

STATE OF SOUTH CAROLINA  
In the Supreme Court

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On Writ of Certiorari to Greenville County  
Perry H. Gravely, Post-Conviction Relief Judge  
R. Lawton McIntosh, Trial Court Judge

Appellate Case No. 2017-002256

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CHRISTOPHER ERIC RUSSELL,

Respondent,

v.

THE STATE OF SOUTH CAROLINA,

Petitioner.

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**REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ATTORNEYS FOR PETITIONER

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**TABLE OF CONTENTS**

PROCEDURAL AND FACTUAL HISTORY .....2

ARGUMENT .....6

    Contrary to Russell’s assertions, the corrected trial transcript does not support his version of events, and in fact now directly contradicts his self-serving testimony, which was initially found credible by the PCR court based on an error in the original transcript. Therefore, the credibility findings in the PCR court’s order granting relief are no longer supported by the record, and the PCR court abused its discretion in denying the State’s motion pursuant to Rule 60(b), SCRCP.....6

CONCLUSION.....8

### Procedural History

Respondent Christopher Eric Russell (Russell) was indicted by the July 2011 term of the Greenville County Grand Jury for conspiracy (2011-GS-23-1118), kidnapping (2011-GS-23-1122), armed robbery (2011-GS-23-1123), and first-degree burglary (2011-GS-23-1124). App. 735-36, 739-40, 743-44, 747-48. Susannah Ross, Esquire, represented him. App. 1. On February 13, 2013, Applicant proceeded to a jury trial and was found guilty as indicted on all charges. App. 1, 512-13. The Honorable R. Lawton McIntosh sentenced Russell to confinement for five years for conspiracy and life without parole for each charge of kidnapping, armed robbery, and first-degree burglary. App. 512-13. The sentences are to run concurrently. App. 512-13.

A notice of appeal was filed on Russell's behalf and an appeal perfected pursuant to Anders v California, 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed Russell's convictions. State v. Russell, Op. No. 2015-UP-435 (filed on August 19, 2015). The Remittitur was issued on September 16, 2015. App. 612.

Thereafter, on June 1, 2016, Russell filed an application for post-conviction relief alleging trial counsel was ineffective for failing to convey a twenty-year plea offer to him prior to trial. App. 616-22. Petitioner made its Return on January 12, 2017, requesting an evidentiary hearing be held. App. 623-28. An evidentiary hearing into the matter was convened on April 19, 2017, at the Greenville County Courthouse. App. 630. Russell was present at the hearing and represented by R. Mills Ariail, Esquire. App. 630. Lindsey A. McCallister, Esquire, of the South Carolina Office of the Attorney General represented Respondent. App. 630. Russell testified on his own behalf. App. 631. Petitioner presented testimony from trial counsel. App. 631.

On June 12, 2017, the post-conviction relief court signed an order granting post-conviction relief, finding trial counsel was ineffective for failing to convey a twenty-year plea

offer to Russell prior to trial. App. 702-11. This order was filed by the Greenville County Clerk of Court on June 15, 2017. App. 702. Petitioner received copy of the order via U.S. Mail on June 19, 2017. App. 713. On June 29, 2017, Petitioner filed a motion to reconsider, alter, and amend pursuant to Rule 59(e), SCRCF. App. 713-17. On July 21, 2017, the post-conviction relief court denied Petitioner's motion to reconsider. App. 718.

Thereafter, Petitioner received correspondence indicating trial counsel had contacted the trial court reporter, who reviewed the trial tapes and discovered an error in the transcript. App. 729. Petitioner then filed a motion pursuant to Rule 60(b)(1), SCRCF, asking the post-conviction relief court to reconsider its decision based upon the corrected transcript. App. 719-31. The post-conviction relief court denied Petitioner's motion by order filed October 12, 2017. App. 732-33.

### **Factual History**

On Saturday night, December 20, 2010, Jeffrey Lyles (Mr. Lyles) was at home relaxing with a fire, when two armed men wearing camouflage clothing and police masks burst through his back door. App. 82-83, 85. The men identified themselves as police officers, shoved Mr. Lyles to the ground, kicked him in the side, and tied his hands behind his back. App. 85-86. The skinnier of the two men shoved a gun into Mr. Lyles' mouth, demanding to know where his money and safe were and threatening to kill him if he did not tell them. App. 88. The men then moved Mr. Lyles to a back bedroom, stole \$760 from his wallet, along with his watch and cellphone, and began ransacking the house apparently trying to locate the safe and money they believed to be there. App. 89-90, 94.

