

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

**RECEIVED**

JUN 24 2014

Certiorari to Richland County  
Court of Common Pleas  
L. Casey Manning, Circuit Court Judge. **S.C. Supreme Court**

Appellate Case No. 2013-001336

JONATHAN PORTERFIELD,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

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## ISSUES PRESENTED

- I. Did the post-conviction court rule on the claim of ineffective assistance of counsel for failure to file an appeal from the denial of specific performance of the initial ten year plea negotiation?
- II. Did the post-conviction court rule on the claim of ineffective assistance of counsel for failure to include express language that all pending warrants were being disposed of per the original plea agreement? If so, did the post-conviction relief court properly find that Counsel was not ineffective?

## STATEMENT OF THE CASE

Petitioner was true bill indicted during the March and April 2008 terms of the Richland County Grand Jury for two counts of Armed Robbery (2008-GS-40-011925, -12450). On May 20, 2008, Petitioner appeared with counsel, Greg Collins, Esquire, before the Honorable J. Michelle Childs, where he waived presentment to the Richland County Grand Jury for two additional counts of Armed Robbery and one count of Attempted Armed Robbery (2008-GS-40-11804, -11805, -11807). At this proceeding, Petitioner pled guilty to three counts of Armed Robbery and one count of Attempted Armed Robbery as indicted, as well as one count of the lesser included offense Strong Arm Robbery. The State was represented by Anna R. Good. In accordance with the State's recommendation for an aggregate sentence of ten years imprisonment, Judge Childs sentenced Petitioner to ten years imprisonment for each Armed Robbery and Attempted Armed Robbery and five years imprisonment for the Strong Arm Robbery, with all sentences to be served concurrently. No direct appeal was filed.

On September 25, 2008, Petitioner appeared again before Judge Childs with counsel, Greg Collins, for a hearing on Petitioner's motion to enforce the plea agreement. The State was again represented by Anna R. Good. In particular, Petitioner alleged there were two outstanding warrants for Armed Robbery and Possession of a Weapon during the Commission of a Violent Crime which had not been disposed of with his May 2008 guilty plea that the State elected to proceed forward on only after he entered the South Carolina Department of Corrections. Petitioner argued that he understood that his plea was going to be for all outstanding charges and that the two new charges should be included in his original ten year plea negotiations. Judge Childs denied Petitioner's request to enforce the plea agreement but allowed Petitioner to

withdraw his May 20, 2008 guilty plea to allow Petitioner and the State to re-enter plea negotiations to encompass all pending charges.

On March 15, 2010, Petitioner appeared once more before Judge Childs with counsel, Ashley Thomas,<sup>1</sup> where he pled guilty to four counts of Armed Robbery, one count of Strong Arm Robbery, one count of Attempted Armed Robbery and one count of Assault on a Correctional Officer pursuant to negotiations between Petitioner and the State for a sentence range between twelve to fifteen years imprisonment. The plea negotiations were to dispose of *all* outstanding charges against Petitioner. The State was represented by Vanessa Shipley.<sup>2</sup> Judge Childs accepted Petitioner's guilty plea to all outstanding charges and sentenced Petitioner to concurrent terms of fourteen and-a-half years imprisonment for each Armed Robbery, ten years imprisonment for Attempted Armed Robbery, and five years imprisonment for Strong Arm Robbery, all to be followed consecutively by six months imprisonment for the Assault on a Correctional Officer, for an aggregate fifteen year sentence.

Thereafter, Petitioner filed a motion to reconsider his sentence and a hearing on said motion was held before Judge Childs on March 19, 2010. Petitioner was present at the hearing with current counsel Thomas and former counsel Collins. Shipley appeared on behalf of the State. By order filed August 12, 2010, Judge Childs ordered Petitioner's sentences be amended to twelve years imprisonment "for the Armed Robbery charges."

Petitioner filed an application for post-conviction relief on December 2, 2010, alleging that he was being held in custody unlawfully based on allegations that he "was originally

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<sup>1</sup> Petitioner's former counsel, Gregory Collins, was no longer employed by the Fifth Circuit Public Defender's Office at the time of Petitioner's second plea, and Thomas assumed representation of Petitioner

<sup>2</sup> Similarly to the changes that occurred with Petitioner's counsel, Good was no longer employed by the Fifth Circuit Solicitor's office, and Shipley took over the prosecution of this case.

