

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable Michael G. Nettles, Circuit Court Judge

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STEPHEN FRANCOIS,

**ORIGINAL**

**RECEIVED**

JUL 03 2019

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-002016

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PETITION FOR WRIT OF CERTIORARI

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## **ISSUES PRESENTED**

I. Whether the PCR court erred in denying relief, where Petitioner's plea was not freely, intelligently, and voluntarily made, where plea counsel provided ineffective assistance of counsel and advised Petitioner that he would receive a sentence of between fifteen and twenty-two years based on his lesser culpability compared to two co-defendants, where a global plea agreement contained a sentencing range of between fifteen and thirty years for all three defendants, where Petitioner pleaded guilty on the advice of counsel, and where Petitioner received a thirty year sentence identical to his two more culpable co-defendants?

II. Whether the PCR court erred by denying Petitioner's request for a continuance, where Petitioner had received a transcript from a hearing involving two crucial post-trial motions less than three weeks before the evidentiary hearing, where Petitioner's father who was going to testify about the representations plea counsel made to Petitioner regarding sentencing was out of the country for work and could not attend the hearing following limited notice to Petitioner, and where Petitioner had been on lockdown repeatedly and therefore unable to speak with his PCR counsel on the telephone?

## STATEMENT

Petitioner was indicted by a Charleston County grand jury on June 7, 2010 for two counts of burglary in the first degree, three counts of kidnapping, two counts of possession of a firearm during the commission of a violent crime, and two counts of armed robbery. App. 3 ll. 6 – 16; App. 334 – 351. He pleaded guilty before the Honorable R. Markley Dennis, Jr. on January 19, 2011. App. 15 l. 8 – App. 21 l. 7. Peter Brown represented Petitioner, and Scarlett Wilson served as the solicitor. Judge Dennis accepted Petitioner's plea as well as pleas from two co-defendants, Miguel Starks and Reginald Rice. App. 46 ll. 2 – 4.

Sentencing was deferred until March 22, 2011. App. 48. A global sentencing agreement extended to all three defendants: the sentences would be concurrent and there existed a cap of thirty years. App. 79 l. 13 – App. 81 l. 4. Petitioner's parents, Kimberly and Marlon Francois, spoke on his behalf at the sentencing hearing. App. 168 l. 6 – App. 171 l. 19. His mother wondered aloud whether Petitioner had acted out following his parents' separation; Petitioner, in response, maturely took full responsibility and assured his mother his conduct was not a result of their separation. App. 168 l. 6 – App. 173 l. 18.

Although he appeared to vacillate immediately beforehand, the plea judge sentenced Petitioner and his two, more culpable co-defendants, to identical sentences of thirty years each. App. 180 l. 2 – App. 183 l. 6. Counsel for Petitioner filed a Motion for Reconsideration of Sentencing on April 1, 2011. App. 185. The state filed a response on April 4, 2011. App. 186 – 190.

A hearing on the motion to reconsider was heard before the Honorable R. Markley Dennis on November 13, 2014, **more than three years later**. App. 191. Peter Brown again appeared on behalf of Petitioner, and Culver Kidd appeared on behalf of the state. A motion to

relieve counsel had been filed prior to the hearing. App. 195 ll. 5 – 15. Inexplicably, the reconsideration judge heard the motion to reconsider the sentence prior to the motion to relieve counsel, even though counsel admitted he was not prepared for the reconsideration matter. App. 196 l. 20 – App. 197 l. 8. Counsel noted that he anticipated the court only hearing the motion to relieve at that time:

Your Honor, this is - - I've got to state jury very, very briefly for the record that this decision to do the Motion to reconsider is a surprise to some degree in that it was going to be done today. I thought that we were going to do a Motion to relieve.

...

**I am not adequately prepared to argue the Motion to reconsider.**

App. 196 l. 22 – App. 197 l. 5. (emphasis added).

Nonetheless, the hearing continued; the court denied the motion for reconsideration and granted the motion to relieve. App. 211 ll. 13 – 17; App. 213 ll. 5 – 13. An Order Denying the Motion for Reconsideration was signed on November 13, 2014. App. 216.

Petitioner then filed a timely application for post-conviction relief on August 25, 2015. App. 217. It contained an allegation of ineffective assistance of counsel, a claim of involuntary guilty plea, and an assertion of a due process violation. App. 219. The state made its Return on or about June 2, 2016. App. 226 – 232.

