

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Horry County  
Honorable Larry B. Hyman, Jr., Circuit Court Judge

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SHANNON DEVANTE COOPER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA

RESPONDENT.

APPELLATE CASE NO. 2018-001820

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PETITION FOR WRIT OF CERTIORARI

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**RECEIVED**

FEB 11 2019

S.C. SUPREME COURT

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**ISSUE PRESENTED**

**Whether the PCR court erred in failing to find that Plea Counsel rendered constitutionally ineffective assistant of counsel by failing to communicate the State's formal written plea offer to the Petitioner prior to the written expiration date of the formal written plea offer?**

## STATEMENT OF CASE

Mr. Shannon DeVante Cooper (“Petitioner”) was indicted at the November 2013 term of the Horry County Grand Jury for burglary, first degree (2013-GS-26-04759) and kidnapping (2013-GS-26-04759). Petitioner was further indicted at the January 2015 term for armed robbery (2015-GS-26-00860). On April 20, 2015, Applicant pled guilty as indicted. The Honorable Benjamin H. Culbertson sentenced Petitioner to imprisonment for concurrent terms of 22 years on each charge.

Petitioner filed a timely notice of appeal. By order filed July 1, 2015, the South Carolina Court of Appeals dismissed Petitioner’s appeal for failing to provide a sufficient explanation for appeal. The Remittitur was issued on July 20, 2015.

On July 1, 2016, Petitioner filed an application for post-conviction relief. (A. 102-112). On July 27, 2017, the State filed a Return to Petitioner’s application for post-conviction relief. (A. 125-130). On March 28, 2018, the Petitioner filed an amended application for post-conviction relief. (A. 113-124).

On May 25, 2018, an evidentiary hearing was held before the Honorable Larry B. Hyman, Jr. (App. p. 131-206). In a written order signed July 17, 2018, Judge Hyman denied relief and dismissed the application. (A. 216-224). On August 1, 2018, Petitioner filed a Rule 59(e) Motion for Reconsideration of Final Order. (A. 225-230). In a written order signed September 4, 2018, Judge Hyman denied Petitioner’s Rule 59(e) Motion for Reconsideration of Final Order. (A. 231-234). A timely notice of intent to appeal was filed on October 12, 2018. This petition for writ of certiorari follows.

## STATEMENT OF FACTS

On September 25, 2013, Petitioner was arrested by the Horry County Police Department for burglary first degree, kidnapping and possession of weapon during commission of a violent crime for an alleged incident that occurred on September 4, 2013. (A. 138; Applicant's Exhibit 2, A. 210). Petitioner was indicted on the same offenses along with an additional directly presented indictment for armed robbery arising from the same alleged incident. (A. 133).

On September 25, 2013 at the initial bond setting, Petitioner was issued a \$150,000 bond and given an initial appearance date of November 22, 2013. (A. 138; Applicant's Exhibit 2, A. 210). Petitioner never posted bond and remained detained at the J. Ruben Long Detention Center in Conway, South Carolina. (A. 139-140). On September 25, 2013, Petitioner was also approved and appointed an attorney from the Horry County Public Defender's Office by the bond court magistrate. (A. 138-139; Applicant's Exhibit 2, A. 210). The Horry County Public Defender's Office opened a file on Petitioner on October 9, 2013. (A. 163). Plea Counsel testified he did not meet with Petitioner until October 30, 2013, nearly three weeks after being appointed to represent Petitioner, and more than one month after Petitioner was arrested. (A. 151).

In November 2013, Petitioner was violated on a Youthful Offender Act parole violation from previous convictions and transferred from the J. Ruben Long Detention Center in Horry County to Kirkland Correctional Institution on November 14, 2013. After being classified, on January 9, 2014, Petitioner was transferred to Turbeville Correctional Institution. (Applicant's Exhibit 1, A. 207-208). Plea Counsel did not keep an accurate location or address for Petitioner in Petitioner's file. (A. 172-173). Petitioner returned to the J. Ruben Long Detention Center in Horry County on July 15, 2014 after completing his Youthful Offender Act parole violation sentence. (A. 140-144; Applicant's Exhibit 1, A. 207-208).

