STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO HORRY COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge

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Appellate Case No. 2017-002457

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Kenneth Jordan Bell,

Petitioner,

v.

State of South Carolina,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## TABLE OF CONTENTS

## RESPONDENT'S ISSUES PRESENTED

Did the PCR court properly deny relief where applicant never alleged Counsel was ineffective for advising him to decline a plea offer for ten years and instead proceed to trial, where he was convicted and sentenced to a term of fifteen years incarceration?

## STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Petitioner was indicted at the March 2013 term of the Horry County Grand Jury for burglary, first degree (2013-GS-26-01335); kidnapping (2013-GS-26-01336); possession of a weapon during the commission of a violent crime (2013-GS-26-01337); armed robbery (2013-GS-26-01339); and criminal conspiracy (2013-GS-26-01340. M. Greg McCollum, Esq. represented Petitioner, and Nancy Livesay, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On August 12, 2013, Petitioner proceeded to trial before the Honorable Roger L. Couch and a jury. The jury found Petitioner guilty as indicted on August 15, 2013. Judge Couch sentenced Petitioner to imprisonment for concurrent terms of 15 years for burglary, 10 years for armed robbery, 10 years for kidnapping, 5 years for the weapon, and 5 years for conspiracy.

Petitioner filed a timely notice of appeal and a direct appeal was perfected by Carmen V. Ganjehsani, Esq., who raised the following issues:

1. The Trial Court erred in instructing the jury that if the jury failed to reach a verdict on one of the charges against [Applicant], a mistrial would be declared, the case would be retried, and the parties would "go through this whole process again;" the Trial Court erred by not clarifying that the jury's failure to reach a verdict on any one indictment would necessitate a new trial on that particular indictment, not a new trial of the entire case.
2. The Trial Court erred in excluding evidence that one of the alleged victims and a co-defendant had entered into a previous drug transaction for which the alleged victim owed the co-defendant money and that the reason the co-defendant and [Applicant] went to the alleged victim's apartment was to collect money for this drug debt; the evidence was relevant and admissible because (1) it was part of the *res gestae* of the alleged crime; (2) it had bearing on the [Applicant's] intent in going to the alleged victim's apartment and whether [Applicant] had the required *mens rea* for the charges against him; and (3) it showed bias on the part of the alleged victim for which [Applicant] was entitled to confront him with on cross-examination. Furthermore, the probative value of this evidence was not

substantially outweighed by any prejudicial effect to the State's case and to the alleged victim, especially where the Trial Court had already allowed the jury to hear that the alleged victim had previously been convicted of drug charges.

By unpublished opinion decided September 2, 2015, the South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Bell, Op. No. 2015-UP-447 (S.C. Ct. App. 2015). The Remittitur was issued on September 28, 2015.

Petitioner filed his application for post-conviction relief on September 14, 2016 (2016-CP-26-06088). He alleged the following grounds for relief in his application:

1. "Ineffective assistance by trial counsel;"
    a. "for one instance, counsel failed to [appropriately] protect the trial record when the court gave a charge to the jury in a matter which necessitated an Allen Charge."
    b. "failure to properly investigate"

Respondent made its return on August 9, 2017, and an evidentiary hearing into the matter was convened on September 18, 2017, before the Honorable William H. Seals, Jr. Petitioner was present at the hearing and represented by Steven W. Fowler, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent. By written order dated November 6, 2017, and filed November 13, 2017, Judge Seals denied and dismissed the application.

## STATEMENT OF THE FACTS

### a. The Crime and the Trial

On February 2, 2013, Paul DeGruccio and Tanner Clark were in their apartment when two masked men burst through the door—one with a gun and one with a tire iron. (Appx. 105, ll. 8-16; Appx. 106-07; Appx. 147, ll. 7-12) A friend, Erik Meijer, was also there playing video games in the living room, and another roommate, Scott McDonald, was asleep in his room. (Appx. 110, ll. 15-22) Clark called 911 from his locked bedroom and stayed on the phone with the operator until he saw the police arrive and arrest the men in the parking lot. (Appx. 107, ll. 4-5; Appx. 108, ll. 3-10) Petitioner and Chris Bell (Chris) were the two men arrested on the scene. (Appx. 253-54)

