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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2017-002632
(2016-CP-46-3602)

State of South Carolina……………………………………………………………Respondent,

v.

Travis Hines…….…………………………………………………………………Petitioner.

AMENDED PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the South Carolina Court of Appeals erred in affirming the PCR court's decision to uphold Travis Hines's conviction and sentence when a criminal defendant's right and interest in reviewing the State's discovery, as guaranteed by Rule 5(a)(1)(C) of the South Carolina Rules of Criminal Procedure, supersedes a solicitor's policy of using discovery as a bargaining chip in plea negotiations and any decision to the contrary violates both the statute and a defendant's rights to due process.

II. Should this Court overrule *Hyman v. State* because it is contrary to Rule 5(a)(1)(C) of the South Carolina Rules of Criminal Procedure and because it fails to recognize there is a statutory remedy available for Solicitors who believe it necessary to restrict discovery due to concerns over confidential informants that would allow appellate oversight of these decisions and not leave them in the unilateral discretion of solicitor offices.

III. Did the South Carolina Court of Appeals err by finding Hines's guilty plea was voluntary when the State filed notice to seek LWOP as a way to keep Hines from pursuing access to his discovery and when the circuit court's colloquy with Hines was perfunctory?

STATEMENT OF THE CASE

Travis Hines entered a *pro se* plea to distribution of heroin on December 17, 2015. After entry of the plea, the Honorable Judge John C. Hayes sentenced Mr. Hines to fourteen years in prison. Mr. Hines filed an application for post-conviction relief on December 9, 2016. The State filed its return on May 22, 2017, and a PCR hearing was held before the Honorable R. Lawton McIntosh on July 31, 2017. Mr. Hines was represented by Leah Moody. Mr. Hines' petition was denied and dismissed with prejudice, and the order was filed on November 14, 2017.

Mr. Hines filed his timely notice of appeal on December 28, 2017. He then filed his petition for writ of certiorari from the denial of his PCR on April 5, 2018. He was represented by C. Rauch Wise. The State filed its return on July 16, 2018. Mr. Hines filed a Reply on August 20, 2018. The South Carolina Court of Appeals grated certiorari on June 28. 2018. The matter was heard on April 13, 2021. The South Carolina Court of Appeals affirmed on writ of certiorari on December 8, 2021. *Travis Hines v. State of South Carolina*, Op. No 5877 (filed December 8, 2021).

Mr. Hines subsequently filed a petition for rehearing to the South Carolina Court of Appeals on January 24, 2022, and it was denied on February 24, 2022.

This petition for writ of certiorari timely follows.

Relevant Facts

On December 26, 2014, Travis Hines was arrested for distribution of heroin. App. 84. After his arrest, Mr. Hines was represented by two separate attorneys. Significantly, neither attorney (nor any others throughout the pendency of this case) were able to view the entirety of the State's evidence related to the alleged drug buy that occurred on May 21, 2014. App. 84.

Mike McKinnon of the York County public defender's office was initially appointed to represent Mr. Hines. Discovery was sent to Mr. McKinnon, but despite being a drug case, the discovery did not include a drug report or the video of the alleged buy. App. 58. During this time, the State offered Mr. Hines a ten-year sentence in exchange for a guilty plea. App. 33; email. At no time did Mr. Hines reject the offer. App. 46.

Mr. Hines, unhappy with Mr. McKinnon, retained the legal services of Christopher Wellborn. Once retained, Mr. Wellborn immediately provided the State with his Rule 5 discovery request and his *Brady* motion. App. 30-31. On July 7, 2015, Mr. Wellborn received the electronic discovery from the State. App. 31. Yet again, the discovery was incomplete for a drug case; it did not include the video of the buy nor a drug report. Instead, the file included "still" photos of the alleged buy. App. 31.

During the initial stages of his representation, the State offered Mr. Wellborn the same ten-year sentence it initially offered to Mr. McKinnon. App. 33. However, Mr. Wellborn did not feel comfortable having Mr. Hines plead guilty without viewing the unreleased video or having any relevant discovery pertaining to a drug charge. App. 32, 38. In fact, he informed Mr. Hines that he

"wanted to see the video because it might give him a defense to the charge that he would otherwise plead guilty to a ten-year deal on." App. 33-34.

Remarkably, on August 12, 2015, Mr. Wellborn received another email from Solicitor Newkirk that the offer increased from ten years to eighteen years "upon review and discussions with management." App. 34-36. There were no elaborations on the parties involved in the discussion, or any further details provided despite efforts to understand why the offer increased. App. 34-36. The email further explained that Mr. Hines was eligible for a sentence of life without parole. App. 34. During this exchange Solicitor Newkirk also denied their request to see the video. Specifically, Solicitor Newkirk informed Mr. Wellborn that he was not allowed to have the video until the plea offer was rejected. App. 35. Indeed, the plea was conditioned upon Mr. Hines agreeing to waive his right to view the video of the alleged drug buy. App. 35.

