STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Dorchester County

Honorable Doyet A. Early, Circuit Court Judge

Opinion No. 5702 (S.C. Ct. App. Filed December 31, 2019)

THE STATE,

RESPONDENT,

V.

EDWARD PRIMO BONILLA,

PETITIONER

APPELLATE CASE NO. 2016-001725

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on February 20, 2020.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred by holding that a direct appeal was not the proper mechanism for petitioner to challenge the trial court's ruling that petitioner gave defense counsel his "informed consent" to reveal the location where the decedent's body was located, since petitioner had the right to have the trial court's erroneous ruling heard on direct appeal, the record was adequately developed for appellate review, and post-conviction relief was not a co-equal meaningful avenue of relief where it was limited to an allegation of ineffective assistance of counsel under the Strickland v. Washington, 466 U.S. 668 (1984) standard which cannot not address the propriety of the trial judge's ruling on "informed consent"?

2.

Whether the Court of Appeals erred by holding that that petitioner gave defense counsel his "informed consent" to reveal the location where the decedent's body was located where the testimony during the suppression hearing revealed defense counsel thought there was "no reasonable alternative" to his "strategy" to reveal the location of the body under the circumstances, and that petitioner only acquiesced in trial counsel's plan because he thought he had no alternative?

STATEMENT OF FACTS

Procedural history

Petitioner was indicted at the Dorchester County Grand Jury for the offense of murder. R. 621 – 622. His case was called to trial on Monday, August 8, 2016, before the Honorable Doyet A. Early, III. Assistant solicitors Donald Sorenson and Ryan Templeton represented the state. Russell D. Hilton and Mandy Kimmons represented petitioner. R. 1.

On Thursday, August 11, 2016, the jury found petitioner guilty. R. 616, l. 23 – 617, l. 3. Judge Early sentenced petitioner to life imprisonment. R. 620, ll. 14-16.

The Court of Appeals affirmed petitioner's conviction in State v. Bonilla, 429 S.C. 253, 838 S.E.2d 1 (Ct.App. 2019). App. 1. Petitioner sought rehearing which was denied on February 20, 2020. App. 32.

This petition for a writ of certiorari follows.

Relevant facts

Petitioner met the decedent on an internet dating site. They went to a party and bonfire at the home of petitioner's brother on April 4, 2015. A couple of days later a missing person's case was opened on the decedent. Petitioner was later arrested for obstruction of justice, apparently because the police thought he was not forthcoming about his explanation of how the date with the decedent ended that evening. First Circuit public defender Mark Leiendecker was appointed to represent petitioner on the obstruction of justice charge. R. 8, l. 10 – 9, l. 9.

A pre-trial hearing was held on the issue of whether petitioner gave "informed consent" to his public defender, Mark Leiendecker, on May 8, 2015 to tell the police where the decedent's body was located. Defense counsel Hilton argued under Rule 1.6 -- on attorney-client confidentiality, Rule 407, SCACR, that a hearing was required on the "informed consent" issue,

and the voluntariness of that consent. Defense counsel also noted it was obvious that prior counsel Leiendecker could no longer represent petitioner because he was a key witness who would have to testify. Rule 1.6(a) states: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . ." There was no allegation in the present case that any of the exceptions contained in Rule 1.6(b) of Rule 407, SCACR applied in this case. R. 2, l. 12 – 4, l. 3.

Counsel Leiendecker testified during the suppression hearing that he was a former part-time magistrate in Dorchester County before he became the Circuit Public Defender in 2008. R. 8, l. 10 – 9, l. 15. Petitioner was first arrested for obstruction of justice, and then the charges were upgraded to murder. On **May 8, 2015**, twenty-four days after the search warrants were executed in Charleston County -- that present defense counsel argued were illegal -- on the Hyundai Sonata and the work van, Counsel Leiendecker revealed to the police where petitioner told him he had hidden the decedent's body. R. 9, ll. 16-19.

Defense counsel testified that he could not recall whether he discussed with petitioner disclosing the location of the decedent's body to the police *on May 8, 2015, or before that date*. R. 9, l. 16 – 10, l. 23. Defense counsel offered that he thought petitioner should have understood the purpose of their meeting that day at the criminal investigative division located in a trailer behind the sheriff's office. They met alone in a small conference room there. R. 10, l. 14 – 11, l. 21.

Counsel Leiendecker importantly clarified "before Edward and I met that day, *I did **not** have the information I provided to the Dorchester County sheriff's office*." R. 11, ll. 16-21. (emphasis added). Defense counsel said as a matter of "strategy" it was decided to reveal to the police where the decedent's body was buried in a wooded area. R. 12, ll. 7-11.

Leiendecker said that petitioner showed him on his iPad, a map, where the decedent's body could be found. R. 12, ll. 15-25.

