

STATE OF SOUTH CAROLINA  
In the Supreme Court

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MAR 26 2018

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas  
Robert E. Hood, Circuit Court Judge

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S.C. SUPREME COURT

Appellate Case No. 2017-001742  
Lower Court Case No. 2015-CP-32-1885

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JUAN ARROYO, #354538,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**PETITION FOR WRIT OF CERTIORARI**

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**ATTORNEY FOR PETITIONER.**

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QUESTION PRESENTED

I.

Whether the PCR court erred in concluding that defense counsel was not ineffective for failing to properly advise the Petitioner of all plea offers conveyed by the State?

## STATEMENT OF THE CASE

The Petitioner, Juan Arroyo, was one of numerous co-defendants charged with conspiracy to traffic heroin (Count I) by the State Grand Jury. The Petitioner was also charged with several substantive counts of trafficking heroin arising out of Horry and Georgetown Counties (Counts IV, VI, and VII). See App. pp. 593-598. On November 10, 14-15, 2011, the Petitioner proceeded to trial on Counts I and IV. The Petitioner was represented at this trial by Debra R. Chapman, Esquire. This trial ended in a mistrial. On March 4-5, 2013, the Petitioner proceeded to trial again,<sup>1</sup> this time solely for Count IV. The Petitioner was represented at trial by Attorney Chapman and Bradley M. Kirkland, Esquire. At the conclusion of the trial, the jury found the Petitioner guilty as charged. The Honorable William P. Keesley, presiding circuit judge, sentenced the Petitioner to twenty-five years' imprisonment.

The Petitioner timely appealed his convictions and sentences to the South Carolina Court of Appeals. In an unpublished opinion, the Court of Appeals dismissed his appeal pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Arroyo, Op. No. 2014-UP-338 (S.C. Ct. App. filed September 24, 2014); App. pp. 583-584. The remittitur was issued on October 10, 2014. App. p. 585.

On May 22, 2015, the Petitioner filed an Application for Post-Conviction Relief with the Lexington County Clerk of Court. An evidentiary hearing into the matter was convened on April 18, 2017, before the Honorable Robert E. Hood, presiding circuit judge. On June 2, 2017, the PCR court filed an Order of Dismissal which denied relief on all of the Petitioner's claims. App. pp. 749-761. The Petitioner timely filed a Rule 59(e), SCRCP, motion to reconsider the judgment. App. pp. 762-766. Judge Hood denied this motion in a Form 4 memorandum order. App. pp. 767-

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<sup>1</sup> Both trials were held in Lexington County.

768. The Petitioner served his Notice of Appeal from Judge Hood's orders on August 17, 2017, and this Court received the notice on August 21, 2017.

Notice of appeal was timely served and filed. The Petitioner now seeks a writ of certiorari.

## ARGUMENT

### **I. There is no evidence to support the PCR court's conclusion that defense counsel was not ineffective for failing to sufficiently convey the State's plea offer.**

#### A. How the Issue Arose Below

Although there were numerous allegations against the Petitioner, the only charge for which he was convicted consisted of a controlled drug purchase that was recorded on video. Attorney Chapman described the evidence as strong and that it was her opinion that “he would be convicted” if he proceeded to trial. App. p. 628, line 3. Due to the substantial nature of the evidence against the Petitioner, he agreed to cooperate with the State and signed a proffer agreement. Throughout the course of his cooperation, the Petitioner was interviewed approximately three to four times. See App. p. 625, lines 7-21. Attorney Chapman assumed that the case would result in a plea following the Petitioner's cooperation. See App. p. 625, line 22-p. 626, line 3.

