

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

**RECEIVED**

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Certiorari to Horry County

AUG 07 2019

The Honorable Kristi F. Curtis, Circuit Court Judge **S.C. SUPREME COURT**

2017-CP-26-01985  
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Richard S. Kreisler, Jr. #223184,

PETITIONER,

v.

State of South Carolina,

RESPONDENT.

Appellate Case No.: 2019-000646  
\_\_\_\_\_

**PETITION FOR A WRIT OF CERTIORARI**  
\_\_\_\_\_

ASHLEY A. MCMAHAN  
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ATTORNEY FOR PETITIONER

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## QUESTION PRESENTED

1. DID THE PCR COURT ERR IN DENYING THE PETITIONER RELIEF WHEN THE PETITIONER WAS NEVER GIVEN THE FIRST PLEA OFFER AND WOULD HAVE TAKEN THE PLEA OFFER HAD IT BEEN GIVEN TO HIM?

## STATEMENT OF THE CASE

The Horry County Grand Jury indicted Petitioner at the December 2011 term of General Sessions for Burglary, 1<sup>st</sup> Degree (2011-GS-26-04495). (App. p. 143) Public Defender W. Thomas Floyd represented Petitioner.

On September 5, 2013, the Petitioner pled guilty to a negotiated plea before the Honorable Larry B. Hyman. On September 11, 2013, Judge Hyman sentenced the Petitioner according to the negotiations, imprisonment for a term of 15 years. (App. p. 142)

Petitioner filed a Notice of Appeal with the South Carolina Court of Appeals. By order filed December 4, 2013, the South Carolina Court of Appeals dismissed the Applicant's appeal for failure to provide a sufficient explanation as required by South Carolina Appellate Court Rule 203(d)(1)(B)(iv). (App. p. 151) The Remittitur was sent on January 8, 2014. State v. Kreisler, Appellate Case No. 2013-001994. (App. p. 150)

Petitioner filed his first application for post-conviction relief (PCR) on March 27, 2017. (2017-CP-26-01985). (App. pp. 17-34). He filed a second PCR application on April 25, 2017. (2017-CP-26-2587). (App. pp. 35-51) The State filed its initial Return and Motion to Dismiss on June 5, 2017, (App. pp. 57-61) and its Amended Return on or about June 13, 2017. (App. pp. 62-69) Petitioner filed a Motion to Merge the applications on June 5, 2017. (App. pp. 70-71) That motion was granted on July 31, 2017. (App. pp. 72-73).

A PCR hearing was convened at the Horry County Courthouse on November 26, 2018. (App. pp. 74-120). Petitioner was present and represented by Ashley A.

McMahan, Esquire. Assistant Attorney General Johnny E. James, Jr. of the South Carolina Attorney General's Office represented Respondent. The Honorable Kristi F. Curtis denied relief in an order filed on April 8, 2019. (App. pp. 135-141).

## STANDARD OF REVIEW

The reviewing court defers to the PCR court's factual findings and will uphold them if supported by any evidence in the record. Smalls v. State, 422 S.C. 174, 179–181, 810 S.E.2d 836, 839 (2018). Furthermore, the reviewing court affords great deference to a PCR court's credibility findings. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). Questions of law are reviewed de novo, and this court will reverse the PCR court if its decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

## ARGUMENT

**The Petitioner timely filed his PCR application within one-year of discovering the plea offer letter.**

Petitioner's Remittitur from his appeal was sent on January 8, 2014. He filed his PCR application on March 27, 2017. When a PCR applicant seeks relief on the basis of newly discovered evidence following a guilty plea, relief is appropriate only where the applicant presents evidence showing that (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the "interest of justice" requires the applicant's guilty plea to be vacated. Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014).

Petitioner has met these factors. First, the letter regarding the plea offer was seen and received by the Petitioner after his guilty plea and while in the SC Department of Corrections. (App. p. 82, lines 5-22) Petitioner's guilty plea was on September 5, 2013. (App. p. 149).