Apparently, counsel Leiendecker did all the talking with law enforcement **on May 8, 2015**, petitioner "did not speak to anybody in the sheriff's office that I remember." R. 13, ll. 1-4. Counsel met with petitioner in the sheriff's office conference room for twenty to forty minutes, and they "talked about the reasons that may be helpful or beneficial to his defense [to reveal the location of the body]." R. 13, l. 12 – 14, l. 7.

When defense counsel Hilton asked Leiendecker if there were any reasonable alternatives that he could have conveyed to petitioner other than revealing the location of the decedent's body, defense counsel answered: "**I don't remember that**. I remember that the discussion of **my strategy** for [and] the reason that it might be **beneficial** to his case if that's what you're talking about. **And there was no reasonable alternative to that purpose**." R. 14, ll. 2-14 (emphasis added). Leiendecker made the disclosure to Captain Phinney. He said he felt petitioner was "on board with this disclosure and the reasons why it was beneficial to him." R. 14, ll. 8-21.

The judge then questioned Leiendecker:

> Q. What were those beneficial strategies that you anticipated receiving if you made the disclosure?
>
> A. Your Honor, **the only reason or purpose for this disclosure was so that an autopsy could be performed on the body**, and without the location of the body that would've been impossible. Without going further into any legal discussions or strategy, that was the purpose. Now, if Your Honor wants further detail and you direct me to answer that, I guess I would have to.
>
> Q. Did you discuss with him the **potential harm** of disclosing the location of the body? I.e. what he would be faced with, charged with? What was he charged with at that time?

A. At that point, Your Honor, **he was already charged with murder. And we did discuss how he had been charged with murder without the victim's body having been found**. And as Edward and I discussed, it related to evidentiary issues provided in discovery from the Dorchester County Sheriff and/or Solicitor's office that included DNA locations that were solely under the control of Edward.

Q. So, specifically, what harmful consequences did you discuss with him of the disclosure, if any?

A. The obvious fact that **it would be difficult or impossible for him to deny that he knew what happened to Ms. Pegram following their separation on the night in question when they had been together**; that it would put him at the scene of what was alleged to be a murder; and that it would open him up him even in a best case scenario to other charges including possible charge of desecration of human remains.

R. 15, l. 4 – 16, l. 7. (emphasis added).

On cross-examination by Counsel Leiendecker's attorney, Mr. Murphy, counsel offered "I was confident and felt firmly convinced that Edward was not only giving me truthful information, but that he understood I was going to reveal that to Captain Phinney, and that I had his consent to do it." R. 17, l. 19 – 18, l. 6. Leiendecker said he continued to represent petitioner until the first of the year, when it became clear he had a conflict because he was a witness. R. 18, ll. 12-22.

Petitioner also testified during the suppression hearing. Petitioner said he was arrested on the night of **April 15, 2015**, the day the search warrant was issued in Dorchester County. R. 20, ll. 14-22. Petitioner testified that he told Leiendecker "my story of what happened. That was in our first meeting. Petitioner said his second meeting was at the courthouse after he was charged with murder, and the third meeting was at the CID office at the jail on **May 6, 2015** the day the

location of the body was disclosed. R. 21, l. 3 – 22, l. 8. The following occurred on direct examination of petitioner:

> Q. And did that conversation, was it regarding the disclosure of the body?
>
> A. It was -- from what I remember from that phone call conversation is I remember just giving my cell -- after I disclosed to him, told him the story of everything that happened, **I really was not aware that he was actually going to do go to the detectives and tell them, you know, I have this information**.
>
> Q. All right. Well, pause a second because I want to focus on that telephone conversation, okay. We're gonna get to the other part.
>
> A. Yes, sir.
>
> Q. But tell me about the telephone conversation. What was the discussion there regarding disclosure of the body?
>
> A. Okay. I remember coming out of my cell and going up to the front where the booking area is. Mr. Leiendecker made a very -- to the CO's there, made it clear that he wanted a private line; one that was not, you know, was not recorded, and he wanted me to speak to him in privacy. So they took me from the booking area to -- I would assume it was someone's office. So I talked to him on that line. **And basically told me the detectives were on their way to come pick me up to take me to the CID unit to disclose the location of the body**. During that conversation, I, you know, I was kind of distraught, you know, a little confused that this was already happening. **Because, honestly, I believe I did not give him permission to do this** or was under the impression that he was going to do this. It was through that conversation that I found out that this was happening. And, you know, that's when -- I can understand through the conversation that we had that **it was not something that I really had knowledge that was going to happen.**

R. 22, l. 1 – 23, l. 8 (emphasis added).

The following also occurred between defense counsel Hilton and petitioner:

Q. Okay. Did he talk about the ramifications of disclosing the body?

A. **He just told me the benefits**. You know, when I think back, there were these benefits of what this was and, you know, pretty much I don't want to say he backed me into a corner to do this **because I already felt as if this was already in motion**. And for him to go there and tell him this and then me to say, "I didn't do this," or, you know, it just didn't seem -- it just didn't seem like the right thing that was going on, or ---

THE COURT: What was not the right thing?

