STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Jocelyn J. Newman, Circuit Court Judge

APPELLATE CASE NO 2020-000916

RICHARD B. MOCK,..... APPELLANT

V.

STATE OF SOUTH CAROLINA,..... RESPONDENT

APPELLANT'S *PRO SE* BRIEF

Richard B. Mock, #369163
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Columbia, S.C. 29210

Appellant *pro se*

ISSUE

WAS GUILTY PLEA COUNSEL INEFFECTIVE IN DEFENSE COUNSEL FAILING TO INFORM APPELLANT THAT STATE WAS SEEKING AN ACTIVE TWENTY-YEAR SENTENCE PRIOR TO ADVISING AND ENCOURAGING APPELLANT TO ACCEPT THE NEGOTIATED PLEA AGREEMENT OF FORTY YEARS?

In this appeal, Appellant asserts guilty plea counsel was ineffective for failing to inform him that the State was seeking an active twenty-year sentence prior to advising and encouraging him to accept the negotiated plea agreement of forty years. Although this specific factual allegation was not raised by Appellant during the PCR evidentiary hearing, and was, therefore, not ruled upon by the PCR judge, the interests of justice require this Court to set aside any procedural default which may prohibit this Court from addressing this issue, or from remanding this case to the PCR court for additional evidentiary proceedings.

Ineffective Assistance of Counsel Standard

To establish a claim of ineffective assistance of counsel, the Appellant has the burden of proving "(1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case." *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008). In order to establish prejudice when challenging a guilty plea, Appellant must prove "there is a reasonable probability that, but for counsel's errors, the [Appellant] would not have pled guilty, but would have gone to trial." *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the Appellant would have been successful had he gone to trial. *Alexander v. State*, 303 S.C. 539, 549, 402 S.E.2d 484, 485 (1991). While considering claims of ineffective assistance of counsel stemming from a guilty plea, the United States Supreme Court stated in *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), that, "in order to satisfy the 'prejudice' requirement, the defendant must show there is a reasonable probability that, but for the counsel's errors, he would not have pled guilty and would have insisted on going to trial."

However, more recently in *Missouri v. Frye*, 566 U.S. 134, 132 S.Ct. 1399, 183 L.Ed.2d 379 (2012), the same Court held the "Sixth Amendment guarantees [Appellant] the right to have counsel present at all 'critical' stages of the criminal proceedings," 566 U.S., at 140; also *Montejo v. Louisiana*, 556 U.S. 778, 786, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009), and further that, "where [Appellant] pleads guilty to less favorable terms and claims that ineffective assistance of counsel caused him to miss out on a more favorable earlier plea offer, *Strickland's* inquiry into whether "the result of the proceeding would have been different," *Strickland*, 466 U.S., at 694, 104 S.Ct. 2052, requires looking not at whether [Appellant] would have proceeded to trial

absent ineffective assistance but whether he would have accepted the offer to plead pursuant to the terms earlier proposed. *Frye*, 132 S.Ct. at 1410.

In this case, guilty plea counsel Tracy Pinnock (hereinafter "Pinnock"), stated that she spoke with the client and his desire for a reduced sentence (APP. 100-101). Pinnock also noted she conveyed this request by Appellant to Solicitor Bodman (hereinafter "Bodman"), which then stated to Pinnock her desire for an active twenty year sentence (APP. 101). After this discussion, no evidence is given by Pinnock that she gave this information of a twenty year active sentence by prosecution to Appellant. Instead, Pinnock begins a discussion of a forty year sentence with Appellant, much more outside the scope of either the defendant's plea request or the sentence the prosecution was seeking (APP.84, 93, 101-102). According to the record before this Court during the PCR evidentiary hearing, Appellant testified,

> Q. Did you and Ms. Pinnock ever discuss for a 40 year standpoint?
>
> A. The discussion I was told by Tracy was that she was told by the solicitor's office was that
>
> That was the amount of time they wanted.
>
> Q. Okay. So, that was the offer you had was 40 years?
>
> A. That was it.
>
> (APP. 84, LNS. 7-13)