An evidentiary hearing took place on October 5, 2018 before the Honorable Michael G. Nettles. App. 233. Christopher Murphy represented Petitioner, and Megan Jameson appeared on behalf of the state. Petitioner and plea counsel testified at the hearing. The PCR judge took the matter under advisement and requested proposed orders. App. 312 ll. 10 – 13. An Order of Dismissal was filed on October 24, 2018. App. 314. The PCR court found plea counsel's testimony credible and concluded that Petitioner failed to satisfy his burden.

This petition follows.

## ARGUMENT

**I. The PCR court erred in denying relief, where Petitioner's plea was not freely, intelligently, and voluntarily made, where plea counsel provided ineffective assistance of counsel and advised Petitioner that he would receive a sentence of between fifteen and twenty-two years based on his lesser culpability compared to two co-defendants, where a global plea agreement contained a sentencing range of between fifteen and thirty years for all three defendants, where Petitioner pleaded guilty on the advice of counsel, and where Petitioner received a thirty year sentence identical to his two more culpable co-defendants.**

### Relevant facts

Petitioner was twenty years old at the time of his plea and was previously enrolled at the College of Charleston with a double major in political science and business. App. 43 ll. 1 – 6. He was raised in Atlanta and maintained a 3.6 GPA in high school. App. 153 l. 3 – App. 156 l. 2. He was an excellent athlete; he played football and baseball all four years of high school. Id. He participated in mock trial in high school, and his team earned second place in its regional competition in Atlanta. Id. Petitioner was voted best attorney. Id. He aspired to practice law. Id.

Charleston Southern University offered Petitioner a football and baseball scholarship. Id. After attending school there for a year and a half, he transferred to the College of Charleston. Id. He became involved in the Call Me Mister Program, which “is out there for black males to be encouraged and help with their education in order to give back to the community and encourage them to go into teaching.” Id. Unfortunately, Petitioner was persuaded by Miguel Starks, a previous teammate of Petitioner's and quarterback at The Citadel, to participate in some ill-

conceived antics leading to the arrest of Starks, co-defendant Rice, and Petitioner following two home invasions.

Petitioner acknowledged his participation. App. 161 l. 16 – App. 163 l. 11. He was the first of all the co-defendants to cooperate with law enforcement, without a proffer, and provided a “pretty detailed statement to the police.” App. 61 ll. 7 – 13. As noted by counsel at the sentencing hearing:

Mr. Francois acknowledged his participation in it. He spoke to the City authorities. It was on a video. It was recorded. He obtained counsel, and we immediately went forward and met at the Charleston County Sheriff’s Office. We gave a full and complete statement immediately. We were the first one to do so, Your Honor. We understood that that was the way to go.

He did that without a proffer. He did that without any promises at all. He knew it was the right thing to do, and he needed to do it. I think that started the other defendants, and they all ended up giving statements as you are aware.

App. 161 l. 18 – App. 162 l. 7. Regarding sentencing, counsel suggested that there was a chance that Petitioner may only be required to serve the statutory minimum:

Solicitor Wilson is extremely tough. And she came to us and said, ‘Well, here’s your offer. Your client [is] going to have to accept the mandatory minimum of fifteen years in prison on burg[lary] first. I am unwavering on that. I’m not moving off of that. I’m not going to give on armed robbery.’

...

But she said, ‘I’m going to keep the mandatory minimum of fifteen, and I’m going to give you a range, a sentencing range, of up to thirty years in prison.’ And she put that out there for us. She had the foresight - - and she did that only after probably about eleven months, when she came to us in January.

...

And we had to sit down and we had to pray about it. I spoke to my client several times. I had to speak to his family and explain that, “your son’s going to have to go to prison for fifteen years. He’s going to have to serve eighty-five percent of that. He’s going to have to do 4,654 days at the very, very best for his actions.

App. 162 l. 25 – App. 164 l. 13. Plea counsel requested that the judge sentence the three male co-defendants “individually for their culpability, planning, participation, possession of weapons and actions that took place or might have not taken place during that.” App. 165 ll. 15 – 21. Counsel further explained that Petitioner did not bring any weapons to the robberies. He “wasn’t involved in the entry of the first house on Johns Island.” App. 66 ll. 2 – 11.

Petitioner’s parents retained plea counsel and paid him \$35,000. App. 240 ll. 13 – 20. At the evidentiary hearing, Petitioner explained how communication waned following his sentencing but while the reconsideration motion was pending. App. 240 ll. 21 – 25. He spoke about how counsel and the solicitor worked out a deal to avoid trial. App. 243 l. 10 – App. 244 l.

