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**S.C. Supreme Court**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Anderson County

R. Lawton McIntosh, Circuit Court Judge  
\_\_\_\_\_

REYNALDO GONZALEZ,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000100  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

BENJAMIN JOHN TRIPP  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

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QUESTION PRESENTED

Does the record support the PCR court's finding that counsel was not deficient in not advising Petitioner to accept a favorable plea offer and forego seeing some evidence that had not yet filtered in through discovery; where through discovery and minimal investigation, counsel already had available a mountain of evidence—including a full confession—condemning Petitioner; and where counsel's reservations in fully advising Petitioner came from her mistaken belief that she would face personal liability for not advising him to wait for every last piece of evidence from the State?

## STATEMENT

On January 23, 2007, the Anderson County Grand Jury indicted Petitioner Reynaldo Gonzalez on counts of conspiracy to traffic methamphetamine, trafficking methamphetamine more than 400 grams, and possession of cocaine. App. 221-231. The indictments stemmed from an alleged bust-buy on November 3, 2006. Prior to that date, Petitioner allegedly accosted a stranger and offered to facilitate a methamphetamine transaction. The would-be buyer notified police, and Investigator Toby Jordan helped set up an undercover buy. On November 3, 2006, Investigator Jordan and the undercover informant went to Petitioner's home and purchased three pounds of methamphetamine while wearing hidden audio-recording equipment. App. 32, line 21—App. 33, line 11; App. 90, lines 6-19.

Immediately after the transaction, Investigator Jordan and nearby officers arrested Petitioner. App. 185, line 23—App. 186, line 1. Petitioner gave a complete statement and confession, even giving up his source—another person in the county with whom the officers were familiar. App. 72-73; App. 174, line 23—App. 175, line 4. The officers field tested the meth, App. 39, lines 21-24; App. 102, lines 11-14, and Investigator Roger Scoggins photographed, logged, and collected the meth for storage in evidence. App. 91, line 16—App. 92, line 10. On September 5, 2008, Solicitor Rame Campbell offered Petitioner a plea with a recommended fifteen-year sentence. App. 36, lines 3-5. Based on the advice of counsel, Petitioner ultimately failed to accept the offer and wound up with a sixteen and a half year sentence instead.

After the arrest, Petitioner began cooperating with law enforcement in attempting undercover buys and naming his source. App. 33, lines 17-21; App. 98, line 21—App. 99, line 3; App. 102, 15-20; App. 108, line 20—App. 111, line 19. In May of 2008, Petitioner hired Druanne White as counsel. She quickly submitted discovery requests to the State and on July 7, 2008

requested to see the State's physical evidence. While she awaited an opportunity to view the physical evidence, additional discovery trickled in from the State on September 9 and September 12 of 2008. The timeline thus far was "completely normal," App. 35, lines 17-22; App. 162, lines 16-17, and in fact counsel herself previously "did that as a prosecutor all the time, because it flows in when it does." App. 162, lines 17-19.

Upon informing counsel of the fifteen-year plea offer, the solicitor told her the offer would expire on September 16, 2008. App. 181, lines 21-23. By September 12, counsel had received the following evidence from the state:

- (1) results of tests of scales used to weigh meth;
- (2) Petitioner's confession and statement;
- (3) statements, notes, and reports from investigating officers;
- (4) photos of meth seized from Petitioner's home;
- (5) Advice of Rights Form for Defendant;
- (6) seized evidence log;
- (7) drug analysis report;
- (8) BEST kit envelope.

App. 154, lines 5-13; App. 165, lines 5-18; App. 181, lines 11-20. Additionally on September 12, 2008, counsel met with Officer Jordan to talk about the case. App. 166, lines 8-11. The only evidence the State had not provided by the expiration of the plea offer was the tape recordings from the undercover informant during the buy and specific chain of custody documentation, which the State provided on September 24, 2008 and October 2, 2008, respectively. App. 3, lines 18-22; App. 7, lines 6-11.