Meanwhile, Elaine Lyles (Mrs. Lyles) and her granddaughter were leaving work at the family's restaurant to go get something to eat, but when they were unable to reach Mr. Lyles on

his cellphone, they drove to their home to check on him instead. App. 112-14, 154-55. Mrs. Lyles entered the home and walked down the hallway looking for Mr. Lyles. App. 115-16. As she did so, the skinny man with the gun jumped out and forced her to the floor. App. 116. The granddaughter, who had not been seen by the men in the house, immediately ran to a neighbor's house to get help. App. 161-62.

The robber with the gun demanded Mrs. Lyles tell him where the money and the safe were, threatening to kill her husband if she did not comply. App. 117. He took \$200 from her, and then both men continued ransacking the house. App. 118-19. By this time, the Lyles' granddaughter and a neighbor, Jimmy McDaniels (McDaniels), had called 911. App. 162, 170. The police arrived approximately two minutes later, and set up a perimeter outside the Lyles' home. App. 163, 170-71, 186, 188-89, 202.

Inside the home, the robbers noticed the arrival of law enforcement and began to panic. App. 120-21. The bigger man ran out the back door, discarding his pistol in the back yard as he did so. App. 189-90, 193. He was quickly apprehended with the help of a police dog and was identified as Antonias Williams. App. 189-90. The skinnier robber took off his mask, and when he turned his attention away from Mrs. Lyles, she got up and ran out the back door as well.<sup>1</sup> App. 122, 202. As she did, the skinny man fled out the front door and escaped into a nearby wooded area while the officers' attention was focused on Williams and Mrs. Lyles. App. 203.

Williams was Mirandized, and he admitted to being in possession of the Lyles' property. App. 193-94. He explained to officers that he and his accomplice believed there was \$200,000 hidden inside the home. App. 199. Williams also told officers the vehicle used in the crime was parked one street over. App. 244. However, Williams repeatedly refused to name his

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<sup>1</sup> At trial, Mrs. Lyles testified that although she did not get a good look at his face, the skin tone, lips, and voice of the skinny man matched those of Russell. App. 122, 144-46.

accomplice. App. 200, 244-45. Using Williams' information, officers located a white van parked in the driveway of a vacant residence one street away from the Lyles home. App. 207. The van was removed from the scene, and investigators obtained a search warrant for it. App. 208-09, 225-26. Inside, they recovered one cell phone next to the driver's seat, another cellphone plugged into the van's charging port, various police costume items, a stocking cap, and a pry bar. App. 248-51.

On January 5, 2011, Investigator Weiner interviewed Williams again, and this time Williams identified Christopher Eric Russell as his accomplice. App. 254-55. Investigator Weiner also asked Williams about the cellphones found in the van, and Williams indicated Russell's cellphone was the one plugged into the charger. App. 255-56. Based on Williams' statement, Investigator Weiner obtained a search warrant for the phone, a subpoena for the phone records, and a warrant for Russell's arrest. App. 256-57, 259-60.

Thereafter, on January 10, 2011, officers located Russell and arrested him after he attempted to flee on a bicycle. App. 195-97. When he was booked at the Greenville County Detention Center, he identified his mother as his next of kin and provided her phone number as part of the booking process. App. 277-78. Officers conducted a forensic examination of the cellphone identified as Russell's by Williams, and the same phone number Russell provided during booking was included in the cellphone's contact list as "Momma."<sup>2</sup> App. 263, 269,

Russell was indicted for first-degree burglary, kidnapping, armed robbery, and conspiracy, and proceeded to trial. App. 1, 735-36, 739-40, 743-44, 747-48.

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<sup>2</sup> The cellphone was pre-paid, and no ownership information was available. App. 256-57.

## ARGUMENT

**Contrary to Russell's assertions, the corrected trial transcript does not support his version of events, and there is no longer any probative evidence, other than Russell's own self-serving testimony, to support the credibility findings in the PCR court's order granting relief. Therefore, the PCR court abused its discretion in denying the State's motion pursuant to Rule 60(b).**

In granting relief, the post-conviction relief court found trial counsel was constitutionally ineffective for failing to convey a twenty-year plea offer to Russell prior to trial. App. 702, 705-08. The lower court specifically relied on the trial transcript, which, at the time of the PCR hearing was transcribed in such a way as to confirm Russell's testimony at the evidentiary hearing rather than trial counsel's testimony. App. 511, 707. That transcript, however, was erroneous and has now been corrected so that the opposite is true – trial counsel's version of events is supported by the transcript rather than Russell's. App. 729-30. Therefore, the post-conviction relief court's reasoning in granting relief is no longer supported by probative evidence, and the court abused its discretion in denying Petitioner's Rule 60(b)(1), SCRCP, motion.

