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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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Certiorari to Greenwood County  
Court of Common Pleas  
Post-Conviction Relief

J. Mark Hayes, II, Circuit Court Judge

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Appellate Case No.: 2018-001116

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Jamal Hakeem, ..... Petitioner,

vs.

State of South Carolina, ..... Respondent.

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PETITIONER'S BRIEF

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## TABLE OF AUTHORITIES

### Cases

<u>Buckson v. State,</u> 423 S.C. 313, 815 S.E.2d 436 (2018) .....	6
<u>Castro v. State,</u> 427 S.C. 77, 789 S.E.2d 44-47 (2016) .....	7,8
<u>Cherry v. State,</u> 300 S.C. 115, 386 S.E.2d 624 (1989).....	8
<u>Goins v. State,</u> 397 S.C. 568, 726 S.E.2d 1 (2012) .....	6
<u>Harden v. State</u> 276 S.C. 249, 255, 277 S.E. 2d 692, 694-95 (1981) .....	7,8
<u>Jordan v. State,</u> 406 S.C. 443, 752 S.E.2d 538 (2013).....	6
<u>Medlin v. State</u> 276 S.C. 540, 541, 280 S.E.2d 648 (1981) .....	7
<u>Sellner v. State,</u> 416 S.C. 606, 787 S.E.2d 525 (2016) .....	6
<u>Smalls v. State,</u> 422 S.C. 174, 810 S.E.2d 836 (2018) .....	6
<u>Strickland v. Washington,</u> 466 U.S. 668, 104 S.Ct. 2052 (1984).....	6
<b>Canons</b>	
Judicial Canon 3 .....	7
<b>Constitution</b>	
U.S. Constitution Amend. VI .....	7

## STATEMENT OF ISSUE ON APPEAL

Whether trial counsel was ineffective in failing to file a motion to reconsider Petitioner's sentence after the trial judge communicated a plea offer to Petitioner and in failing to put this communication by the trial judge on the record when the trial judge imposed a sentence ten years harsher than its previously communicated fifteen-year offer?

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenwood County Clerk of Court. Petitioner was indicted during the June 2015 term of the Greenwood County Grand Jury for armed robbery and possession of a firearm during the commission of a violent crime (2015-GS-24-0855, 0856). Petitioner proceeded to a jury trial on July 13, 2015 before the Honorable Edward W. Miller. Geddes Anderson, Esquire represented Petitioner at trial. C. Yates Brown and Wade Downtin, Esquires prosecuted the case. After the jury returned guilty verdicts on both counts, Judge Miller sentenced Petitioner to twenty-five years for armed robbery and five years for the weapons charge. A timely notice of intent to appeal was served on July 18, 2015. Kathrine Hudgins, Esquire with the Division of Appellate Defense filed an Anders brief on Petitioner's behalf along with an accompanying motion to be relieved on May 11, 2016. This court dismissed the appeal without argument in an unpublished, *per curiam* opinion on February 8, 2017. Remittitur was returned February 24, 2017.

Petitioner filed an application for post-conviction relief on May 16, 2017 in which he alleged several instances of ineffective assistance of counsel. A return was filed by the State on October 2, 2017. Petitioner amended his application for post-conviction relief by and through his attorney, Ashley A. McMahan, Esquire, on February 20, 2018. A hearing was held on this matter on February 27, 2018 in Laurens, South Carolina before the Honorable J. Mark Hayes, II. Judge Hayes denied relief on all grounds and dismissed the action via an order filed May 7, 2018. A timely notice of appeal was received by the Supreme Court on June 18, 2018. Susan Hackett, Esquire of the Division of Appellate Defense filed a Johnson Petition and appendix on March 5, 2019. Petitioner filed a *pro se* Response to Johnson Petition on June 14, 2019. On June 17, 2019, the Supreme Court transferred the case to this court and an order requiring a new petition was

issued November 4, 2020. Undersigned counsel moved to be substituted in as counsel, with consent of Ms. Hackett, on November 24, 2020. The order was granted on December 1, 2020.