THE WITNESS: For me just to back out and say, "I don't know where the body is." **If he's already gone to them and told them, you know, "I do know where the location is," and, you know, I felt like I had no choice to be honest, Your Honor**.

R. 24, l. 24 – 25, l. 14. (emphasis added).

Petitioner said he thought he had been backed into a corner because he told his attorney "If I can't make you believe what happened with this situation then how am I going to be able to convince a jury." R. 25, l. 16 – 26, l. 1. The following also occurred on direct examination of petitioner:

Q. And the question that I had for you was at any point in time did you agree with him that it was the best course of action?

A. **If I did agree with it, I was not aware that that came out of my mouth. Because like I said, I gave him the information of what everything happened because at the time he was my attorney**. *And, you know, just with you as well, I told my story, said everything that happened*. And then after that, you know, it was probably maybe a week or so after that meeting, that's when I was getting called downstairs with the telephone conversation with him. And that's when, you know, he basically told me that the detectives were on their way to come get me.

R. 26, ll. 2-14. (emphasis added).

On cross-examination, petitioner said he did not remember Leiendecker telling him the possible detriments to revealing the location of the body to the police. Petitioner repeated he felt like he had been backed into a corner by the defense counsel, and "I just felt like if he had already went [gone] to them and told them this, that it would just be bad for me to deny any of it after he's already spoken to the detectives about this." Petitioner also said by the time of his meeting where the location of the body would be disclosed, petitioner said: "I didn't have many questions at that point." Petitioner said under the circumstances described above, he was "on board" with disclosing the information. R. 28, l. 6 – 29, l. 15.

The McClure v. Thompson, 323 F.3d. 1233 (9th Cir. 2003) analysis

Judge Early then ruled that the issues were whether petitioner consented to the disclosure, and whether his consent was informed consent. R. 30, ll. 2-11. The judge cited McClure v. Thompson, 323 F.3d. 1233 (9th Cir. 2003) as instructive on the issue of "informed consent." The judge said McClure was the roadmap for his ruling. The judge ruled petitioner gave informed consent and that defense counsel Leiendecker did not violate Rule 1.6(a), of the Rules of Professional Responsibility. The judge suggested, given his ruling, that the parties stipulate to the fact that the location of the body was disclosed to the prosecution by the defense. This would prevent the necessity of counsel Leiendecker testifying. R. 30, l. 2 – 31, l. 5.

Once the judge ruled that petitioner agreed to disclosure of the locations of the decedent's body after giving "informed consent" the court correctly assured defense counsel that he was "protected" in entering into the stipulation, R. 83, l. 24 – 84, l. 25:

AST. SOL. SORENSON: The stipulation is that attorney Mark Leiendecker is the Chief Public Defender in Dorchester County. Originally, Mr. Leiendecker was appointed to represent Mr. Bonilla in this case. On May the 8th of 2015, attorney Mark Leiendecker contacted Captain

> Tony Phinney and informed Captain Phinney that his client may have information about the location of the remains of Ashley Pegram. The defendant was transported to the Criminal Investigations Office so that he could meet with Mr. Leiendecker. After Mr. Leiendecker and Mr. Bonilla met for approximately 20 minutes, Mr. Leiendecker met with Captain Phinney with an electronic notebook displaying a map. Mr. Leiendecker gave a general location of where they would discover the body of Ashley Pegram near Brown Town Road and Seven Mile Road in Harleyville, South Carolina. This disclosure was made by Mr. Leiendecker with the consent of Mr. Bonilla.

R. 259, l. 19 – 260, l. 10.

The Autopsy Report

Dr. Nicholas Batalis, the pathologist, testified that the decedent was found "nude from the abdomen down." She had black electrical tape "on the body that was out of the ordinary. One was around the right wrist. There was some black electrical tape that was wrapped around the wrist. R. 373, ll. 2-25.

There was tape "that was wrapped around the neck of the decedent when I examined the body." "To remove the tape, I then made a cut through it . . ." R. 377, ll. 9-13. Doing a sexual assault protocol was "[n]ot possible to do in this case because all of the tissue, the anus, the vagina, all of that tissue around there was absent." R. 380, ll. 3-20.

The body was badly decomposed but Dr. Batalis said "there were fractures on both sides of the thyroid cartilage. And that is an injury that we will see somewhat commonly in manual strangulation or if there was some sort of severe blunt force trauma to the neck." The body was "suspicious for injuries in the scalp." R. 382, ll. 2-23. Dr. Batalis opined the decedent was killed by "homicidal violence." Dr. Batalis said the decedent's death was the result of violence

against her, he again noted the electrical tape, brunt force injuries, bleeding into the scalp, suspicions of asphyxia, "and the scalp defect." R. 387, l. 5 – 390, l. 7.