According to Solicitor Newkirk, it is not an uncommon practice in the Solicitor's office for a defendant to waive their right to see the drug report and video as part of their plea deal. App. 56-59. It is the general policy of the Solicitor's office to "not release the video of a confidential informant in a drug case unless the defendant is then willing to not accept an offer from the State." App. 56.

The State reasoned that the policy protects the informant; yet Mr. Wellborn informed them that Mr. Hines knew the identity of the informant without looking at the video, and even gave them the informant's name. App. 35, 39. Nonetheless, the solicitor's office held firm in its decision to condition the discovery on Mr. Hines' rejection of the plea offer.

On August 12, 2015, Mr. Hines informed Mr. Wellborn that he did not want to accept the offer by the State because he had not seen the video of the alleged buy. App. 37. Mr. Wellborn agreed; he was not recommending Mr. Hines plead guilty to a drug charge without looking at the

video or the report. App. 38. This tactic by the State was, politely speaking, a "pressure, sort of extortive process by which you give up your right to discovery and take the eighteen. If you actually want to exercise your right to Discovery, you are going to lose that" by taking the plea. App. 37.

Mr. Wellborn explained to Mr. Hines that this approach by the State was "legally suspect given Justice Toal's memo over ten years ago that was something that was in disfavor with the Court." App. 35. "They did not have the full discovery […] and as an ethical matter not to mention a matter which might result sort of ironically in a post-conviction relief action, I did not feel comfortable accepting an offer on behalf of a client where we didn't have discovery that indicated he was guilty." App. 46.

Around October 23, 2015, Mr. Wellborn finally received the drug report. App. 37. Almost a month later and over four months after the initial request, Mr. Wellborn received an email offering him an opportunity to see "relevant portions" of the video as determined by the State if he signed a protective order. App. 39; cite to email. On November 17, 2015, Mr. Wellborn, not Mr. Hines, was afforded an opportunity to view the portions of the video that the State deemed relevant. App at 39.

After reviewing the select portions of the video, Mr. Wellborn had a conversation with Mr. Hines that he did not think going to trial was in Mr. Hines' best interest. While the "relevant" portions of the video showed Mr. Hines "fiddling with a package" and it would not, in his opinion, be "an extraordinary circumstantial leap to connect the dots" that the informant was given drugs," there was no there was no direct evidence of a drug buy. App. 24, 40. Shortly after seeing portions of the video selected by the State, the offer changed yet again. This time from eighteen years to fifteen years. App. 41.

On December 15, 2015, Mr. Hines appeared before the Honorable Judge Daniel Hall and requested Mr. Wellborn be relieved as his attorney and expressed to Judge Hall his intent to hire another attorney. App. 113-114. During this same hearing, the State formally notified Mr. Hines that they would be seeking life without parole. App. 117-118.

Mr. Hines attempted to hire another attorney, but the fast-approaching deadline in his case left little time for an attorney to prepare for trial. App. 17. Therefore, he had no choice but to proceed *pro se* and plead guilty as he could not prepare for a trial himself and the plea offer was set to expire the end of the term. According to Mr. Hines, if he failed to take the plea deal, the State would proceed with the life without parole sentence, an outcome Mr. Hines wanted to avoid. Prior to the plea hearing, the State negotiated with Mr. Hines and reduced the sentence to fourteen years in exchange for a guilty plea. App. 100-03.

On December 17, 2015, Mr. Hines appeared *pro se* before the Honorable Judge John C. Hayes. App. 97. After inquiring about his background, Judge Hayes had a colloquy with Mr. Hines concerning his right to self-representation, and the rights he was giving up because of the plea. App. 102-104. After this discussion, Judge Hayes accepted the plea and sentenced Mr. Hines to fourteen years in prison. App. 106.

ARGUMENTS

I. The court erred in affirming the PCR court's decision because a criminal defendant's right and interest supersedes a solicitor's policy of using discovery as a bargaining chip to a plea and any decision to the contrary violates the Constitution and Rule 5(a)(1)(C) of the South Carolina Rules of Criminal Procedure.

The critical issue in this petition is whether a defendant's rights to view discovery, as provided for by state statute, supersedes a solicitor's office "policy" to condition that right on a plea deal. Relying on this Court's decision in *Hyman v. State*, 397 S.C. 35, 48, 723 S.E.2d 375

(2012), the South Carolina Court of Appeals found that the State struck an "appropriate balance," and Mr. Hines was not entitled to relief. *Travis Hines v. State of South Carolina*, Op. No 5877 (filed December 8, 2021)**.** This ruling is inaccurate, and this Court should grant certiorari.

