STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO HORRY COUNTY
Court of Common Pleas
Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2019-000646

Richard S. Kreischer, Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUE PRESENTED

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?

RESPONDENT'S ISSUE PRESENTED

Did the PCR Court properly deny Petitioner relief where the original prosecutor testified that he orally communicated the first plea offer to Petitioner, who rejected it, more than a year before Petitioner's guilty plea, and nearly five years before the application for PCR, such that Petitioner could not prove any element of prejudice and was procedurally barred by the statute of limitations?

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 December 2011 term of the Horry County Grand Jury for burglary, first degree (2011-GS-26-04495). W. Thomas Floyd, Esq. represented Petitioner, and J. Stephen Grooms, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On July 5, 2013, Petitioner pled guilty as indicted. The Honorable Larry B. Hyman, Jr. sentenced Petitioner to imprisonment for a term of 15 years.

Petitioner filed a timely notice of appeal. By order filed December 4, 2013, the South Carolina Court of Appeals dismissed Petitioner's appeal for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. The remittitur was issued on January 8, 2014.

Petitioner filed his application for post-conviction relief on March 27, 2017 (2017-CP-26-01985). He alleged the following grounds for relief in his application:

1. Plea counsel's letter of January 6, 2012, mailed the State's plea offer dated November 28, 2011, to an address which was not owned or lived in by Applicant since 2002.
    a. "Never knew of plea offer till received file [illegible]"
    b. "if knew of plea offer would have accepted same"

Respondent made its return and motion to dismiss on June 1, 2017, requesting the application be dismissed as untimely and because Petitioner failed to make a *prima facie* showing of newly discovered evidence. Petitioner, by and through PCR counsel Ashley A. McMahan, Esq., thereafter amended his application by filing on June 5, 2017, to allege the following additional allegations and facts:

2. Newly discovered evidence of ineffective assistance of counsel; in that:
    a. "Applicant has evidence of material fact that has not been previously presented that he was denied a plea offer. This offer was not discovered

> by the Applicant until sometime in April 2016. This PCR Application was filed within the one-year time frame requirement. The Applicant attached a copy of this plea offer and accompanying letter to his original PCR application. This plea offer was mailed to an address where the Applicant did not reside. As the attached public records to his application show, he did not even own this property at the time the letter was mailed. Also, his bond form, which is also attached to the original application, indicated his actual address. Furthermore, the Applicant was actually in the Horry County Detention Center at the time this letter was mailed out to him with the plea offer."

Respondent amended its return by filing on June 20, 2017, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on November 26, 2018, before the Honorable Kristi F. Curtis. Petitioner was present at the hearing and represented by attorney McMahan. The undersigned represented Respondent. By written order dated April 2, 2019, and filed April 8, 2019, Judge Curtis denied and dismissed the application.

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).

ARGUMENT

THE POST-CONVICTION RELIEF COURT PROPERLY DENIED RELIEF GIVEN GROOMS' CREDIBLE TESTIMONY THAT HE ORALLY COMMUNICATED THE PLEA OFFER IN COUNSEL FLOYD'S PRESENCE TO PETITIONER, WHO REJECTED IT, SUCH THAT PETITIONER COULD NOT SHOW PREJUDICE AND WAS UNTIMELY IN FILING HIS APPLICATION

The PCR court's order denying relief must be affirmed under the "any evidence" standard of review because former assistant solicitor J. Stephen Grooms credibly testified that he communicated the ten-year plea offer in the presence of plea counsel W. Thomas Floyd ("Counsel" or "Counsel Floyd") to Petitioner, who curtly rejected it, and that the offer ceased to be available after Petitioner failed to appear in court in July 2012. Accordingly, the PCR court's order is supported by evidence in the record, and the petition should be denied.

First, "[a]n application or relief filed pursuant to [the Uniform Post-Conviction Procedure Act] must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later." S.C. Code Ann. § 17-27-45. However, where an applicant for post-conviction relief "contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of the actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence." S.C. Code Ann. § 17-27-45(C). Where an applicant can demonstrate that his failure to timely file an application is the result of circumstances beyond his control, he may be entitled to tolling of the one-year statute of limitations based on equitable principles. Mose v. State, 420 S.C. 500, 512, 803 S.E.2d 718, 723-24 (2017).