Right to Effective Assistance of Counsel during the Plea Bargaining Process

Our South Carolina Court of Appeals has recognized "the right to effective assistance of counsel extends to the plea bargaining process." *Simuel v. State,* 432 S.C. 150, 850 S.E.2d 642, 643-44 (Ct.App.2020); also *Lafler v. Cooper*, 566 U.S. 156, 162, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012). 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." *Frye*, 132 S.Ct. at 1408; *Boyd v. Waymart,* 579 F.3d 330, 356 (2009) (adopting "rule that counsel's failure to convey a plea offer constitutes deficient performance."). cf. Rule 1.4(a)(3) of the Rules of Professional Conduct ("A lawyer *shall* keep the client reasonably informed about the status of the matter."), and Rule 1.4(b) ("A lawyer *shall* explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); *Matter of Schnee*, 432 S.C. 500, 507, 854 S.E.2d 840 (2021). The specific issue raised here on appeal by Appellant is whether counsel has a duty to communicate *informal* offers from the prosecution to Appellant during the plea negotiation process.

During the PCR evidentiary hearing, and *after* Appellant testified, Pinnock testified,

Q. Okay. And so – so then ultimately Mr. Mock decides to accept a plea, correct?

A. Yes.

Q. Okay. So, can you talk a little bit about how that came about?

A. So, I went down to the, to the detention center, let's see, and he and I discussed – he wanted me to go to the solicitor and propose a 30 year sentence suspended to 10 or 15 years.

Q. Okay.

A. I went back and talked to the prosecutor about that. Ms. Bodman informed me that she was seeking a 20 year sentence. So, we got kind of creative with the charges because I – Mr. Mock was adamant that any sort of offer or resolution that we came to did not include the, the CSC charges. So, that's how we kind of came up with the creative combination of the charges to reach that resolution point.

Q. Okay.

A. I went back down there. It was over a weekend, I think it was a Sunday, discussed it with him again. He, he told me that's what he wanted to do, and then before he came to Court, I took the paperwork down to the detention center, and we went through everything, and he signed it at that point.

Q. Okay. And, ultimately, the sentence that you came up with was a, a total, an aggregate sentence of 40 years, correct?

A. Yes.

Q. Okay. And did I – I don't know if I misheard you earlier. Did you say the solicitor wanted a 20 year sentence?

A. Yes.

Q. Okay.

A. She, she was seeking---

Q. So – sorry.

A. Sorry.

Q. Sorry. Can you explain how we get to 40 years then?

A. Yes.

Q. Okay.

A. So, *she was seeking an active 20 year sentence.*

Q. Okay.

A. None of the charges that we were able to negotiate carried a 20 year sentence. So, in order to get the – what's, what's classified as nonviolent time, that was *the only way* to get a nonviolent 20 year sentence. Even though it says 40 years on the paperwork, calculation wise, it was, *it was around what everybody was seeking to try to do.*

(APP. 100, LN. 20 – APP. 102, LN. 18) (emphasis added)

The appellate court gives great deference to the PCR court's findings of fact and conclusions of law, *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), and also "gives great deference to a PCR [court's] findings where matters of credibility are involved." *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). "In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision." *Abney v. State,* 408 S.C. 41, 45, 757 S.E.2d 544, 545 (Ct. App. 2014); *Holden v. State,* 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011). In a PCR proceeding, an applicant bears the burden of establishing that he or she is entitled to relief. Moreover, defense counsel's comments during the sentencing hearing are entitled to consideration. See *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977) ("Solemn declarations in open court carry a strong presumption of verity".).

The first prong to prove ineffective assistance is whether Pinnock's performance was deficient. In this instant case, Pinnock violated Rules 1.4(a)(3) and 1.4(b) of the Rules of Professional Conduct by failing to keep Appellant aware of ongoing plea negotiations, and by failing to advise Appellant that Bodman was seeking a sentence that was six years less than Pinnock ultimately advised Appellant to accept (App. 26-29, 101-102).

Duties of Counsel in Advising a Client With Respect to a Plea Offer That Leads to a Guilty Plea

In *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), the United States Supreme Court discussed the duties of counsel in advising a client with respect to a plea offer that leads to a guilty plea. The U.S. Supreme Court made clear that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right for effective assistance of counsel." 559 U.S. at 373, 130 S. Ct. at 1486. The Court also rejected the argument that a knowing and voluntary plea supersedes errors by defense counsel. See *Frye*, 566 U.S. at 141.