How the Disclosure Further Played Out

In his closing argument, the solicitor told the jury that that the defense had an ulterior motive for petitioner's prior lawyer, Mark Leiendecker, telling the police where the decedent's body could be located. "This is through the lawyer not Mr. Bonilla telling law enforcement this. And I can only kind of guess that, you know, a little bit of the story his former lawyer had involved, you know, I hit her with a car [accidently]. I mean, if we help you find the body, *hopefully we'll find evidence when they do the autopsy that's going to support that; that's going to support your story* and then we can maybe try to work this thing out. Well, I can't even imagine the surprise when, you know, *the autopsy reports come back and she's not clothed. She's got multiple injuries to her head. She's got black electrical tape wrapped around her neck and around her wrist."* The solicitor said petitioner and the defense put the family through five weeks of "absolute hell," with petitioner's lies. R. 604, l. 8 – 605, l. 6. (emphasis added).

Addressing the jury after the verdict, the judge said: "I commend the jury for their courage in seeing through the fabricated story, in my opinion, that was presented by the defendant. I found his testimony to be highly incredible, void of any truth." R. 619, ll. 16-22.

Other Trial Evidence

Petitioner's cell phone was seized from the company van pursuant to the search warrant. Dorchester investigator Adam Smith testified that petitioner sent a text message to his boss on April 4, 2015 at 4:53 a.m. -- after his date with the decedent -- stating that he was sick, and that he would not be in that day. Smith also testified that petitioner sent his employer another text

message at 6:38 a.m. on Monday, April 6, 2015, saying he was still sick but that he would be in to work the next day. R. 305, ll. 6-24.

Smith further testified that petitioner's brother apparently sent him a message on April 3, 2015 at 7:37 in the evening -- before the bonfire party – that he had marijuana. R. 306, l. 8 – 307, l. 11. The cell phone seized from the work truck also revealed on April 3, 2015 at 9:23 p.m. that petitioner was near the decedent's residence. R. 313, ll. 9-16.

Smith also testified that on the morning of April 4, 2015, between 6:42 a.m. and 7:12 a.m., that petitioner's cell phone was pinging in the general area of Harleyville, South Carolina, near Brown Town Road where the decedent's body was located after petitioner disclosed its location. R. 315, ll. 11-22.

Petitioner testified that he met the decedent on a dating site. R. 460, ll. 1-11. They had a date on the night of April 3, 2015, for his brother's bonfire party. The decedent drank at the bonfire party. R. 462, l. 15 – 479, l. 6. Petitioner said the decedent was intoxicated after the party, and they stopped at the Sunoco gas station so she could use the restroom. This was captured on a security camera and was contained in the search warrant application for the car. R. 623 – 635.

Once they got back on the road, the decedent told petitioner to stop somewhere along the road so that she could go to the bathroom again. When the decedent got out of the car to go to the bathroom near a wooded area, petitioner said he locked the doors because he could not control the decedent because she was drunk. R. 462, l. 15 – 479, l. 6. Petitioner's sister, Brandy Chance, admitted that the decedent sometimes acted as if she were bipolar when she drank alcohol. Chance said she did not know if the decedent was ever formally diagnosed as bipolar. R. 115, l. 11 – 116, l. 1.

Petitioner said when he backed his car up to leave after locking the decedent out. He accidentally "bumped" her with his car while backing up to drive away. Petitioner got out of the vehicle to investigate, and the angry decedent tried to hit him repeatedly. Petitioner said he restrained the decedent by grabbing her in a "bear hug," and that she finally stopped trying to hit him. Petitioner then let her go and was surprised when she went limply to the ground. R. 475, l. 18 – 490, l. 16

Petitioner testified that he panicked, he did not know what to do, and he put the decedent in the trunk of the Hyundai. He drove away thinking about what to do. R. 475, l. 18 – 490, l. 16.

The decedent's body was ultimately transferred into his work van, and petitioner dumped the body off in secluded location. However, petitioner went back, and picked up her body, and put in the back of the van. Petitioner admitted that he drove the van to a wooded area, dug a shallow grave with assistance of a board in the back of the work van, and he buried the decedent there. R. 460, l. 1 – 491, l. 13. Petitioner admitted he tried to "cover his tracks," which included a fake text message to the decedent saying he was sorry he left her and drove away but that she was drunk and out of control. R. 486, l. 10 – 488, l. 3.

Petitioner said disclosed the "location where Ashley was located, and . . . [with the assistance of his prior lawyer] "[h]e was able to kind of get in the general location of where I was at. And then I used his iPad to kind of retrace my steps and go back to that place." R. 488, l. 1 – 489, l. 19.

1.

