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# The State of South Carolina

## In the Supreme Court

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APPEAL FROM SPARTENBURG COUNTY  
Court of Common Pleas

J. Mark Hayes II, Circuit Court Judge

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Case No. 2012-213146

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**RECEIVED** ISAAC J. WALKER,

OCT 03 2013

*Petitioner,*

v.

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA,

*Respondent.*

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PETITION FOR A WRIT OF CERTIORARI

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**ISSUE PRESENTED**

Did the PCR court err in finding that the Petitioner would not have accepted a plea offer where trial counsel was found to not have communicated the offer to the petitioner, as the Sixth Amendment right to effective assistance of counsel now extends to the consideration of plea offers that lapse or are rejected?

## STATEMENT

### **Indictment and Trial**

The Applicant was indicted by the Spartanburg County Grand jury during the January 2007 term of General Sessions for burglary first degree (2006-GS-42-4027). App. 29. On January 23, 2008, the Applicant was convicted of this charge by a jury. App. 29. The Honorable Paul M. Burch sentenced the Applicant to confinement for twenty-five (25) years on the charge of Burglary first degree. App. 64. After a motion for a New Trial and a Motion to Reconsider were filed by trial counsel, the Applicant's sentence was reduced to twenty-two (22) years. App. 65, 80.

### **Appeal**

A timely notice of appeal and an Anders brief were filed by the Petitioner. However, the Petitioner voluntarily withdrew his appeal and the appeal was dismissed and the Remittitur was issued by the South Carolina Court of Appeals on October 22, 2009. App. 274, 285.

### **PCR Application and Evidentiary Hearing**

On October 20, 2010, the Petitioner filed his application requesting post-conviction relief. App. 288. In his original application, Petitioner alleged newly discovered evidence, ineffective assistance of counsel, lack of subject matter jurisdiction, and miscarriage of justice. The Respondent filed its return on May 3, 2011. App. 298. Petitioner then filed a first amendment to the PCR application on June 20, 2011. App. 304. Petitioner added eighteen (18) new claims to his original PCR application. On August 24, 2011, Petitioner filed a second amendment to the PCR petition. App. 308. In this amendment the Petitioner alleged the following:

Applicant is informed and believes that on or about October 11, 2006, his Counsel, Kathleen J. Hodges with the Office of the Seventh Circuit Public Defender, received an offer from the Solicitor's Office allowing the Applicant to plead straight up to the original charge of grand larceny which if not accepted

would result in the direct indictment of Applicant on the charges of burglary first degree; that this offer was never communicated to Applicant; and that the Applicant would have accepted this offer in order to avoid indictment on charges of Burglary first degree. App. 308.

An evidentiary hearing was subsequently held at the Spartanburg County Courthouse before the Honorable J. Mark Hayes, II, on December 6, 2011. App. 311. Petitioner was represented by Ransome A. Coleman and the Respondent was represented by Suzanne H. White of the South Carolina Attorney General's Office.

**Isaac J. Walker (Petitioner)**

Petitioner testified at the evidentiary hearing and introduced several exhibits in support of his claim. Petitioner testified that he was arrested on September 6, 2006, on charges of Grand larceny. App. 317, ll. 14-20. He bonded out of jail on October 15, 2006. App. 319, ln. 7. He stated that he did not speak to his appointed attorney until he received a phone call from her on or about December 18, 2007. App. 318, ll. 3-14. During that phone call, Petitioner testified that his attorney introduced herself to him and informed him that he was charged with Burglary first degree. App. 322, ll. 3-5. Petitioner argued with his attorney because he felt there must be a mistake since he bonded out on a grand larceny charge and had no knowledge of a burglary charge. App. 322, ll. 6-16. Trial counsel explained to him that he had been directly indicted on the burglary charge and that a plea offer had been made to plead to two burglaries or he would be tried on burglary first degree. App. 323, ll. 8-17. Ultimately Petitioner rejected the offer and was tried and convicted of burglary first degree. App. 29; App. 31.