Second, as to the underlying issue, "[t]he 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.'" Collins v. State, 422 S.C. 250, 261, 810 S.E.2d 871, 876 (2018) (quoting Missouri v. Frye, 566 U.S. 134, 145 (2012)). Generally, defense counsel provides deficient performance when he or she does not communicate such an offer to the defendant. Frye, 566 U.S. at 145. To show prejudice, an applicant for post-conviction relief "must demonstrate a reasonable probability that: (1) he [or she] 'would have accepted the earlier plea offer had [he or she] 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, 422 S.C. at 262, 810 S.E.2d at 877 (quoting Frye, 566 U.S. at 147; citing Lafler v. Cooper, 566 U.S. 156, 164 (2012)). An applicant must show actual prejudice, but depending on the facts of the case, an applicant's self-serving statement *may* be sufficient to establish actual prejudice. Davie, 381 S.C. at 613, 675 S.E.2d at 422.

At the evidentiary hearing, Grooms testified he communicated an offer to Petitioner in Courtroom 3A of the Horry County Government & Justice Center, in which Petitioner would plead guilty to burglary, second degree in exchange for a sentence of ten years. (Appx. 104-05). Grooms recalled the particular arrangements of the attorneys in the courtroom on June 1, 2012, and then explained:

> And we called Mr. Kreischer's name, he did not come to the front because he wasn't in the courtroom. At some point, he came walking through the double doors, walked right up to the table, had his hands on either side of the table, and says, did somebody call my name. I, at that point, didn't recognize him. I said, well, what's your name? Mr. Floyd was still seated right across from me. He said Richard Kreischer. I said, yes, sir, we did call your name. . . . We're here to do one thing and one thing only. I'm here to give you a plea offer. You can sign a piece of paper saying you want to accept or reject it. You can talk to your attorney about it before that date if you want to. So, I said, your plea offer is 10 years on a burg second – I'm sorry – yeah, 10 years on burg second and you'll

> probably do about three and a half, four years; I don't know. And he looked at me directly and said, you ain't got shit on me. Signed the piece of paper, walked out of the courtroom, and I have that piece of paper for you.

(Appx. 105-07). Nonetheless, the plea offer remained "on the table" until Petitioner failed to appear for a July court date. (Appx. 107-08). Counsel Floyd attempted to negotiate on behalf of his client, but Grooms was unwilling to extend any plea offer after Petitioner failed to appear in July 2012. (Appx. 112, ll. 3-19).[1] Petitioner was later arrested in New Jersey. (Appx. 112-13).

Petitioner could not specifically recall Grooms offering him ten years, but did "recall having a conversation with Mr. Floyd about it outside one time." (Appx. 88, ll. 12-21; Appx. 115, ll. 7-10). Petitioner did not recall the discussion as relating to the specific ten year offer provided, but did recall that Counsel Floyd would try to obtain such an offer. (Appx. 89-90). Petitioner recalled appearing for roll call and signing a paper to show his attendance, but could not remember "Mr. Grooms saying anything else" to him, or if Counsel Floyd said "anything else" to him. (Appx. 115, ll. 11-23).[2] Petitioner initially testified that he would have accepted the plea offer had he known about it "[b]ecause it was a lot less than it would've been for what I'm doing now" (Appx. 83-84), but when questioned on cross-examination about whether he would have accepted the offer without knowing he would ultimately serve more time, he replied that he "would've definitely thought about it." (Appx. 86-87; Appx. 88, 19-21). Petitioner denied ever telling anybody he did not wish to plead guilty. (Appx. 88-89).

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[1] Petitioner takes issue with the PCR court's finding that Grooms was credible, emphasizing out of context Grooms' remark that he "may've misspoken[.]" Petitioner for Writ of Certiorari at 10; (Appx. 112, line 6). Grooms was clarifying an off-hand remark he made responding to Petitioner's final question in cross-examination that was not clearly attributed to anybody. (Appx. 111-12). The broad meaning intended by Petitioner's citation to the remark without context is misleading.

[2] Petitioner takes issue with the PCR court's summary of Petitioner's testimony as that he could not remember the June 1, 2012, appearance. Petition for Writ of Certiorari at 9; (Appx. 140). Though a more accurate phrasing would be that Petitioner could not remember the substance of conversations with the attorneys at the appearance, the PCR court's conclusions remain valid.

