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S.C. Supreme Court

STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable C. Victor Pyle, Jr., Guilty Plea Judge  
The Honorable D. Garrison Hill, Post-Conviction Relief Judge

Appellate Case No. 2014-001427

Patrick B. Connor,.....Respondent,

v.

State of South Carolina,.....Petitioner.

**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

1. Did the PCR judge err in finding Petitioner met his burden of proving his plea attorney was ineffective in conveying a plea offer and that he was prejudiced as a result?

## STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Respondent for 3 counts of armed robbery (2010-GS-23-9055, count 1; -9063, count 1; -9065, count 1) and 3 counts of possession of a weapon during the commission of a violent crime (2010-GS-23-9055, count 2; -9063, count 2; -9065, count 2). (App.pp.127-28; pp.133-34; pp.139-40). Larry Cooke, Esquire represented Respondent.

On January 11, 2012, Respondent pled guilty. The Honorable C. Victor Pyle, Jr. sentenced Respondent to concurrent terms of 25 years for each count of armed robbery and 5 years for each count of possession of a weapon during the commission of a violent crime. (App.p.20). Respondent did not appeal.

Respondent filed an application for post-conviction relief (PCR) on January 10, 2013 (2013-CP-23-0154). (App.pp.22-29). A hearing was held at the Greenville County Courthouse on April 23, 2014. (App.pp.37-104). Respondent was present and represented by Jeffrey Falkner Wilkes, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented the State. The Honorable D. Garrison Hill granted relief in an order filed May 30, 2014. (App.pp.121-24).

## STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

## ARGUMENT

**The PCR judge erred in finding Petitioner met his burden of proving his plea attorney was ineffective in not conveying a plea offer and that he was prejudiced as a result.**

### A.

#### Guilty plea hearing

Respondent pled guilty to 3 counts each of armed robbery and possession of a weapon during commission of a violent crime. Respondent told the plea judge he had spoken to plea counsel “a sufficient amount of time to plead guilty” and that he understood the talks he had with plea counsel. (App.p.5). Respondent told the plea judge he was satisfied with plea counsel, did not have any complaints to make against him, and that plea counsel had not done anything that he did not like. (App.pp.5-6). Respondent stated he had not been made any promises in exchange for his guilty pleas. (App.pp.6-7). After the plea judge noted the maximum sentences for the charges, Respondent stated he understood and wanted to waive his right to trial and plead guilty. (App.pp.7-8). Respondent agreed with the State’s recitation of the facts. (App.p.12). After plea counsel spoke in mitigation, Respondent apologized to the victims and stated “I know I did the crime.” (App.pp.13-15). Neither Respondent nor plea counsel made any mention of either plea offers or negotiations or a hope for a certain sentence.

### B.

#### Plea offers

At the PCR hearing, Respondent presented two different plea offer letters sent by the State to plea counsel. They were admitted into evidence as Applicant’s Exhibits 1

and 2.

Applicant's Exhibit 2 was a plea offer letter from the State dated January 2, 2011. In it, the State agrees that if Respondent cooperates against his co-defendants and "does not get into further trouble," he will plead guilty to 3 armed robbery charges, the State will not prose 15 additional charges, and the State will recommend a 14-year sentence. The expiration date is May 3, 2011. (App.pp.108-09).

Applicant's Exhibit 1 was a plea offer letter from the State dated May 24, 2011. In it, the State agrees to make a 14-year recommendation if Respondent pleads guilty to two counts each of armed robbery and possession of a weapon during commission of a violent crime and one count each of conspiracy and first-degree assault and battery. The warrant numbers listed for these charges indicate these are **different** from any of those listed in the first plea offer. The expiration date is – confusingly – May 8, 2011. (App.pp.106-07).

#### **Respondent's PCR testimony**

At the PCR hearing, Respondent stated he met with plea counsel in October 2010 at his bond hearing and again at his preliminary hearing. (App.p.41; p.52). Respondent stated he was released on November 28, 2010 and his first appearance was January 21, 2011. (App.p.42; pp.52-54). Respondent stated he met with plea counsel during the first appearance and counsel stated there was a 14-year plea offer (and showed him the offer letter<sup>1</sup>) but that they "didn't never get to go over any of the statutes or the – any lesser included offenses that I could – anything else that I could get out of not getting the 14-

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<sup>1</sup> Applicant's Exhibit 2.

year plea.” (App.pp.43-44; p.54). Respondent admitted that plea counsel mentioned the expiration date for the offer. (App.p.54). Respondent stated he picked up his discovery materials from plea counsel’s office in April 2011 but counsel was not there. (App.p.44; p.55).

Respondent stated plea counsel sent a letter on October 3, 2011<sup>2</sup> to notify him of a October 17, 2011 trial date and set up a meeting on October 13th. (App.p.45). Respondent stated he attended this meeting and that he and plea counsel reviewed the charges and evidence. Respondent admitted he knew the 14-year offer had expired at this point. (App.p.49; pp.50-51; p.57). Respondent stated he and plea counsel discussed both a plea and a trial at the October 2011 meeting and that he asked plea counsel to obtain a new plea offer. (App.p.58). Respondent stated he would have taken the 14-year plea offer if he had known the strength of the State’s evidence and the maximum penalties. (App.p.49). Respondent stated he did not tell the plea judge that he wanted to take the 14-year offer because he just wanted to get the plea over with. (App.p.61). While Respondent stated he was not expecting to receive a 25-year sentence, he admitted he knew he was facing a maximum of 30 years on each armed robbery charge. (App.p.61).