After his conviction, Petitioner testified that he requested and received a complete copy of his file that was in the possession of his trial counsel. App 319, ll 20-25; App. 320, ll. 1-4. While reviewing those records Petitioner discovered an apparent letter to his trial counsel that indicated an offer to plead to his original charges had been made to his attorney. App. 24; App

319, ll. 9-16; App. 320, ll. 22-25; App. 321, ll. 1-4. The letter was addressed to Kathleen Hodges (trial counsel) and dated "October 11". App. 24. The letter clearly made an offer for Petitioner to plead to grand larceny where the value of the goods was between \$1000 to \$5000. The letter further explained that if he did not accept the offer by "October 25" then the offer would be withdrawn and Petitioner would be directly indicted for burglary first degree. App. 24. Petitioner testified that his attorney did not communicate this offer to him. App. 321, ll. 6-10.

Petitioner also discovered a series of emails between his attorney and the prosecutor in which the prosecutor made a second offer, after Petitioner was indicted for burglary first degree, to plead to one count of burglary second degree (nonviolent) and one count of burglary second degree (violent). App. 324, ll. 21-25; App. 325, ll. 1-17. In the email exchange trial counsel explains, ". . . I need to get him in to go over the discovery and have a face to face talk re the facts and law. He is not going to acquiesce on the telephone. I will keep you posted." App. 31; App. 333-335. The next day trial counsel wrote to the prosecutor that Mr. Walker declined the state's offer and requested a jury trial. App. 31.

Despite the fact that Petitioner had rejected the offer to plead to burglary, he was adamant that he would have accepted an offer to grand larceny if it had been made known to him. App. 325-326; App. 333, ll. 6-10; App. 337, ll. 6-14; App. 348, ll. 13-23; App. 353, 6-25; App. 364, ll. 19-25. At the hearing Petitioner admitted that he went to the house with his co-defendant, they were there together, they left together and they left with the guns. App. 330-331. He further stated, "Like I say, again, I would have accepted this plea. Ain't no way around it considering the circumstances of the case. I took her out there. She brought them guns. I was in my car." App. 337, ll. 6-14. He testified that the reason he did not accept the plea offer to Burglary

Second Degree is that he felt he was innocent of Burglary, however he would have accepted a plea to Grand larceny. App. 364, ll. 19-25.

**Lucille McEntyre (Mother of Petitioner)**

The mother of the petitioner testified that she recalled the telephone call from trial counsel in December of 2007. App. 368-369. She further testified that Petitioner had not received any mail at the house from the Public Defender's Office. App. 370-371. She testified that she was very involved with the Petitioner's case and was with him every time that he met with trial counsel except for the first time he met with her. App. 371-372; App. 373 ll. 6-72. She stated that she had not met with or spoken to trial counsel prior to December of 2007. App. 373-374. She testified that her son had said that he did not go in the house and that was corroborated by the victim. App. 377, ll. 5-7; App. 379, ll. 7-24.

**Kathleen J. Hodges (Trial Counsel)**

Ms Hodges testified that she was appointed to represent the petitioner in September of 2006. App. 385, ll. 14-15. She testified that she also represented Petitioner on a 2004 burglary charge that had originally been dismissed at a preliminary hearing but was directly indicted in July of 2006. App. 385, ll. 18-25. (That charge is not the subject of this post conviction relief action). Her original appointment was for a grand larceny warrant. App 386, ll. 18-25. Ms. Hodges agreed that she had received an offer for Petitioner to plead to grand larceny in October of 2006. App. 387, ll. 7-23.

She then read from an email which appeared to reference the October plea offer. App. 388-389; App. 25; App. 27. In the email she tells the prosecutor that she intends to go to the jail the next week and communicate the offers. App. 25; App. 388-399. Apparently the prosecutor had received no response to his offer as of November 1, 2006, so he sent an email reminding trial

counsel that he had extended an offer and stated that he would extend the date to respond to November 15, 2006, since she was getting ready for trial at the time he extended the offer. App. 27; App. 388-399. Ms. Hodges then explained that her normal practice was to relay offers to her clients but she had no specific recollection of relaying this particular offer to Petitioner and had no other documentation in her file that would indicate that she had relayed the offer. App. 390, ll. 5-19.

