

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Union County  
John C. Hayes, III, Circuit Court Judge  
\_\_\_\_\_

**ORIGINAL  
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DEC 18 2015

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S.C. SUPREME COURT  
SC SUPREME COURT

MICHAEL TIM GRAY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001605

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

BENJAMIN JOHN TRIPP  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

INDEX

INDEX.....1

ISSUE PRESENTED .....2

STATEMENT .....3

ARGUMENT .....5

CONCLUSION .....7

**QUESTION PRESENTED**

Does the record support the PCR court's finding that plea counsel was not deficient in failing to relay the State's plea offer to Petitioner where she sent emails to the solicitor acknowledging that Petitioner did not have reliable access to a phone line; where Petitioner gave her two email addresses to reach him; and where instead of emailing him, she called and left one message and sent a letter to his mother's address?

## STATEMENT

On January 9, 2012, the Union County Grand Jury indicted Petitioner Michael Tim Gray for two counts of petit larceny. App. 79-82. On May 10, 2012, the Grand Jury indicted him for first degree burglary. App. 83-84. On August 15, 2012, Petitioner appeared at a plea hearing before The Honorable Michael G. Nettles. Melinda Butler represented Petitioner and Thomas Plemming represented the State. App. 1. The State alleged that on the morning of October 20, 2011, Petitioner and a female accomplice stole a flat screen television from a residence on Deep Water Road. Later that day, he also stole a small pickup truck bed from a nearby residence and then stole \$260 in cash and a gold ring from a third nearby. App. 6, line 13—App. 8, line 23.

Pursuant to a plea deal, Petitioner pled guilty to two counts of petit larceny and one count of second degree burglary in exchange for a negotiated sentence of sixteen years' incarceration. App. 3, lines 11-15; App. 11, lines 6-13; App. 12, lines 9-14. During the colloquy, plea counsel told the court that the two "did talk on the phone numerous times. [They] actually had email back and forth with [Petitioner's] girlfriend on different things regarding these charges." App. 4, lines 15-18. The court accepted the plea and sentenced Petitioner to ten years' incarceration for one larceny charge, fifty-six days concurrent for the second, and six years' consecutive incarceration for the burglary charge. App. 13, lines 15-20; App. 16, lines 6-21.

On February 4, 2013, Petitioner filed an application for post-conviction relief ("PCR") claiming ineffective assistance of plea counsel. App. 18—App. 24. The State filed a return on August 22, 2013. App. 25—App. 29. On December 10, 2013, Petitioner appeared at an evidentiary hearing before The Honorable John C. Hayes, III. Laura Saunders represented Petitioner and J. Rutledge Johnson represented the State. App. 30.

Plea counsel testified she was appointed to represent Petitioner on March 1, 2012. App. 34, lines 14-17. She said her office sent him a letter sometime in March. App. 38, lines 18-20. She said that she had a phone number for Petitioner's mother, but she never had one for him. App. 65, lines 23-24. During the case she communicated with him through letters to his mother's address, his regular phone calls to her office, and planned phone conferences. App. 37, lines 12-23. She testified that on March 20 of 2012, the solicitor emailed her a plea offer with a recommended sentencing cap of eight years' incarceration and set an expiration date of April 9, 2012. App. 38, lines 10-18; App. 70. She did not hear from Petitioner until April 20, 2012. App. 40, lines 2-5.

Petitioner testified that he gave plea counsel email addresses for both himself and his girlfriend, but she did not email him until after April 9, 2012. App. 50, line 15—App. 51, line 8. Even then, he was never made aware of the eight-year plea offer. App. 53, lines 1-6; He affirmed, "If she emailed me I would call her." App. 54, line 14. Petitioner submitted into the record copies of emails sent during the proceedings in the lower court. App. 68—App. 73. One email showed that the solicitor informed plea counsel of the eight-year plea offer on March 20, 2012. App. 70. Another showed that on April 12, 2012, plea counsel told the solicitor, "My office is mailing a letter to him today. Although we have called him and left message, we have not sent mail, therefore I prefer to try this option first since he may very well be unable to access his cell phone voicemail." App. 68—App. 69.

