STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Roger E. Henderson, Circuit Court Judge

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TIMOTHY YOUNG,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002162

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# PETITION FOR WRIT OF CERTIORARI

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## ISSUE PRESENTED

Whether the PCR court erred in finding trial counsel effective where her failure to properly communicate to the solicitor that Petitioner wanted to accept the plea offer to a recommended cap of three years resulted in the expiration of the offer before it could be formally accepted by the court and Petitioner was sentenced to fifteen years incarceration after trial?

## STATEMENT OF THE CASE

**Introduction**

Petitioner Timothy Young resided in a poor area of Charleston. Young was arrested by Charleston County police officer Patrick Gill for loitering mere blocks from his residence. App. 48, ll. 3-13; App. 52, l. 22 – 53, l. 3. According to officer Gill, at a May 25, 2010 bond hearing on the loitering charge, Magistrate Steinard issued a "trespass notice" as a condition of bond such that Young was prohibited from entering a one-by-two block area that would have been his most direct route home.[1] Because Judge Steinard was deceased and there was no written order, the only evidence of the "trespass notice" was Gill's testimony. App. 38, ll. 16 – 40, l. 3; App. 42, l. 13 – 43, l. 15; App. 47, l. 3 – 50, l. 3. Young testified that the magistrate merely instructed him not to loiter in the area, but that he was still allowed to walk through the area to get home. Otherwise, Young would have to walk almost four blocks out of the way to get home. App. 58, l. 5 – 61, l. 12.

It was based on the alleged "trespass notice" that the officer went to approach Young on May 29, 2010. App. 38, ll. 5-15; App. 44, ll. 1-20. Young ran from the officer, after which an alleged altercation ensued and Young was arrested. A quantity of crack cocaine was found in Young's pocket during a search incident to arrest. App. 40, l. 4 – 42, l. 3; App. 50, l. 4 – 51, l. 3; App. 61, l. 13 – 65, l. 19. Young was charged with possession with intent to distribute ("PWID") cocaine base (third offense), PWID cocaine base within proximity of a park, resisting arrest, and threatening the life of a public official.[2]

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[1] A map of the area was utilized at Young's trial to show the area where the no-loitering notice was issued, where Young was seen by police thereafter, and where Young lived. App. 59, l. 2 – 60, l. 3.

[2] As will be seen *infra*, Young was acquitted of threatening the life of a public official. App. 278, ll. 13-17.

On August 12, 2010, the State offered to recommend a cap of three years if Young pled guilty to threatening a public official, PWID crack (second offense), and resisting arrest. The solicitor would dismiss the charge for PWID cocaine base within proximity of a park. App. 383. Because of Young's belief that he was lawfully walking, and not loitering, in the area where the officer approached him, Young rejected the three year offer when it was initially made. However, once Young had spent a year in the county jail, he decided to accept the three year offer when it was re-extended by the solicitor on June 9, 2011. App. 353, l. 4 – 356, l. 14; App. 384. Young was set to appear to enter a guilty plea during the week of August 1, 2011. App. 385. After court was cancelled for the remainder of that week because Judge Hughston fell ill,[3] Young's case was set for trial. App. 364, ll. 10-22. At Young's sentencing hearing, trial counsel admitted some responsibility for Young's inability to "take" the three year offer, saying that it was due to a "miscommunication" between she and the solicitor. App. 284, l. 15 – 285, l. 7. However, at the PCR hearing, trial counsel shifted the blame to the solicitor, saying that the solicitor arbitrarily increased the offer to five years merely because Young was unable to appear to plea after the judge fell ill. App. 364, l. 23 – 366, l. 16.

**Indictment, Trial, and Direct Appeal**

On August 2, 2010, the Charleston County grand jury indicted Petitioner Timothy Young for possession with intent to distribute ("PWID") cocaine base, PWID cocaine base within proximity of a park, resisting arrest, and threatening the life of a public official. App. 397 – 402; App. 4, ll. 14-18.

[3] The South Carolina Judicial Department's schedule for the August 2011 Term of Circuit and Family Court was admitted at the PCR hearing, confirming that Judge Hughston was the judge scheduled for General Sessions court in Charleston the week of August 1, 2011. App. 386.