Ms. Hodges explained that Petitioner was impassioned about the case and told her that the co-defendant claimed that she owned the rifles. App. 390-391. Ms. Hodges stated that she did not believe that the Petitioner would have pled to Grand larceny. App. 399, ll. 18-21.

### **Order of Dismissal**

On March 16, 2012, Judge Hayes ruled in his Order of Dismissal that Petitioner failed to establish plea counsel provided ineffective assistance of counsel in that it was more likely than not that trial counsel had communicated the offer to Petitioner. App. 411. He based this ruling on the fact that it was the common practice of trial counsel to communicate plea offers to her clients although she had no specific recollection of communicating this plea offer to Petitioner. App. 415. Furthermore, Judge Hayes found that it was more likely than not that the Petitioner would not have accepted any offer made to him by the prosecution based upon the Petitioner's "passionate testimony regarding his limited involvement with the facts associated with the crime." Consequently, Petitioner's request for PCR relief was denied. App. 415-416.

### **Motion for Reconsideration**

On April 3, 2012, the Petitioner filed a Motion for a New Trial or Reconsideration pursuant to Rule 59, SCRCP. App. 419. In the motion the Petitioner argued that a review of the evidence presented at the PCR hearing clearly showed that it was more likely than not that trial

counsel failed to communicate the offer to plead to grand larceny to the Petitioner. Further he argued that it is more likely than not that the Petitioner would have accepted the offer if it had been made known to him and explained by trial counsel.

On April 17, 2012, the Attorney General's office filed a return to the Motion for Reconsideration. App. 424. In their Return the Attorney General's office argued that the Court observed each witness and assessed their credibility. The Attorney General's office admitted that there was a scrivener's error in the Order which should be corrected but, otherwise, the ruling of the Court should remain unchanged.

On April 24, 2012, the Petitioner filed an Amendment to the Motion for Reconsideration. App. 427. In the Amendment Petitioner asked the Court to reconsider its decision in light of the recent decisions by the United States Supreme Court in Missouri v. Frye, 132 S. Ct. 1399 (2012) and Lafler v. Cooper, 132 S. Ct. 1376 (2012). Petitioner argued that these cases created a standard by which a review of the evidence presented at the PCR hearing would result in a finding that (1) trial counsel failed in her duty to communicate the formal offer of the Solicitor to plead guilty to a less serious charge, (2) Applicant would have accepted the offer had it been communicated to him, (3) neither the Solicitor nor the trial court would have prevented the plea from being accepted and implemented, and (4) the loss of the plea opportunity led to a trial and conviction on more serious charges and the imposition of a more severe sentence than Applicant would have been subject to under the original plea offer.

On June 14, 2012, a hearing was convened on Petitioner's Motion to Reconsider. App. 432. Petitioner argued that the recent Supreme Court cited in his motion had an impact on his case. App. 436-437. He argued that without any documentation whatsoever that the offer had been conveyed to the Petitioner and the fact that trial counsel had no independent recollection of

conveying the offer to Petitioner, the Court should have found that the offer was not communicated to Petitioner and trial counsel's performance was deficient. App. 436, ll. 1-7. The State argued that Lafler and Frye should not be applied retroactively. App. 442, ll. The State also argued that the Petitioner still has the burden to prove both deficient performance and prejudice so the application of Lafler and Frye would not change the outcome of the case. App. 443, ll. 2-5.

### **Amended Order of Dismissal**

On October 28, 2012, the Court signed an Amended Order of Dismissal. App. 448. In this Order the Court found that the Applicant had met his burden of proof as to counsel's deficiency in failing to convey the October 2006 plea offer. App. 452. However, the Court did not alter its ruling that Applicant had failed to establish the second prong of prejudice. App. 452-453.

In the Amended Order the Court noted that although the Applicant testified passionately that he would have accepted the October 2006 plea had he known about it, he also testified equally passionately regarding his limited involvement with the facts associated with the crime. For that reason the Court found that Petitioner's claim that he would have accepted the plea offer was not credible and it was more likely than not that he would not have accepted the offer had it been communicated to him. App. 452-453.