On January 9, 2014, the State conveyed the following formal written plea offer: Plea to kidnapping with the dismissal of burglary first degree, possession of weapon during commission of a violent crime, armed robbery and a recommendation by the State of thirteen years. The formal written plea offer from the Fifteenth Judicial Circuit Solicitor's Office stated:

The Defendant must accept the offer by February 28, 2014 or it is considered rejected and the State will not make the offer again. Should the defendant accept the offer, he or she must enter the plea before or during the March term of court. Please review the offer with your client, sign and date as indicated below, and return to me no later than February 28, 2014.

(Applicant's Exhibit 3, A. 211-212). The formal written plea offer contained a section at the bottom of the letter where the Petitioner was to select either trial or guilty plea, along with a place for the Petitioner's signature and date, and Plea Counsel's signature and date. (A. 170-171; Applicant's Exhibit 3, A. 211-212).

On January 16, 2014, Plea Counsel mailed a letter titled, PLEA OFFER FROM SOLICITOR addressed to the Petitioner to 4853 Meadowsweet Dr. Apt. 1804 Myrtle Beach, SC 29579. (A. 172). The January 16, 2014 letter titled, PLEA OFFER FROM SOLICITOR enclosed a copy of the formal written plea offer from the Fifteen Judicial Circuit Solicitor's Office and stated:

Please contact me at the phone number listed below before the plea-expiration date so we can discuss your case and the plea offer . . . The solicitor will not extend the plea offer date, so it is important that you contact me.

(Applicant's Exhibit 3, A. 211-212). According to the South Carolina Department of Corrections Classification Summary Reports, Petitioner was incarcerated at Turbeville Correctional Institution when Plea Counsel mailed the January 16, 2014 letter titled, PLEA OFFER FROM SOLICITOR along with a copy of the formal written plea offer from the Fifteen Judicial Circuit Solicitor's Office to the Petitioner at 4853 Meadowsweet Dr. Apt. 1804 Myrtle Beach, SC 29579. (Applicant's Exhibit 1, A. 207-208). Additionally, the Petitioner testified that he never received the January 16,

2014 letter titled, PLEA OFFER FROM SOLICITOR or a copy of the formal written plea offer from the Fifteenth Judicial Solicitor's Office while he was detained at Turbeville Correctional Institution, and only learned about the formal written plea offer sometime after he came back to J. Ruben Long Detention Center in Horry County. (A. 145). Petitioner testified that Plea Counsel never visited him or sent him any correspondences while he was incarcerated at Turbeville Correctional Institution. (A. 142-143). Petitioner testified that after learning of the formal written plea offer, he apprised Plea Counsel that he wanted to accept the formal written plea offer, but that the formal written plea offer had expired. (A. 145). Petitioner further testified that had he known about the formal written plea offer prior to its expiration he would have accepted the plea offer. (A. 145). Petitioner was never a formally arraigned in circuit court on the indictments and plea offer. (A. 157, 176-178).

Petitioner testified that Plea Counsel requested the circuit court reinstate the formal written plea offer allowing the Petitioner could accept the formal written plea offer. (A. 145). On April 14, 2015, Plea Counsel file and served a MOTION TO RE-OPEN PLEA OFFER. The MOTION TO RE-OPEN PLEA OFFER requested the presiding judge to re-open the State's plea offer of Kidnapping, with a recommended sentence of thirteen years and "move[d] for an Order allowing [Petitioner] to accept the State's previous offer." (Applicant's Exhibit 4, A. 213-214). The MOTION TO RE-OPEN PLEA OFFER expressly stated that the expiration of the formal written plea offer was February 28, 2014. (Applicant's Exhibit 4, A. 213-214). The MOTION TO RE-OPEN PLEA OFFER was argued by Plea Counsel before Judge Culbertson on April 20, 2015. Judge Culbertson denied the motion along with others. (A. 38-40).