Throughout the entirety of this case, Mr. Hines has properly argued that the State violated his rights to view discovery pursuant to Rule 5(a)(1)(C) of the South Carolina Rules of Criminal Procedure. Pursuant to this rule:

> Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial or were obtained from or belong to the defendant.

The requirement of Rule 5 imposes a mandatory obligation on the part of solicitors. The critical language in Rule 5(a)(1)(C), is the prosecution "shall" permit the defendant the opportunity to inspect…items material to the preparation of his defense.[1] Indisputably, the video of the alleged drug buy was material to the preparation of Mr. Hines' defense and would have been used by the State in their case in chief. Yet, the record is devoid of any evidence that Mr. Hines was ever afforded the opportunity to view the video despite making it well known that he wanted to do so prior to taking the plea deal.

Instead, Mr. Hines was forced to either forgo discovery and accept a plea offer of fourteen years or review discovery and run the risk of life without parole. The solicitor's office lacks the authority to impose this burden on a criminal defendant, yet for at least 10 years it has been happening in some (not all) jurisdictions in South Carolina.

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[1] See also Rule 3.4: Fairness to Opposing Party and Counsel. A lawyer shall not (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.

The plain reading of Rule 5 says that Mr. Hines is entitled to all documents and tangible evidence, which are within the possession, custody, or control of the prosecution… which are material to the preparation of the defense or are intended for use by the prosecution as evidence in chief at the trial. Rule 5(a)(C). However, in *Hyman v. State*, 397 S.C. 35, 48, 723 S.E.2d 375 (2012), the Supreme Court of South Carolina crafted a new rule. Pursuant to *Hyman*, the State, instead of complying with Rule 5(a)(1)(C) of the South Carolina Rules of Criminal Procedure, can instead create an "appropriate balance" by providing still photographs to the defendant and providing defense counsel access to portions of the video evidence in a case. *Hyman*, at 48, 723 S.E.2d at 387. This unnecessary tension is being abused by solicitors who are conditioning the right to review evidence on whether the defendant intends to plead guilty or go to trial. Such actions are not proper unless undertaken by the legislative branch.

Simply put, Mr. Hines wanted to watch the video of the alleged drug buy in his drug charge, and under SCRCrP Rule 5(a)(1)(C), he was entitled to review the entire video. Contrary to the South Carolina Court of Appeals' opinion, Mr. Wellborn's viewing of the portion of the video the State deemed relevant (well over four months after it was requested) does not comply with Rule 5 (a)(1)(C).

This "policy" and the Court of Appeals' decision to allow the solicitor's office to abuse its authority violates the plain language of Rule 5 a(1)(C); and it results in constitutionally and structurally tainted pleas. There are ample ways to protect a confidential informant that do not violate an individual's right to make informed decisions relating to their criminal charges.

The South Carolina Court of Appeals' continued reliance on *Hyman* (without legislative changes) is erroneous, misguided, unconstitutional, and elevates a solicitor's policy above a

defendant's rights to make a knowing, intelligent decision. This Court should grant Mr. Hines's petition for a writ of certiorari.

II. This Court should overrule *Hyman*.

The *Hyman* decision is wrongly decided because it fails to respect the legislature's intent in passing legislation that controls how discovery in criminal cases in South Carolina is to be conducted. Instead, in the *Hyman* opinion, this Court crafted its own rules regarding discovery and has allowed solicitors to unilaterally and without meaningful oversight decide what discovery may be provided to a criminal defendant so long as it alleges it is curtailing this right to protect confidential informants. *Hyman* holds "in cases involving a confidential informant, a criminal defendant's interest in access to certain evidence must be weighed against the State's interest in protecting the identity and safety of the informant." *Hyman*, 397 S.C. at 47, 723 S.E.2d 375 at 381. The Court then went on to approve the solicitor's withholding discovery in the case since defense counsel was provided still photographs. While it may be true the State has an interest in protecting informants, there is a procedure for protecting this interest that was not followed in the *Hyman* case nor in this case. Rule 5(d)(1) of the Rules of Criminal Procedure provide that:

> Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an *ex parte* showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

To the extent *Hyman* is understood to countenance a solicitor's office making unilateral decisions to withhold discovery required by statute and without undertaking the actions expressly provided for by the statute in situations where the safety of confidential informants is a concern,

this Court should overrule *Hyman* and make it clear that the remedy in these situations has been provided for by the legislature and solicitors are expected to follow it.

Additionally, this Court should make clear that predicating plea offers on access to discovery is improper and amounts to coercive plea-bargaining. This Court should grant certiorari and allow for additional briefing on this claim.

III. Did the court of appeals err by finding Hines's guilty plea was voluntary when the State filed notice to seek LWOP after initially extending an offer of 10 years if Hines waived his right to discovery, and as a way to keep Hines from pursuing access to his discovery, and when the circuit court's colloquy with Hines was insufficient under existing state law?