In the case now before this Court, Appellant points out that the legal question presented is similar to that in *Frye*, namely, that Pinnock was deficient in failing to communicate to Appellant the earlier informal offer of an active twenty year sentence. The challenge is both to the advice pertaining to the plea

that was accepted, and to Pinnock's performance of legal representation that preceded it with respect to the other potential pleas and plea offers. Appellant respectfully reminds this Court that this issue underscores an important point: that the plea-bargaining process is often in flux, with no clear standards or timelines and with no judicial supervision of the discussions between prosecution and defense. Indeed, discussions between client and defense counsel are privileged. Due to incompetent legal representation by Pinnock, Bodman actually received a more favorable result—six years *more* than the active twenty year sentence she was seeking.

Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. See Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics,S. Rosenmerkel,M.Durose,&D.Farole, Felony Sentences in State Courts, 2006 Statistical Tables, p.1(NCJ226846,rev.Nov.2010),http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf; *Padilla*, 559 U.S., at 372, 130 S. Ct., at 1485-1486 (recognizing pleas account for nearly 95% of all criminal conviction). The reality is that 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. Because ours "is for the most part a system of pleas, not a system of trials," *Lafler*, *post*, at 1338, 132 S. Ct. 1376, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. "To a large extent...horse trading [between Bodman and Pinnock] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909, 1912 (1992). See also Barkow, Separation of Powers and the Criminal Law, 58 Stan. L.Rev. 989, 1034 (2006) ("[Defendants] who do take their case to trial and lose receive longer sentences that even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences that other individuals who are less morally culpable but take a chance and go to trial" (footnote omitted)). In today's criminal justice system, the negotiation of a plea bargain, rather that the unfolding of a trial, is almost always the critical point for a defendant.

To note the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that plea agreements can benefit both parties. In order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations. "Anything less...might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would

help him.'" *Massiah*, 377 U.S., at 204, 84 S.Ct. 1199 (quoting *Spano v. New York*, 360 U.S. 315, 326, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959) (Douglas, J., concurring)).

The inquiry then becomes how to define the duty and responsibilities of Pinnock in the plea bargain process. This is a difficult question. "The art of negotiation is at least as nuanced as the art of trial advocacy, and it presents questions further removed from immediate judicial supervision." *Premo v. Moore*, 562 U.S. 115, 125, 131 S.Ct. 733, 741, 178 L.Ed.2d 649 (2011). Bargaining is, by its nature, defined to a substantial degree by personal style. The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process. cf. *ibid.*

Here the question is whether Pinnock had a duty to communicate Bodman's desire of an "active twenty year sentence" to Appellant *before* advising Appellant to accept a plea agreement on terms and conditions that ultimately resulted in a longer sentence. Appellant asserts Rules 1.4(a)(3) and 1.4(b) of the Rules of Professional Conduct answer this question in the affirmative. Although the standard for Pinnock's performance is not determined solely by reference to codified standards of professional practice, these standards are important guides. The American Bar Association recommends defense counsel "promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney," ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(a) (3d ed. 1999), and this standard has been adopted by numerous state and federal courts over the last 30 years.

To show where a plea offer has lapsed or been rejected because of Pinnock's deficient performance, Appellant must also demonstrate a reasonable probability both that he would have accepted the more favorable plea offer had he been afforded effective assistance of counsel, and that the plea agreement would have been entered without the Bodman's canceling it or the trial court's refusing to accept it, if they had the authority to exercise that discretion under state law. *Hill* correctly applies in the context in which it arose, but it does not provide the sole means for demonstrating prejudice arising from counsel's deficient performance during plea negotiations. Because *Frye* argues that with effective assistance he would have accepted an earlier plea offer as opposed to entering an open plea, *Strickland's* inquiry into whether "the result of the proceeding would have been different," 466 U.S., at 694, 104 S.Ct. 2052, requires this Court to look not at whether Appellant would have proceeded to trial but at whether he would have accepted the earlier plea offer. Appellant must also show that, if Bodman had the discretion to cancel the plea agreement (which she did have discretion), or the trial court had the discretion to refuse to accept it (which it did have the discretion), there is

a reasonable probability neither Bodman nor the trial court would have prevented the offer from being accepted or implemented (APP. 26-31).

