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**S.C. Supreme Court**

STATE OF SOUTH CAROLINA  
In The Supreme Court

CERTIORARI TO FLORENCE COUNTY  
Court of Common Pleas

The Honorable Michael G. Nettles, Post-Conviction Relief Judge  
The Honorable Thomas A. Russo, Trial Court Judge

Appellate Case No. 2014-000910

David Myers,.....Petitioner,

v.

State of South Carolina,.....Respondent.

**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

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## QUESTION PRESENTED

1. Did the lower court properly find that Petitioner's trial counsel conveyed the State's plea offer, and Petitioner elected to proceed to trial, where trial counsel testified at the PCR hearing that he conveyed the offer to Petitioner?

## **STATEMENT OF THE CASE**

Petitioner is not presently incarcerated with the South Carolina Department of Corrections. In June 2011, the Florence County Grand Jury indicted Petitioner for shoplifting, third or subsequent offense (2011-GS-21-981). Scott P. Floyd, Esquire, represented Petitioner. On June 29, 2011, a jury found Petitioner guilty as indicted. The Honorable Thomas A. Russo sentenced Petitioner to ten (10) years imprisonment on the shoplifting charge.

Petitioner filed a timely notice of appeal. Robert M. Pachak, Esquire, of the Office of Appellate Defense perfected the appeal with the filing of an Anders brief on October 11, 2011. The South Carolina Court of Appeals dismissed the appeal on January 30, 2013. State v. Myers, Op. No. 2013-UP-051 (S.C. Ct. App. filed January 30, 2013). The remittitur was returned to the circuit court on February 28, 2013.

Petitioner subsequently filed an application for post-conviction relief on February 18, 2013. Respondent made its Return on September 16, 2013. (App.pp.125-130). An evidentiary hearing into the matter was convened on February 10, 2014, at the Florence County Courthouse. Petitioner was present and represented by Tristan M. Shaffer, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent. (App.pp.131). By Order of Dismissal dated March 7, 2014, the Honorable Michael G. Nettles denied and dismissed the PCR application with prejudice. (App.pp.182-190).

## **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 United States Supreme Court has established 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 v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). 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, 466 U.S. 668 at 674 (1984). Under the second prong, the PCR applicant “must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). This Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them, and will reverse the decision of the PCR judge 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). Vasquez v. State, 388 S.C. 447, 456, 698 S.E.2d 561, 565 (2010).

**1. The lower court properly found that Petitioner's trial counsel conveyed the State's plea offer, and Petitioner elected to proceed to trial, where trial counsel testified at the PCR hearing that he conveyed the offer to Petitioner.**

Petitioner argues, "Trial counsel's failure to adequately communicate a plea offer made by the state to Petitioner violated Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel where it was undisputed that the solicitor offered to recommend a sentence of four years imprisonment if Petitioner pled guilty and where Petitioner testified that if trial counsel would have advised him of the offer he would have accepted the offer and pled guilty instead of proceeding to trial." (Cert. Pet. p.4). This argument is without merit, as trial counsel's testimony at the PCR hearing clearly indicated he conveyed the plea offer to Petitioner and advised him he should take it, due to the overwhelming evidence against Petitioner, and the fact Petitioner was facing ten (10) years in prison. See Bennett v. State, 371 S.C. 198, 204-05, 638 S.E.2d 673, 676 (2006) (counsel not ineffective for advising client to plea to avoid maximum penalty if convicted).

This case hinges on whether Petitioner was advised by trial counsel of the plea offer extended by the State. To be successful on an allegation of an un-conveyed plea offer, Petitioner must prove: (1) trial counsel's failure to communicate the State's initial plea offer constituted deficient performance, and (2) Petitioner was prejudiced by the deficient performance, or there was a reasonable probability that but for this deficient performance, he would have accepted he original plea offer. Davie v. State, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009). Generally, failure to convey a plea offer

constitutes deficient performance, although the existence of prejudice needs to be evaluated on a case-by-case basis. Id. at 613, 675 S.E.2d at 422. To show prejudice from a failure to convey a plea offer, Applicant must:

demonstrate a reasonable probability [he] would have accepted the earlier plea offer had they been afforded effective assistance of counsel. [He] must also demonstrate 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. To establish prejudice in this instance, it is necessary to show a 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.