<u>The Court of Appeals erred by holding that a direct appeal was not the proper mechanism for petitioner to challenge the trial court's ruling that petitioner gave defense counsel his "informed consent" to reveal the location where the decedent's body was located, since petitioner had the right to have the trial court's erroneous ruling heard on direct appeal, the record was adequately developed for appellate review, and post-conviction relief was not a co-equal meaningful avenue of relief where it was limited to an allegation of ineffective assistance of counsel under the *Strickland v. Washington*, 466 U.S. 668 (1984) standard which cannot not address the propriety of the trial judge's ruling on "informed consent"</u>

The Court of Appeals held that a direct appeal was not the proper mechanism to determine this legal issue:

> First, even if Bonilla could demonstrate that he did not give informed consent, we do not believe this court could provide appropriate relief. At trial, Bonilla moved to suppress his statement to Leiendecker disclosing the location of Ashley's body. However, we note the exclusionary rule is meant to deter improper police conduct. *See State v. Brown*, 401 S.C. 82, 92, 736 S.E.2d 263, 268 (2012) ("[T]he exclusionary rule's sole purpose is to deter future [constitutional] violations [by law enforcement] and []where suppression fails to yield 'appreciable deterrence,' exclusion is 'clearly . . . unwarranted."' (emphasis added) (quoting *Davis v. United States*, 564 U.S. 229, 237 (2011)). Here there was no improper police conduct to deter by suppressing Bonilla's statement, as Bonilla alleged that his attorney, not law enforcement, acted inappropriately. Additionally, even if the statement could be suppressed, we do not find that this would preclude the admission of evidence gathered when Ashley's body was discovered. *Cf. United States v. Patane*, 542 U.S. 630, 633-34 (2004) (holding that, in the context of a *Miranda* violation, the exclusionary rule only applies to testimonial and not physical evidence); *see also Nickel v. Hannigan*, 97 F.3d 403, 409 (10th Cir. 1996) ("[C]ourts have refused to apply such a broad evidentiary rule of exclusion to breaches of privilege."); *United States v. Marashi*, 913 F.2d 724, 731 n.11 (9th Cir. 1990) (stating in dictum "that no court has ever applied [the 'fruits of the

poisonous tree'] theory to any evidentiary privilege"). As such, because Bonilla is challenging the actions of his attorney, his claim regarding Rule 1.6 would best be addressed in an action for ineffective assistance of counsel[1], which this court is precluded from hearing on direct appeal. *See Matter of Chapman*, 419 S.C. 172, 182, 796 S.E.2d 843,847 (2017) ("Thus, on direct appeal, [appellate courts] will not consider claims involving ineffective assistance of counsel.").

Second, this court's scope of review is limited by the evidence in the record on appeal. *See* Rule 210(h), SCACR ("Except as provided by Rule 212 and Rule 208(b)(l)(C) and (2), the appellate court will not consider any fact [that] does not appear in the Record on Appeal."); *see also Sanders v. Salley*, 283 S.C. 458, 460, 322 S.E.2d 829, 830 (Ct. App. 1984) ("This [c]ourt does not sit as a trial court to receive evidence on disputed issues of fact; our function is to review the judgment of the circuit court for reversible error based on the issues and evidence presented to that court."). Thus, this court's review is limited to the testimony provided by Bonilla and his attorney, who took care not to reveal the substance of his confidential discussions with Bonilla. Without more information regarding what Bonilla and his attorney actually discussed, this court cannot find that the circuit court's determination regarding informed consent was "clearly wrong." *See Parker*, 381 S.C. at 74, 671 S.E.2d at 622 ("In criminal cases, appellate courts are bound by fact finding in response to preliminary motions . . . where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." (quoting *Asbury*, 328 S.C. at 193,493 S.E.2d at 352)).

If Bonilla believes he did not give Leiendecker informed consent to disclose the location of Ashley's body, post-conviction relief ("PCR") would be the proper mechanism by which to adjudicate this issue for several reasons. First, in PCR, Bonilla could challenge the finding that he gave informed consent and seek appropriate relief by bringing a claim for ineffective assistance of counsel. *See Matter of Chapman*, 419 S.C. at 181, 796 S.E.2d at 847 ("[T]he legislature provided an alternative procedure by which criminal defendants must assert claims regarding ineffective assistance of counsel: post-conviction relief (PCR). "). Second, the PCR court could receive additional evidence regarding the issue of

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[1] *See* Robert P. Mosteller, *Admissibility of Fruits of Breached Evidentiary Privileges: The Importance of Adversarial Fairness, Party Culpability, and Fear of Immunity*, 81 Wash. U. L.Q. 961, 990-92 (2003) (identifying ineffective assistance of counsel as the proper action by which to challenge an attorney's disclosure of confidential or privileged information to law enforcement).

