I need to talk to an attorney. And that is when they stopped.

App. 72, l. 17 – 73, l. 2. The judge gave the attorneys additional time to research the issue, but said he was inclined to allow the statement "DNA will convict me" but not the fact that, contemporaneously therewith, he was asked to provide a DNA sample and refused. App. 74, l. 22 – 75, l. 8. After hearing further argument from counsel, the judge ruled the statement "DNA will convict me" was admissible, but could not be related to the fact that Petitioner refused to voluntarily provide a DNA sample. App. 100, ll. 5-11. The judge also ultimately allowed testimony regarding Petitioner's alleged statements related to a potential guilty plea. App. 99, ll. 13-14.

The trial judge's findings and ruling are not supported by the evidence. During Petitioner's interrogation, he invoked both his Fifth Amendment right to counsel and his Fifth Amendment right to remain silent. Petitioner invoked his right to counsel when he asked to speak to an attorney after being asked to submit a DNA sample. App. 66, ll. 16-22. At that point, the interview should have stopped completely. Petitioner also invoked his Fifth Amendment right against self-incrimination when he sought to end the interview. App. 64, ll. 18-24. At that point Petitioner's right to remain silent should have been "scrupulously honored." However, there is no indication the interrogation immediately ceased when Petitioner was questioned further after his phone call to Castro and allegedly made a second inquiry regarding plea negotiations. No significant period of time passed, no second set of Miranda warnings was given, and the continued questioning had to do with the same alleged crime.

Martin's testimony regarding when Petitioner's statements were made was speculative, as he repeatedly stated he did not remember and it could have been during the interview, at the end of the interview, or before he made the phone call. App. 66, ll. 10-15; App. 69, l. 25 – 70, l. 4. Thus, the trial judge's "inference" of the order in which the statements and invocation occurred is unfounded where the evidence established Martin could not recall whether the request for DNA and alleged statement "DNA will convict me" were made during or at the end of the interview. If they were made at the end of the interview, then they consequently would have been made after Petitioner indicated he no longer wished to continue discussing the case and requested an attorney. Further, Martin was clear that the second offer to plead guilty occurred just prior to the actual termination of the interview, after the phone call to Castro, at which point Petitioner had unquestionably invoked his right against self-incrimination by stating he no longer wished to

discuss the case. App. 64, l. 18 – 65, l. 1; App. 226, l. 23 – 227, l. 17. This undeniable violation lends even more suspicion to the order of the statements and invocation of rights.

Because Martin's testimony was not clear that the incriminating statement "DNA will convict me" was made prior to Petitioner's assertion of his right to counsel and right against self-incrimination, the trial judge erred in allowing the admission of the statement at trial. Furthermore, at a minimum, Petitioner's second inquiry regarding a plea offer was unquestionably made after he asserted his right to end the interview and Martin failed to scrupulously honor that request. Therefore, the trial judge abused his discretion by admitting Petitioner's alleged incriminating statements. Accordingly, there is a reasonable probability the Court of Appeals would have reversed Petitioner's conviction and remanded his case for a new trial.

Respectfully, this Court should grant certiorari, hold trial counsel's deficient performance prejudiced Petitioner, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, this Court should grant certiorari and order further briefing on the issues presented.

Respectfully submitted,

s/ Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of April, 2020.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

APR 06 2020

S.C. SUPREME COURT

Certiorari to Richland County

Honorable Kristi F. Curtis, Circuit Court Judge

MICHAEL ORLANDO BROWN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Petition for Writ of Certiorari and Appendix in the above referenced case have been served upon Lindsey McCallister, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Michael Orlando Brown, #295408, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 1st day of April, 2020.

s/ Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 1st day of April, 2020.

Lindsey M. Matthews (L.S.)
Notary Public for South Carolina
My Commission Expires: October 22, 2024.