Petitioner proceeded to trial on charges of first-degree burglary, armed robbery, kidnapping, possession of a weapon during the commission of a violent crime, and criminal conspiracy. Pretrial, the State made a motion in limine to keep out details of a prior marijuana deal between DeGruccio and Chris and subsequent debt owed by DeGruccio, arguing it was not relevant, that even if it was relevant it was unfairly prejudicial, and that there was no relationship between DeGruccio and Petitioner. (Appx. 34-35) Counsel argued the drug transaction and resulting debt should be admitted for a full and complete confrontation, to show bias, and as part of the *res gestae* of the crime. (Appx. 37, ll. 2-22) The trial court acknowledged Petitioner has the right to confront and present any defense. (Appx. 39, ll. 21-23) In weighing the prejudicial effect versus the probative value, the trial court asked Counsel if there was any reason the collection of the debt had to be characterized as a drug deal. (Appx. 40-41) When Counsel argued the testimony would go to the intent of the burglary and armed robbery, the trial court

asked, "Again though, if he intends to collect a debt, if that's the intent, why do we care what it was for?" (Appx. 41, ll. 11-16) This exchange followed:

> [Counsel]: I think there's some difference if it was, it was lawful debt or an unlawful debt.
>
> The Court: Well, if it was an unlawful debt, nobody has a right to collect it and then it goes against your defense. Am I right or wrong?
>
> [Counsel]: If it were--if it were derived--it's my --Your Honor, I understand you have the ability to rule on this. It's the Defense position that that is a relevant part of the crime charged. That's what was really going on. That's what happened. Therefore, it's relevant. We would submit that it's not unduly prejudicial to the State's case to prove the truth of what happened in the case as part of the reasoning of the case and the res gestae and the true facts of the case, Your Honor. That's the Defense'[s] position.
>
> The Court: All right. I'm gonna, I'm gonna rule in your favor to the extent that I'm going to limit them from characterizing the debt as stemming from any type of illegal activity or drug, drug transaction. I will not prevent them, however, from testifying to the fact that the purpose, their intent at the time they went over there was to collect a debt that goes to an element of the crime and I find that that would be admissible if they did go there for the purpose of collecting a debt, not to commit any type of robbery. So I'll allow that to come in, but I find that characterizing it as a debt stemming from a drug transaction, the prejudicial effect of that would outweigh the probative value of that information so I'm excluding it to that extent.
>
> [The State]: Your Honor, my only concern with that is that once we allow them to go into a debt, my fear is that it is definitely insinuating that he has the right to go in and collect that debt, which that's not a defense. I don't believe you can break into somebody's house and burglarize them and that is essentially---
>
> The Court: No, but burglary--burglary is entering a home with the intent to commit a crime therein. Now, if at the time they entered the home they did not have the intent to commit a crime, that's an element of the offense--you've got to prove that when they went in, they had the intent to commit a crime therein. So I'm gonna let them put in what their intent was when they went in the place. If they, if they testify, I don't know what evidence they're gonna present, but I'm not gonna exclude it because that goes to one of the elements of the crime. I mean, if I go into someone's home for the purpose of drinking lemonade and then later on I commit a crime, that may not be a burglary when I entered without the intent to commit a crime. That's my ruling.

(Appx. 41-43)

The State called Tanner Clark to testify regarding his 911 call on the day of the incident. (Appx. 104-06) While in his bedroom, he heard a commotion in the living room, poked his head out, saw two men coming into the apartment—one with a gun, shut and locked his bedroom door, and called 911. (Appx. 107, ll. 1-16; Appx. 111, ll. 9-13.) Before closing the door, he saw the man with the gun put it up to his roommate's head and tell him to sit down. (Appx. 112, ll. 16-21) Clark then heard the men take DeGruccio back to his room and begin arguing. (Appx. 107, ll. 23-25) He heard one man refer to the other as "Kenny." (Appx. 113-14) At one point, he heard DeGruccio say something like, "Why are you doing this?" (Appx. 114, ll. 18-24) He testified he did not hang up with the 911 operator until he saw police arrive and apprehend the two men. (Appx. 108, ll. 3-10) He testified he did not feel like he was free to leave after he saw the men and the gun. (Appx. 113, ll. 11-13; Appx. 140, ll. 5-7, 21-25.) On cross-examination, Clark admitted he now knows DeGruccio owed Chris money at the time of the incident. (Appx. 135, ll. 9-14)