The State's initial plea offer was to a negotiated eighteen years, and the Petitioner rejected the offer. See App. pp. 628-630. After the Petitioner rejected that offer, the State returned with a written plea offer that stated: “The parties have negotiated the sentence of Defendant, Juan Rodolpho Arroyo, for a recommended sentencing range of fourteen (14) to eighteen (18) years.” App. p. 739. This document was dated October 17, 2011. A sentencing sheet was also prepared which stated that the sentence had a negotiated range of 14-18 years. App. p. 744. Attorney Chapman testified that the written plea agreement was incorrect, and that the sentencing sheet reflected her understanding of the agreement:

Q. The plea agreement reads recommended sentencing range of 14 to 18 years, but the sentencing sheet reads negotiated 14 to 18 years.

A. I don't know why they put negotiated. That's not my writing. But what the deal was we could argue anything between the 14 and 18. So we negotiated, I guess you could say because it carries 7 to 25, it

was a lesser included offense than what he was charged with and I guess negotiated is that he would have to at least get 14, no more than 18.

App. p. 633, lines 10-18.

Based on the discrepancy between the written plea agreement and the sentencing sheet, the Petitioner argued in an amended PCR application that defense counsel was ineffective for “failure to effectively communicate all plea offers to Applicant and the sentencing possibilities under such offers.” App. p. 609. At the PCR hearing, the Petitioner testified that he had been informed that the plea carried a negotiated range of fifteen to eighteen years, and that he had rejected that offer. App. pp. 677-680. He further testified that he would have accepted the written plea offer had he known that he could receive a sentence lower than fourteen years under its terms. App. pp. 681-682; see also App. p. 685, lines 10-17.

The PCR court denied relief on this claim, finding that “Counsel not only communicated the offer to Applicant, but pled with him numerous times to accept the offer.” App. p. 755. The PCR court further concluded that “the weight of the evidence shows that the offer was actually a range of fourteen (14) to eighteen (18) years.” App. p. 755. The Petitioner now contends that the PCR court’s findings are unsupported by any probative evidence and that certiorari should be granted to review them.

#### B. Standard of Review

The Sixth and Fourteenth Amendments to the United States Constitution guarantee every criminal defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to prove a claim of ineffective assistance of counsel for failure to sufficiently convey a plea offer, the moving party must show that defense counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for

attorneys representing clients in criminal matters; and (2) that the outcome of the plea process would have been different with competent advice. Lafler v. Cooper, 566 U.S. 156 (2012); see also Missouri v. Frye, 566 U.S. 134 (2012).

On appeal, a PCR court's findings will be upheld if there is any evidence of probative value supporting them. Cherry v. State, 300 S.C. 155, 386 S.E.2d 624 (1989). "The appellate court will reverse the PCR court only where there is either no probative evidence to support the decision or the decision was controlled by an error of law." Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011).

### C. Discussion

"Where language used in an instrument is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument." State v. Gates, 299 S.C. 92, 95, 382 S.E.2d 886, 887 (1989). Additionally, "[t]he necessary elements of a contract are an offer, acceptance, and valuable consideration. A valid offer 'identifies the bargained for exchange and creates a power of acceptance in the offeree.'" Sauner v. Public Service Authority of South Carolina, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003) (quoting Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co., 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993). "[A] plea agreement is nothing more than an offer until it is approved by a court." Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999) (citing United States v. Papaleo, 853 F.2d 16 (1st Cir. 1988)).

The Petitioner contends that defense counsel was ineffective for failing to advise the Petitioner that he could require the State to abide by the more favorable terms set forth in the written plea agreement. The following facts are uncontroverted. The written plea agreement stated that the sentencing range was a recommended fourteen to eighteen years. The offer conveyed to

the Petitioner was for a negotiated sentence. Defense counsel did not convey to the Petitioner that he could receive a sentence below the fourteen-year range if he accepted the plea agreement.

The written plea agreement, consequently, contained a written offer made by the State for a *recommended* sentencing range of fourteen to eighteen years. Since defense counsel did not convey these terms to the Petitioner, defense counsel's performance was clearly deficient. See Frye, 566 U.S. at 145 ("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.") The PCR court's finding that all plea offers were properly conveyed, consequently, is unsupported by any probative evidence as it is directly contradicted by the record.