## ARGUMENT

**The PCR court erred in finding that the Petitioner would not have accepted an offer to plead to grand larceny if it had been communicated to him by his trial counsel. The Sixth Amendment right to effective assistance of counsel now extends to the consideration of plea offers that lapse or are rejected.**

**Standard of Review:** An appellate court gives great deference to the PCR court's findings of fact and conclusions of law. Shumpert v. State, 378 S.C. 62, 66, 661 S.E.2d 369, 371 (2008). If matters of credibility are involved, then this court gives deference to the PCR court's findings because this court lacks the opportunity to directly observe the witnesses. Solomon v. State, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994). Any evidence of probative value in the record is sufficient to uphold the PCR court's ruling. Caprood v. State, 338 S.C. 103, 109–10, 525 S.E.2d 514, 517 (2000).

**Argument:** Petitioner's testimony presented at the evidentiary hearing unequivocally supports that Petitioner would have accepted the prior more favorable plea offer had it been made known to him and there is no evidence indicating that the solicitor would have withdrawn the plea offer, or that the plea court would not have accepted his plea. Accordingly, the PCR court erred in finding that Petitioner would not have accepted the plea offer even if it had been made known to him. See Missouri v. Frye, 566 U.S. \_\_\_\_, 132 S. Ct. 1399 (2012), (holding the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected, and reaffirming Hill v. Lockhart, 474 U.S. 52 (1985) (applying the ineffective assistance of counsel standard set forth in Strickland v. Washington, 466 U.S. 668 (1984) to guilty pleas); see also Lafler v. Cooper, 566 U.S. \_\_\_\_, 132 S. Ct. 1376 (2012), (addressing as the companion case to Frye, situations where the subsequent conviction is from a full trial and jury verdict, and noting that these cases address where "inadequate assistance of

counsel caused nonacceptance of a plea and further proceedings led to a less favorable outcome”).

The Sixth Amendment guarantees “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” U.S. Const. amend. VI. The United States Supreme Court established the constitutional right to *effective* assistance of counsel in Powell v. Alabama, 287 U.S. 45 (1932), and subsequently created the standard for ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984). The Supreme Court extended this standard to guilty pleas in Hill v. Lockhart, 474 U.S. 52 (1985), and recently expanded this standard to apply during the plea-bargaining stage. See Missouri v. Frye, 566 U.S. \_\_\_\_, 132 S. Ct. 1399 (2012) (holding the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected); see also Lafler v. Cooper, 566 U.S. \_\_\_\_, 132 S. Ct. 1376 (2012) (addressing, as the companion case to Frye, cases where “inadequate assistance of counsel caused nonacceptance of a plea and further proceedings led to a less favorable outcome” after a full trial and jury verdict).

In Missouri v. Frye, the “case [arose] in the context of claimed ineffective assistance that led to the lapse of a prosecution offer of a plea bargain, a proposal that offered terms more lenient than the terms of the guilty plea entered later.” Frye, 132 S. Ct. at 1404. There were two questions before the United States Supreme Court in Frye: (1) “whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected[;]” and (2) “If there is a right to effective assistance with respect to those offers, . . . what a defendant must demonstrate in order to show that prejudice resulted from counsel’s deficient performance.” Frye, 132 S. Ct. at 1404.

The Frye 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., 132 S.Ct. at 1405 (citations and internal quotation omitted). The Frye Court held that the right to effective assistance of counsel extends not only to those situations in which a criminal defendant accepts a plea bargain and waives his right to trial,<sup>1</sup> but also to situations where plea offers are rejected or allowed to lapse. Id. at 1409.

In support of its holding, the Frye Court explained:

The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours ‘is for the most part a system of pleas, not a system of trials,’ *Lafler, post*, at 11, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.

Id. at 1407.<sup>2</sup> The Court emphasized, “*In 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*” and “*defense counsel have responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires.*” Id. at 1407 (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

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<sup>1</sup> See Hill v. Lockhart, 474 U.S. 52 (1985) (establishing the standard for ineffective assistance of counsel claims arising from a guilty plea); see also Padilla v. Kentucky, 559 U.S. \_\_\_\_, 130 S. Ct. 1473 (2010) (finding ineffective assistance of counsel where counsel failed to advise a defendant regarding the deportation consequences of a conviction).