Secondly, Petitioner's mother testified at the PCR hearing. Ms. Abernathy stated that she had requested the Petitioner's files from the Public Defender's office multiple times. She was only able to get those documents with the assistance of another attorney, David Cantey. Mr. Cantey called to the Public Defender's office, who agreed to copy the files, and Ms. Abernathy went and picked them up. (App. pp. 78, line 23 – p. 80, line 9; App. p. 123). It was only after the Petitioner's mother

attempted to obtain the file, failed, obtained the help of counsel and received the file, was the original plea offer letter found. Even with due diligence, the letter was only found after counsel intervened.

Finally, the interests of justice require that the Petitioner's guilty plea be vacated and he be afforded the benefit of the first plea offer. Mr. Floyd testified that the offer was mailed two months after the plea was sent to the Public Defender's Office, that he mailed it to an address not listed on the Petitioner's bond form – nor an address the Petitioner resided at – as he was actually in the detention center, and that the Petitioner had never signed off on the plea offer as having ever reviewed it. (App. p. 97, lines 1-13; App. pp. 92, line 8 – 95, line 2; App. p. 98, lines 20-23.)

Based on Mr. Floyd's ineffectiveness in conveying this plea offer to the Petitioner, and confirming that the Petitioner had knowledge of and had rejected the plea offer, the interest of justice requires the Petitioner's guilty plea to be vacated.

**The PCR court erred in denying the Petitioner's application, as the Petitioner never knew of the first plea offer and would have accepted that offer had he known about it.**

At the PCR hearing, Petitioner argued Mr. Floyd was ineffective for failure to convey the ten-year plea offer to the Petitioner. The United States Supreme Court has held that "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." Missouri v. Frye, 566 U.S. 134, 145, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012). Generally, where defense counsel does not communicate such an offer to the

defendant, counsel has rendered ineffective assistance. Id.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). According to the prejudice prong of the Strickland analysis, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Id.

To show prejudice under Strickland, a defendant 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." Frye, 566 U.S. at 147, 132 S.Ct. 1399; see Lafler v. Cooper, 566 U.S. 156, 164, 132 S.Ct. 1376, 182 L.Ed.2d 398 (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”).

Petitioner never received the burglary, 2<sup>nd</sup> degree ten-year plea offer extended by the Solicitor. Mr. Floyd sent this offer to the wrong address (*See App. pp. 29 and 32*) almost two months after he had received the offer from the Solicitor. (*See App. p. 31*). Mr. Floyd never discussed this offer with the Petitioner. (*App. p. 98, lines 20-23; App. p. 83, line 25 – p. 84, line 7; App. p. 86, lines 12-14; App. p. 89, line 21 – p. 90, line 3, App. p. 98, lines 10-13; App. p. 98, lines 20-23; App. p. 100, line 23 – p. 101, line 2*). While Mr. Grooms insists he conveyed the offer during a court appearance on June 1, 2012, the Petitioner has no recollection of this “plea offer” even though the Petitioner recalled being at the appearance<sup>1</sup>. (*App. p. 115, lines 11-23*). Assuming Mr. Grooms’ memory is correct<sup>2</sup>, blurting out a possible offer to the Petitioner at an appearance date does not cure or absolve Mr. Floyd’s ineffectiveness in his failure to convey to the Petitioner the plea offer from November 2011. The PCR court erred in finding that this minor exchange somehow cured any deficiency by Mr. Floyd.

The Petitioner would have accepted the offer to the lesser offense with a ten-year sentence. His testimony at the PCR hearing notes he would have accepted it had he known about it, furthermore he stated at his guilty plea he wanted his

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<sup>1</sup> The PCR court incorrectly ruled that the Petitioner “could not remember the June 1, 2012, appearance”, which is not accurate. The Petitioner testified at the PCR hearing he was at the appearance that day. (*App. p. 115, lines 11-23.*)

<sup>2</sup> The PCR court only ruled as to Mr. Grooms’ credibility and no others in its Order of Dismissal, yet Mr. Grooms

attorney to get him a ten-year offer. (App. p. 83, line 25 – p. 26, line 7; App. p. 5, lines 6-12).