Missouri v. Frye, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1399, 1409 (2012).

In the instant case, Counsel's testimony at the PCR hearing clearly and unequivocally indicated that not only did he convey the plea offer, but he thought Petitioner was foolish to demand a trial in light of the evidence against him. The evidence in the record is clear and unambiguous. Counsel testified that on March 22 or 23, 2011, the solicitor extended a plea offer of four (4) years with no definite expiration date. (App. pp.138-39). Counsel then testified, in response to a question of whether he spoke with Petitioner about the offer, "Well, yes. I mean, I had a chance to speak with him. After reviewing the case, I mean, I was kind of mystified as to why he didn't want to take the offer." (App. p.141). Counsel then explained why, testifying,

Because, you know, it was not a case where he was identified and picked up a couple days later as it was originally written down by the investigator. According to our investigator, Mr. Myers told him he was arrested two days later.

Actually, he was arrested almost immediately upon leaving the store. The witnesses for Walmart were claiming they never really took their eyes off of him for the most

part.

So it was like they saw him – they claimed they saw him actually taking the stuff and then followed him out into the parking lot while they were calling the police.

Then he was arrested within a few minutes after that. So under the circumstances I really didn't feel that he had much of a chance of success at trial.

(App. p.141).

Additionally, Counsel testified that while he attempted to explain the evidence against Petitioner was overwhelming, it was ultimately Petitioner's decision to go forward at trial and reject the plea offer. Remarkably, counsel testified Petitioner never indicated any interest in accepting a plea, despite the overwhelming evidence against him. (App. p.147).<sup>1</sup> Finally, Petitioner testified at the PCR hearing that Counsel did advise him he was facing a ten (10) year sentence if convicted at trial. (App. p.158).

Respondent submits Petitioner has failed to show Counsel failed to convey the plea offer, much less show any resulting prejudice from the alleged omission. The PCR judge, who was in a position to weigh the credibility of both Petitioner's and Counsel's testimony, determined to give Counsel's testimony greater weight than Petitioner's where Counsel testified he not only conveyed the plea offer but was astounded at Petitioner's unwillingness to consider the plea. As such, ample evidence of probative value exists in the record to sustain the lower court's findings. See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Accordingly, the PCR judge's finding should not be disturbed, and the Petition should be denied

#### CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition

for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

ALAN WILSON  
Attorney General

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Assistant Attorney General

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Columbia, S.C. 29211  
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By:   
ATTORNEYS FOR RESPONDENT

*February 20, 2015*

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<sup>1</sup> Respondent notes Petitioner was represented at trial by the Chief Public Defender for the Twelfth Circuit, who presumably had no compelling interest in forcing a shoplifting case to trial.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Florence County

The Honorable Michael G. Nettles, Circuit Court Judge

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DAVID MYERS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Lara M. Caudy, Esquire  
Appellate Defender  
SC Commission on Indigent Defense  
Division of Appellate Defense  
P.O. Box 11589  
Columbia, SC 29211

This 20<sup>th</sup> day of February, 2015.

  
NORMA BIGBEE  
LEGAL ASSISTANT



ALAN WILSON  
ATTORNEY GENERAL

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FEB 20 2015

February 20, 2015

S.C. Supreme Court

**VIA HAND DELIVERY**

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

**RE: David Myers v. State of South Carolina**  
**Appellate Case No: 2014-000910**

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

J. Croom Hunter  
Assistant Attorney General  
Bar No: 101253

JCH/nb  
Enclosures

cc: Lara M. Caudy, Esquire (2 copies)