<sup>2</sup> The Frye Court noted, The “simple reality” is that “ours ‘is for the most part a system of pleas, not a system of trials.’” Frye, 132 S. Ct. at 1407 (citing Lafler, 132 S. Ct. at 1388). Specifically, “[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.” Id.

help him.” Id. at 1408 (citing Massiah v. United States, 377 U.S. 201 (1964) (quotation citation omitted)).

Having found that the Sixth Amendment right to effective assistance counsel applies to the plea bargaining stage, the Frye Court then applied the Strickland ineffective assistance of counsel standard to the plea bargaining stage: (1) whether plea counsel’s performance was deficient by failing to communicate the prior more favorable plea offer to Frye; and (2) whether Frye was prejudiced as a result of plea counsel’s deficient performance. The Frye Court held that plea counsel’s performance was deficient, as it fell below “an objective standard of reasonableness” when he “did not make a meaningful attempt to inform the defendant of a written plea offer before the offer expired.” Id. at 1410.

As to proving prejudice where a plea offer has lapsed or been rejected because of counsel’s deficient performance, the Frye Court adapted the Strickland standard to require a PCR claimant to show: (1) that there is “a reasonable probability [the defendant] would have accepted the earlier [more favorable] plea offer had [he] been afforded effective assistance of counsel[;]” and (2) that there is “a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law.”<sup>3</sup> Id. at 1409.

The Frye Court noted, “[I]n most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain.” Id. at 1410. Therefore, “[t]o establish prejudice in this instance, it is necessary to show a

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<sup>3</sup> The Court noted that its adaptation of the Strickland standard “does nothing to alter the standard laid out in Hill[, 474 U.S. 52].” Frye, 132 S. Ct. at 1409.

reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or *a sentence of less prison time.*” Frye, at 1409 (emphasis added); see also Glover v. United States, 531 U.S. 198, 203 (2001) (“[A]ny amount of [additional] jail time has Sixth Amendment significance”), quoted with approval in Lafler, 132 S. Ct. at 1387.

Applying the modified Strickland standard, the Frye Court found that “there appears to be a reasonable probability Frye would have accepted the prosecutor’s original offer of a plea bargain if the offer had been communicated to him, because he pleaded guilty to a more serious charge, with no promise of a sentencing recommendation from the prosecutor.” Id. at 1411. Notably, the Court noted that Frye had received a “new offense” after having received the former plea offer, and that the lower court failed to address whether the plea offer would have been adhered to by the prosecution and accepted by the court. Id. at 1411. Consequently, the Court remanded the case to allow the state court to address that question. Id. at 1411.

### **Deficient Performance**

In this case, the PCR Court found that plea counsel’s performance was deficient, as petitioner met his burden of proof in establishing that counsel failed to convey the October 2006 plea offer. App. 452. Therefore, Petitioner submits that the first prong of the ineffective assistance of counsel standard as set forth in Strickland, 466 U.S. 668, has been conclusively established as the State has not appealed the ruling.

### **Prejudice**

#### *(A) Petitioner Would Have Pled Guilty to Grand larceny*

Petitioner was prejudiced by plea counsel’s deficient performance because both prongs of the Frye Court’s adapted Strickland standard are satisfied. First, there is “a reasonable

probability [Petitioner] would have accepted the earlier [more favorable] plea offer had [he] been afforded effective assistance of counsel.” See Frye, 132 S. Ct. 1399 (2012). This is evinced best by Petitioner’s testimony at the evidentiary hearing: “Like I say, again, I would have accepted this plea. Ain’t no way around it considering the circumstances of the case. I took her out there. She brought them guns. I was in my car.” App. 337, ll. 11-14. Furthermore, in response to questioning by PCR counsel, the Petitioner admitted that he went to the house with his co-defendant, they were there together, they left together and they left with the guns. App. 330-331.