The PCR court found Grooms' testimony "entirely credible" and concluded that Petitioner "affirmatively rejected the offer upon learning of it in June 2012." (Appx. 140). Whether Counsel Floyd sent the letter to the correct address for his vagabond client is ultimately irrelevant. Petitioner knew of the offer on June 1, 2012, rejected it, and then skipped town. The offer ceased to exist once Petitioner absconded. Further, Petitioner never affirmatively testified he would have accepted the offer *at the time*,[3] but only offered that he would have thought about it. In light of these facts, Petitioner cannot make the first or second showings required for prejudice.

Additionally, because Petitioner knew of the offer, he cannot claim that he first learned of it at any date after June 1, 2012, foreclosing the application of S.C. Code Ann. § 17-27-45(C), or any conceivable basis for equitable tolling. Instead, Petitioner's application was subject to treatment under S.C. Code Ann. § 17-27-45(A), such that the application was due Friday, January 9, 2015, but not filed until March 27, 2017. Petitioner was two years late. Thus, the PCR court properly denied the application based on the statute of limitations.

Petitioner argues that Grooms' communication of the offer to him at the June 1, 2012, appearance "does not cure or absolve Mr. Floyd's ineffectiveness[.]" By Petitioner's reasoning, any misdirected letter by defense counsel regarding a plea offer would render that offer irrevocable into perpetuity, without regard to whether the defendant actually knew about the offer or not. No precedent or sensible justification for such a position exists. Stripping the law

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[3] Petitioner's reasoning on direct examination that he would have taken the offer relies upon facts not contemporaneously available with when the offer was on the table. Obviously any inmate would go back and take a better plea offer after finding out they are to be sentenced to a greater term of incarceration.

to its lay core, the concern addressed in Frye is that defendants should actually know when they have offers—Petitioner did.

Petitioner also notes the Court only ruled on Grooms' credibility, and did not explicitly rule on the credibility of any other witness. PCR courts are obliged to make "findings of fact," which the PCR court did. S.C. Code Ann. § 17-27-80. A PCR court is not obliged to expressly rule as to the credibility of each and every detail advanced by witnesses at a PCR hearing; rather, it need only state its findings as to *what happened.* Positive credibility findings may be safely inferred from the factual conclusions reached and the evidence supporting those conclusions. Negative credibility findings may be safely inferred where the factual conclusions reached are contrary to certain testimony or evidence. Though broad credibility findings can be included in an order resolving a PCR action where appropriate, they should be rendered with judicious caution, *especially* in the case of negative credibility findings, lest the PCR court rule that demonstrably credible testimony is not credible.[4] Here, the PCR court ruled Petitioner knew of, and bluntly rejected, the offer when Grooms communicated it to him on June 1, 2012. Petitioner testified he never rejected any such offer. By virtue of ruling to the contrary, the PCR court did not find credible Petitioner's testimony to the effect that he did not reject the offer.

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[4] For example, many applicants for post-conviction relief begin their testimony by identifying their charges and who represented them. A PCR court would arguably err, however harmlessly, if it ruled an applicant's testimony entirely lacked credibility where he or she correctly identified trial counsel. A PCR court *could* rule "this Court finds any testimony to the contrary of its findings is not credible," but such language is a needless tautology that invites slapdash drafting of the sort that this Court has vociferously railed against. E.g. Fishburne v. State, Op. No. 27911 (S.C. Sup. Ct. filed July 31, 2019); Reese v. State, 425 S.C. 108, 820 S.E.2d 376 (2018); Simmons v. State, 416 S.C. 584, 788 S.E.2d 220 (2016); Garner v. State, 371 S.C. 1, 636 S.E.2d 860 (2006); Bryson v. State, 328 S.C. 236, 493 S.E.2d 500 (1997); Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992); McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991).

CONCLUSION

Petitioner swore at the prosecutor who tried to cut him a break, absconded to New Jersey, and now seeks to turn back the clock to undo his own impetuous error. Petitioner cannot be permitted to do so. 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

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11 Sept., 2019

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S.C. SUPREME COURT

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In the Supreme Court

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Appellate Case No. 2019-000646

RICHARD KREISCHER,

Petitioner,

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STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

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:

Ashley A. McMahan, Esquire
McMahan & Taylor, Attorneys, LLC
Post Office Box 5501
West Columbia, South Carolina 29171

This 11th Day of September, 2019.

EVA COOK
Legal Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
SEP 11 2019
S.C. SUPREME COURT

September 11, 2019

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

RE: **Richard Kreischer, #223184 v. State of South Carolina**
Appellate Case No. 2019-000646
Lower Court Case No. 2017-CP-26-1985

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/ec
Enclosures

cc: Ashley A. McMahan, Esquire