The fifteen-year offer expired while counsel waited on this remaining evidence to become available. On October 3, 2008, she contacted the solicitor and tried to accept the plea:

[T]hat put me in a terrible position because how on Earth can I plead somebody and face a P.C.R. if I haven't seen the physical evidence, I haven't seen the chain of custody and I didn't have the tapes? . . . I called the day after I saw this evidence and said, okay, now we've seen everything. But I cannot plead a client, Judge, and come up

here a year later in front of you for a P.C.R. and have to explain why I didn't see any of these things. I have to see them.

App. 7, line 6—App. 8, line 2. She worried in particular about “the memo from Chief Justice Toal in 2004, [in which] she says it’s unethical for us to do this. And I can’t be put in a position . . . to forego that discovery because the [plea] expired . . .” App. 9, lines 3-12; App. 195.

On October 10, 2008, the solicitor offered another plea with a recommended cap of eighteen years. App. 156, lines 2-6. On January 14, 2009, Petitioner, counsel, and Solicitor Campbell appeared at a plea hearing before The Honorable J.C. Nicholson, Jr. App. 18. Petitioner pled to reduced trafficking charge of 28 to 100 grams. App. 31, lines 11-13; App. 32, lines 2-5. The State informed the plea judge of the recommended cap of eighteen years. App. 30, lines 21-23. The plea judge accepted the plea and sentenced Petitioner to sixteen and a half years for the trafficking charge concurrent with ten years for conspiracy charge and three years for the possession of cocaine charge. App. 35, lines 1-4; App. 41, lines 2-22.

On February 2, 2011, Petitioner filed an application for post-conviction relief (PCR) alleging ineffective assistance of counsel. App. 43-48. The State served a return and partial motion to dismiss on March 15, 2012. App. 49-55. On April 26, 2012, Petitioner filed an amended to his application for PCR. App. 56-79. On May 8, 2013, Petitioner appeared at an evidentiary hearing before The Honorable R. Lawton McIntosh. Carolyn Galloway represented Petitioner and Walt Whitmire represented the State. App. 80. Counsel testified about her discussion with Solicitor Campbell about the expiration of the fifteen-year offer:

As I recall, I picked up the phone and called Rame and said, Rame, it’s not just me, the Supreme Court sent us a memo, all the solicitors, in 2004 and said you cannot make a plea conditional on not getting discovery. It puts us in an ethical violation, because we have to ethically do a thorough job and if you say you accept a plea before you get ten tapes, see the physical evidence, get the chain of custody, then it sets me up for a PCR, which of course, I’m doomed if I do

and doomed if I don't on this one. I haven't done any of my work and so I said would please extend the plea offer . . . .

App. 147, line 17—App. 148, line 3. “It just put me into an ethical bind, because ethically, I have to do a thorough job, but how do I respond to a plea offer when I haven't gotten all the material things in the case?” App. 149, lines 21-24.

Counsel also testified about the advice she gave Petitioner concerning the plea offer:

Let me just say, I never tell a client to take a plea or not to. I go over the pros, the cons . . . I would have said, you know, we don't know if they still have the evidence, we don't know if it's intact, we don't know the chain of custody, who was in the chain of custody, if they are even alive anymore and you know, if you can knock something out, then, of course, you might have a chance of walking. Now, I wouldn't have gone that far in telling him that, but I would have said, “We are missing some significant things,” . . . .

App. 150, lines 2-15.

Q: And you had not accepted it or talked with your client and you indicated you did not advise, but your client had decided not to accept it. He says it was because you told him you still had not reviewed all the discovery. Is that right?

A: I definitely would have told him. He still wants to see all the discovery now and I don't blame him. He has a right to it, so I told him we still don't have these things.

Q: So, you could not advise, if I want to call it that, you could not say to your client, “I've seen all of the discovery, the 15 years is there and, you know, there's nothing else for us to see.” You could not say that before it was withdrawn. Is that right?

A: I'm not sure I get that, but I had given him a copy of the letter and he knew when it expired, but we also knew we were missing some critical pieces.

App. 155, lines 8-24.