To establish prejudice in this instance, it is necessary to show a reasonable probability that 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. Cf. *Glover v. United States*, 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed 2d 604 (2001) ("[A]ny amount of [additional] jail time has Sixth Amendment significance"). In a case such as this, where Appellant pleads guilty to less favorable terms and claims that ineffective assistance of counsel caused him to miss out on a more favorable plea offer, *Strickland's* inquiry into whether "the result of the proceeding would have been different," 466 U.S., at 694, 104 S.Ct. 2052, requires looking not at whether Appellant would have proceeded to trial absent ineffective assistance but whether he would have accepted the offer to plead pursuant to the terms earlier proposed.

In order to complete a showing of *Strickland* prejudice, Appellant has shown a reasonable probability he would have accepted Bodman's earlier informal plea offer of an active twenty year sentence. However, Appellant must also show that, if Bodman had the discretion to cancel it (which she did), or if the trial court had the discretion to refuse to accept it (which it did), there is a reasonable probability neither Bodman nor the trial court would have prevented the offer from being accepted or implemented. The Federal Rules, some states rules including this Court's precedents give trial courts some leeway to accept or reject plea agreements, see Fe. Rule Crim. Proc. 11(c)(3); see Mo. Sup.Ct. Rule 24.02(d)(4); *Boykin v. Alabama*, 395 U.S. 238, 243-244, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). It can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences. So in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial non-approval of a plea bargain. The determination that there is or is not a reasonable probability that the outcome of the proceeding would have been different absent counsel's errors can be conducted within that framework.

These standards must be applied to the instant case. As regards to the deficient performance prong of *Strickland*, the Court of Appeals found the "record is void of *any* evidence of *any* effort by trial counsel to communicate the [formal] Offer to Frye during the Offer window, let alone any evidence that Frye's conduct interfered with trial counsel's ability to do so." 311 S.W.3d, at 356. On this record, it is evident that Frye's attorney did not make a meaningful attempt to inform the defendant of a written plea offer before the offer expired. See *supra*, at 1404 – 1405. The Missouri Court of Appeals was correct that "counsel's representation fell below an objective standard of reasonableness." *Strickland, supra*, at 688, 104 S.Ct. 2052.

During the PCR evidentiary hearing, Appellant testified,

Q. Okay. You said you had some parts you objected to. Do you recall what those were?

A. The no parole and the no appeal being that I would think that my attorney would fight for me a little bit more when it came to that.

Q. Okay. *Did you have a chance to negotiate this?*

A. *No.*

Q. Okay. *It was here it is, sign it, take it or leave it?*

A. *That was it.*

(APP. 93, LNS. 7-15) (emphasis added)

From Appellant's testimony there was no negotiating, nor did Appellant discuss with Pinnock the twenty year active sentence Pinnock knew Bodman was seeking. During the PCR evidentiary hearing, and *after* Appellant testified, Pinnock testified,

Q. Okay. Okay. All right. You mentioned that the solicitor wanted an *active* sentence of 20 years.

A. Yes.

Q. When you say that, you said there wasn't a charge that carried 20 years.

A. Uh-huh. (Affirmative).

Q. Okay. Okay. If there had been a charge that – I'm trying to – let me ask it this way. If there had been a 20 year sentence available, would that have satisfied the solicitor?

A. That I don't. I don't know.

Q. Okay. When did y'all get into the discussion based on percentages of amount that he'll have to serve, parole eligibility, things like that? How does that -- how does that evven come into your negotiations with the solicitor?

A. I think – so, a lot of our argument back and forward again was our hard line was the CSC charges needed to go. That was something that I did not think was negotiable. I, didn't – you know, my understanding from meeting with Mr. Mock was, again, any resolution was not going to include any level of CSC. *So, in order to get what we wanted as far as the charges, we had to try to find a creative way to, I guess, meet on common ground to get what we wanted charge wise, and also to try to get to where the solicitor was willing to go to.*

Q. Okay. What is your understanding of the amount of time a person, percentage wise, would have to serve on a CSC with a minor first degree?