### **STATEMENT OF FACTS**

On April 11, 2013, a Shell station in Greenwood was robbed. The clerk on duty testified the robber took a beer from the back cooler, placed it on the counter, and asked for three packs of Newport cigarettes. (App. p.104, line 20 – p.105, lines 1-24) As part of the cigarette purchase, the clerk entered the robber's date of birth into the computer. When she turned around from reaching for the cigarettes, the robber pointed a gun at her and asked for all of the money from the register, which he received and left the store. (App. p.105, lines 11-20) When law enforcement arrived, the clerk recounted this story and provided a receipt with the date of birth provided by the robber. (App. p.134, line 22 – p.135, lines 1-6) This information was used to obtain a list of suspects with the same date of birth and to develop a lineup containing these individuals, which included Petitioner. (App. p.136-37)

From this lineup, the clerk identified Petitioner, which led the Greenwood Sheriff's Office to Petitioner's house where they encountered his wife, Bird Hakeem. (App. p.108, line 12 – p.109, line 22; p.137 lines 5-15; p.139, line 20 – p.140, line 25) She testified at trial that officers surrounded the house with guns drawn. (App. p.53, line 1 – p.54, line 25) Petitioner was not home, but his wife called him and asked him to return. (App.p.141, lines 1-6) He did so and was immediately arrested. (App.p.142, lines 15-21) Mrs. Hakeem authorized a search of the home, which yielded items consistent with the report from the clerk, including two unopened packs of Newports in the pocket of a sweatshirt. (App. p.147, line 20 – p.149, line 24) Petitioner was ultimately convicted.

Through the post-conviction relief process, Petitioner revealed that, while the jury was deliberating, the trial judge approached him regarding taking a plea deal. (App. p.258 (list of allegations); p. 268 (amended application); p.282, lines 2-23) This was reiterated by his wife, Bird Hakeem, and his attorney, Geddes Anderson. (App.p.293, line 6 – p.294, line 8; p.302, line 3 – p.303, line 18; p.304, lines 7-18) Though the accounts differ slightly, they all reflect that the trial judge was asking whether Petitioner was going to take a plea offer for 15 years. (App.p.284, line 25 – p.285, line 16) Trial counsel testified that a plea offer for ten years had been on the table since the beginning. (App. p.296, lines 14-22) Petitioner was ultimately sentenced to 25 years (25 and 5, concurrent). (App. p.230, lines 5-6) Similarly, both Petitioner and trial counsel’s testimony reflect that trial counsel never discussed the possibility of filing a motion for reconsideration regarding his sentence. (App. p.291, lines 9-13; p.302, line 22 - p.303, line 18)

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E. 2d 436, 440 (2018); Smalls, 422 S.C. at 180-181, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E. 2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, at 180-181, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3, (2012).

## ARGUMENT

**Trial counsel was ineffective in failing to file a motion to reconsider Petitioner's sentence after the trial judge communicated a plea offer to Petitioner and in failing to put this communication by the trial judge on the record when the trial judge imposed a sentence ten years harsher than its previously communicated fifteen-year offer.**

The consideration of post-conviction relief cases necessarily involves a review of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). While the general ideas of its two prong test – was counsel's performance deficient and, if so, did it prejudice applicant so much as to establish a reasonable probability that, but for these errors, the result of the trial would have been different – are forefront in our minds as practitioners, there is another element that proves useful in these analyses. *Strickland* established the rule that, in proving a claim of ineffectiveness, “the defendant must overcome the presumption that, under the circumstances, the challenged action

‘might be considered sound trial strategy.’” Id. at 689. Nothing about defense counsel’s conduct surrounding the trial judge’s plea offer can be viewed as sound trial strategy and, therefore, must be considered deficient and prejudicial conduct.

Petitioner testified at the post-conviction relief hearing that, while the jury was deliberating, “me, my wife and my attorney was in the back room discussing the case and the judge came in and offered me 15 years and he said, ‘You might want to talk to your wife about this. I’ll give you some time to think about.’ He came back in about 15 or 20 minutes and he said, ‘Take it or leave it.’” (App. p.282, lines 9-14) Petitioner turned down this offer because he was not guilty but was surprised that trial counsel did not put the incident on the record. (App. p.283, lines 3-8) He added that he felt punished by the trial judge for not taking the plea because the sentence he was sentenced to ten years more than the offer. (App p.283, lines 16-21) The issues surrounding this scene are multiple.

Bird Hakeem, wife of Petitioner, recalls trial counsel being called to the bench, then sent to a back room with herself and Petitioner. At some point, the Judge came in and said, “Yay or nay?” (App. 293, lines 9-16) While back there, she recalls talking with trial counsel about whether Petitioner should take a 10-15 year plea, which she wanted Petitioner to take. (App. P. 293, line 25- p. 294, line 6) She could not recall whether the Judge mentioned a term of years. (App. P. 295, lines 3) Trial counsel also recalled the Judge coming to the door, but could not recall what he said. (App. P. 298, lines 14-19)

The record does not include the content of the bar conference between the Judge and trial counsel that preceded the backroom conference during deliberations. The failure to capture this conversation is just as crucial as the failure to capture anything that happened with the Judge in the back hallway. This potentially changes the subject of “Yay or nay?” from “Will my afternoon be free?” to “Will he take the 15-year deal?” The apparent simplicity of this question does not remove the potential for impropriety. If the trial judge was instructing trial counsel to speak to Petitioner about a plea deal, regardless of the number of years, this should have been on the record pursuant to both Medlin v. State 276 S.C. 540, 541, 280 S.E. 2d 648 (1981) and Harden v. State, 276 S.C. 249, 255,

277 S.E.2d 692, 694-95 (1981). Again, by urging Petitioner to take the plea offer, the trial judge was infringing upon Petitioner's inviolate constitutional right to exercise his right to a jury trial.