> informed consent. *See* S.C. Code Ann. § 17-27-80 (2014) ("The [PCR] court may receive proof by affidavits, depositions, oral testimony or other evidence and may order the applicant brought before it for hearing.") Finally, the PCR court would not be constrained by Rule 1.6 or attorney-client privilege. *See Drayton v. Indus. Life & Health Ins. Co.*, 205 S.C. 98, 108, 31 S.E.2d 148, 152 (1944) ("The general rule excludes from evidence confidential communications of a professional nature between attorney and client, unless the client, for whose benefit the rule is established[,] waives the privilege."); *see also* S.C. Code Ann. § 17-27-130 (2014) ("Where a defendant alleges ineffective assistance of prior trial counsel . . . as a ground for post-conviction relief . . ., the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant . . . to the extent necessary for prior counsel to respond to the allegation.").

App. 11-12.

Discussion

Appellant is a party aggrieved by a sentence, and he has a right to a direct appeal as authorized by statute and appellate court rules of practice. State v. Rearick, 417 S.C. 391, 398-99, 790 S.E.2d 192, 196 (2017); S.C. Code §14-3-330. A right to appeal means a right to "meaningful review" of direct appeal issues. State v. Ladson, 373 S.C. 320, 321, 644 S.E.2d 27, 272 (2007).

This case is similar to State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013), in a number of respects. Rivera and has defense lawyer were also not on the same page or team. Rivera wanted to testify and confess to the murders. Rivera had wanted to do the same thing during his non-capital murder trial involving the death of Asha Wiley. Rivera's trial attorney did not want Rivera to testify and confess. Defense counsel made that known in open court to the trial judge and solicitor. Rivera told the judge he wished to testify. In Rivera, the state urged that the right to testify dispute between Rivera and his trial counsel should be resolved in post-conviction relief. State v. Rivera, 402 S.C. 225, 239, 741 S.E.2d 694, 701 (2013).

This Court disagreed, noting that the right to testify issue had been pled and argued as a direct appeal error by the trial court. "[A]ppellant's claim is (and has consistently been) presented not as an ineffective assistance of counsel claim, but rather, as an error committed by the trial court in excluding Appellant's testimony, which is not an appropriate basis for an ineffective assistance of counsel claim. c*iting* Wolfe v. State, 326 S.C. 158, 162, 485 S.E.2d 367, 369 n. 2 (1997) ("[T]rial court error does not constitute an appropriate basis for a finding of ineffective assistance of counsel)." Further, the record was adequately developed for direct appeal. State v. Rivera, 402 S.C. 225, 241, 741 S.E.2d 694, 702 (2013)

Here, petitioner has pled the ruling of the trial judge that petitioner gave "informed consent" to trial counsel to reveal the location of the decedent's body as an erroneous suppression ruling made during a pre-trial hearing. It is tantamount to alleging error in ruling that a confession was admissible after a Jackson v. Denno, 378 U.S. 364 (1964) hearing. Petitioner has argued it as a direct appeal issue, and responded that post-conviction relief was an inferior and improper remedy in this case when the matter was raised for the first time at oral argument.

The Court of Appeals also reasoned that if it agreed with petitioner that he did not give his Public Defender "informed consent" to disclose the location of the decedent's body it still could not grant him a remedy. As discussed at oral argument in the Court of Appeals that is incorrect because the remedy would be the granting of a new trial because the defense was forced to enter into a stipulation that petitioner revealed the location of the decedent's body once the judge erroneously ruled that petitioner had given his attorney "informed consent" to disclose the location of the body to law enforcement. Further, the Court's reasoning that if it ruled

inadmissible evidence that petitioner disclosed the location of the body that other evidence would still be admissible against petitioner was immaterial.

While it is undoubtedly true that suppression of a defendant's improperly obtained statement to the police is used to deter police misconduct, it was a system wide failure in this case that led to petitioner disclosing the location of the decedent's body to his considerable prejudice. When petitioner did not give his attorney informed consent to reveal the location of the decedent's body, and the trial court erroneously ruled otherwise and admitted evidence petitioner disclosed the location of the body, this became a direct appeal issue. Any unfamiliarity with handling a lack of "informed consent" issue where defense counsel participated with law enforcement to obtain the body location information from an unwitting defendant made this a structural type error in the criminal justice system for which the appellate court must craft a remedy.

Again, in State v. Rivera, 401 S.C. 225, 231, 741 S.E.2d 694, 697-98 (2013), this Court reversed the defendant's conviction and sentence in a death penalty case where defense counsel and the trial judge collaborated or agreed to not allow Rivera his wish to testify in his defense. Defense counsel noted: "{W]e cannot put him on the stand without him harming his case so irreparably as to void any meaningful consideration to guilt or innocence in this matter." The judge ultimately agreed, and this Court found the denial of Rivera's constitutional right to testify, to protect him from himself, was a structural error that could not be treated as harmless error.