A. I mean it's 85 percent. So, minimum would be 85 percent. No parole.

Q. Okay. What about for a lewd act on a minor?

A. Lewd act is classified – I believe it's classified as violent, but it's – or a strike. I, I can't remember. I, I have to look these things up all the time. But it's my understanding that it was 65 percent.

Q. Okay. And how about the sexual exploitation charge?

A. Sixty-five.

Q. Okay. *Twenty years at 85 percent still wouldn't be 20 years*, and I know that sounds silly for me to ask it that way. *What was your understanding of what the solicitor wanted in this case?*

A. *She told me that she wanted an active 20 years. Not a 20 year sentence, but an active 20 years.*

Q. *Yeah. She wanted him to be in jail for 20 years –*

A. *Yes.*

Q. *--or prison for 20 years?*

A. That is – yes, that is the information that I was told.

Q. Okay. *At 65 percent, 40 years is more than that.*

A. *Yeah.*

Q. Okay. Was there ever any discussion that a 30 year sentence would essentially satisfy what she was looking for?

A. I don't have anything in my notes.

(APP. 118, LN. 1 – APP. 120, LN. 7) (emphasis added)

Pinnock testified to the fact that not only did she know prosecution wanted an active 20 year sentence, but was well versed in the percentages that went along with the charges against Appellant. When the PCR attorney for the Appellant noted to Pinnock that at 65 percent, 40 years was more than what Bodman was seeking, Pinnock clearly affirms this point in fact.

The second prong of ineffective assistance of counsel is a three part test: First, prejudice is established by the fact that Pinnock admitted she knew of the informal offer of a twenty year active sentence, but instead advised Appellant to accept a formal plea agreement that included a forty year sentence at sixty-five percent.

Pinnock further recognized this sentence ultimately amounted to twenty-six years (APP. 120, LN. 2-4), far exceeding the twenty years Bodman was seeking. Any reasonable person would not accept a plea agreement that included a higher sentence than one sought by the solicitor.

Second, the test requires whether the plea would have been entered without the prosecution canceling it. That Pinnock knew a "twenty year active sentence" is precisely what Bodman was seeking speaks to the fact that the plea agreement under precisely those stated terms would have been entered by Bodman without deference by the courts or the judge (APP. 119 LN 18 – APP. 120 LN 1). And, Appellant would point out that the guilty plea colloquy demonstrates ample evidence supporting the fact that the trial judge was both eager and amenable in accepting the plea agreement (APP. 30 LN 20 – APP. 32 LN 15).

Third, would the end result of the process have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. The answer to this is an affirmative on all parts. Six years from a twenty year sentence is more than 25 percent of the original sentence. Any reasonable person would have taken the offer of lesser time without the consideration of going to trial instead.

Excusing Procedural Default in PCR Proceedings

In most PCR cases, however, courts have refused to excuse the pleading and issue-preservation requirements that apply in all civil cases. As with *Mangal v. State*, 421 S.C. 85, 805 S.E.2d 568 (2017), *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991), for example, the courts refused to relax procedural requirements simply "on the ground that his first...PCR application was insufficient due to ineffective PCR counsel." In *Plyler v. State*, 309 S.C. 408, 424 S.E.2d 477 (1992), the applicant attempted to raise on appeal for the first time a burden-shifting claim based on trial counsel's failure to object to the trial court's malice charge. 309 S.C. at 409, 424 S.E.2d at 478. As to the merits of the claim, the Court found "the malice charge...is so diseased with burden-shifting presumptions that it violates *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)." *Plyler*, 309 S.C. at 410-11, 424 S.E.2d at 478.