On August 31 – September 2, 2011, Young proceeded to trial before the Honorable Deadra Jefferson and a jury. Young was represented by Cantrell Frayer and Chad Simpson. The State was represented by assistant solicitors Culver McClain and Chad Simpson. App. 1; App. 249. The jury found Young not guilty of threatening the life of a public official, but convicted him of both drug offenses and resisting arrest. App. 277 – 279. Judge Jefferson imposed concurrent sentences of fifteen (15) years for PWID, third offense; ten (10) years for PWID within proximity of a park; and one (1) year for resisting arrest. App. 286 – 287.

A pre-trial colloquy was conducted, at which time Young rejected the State's five year plea offer. App. 4 – 9. During the sentencing hearing, trial counsel Frayer said:

> Your Honor, I just need to be clear for the record. **There was an offer in the case of a plea** to possession of cocaine base third, resisting arrest, and threatening a public official. The State would dismiss the possession of cocaine proximity of a school in exchange for a guilty plea **with a recommended cap of three years.**
>
> **Due to some miscommunication between myself and the solicitor's office,** which we talked about earlier this week, **that offer was -- my client was not able to take a -- was not able to take -- make available of that offer.**
>
> There was a second offer that was extended to my client, which was a guilty plea to possession of -- possession with intent to distribute cocaine base second offense, resisting arrest, and threatening a public official. That offer was rejected by my client and we proceed[ed] to trial.

App. 284, l. 15 – 285, l. 7 (emphasis added).

Appellate defender Katherine Hudgins represented Young on direct appeal. App. 289. On November 27, 2013, the Court of Appeals issued an unpublished opinion dismissing the appeal pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). App. 304.

**Post-Conviction Relief Application and Hearing**

On January 22, 2014, Young filed an application for post-conviction relief ("PCR"). App. 306. On March 20, 2015, the State filed its Return. App. 335. An evidentiary hearing was held

before the Honorable Roger E. Henderson on July 21, 2015. Young was represented by Rodney Davis, and the State was represented by assistant attorney general J. Rutledge Johnson. App. 340. Young and trial counsel Frayer both testified at the PCR hearing. App. 341.

Young testified that he was "locked up" in the county jail from the date of his arrest, May 29, 2010, until his trial in August 2011. Approximately three to four months after his arrest, Frayer advised Young that the State extended him a plea offer for three years. The same offer of three years was presented to Young again after he had spent approximately one year in the county jail. At that point Young agreed to accept to the State's offer. A plea hearing was scheduled for the first week of August, but Young was never brought to court. Young confirmed that he would have entered the guilty plea to the three year offer had he been brought to court that week. When the solicitor later increased the offer to five years, Young rejected the offer. App. 353, l. 4 – 356, l. 14.

Trial counsel Frayer testified that the initial offer from the solicitor's office was a cap of three years, evidenced by an e-mail from the solicitor sent August 12, 2010. App. 362, ll. 3-6; App. 383. She agreed that, at first, Young rejected the three year offer because he wanted to deal with the trespass charge in magistrate's court first. Frayer tried to get the solicitor to extend a better offer, even asking her to consider time-served. However, the solicitor was only willing to re-extend the offer of a three year cap. Frayer said that she asked the solicitor to put Young on the plea docket in August, and the solicitor complied by placing him on the docket for the week of August 1, 2011. Judge Hughston was presiding over general sessions court that week, but fell ill such that the remainder of the week's docket was cancelled and Young was never transported. According to Frayer, the solicitor said that since he did not plead when he was on the plea docket, the offer to Young was increased to a cap of five years. Frayer expressed to the solicitor that Young was being penalized for something beyond his control, to no avail. Thereafter, Frayer explained to Young that

his options were now only to accept the five year offer or go to trial. Young was understandably upset and rejected the five year offer. App. 362, l. 3 – 367, l. 21; App. 369, l. 10 – 373, l. 16; App. 383 – 385.

**Order of Dismissal**

On September 23, 2015, Judge Henderson filed an Order of Dismissal, denying Young's application for post-conviction relief. App. 389. The court found that:

> By no fault of Counsel, Judge Hughston fell ill and the term of General Sessions was cancelled. Counsel then contacted the solicitor and asked that this cancellation not be held against Applicant and to re-offer the three (3) year cap. The solicitor, who may rescind an offer at any time before a defendant accepts it, decided not to re-offer the three (3) year cap. Instead, the solicitor offered Applicant a plea for five (5) years, which Applicant rejected on the record before his trial.

