STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO SUMTER COUNTY
R. Ferrell Cothran, Jr. Plea Judge
D. Craig Brown, Post-Conviction Relief Judge

Appellate Case No. 2017-002381

DERRICK DARBY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES

Did the post-conviction relief court properly determine Petitioner failed to establish any constitutional depravations entitling him to relief where Petitioner failed to establish a fifteen-year plea offer was extended by the State and Petitioner knowingly and voluntarily entered a negotiated guilty plea to the lesser-included offense of voluntary manslaughter with the advice of competent counsel who worked to secure him a favorable plea offer?

STATEMENT OF THE CASE

Petitioner Derrick Darby is presently confined in the South Carolina Department of Corrections following his guilty plea in Sumter County. On February 27, 2013, a large crowd, including Petitioner, gathered in the front yard of Patricia Singleton to watch a fight between two women. During the flight, Petitioner pulled a handgun from his pack pocket and fired the weapon, fatally striking Ms. Singleton in the chest. Petitioner fled the scene, and Ms. Singleton was later pronounced dead at the hospital.

During its May 2013 term, the Sumter County Grand Jury indicted Petitioner for murder, possession of a weapon during the commission of a violent crime, and unlawful carrying of a stolen pistol (2013-GS-43-0597). He was originally represented on these charges by Assistant Public Defender Tiffany Butler, and once Ms. Butler left the public defender's office, was represented by Assistant Public Defender Katarzyna K. Timmons. Assistant Solicitor Jason Corbett of the Third Circuit Solicitor's Office prosecute the case.

On December 8, 2015, Petitioner appeared in the Sumter County Court of General Sessions before the Honorable R. Ferrell Cothran, Jr., circuit court judge, and pled guilty to the lesser-included offense of voluntary manslaughter. Pursuant to negotiations entered into between Petitioner and the State, the plea court sentenced Petitioner to confinement for twenty years; the remaining two weapons charges were dismissed pursuant to the plea.

Petitioner filed a notice of appeal challenging his negotiated guilty plea. In response, the South Carolina Court of Appeals asked plea counsel to provide a written explanation of an issue that could be raised on appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR. Plea counsel responded that she was "not aware of any preserved appellate issues" and filed the appeal "to protect the client's right to appeal." Plea counsel also forward this explanation to Petitioner and

advised him he had twenty days to inform the Court of Appeals of any arguable issues preserved for appellate review. Petitioner failed to respond or otherwise provide the Court of Appeals with a sufficient explanation. By order filed February 18, 2016, the Court of Appeals dismissed the appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR. The Remittitur was returned to the circuit court on March 8, 2016. [1]

On October 24, 2016, Petitioner filed a *pro se* application for post-conviction relief (2016-CP-14-00273), alleging "Trial Counsel gave erroneous advice to take the plea." On March 3, 2017, Respondent served its return to the application and requested an evidentiary hearing on the application. An evidentiary hearing was convened July 24, 2017, before the Honorable D. Craig Brown, circuit court judge. Petitioner was present alongside counsel Lance S. Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office. At the start of the evidentiary hearing, Petitioner moved to orally amend his application to include a claim that counsel was ineffective for failing to move to enforce a prior plea agreement of fifteen years and asked for relief in the form of resentencing to enforce that purported plea offer rather than a new trial. Petitioner testified on his own behalf and presented testimony from plea counsel. Respondent presented testimony from Petitioner's initial attorney, Tiffany Butler. At the conclusion of the evidentiary hearing, Judge Brown took the matter under advisement.

Thereafter, Judge Brown denied relief, and, on September 6, 2017, issued a written order denying the application in full. This order was filed with the Sumter County Clerk of Court on November 9, 2017.

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[1] The records from Petitioner's direct appeal were not included in the Appendix. As these were before the lower court, these records should have been included in the Appendix pursuant to Rule 243(f)(1), SCACR.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly determined Petitioner failed to establish any constitutional depravations entitling him to relief where Petitioner failed to establish a fifteen-year plea offer was extended by the State and Petitioner knowingly and voluntarily entered a negotiated guilty plea to the lesser-included offense of voluntary manslaughter with the advice of competent counsel who worked to secure him a favorable plea offer.

On appeal, Petitioner argues the post-conviction relief court erred in denying him relief because plea counsel was deficient in her handling of a purported fifteen-year plea offer and that this deficiency resulted in him entering a negotiated guilty plea for five more years than what he purports has been previously offered. Petitioner argues counsel was therefore constitutionally ineffective and this ineffectiveness warrants remanding the matter back to the court of general sessions for a resentencing. However, the post-conviction relief court properly rejected this argument, finding Petitioner failed to establish that the State had ever extended a fifteen-year plea offer and plea counsel acted reasonably in her handing of plea offers from the State. These findings are not controlled by an error of law and are supported by the record. This Court should deny certiorari.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove that

counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief

applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney." Id. at 690.

"A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)). "Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea." Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 712 (2018); see Jamison v. State, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that "guilty plea[s] must be treated as final in the vast majority of cases" and instructing that caution must be exercised so as not to "undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea").

When alleging plea counsel was deficient in his or her handling of a plea offer, an applicant "must demonstrate a reasonable probability that: (1) he 'would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel;' (2) "the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it;" and (3) "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." Collins v. State, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018) (citing Missouri v. Frye, 566 U.S. 134, 147 (2012)); see Lafler v. Cooper, 566 U.S. 156, 164 (2012) (stating "a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented

to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed").