The Courts have often considered the tension between the rights at stake in PCR proceedings and the application of traditional procedural requirements for the presentation and preservation of issues. See, e.g., *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016); *Odom v. State*, 337 S.C. 256, 523 S.C.2d 753 (1999). The Supreme Court of the United States recently addressed this tension in *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). Martinez filed a second PCR action in state court with new counsel asserting trial counsel provided ineffective assistance. 566 U.S. at 6-7, 132 S.Ct. at 1314, 182 L.Ed.2d at 281. The state court dismissed this PCR action, finding Martinez was procedurally barred from pursuing ineffective assistance claims that should have been asserted in his first PCR action. 566 U.S. at 7, 132 S.Ct. at

1314, 182 L.Ed.2d at 281. Martinez subsequently filed a writ of habeas corpus in federal court, again raising the ineffective assistance of counsel claims. *Id.* The district court refused to address the claims on the ground they were barred by procedural default in state court, and "Martinez had not shown cause to excuse the procedural default." 566 U.S. at 7-8, 132 S.Ct. at 1315, 182 L.Ed.2d at 281. After the Ninth Circuit affirmed, the Supreme Court granted certiorari. 566 U.S. at 8, 132 S.Ct. at 1315, 182 L.Ed.2d at 282.

The Supreme Court held "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U.S. at 17, 132 S.Ct. at 1320, 182 L.Ed.2d at 288. In doing so, the Court recognized the right to the effective assistance of trial counsel is a "bedrock principle in our justice system," and acknowledged applicants "confined to prison" and "unlearned in the law" often have difficulty complying with procedural rules in a PCR case. 566 U.S. at 12, 132 S.Ct. at 1317, 182 L.Ed.2d at 284. The Court considered *Martinez* again in *Robertson*. In *Robertson*, the court permitted the PCR applicant to pursue a successive application the PCR court found was procedurally barred. 418 S.C. at 516, 795 S.E.2d at 34. This states that where a defendant alleges, in a successive PCR application, facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR application, and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing.

In addition, there is a question of the timing of filing a late claim after the one year time frame. In *Coats v. State*, 352 S.C. 500, 575 S.E.2d 557 (2003), however, petitioner did not file his claim within one year after his conviction as required by S.C. Code Ann. 17-27-45(A) (sup.2001). It would appear that this section bars petitioner's claim; however, the courts concluded his claim fell within the discovery rule, which provides:

> If the applicant 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 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) (Supp.2001).

Furthermore, in *Austin v. State*, 305 SC 453, 409S.E.2d 395 (1991), Petitioner's original application for PCR was denied after a hearing. Petitioner subsequently filed an application alleging only that his PCR counsel was ineffective in failing to seek appellate review of the denial of PCR. The right to seek appellate review of the denial of PCR is expressly authorized by state law. S.C. Code Ann. 17-27-100 (1985); Supreme Court Rule 50(9). *Knight v. State*, 284 S.C. 138, 325 S.E.2d 535 (1985). While the constitutional right to counsel does not extend to discretionary appeals on collateral attack, the courts have ruled that *Anders v.*

California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), shall continue to apply in PCR matters. *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988). *Anders* requires appellate counsel to brief *arguable* issues, despite counsel's belief the appeal is frivolous, as a safeguard of the right to appeal. In applying *Anders* on PCR, courts have recognized a prisoner's right to the assistance of appellate counsel in seeking review of the denial of PCR. Supreme Court Rule 50(6) expressly provides for the appointment of counsel to seek appellate review on PCR. Because of the State's rules, the court remanded the case for an evidentiary hearing on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review, and whether failure to obtain review of a meritorious issue prejudiced petitioner.

The Supreme Court's decision in *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), reminds this Court that the Sixth Amendment guarantee of effective assistance of counsel is a "bedrock principle in our justice system." As with *Martinez, Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016), counsel this Court that there are situations where the interest of justice require PCR courts to be flexible with procedural requirements *before* PCR applicants suffer procedural default on substantial claims. Such flexibility is consistent with the purpose and spirit of our Rules of Civil Procedure. These considerations should guide PCR courts when struggling to balance procedural requirements against the importance of the issues at stake in PCR proceedings. Appellate courts encourage trial courts in PCR cases to use the discretion granted to them on procedural matters to find reasonable ways – within the flexibility of our Rules – to reach the merits of substantial issues.