On December 15, 2015, a hearing was held on Hines's motion to relieve his counsel, Mr. Chris Wellborn. On that date, the State indicated it would seek life without parole for this offense. App. 118. Hines informed the Court he wanted to retain another attorney. App. 114.

Two days later, on December 17, 2015, Hines appeared before Judge John Hayes and entered his plea. The solicitor informed the Court Hines was proceeding pro se:

> I have no doubt in his intelligence or his understanding of the proceedings. He was advised of his right to counsel by Judge Hall on Tuesday when he relieved Mr. Welborn of his services.
>
> App. 101.

The court thereafter asked Hines about his educational background and then the following exchange occurred:

> THE COURT: You have the right to have an attorney represent you in regard to this charge and if you cannot afford one the State would be required to appoint an attorney to represent you within some limits. That is you would be appointed a lawyer to represent you if you wish. If you could not afford one the limitation being that you are assigned an attorney that would be your attorney. It's dangerous for you to proceed without an attorney since you're not one and there is a benefit in having an attorney to represent you.
>
> Do you understand that?

MR. HINES: Yes, sir.

THE COURT: Do you wish to have an attorney in regard to this charge or give up that right?

MR. HINES: I give up that right.

THE COURT: I find Mr. Hines has freely voluntarily knowingly and intelligently understanding the benefits of counsel and the danger of self-representation exercises his right to proceed pro se. App. 102.

Judge Hayes then accepted the plea and sentenced Mr. Hines to 14 years in prison.

The Court of Appeals erred in finding that this colloquy comported with the requirements of the law in this state.

In *State v. Samuel*, 422 S.C. 596, 813 S.E.2d 487 (2018), this Court determined the standard of review for this claim. Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel is a mixed question of law and fact which appellate courts review de novo. *United States v. Lopez-Osuna*, 242 F.3d 1191, 1198 (9th Cir. 2000). The Court will consider the defendant's history, the circumstances of his decision as presented to the circuit court at the time the defendant made his request. *United States v. Singleton*, 107 F.3d 1091, 1097 (4th Cir. 1997).

As this Court acknowledged in *Samuel*, whether a defendant has intelligently waived his right to counsel depends on the particular facts and circumstances surrounding each case, including the background, experience, and conduct of the accused. *Singleton*, 107 F.3d at 1097.

The circuit court failed to ensure that Hines's request to represent himself was knowing and voluntary for two reasons. First, the colloquy with Hines was perfunctory at best and was not a meaningful inquiry into whether Hines was making a knowing and voluntary waiver of his right to counsel. But secondly, the court did not make a sufficient inquiry into the circumstances of the case to realize that Hines was being coerced into taking this plea because the State had served its notice to seek life without parole after the court relieved Mr. Welborn as Hines's lawyer. This

plea must be understood in the context of Hines's repeated efforts to access his discovery and see the videotape in this case. Unable to secure the evidence against him, Hines's relationship with his lawyer faltered. Seeking a new lawyer, the State then threatened Hines with a life sentence if he did not take a plea (and waive his right to his discovery). The circumstances of Hines's plea were egregiously coercive and improper on the part of the State. It is hard to construe the State's actions in this case as anything other than a bald attempt to threaten Hines's into foregoing his efforts to obtain the discovery in his case. Without a lawyer, and with the remainder of his natural life in the balance, Hines took the plea. He still has not seen the discovery in his case.

As for the perfunctory nature of the judge's inquiry, the judge did not seek the kind of meaningful inquiry that this Court approved of in *Samuel.* For instance, the court merely elicited from Hines that he was in college and that he worked as an electrician's helper. App. 101-102. The court did not determine, prior to allowing Hines to proceed *pro se*, whether Hines knew the elements of the crime or what his potential sentence could be. The court did not inquire as to alcohol or drug abuse or current medications. The court did not inquire as to why Hines was representing himself and whether he really wanted to. Had the court done so, it would have revealed the discovery issues in this case. The court did not explain what rights Hines would be giving up until after he found Hines had waived his right to counsel. In short, the circuit court did not undertake the kind of inquiry that satisfied a majority of this Court in *Samuel* that the defendant knowingly and voluntarily waived his right to counsel.

The Court of Appeals erred in summarily finding that Hines's waiver of the right to counsel was knowing, voluntary, and not coerced by the State. The Court of Appeals rests its holding on its finding that Hines voluntarily relieved his prior lawyer and then voluntarily decided to "take advantage of the State's plea offer, which reduced his exposure from LWOP to fourteen years'

imprisonment." *Hines* at *18. Respectfully, this is not a proper *Faretta* analysis and disregards the discovery issue that animates this case. This Court should grant certiorari and allow additional briefing on this issue.

CONCLUSION

This Court should grant the writ.

Respectfully submitted,

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