App. 341. The Court further found that: "Applicant had ample opportunity to accept either offer, but rejected both of them. When he did not accept the offers, but rejected them, the solicitor was under no obligation to re-offer the plea bargains." App. 341. The Order did not mention Frayer's statements with respect to the plea offers made during the sentencing hearing. See App. 284, l. 15 – 285, l. 7.

## ARGUMENT

**The PCR court erred in finding trial counsel effective where her failure to properly communicate to the solicitor that Petitioner wanted to accept the plea offer to a recommended cap of three (3) years resulted in the expiration of the offer before it could be formally accepted by the court and Petitioner was sentenced to fifteen (15) years incarceration after trial.**

The PCR court erred in finding that withdrawal of the three year plea offer was simply a matter of prosecutorial discretion and no fault of trial counsel. See App. 341. During the sentencing hearing, trial counsel Frayer described the three year offer as becoming unavailable to Young due to a **miscommunication** between she and the solicitor. App. 284, l. 15 – 285, l. 1. Implicit in an attorney's duty to communicate a plea offer to their client is the consequential duty to properly communicate the client's acceptance of the offer to the prosecutor. See Davie v. State, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009) (announcing rule that "counsel's failure to convey a plea offer constitutes deficient performance"). Here, it was Frayer's failure to properly communicate with the solicitor that resulted in the expiration or revocation of the three year plea offer before it could be formally accepted. App. 284, l. 15 – 285, l. 1. Young was prejudiced in that he was ultimately sentenced to fifteen years, **five times the maximum time that the solicitor would have recommended pursuant to the three year cap offer**. App. 286, l. 19 – 287, l. 5; App. 356, ll. 5-14; see Bell v. State, 410 S.C. 436, 443, 765 S.E.2d 4, 7-8 (Ct. App. 2014) (finding evidence of prejudice from the difference in the offer and sentence imposed and the applicant's self-serving statement that he would have accepted offer).

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668, 685–86, 104 S.Ct. 2052 (1984). This Court has also held that "a defendant has the right to effective assistance of counsel during the plea bargaining process." Davie, 381 S.C. at 607, 675 S.E.2d at

419. "[A]s 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." Missouri v. Frye, 132 S.Ct. 1399, 1408; see also Davie, 381 S.C. at 609, 675 S.E.2d at 420 (2009).

It is axiomatic that an attorney's duty to communicate a plea offer to their client requires that such communication be done in a timely manner. See Bell, 410 S.C. at 439, 765 S.E.2d at 5 (upholding grant of post-conviction relief where trial counsel failed to communicate the plea offer to client before the jury's verdict); Davie, 381 S.C. at 610, 675 S.E.2d at 421 (finding deficient performance even where delay in communication of offer was caused by "excusable neglect"). Likewise, the communication to client **must include information on when the plea offer will expire**. See Kolle v. State, 386 S.C. 578, 591, 690 S.E.2d 73, 80 (2010) (finding plea counsel deficient in misinforming client that the plea offer would remain open until after the suppression hearing). Further, once a defendant indicates their intent to accept the solicitor's offer, the trial attorney **must properly communicate the desire to accept the offer to the solicitor**, otherwise the communication of the offer to the client would be pointless.

In the present case, the State made the following offer via e-mail on August 12, 2010

> Here is my offer:
> DOA: 05/29/10
> Threatening Public Official .... AS IS
> PWID Crack 3rd... Poss Crack 2nd
> Prox Crack ... NP
> RA... AS IS
> * Recommend a cap of 3 years
>
> Please let me know if he is inclined to accept. I intend to place him on a plea docket for Sept. 6.

App. 383. Ten months later, on June 9, 2011, defense counsel asked the solicitor to consider making an offer of time-served in light of the more than one year Young had been in the county

detention center and the lack of any written order regarding trespassing. The solicitor responded:

> My offer of Poss 3rd with a recommended cap of 3 years is extremely generous. I will put him on one more plea docket for June 27. If he does not plead that week, I can put him on a trial docket for July 18.

App. 384. That deadline for acceptance of the offer was obviously extended because on June 29, 2011, a notice was sent to trial counsel:

> The above-referenced matter involving your client is on the Guilty Plea Docket for the week of August 1, 2011. Please call this office on the Friday before the plea week in order to determine the exact date and time your client is scheduled to appear.
>
> Your client's failure to attend court at the appointed time, whether or not he wishes to plead guilty, will result in the issuance of a Bench Warrant for his arrest. Furthermore, if your client does not appear at the appointed time his case may be placed on the next Trial Docket and may be tried in his absence if he fails to appear for trial.