In this instant case the issue is multi-layered. The first issue is the fact that Pinnock, on the stand and under oath, voluntarily admitted there was an informal offer by Bodman previously not addressed or offered to Appellant, nor was the longer sentence objected to by Pinnock at the guilty plea hearing. This addresses the ineffective assistance and the discovery of an unknown piece of evidence that could not have been addressed by Appellant before this point. It also leads to all prongs and test by *Strickland* to be conclusive for ineffective assistance of counsel.

The second issue to address is PCR counsel not questioning Pinnock on the previously unknown plea offer, and the disparity of time between the unknown plea offer and what Appellant was advised by Pinnock to accept and plead guilty to in the plea agreement. PCR counsel's inadequate questioning of Pinnock regarding the informal plea offer of an active twenty year sentence by Bodman, therefore, leaves this Court in a precarious position of reviewing Appellant's claim without a full and complete record of the facts surrounding the informal plea offer, thus putting the Appellant in jeopardy of foreclosure due to a procedural bar.

Finally, there is the issue of the timing in the filing of appeal of the PCR court's final decision. The PCR hearing was held on December 4, 2018. However, the final order is not signed by the presiding judge until June 3, 2020, and the certificate to the transcript is dated September 27, 2020. Furthermore, the Appellant was not first contacted by appellant defense until December 31, 2020, and the first letter containing any transcript or other evidence was not provided by appellant defense to Appellant until January 15, 2021. Therefore, January 15, 2021 is the first time Appellant was able to read any transcripts or other evidence, and could not have possibly discovered any new evidence himself or file any appeal until it was too late. The Appellant should not be hindered or liable for delay because of the failure and hindrance by the courts or counsel.

Successive PCR Applications Are Highly Disfavored

"All applicants are entitled to a full and fair opportunity to present claims in one PCR application." *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). "Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than 'one bite at the apple as it were'." *Id.* Section 17-27-90 of the South Carolina Code generally prohibits the filing of successive PCR applications, stating:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding that the applicant has taken to secure relief, may not be the basis for a subsequent application, *unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.*

S.C. Code Ann. 17-27-90 (2014) (emphasis added). In *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991), the Court interpreted section 17-27-90 to forbid "a successive PCR application unless an applicant can point to a 'sufficient reason' why the new grounds for relief he asserts were not raised, or were not raised properly." *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). The Court in *Aice* acknowledged that there may be "unique" circumstances, where a PCR counsel's assistance could be challenged in a successive application. *Id.* at 451, 409 S.E.2d at 394. However, the Court expressly held "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' allowing for a successive PCR application under 17-27-90." *Id.*

Despite the express holding in *Aice*, Petitioner argued *Martinez* excused the procedural bar of section 17-27-90. In *Martinez*, the "precise question" addressed by the United States Supreme Court ("USSC") was "whether ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding." *Martinez*, 132 S.Ct. at 1315. The USSC answered this question by holding that:

> [w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

S.C. Code Ann. 17-27-45(A), 17-27-70(b), 17-27-90 section of "Excusing Procedural Bar" states:

> Where a defendant alleges, in a successive PCR application, facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR application, and these facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be reserved by a hearing.

Moreover, *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013), notes of this same issue;

> Where an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing.

Additionally, in *Jamison v. State*, 410 S.C. 456, 765 S.E.2d 123 (2014), the court ruled the PCR Act provides that "[a]ny person who has been convicted of, or sentenced for, a crime and who claims...that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice" is entitled to seek post-conviction relief S.C. Ann. 17-27-20(A)(4) (2014). Likewise, sec. 17-27-20(A)(4) of the S.C. Sup. Ct. standard notes of the PCR Act:

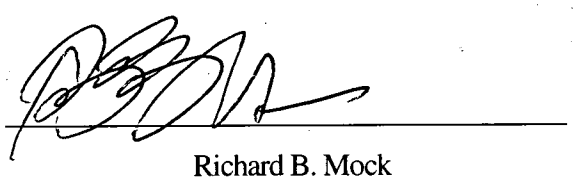
> [W]hen a [PCR] applicant seeks relief on the basis of newly discovered evidence following a guilty plea, relief is appropriate only where the applicant presents evidence showing that (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, 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.* In other words, *"a [PCR] applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.*