Paul DeGruccio testified next regarding the events of February 2, 2013. (Appx. 141-42) He explained he woke up to a phone call from a woman named Jasmine, who was supposed to come over to his apartment. (Appx. 142, ll. 14-17; Appx. 143, ll. 10-17; Appx. 144, ll. 2-6) According to DeGruccio, Jasmine texted him when she arrived and asked him to crack the door. (Appx. 145, ll. 13-17) He cracked the door and was looking out the window into the parking lot when the door burst open and two masked men entered—one holding a tire iron and one with a gun. (Appx. 145, ll. 17-22; Appx. 147, ll. 7-12) When DeGruccio heard the voice of the man with the tire iron, he recognized it as that of Chris Bell and said Chris's name, at which time the intruder removed his mask. (Appx. 148, ll. 10-14) DeGruccio testified Petitioner pointed the gun at him several times and he did not feel free to leave. (Appx. 149, ll. 3-9) Chris then took

DeGruccio to his room and told DeGruccio he was going to give Chris whatever he had. (Appx. 149, ll. 20-24) Petitioner stayed in the living room with his gun on Erik Meijer. (Appx. 149-50) DeGruccio stated:

> After me and Chris went into my room, he was kind of rummaging through my stuff throwing my things everywhere and I kind of was a little upset about the situation, kind of our past and everything, I was like talking to him, you know. I had owed him money for something and the situation, what--I was basically, we had talked a couple of months back about this and ---

(Appx. 150, ll. 5-11)

On cross-examination, DeGruccio testified he owed Chris approximately $800. (Appx. 172, ll. 3-7) Counsel elicited that the debt came from one transaction. (Appx. 172, ll. 8-11) Immediately following that testimony, Counsel asked about DeGruccio's felony conviction. (Appx. 172, ll. 12-14) The State objected to this line of questioning, arguing the trial judge had already ruled the drug transaction between Chris and DeGruccio would not be admitted. (Appx. 173, ll. 1-17.) Counsel argued possession with intent to distribute (PWID) is a crime of dishonesty, but the trial judge disagreed and analyzed the testimony under Rule 609(a)(1), SCRE. (Appx. 179-81) The State then argued there was no probative value to questioning DeGruccio about his felony except to slander him. (Appx. 181, ll. 11-23) The trial judge ruled in favor of Petitioner, finding the probative value did not outweigh the prejudicial effect. He allowed Petitioner to ask about the felony but not to connect it to a transaction between Chris and DeGruccio. (Appx. 182, ll. 10-15.) The judge instructed Petitioner he could ask about the conviction but if DeGruccio admitted it, the inquiry would end without the introduction of any extrinsic evidence. (Appx. 184, ll. 20-24) Further, the trial judge reiterated his ruling that the fact the debt arose out of the drug transaction was not relevant. (Appx. 185, ll. 1-7) The trial judge specifically ruled that Petitioner could ask DeGruccio if he had a felony conviction for

PWID marijuana, and the State argued it would be unduly prejudicial because there would be an assumption that there was a transaction between DeGruccio and Chris, stating:

> I, I think my concern is, I'm just—once we get into the fact that he has a PWID marijuana charge, the assumption is gonna be the transaction obviously because it's gonna come in that he has—and I think in some circumstance, it would be probative but, when I think you look at the fact that we're talking about a transaction that has led to an armed robbery and burglary first, I think it's very quick for them to jump to this transaction obviously had drugs involved.