On April 20, 2015, Petitioner pled guilty in front of Judge Culbertson to indictment 2013-GS-26-04759 for burglary first degree; indictment 2013-GS-26-04760 for kidnapping; and

indictment 2015-GS-26-00360 for armed robbery. Indictment 2014-GS-26-326 for armed robbery and indictment 2013-GS-26-4761 for possession of a weapon during the commission of a violent crime were nolle prossed. (A. 62-64). The plea was without negotiation or recommendation from the State. All charges were classified violent and most serious offenses. Petitioner was sentenced by Judge Culbertson to twenty-two years concurrent on all indictments. (A. 96, 99-101).

On May 25, 2018, at the PCR hearing Plea Counsel testified the he opened Petitioner's file in his office on October 9, 2013 and only first met with Petitioner on October 30, 2013, three weeks after he was appointed to the case. (A. 151, 163). Plea Counsel testified that he met with Petitioner only about a total of seven or eight times over the course of about a year and a half, and only spent approximately eight to ten hours in total with Petitioner discussing Petitioner's case with him. (App. p. 193-194). Plea Counsel testified that he received the formal written plea offer from the State and mailed it to what his office had as Petitioner's home address. (A. 169-172). Plea Counsel testified that he was not aware of Petitioner's location at Turbeville Correctional Institution until the end of January 2014 at roll call. (A. 169). Plea Counsel acknowledged that he did not update Petitioner's address or location in Petitioner's file. (A. 172-172). Plea Counsel testified that he did not meet or speak with Petitioner while he was incarcerated at Turbeville Correctional Institution. Plea Counsel also testified that he did not meet or speak with Petitioner prior to the stated expiration date of the formal written plea offer and acknowledged that he could have but did not based on his communication with the assistant solicitor assigned to the case. (A. 153, 173-174). Plea Counsel testified that his communications with the assistant solicitor included discussions of cooperation agreements among Petitioner and co-defendants with the State to testify at trial and "that that offer was still gonna be there while this shook out." (A. 153). Plea Counsel testified that the plea offer was available to the Petitioner and Petitioner rejected the plea offer. (A. 154-157). However, Plea

Counsel could not articulate an exact expiration date of the formal written plea offer during cross examination other than “either an arraignment is a red line or the appearance of the case on a trial roster.” (A. 175-176). According to Plea Counsel when asked why Petitioner could not accept the formal written plea offer, Plea Counsel testified, “Well, by then we were at trial.” (A. 175). Plea Counsel was asked if there were any on the record rejections of the plea offers, he answered no. When Plea Counsel was asked if there were any writing of rejections of the plea offers, he answered no. (A. 176).

Though Plea Counsel testified at the PCR evidentiary hearing that the plea offer was available to Petitioner and Petitioner rejected the plea offer, Plea Counsel stated in his January 16, 2014 letter to Petitioner titled, PLEA OFFER FROM SOLICITOR: “The solicitor will not extend the plea offer date, so it is important that you contact me.” (Applicant’s Exhibit 3, A. 211-212). Further, Plea Counsel filed on April 14, 2015 and argued before Judge Culbertson on April 20, 2015 the MOTION TO RE-OPEN PLEA OFFER and “move[d] for an order allowing [Petitioner] to accept the State’s previous offer” and specifically wrote in the pre-trial MOTION TO RE-OPEN PLEA OFFER that the expiration of the plea offer was February 28, 2014. (Applicant’s Exhibit 4, A. 213-215).