sentence to 10 yrs. [sic] for these same charges. Everyone except 2008-GS-40-424)” and that he “cannot be resentenced and given a harsher sentence for the same charges [he] already pled to.” App. p. 58. Respondent made its Return on February 9, 2011, requesting an evidentiary hearing be held. A “Supplemental Application for Post-Conviction Relief” was filed by Petitioner, through his counsel, on August 23, 2011, alleging that “the public defender for [Petitioner] did not monitor the charges that the [Petitioner] pled guilty to on May 20, 2008, and ensure that Applicant was pleading to all outstanding charges with the correct warrant and indictment numbers.” App. p. 72. An evidentiary hearing was convened on May 23, 2012, at the Richland County Courthouse before the Honorable L. Casey Manning. Petitioner was present and represented by Rowland P. Alston, III, Esquire. Respondent was represented by Assistant Attorney General Robert D. Corney of the South Carolina Attorney General’s Office. Petitioner testified on his own behalf at the hearing and presented testimony from both former counsels Ashley Thomas and Gregory Collins. Respondent presented testimony from one of the former prosecuting Assistant Solicitors, Anna R. Good. Judge Manning denied and dismissed Petitioner’s application by written order signed March 26, 2013 and filed March 27, 2013. Petitioner’s subsequent “Motion to Alter or Amend” was denied on June 7, 2014 by written Order filed June 17, 2013.

Petitioner filed a Petition for Writ of Certiorari on February 19, 2014. This Return follows.

## STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review in a post-conviction relief action is whether "any evidence of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court's decision when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his 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 applicant 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 (1984); Butler, *supra*.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, *supra*. An applicant must overcome this presumption in order to receive relief. Cherry, *supra*.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, supra. First, an applicant 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, supra. Second, counsel's deficient performance must have prejudiced the applicant 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. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

## ARGUMENT

- I. **The post-conviction court did not rule on the claim of ineffective assistance of counsel for failure to file an appeal from the denial of specific performance of the initial ten year plea negotiation; and therefore, this allegation is not preserved for appellate review. However, if this Court finds this allegation to be reserved, Petitioner failed to meet his requisite burden of proof.**

Petitioner contends that Counsel was ineffective for failing to appeal the plea court's denial of specific performance of his original plea bargain for ten years imprisonment. Petitioner contends the issue of whether Petitioner was entitled to the "specific performance of his original ten-year bargain was . . . best addressed on direct appeal rather than on PCR." PWC p. 5. However, Petitioner did not raise this issue in his post-conviction relief application, supplemental application, or at the evidentiary hearing. At the post-conviction relief evidentiary hearing, there was no testimony whatsoever regarding Counsel's failure to file an appeal on Petitioner's behalf. Additionally, the post-conviction relief court's Order of Dismissal does not address this allegation, nor is this allegation addressed in Petitioner's Motion to Alter or Amend.

It is well settled that an issue that has not been presented to or ruled upon by the lower court will not be considered on appeal. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). If an issue is raised but not ruled upon, it is not preserved for appeal. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. Gee, 262 S.C. 373, 204 S.E.2d 727. This also applies to post-conviction relief proceeding. See Burgess v. State, 402 S.C. 92, 738 S.E.2d 264 (Ct. App. 2013) (holding that an issue must be ruled upon by the post-conviction relief court to be preserved for appellate review). Petitioner has not previously raised this issue

and the post-conviction relief court did not rule on this allegation; therefore, it is not preserved for appellate review.

However, assuming *arguendo* that this issue is preserved for this Court's review, this allegation is wholly without merit. The United States Supreme Court has rejected a "bright-line rule that counsel must always consult with the defendant regarding an appeal." Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000). Instead, the Court held that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Id. "[A]lthough not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings." Id.

Petitioner presented no testimony and offered no evidence that he ever requested counsel file an appeal on his behalf. Additionally, Petitioner never testified that he wanted to appeal his guilty plea proceeding(s). Furthermore, Petitioner never testified that counsel did not consult with him regarding an appeal. Therefore, as Petitioner wholly failed to present any evidence on this issue, he has failed to meet his requisite burden of proof.

**II. The post-conviction court did not rule on the claim of ineffective assistance of counsel for failure to include express language that all pending warrants were being disposed of per the original plea agreement, and therefore, this allegation is not preserved for appellate review. However, if this Court finds this allegation to be preserved, Petitioner failed to meet his requisite burden of proof.**

Petitioner argues that trial counsel was ineffective for failing to ensure that his initial ten year plea bargain was globally encompassing of all pending charges. However, Petitioner presented this issue during the lower court proceeding as whether he was entitled to specific performance or resentencing of ten years in accordance with his initial guilty plea or whether counsel was ineffective for failing to monitor all pending charges against Petitioner. App. p. 58; p. 72-73; p. 127; p. 131. The specific allegation that counsel was ineffective for failing to include any express language as to all pending charges was not raised or ruled upon by the post-conviction relief court; therefore it is not preserved for appellate review. See Gee, supra; Watts, supra; Burgess, supra.

