

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Beaufort County

Jennifer B. McCoy, Circuit Court Judge

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**RECEIVED**

**Nov 03 2021**

**S.C. SUPREME COURT**

PHILENZA PRITCHETT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-001255

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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## **ISSUE PRESENTED**

Whether the PCR court erred where it where it found counsel provided effective representation where Petitioner's decision to reject a favorable plea offer was not knowingly and intelligently made, where defense counsel incorrectly thought Petitioner had a "good" suppression issue, since the critical identification was not suppressed and its admission was upheld on direct appeal?

## STATEMENT

On May 20, 2010, a Beaufort County Grand Jury indicted Petitioner for armed robbery, kidnapping, criminal conspiracy, possession of a weapon during the commission of a violent crime, and unlawful carrying of a pistol. App. 621 – 630. Petitioner was tried before the Honorable Brooks Goldsmith and a jury, from August 25 – 28, 2014. Jessica Saxon and Helen Novell represented Petitioner. Lynnor Musser represented the State. App. 1.

The State alleged that on April 1, 2010 at 2:48 a.m., officers were dispatched to the Kangaroo Express in Hilton Head after the clerk, Makia Fulton, reported an armed robbery. App. 91, l. 24 – 93, l. 3. Fulton said the store was robbed at gunpoint by two armed men who wore hooded sweatshirts and largely obscured their faces with blue bandanas. According to Fulton, the robbers forced her to open two cash registers and stole cash (later determined to total \$181), several cartons of cigarettes, and a handful of cigarillos. Fulton said the men took her cell phone and forced her into the bathroom before leaving. Fulton emerged from the bathroom after a few minutes and called 911. App. 189, l. 15 – 205, l. 21; App. 232, l. 11 – 234, l. 13.

Fulton said one of the robbers was white and one was black, and she claimed she recognized both men's voices. App. 190, ll. 3-4; App. 207, ll. 19-21; App. 157, l. 24 – 158, l. 3. Fulton claimed the black robber had a silver and black gun. App. 190, ll. 11-18. The responding officer broadcast the description of two male suspects, one black and one white, and other officers quickly went to check for suspicious activity at nearby twenty-four-hour convenience stores. App. 93, l. 17 -95, l. 2. Five or ten minutes later, Officer Murphy checked the parking area at the Gum Tree Pantry, which was five miles away from the Kangaroo Express. App. 104, ll. 1-25; App. 99, ll. 9-12. At the gas pumps, Murphy saw a Jetta with a white man and a black

man in the front seats. Another black man was in the back seat, and a woman came out of the gas station and got into the car. App. 104, l. 18 – 106, l. 25.

Murphy said the white male driver, Brandon Rolt, looked nervous and slumped down in his seat when he spotted the officer. Murphy turned on his blue lights and walked up to the car, where he saw a gun between the console and driver's seat. The front passenger, Harry Lockett, was a black male. Petitioner, who was also a black male, was in the back passenger seat with the female passenger. Backup arrived and the four motorists were handcuffed and detained. App. 107, l. 5 – 113, l. 10.

The Beaufort County Sheriff's Department's had a policy that show-up identifications were only justified when no other means of identification are practical and no other evidence exists to hold the suspect. App. 163, l. 10 – 164, l. 6. Defense counsel questioned Officer Polites why the four motorists in the Jetta were not held on an unlawful weapon charge, apparently to make the point that a voice identification lineup could have been done. App. 165, l. 6 – 166, l. 3. Nevertheless, Officer Polites brought Fulton to the Gum Tree Pantry to see if she could identify anyone. App. 146, l. 17 – 147, l. 21.

One by one, all three male motorists were taken out of the police car, still wearing handcuffs, and a flashlight was shined in their faces. Fulton said she did not recognize Rolt or Lockett, but claimed that Petitioner, who she knew because she styled his mother's hair, was one of the men who robbed her. Fulton called Petitioner Lenny, and claimed she was certain he was one of the robbers. App. 147, l. 18 – 150, l. 3; App. 207, l. 7 – 212, l. 2.