Finally, post-conviction relief is an inferior remedy to a direct appeal. The right to counsel is statutorily based, and many states do not even grant it in PCR. On direct appeal, petitioner had to show that the trial judge's ruling on "informed consent" was error, and that he

was prejudiced. It is difficult to fathom how an erroneous ruling by the trial court which allowed the jury to hear a stipulation – evidence – that petitioner informed his attorney of the location of the victim's body could not be found prejudicial, and not harmless error entitling petitioner to a new trial.

However, under the Strickland v. Washington, 466 U.S. 668, 694 (1984) standard, a petitioner must show that his attorney's performance was deficient, and prejudice. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

A direct appeal is a meaningful right, with the right to effective representation before the appellate court on the first appeal as of right. Evitts v. Lucy, 470 U.S. 387 (1985). Post-conviction relief is a secondary inferior remedy largely dependent on the whim of a state's General Assembly. The Court of Appeals erred by refusing to address petitioner's dispositive issue on direct appeal, and certiorari respectfully should be granted on this novel and important issue.

2.

The Court of Appeals erred by holding that that petitioner gave defense counsel his "informed consent" to reveal the location where the decedent's body was located where the testimony during the suppression hearing revealed defense counsel thought there was "no reasonable alternative" to his "strategy" to reveal the location of the body under the circumstances, and that petitioner only acquiesced in trial counsel's plan because he thought he had no alternative

The Court of Appeals further held:

> Although we do not believe a direct appeal is the proper mechanism by which to challenge Leiendecker's disclosure, we will review the circuit court's finding of fact under our narrow scope of review.
>
> Given the uncommon nature of this scenario, our jurisprudence on the issue is limited. Consequently, the circuit court applied the standard from *McClure v. Thompson*[2], a Ninth Circuit habeas corpus case. In *McClure*, the Ninth Circuit found an attorney's failure to obtain informed consent before disclosing evidence would entitle a defendant to bring a claim for ineffective assistance of counsel. 323 F.3d at 1242--43. The court observed that "[t]he professional standard that allows disclosure of confidential communications when 'the client consents after consultation' has two distinct parts: consent by the client, and consultation by the counsel." *Id.* at 1243. Accordingly, the court provided that "the mere fact of consent is not sufficient to excuse what would otherwise be a breach of the duty of confidentiality. Consent must also be informed. That is, the client can provide valid consent only if there has been appropriate 'consultation' with his or her attorney." *Id.* at 1244. "Even in cases in which the negative ramifications seem obvious[,] . . . we require that a criminal defendant's decision be made on the basis of legal guidance and with full cautionary explanation." *Id.* Due to the similarities between the standard espoused by the Ninth Circuit and our state's definition of informed consent set forth in Rule 1.0(g), we believe the circuit court properly relied on *McClure* as

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[2] 323 F.3d at 1233.

persuasive guidance in determining whether Bonilla provided informed consent.

Here, Bonilla conceded that he consented to Leiendecker's disclosure. Thus, applying the standard from McClure, the circuit court next determined whether Bonilla's consent was given after full consultation with his attorney. *See id*. ("[T]he mere fact of consent is not sufficient . . . ."). Leiendecker indicated that he had multiple conversations with Bonilla about disclosing the location of Ashley's body, described the benefits of disclosure, and explained the potential consequences of disclosure. Leiendecker further testified that, for the purpose of establishing Bonilla's accident defense, he did not believe there was any reasonable alternative to disclosure. Given Leiendecker's testimony, we conclude there is evidence in the record to support the circuit court's finding of informed consent. *See Parker*, 381 S.C. at 74, 671 S.E.2d at 622 ("In criminal cases, appellate courts are bound by fact finding in response to preliminary motions . . . where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." (quoting *Asbury*, 328 S.C. at 193, 493 S.E.2d at 352)); *see also* Rule l.0(g), RPC, Rule 407, SCACR ("'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."); *McClure*, 323 F.3d at 1244 ("[T]he client can provide valid consent only if there has been appropriate 'consultation' with his or her attorney."). While Bonilla testified that Leiendecker did not explain the ramifications of disclosure, the circuit court found Bonilla's testimony to be less credible than Leiendecker's. *See Wilson*, 345 S.C. at 6, 545 S.E.2d at 829 ("[An appellate court is] bound by the [circuit] court's factual findings unless they are clearly erroneous."). Thus, given this court's limited scope of review, the circuit court's finding is not overcome by Bonilla's conflicting testimony. *See Parker*, 381 S.C. at 74, 671 S.E.2d at 622 ("In criminal cases, appellate courts are bound by fact finding in response to preliminary motions where there has been conflicting testimony . . . ." (quoting *Asbury*, 328 S.C. at 193,493 S.E.2d at 352)). Accordingly, the circuit court did not err in finding Bonilla gave Leiendecker his informed consent to disclose the location of Ashley's body.