4. The specifics of the agreement were discussed with counsel, Petitioner, and his father:

So in the case, my father and I - - we were both seeing Pete at the same time then. He would come down from Atlanta and we would meet with Pete at that time. From our understanding was we were going to get - - we’re going to get you on the lower end or the lower half of the 30, which would be 15 - - open plea to 15 to 30, either between 15 and 22 years. That was the agreement. He said that that didn’t need to be said in open court because it was already established in chambers.

App. 244 l. 24 – App. 245 l. 7.

Petitioner answered pointedly when asked whether he was under the impression that he was going to receive thirty years: “No, sir, I wasn’t.” App. 245 ll. 8 – 15. His understanding was that he would receive something less. Id. Petitioner stated that the plea agreement was understood to be staggered: Petitioner would be on the lower end, Rice would be in the middle, and Starks would be at the top. App. 248 ll. 12 – 23. That arrangement followed conversations with counsel and the solicitor. App. 245 ll. 16 – 19.

Counsel told Petitioner that he could expect to receive no more than twenty-two years:

Mr. Brown [said] you can expect to receive no more than 22 years. He said, expect - - don't expect 15. He said we won't be on the top end of it; we won't be at the 30 range, we [won't] be at the 25 to 30 range because we didn't have the sexual misconduct [that co-defendant Starks had]. Mr. Starks was pleading to the sexual misconduct and Mr. Starks had too ownership of being the ring leader of the whole situation as it was.

App. 245 l. 18 – App. 246 l. 1. Petitioner reiterated that Starks was more culpable and “did worse things” than Petitioner. App. 246 ll. 2 – 9. Although none of this was memorialized in correspondence, counsel took note of it in his legal pad:

The closest thing I had to writing was, in Mr. Brown's notes, he would write like - - he would always give a charge. This is what we're looking at and he'll have his legal pad and he'll write 15, and then he'll write a line above the 15 and it'd be like 22, this is where we're going to be right in this area. I talked to Judge Dennis, I've talked to Ms. Wilson.

App. 249 ll. 1 – 16. Although Petitioner and his father questioned why sentencing was not severed, counsel never made such a motion. Id.; App. 253 l. 20 – App. 254 l. 14.

Interestingly, Petitioner then touched on an unfair aspect of the sentencing:

Judge Dennis made a statement saying, he doesn't expect me to understand the brotherhood that [T]he Citadel had, and how Mr. Starks and Mr. Rice violated that brotherhood, but he does expect me to understand that I knew better because I was supposed to be the smartest.

...

Just because my GPA was [higher] than Mr. Starks' or Mr. Rice's, doesn't mean necessarily that I'm responsible for their actions. Again, it showed - - it was shown, and Ms. Wilson saw, in the text messages that me and Mr. Starks had a debate about the whole situation and that's one of the reasons she said, you are least culpable and this is one of the reasons why you'll be on the 15 to 22 [range] and because we can't just let you go, and I understand that with studying the law. What I didn't understand is why would you promise me - - make this agreement with my family, make this agreement with me, sell me on this dream, and then when it happens, you say, oh well.

App. 246 l. 14 – App. 247 l. 8. Counsel was ineffective for failing to move to sever the pleas and sentencing. App. 263 l. 21 – App. 264 l. 8. Additionally, counsel failed to secure the appearance and testimony of family members at the motion to reconsider hearing. App. 262 ll. 5 – 21.

Petitioner recalled incredibly specific details from counsel's representation of him, thus reinforcing his credibility. He recalled the name of counsel's assistant. App. 283 l. 7 – App. 284 l. 22. He left messages with her but rarely heard back from counsel. Id. Moreover, Petitioner also pointed out how his mother pleaded for mercy against the advice of counsel at the sentencing hearing:

Actually, my mom pled for mercy; my dad did not mention anything about mercy because that's what ... Mr. Brown asked us not to do. He said do not bring up the mercy factor. Do not bring up mercy ... mercy is one of those things you just don't want to bring up with [the sentencing judge] and after my mom said it, Mr. Brown looked over his shoulder and she eased off of it.

App. 284 ll. 3 – 22.