#### **Plea counsel’s PCR testimony**

Plea counsel testified the public defender file was opened on July 2, 2010 and the file reflected he met Respondent at the jail on July 6, 2010. (App.pp.62-63). Plea counsel referred to his file throughout his testimony. Plea counsel testified he represented Respondent at the preliminary hearing on August 16, 2010 and the hearing was extremely

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<sup>2</sup> Applicant’s Exhibit 3. (App.p.110).

thorough. (App.p.64). Plea counsel testified his file reflected he represented Respondent at a bond hearing on September 10, 2010. (App.p.64). Respondent was released on bond.

Plea counsel testified he saw Respondent on March 1, 2011 (after Respondent received a bond card) and they set up an appointment for March 8, 2011. Plea counsel testified he gave Respondent discovery materials at this meeting<sup>3</sup> and that Respondent knew the charges he was facing. (App.pp.64-65; p.71; pp.78-79). Plea counsel testified Respondent told him on March 29, 2011 that he wanted a sentence of either 3-5 years or probation and that he likely would have told Respondent this was unlikely. (App.p.65; p.71). Plea counsel testified he would have showed Respondent the plea offer letter by April 2011 because his file reflected a notation of “No deal” on April 26, 2011. (App.p.66; p.71). Plea counsel testified there was another notation in his file that on August 9, 2011, “The Defendant appeared, no deal.” (App.p.66; p.72).

Plea counsel testified he received notice the case was on the trial docket for October 2011 and sent a letter to Respondent about this on October 3, 2011. (App.p.66). Plea counsel testified the letter was returned because Respondent provided the wrong address. (App.pp.66-67). Plea counsel testified between October 2011 – January 2012, Respondent and his mother indicated they were going to hire different attorneys – which they ultimately did not do. (App.pp.67-68). Plea counsel testified Respondent missed a January 9, 2012 meeting but showed up the next day and they reviewed the case. (App.p.68). Plea counsel stated there was no notation in his file – one way or the other –

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<sup>3</sup> Plea counsel testified he received discovery in October 2010. (App.p.77).

that he discussed the second plea offer (from May 24, 2011) with Respondent. (App.pp.84-85).

**PCR judge's order**

In granting Respondent's application for post-conviction relief, the PCR judge found plea counsel failed to convey the State's second plea offer to Respondent. The PCR judge found this resulted in prejudice because of the "significantly stiffer sentence [Respondent] ultimately received." The PCR judge concluded Respondent met his burden of proving ineffective assistance of counsel and was entitled to post-conviction relief. (App.pp.123-24).

**C.**

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985).

**D.**

**Deficiency**

The PCR judge erred in finding plea counsel was deficient. It is undisputed that

plea counsel conveyed the January 2, 2011 plea offer to Respondent. It is further undisputed that Respondent rejected this offer and knew of its expiration date. Plea counsel testified Respondent wanted a plea offer for a 3-5 year sentence or probation. It is unsurprising, therefore, that he rejected the January 2, 2011 plea offer for a 14-year sentence. Plea counsel's notes indicated Respondent rejected this offer at least twice. It is axiomatic that an attorney cannot force his client to accept a plea offer and that the decision whether to accept or reject such an offer rests solely with the client. See Rule 1.2(a), RPC, Rule 407, SCACR.

There is no credible evidence plea counsel did not convey the May 24, 2011 plea offer to Respondent. Plea counsel testified there was no notation in his file about this one way or the other. As such, cases such as Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) are distinguishable because there is no affirmative indication of whether or not the second plea offer was conveyed in Respondent's case. Regardless, as late as August 2011, there is a notation in plea counsel's file that Respondent appeared in court and there was "no deal." Even assuming arguendo the May 24th plea offer was not promptly conveyed to Respondent, this would have been the result of Respondent not providing the proper contact information to his attorney. Plea counsel testified Respondent did not provide a correct contact address when he was booked at the detention center. (App.p.90). As such, Respondent's own action led to a breakdown in communication with plea counsel. See, e.g., Branham v. Capital Life & Health Ins. Co., 220 S.C. 67, 79, 66 S.E.2d 451, 456 (1957) (Stukes, J., concurring) (concluding that, while the result may have been harsh upon the party, "he has made his own bed").

Further, this Court should not entertain the idea of error in this case because Respondent admitted his guilt after the plea judge accepted his guilty pleas. See Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) (review of trial error unnecessary when defendant admits guilt after his conviction). Respondent apologized to the victims and stated:

I wish I could take it all back. If I had the chance to I would. That would be the one thing in my life that I would take back. . . . I know I did the crime. So I know there's going to be a sentence, Your Honor. So I just hope that you have mercy on me, Your Honor. I'm very sorry.