App. 385.

Trial counsel Frayer identified the aforementioned e-mails and plea notice on cross-examination at the PCR hearing. Thus, though Frayer initially testified that the three year offer was first made in March or April of 2011, she subsequently acknowledged that the solicitor's e-mail dated August 12, 2010 relayed the offer. App. 362, l. 3 – 367, l. 21; App. 369, l. 10 – 373, l. 16; App. 383 – 385. The timing of the e-mail is consistent with Young's testimony that the offer was extended three to four months after he was arrested. App. 353, ll. 12-15.

Both Frayer and Young agreed that the initial three year offer was rejected. However, they also both agreed that after Young had spent a year in jail, he was open to a plea offer. That was why Frayer requested an offer of time-served on June 9, 2011, to which the solicitor responded that three years was the best offer she would extend. Young was then placed on the plea docket for the week of August 1, 2011. However, when the judge fell ill, court was not held for the remainder of the week and the solicitor increased the plea offer to five years. App. 353, l. 4 – 355, l. 20; App. 362, l.

20 – 365, l. 25; App. 366, ll. 23-25, App. 384 – 385. Frayer said that she went to the jail and told Young about the increase in the offer, at which time he said "no, I can't do -- I am not going to take that five, you know, it was supposed to be the cap of three, we are just going to go to . . . trial." App. 366, l. 12 – 367, l. 1. Frayer then explained: "Because that is the only way I would have been ready for trial is when he said they he was -- hey, I am not taking the five, let's get ready for trial. And so we were ready for trial." App. 367, ll. 2-5. Thus, it was only after the three year offer was withdrawn that Young made the decision to go to trial and that Frayer even began to prepare for trial. App. 355, l. 14 – 356, l. 1; App. 366, l. 6 – 367, l. 5.

At Young's sentencing hearing, Frayer accepted responsibility for Young's not getting the advantage of the three year offer. App. 284, l. 15 – 2 85, l. 1; cf. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) ("In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing."). She specifically said that Young was unable to take the offer because of "some miscommunication between myself and the solicitor's office." App. 284, l. 15 – 285, l. 1. The only reasonable interpretation of her statement is that Frayer did not properly communicate Young's intent to accept the three year offer to the solicitor. Yet, when the solicitor was not there to defend herself at the PCR hearing, Frayer attempted to deflect her own responsibility and paint the solicitor as unreasonable and arbitrary. Frayer testified that the solicitor was not being "fair" and "penalizing" Young for the judge's illness. App. 364, l. 23 – 365, l. 20; App. 366, ll. 8-11. On the contrary, it was Frayer's responsibility to properly communicate with the solicitor in order to effectuate Young's desire to accept the three year offer. Thus, it was Frayer's admitted failure to communicate that cost Young the benefit of the state's three year offer.

Though this Court generally defers to the PCR Court's findings of credibility, this Court will not uphold the PCR Court's findings where there is no probative evidence to support them. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996). Here, the PCR court ruled: "While Applicant claims he was willing, able and ready to accept the three (3) year offer, this Court finds his testimony not credible, while finding Counsel's testimony credible." The problem with this finding is that both Young and trial counsel agreed that Young rejected the three-year offer when it was initially made but that **Young would have accepted the renewed three-year offer in August 2011**. App. 353, l. 4 – 356, l. 5; App. 362, l. 20 – 365, l. 25; App. 366, ll. 23-25. Trial counsel said that Young rejected the five year offer because "it was supposed to be the cap of three." App. 366, ll. 23-25. Thus, there was no evidence to support the PCR court's finding that Young would not have accepted the three year offer. As such, the twelve year disparity between the plea offer and imposed sentence, and Young's testimony, were sufficient for the PCR court to find that he was prejudiced by trial counsel's failure to properly communicate his acceptance of the solicitor's three year plea offer. See Bell v. State, 410 S.C. at 443, 765 S.E.2d at 7-8.

## CONCLUSION

Based on the foregoing, Petitioner Timothy Young, respectfully requests that this Court grant certiorari and allow further briefing on this issue.

Respectfully submitted,

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of June, 2016.

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IN THE SUPREME COURT

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TIMOTHY YOUNG,

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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 J. Rutledge Johnson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Timothy Young, at Macdougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472 this 8th day of June, 2016.

Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day of June, 2016.

(L.S.)
Notary Public for South Carolina
My Commission Expires: April 27, 2026.