It naturally follows that in addition to being the recipient of ineffective assistance of counsel, Petitioner's guilty plea was involuntary. App. 261 l. 3 – App. 262 l. 21. Counsel never had a conversation with Petitioner about going to trial. App. 247 ll. 9 – 14. The plea was always the only option. App. 287 ll. 20 – 24. Petitioner indicated that had he known he was going to receive thirty years, he would have elected to go to trial. App. 282 l. 17 – App. 283 l. 6. At the evidentiary hearing, he was recalled to the stand following plea counsel's testimony and spoke at length:

Mr. Murphy, like I explained to you before, if I would've known I was [going to receive] 30 years, we should've went to trial, because at least I would've had a better appeal option. I cooperated. I did what the state asked me to do. I did what Pete asked me to do. I was - - I did everything my attorney advised me to do throughout the whole process. Mr. Brown said he never promised that, he never promised that. He kept saying that, but every time we would meet, he would draw a diagram on his legal pad, like I said before, **he would draw a diagram on his legal pad, 15 at the bottom, 20 in the middle, 25, 30, like a triangle and he would put me between them, 15 and 20 range.** Mr. Rice would be in the mid-twenties range, and Mr. Starks would be in the 30 at the top of the pyramid. And countless [ ] times, he drew that diagram, not only with me, but with my father. We both had that kind of understanding.

App. 308 l. 3 – App. 309 l. 8. (emphasis added)

Inexplicably, plea counsel did not bring his entire file “because of the PCR nature.” App. 290 ll. 1 – 8. However, from memory, he agreed that Petitioner was the least culpable of the three male codefendants. App. 288 ll. 11 – 14. Within seconds of denying ever having a chambers meeting with the plea judge, counsel reversed course and noted that he was “sure we had meetings with [the judge] prior to it.” App. 291 ll. 7 – 24.

Regarding the severance motion, counsel indicated that he verbally made a motion but did not file a written request. App. 294 ll. 8 – 24. Notably, however, the word sever does not appear in the plea or sentencing transcripts. Although counsel asked that the sentencing judge “consider [Petitioner’s] participation and consider him separately,” there was no motion to sever made. App. 167 ll. 14 – 20. Petitioner remarked that he likely would not have received the full thirty year sentence if counsel had moved to sever, noting the significant differences in his conduct and his co-defendants’. App. 308 l. 3 – App. 309 l. 8.

Counsel denied telling Petitioner to expect fifteen years but straightforwardly admitted that he would have told Petitioner to expect twenty-two years. App. 305 ll. 3 – 15.

### Discussion

In Missouri v. Frye, 566 U.S. 134 (2012), the United States Supreme Court noted that the, “Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings[, which] . . . include arraignments, postindictment interrogations, postindictment line ups, and the entry of a guilty plea.” Id. at 141 (citations and internal quotation omitted). The Court further emphasized that “[i]n today’s criminal justice system, . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.” Id. (emphasis added). Accordingly, “[a]nything less [than effective counsel during plea negotiations]... might deny a defendant ‘effective representation by counsel at the only

stage when legal aid and advice would help him.” Id. at 1408 (citing Massiah v. United States, 377 U.S. 201 (1964) (quotation citation omitted).

“The benchmark for judging any claim of ineffectiveness must be whether 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). To prove ineffective assistance of counsel, “the defendant must show that counsel’s performance was deficient” and “that the deficient performance prejudiced the defense.” Id. “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” Id. at 687-688.

The difference, “between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea.” Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). The longstanding test for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Hill v. Lockhart, 474 U.S. 52, 56 (1985) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984) to claims of the same against plea counsel).

First, “the voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases.” Hill, 474 U.S. at 56. On the other hand, the prejudice requirement focuses on whether “there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” Id. at 59. “[T]he voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at

the time of the entry of the guilty plea, and also from the record of the PCR hearing.” Holden v. State, 393 S.C. 565, 572-74, 713 S.E.2d 611, 615-12 (2011).

“The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland, 466 U.S. at 685 (quoting Adams v. United States ex. rel. McCann, 317 U.S. 269 (1942)). Additionally, a guilty plea that was entered by one fully aware of the direct consequences “must stand *unless induced by . . . misrepresentation*.” Brady v. United States, 397 U.S. 742 (1970) (emphasis added) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (1957)).

Concerning prejudice, “a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Strickland, 466 U.S. at 694. Rather, “[t]he 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.” Id.

### Discussion

When counsel provided Petitioner’s legal file to him, it did not contain any notes. App. 264 ll. 14 – 24. Petitioner was therefore unable to substantiate his highly specific recollection that counsel would draw a pyramid with sentencing numbers on it.