## ARGUMENT

**The PCR court erred in failing to find that Plea Counsel rendered constitutionally ineffective assistance of counsel by failing to communicate the State's formal written plea offer to Petitioner prior to the written expiration date of the formal written plea offer.**

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). The right to counsel attaches to all critical stages of the criminal proceedings. Montejo v. Louisiana, 556 U.S. 778, 786, 129 S.Ct. 2079, 2085 (2009). “Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea.” Missouri v. Frye, 566 U.S. 134, 140, 132 S.Ct. 1399, 1405 (2012). Further, in Missouri v. Frye, the United States Supreme Court citing Padilla v. Kentucky, 559 U.S. 356, 373, 130 S.Ct. 1473, 1486 (2010), stated that “the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.” Missouri v. Frye, 566 U.S. at 141, 132 S.Ct. at 1406. To render effective assistance of counsel under the Sixth Amendment “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.” Id. at 145, 132 S.Ct. at 1408; see Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009); see Bell v. State, 410 S.C. 436, 765 S.E.2d 4 (2014).

On a claim of ineffective assistance of counsel for plea counsel's failure to communicate a formal plea offer from the prosecution on terms and conditions that may be favorable to the accused, Petitioner is required to prove: (1) plea counsel's failure to communicate the State's offer to Petitioner constituted deficient performance; and (2) Petitioner was prejudiced by this deficient performance. See Davie v. State, 381 S.C. at 608, 675 S.E.2d at 420.

**I. Plea Counsel's failure to convey the formal written plea offer of a recommended sentence of thirteen years prior to the written expiration date of February 28, 2014 constitutes deficient performance.**

Plea counsel's "failure to convey a plea offer constitutes deficient performance." Davie v. State, 381 S.C. at 609, 675 S.E.2d at 420.

In Davie, the PCR applicant alleged that plea counsel had failed to inform the PCR applicant of a written plea agreement in which the State offered a fifteen-year sentence in exchange for PCR applicant's plea to all of the pending charges. Id. at 606, 675 S.E.2d at 418. The PCR applicant in Davie testified at the PCR hearing that plea counsel never communicated the fifteen-year plea offer to him and he only learned about the plea offer two years after he pled guilty, and that if he had been aware of the plea offer prior to the plea proceeding he would have accepted the fifteen-year plea offer. Id., 675 S.E.2d at 418-19. Plea counsel testified that the State mailed the plea offer to his old address while he was in the process of changing to his new address and that he did not receive the offer until after the expiration of the offer, and if he had been aware of the offer, he would have communicated the offer to the PCR applicant. Id., 675 S.E.2d at 419. The PCR applicant pled guilty to several charges without negotiation or recommendation from the State and was sentenced to twenty-seven years in prison. Id. at 605, 675 S.E.2d at 418. The South Carolina Supreme Court found that "plea counsel's failure to convey the State's initial plea offer to [PCR applicant] constituted deficient performance." Id. at 610, 675 S.E.2d at 421. In explaining the ruling, the South Carolina Supreme Court stated:

Although counsel's failure to do so could be construed as excusable neglect if one believes that the State's written offer was truly lost in the process of counsel's office relocation, we do not believe that such neglect would negate the deficient performance. Even if counsel is given the benefit of the doubt that he was not aware of the plea offer until after the expiration date, we find counsel was deficient in not objecting at the plea hearing.

Id., 675 S.E.2d at 421.

In Bell v. State, the PCR applicant was convicted at a jury trial and sentenced to twenty years in prison. 410 S.C. 436, 438, 765 S.E.2d 4, 5 (2014). The PCR applicant in Bell alleged that trial counsel was ineffective for failing to communicate a ten-year plea offer. Id., 765 S.E.2d at 5.