Initially, it is highly unusual for a judge to speak to a defendant during jury deliberations. While not as offensive as a trial judge violating the sanctity of a jury deliberation room, it is an event that does not happen often, perhaps in part because it can be seen as the judge being less than impartial and potentially violative of Judicial Canon 3. More worrisome than how the trial judge made this communication is what he said.

By urging Petitioner to take the plea offer, the trial judge was infringing upon Petitioner's inviolate constitutional right to exercise his right to a jury trial. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . ." U.S. Const. amend. VI. As has recently been considered by our state Supreme Court, "[w]hen a trial judge considers the fact that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant, it is an abuse of discretion." Castro v. State, 427 S.C. 77, 789 S.E.2d 44 (2016)(citations omitted). In Castro, the trial judge stated during sentencing that "the State has had to take you to trial on a case where there was overwhelming evidence of your guilt." Id., 427 S.C. at 81, 789 S.E.2d at 46. The Castro court continued:

Rather, a trial judge abuses his or her discretion when he or she *considers* the fact that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant. Thus, although evidence from the record of other, valid reasons for a sentence might aid an appellate court in determining whether the trial court improperly considered a defendant's decision to proceed to trial during sentencing, those other sentencing factors do not negate the abuse of discretion that occurs when one of the sentencing factors considered by the trial judge was the defendant's decision to proceed to trial.

Id., 417 S.C. at 83, 789 S.E.2d at 47. Clearly, the trial judge in the matter *sub judice* was invested in the outcome of Petitioner's deliberation on whether to take the plea. Evidence provided by three witnesses, all highly involved in the case, show that the length of Petitioner's sentence was on the forefront of the trial judge's mind. If the jury came back with guilty verdicts, the length of sentence

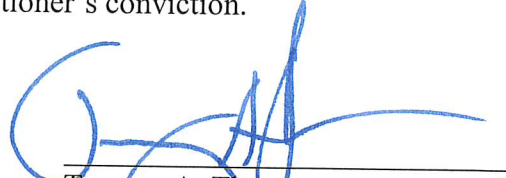
would have been the only decision left for the trial court to make and he was clearly looking to avoid that responsibility by urging Petitioner to take the plea offer.

Unfortunately, the similarities between the case at bar and Castro do not end there. In Castro, trial counsel filed a motion to reconsider sentencing but did not argue the fact that the trial judge was obviously influenced by Defendant's decision to exercise his right to a jury trial. Id., 417 S.C. at 81, 789 S.E.2d at 46. The Supreme Court found this to clearly be deficient performance and easily overturned the post-conviction relief's finding that trial counsel's decision was a valid trial strategy as contemplated in Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Rather, it found, trial counsel's testimony at the post-conviction relief hearing revealed no strategy at all.

The exact same scenario is present here but to a higher degree. Here, trial counsel failed to file a motion for reconsideration on any basis. Similarly, however, his testimony at the post-conviction relief hearing was devoid of any reasoning that could make it a trial strategy. In fact, he testified, "I will admit. Probably I should have waited a few days and filed a motion, but I didn't do it and file an appeal. So I will admit that that was inadvertent. Something perhaps I should have done." (App. p.302, lines 4-7). Regardless of trial counsel's thoughts on the likelihood of success of such a motion, he was ineffective per Castro for failing to file it. Had he made a timely objection or filed such a motion, it would have been preserved for appeal thus allowing earlier review of the matter and, potentially, a shorter term and avoidance of retrial for Petitioner. See Castro, 417 S.C. at 84, 789 S.E.2d at 48 ("Because trial counsel was deficient in failing to object to the trial judge's improper consideration of petitioner's decision to exercise his right to jury trial in sentencing petitioner, and, had the objection been preserved for appeal, an appellate court would have held the trial judge abused his discretion, we hold the PCR judge erred in denying petitioner's application for PCR.")

## CONCLUSION

This Court must remand or dismiss Petitioner's conviction.



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