Petitioner testified repeatedly that he was under the impression, based on advice from counsel, that he was going to receive a sentence of between fifteen and twenty-two years. App. 250 ll. 8 – 11; App. 255 ll. 4 – 7; App. 265 l. 9 – App. 266 l. 15; App. 272 ll. 6 – 15; App. 275 ll. 5 – 9; App. 278 ll. 3 – 9; App. 280 l. 15 – App. 281 l. 6. In those conversations, counsel never explained the difference between a recommendation and a negotiated plea. App. 250 ll. 12 – 24.

When asked why he did not speak up about the agreement at either the plea or sentencing hearings, Petitioner clarified that he was advised accordingly by counsel. All. 255 ll. 11 – 16.

Petitioner was induced into pleading guilty by plea counsel who led him to believe that he would receive a sentence of between fifteen and twenty-two years. Counsel failed to move to sever the sentencing from Petitioner's two more culpable co-defendants. Petitioner never heard from counsel about the possibility of going to trial and receiving a lighter sentence. Because Petitioner believed that he was not going to receive a thirty year sentence based upon the advice of retained counsel, he chose to plead guilty. His lengthy sentence is a product of ineffective assistance of counsel and an unknowing guilty plea.

**II. The PCR court erred by denying Petitioner's request for a continuance, where Petitioner had received a transcript from a hearing involving two crucial post-trial motions less than three weeks before the evidentiary hearing, where Petitioner's father who was going to testify about the representations plea counsel made to Petitioner regarding sentencing was out of the country for work and could not attend the hearing following limited notice to Petitioner, and where Petitioner had been on lockdown repeatedly and therefore unable to speak with his PCR counsel on the telephone.**

Relevant facts

At the outset of his evidentiary hearing, PCR counsel moved for a continuance request on behalf of Petitioner:

Mr. Francois wants me to ask for a continuance for this case because he does not believe he is prepared. I, on the other hand, am prepared to go forward today. He says that he ... has not been in contact with me enough. He's been like at Lieber. As I understand it, he's been in lockdown. ... He does not want to go forward today.

App. 236 l. 20 – App. 237 l. 9. The PCR court then heard testimony from Petitioner who offered an honest perspective of what his life had been like in the preceding months and why a continuance was necessary:

[W]e just received the reconsideration transcript less than 20 days ago. I'm at Lieber. I've been attempting to get into the law library. I've been attempting to get in contact with Mr. Murphy. Being at Lieber right now, we've been in lockdown for the past six months. I haven't been able to talk to him. The last conversation I had with Mr. Murphy, the last correspondence I personally had with Mr. Murphy was when we last spoke in May. I have not talked to him and we have not spoken about anything that he wants to through with the PCR. He hasn't heard the things that I want to address at the PCR. It is not a good time because we haven't had any conversation. We haven't had any kind of communication.

App. 238 ll. 3 – 16. The PCR court denied the continuance request because PCR counsel was prepared. App. 238 ll. 17 – 22.

Petitioner's case could have been significantly more thorough had the PCR court granted his request for a continuance. Petitioner's father could have provided an affidavit or testified at the hearing. Petitioner and his counsel could have had strategic discussions about amending his application and perhaps including additional claims of ineffective assistance of counsel, including counsel's failure to prepare for the motion to reconsider hearing. Petitioner could have requested that the solicitor from the guilty plea and sentencing hearing as well as the assistant solicitor from the reconsideration hearing be sent a subpoena in order to provide testimony regarding the matter raised in Issue 1, *supra*. Because none of these opportunities were made available to Petitioner, he was denied his full bite at the apple.

Much like plea counsel, who was unprepared for the reconsideration hearing, Petitioner remarked that he and PCR counsel were not ready for the evidentiary hearing. App. 267 l. 23 – App. 268 l. 11. Petitioner discussed the never-ending difficulties of being incarcerated and attempting to correspond with his attorney:

But being in - - being at Lieber Correctional Institution, being locked down since March, we haven't had no conversation, we haven't had an opportunity to adequately prepare, and it's all over - - it's the same thing all over again. Mr. Brown wasn't adequately prepared to handle my reconsideration. He wasn't adequately prepared. We didn't have any conversation about it. ... When somebody else is constantly dictating the outcome of my life without even consulting me, if that's the justice system, then it's flawed because ... it's a partnership.