At the PCR hearing in Bell, the PCR applicant testified that he learned of the State's plea offer during the sentencing phase after conviction and the plea offer was for ten years. Id., 765 S.E.2d at 5. The PCR applicant testified that trial counsel did not tell him about the ten-year plea offer prior to verdict and that he would have accepted the plea offer had he known about it. Id., 765 S.E.2d at 5. Trial counsel testified that the PCR applicant's file had been transferred to her after prior counsel was relieved and that the ten-year plea offer was noted in the PCR applicant's file but nothing in the file indicated that the offer was conveyed to the PCR applicant. Id. at 438-439, 765 S.E.2d at 5. Trial counsel testified during her last meeting with the PCR applicant they discussed the case and evidence, and her notes indicated that PCR applicant did not want to plead guilty. Id. at 439, 765 S.E.2d at 5. The State conceded an offer was never extended to the PCR applicant, but contended an offer never existed. Id., 765 S.E.2d at 5. The State's contention was based on the solicitor's comments during PCR applicant's sentencing after conviction at trial where the solicitor stated: "[PCR applicant] was not offered to plead the minimum, and the offer has nothing to do with this. There are no plea offers in this case . . . I just want to reiterate, I have never tendered a plea offer on this case." Id. at 442, 765 S.E.2d at 7. Trial counsel disagreed with the solicitor's comments at sentencing and "[t]he trial judge stated, we are not going to argue, it is my job to sentence." Id., 765 S.E.2d at 7.

The PCR court in Bell found "trial counsel was ineffective by failing to communicate the plea offer to [PCR applicant] before the jury's verdict." Id., 765 S.E.2d at 5. Specifically, the PCR court found "a plea offer was made by the State and that counsel failed to communicate the plea

offer to [PCR applicant].” Id., 765 S.E.2d at 5. The South Carolina Court of Appeals affirmed the PCR court’s ruling. Id. at 442, 765 S.E.2d at 7.

In the instant case, Plea Counsel’s failure to convey the formal written plea offer to the Petitioner to plead guilty to kidnapping in exchange for a recommendation of a thirteen-year sentence prior to expiration of the formal written plea offer constitutes deficient performance. See Missouri v. Frye, 566 U.S. 134, 132 S.Ct. 1399 (2012); see Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009); see Bell v. State, 410 S.C. 436, 765 S.E.2d 4 (2014).

Plea Counsel was appointed to represent Petitioner on September 25, 2013. (Applicant’s Exhibit 2, A. 210). On January 9, 2014, the State conveyed a formal written plea offer of kidnapping with the dismissal of burglary first degree, possession of weapon during commission of a violent crime, armed robbery along with a recommendation by the State of a sentence of thirteen years of incarceration. By the terms of the formal written plea offer the plea offer must have been accepted by February 28, 2014 or the formal written plea offer would be considered rejected and it would not be offered again. Furthermore, the plea must have been entered by the PCR applicant before or during the March 2014 term of court. (Applicant’s Exhibit 3, A. 211-212).

It is uncontested that Petitioner was incarcerated within the South Carolina Department of Corrections when Plea Counsel mailed a copy of the formal written plea offer to an apartment at 4853 Meadowsweet Drive, Myrtle Beach, South Carolina on January 16, 2014. (Applicant’s Exhibit 1, A. 207-209; Applicant’s Exhibit 3, A. 211-212; A. 220). According to Plea Counsel’s testimony at the PCR hearing, Plea Counsel did not have any communications with the Petitioner about his case from October 30, 2013 until July 30, 2014 and did not discuss the formal written plea offer with the Petitioner prior to the expiration of the formal written plea offer. (A. 151, 153-154, 173).

Petitioner testified at the PCR hearing that Plea Counsel did not communicate with him while he was incarcerated at Turbeville Correctional Institution and that he did not receive any letters from Plea Counsel while he was incarcerated at Tubeville Correctional Institution. (A. 143). Petitioner testified that he did not learn of the formal written plea offer while he was incarcerated within the South Carolina Department of Corrections and did not receive the January 16, 2014 letter from Plea Counsel titled, PLEA OFFER FROM SOLICITOR along with a copy of the formal written plea offer from the Fifteen Judicial Circuit Solicitor's Office. (A. 143-144). Petitioner testified that he learned of the formal plea offer of thirteen years to kidnapping with the dismissal of the remaining charges sometime when he came back to Horry County Detention Center (J. Ruben Long Detention Center) and that the plea offer had expired. (A. 145). There was never an arraignment of the Petitioner in circuit court on the indictments and plea offer. (A. 157, 178). There were no on the record rejections or written rejections of the plea offer by the Petitioner. (A. 176).