Blue bandanas, Newport cigarettes, cigarillos, and dark clothing were found in the Jetta. The gun by the console was a nine millimeter black handgun. A second gun, which was a black and silver forty caliber handgun, was found underneath the front passenger seat in front of

Petitioner's seat. There was a third gun in the glove compartment. App. 116, l. 13 – 118, l. 25; App. 245, l. 4 – 257, l. 9. The State claimed Petitioner's tennis shoes, which had a blue stripe or swoosh, were consistent with the tennis shoes worn by the black male robber as reflected in video surveillance footage of the robbery. R. 98, ll. 18-22; App. 411, ll. 7-13. However, DNA found on the silver and black handgun located under the seat in front of Petitioner was compared to Petitioner's DNA, and he was excluded as a contributor. App. 355, l. 23 – 356, l. 5.

Pretrial, defense counsel moved to suppress Fulton's identification of Petitioner based on the suggestiveness of the show-up identification procedure used by the Sheriff's Department. The motion was denied, and Fulton's identification of Petitioner was admitted as key evidence of guilt. App. 69, l. 6 – 77, l. 20; App. 148, l. 18 – 150, l. 1; App. 211, l. 12 – 212, l. 2.

Petitioner was convicted as indicted and he was sentenced to serve concurrent terms of imprisonment of fifteen years for armed robbery, fifteen years for kidnapping, five years for criminal conspiracy, five years for possession of a weapon during the commission of a violent crime, and one year for unlawful carrying of a pistol. App. 440, l. 12 – 441, l. 1; App. 452, ll. 6-21; App. 631 – 635.

On direct appeal, Petitioner argued that, "The court erred by admitting a witness's out-of-court and in-court identification of Appellant in violation of his due process rights since the show up procedure used by law enforcement was unduly suggestive and the identification was so unreliable that a substantial likelihood of misidentification existed." App. 454 – 480. However, the Court of Appeals affirmed, finding:

As to whether the trial court erred in admitting a witness's out-of-court and in-court identifications of Pritchett in violation of his due process rights: *State v. Govan*, 372 S.C. 552, 559–60, 643 S.E.2d 92, 96 (Ct. App. 2007) (finding the in-court identification was reliable independent of the show-up identification when the restaurant employees viewed Govan in a well-lit building; the

witness was immediately next to and in direct contact with Govan for the duration of the robbery as he held her by the arm and put a gun to her head; the witness had significant opportunity to view Govan at a time when her attention would have been heightened; Govan's appearance at the time of the show-up was consistent with the witness's prior description of him, and she stated she was certain Govan was the man who robbed her; and the show-up occurred within forty-five minutes of the robbery); *State v. Brown*, 356 S.C. 496, 506, 589 S.E.2d 781, 786 (Ct. App. 2003) (finding the witness's pre-trial identification of Brown was reliable under the totality of the circumstances); *State v. Liverman*, 398 S.C. 130, 141, 727 S.E.2d 422, 427 (2012) (finding the witness' prior knowledge of the defendant was a “significant factor in determining reliability” and mitigates the “suggestive nature of a show-up”).

*State v. Philenza Pritchett*, Op. No. 2016-UP-523 (S.C. Ct. App. Filed December 21, 2016). App. 502 – 504. The remittitur was issued February 7, 2017. App. 505.

On February 6, 2018, Petitioner filed an application for post-conviction relief. App. 507 – 515. On May 2, 2018, the State made its return. App. 516 – 520. On November 4, 2019, a hearing was held on the matter before the Honorable Jennifer B. McCoy. Petitioner was represented by John Gentry, III. The State was represented by Sarah Gunton. App. 521.

Several plea offers were extended to Petitioner by the prosecutor prior to trial. App. 450, ll. 10-13; App. 603. It was undisputed that the prosecution extended a very favorable plea offer to Petitioner in December of 2013, when the prosecution offered that if Petitioner pleaded guilty to strong arm robbery and unlawful carrying of a pistol, it would: reduce the armed robbery to strong arm robbery; dismiss by nolle prosequi the remaining charges of kidnapping, possession of a weapon during the commission of a violent crime, and conspiracy; and would recommend an active YOA<sup>1</sup> sentence not to exceed five years. App. 601; App. 555, ll. 1-9. At the PCR hearing, Petitioner explained that he rejected this plea bargain in “ignorance,” and said that had

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<sup>1</sup> See Judge William R. Byars Youthful Offender Act, S.C. Code Ann. §24-19-5 – §24-19-160.

he been fully advised how certain legal matters would unfold at trial, he would have taken the plea offer. App. 537, ll. 4-10; App. 542, l. 12 – 543, l. 10. Petitioner explained that regarding whether Fulton’s identification of him would be admitted at trial, he understood the procedure was “frowned upon” per sheriff’s department procedures. App. 535, ll. 19-25.