App. 268 l. 12 – App. 269 l. 11. The evidentiary hearing was in October; Petitioner had been on lockdown for at least six months.<sup>1</sup> Petitioner reiterated that he had not spoken with PCR counsel on the telephone; they had not discussed the transcripts. App. 269 l. 20 – App. 270 l. 6.

Petitioner had just received the transcript of the reconsideration hearing from almost four years ago, only twenty days before the evidentiary hearing. App. 269 l. 20 – App. 271 l. 1. Counsel admitted, both at the motion hearing and at the evidentiary hearing, that he was unprepared. App. 196 l. 20 – App. 197 l. 8; App. 301 ll. 9 – 13. As previously mentioned, counsel did not file a Notice of Appeal following the denial of the motion to reconsider Petitioner's sentence. It is unclear whether he advised Petitioner of his appellate rights. He did, however, have a pre-prepared proposed order granting the motion to relieve counsel ready for the judge's signature at the reconsideration hearing. App. App. 213 l. 21 – App. 214 l. 2.

Notably and perhaps more importantly, Petitioner's father was out of the country for work and unable to attend the evidentiary hearing. *Id.* As noted *supra*, Petitioner's father would have testified at length about the promises made to Petitioner regarding sentencing. Petitioner had only learned about the PCR hearing less than twenty days prior to it happening. *Id.*

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<sup>1</sup> Emily Bohatch, "Prisoners across SC still in lockdown 5 months after deadly riot. Here's why," <https://www.greenvilleonline.com/story/news/local/2018/09/20/prisoners-across-sc-still-lockdown-5-months-after-deadly-riot/1356991002/> (last visited July 3, 2019).

## Discussion

“The authority of the court to grant continuances and to determine the order in which cases shall be heard is derived from its power to hear and decide cases. This adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants.” Williams v. Bordon’s, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980). The South Carolina Rules of Criminal Procedure provide that the presiding judge may grant a continuance based upon “a showing of good and sufficient legal cause.” Rule 7(c), SCRCrimP. The South Carolina Rules of Civil Procedure contain a similar threshold but also carve out an additional reason to grant a continuance: For Absence of Witness. Rule 40(i), SCRCP. Regarding the absence of a witness, the following standard applies:

No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel or agent, to the following effect, to wit: That the testimony of the witness is material to the support of the action or defense of the party moving; that the motion is not intended for delay; but is made solely because the party cannot go safely to trial without such testimony; that there has been due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that the motion is not intended for delay. In all such cases where a subpoena has been issued, the original shall be produced, with proof of service, or the reason why not served, endorsed thereon, or attached thereto; or, if lost, the same proof shall be offered with additional proof of the loss of the original subpoena. A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the foregoing matters what fact or facts he believes the witness if present would testify to, and the grounds for such belief.

Rule 40(i)(2), SCRCP.

“It is axiomatic that determination of [a motion for continuance] must depend upon the particular facts and circumstances of each case.” State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012) (quoting State v. Babb, 299 S.C. 451, 454-455, 385 S.E.2d 827, 829 (1989)). While “[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process,” the decision must rest upon, “the circumstances present in

every case, particularly in the reasons presented to the trial judge at the time the request is denied.” Ungar v. Sarafite, 376 U.S. 575, 589, 84 S.Ct. 841, 850 (1964).

In Winkler v. State, 418 S.C. 643, 795 S.E.2d 686 (2016), this Court held the trial judge erred when he denied Winkler’s continuation to investigate evidence of brain damage. Id. at 663, 795 S.E.2d at 697. After conviction, Winkler filed an application for post-conviction relief and was appointed counsel. Id. at 659, 795 S.E.2d at 695. Two months into the representation counsel suspected Winkler suffered from brain damage. Id. at 660, 795 S.E.2d at 695. Counsel requested funding to investigate, which was approved, and hired a neuropsychologist. Id. Counsel moved to extend the deadlines in the scheduling order by ninety days. He explained that testing and analysis would require approximately ten weeks. Id. at 660-661, 795 S.E.2d at 696. The judge extended the deadline for filing an amended application, but refused to extend the PCR trial date. Id. at 661, 795 S.E.2d at 696.