Notwithstanding Plea Counsel's testimony at the PCR hearing that the plea offer was available to Petitioner but rejected (A. 154) and that there is not really a deadline for plea offers (A. 175), Plea Counsel filed a pre-trial MOTION TO RE-OPEN PLEA OFFER on April 14, 2015 specifically stating in the written pre-trial motion that the plea offer's expiration was February 28, 2014 and moved for an order allowing the Petitioner to accept the State's previous offer. (Applicant's Exhibit 4, A. 213-215). Additionally, by written terms of the formal written plea offer: "The [Petitioner] must accept the offer by February 28, 2014 or it is considered rejected and the State will not make the offer again." (Applicant's Exhibit 3, A. 211-212). Furthermore, Plea Counsel's January 16, 2014 letter to Petitioner titled, PLEA OFFER FROM SOLICITOR stated: "The solicitor will not extend the plea offer date, so it is important that you contact me." (Applicant's Exhibit 3, A. 211-212).

Like Davie, 381 S.C. 601, 675 S.E.2d 416 (2009) and Bell, 410 S.C. 436, 765 S.E.2d 4 (2010), where counsel failed to convey the PCR applicants' plea offers to the PCR applicants, in the instant case, Plea Counsel's failure to convey to the Petitioner the formal written plea offer of thirteen years to kidnapping with the dismissal of the remaining charges prior to the formal written plea offer's expiration date of February 28, 2014 constitutes deficient performance.

**II. Petitioner was prejudiced by Plea Counsel's deficient performance because Petitioner would have received a significantly lower sentence than the twenty-two-year sentence that was imposed.**

To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel.

Missouri v. Frye, 566 U.S. at 147, 132 S.Ct. at 1409; see Bell, 410 S.C. at 443, 765 S.E.2d at 7 ("In determining prejudice for counsel's failure to convey a plea offer, the South Carolina Supreme Court advocated a case-by-case approach of assessing whether but for counsel's deficient performance a defendant would have accepted the State's proposed plea bargain and that he would have benefited from the offer." citing Davie, 381 S.C. at 613, 675 S.E.2d at 422.). While holding that actual prejudice must be shown, the South Carolina Supreme Court in Davie stated "[h]owever, it is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant's self-serving statement may be sufficient to establish actual prejudice." 381 S.C. at 613, 675 S.E.2d at 422.

In Frye, the defendant was charged with an offense that carried a maximum term of imprisonment of four years. 566 U.S. at 138, 132 S.Ct. at 1404. The prosecutor sent a letter to the defendant's counsel offering a choice of two plea bargains. Id., 132 S.Ct. at 1404.

The prosecutor first offered to recommend a three-year sentence if there was a guilty plea to the felony charge, without a recommendation regarding probation but with a recommendation that [the defendant] serve ten days in jail as so-called 'shock' time.

The second offer was to reduce the charge to a misdemeanor and, if [the defendant] pleaded guilty to it, to recommend a ninety-day sentence.

Id. at 138-139, 132 S.Ct. at 1404. The letter included an expiration date. Id. at 139, 132 S.Ct. at 1404. The defendant's attorney failed to advise the defendant of the offers and the offers expired. Id., 132 S.Ct. at 1404. The defendant eventually pled guilty and the trial judge sentenced the defendant to three years in prison. The defendant filed for postconviction relief in state court and "alleged his counsel's failure to inform him of the prosecution's plea offer denied him effective assistance of counsel." Id., 132 S.Ct. at 1405. At the PCR evidentiary hearing, the defendant "testified he would have entered a guilty plea to the misdemeanor had he known about the offer." Id., 132 S.Ct. at 1405. The PCR court denied the postconviction motion, but the Missouri Court of Appeals reversed, and the United States Supreme Court granted certiorari. Id. at 139-140, 132 S.Ct. at 1405.

