

STATE OF SOUTH CAROLINA  
In The Supreme Court

CERTIORARI TO DORCHESTER COUNTY  
Court of Common Pleas

The Honorable Edgar W. Dickson, Circuit Court Judge  
Case No. 2008-CP-18-1516

CURTIS BRYANT,..... PETITIONER,

v.

STATE OF SOUTH CAROLINA,.....RESPONDENT.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## **ISSUE PRESENTED**

Is there sufficient evidence of probative value in the record to support the PCR judge's finding that Applicant failed to sufficiently establish counsel was ineffective in advising Applicant of the potential sentences he faced?

## STATEMENT OF THE CASE

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Dorchester County. The Applicant was indicted at the December 2006 term of the Dorchester County Grand Jury for Armed Robbery (2006-GS-18-1761). He was represented by Marva Hardee-Thomas, Esquire. On June 12, 2007, Applicant pled guilty before the Honorable Diane S. Goodstein and was sentenced to fifteen (15) years imprisonment. Applicant did not appeal his plea or sentence.

Applicant filed for post-conviction relief (PCR) on June 12, 2008, alleging that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of appellate counsel;
  - a. "No appeal filed"
  - b. "Failed to have plea bargain enforced"
2. Involuntary Guilty Plea due to Ineffective Counsel.

An evidentiary hearing into the matter was held on December 10, 2009, at the Orangeburg County Courthouse. The Applicant was present at the hearing and was represented by Charles T. Brooks, III, Esquire. The Respondent was represented by Mary S. Williams of the South Carolina Attorney General's Office. By order dated March 1, 2011, and filed March 11, 2011, the Honorable Edgar Dickson denied and dismissed the application with prejudice in part, and granted the application in part to allow Applicant the opportunity to seek a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.e.2d 35 (1974). Applicant's PCR counsel filed an appeal of the PCR, as well as an Anders brief for the belated direct appeal, and this Petition followed.

## STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence’ of probative value” exists to sustain the PCR judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, Id. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

## ARGUMENT

1. **There is evidence of probative value to support the PCR judge's finding that Applicant failed to establish counsel was ineffective in advising Applicant of potential sentences he was facing.**

Petitioner contends that the PCR judge erred in failing to find counsel ineffective based on counsel's alleged erroneous advice as to the sentences Petitioner would receive if he pled guilty. Namely, Petitioner alleges that at the time of his plea, he thought he was entering a plea as part of a plea deal that would result in him receiving a negotiated ten (10) year jail sentence.

Petitioner testified at the PCR hearing that he received a letter from counsel dated March 6, 2007, advising him that the State had made a plea offer under which Petitioner would receive a negotiated ten (10) year sentence in exchange for a guilty plea to armed robbery. The letter went on to state that the plea offer was for March 12, 2007, and that if Petitioner wanted to accept the offer, he must be present before the term ended on March 16, 2007. (App. p. 42) (App. p. 60, lns 14 – 28; lns 19 – 22; p. 77, lns 11 – 22.) At that time, Petitioner decided to pursue further investigation into his case rather than enter that plea. (App. p. 61, lns 1 – 4.) Petitioner contends that at no time after that did counsel advise him that the negotiated ten (10) year plea offer was withdrawn by the State, so when he appeared in court on June 12, 2007, it was his belief that he was accepting the ten (10) year negotiated sentence. (App. p. 60, lns 14 – 18.) Counsel testified that, in her experience, a plea offer expires if it is not accepted during the term of court for which it is offered, in this case the March 2007 term. (App. p. 70, line 14 – p. 71, line 18; p. 77, lns 14 – 22.) Petitioner has conceded that he did not convey his desire to accept the plea offer until June of 2007, well after the March term had ended. (App. p. 60, line 23 – p. 61, line 8.) “[A] defendant does not have a Constitutional right to plea bargain, a trial judge is not required to accept a plea bargain, ...and ordinarily a plea offer is nothing more than an offer until it is accepted by the defendant by entering a court-approved guilty plea.” Custodio v. State, Op.

No. 26296 (S.C. filed March 26, 2007); *see also* Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (S.C. 1999). The State acted well within its power in revoking the plea offer after Petitioner declined to accept it during the March 2007 term of court, and this revocation was made clear in counsel's March 6, 2007, letter to Petitioner. Petitioner was on full notice after that March term ended that the plea offer was no longer being extended.

At the plea hearing on June 12, 2007, Judge Goodstein began her plea colloquy with Petitioner by reviewing the potential sentences Petitioner was facing on the charge, including the mandatory minimum ten (10) year sentence that it carried. (App. p. 6, lines 6 – 15.) Therefore, Petitioner had full knowledge of the potential sentences he was facing. Additionally, Petitioner assured the plea court that no promises or rewards had been held out to him in an attempt to get him to plead guilty. (App. p. 18, lns 22 – 25.) Further, at the close of the plea just before sentencing, counsel told the court that Petitioner had “asked [her] to ask the court to consider the most lenient amount” of prison time on the charges, going on to say “[Petitioner] understands...before he gets out...**if he gets** the minimum, he's going to be 54 years of age...” (emphasis added) (App. p. 26, lines 3 – 7.) At the PCR hearing, Counsel testified that Petitioner was familiar with court proceedings, understood plain language and is the type of person that is likely to speak up if he has any concerns; however, at no time during or after this request to the court did Petitioner inquire about or ask for time to review the terms of the plea with counsel, despite counsel openly requesting sentencing leniency, a request that is obviously inconsistent with a negotiated plea. (App. p. 83, lns 17 – 25.)

Petitioner stated that he signed the sentencing sheet while it was still blank, at which point it indicated the plea would be to a negotiated sentence. (App. p. 54, line 15 – p. 55, line.) Counsel went on to say that prior to going to court in June of 2007 for Petitioner's plea, she advised him, and fully believed he understood, that he was facing anywhere from ten (10) to

thirty (30) years imprisonment on the charge. (App. p. 78, ln 21 – p. 23.) She also stated that although she did not have anything in her file to indicate specifically that she conveyed to Petitioner the plea offer had been withdrawn, she believed Petitioner should not have had any expectation that he would be sentenced to the minimum ten (10) years based on their discussions. (App. p. 81, ln. 15 – 19; p. 80, ln 10 – 12.)

Based on the above facts in the record, there is more than sufficient evidence of probative value to support the PCR judge's denial of Petitioner's PCR application. Counsel's March 2007 letter specifically addressed the plea offer including the time period in which Petitioner had to accept it, counsel testified she didn't believe Petitioner had any reason to believe he was pleading pursuant to that plea, and the transcript from the plea clearly shows that Petitioner made a voluntary and intelligent decision to enter this plea without any promises being held out to induce such. Further, the plea judge's colloquy with Petitioner and counsel's remarks to the court during the plea were patently inconsistent with the terms of the supposed plea offer, and Petitioner had several opportunities to voice his concerns over these inconsistencies, but failed to do so. For those reasons, Respondent requests this petition be denied and the findings stated in the Order of Dismissal be maintained.

### **CONCLUSION**

For the reasons stated above, this Court should affirm the PCR Court's Order and deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON  
Attorney General

*[Signature on Next Page]*



STATE OF SOUTH CAROLINA

SUPREME COURT

—————  
Certiorari to Dorchester County  
The Honorable Edgar W. Dickson, Circuit Court Judge  
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CURTIS BRYANT,

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RESPONDENT.

—————  
**PROOF OF SERVICE**  
—————

I, Lauren Meara, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Pachak, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 27<sup>th</sup> day of September, 20 11.

Lauren Meara  
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