Winkler was unable to obtain the recommended PET scan because of elevated blood glucose levels. Id. Thereafter, counsel helped Winkler get treatment for his previously undiagnosed diabetes. Id. Despite receiving weeks of diabetes treatment, Winkler’s blood sugar was still too high to perform an accurate study of his brain and additional time was needed for treatment and analysis. Id. Counsel requested a continuance of six months to file his final amended PCR application and to adjust other dates, which included the trial. This request was denied. Id. at 662, 795 S.E.2d at 696

This Court explained that the PCR statute, much like the Rules of Criminal Procedure, stated additional time should be granted, “if ‘good cause is shown to justify a continuance.’” Id. at 662, 795 S.E.2d at 697, (quoting S.C. Code Ann. § 17-27-160(c)). This Court found the PCR court abused its discretion when it denied Winkler’s second motion for additional time because

Winkler presented, “good cause,” for the continuance. Id. at 663, 795 S.E.2d at 697. This Court found no evidence to support the PCR judge’s finding that PCR counsel had, ““ample opportunity,”” to investigate and develop the evidence related to potential brain damage. Id. Thus, Winkler provided, “good cause,” to justify a continuance. Id. According to the Court, the PCR court’s denial of the continuance request, “left PCR counsel in a position from which they could not present evidence to support the claim that trial counsel was ineffective for failing to investigate Winkler’s brain damage.” Id.

In State v. McMillian, 349 S.C. 17, 24, 561 S.E.2d 602, 605 (2002), this Court held the trial court abused its discretion when it denied McMillian’s motion for continuance to obtain the transcript of his first trial in order to prepare for his second trial. McMillian made a timely request for the transcript of his first trial, but his second trial started before he received it. Id. at 19, 561 S.E.2d at 603. He moved for a continuance to obtain the transcript in order to impeach a witness against him, but his request was denied. Id. The Court found the PCR court abused its discretion because, “[t]he only ‘neutral’ witness for the state during McMillian’s second trial was Dorothy Williams Rumph.” Id. at 21, 561 S.E.2d at 604. Therefore the Rumph’s credibility, “was essential to McMillian’s defense,” and the crucial nature of Rumph’s testimony could not be overstated. Id. The Court concluded that, “the verdict hinged upon her credibility,” and without the transcript from the first trial, “McMillian was hindered in his ability to impeach her.” Id. at 23, 561 S.E.2d at 605.

In the instant case, there is no indication that Petitioner had requested numerous continuances as was the case in Holmes v. Haynsworth, Sinkler & Boyd, P.A., 408 S.C. 620, 760 S.E.2d 399 (2014), abrogated by Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 787 S.E.2d 485 (2016). Petitioner made a showing that his father had “some particular

contribution to make,” and therefore should have been granted a continuance. See Wayne Smith Const. Co., Inc. v. Wolman, Duberstein, and Thompson 294 S.C. 140, 363 S.E.2d 115 (Ct. App. 1987).

Petitioner had been lockdown for half a year following the riot at Lee Correctional Institution that killed seven people. He was unable to speak with his PCR counsel over the telephone; strategizing was therefore practically impossible. He was therefore undoubtedly prejudiced. His father, a party to the conversations with plea counsel involving the plea deal offered to Petitioner, was not in the country and unable to return in time for the hearing. Petitioner’s father, at the time of sentencing, had worked at Delta for over twenty-three years. App. 151 ll: 10 – 23. Petitioner’s mother had worked for seventeen years in the Fulton County School District. Id.

PCR counsel did not secure the presence and testimony of the solicitor. Had Petitioner had additional time to contemplate those decisions, following a more detailed review of the reconsideration transcript, his PCR allegations could have been fully discussed and analyzed with additional witnesses’ testimony. His continuance request should have been granted.

**CONCLUSION**

For the foregoing reasons, Petitioner requests that this Court grant his petition for writ of certiorari to allow full briefing on this issues, reverse the charge against him, and remand the case for a new trial.



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Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of July, 2019.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable Michael G. Nettles, Circuit Court Judge

STEPHEN FRANCOIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

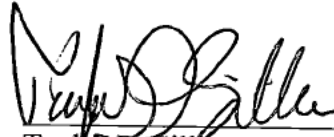
RESPONDENT

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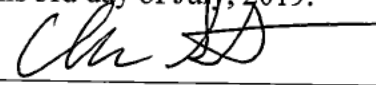
CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Stephen Francois, #345325, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 3rd day of July, 2019.

  
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Taylor D Gilham  
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER  
this 3rd day of July, 2019.

  
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(L.S)

Notary Public for South Carolina

My Commission Expires: *October 26, 2019*