In Frye, the United States Supreme Court stated:

There appears to be a reasonable probability [the defendant] would have accepted the prosecutor's original offer of a plea bargain if the offer had been communicated to him, because he pleaded guilty to a more serious charge, with no promise of a sentencing recommendation from the prosecutor.

Id. at 150, 132 S.Ct. at 1411. The United States Supreme Court held that the Missouri Court of Appeals "did not err in finding [the defendant's] acceptance of the less favorable plea offer indicated that he would have accepted the earlier (and more favorable) offer had he been apprised of it." Id., 132 S.Ct. at 1411.

In Bell, the plea offer that was not conveyed to the PCR applicant was ten years imprisonment and the PCR applicant was sentenced to twenty years. 410 S.C. at 443, 765 S.E.2d at 7-8. The PCR applicant in Bell testified "he would have taken the State's plea offer had . . . counsel told him about it." Id., 765 S.E.2d at 8. The South Carolina Court of Appeals in Bell citing Davie,

381 S.C. 601, 675 S.E.2d 417 (2009) ruled that the difference in the sentence received by the PCR applicant and the plea offer was proof of prejudice. Bell, 410 S.C. at 443, 765 S.E.2d at 8. The South Carolina Court of Appeals in Bell further found, although the PCR applicant's testimony was self-serving, the statement is evidence of prejudice. Id., 765 S.E.2d at 8.

In the instant case, the Petitioner testified that had he known about the formal written plea offer prior to its expiration that he would have accepted the formal written plea offer. (A. 145). Notwithstanding Plea Counsel's assertions that at the PCR hearing that the Petitioner did not want to accept the plea offer (A. 154-157), Plea Counsel filed a MOTION TO RE-OPEN PLEA OFFER on April 14, 2015 requesting the presiding judge of General Sessions re-open the State's plea offer and moved for an order allowing the Petitioner to accept the State's previous offer and plea to Kidnapping, with a recommended sentence of thirteen years. (Applicant's Exhibit 4, A. 213-215). The MOTION TO RE-OPEN PLEA OFFER was argued and denied on April 20, 2015 by the Judge Culbertson (A. 38-40), which immediately proceeded the Petitioner pleading guilty in front of Judge Culbertson on April 20, 2015 to more serious charges, including charges with mandatory minimum sentences of ten years – armed robbery and fifteen years – burglary first degree, and maximum sentences of life without the possibility of parole – burglary first degree, with no promise of a sentencing recommendation from the State. The Petitioner ultimately received a sentence of twenty-two years after pleading guilty to indictment 2013-GS-26-04459 for burglary first degree, indictment 2015-GS-26-00360 for armed robbery, and indictment 2013-GS-26-04460 for kidnapping. (A. 69-79, 99-101).

Like the defendants in Fry, 566 U.S. at 139, 132 S.Ct. at 1405, and Bell, 410 S.C. at 438, 765 S.E.2d at 5, the Petitioner in the instant case testified at the PCR hearing that had he known about the formal written plea offer he would have accepted the formal written plea offer. (A. 145).

Like in Bell, although the Petitioner's testimony was self-serving, the statement is evidence of prejudice. 410 S.C. at 443, 765 S.E.2d at 8. Furthermore, like in Fry, the Petitioner here ultimately plead guilty to a less favorable plea indicating that Petitioner would have accepted the earlier and more favorable plea offer had Petitioner been apprised of it. 566 U.S. at 150, 132 S.Ct. at 1411.