(Appx. 187, ll. 11-19) The trial court then allowed Petitioner to make a proffer regarding the details of the conviction, during which DeGruccio admitted the drugs taken during his arrest for PWID were the drugs he got from Chris and were the reason he owed Chris money. (Appx. 189-91)

Following the proffer, defense counsel argued the jury should be allowed to hear the details of the prior transaction because it was part of the *res gestae*, showed motive and intent, and was relevant. (Appx. 193-94) The trial court reminded Petitioner it already overruled the State's objection and ruled in Petitioner's favor on allowing the conviction in, but it did not change its ruling as to the details of the drug transaction and how it was the reason for the debt owed. (Appx. 194-96) Cross-examination then continued, and Petitioner elicited from DeGruccio that he had been convicted of a felony and that it was PWID marijuana. (Appx. 196-97) Immediately after eliciting that testimony, Petitioner asked DeGruccio about knowing Chris and recognizing his voice under the mask, specifically asking, "And the reason you knew it was Chris is because when he was referring to money that you owed him, you knew that made you know who it was, right?" (Appx. 197, ll. 8-25.)

Officer Natalie Boyd of the Horry County Police Department testified regarding her response to the 911 call reporting two masked men in an apartment on February 2, 2013. (Appx. 247-50) As she arrived on the scene, she saw two subjects—who matched the description she

had received of two men in black hoodies and jeans—cross the parking lot and start to get into a red vehicle. (Appx. 250-51; Appx. 252, ll. 3-6.) She ordered the subjects to the ground and placed them in handcuffs. (Appx. 254, line 3; Appx. 255, ll. 5-8.) She testified one of the subjects was Petitioner. (Appx. 256-57) During Officer Boyd's testimony, the State introduced the video she captured on her in-car camera. (Appx. 261-62) The trial judge admitted it and it was played for the jury. (Appx. 273, ll. 15-21) Officer Boyd testified she collected a .45 automatic round from Petitioner's pocket. (Appx. 276, ll. 14-20) The gun was found on the back floorboard of the vehicle the men were getting into when captured. (Appx. 276, ll. 5-13)

Next, Officer Timothy Cast testified about the evidence collected on the scene. (Appx. 294-95) He testified there were five rounds in the gun—four in the clip and one in the chamber. (Appx. 303, ll. 5-11) He explained that because there was a round in the chamber, the gun was ready to shoot without being racked. (Appx. 305, ll. 1-18)

Ultimately, the jury found Petitioner guilty of all charges, and the trial court sentenced him to concurrent sentences of fifteen years' imprisonment for first-degree burglary, ten years' imprisonment for armed robbery, ten years' imprisonment for kidnapping, five years' imprisonment for the weapon charge, and five years' imprisonment for criminal conspiracy. (Appx. 507-08, 523.)

**b. The PCR application and hearing**

Petitioner filed his application for post-conviction relief on September 14, 2016. (Appx. 558-66). PCR counsel did not amend the application, despite Respondent's request prior to the hearing to do so by way of a motion for a more definite statement included as part of its Return.[1]

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[1] As indicated in the record, PCR counsel Fowler, despite Respondent's respectful protestations both on and off the record, takes the position that any allegation of ineffective assistance of counsel is broadly inclusive of all conceivable allegations of ineffective assistance of counsel. (Appx. 584-85).

(Appx. 567-70; Appx. 574, ll. 11-20). When Respondent set forth its understanding of the allegations to be proceeded upon and withdrew its motion for a more definite statement, PCR counsel made no effort to expand upon Respondent's summation. (Appx. 574, ll. 3-24). PCR counsel explored various other potential grounds for relief not set forth in the application, over Respondent's objections. See Appx. 584-85 (inquiring about counsel's performance examining witnesses); Appx. 585-86 (inquiring about counsel's performance upon the jury's discovery of a shell casing inadvertently left in a computer case in evidence); Appx. 587-88 (inquiring about counsel's performance in not requesting an instruction for a lesser-included charge). Petitioner's only testimony as to plea offers was as follows:

> Q: Was a plea ever provided to you by your attorney?
>
> A: The only plea – the only plea that I was offered was a – violent for armed robbery and I was advised not to take it.

(Appx. 589, ll. 15-17). Petitioner never indicated that he rejected the offer strictly because he was advised not to take it, nor that he was dissatisfied by Counsel's advice not to take it.