Applicant asserts there was a valid fifteen-year offer extended by the State, he accepted this fifteen-year offer, and plea counsel was constitutionally ineffective in failing to move for the plea court to enforce this purported offer. However, the record clearly supports the post-conviction relief court's finding that the State did not extend a fifteen-year plea offer to Petitioner. At the evidentiary hearing, plea counsel testified she originally believed the State had extended a plea offer for a sentence of up to fifteen-years' imprisonment to the lesser-included offense of voluntary manslaughter and based on this impression, she sent Petitioner a letter conveying this supposed plea offer. (App. 49-53, 71). However, she then went back to attempt to negotiate a better plea offer as requested by her client, and upon discussing the case with the prosecutor, realized a formal offer had not been extended by the State and she had a misimpression of their earlier conversations when she conveyed the nonexistent "offer" of fifteen-years to Petitioner. (App. 49-53, 72). She testified she never received a written plea offer from the State and never testified that there was indeed a plea offer from the State—only that she "thought" there had been an offer based on a miscommunication with the prosecutor. (App. 49-53, 55). There is evidence of probative value to support the post-conviction relief court's finding that no fifteen-year plea offer was extended by the State.

Because there was never a valid fifteen-year offer from the State, Petitioner's reliance on Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988), is misguided. In Jordan, this Court determined plea counsel was ineffective for failing to move to withdraw his client's plea or

otherwise enforce the prior plea agreement for a recommended probationary sentence. Id. This Court found, "In the present case, Jordan insisted on proceeding to trial. Jordan only agreed to plead guilty when he believed the solicitor would neither oppose nor recommend probation. When the solicitor disregarded the agreement, Jordan's attorney failed to draw Judge Eppes' attention to the plea bargain and then failed to move to withdraw Jordan's guilty plea. We hold that the conduct of Jordan's counsel in not protecting Jordan's right to enforce the plea agreement with the Solicitor's office fell below 'prevailing professional norms.' " Id. at 54, 374 S.E.2d at 685.

In the present case, unlike Jordan, there is no evidence that a valid plea offer of fifteen-years had been extended by the State. Counsel's own testimony establishes there was a miscommunication between her and the prosecutor and the prosecutor adamantly denied ever extending a fifteen-year offer. Moreover, unlike Jordan, Petitioner's guilty plea was not induced by the purported fifteen-year offer, as Petitioner entered his guilty plea with full knowledge and understanding that the plea was for a twenty-year sentence. (App. 3-4, 9, 17-18, 44-45, 55).

Additionally, the record supports plea counsel performed competently in her handling of plea negotiations and offers on behalf of Petitioner. Once Petitioner asked counsel to negotiate a better plea offer in response to the alleged fifteen-year offer, counsel went back to the prosecutor and negotiated "extensive[ly]" to secure a favorable plea offer for Petitioner. (App. 9, 49-55). She then presented this offer to Petitioner, who elected to accept this favorable plea offer rather than proceed to trial on a murder indictment where he faced a mandatory minimum sentence of thirty-years imprisonment up to life without parole if convicted.

Ultimately, Petitioner's guilty plea was induced not by any purported ineffectiveness of counsel as to a fifteen-year plea offer, as no such offer was ever extended by the State. Rather, plea counsel misconstrued oral communications with the prosecutor to be an offer for fifteen-years, and upon receiving clarification from the prosecutor that such an offer had not been extended, was able to secure as favorable offer as the State was willing to make, which ultimately was accepted by Petitioner. The post-conviction relief court properly determined Petitioner failed to establish any constitutional depravations warranting relief and these findings are supported by the record. This Court should deny certiorari.

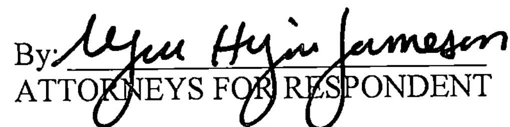
CONCLUSION

Because the post-conviction relief court properly determined Petitioner failed to establish any constitutional depravations, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108



By: ______________________
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

December 12, 2018

STATE OF SOUTH CAROLINA
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S.C. SUPREME COURT

CERTIORARI TO SUMTER COUNTY
R. Ferrell Cothran, Jr. Plea Judge
D. Craig Brown, Post-Conviction Relief Judge

Appellate Case No. 2017-002381

DERRICK DARBY, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

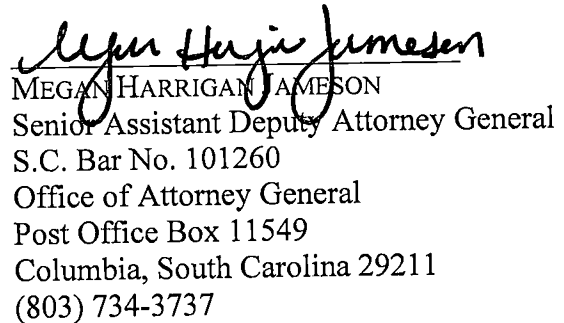
PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the interagency mail to be delivered to Petitioner at the address below:

Chief Appellate Defender Robert M. Dudek
South Carolina Commission on Indigent Defense—Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 12th day of December, 2018.



MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 101260
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ALAN WILSON
ATTORNEY GENERAL

December 12, 2018

RECEIVED
DEC 12 2018
S.C. SUPREME COURT

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

Re: **Derrick Darby v. State of South Carolina**
Appellate Case No. 2017-002381

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to the Petition for Writ of Certiorari** in the above-referenced post-conviction relief appeal for filing with the Court. Petitioner is simultaneously being served with a copy of this Return.

Please let me know if I can provide anything additional to the Court on this matter

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
SC Bar No. 100108

MHJ/ks
Enclosures

cc: Robert M. Dudek, Esquire (2 copies)