In the instant case, the Petitioner's formal written plea offer was to plead guilty to kidnapping in exchange for a recommendation of a thirteen-year sentence, with dismissal of the remaining charges. (Applicant's Exhibit 3. 211-212). Additionally, kidnapping does not carry a mandatory minimum period of incarceration. Ultimately, the Petitioner plead guilty to: burglary first degree, which carries a mandatory minimum sentence of fifteen years up to life without the possibility of parole, with no suspended sentence permitted; armed robbery, which carries a mandatory minimum sentence of ten years up to thirty years, with no suspended sentence permitted; and kidnapping which carries up to thirty years; and the Petitioner received a concurrent sentence on all charges of twenty-two years. (A. 69-79, 99-101). Like Bell, here the difference in the plea offer of thirteen years and the Petitioner's sentence of twenty-two years is evidence of his prejudice. 410 S.C. at 443, 765 S.E.2d at 8.

Therefore based on the above, the Petitioner was prejudiced by Plea Counsel's deficient performance and had the Petitioner been able to accept the State's formal written plea offer to plead guilty to kidnapping in exchange for the State's recommended thirteen-year sentence, with dismissal of the remaining charges, the Petitioner would have received a significantly lower sentence than the twenty-two year sentence that was imposed.

### CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari, reverse the PCR Court's ruling and enter an order vacating the Petitioner's convictions and sentence, and

remand this case to the Court of General Sessions for Horry County for a plea and re-sentencing hearing requiring the circuit court judge to take into consideration the State's prior offer of kidnapping with a recommended thirteen-year sentence.

Respectfully Submitted,

By:



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J. Taylor Bell  
S.C. Bar # 100022

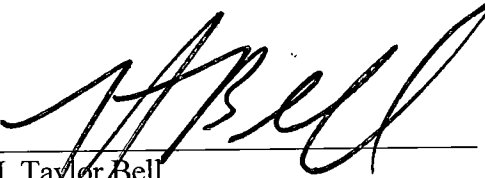
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ATTORNEY FOR PETITIONER

February 11, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his abilities this Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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PETITIONER,

V.

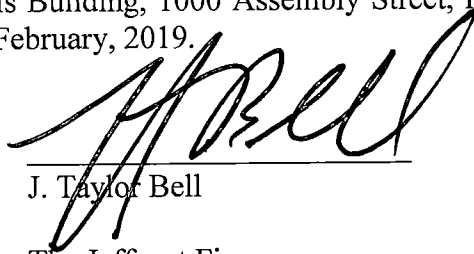
STATE OF SOUTH CAROLINA

RESPONDENT.

APPELLATE CASE NO. 2018-001820

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersign hereby certifies that a true copy of the Petition for Writ of Certiorari and Appendix in the above referenced case has been served upon Johnny E. James, Jr., Esquire, and the State of South Carolina at the Rembert Dennis Building, 1000 Assembly Street, Room 519 Columbia, South Carolina 29201, this 11<sup>th</sup> day of February, 2019.

  
\_\_\_\_\_  
J. Taylor Bell

The Jeffcoat Firm  
1333 Main Street, Suite 510  
Columbia, South Carolina 29201  
(803) 200-2000

ATTORNEY FOR PETITIONER



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February 11, 2019

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**FEB 11 2019**

**S.C. SUPREME COURT**

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

**Re: Shannon DeVante Cooper v. State of South Carolina**  
**Appellate Case No. 2018-001820**  
**Lower Court Case No. 2016-CP-26-00435**

Dear Mr. Shearouse:

Enclosed for filing please find the original and six (6) copies of the Petition for Writ of Certiorari along with the Appendix, along with certificates of service in the above referenced case.

Thank you for your attention to this matter. Please let me know if you have any questions or concerns regarding this matter.

With kindest regards, I am

Yours sincerely,

J. Taylor Bell

cc: Johnny E. James Jr., Asst. A.G.  
Office of Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211

Shannon D. Cooper, SCDC #350524  
Lee Correctional Institution  
990 Wisacky Highway  
Bishopville, South Carolina 29010