On December 16, 2013, the PCR court issued an order dismissing Petitioner's application for failure to establish ineffective assistance of plea counsel. App. 74—App. 78. Specifically, the court recounted supposed testimony from plea counsel "that she did not have a phone number at which to reach the Applicant and used an email address he provided to her to forward the offer from the State to him." App. 77—App. 78.

## ARGUMENT

**The record does not support the PCR court’s conclusion that plea counsel provided effective assistance because her failure to relay the eight-year plea offer resulted from her unreasonably meager efforts to communicate with Petitioner.**

The record does not support the PCR court’s conclusion that plea counsel provided effective assistance because her failure to relay the eight-year plea offer resulted from her unreasonably meager efforts to communicate with Petitioner. 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 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)). 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.”).

“[P]rosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences. So in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would . . . cause prosecutorial withdrawal or judicial nonapproval of a plea bargain.” *Missouri v. Frye* at 1410, 182 L. Ed. 2d at 379. *See also 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)); *Davie v. State*, 381 S.C. 601, 614, 675 S.E.2d 416, 423 (2009) (“Thirdly, both plea counsel and Petitioner testified that had this offer been communicated Petitioner would have accepted the plea agreement. Finally, had Petitioner accepted the original offer, he would have received a significantly lower sentence than the twenty-seven-year sentence that was imposed.”).

In this case, the record does not support the PCR court’s findings about plea counsel’s efforts to communicate with Petitioner. The order of dismissal stated that plea counsel testified that she did not have a phone number at which to reach Petitioner and that she forwarded the eight-year plea offer to his email address. However, her testimony at the PCR hearing was only that she sent him a single letter sometime in March, and unclear is whether the letter said anything about the offer or was more likely an introductory letter. Similarly, in one of the emails to the solicitor, she said her office would mail Petitioner a letter but said nothing about his email. Nothing in the emails showed plea counsel was specifically communicating about the eight-year plea offer.

Instead, the record makes clear that plea counsel did not relay the plea offer to Petitioner through email, which was the only reasonable channel to timely communicate with him. Petitioner testified at the PCR hearing that he gave plea counsel both his and his girlfriend’s email address. Plea counsel was also well aware that Petitioner did not have reliable access to a telephone line. She testified that throughout 2012, she communicated with Petitioner through letters, and the only time the two spoke on the phone was when he was able to call her, whether on his own initiative or

based on a planned phone conference. In her email to the solicitor, she also flatly acknowledged that he “may very well be unable to access his cell phone voicemail.”

In her email to the solicitor on April 12, 2012—just three days after the expiration of the plea offer—plea counsel told the solicitor she that she had called Petitioner once and left a voice mail message. She also sent him a single letter to his mother’s address in March. She never emailed him to relay the offer even though she had two mail addresses for him and even though Petitioner testified that if she emailed him, he would call her. The record does not support the PCR court’s findings in the order of dismissal about plea counsel’s efforts to relay the plea offer, which controlled its conclusion that plea counsel rendered effective assistance. Therefore, this Court should reverse.

**CONCLUSION**

For the foregoing reasons, this Court should grant Petitioner Michael Tim Gray’s petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,

  
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Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of December, 2015.

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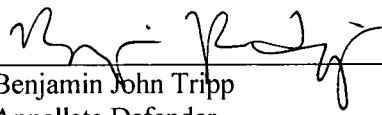
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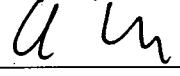
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CERTIFICATE OF SERVICE  
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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Justin Hunter, Esquire this 18th day of December, 2015.

  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day  
of December, 2015.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina

My Commission Expires: May 12, 2025.