Trial courts in this state commonly accept pleas to lesser offenses, negotiated pleas, and the combination of the two. The lesser plea offer would have been accepted by the court in its terms as it commonly happens across the state. A plea to Burglary, 2<sup>nd</sup> Degree – nonviolent is less severe than the Burglary, 1<sup>st</sup> Degree the Petitioner is currently serving. Burglary, 1<sup>st</sup> Degree has a mandatory minimum of 15 years and a maximum possible sentence of life. (See SC Code Section 16-11-311(B)) It is also a no-parole offense (See SC Code Section 16-1-10 and 24-13-100), a most serious offense (See SC Code Section 17-25-45(A)) and is considered a violent offense (See SC Code 16-1-60). Whereas Burglary, 2<sup>nd</sup> Degree – nonviolent, is just that, a nonviolent offense and only carries a possible sentence of up to ten years (See SC Code 16-1-312). It is also a parole-able offense.

“Plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.” Frye 566 U.S. at 143, 132 S.Ct. at 1407. Accordingly, Petitioner has proven the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner has proven the second prong of Strickland – that he was prejudiced by trial counsel’s performance. The PCR court’s decision was controlled by an error of law and

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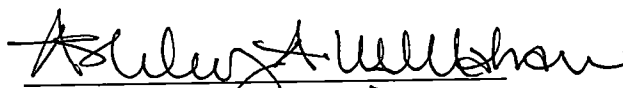
back tracks in his testimony at one point stating “I may’ve misspoken...” App. p. 112, line 6.

Petitioner should be afforded the right to accept the original ten-year plea offer that was never conveyed to him and be resentenced accordingly.

### CONCLUSION

For the foregoing reasons, Petitioner submits this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

August 7, 2019

STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

AUG 07 2019

S.C. SUPREME COURT

The Honorable Kristi F. Curtis, Circuit Court Judge

Case No. 2017-CP-26-01985

Richard S. Kresicher, Jr., #223184, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

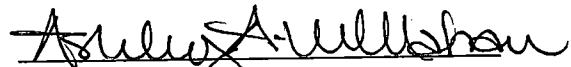
PROOF OF SERVICE

I, Ashley A. McMahan, certify that I have served the within Petition for a Writ of Certiorari and accompanying Appendix on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Johnny E. James, Jr.  
Asst. Attorney General  
S.C. Attorney General's Office  
PO Box 1154  
Columbia, SC 29211-1549

Richard S. Kreischer, Jr., #223184  
1A-0167-B  
Evans Correctional Facility  
610 Highway 9 West  
Bennettsville, SC 29512

I further certify that all parties required by Rule to be served have been served.  
This 7<sup>th</sup> day of August, 2019.



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August 7, 2019

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

Re: Richard S. Kreischer, Jr. #223184  
2017-CP-26-01985  
Appellate Case No.: 2019-000646

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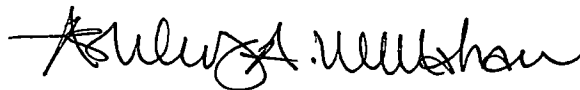
S.C. SUPREME COURT

Dear Mr. Shearouse:

Please find enclosed an original plus six (6) copies of the Petition for a Writ of Certiorari, two (2) copies of the Appendix, and the Certificate of Service.

Should you have any questions, I can be reached at the number and address listed below.

Best regards,



ASHLEY A. McMAHAN  
ATTORNEY AT LAW

AAM  
Enclosures

cc: Richard S. Kreischer, Jr., #223184  
Asst. Attorney General Johnny E. James, Jr.