(App.p.15) (emphasis added). As such, a review of any alleged error should be deemed unnecessary.

### **Prejudice**

The PCR judge erred in finding Respondent demonstrated prejudice in this case. Even assuming arguendo the May 24, 2011 plea offer was not conveyed to Respondent, the order vacating all of Respondent's convictions is not supportable.

Respondent cannot prove prejudice related to the issue of conveyance of the second plea offer. While the PCR judge's order seems to indicate the severity of the sentence is adequate showing of prejudice, this is unsupported. It is abundantly clear the plea judge was very troubled by the fact that Respondent fathered a child while he was on bond for a variety of serious charges. (App.pp.19-20). "A trial judge has broad discretion in sentencing within statutory limits." In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010). "A judge must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant." Id. The

plea judge's statements are the only evidence in the record to explain the judge's thoughts in levying this sentence upon Respondent. In light of the plea judge's clear dislike of how Respondent conducted himself while on bond, this Court cannot find Respondent's 25-year sentence is proof of prejudice in this case. Even if a 14-year recommendation had been taken before the court, there is no guarantee the plea judge would have overlooked his misgivings about Respondent's behavior and levied a 14-year sentence. See Brooks v. State, 325 S.C. 269, 272, 481 S.E.2d 712, 713 (1997) ("A court is not required to accept a plea agreement reached by the State and the defendant.").

Further, it is unlikely Respondent would have accepted the terms of the May 24, 2011 offer, as he told plea counsel he wanted an offer of either a 3-5 year sentence or probation. Respondent did not present any credible evidence or testimony that he would have accepted a 14-year offer. See, e.g., Missouri v. Frye, 132 S. Ct 1399 (2012). Rather, he simply seems upset to have received a 25-year sentence.

Regardless, the plea offers in this case concerned completely different charges. (App.pp.106-09). Respondent ultimately pled guilty to 3 counts each of armed robbery and possession of a weapon during the commission of a violent crime. One count of armed robbery and one count of the weapons charge were addressed in the January 2, 2011 plea offer. In that offer, Respondent was to have pled guilty to a number of charges (including an armed robbery charge<sup>4</sup>) and several charges were to be nol prossed (including a weapons charge<sup>5</sup>). (App.pp.108-09). Respondent clearly refused this plea

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<sup>4</sup> 2010-GS-23-9055, count 1.

<sup>5</sup> 2010-GS-23-9055, count 2.

offer. The other charges Respondent pled guilty to (2 counts each of armed robbery and the weapons charge) were contained in the May 24, 2011 plea offer. (App.pp.106-07). Even assuming arguendo this plea offer was not conveyed to Respondent, he ultimately pled guilty to only 4 of the charges listed in that offer. The PCR judge concluded the second plea offer was not conveyed to Respondent. As such, Respondent would not be entitled to a new trial on the charges from the first plea offer – a plea offer that was conveyed and rejected. As the PCR judge did not make a finding the first plea offer was not conveyed, Respondent clearly was on notice that the State made offers on the armed robbery and weapons charges of indictment 2010-GS-23-9055. As such, Respondent should theoretically only be entitled to some form of relief on the remaining charges to which he pled guilty.

**E.**

Accordingly, Respondent failed to meet his burden of proving both prongs of the Strickland test. Respondent failed to prove plea counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Respondent also failed to prove he was prejudiced by plea counsel's performance.

As Respondent failed to meet his burden of proving ineffective assistance of plea counsel, the PCR judge erred in granting his application for post-conviction relief. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”). There is no probative evidence to support a grant of post-conviction relief in this case. See Cherry v. State, 300 S.C. at 119, 386 S.E.2d at 626.

**CONCLUSION**

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the lower court's ruling. If this Court grants certiorari, the State asks permission under the rules to brief the issue discussed above fully.

Respectfully submitted,

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By:   
ATTORNEYS FOR PETITIONER

December 15, 2014

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable C. Victor Pyle, Jr., Guilty Plea Judge  
The Honorable D. Garrison Hill, Post-Conviction Relief Judge

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Appellate Case No. 2014-001427

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Patrick B. Connor .....Respondent,

v.

State of South Carolina, ..... Petitioner.

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**CERTIFICATE OF SERVICE**

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I, Karen C. Ratigan, certify that I have today served the within Petition for Writ of Certiorari and Appendix upon Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

J. Falkner Wilkes, Esquire  
114 Whitsett Street  
Greenville, South Carolina 29601

I further certify that all parties required by Rule to be served have been served.  
This 15th day of December, 2014.

  
KAREN C. RATIGAN  
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S.C. Supreme Court

ALAN WILSON  
ATTORNEY GENERAL

December 15, 2014

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

**Re: Patrick B. Connor v. State of South Carolina**  
**Appellate Case No: 2014-001427**

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Petition for Writ of Certiorari** along with an Original and one bound Appendix in the above-referenced case.

Sincerely,

Karen C. Ratigan  
Senior Assistant Deputy Attorney General  
SC Bar #68331

KCR/jacc  
Enclosures

cc: Jeffrey Falkner Wilkes, Esquire  
Trisha Allen, Victim Services Counselor