Respondent, upon direct examination of Counsel, inquired about plea negotiations, to which Counsel explained the best deal they ever received was for 10 years without parole, which was not meaningfully superior to the potential outcome at trial if they could achieve a lesser-included charge on burglary, first. (Appx. 593-94). When Counsel attempted to explain Petitioner's circumstances as he felt were relevant to plea negotiations, PCR counsel objected. Id. Asked if Petitioner rejected the offer upon his counsel, Counsel never clearly indicated one way or the other, but offered the retrospect observation that Petitioner's ultimate sentence was five years longer than the offer, and that Counsel would not "force [his] clients to plead guilty because [he's] found that many times, some good things can happen to people who were deserving of it, and he was somebody that I thought should've really gotten a better deal."

(Appx. 594-95). Counsel later noted "if we'd had a better plea offer, I think that we would've resolved the case. And if it had been – if we'd have gotten a 10-year plea offer where he would've been parole eligible, . . . I think he would've taken that." (Appx. 596-97).On cross-examination, PCR counsel did not ask about plea negotiations. (Appx. 603-11).

Petitioner never filed a motion pursuant to Rule 15(b), SCRCP, after the evidentiary hearing. The PCR court ultimately denied relief, and Respondent submitted a proposed order based on the issues set forth in the application, which was thereafter signed and filed. (Appx. 616-26). PCR counsel never filed a motion pursuant to Rule 59(e), SCRCP.

## STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Id. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant 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. 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. Strickland, 466 U.S. at 696. 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. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

## ARGUMENT

**THE ISSUE RAISED IN THE PETITION FOR WRIT OF CERTIORARI IS NOT PRESERVED BECAUSE IT WAS NEVER ALLEGED IN THE APPLICATION, NOR ALLEGED BY APPLICANT AT THE HEARING, NOR RULED UPON BY THE PCR COURT, AND IS IN ANY EVENT WITHOUT MERIT BECAUSE THE RECORD LACKS EVIDENCE TO SHOW THAT, BUT FOR COUNSEL'S ADVICE, PETITIONER WOULD HAVE PLED GUILTY AND NOT GONE TO TRIAL.**

The Court should deny the petition for writ of certiorari because the issue raised is not preserved, as it was at no point prior to the petition ever raised to the PCR court, despite numerous opportunities to do so where the court overruled the State's regular objections to testimony on issues not raised in the application for relief. Consequently, the record is devoid of material evidence to address the allegation newly raised on appeal.

### a. Allegations for post-conviction relief must be alleged in the application, in an amendment, or at the very least clearly raised to the court by way of questioning and the application thereafter amended to conform to the testimony presented.

The pleading and issue-preservation requirements that apply in all civil cases apply to post-conviction relief. Mangal v. State, 421 S.C. 85, 97, 805 S.E.2d 568, 574 (2017). Where an allegation is not raised in the application or at the hearing, it is procedurally barred on appeal. See Hyman v. State, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (citing State v. Newton, 274 S.C. 287, 293, 262 S.E.2d 906, 910 (1980)) (rejecting an allegation that counsel was ineffective for failing to object to the sentence as cruel and unusual where the allegation was "not raised in her application or at the hearing"); Plyler v. State, 309 S.C. 408, 409-10, 424 S.E.2d 477, 478 (1992) (rejecting an allegation that counsel was ineffective for failing to object to a burden-shifting malice charge where the issue "was neither raised at the PCR hearing nor ruled upon by the PCR court," even where the charge was "diseased with burden-shifting presumptions"); Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007) (reversing the Court of Appeals decision vacating an order denying relief where the issued relied upon by the Court of Appeals was not

ruled upon by the PCR court and no motion pursuant to Rule 59(e), SCRCP, was filed). Although our courts have recognized the somewhat relaxed procedures in post-conviction relief cases, and will excuse procedural defaults in *extraordinary* cases, "[i]n most PCR cases, however, [appellate courts] have refused to excuse the pleading and issue-preservation requirements that apply in all civil cases." Mangal, 421 S.C. at 97, 805 S.E.2d at 574.