On November 26, 2013, the PCR court issued its order of dismissal. App. 202-216. The court's analysis first described the “substantial” amount of evidence against Petitioner:

Applicant was arrested as a result of [a] controlled buy with an informant. The informant and Applicant engaged in lengthy negotiations for a substantial narcotics transaction that occurred in Applicant's residence. The State's evidence of Applicant's involvement in the transaction was supported by the informant's account and wire recording along with the undercover officer's observations. Applicant was arrested and confessed.

App. 208. The court later concluded, inter alia, Petitioner failed to prove ineffective assistance for failing to advise him to accept the fifteen-year plea offer. Specifically, the order stated, "counsel adequately advised [Petitioner] of the terms and expiration date of the offer along with all the benefits and detriments at issue." Thus, "[Petitioner] knowingly . . . made the decision to let the offer expire in order for counsel to obtain the informants' wire tapes despite the fact that former counsel had already listened to the tapes and discussed the matter with him." App. 214.

On December 5, 2013, Petitioner filed a motion to alter or amend the order. App. 217-219. The PCR court denied the motion on January 7, 2014. App. 220.

## ARGUMENT

**The record does not support the PCR court's finding that counsel adequately advised Petitioner about the fifteen-year plea offer because her failure to advise him to accept the offer was based on her unreasonable view of the evidence and her misunderstanding of the law.**

The record does not support the PCR court's finding that counsel adequately advised Petitioner about the the fifteen-year plea offer because her failure to advise him to accept the offer was based on her unreasonable view of the evidence and her misunderstanding of the law. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687.

The right to effective assistance of counsel extends to plea negotiations. See *Missouri v. Frye*, 132 S. Ct. 1399, 1408 ("This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."). Counsel's performance can be deficient based on incorrect advice to a defendant deciding whether to accept a plea offer. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012) ("As to prejudice, respondent has shown that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea. In addition, as a result of not accepting the plea and being convicted at trial, respondent received a minimum sentence 3 & half times greater than he would have received under the plea. The standard for ineffective assistance under *Strickland* has thus been satisfied." (citations omitted)).

“The validity of counsel’s strategy is reviewed under ‘an objective standard of reasonableness.’” *Lounds v. State*, 380 S.C. 454, 463, 670 S.E.2d 646, 650 (2008) (quoting *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). “[W]hile the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” *Lounds* at 460, 670 S.E.2d at 649 (quoting *Ard v. Catoe* at 331-32, 642 S.E.2d at 597); *see also Sneed v. Smith*, 670 F.2d 1348, 1353 (4th Cir. 1982) (“To meet this standard, an attorney must at a minimum, ‘conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.’”) (quoting *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968)).

In this case, counsel did not advise Petitioner to accept the plea offer for two reasons. First, she believed that obtaining the informant’s tapes and the specific chain of custody documentation could have beneficial value for Petitioner. This belief was unreasonable because no additional information could surmount the case against him. The PCR court’s order of dismissal accurately described the State’s evidence against Petitioner as “substantial.” The charges stemmed from a controlled buy after lengthy negotiations. A police officer and independent informant participated in the buy at Petitioner’s home. Petitioner gave a complete confession and statement, identified his source, and attempted to work off the charges. The evidence already turned over to counsel included photos of the meth, a seized evidence log, and a drug analysis report. Additionally, counsel admitted the State’s delay in making the evidence available was completely normal and suggested nothing suspicious about the viability of the State’s case. Counsel never articulated any

particular reason to believe the informant tapes could undermine the State's overwhelming case, and indeed she did not even conjecture or speculate as to how they might.

Moreover, counsel could not have reasonably advised Petitioner that waiting for specific documentation of the chain of custody for the meth was prudent because all of the evidence necessary to support the chain of custody was already reasonably available. "It is unnecessary . . . that the police account for 'every hand-to-hand transfer' of the item; it is sufficient if the evidence demonstrates a reasonable assurance the condition of the item remains the same from the time it was obtained until its introduction at trial." *State v. Hatcher*, 392 S.C. 86, 94, 708 S.E.2d 750, 754 (2011) (quoting *State v. Price*, 731 S.W.2d 287, 290 (Mo. Ct. App. 1987)). "The chain of custody need be established only as far as practicable, and we reiterate that every person handling the evidence need not be identified in all cases." *Id.* at 95, 708 S.E.2d at 755.