Having established deficient performance, the Petitioner turns to the question of prejudice. Here, the Petitioner must show that there is "a reasonable probability they would have accepted the ... plea offer [and] must also show that, if the prosecution had the discretion to cancel it or if the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented." Frye, 566 U.S. at 148. The Petitioner submits that this burden has been met. He unquestionably would have accepted the plea offer had he known its full terms, as all parties agreed that his desire was to avoid the high floor set by what he believed to be the negotiated sentencing range.

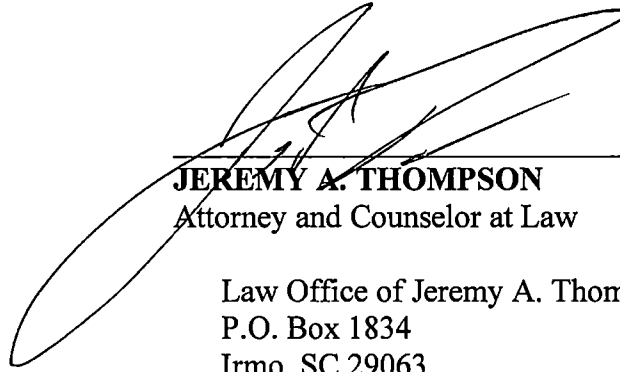
Furthermore, the Petitioner submits that the State would not have been permitted to withdraw its plea agreement. Here, the plea offer was in writing and stated that, once accepted, it could have been "modified only in writing signed by all parties." App. p. 742. Since the terms of the plea agreement were unambiguous, they would have been readily enforceable. Even if the

terms were somehow ambiguous, they would have been strictly construed against the State. See Margalli-Olivera v. INS, 43 F.3d 345, 353 (8th Cir. 1994) (“Where a plea agreement is ambiguous, the ambiguities are construed against the government.”) Accordingly, the Petitioner submits that it would have been erroneous, given the terms of the plea agreement, to permit the State to withdraw the agreement once it had been signed by the Petitioner. Accordingly, the Petitioner respectfully submits that he has met his burden of proof with regard to showing both deficient performance and prejudice resulting therefrom, and that he should receive the benefit of the plea bargain that was unambiguously offered to him by the State.

CONCLUSION

For the reasons stated, the Petitioner asks this Court to grant the petition and to allow full briefing on this issue.

Respectfully submitted,



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**ATTORNEY FOR PETITIONER.**

This 22<sup>nd</sup> day of March, 2018.

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JUAN ARROYO, #354538,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two copies of the Petition for Writ of Certiorari in the above-entitled case has been served upon opposing counsel, James Clayton Mitchell, III, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 22<sup>nd</sup> day of March, 2018.

  
\_\_\_\_\_  
**JEREMY A. THOMPSON**  
ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 22<sup>nd</sup> day  
of March, 2018.

Angela Carter (L.S.)

Notary Public for South Carolina

My Commission Expires: \_\_\_\_\_

My Commission Expires August 20, 2025



LAW OFFICE OF  
**JEREMY A. THOMPSON**  
LLC

March 22, 2018

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MAR 26 2018

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse  
Clerk, Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211-1330

RE: Juan Arroyo, #354538 v. State of South Carolina; 2017-001742

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of my Petition for Writ of Certiorari. I would appreciate your filing the original and six copies of the petition and returning the extra copy to me in the enclosed self-addressed, stamped envelope. If I can be of any further assistance to the Court in this matter, please do not hesitate to contact me. With my thanks for the Court's assistance in this matter, and my best regards, I am,

Yours sincerely,



Jeremy A. Thompson  
Attorney and Counselor at Law

JAT/  
Enclosures

cc: James Clayton Mitchell, III, Assistant Attorney General (w/ enclosures)  
Juan Arroyo, #354538 (w/ enclosures)  
Wendy Arroyo (w/ enclosures)