However, assuming *arguendo* that this issue is preserved for this Court's review, the post-conviction relief court properly found that counsel was not ineffective regarding Petitioner's guilty plea proceeding and specific performance of his initial guilty plea sentence. First, there is credible evidence that the State would have rescinded its offer had it known of the additional charges. In Missouri v. Frye, 132 S.Ct. 1399 (2012), the United States Supreme Court outlined the standard for proving ineffective assistance of counsel in plea bargaining situations in accordance with the two-prong analysis of Strickland. The Court opined that to satisfy the prejudice prong of Strickland in plea circumstances, applicants "must . . . demonstrate a reasonable probability the plea would have been entered into without the prosecution cancelling . . . or the trial court refusing to accept" the plea deal extended. At the evidentiary hearing,

testimony from the prosecuting solicitor responsible for developing the plea offers in Petitioner's case established that there is no reasonable probability the State would have allowed the plea to be entered for a ten year term of imprisonment to dispose of *all* six of Petitioner's outstanding Armed Robbery charges. App. p. 108-109. Good's testimony, which the post-conviction relief court deemed credible, plainly reflects it was never her intention to extend the ten year plea offer in May of 2008 to dispose of six Armed Robbery charges, and she testified she would have never extended a ten year plea offer to dispose of that large of a number of Armed Robberies. App. p. 107-109. Therefore, the post-conviction relief court properly determined that Petitioner failed to establish any resulting prejudice resulting from any of counsel's alleged deficient performance as there is no reasonable probability that, but for counsel's alleged deficiency, Petitioner would have been able to enter the ten year plea to dispose of all six outstanding Armed Robbery charges.

Second, Petitioner alleged he entered his plea with the understanding that it would dispose of all outstanding charges, regardless of whether they were specifically mentioned at the plea hearing. This claim is best interpreted as one of an involuntary guilty plea, for which the proper remedy would be vacation of the underlying plea in its entirety. That is the *precise* relief previously granted to Petitioner by Judge Childs in September of 2008 following the hearing on the motion to enforce the plea agreement. Accordingly, Petitioner cannot prove resulting prejudice as he has already been afforded the precise relief available under such a post-conviction relief allegation.

Third, the plea offer extended to Petitioner was merely that the State would recommend a ten year term of imprisonment, not a negotiation between Petitioner and the State guaranteeing

him a ten year sentence. See App. p. 7 ln. 18. Such a plea offer would not be binding on the plea court upon entry of Petitioner's plea or require the imposition of a ten year sentence. Therefore, Petitioner cannot establish that he pled guilty with the knowledge that the plea court would make the ultimate decision whether to follow or deviate from the State's recommended plea offer.

Lastly, the Assault on a Correctional Officer charge was not part of the May 2008 plea negotiations, as it arose following Petitioner's initial guilty plea proceeding in 2008. App. p. 140-41. Therefore, even if Petitioner had established that he was entitled to enforce the May 2008 plea agreement for a ten year term of imprisonment enforced to dispose of the six Armed Robbery charges, the Assault on a Correctional Officer charge would still be outstanding. Under the relevant law at the time, Assault on a Correctional Officer carried a potential sentence of six months up to five years imprisonment, with the mandatory requirement that any sentence be run consecutively to any other sentence(s) being served. See S.C. Code Ann. § 16-3-430 (2003). Therefore, Petitioner cannot establish that had the original ten year plea agreement been enforced, there is a "reasonable probability" of a different outcome on the charges as he still would have been facing a potential five year consecutive sentence on the Assault charge, amounting to an aggregate fifteen year term of imprisonment.

Based on the foregoing, the post-conviction relief court did not rule on the issue as to whether counsel was ineffective for failing to ensure that his initial ten year plea bargain was globally encompassing of all pending charges; and therefore, this issue is not preserved for appellate review. However, if this Court finds the issue is preserved for appellate review, Petitioner failed to meet his requisite burden of proof.

## CONCLUSION

For the foregoing reasons, this Court should deny this Petition. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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Attorney General

MEGAN E. HARRIGAN  
SC Bar No. 100108  
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By: Megan E. Harrigan  
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June 24, 2014

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Richland County  
The Honorable L. Casey Manning, Circuit Court Judge  
Case No. 2010-CP-40-8477  
Appellate Case No. 2013-001336  
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JONATHAN PORTERFIELD,

**S.C. Supreme Court**  
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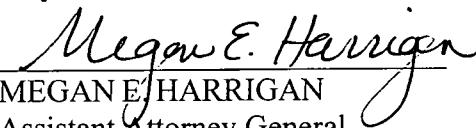
—————  
**PROOF OF SERVICE**  
—————

I, Megan E. Harrigan, 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:

Wanda H. Carter, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, South Carolina 29211

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

This 24<sup>th</sup> day of June, 2014.

  
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ALAN WILSON  
ATTORNEY GENERAL

June 24, 2014

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JUN 24 2014

**S.C. Supreme Court**

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re: Jonathan Porterfield v. The State of South Carolina**  
**Appellate Case No. 2013-001336**

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of Respondent's Return to Petition for Writ of Certiorari.

Sincerely,

Megan E. Harrigan  
Assistant Attorney General  
S.C. Bar No. 100108

MEH/ko  
Enclosures

cc: Wanda H. Carter, Esquire, Appellate Defense  
Trisha Allen, Victim's Services