As an initial matter, counsel should have understood that the need to prove the substance involved in the transaction was meth through testing and the chain of custody was most likely obviated by the testimony of multiple witnesses to the negotiations and discussions over the deal, Petitioner's full confession and statement, and the photos taken after the transaction. Nonetheless, the State had already provided evidence for a reasonable assurance that the substance testing positive as meth in the drug analysis was the same as the substance seized from Petitioner's home based on Officer Scoggins' seized evidence log, the BEST kit envelope, and the availability of the officers and technician producing the drug analysis to speak about their personal knowledge of the chain of custody along with their knowledge of routine standards and practices in collecting and testing drug evidence in the office. Counsel's failed to investigate the chain of custody by any minimal measure beyond waiting for discovery, and she admitted so at the PCR

hearing when she testified she asked Solicitor Campbell to extend the offer because “I haven’t done any of my work.”

The only benefit counsel set forth in the record for waiting out the additional evidence was that Petitioner would be vindicating his right to view “critical” and “significant” evidence before trial. This benefit was not sufficient to reasonably justify forfeiting the favorable plea offer. While the evidence was significant in itself, it was not significant or critical in the overall case against Petitioner because of the mountain of evidence already provided. Further, explaining the right to see the outstanding evidence without explaining that enforcing the right would have no practical benefit and would most likely result in a longer prison sentence was incomplete advice.

Second, the record does not support the finding that counsel’s advice was reasonable because it was based on her apprehension of personally liability for any negative consequences of accepting the plea. Counsel repeatedly expressed to the plea court and the PCR court her overriding reservation in advising Petitioner to forego the additional discovery and accept the plea offer was fear of liability for an ethical violation or in a PCR proceeding. Thus, she stated *she was* “doomed if I do and doomed if I don’t on this one.” She stated the offer put *her* “in a terrible position” because she might have to “face a P.C.R.” She also stated she “cannot plead a client” in the circumstances and she “ha[d] to see” the outstanding evidence. As she communicated to Solicitor Campbell at the time, the plea court, and the PCR court, her position was based primarily on the 2004 memo addressed to solicitors and prohibiting them from making a plea conditional on a defendant’s relinquishment of discovery.

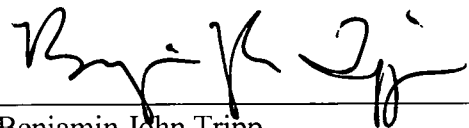
Her apprehension of liability as the basis of her reservation in advising Petitioner to accept the offer was unreasonable for a number of reasons. First, the memo was addressed to solicitors for the State and concern the ethical nature of their offering the pleas, independent of whether accepting

such a plea would be in the best interest of the defendant. The memo does not prohibit defense attorneys from advising clients to accept a plea in such situations, nor does it logically dictate that such advice is unethical. That analysis, as explained above, stands on its own based on many other important factors. Second, she was legally mistaken in believing she would face “PCR liability.” In a PCR case, the defendant is the State, and her obligation would extend no further than appearing as a witness. Third and similarly, her duty in advising Petitioner was to zealously represent his interests, not her own. If she believed a conflict between her interests and his interests existed, she should have addressed that with Petitioner and then with the lower court judge. There was simply no proper variable for her “personal liability” in the formulation of her advice to Petitioner about whether to accept the offer.

#### CONCLUSION

For the foregoing reasons, the record does not support the PCR court’s finding that counsel reasonably and adequately advised Petitioner about the benefits and detriments of accepting the plea offer, and this Court should grant Petitioner Reynaldo Gonzalez’s petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,



Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of August, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Anderson County  
R. Lawton McIntosh, Circuit Court Judge

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REYNALDO GONZALEZ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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CERTIFICATE OF SERVICE

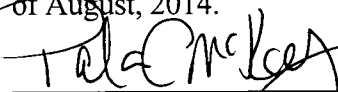
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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 8th day of August, 2014.

  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day  
of August, 2014.

 (L.S.)

Notary Public for South Carolina  
My Commission Expires: July 24, 2022.