App. 12-14.

Discussion

The testimony of counsel Leiendecker that he had "no other alternative" than to advise petitioner to accept his "strategy" of informing the police where the decedent's body was located highlights the lack of "informed consent" in this case. Petitioner said he felt "backed into a corner," and he thought he had no choice but to acquiesce in revealing the location of the decedent's body. The Court of Appeals finding that "Bonilla conceded that he consented to Leiendecker's disclosure," was, respectfully, misleading when petitioner's testimony is taken in context. App. 13. "I felt like I had no choice to be honest, Your Honor," reduces petitioner's testimony to its essence." Further, defense counsel only told petitioner of the alleged "benefits" of revealing the location of the body, and counsel's conclusory testimony that he thought petitioner understood what was going on does not contradict petitioner's testimony. R. 24, l. 24 - 25, l. 14.

Counsel acknowledged that the "autopsy" was everything to his strategy. The solicitor, as seen, in closing before the jury said the defense had an ulterior motive to reveal the location of the body, and he ridiculed the strategic disclosure given the autopsy results. Importantly, there was *no evidence* defense counsel told petitioner that if the autopsy results – everything his strategy depended on – conflicted with what petitioner said occurred, that the consequences would be devastating.

In McClure v. Thompson, 323 F.3d. 1233 (9th. Cir. 2003), the trial court's "roadmap" in this case, which the Court of Appeals found the trial court "properly relied on," the Ninth Circuit Court of Appeals held that the fact defense counsel did not advise McClure of the potential harmful consequences of disclosure invalidated the consent. However, in McClure v.

Thompson, the court found that disclosure was necessary to prevent future criminal acts by McClure.

In this case, the only issue was whether petitioner gave informed consent pursuant to Rule 1.6(a), Rule 407, SCACR, since preventing any future criminal acts was never an issue. It was undisputed that none of the exceptions in Rule 1.6(b), Rule 407, SCACR, were applicable in this case. The court in McClure v. Thompson noted that consent is not enough under Rule 1.6(a). Defense counsel has to consult with the client and advise of the harmful consequences of disclosure. The court noted that the district court had found that the attorney admitted he did not advise McClure of **all** potential consequences. The court further noted that even in cases in which negative ramifications seem obvious, the courts require that a criminal defendant's decision be made on the basis of legal guidance with a fully cautionary explanation. McClure v. Thompson, 323 Fd.3d. at 1244–1245.

The court noted that in a case, such as this one, where the stakes are so high on disclosure, that defense counsel has an obligation to "consult carefully with his client." McClure v. Thompson, 323 Fd.3d. at 1245. McClure v. Thompson was a federal habeas case under a very restrictive standard of review. The court concluded "the choices made by McClure's counsel give us significant pause, and, were we deciding this case as an original matter, we might decide it differently." The court further noted that ascertaining whether defense counsel fully consulted with the defendant, and whether the defendant was fully informed of the options, the benefits, and the adverse consequences, was very important.

Petitioner submits that the testimony of counsel Leiendecker that he had "no other alternative" than to advise petitioner to accept his "strategy" of informing the police where the decedent's body was located highlights the lack of "informed consent" in this case. Petitioner

said he felt "backed into a corner," and he thought he had no choice but to acquiesce in counsel Leiendecker's plan for counsel to reveal where petitioner had told him in confidence the decedent's body was located.

The strongest testimony defense counsel gave in this case was that he told petitioner if they revealed the location of the body that "it would be difficult or impossible for him to deny that he knew what happened to Ms. Pegram following their separation on the night in question when they had been together." R. 15, l. 4 – 16, l. 7.

The record in this case was lacking in support for the judge's ruling that petitioner gave "informed consent" to disclosing the location of the body. The judge ruled immediately after hearing the evidence but what is most apparent is the lack of explanation about the disastrous consequences that would follow if the autopsy results conflicted with what petitioner said actually occurred early that morning. The disclosure of the location of the body so an autopsy could be conducted -- the results of which would match petitioner's testimony was a bold roll of the dice that ended in disaster. Petitioner was entitled to "informed consent" on the adverse consequences of that bold strategy if the autopsy results did not match his testimony. Petitioner felt backed into a corner, and defense counsel thought there "was no other alternative" than his disclosure for autopsy results strategy. Most respectfully, there was not informed consent for the disclosure in this case.[3] See Rule 1.6(a), Rule 407, SCACR; McClure v. Thompson, 323 F.3d. 1233 (9th. Cir. 2003). Certiorari should be granted on this novel issue. See Rule 242, (b)(1), SCACR.

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[3] Petitioner fully recognizes that the result of the plan ending in disaster is not controlling factor.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on these issues.

Respectfully Submitted,

s/ Robert M. Dudek
Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of May, 2020.