Thus, by its plain language, the PCR Act affords "any person" the ability to seek post-conviction relief on the basis of newly discovered evidence – not just individuals convicted and sentenced following trial. Accordingly, the courts ordinarily reject the State's claim that the waiver of trial and admission of guilt encompassed in a guilty plea necessarily preclude post-conviction relief in *all* cases. Although the courts will find that a guilty plea does not preclude post-conviction relief following a guilty plea in all circumstances, it can nonetheless conclude that the traditional, five factor newly discovered evidence test is not the proper test for analyzing whether a PCR applicant is entitled to relief on the basis of newly discovered evidence following a guilty plea.

In this instant case, Appellant did not knowingly and intelligently accept the terms of the plea agreement and choose to plead guilty because of the deficiencies of Pinnock as discussed above. In discovering this new evidence it was found that Pinnock admitted under oath that there was an active twenty year sentence Bodman was seeking, but instead advised Appellant to plead guilty to a forty year sentence of which he would have to serve 65 percent of his sentence, or 26 years, which is six years more than what Bodman was seeking. This meets every test for the two-prong *Strickland* requirement for ineffective assistance of counsel. Moreover, there is the issue of the timing of the final order signed by the PCR judge, the lack of PCR attorney preserving adequate testimony, unknown by the Appellant prior to January 15, 2021. The egregiousness of issues overlooked and mishandled in this case must be addressed forthwith, and in the interest of justice this issue must overcome any procedural bar caused by ineffectiveness of the courts and counsel.

Conclusion

Wherefore, based on the foregoing arguments *pro se*, as Appellant does not wish having to seek a second PCR filing, as successive PCR applications are highly disfavored by the courts, Appellant respectfully asks this Court to enforce the offer of a twenty year active sentence made by Bodman by remanding this case for resentencing, thereby reducing Appellant's sentence due to Pinnock's ineffectiveness, which led to the Appellant not making an intelligent and knowing decision in his guilty plea to the courts, or, in the alternative, based on the inadequacy and incompleteness of the record regarding the original plea offer during the PCR evidentiary hearing, Appellant implores this Court to remand this issue back to the lower court for further review and proceedings to complete the record for this Court's review. The Appellant acknowledges the fact that he has been requesting a trial. However, under the circumstance of this newly discovered evidence regarding the original plea offer of an active twenty year sentence, Appellant reasonably believes he is entitled to be informed of the terms of the original plea offer, and to choose rather to accept those terms and to plead guilty.



Richard B. Mock
Appellant *pro se*

This 7th day of June, 2021.

STATE OF SOUTH CAROLINA
In The South Carolina Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Jocelyn Newman, Circuit Court Judge

2016-CP-40-7261

Richard B. Mock, #369163,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Appellant's *Pro Se* Brief in the above-entitled case has been served upon The South Carolina Court of Appeals and Jenny Abbott Kitchings, Clerk, by mailing in an envelope properly addressed with postage prepaid on this day, to the office located at P.O. Box 11629, Columbia, SC 29211.

Richard B. Mock

June 7, 2021

Cc:
Lindsey Ann McCallister, Esquire

June 7, 2021

RECEIVED
JUN 09 2021
SC Court of Appeals

Re: Richard B. Mock #369163
Appellant's *Pro Se* Brief
2016-CP-40-7261

To whom it may concern;

Per the attached Certificate of Service dated June 7, 2021, there have been two copies of Appellant's *Pro Se* Brief provided to the South Carolina Court of Appeals. I respectfully request one copy of the Appellant's *Pro Se* Brief be returned, stamped True Copy, acknowledging the receipt by the courts of this brief. Please send the stamped copy of the *Pro Se* Brief to: Richard B. Mock #369163, Broad River C.I., Greenwood Dorm Rm. 2090, 4460 Broad River Rd. Columbia, S.C., 29210.

Thank you for your help in this matter.

Sincerely,

Richard B. Mock

Cc:
Lindsey Ann McCallister, Esquire

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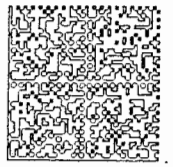

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