In his return to the State's petition for writ of certiorari, Russell repeatedly asserts that even with the corrected transcript, trial counsel's "testimony, and her notes, and her pre-sentencing remarks all corroborate [his] claim that this twenty-year plea offer was never communicated to him." RPWC p. 7. This assertion is clearly inaccurate now that the trial transcript has been corrected. At the evidentiary hearing, trial counsel testified she received a plea offer of twenty years in writing from the solicitor in March 2011. App. 671. She testified it was her usual practice to convey all plea offers and discuss the ramifications of such with her clients in person rather than in writing. App. 672-73, 687. Although she testified she did not

have a note in her file specifically confirming when or how she conveyed the offer, she testified her notes reflected she made jail visits on December 5, 2011, and December 7, 2011. App. 672-73. Trial counsel clearly explained she believed those visits were her attempts to persuade Russell to avoid a sentence of life without parole (LWOP) by accepting the plea offer as the State served Russell with notice of its intent to seek LWOP upon conviction on December 8, 2011, but Russell's "position was always that he was innocent, and he did not want to plead guilty." App. 672-74. This testimony is now corroborated by contemporaneous evidence in the form of the corrected transcript which reflects trial counsel told the trial judge during sentencing, "Mr. Russell has been offered opportunities to plead *without* life without parole on the table a number of times. He has consistently maintained his innocence on this case." App. 729-30 (emphasis added).

Russell testified the only offer ever communicated to him was to plead to life without parole, and if he had known about the twenty-year offer, he would have accepted it. App. 639-43, 656. However, the transcript reflects there was another non-LWOP offer made *during* trial, which trial counsel testified at that point was a "straight-up" plea in exchange for the State withdrawing the LWOP notice. App. pp. 511, 687-88. Importantly, the transcript reflects Russell, at the time of sentencing, did not dispute or correct trial counsel's statement that he had been offered the chance to plead to something less than life. App. 510-13. Further, trial counsel's trial notes reflect Russell refused that offer, along with others which also would have taken LWOP off the table. App. p. 688. Therefore, Russell's testimony insisting the only offer conveyed to him was to plead to LWOP is no longer supported by any evidence, especially given trial counsel's testimony she visited the jail the day before the State served its LWOP notice in order to try to convince him to accept a plea, and Russell's silence during sentencing when trial

counsel and the court discussed the fact that there had been numerous non-LWOP offers made which Russell rejected.

The trial transcript no longer supports Russell's testimony, and in fact, flatly contradicts it. App. 730. Russell's contention trial counsel's notes, testimony, and remarks at trial support his version of events is incorrect. Because the corrected trial transcript now supports trial counsel's testimony rather than Russell's, the post-conviction relief abused its discretion in denying the State's motion pursuant to Rule 60(b), SCRCP.

### CONCLUSION

For all the foregoing reasons and the reasons contained in the State's Petition for Writ of Certiorari, the State requests this Court grant this petition for a writ of certiorari and reverse the post-conviction relief court's denial of its motion for relief from judgment pursuant to Rule 60(b)(1).

Respectfully submitted,

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BY:   
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October 4, 2018

STATE OF SOUTH CAROLINA  
In the Supreme Court

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On Writ of Certiorari to Greenville County  
Perry H. Gravelly, Post-Conviction Relief Judge  
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Respondent,

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**CERTIFICATE OF SERVICE**

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I, Lindsey A. McCallister, certify that I have today served the within **Reply to the Return to Petition for Writ of Certiorari** upon Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**Wanda H. Carter, Esquire**  
**SC Commission on Indigent Defense**  
**Division of Appellate Defense**  
**Post Office Box 11589**  
**Columbia SC 29211-1589**

I further certify that all parties required by Rule to be served have been served.  
This 4<sup>th</sup> day of October, 2018.



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October 4, 2018

Honorable Jenny A. Kitchings  
Clerk – South Carolina Court of Appeals  
Post Office Box 11629  
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**Re: Christopher Eric Russell v. State of South Carolina**  
**Appellate Case No: 2017-002256**  
**Lower Court Case No: 2016-CP-23-3282**

Dear Ms. Kitchings:

Enclosed for filing please find an original and six (6) copies of the **Reply to the Return to Petition for Writ of Certiorari** in the above-referenced case.

Sincerely,

Lindsey A. McCallister  
Assistant Attorney General  
SC Bar #79054

LAM/jacc  
Enclosures

cc: Wanda H. Carter, Esquire  
Victim Advocacy Division (without enclosure)

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