The issues properly raised to and ruled upon by the PCR court were *only* those set forth in the application. The PCR court is encouraged to be flexible in the use of its discretion with procedural requirements to reach the merits of substantial claims, Mangal, 421 S.C. at 99-100, 805 S.E.2d at 575-76, but at minimum Petitioner had to ask the PCR court to exercise that discretion. Petitioner did not amend his application, state additional allegations at the outset of the evidentiary hearing, move to conform the application to the testimony pursuant to Rule 15(b), SCRCP, or move to alter or amend the Order of Dismissal pursuant to Rule 59(e), SCRCP, to address the issue now raised on appeal. PCR counsel *objected* to Counsel's effort to elaborate on facts pertinent to plea negotiations. Having failed to raise the issue, and having affirmatively objected to testimony on the subject as irrelevant, Petitioner cannot now ask this Court to grant him relief on a new issue. Accordingly, the issue raised to the Court is not preserved, and the petition for writ of certiorari should be denied.

**b. Even if the issue were preserved, the record lacks the testimony necessary for Petitioner to have met his burden upon it.**

As for the merits of the issue raised by Petitioner, the record lacks sufficient evidence for Petitioner to meet his burden. The duty of effectiveness extends to the plea bargaining process, but "it is often quite difficult to determine whether counsel failed to provide reasonably effective assistance under prevailing professional norms." Judge v. State, 321 S.C. 554, 560, 471 S.E.2d 146, 149 (1996) (overturned on other grounds by Jackson v. State, 342 S.C. 95, 535 S.E.2d 926

(2000)). "[C]ounsel's advice to reject a plea agreement does not fall below the reasonably effective assistance standard simply because, in hindsight, the advice was wrong or the attorney's trial tactics backfired." Id., 321 S.C. at 561, 471 S.E.2d at 150. Applicants alleging ineffectiveness for advice against accepting a plea offer may meet their burden of showing prejudice by demonstrating that, but for counsel's advice, he or she would have accepted the pela. Id., 321 S.C. at 562, 471 S.E.2d at 150.

There is no testimony by Applicant to show that, but for Counsel's advice, he would have taken the ten year offer. The only testimony he offers is that he would have taken a *better* deal, which was affirmed by Counsel. (Appx. 589-90; Appx. 596-97). Petitioner argues prejudice is shown by the fact that he wound up with a greater sentence than what was offered before trial. Retrospective observation that a sentence after a trial is greater than the sentence offered as part of a proposed plea deal is inadequate to prove prejudice, as established in Judge.

Furthermore, as evidenced by the need for the Allen charge at trial, Counsel's thoughts on "good things happen to good people" (paraphrasing Appx. 595, ll. 1-4) was not *per se* unreasonable, and evidently worked on at least one juror for some time. In a rare role-reversal, Petitioner argues what looks an awful lot like overwhelming evidence. However, Counsel's "good character" strategy remains valid in light of the instructions to the jury that "[e]vidence of good character or good reputation may in and of itself create a doubt as to guilt." (Appx. 456, ll. 3-6). For all of these reasons, even if the issue is preserved, Petitioner has not and cannot meet his burden under either prong of Strickland as analyzed by Judge, and the petition for writ of certiorari should be denied.

## CONCLUSION

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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Attorney General

MEGAN HARRIGAN JAMESON
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By: _____
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17 Dec., 2018

STATE OF SOUTH CAROLINA
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CERTIORARI TO HORRY COUNTY
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KENNETH JORDAN BELL,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Wanda H. Carter, Esquire**
**PO Box 11589**
**Columbia, SC 29201**

This 17th day of December, 2018.

MALLORY MORRIS
Legal Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL



December 17, 2018

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

***RE:*** **Kenneth Jordan Bell v. State of South Carolina**
**Appellate Case No. 2017-002457**
**Lower Court Case No. 2016-CP-26-6088**

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Johnny E. James Jr.
Assistant Attorney General
S.C. Bar No. 101260

JEJ/mm
Enclosures

cc: Wanda H. Carter, Esquire