The PCR Court, however, made a determination that the Petitioner would not have accepted the offer even if it had been made to him. In so ruling the Court explained:

Although the Applicant testified passionately that he would have accepted the October 2006 plea had he known about it, this Court does not find it credible and is not convinced that the Applicant would have accepted the offer based upon his equally passionate testimony regarding his limited involvement with the facts associated with the crime. Given the Applicant’s demeanor, the fact that he rejected the pleas to burglary – 2<sup>nd</sup> degree, and his very strong position concerning his role in the crime, this Court finds that it is more likely than not that the Applicant would not have accepted the plea to the grand larceny charge if it were offered to him at any point. App. 452-453.

A review of the Petitioner’s testimony, however, establishes that he was passionate because he did not believe he was guilty of burglary and he was extremely upset that his attorney did not communicate the offer to plead to grand larceny. Petitioner repeatedly admitted to facts that would establish his guilt on the charge of grand larceny and the fact that the Petitioner was adamant that he was not guilty of burglary offers no insight whatsoever as to whether or not the Petitioner would have accepted a plea to grand larceny; particularly in light of the fact that the offer was never communicated to him or explained to him.

The Petitioner testified that the very first time he recalled speaking with trial counsel was during a phone call in December of 2007. App. 321-322; App. 352, ll. 7-11. During that phone

call his trial counsel told him that he was charged with burglary first degree. The Petitioner was very upset by the allegation because he only was aware that he was served with a warrant for grand larceny and had bonded out on a grand larceny. App. 321-322. Then, suddenly, a person he claimed he had never met called him and told him that he was now charged with burglary. App. 321-322; App. 332, ll. 1-5. Additionally, after a year of hearing nothing about his case he was told he had one day to decide whether to plead to two counts of burglary second degree or go to trial for burglary first degree. App. 323-324; App. 31-33. To further complicate the situation for the Petitioner, his attorney told him that he would also have to plead to a burglary charge that had been dismissed at a preliminary hearing in 2004. App. 335-336; App. 385-386. Petitioner was so upset just by testifying about the phone call that his PCR counsel had to encourage him to remain calm. App. 324, ll. 3-12. Recalling this series of events, quite understandably, was in large part the source of the passion that the Petitioner displayed.

He was also very passionate when testifying that he did not believe he was guilty of burglary. When describing the events that led to his arrest, the Petitioner made it clear that he had no prior knowledge that his co-defendant intended to commit a crime. App. 327-330. He also made it clear that he did not go inside the house. App. 327-330. He made it clear that he believed that the co-defendant was lying when she said that he went into the house and even the alleged victim of the crime agreed that he had not gone into the house. App. 363-364. He concisely explained why he was not going to plead to any offer of burglary:

“I went to trial because I did not commit a first degree burglary. I would have accepted the plea to grand larceny, ma’am. “ App. 364, ll 13-18.

“Ma’am, I would have not accepted a plea to burglary second or first degree. I would have accepted my original plea offer to grand larceny. That was no – there would not have been neither burglary, what I’m telling you.” App. 364, ll. 19-25.

However, he did appear to recognize that a burglary was committed and that he did potentially share some criminal liability for driving off with the guns in his car immediately after the burglary took place:

“If I’m guilty of anything, I’m guilty of accessory after the fact or pleading to a lesser included offense of grand larceny.” App. 337, ll. 21-23.

Petitioner submits that the Court’s reasoning that Petitioner would not have pled guilty to grand larceny because of his “passionate testimony regarding his limited involvement with the facts associated with the crime[,] Applicant’s demeanor[, and] the fact that he rejected the pleas to burglary – 2<sup>nd</sup> degree . . .” is simply not logical and clearly in error. The Petitioner made it very clear why he was passionate and why he would not plead to Burglary.

Nothing in his testimony indicated that he did not believe he had engaged in actions that would satisfy the elements of grand larceny. His testimony made it clear, by his reaction, that he either knew or had reason to know that the co-defendant had just taken guns from the house that they did not belong to her<sup>4</sup>. Petitioner told the PCR Court, on numerous occasions that he understood he had committed the crime of grand larceny:

“Like I say, again, I would have accepted this plea. Ain’t no way around it considering the circumstances of the case. I took her out there. She brought them guns. I was in my car.” App. 337, ll. 11-14.

“ . . . I considered the circumstances of me panicking and leaving when she brought the guns over to my car and put them in there and I helped to get them in the car, I would have accepted the plea again to grand larceny if she had informed me.” App. 346, ll. 19-24.

“I told you I was sitting in my car when Lisa Godfrey brought them guns out to my car and I had to get them in the car, ma’am.” App. 364; ll. 1-3.

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<sup>4</sup> “Ten minutes later I saw her walking from the back rights side of the yard carrying two guns to my car. Opened the back door and put them in the car. I freaked out, and I left.” App. 330, ll. 5-8.

During direct examination Petitioner admitted that he went to the house with his co-defendant, they were there together, they left together and they left with the guns. App. 330-331. Therefore, Petitioner appeared to admit and understand that under the facts of the case he was guilty of grand larceny. Unfortunately, according to the Amended Order of Dismissal, Petitioner never had the opportunity to discuss the elements of grand larceny with an attorney or make an informed decision as to whether he should plead to grand larceny as the offer was never communicated to him.

Regardless, even if the Petitioner maintained his innocence when initially presented with the offer of grand larceny, trial counsel could have discussed option of pleading *nolo contendere* or pursuant to North Carolina v. Alford. Additionally, his attorney could have explained to him in detail the elements of grand larceny or accessory to grand larceny and she could have given him her opinion as to whether or not he should take the offer. There is simply no logical basis for the PCR Court to conclude, particularly in light of the fact that the Petitioner has admitted to actions that would constitute grand larceny, that the Petitioner would more likely than not to reject all offers and proceed to trial. At the very least the Petitioner would have been given the option between facing 15 years to life or pleading to a maximum of 5 years in prison. However, without having a discussion with his attorney concerning the offer and the repercussions of rejecting the offer it is simply impossible for a PCR Court to determine that the Petitioner unequivocally would not have accepted a plea to grand larceny.

(B) *Reasonable Probability*

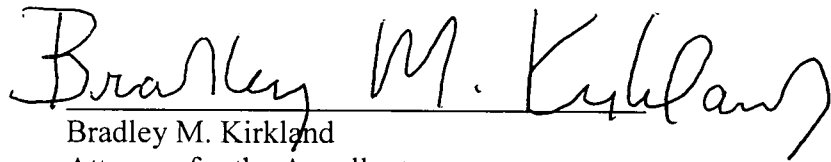
There is “a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law.” Id. at 1410. Unlike in Frye, there is no evidence that

would give “reason to doubt that the prosecution would not have adhered to the agreement or that the trial court would have accepted it.” Id. 1410-11. In fact, the State extended the plea offer in an effort to resolve the case without any indication that trial counsel had requested an extension. App. 27. It was only after trial counsel failed to respond in any way to the original plea offer that the offer was withdrawn. Accordingly, the PCR court erred in finding that the Petitioner would not have accepted the plea offer even if it had been communicated to him.

CONCLUSION

Based on the foregoing reasons, Isaac Walker's petition for writ of certiorari should be granted to allow full briefing on the issue.

Respectfully submitted,



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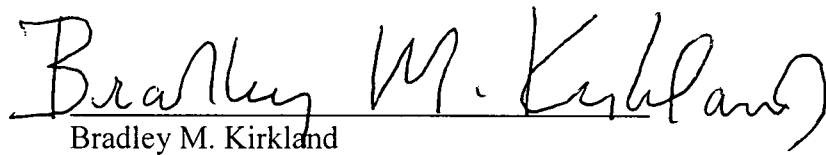
This 2<sup>nd</sup> day of October, 2013.

**CERTIFICATE OF SERVICE**

The Petition and Appendix have been served via, U.S. Mail, postage prepaid, to Counsel  
for the Respondent:

Suzanne H. White, Esquire  
Assistant Attorney General  
Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211

This 2<sup>nd</sup> day of October, 2013.

  
Bradley M. Kirkland