Defense counsel admitted she thought Petitioner had a good suppression issue on the show up identification. “I thought the show [up] ID . . . was a good issue, not only at the trial level, but the appellate level. And apparently they disagreed with me. But, you know, I didn’t think that was a good ID.” App. 563, ll. 8-11. “I certainly thought, you know, it was something that would carry fruits into the appeal stage. And it just didn’t.” App. 564, ll. 4-7.

Nevertheless, defense counsel claimed she told Petitioner that his defense—that he was merely present after the robbery—“wasn’t very viable,” and claimed she encouraged him to take the offer. Defense counsel alleged Petitioner was adamant about maintaining his innocence and rejected the offer. App. 556, l. 1 – 557, l. 23; App. 563, ll. 1-6.

On August 25, 2020 the PCR court issued an order of dismissal. App. 609 – 620. As to whether defense counsel failed to adequately explain the favorable plea offer, the PCR court found no deficiency and no prejudice. The PCR court based its decision on Petitioner’s testimony that he was aware of the offer but decided to reject it, and on counsel’s testimony she met with Petitioner about the offer but he rejected it. App. 615 – 618.

As to whether defense counsel failed to explain the admissibility of Fulton’s identification, the PCR court found no deficiency and no prejudice. App. 618 – 619. The PCR court noted that “this issue was raised on direct appeal” and “[t]he Court of Appeals upheld the admissibility of the witnesses’ [sic] identification testimony . . . Applicant has failed to provide any evidence to show how Counsel was ineffective in the handling of this evidence.” App. 619.

“Applicant did not offer what, if anything, would have changed had he known this information.”

App. 619.

This petition for writ of certiorari follows.

## ARGUMENT

The PCR court erred where it where it found counsel provided effective representation where Petitioner's decision to reject a favorable plea offer was not knowingly and intelligently made, where defense counsel incorrectly thought Petitioner had a "good" suppression issue, since the critical identification was not suppressed and its admission was upheld on direct appeal.

Counsel should have explained to Petitioner that the key piece of evidence against him (Fulton's identification of him as the perpetrator) would probably be admitted at trial. However, counsel erroneously thought Petitioner would prevail on this issue at trial or on direct appeal. Had Petitioner known the eyewitness would identify him as the perpetrator, he would likely have accepted the favorable plea offer that was extended him by the prosecution. Because counsel did not adequately advise Petitioner the identification would likely be admitted at trial, Petitioner's rejection of the favorable plea offer was not knowingly and intelligently made.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). "In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (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) (citing *Strickland*, 466 U.S. at 687).

A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010); *see also McMann v. Richardson*, 397 U.S. 759, 771 (1970). The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*,

474 U.S. 52, 56 (1985). “[D]efense 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 (2012). *See also Simuel v. State*, 432 S.C. 150, 155-56, 850 S.E.2d 642, 644-45 (Ct. App. 2020) (testimony that counsel advised defendant of twenty-year plea offer, advised defendant he faced possibility of life without parole at trial, and advised defendant of uncertainty concerning a potential legal challenge supported PCR court’s denial of post-conviction relief).

Here, Petitioner established counsel’s deficient performance, since counsel admitted that she erroneously thought Fulton’s identification of Petitioner as a perpetrator would be suppressed. *Hill v. Lockhart*, 474 U.S. at 56. In fact, this critical eyewitness identification was admitted at trial, and its admission was upheld on direct appeal. *See State v. Philenza Pritchett*, Op. No. 2016-UP-523 (S.C. Ct. App. Filed December 21, 2016); App. 502 – 504; App. 563, l. 8 – 564, l. 7.

To show prejudice where a plea offer was 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.” *Frye*, 566 U.S. at 147. “Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it . . . 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.” *Id.* “In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice.” *Lafler v. Cooper*, 566 U.S. 156, 163 (2012). “[T]he defendant

who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence.” *Id.* at 166.

Here, Petitioner explained that he wished he had taken the December 2013 plea offer, and that his failure to do so was done in “ignorance,” based on his discussions with counsel. App. 537, ll. 4-10. The plea offer was a favorable one, since pursuant to his convictions at trial Petitioner was sentenced to serve an active fifteen year prison term on five charges including armed robbery, but he would have only been convicted of two charges (strong arm robbery and unlawful carrying of a pistol) with a recommended active YOA not to exceed five years had he accepted the offer. App. 601; App. 555, ll. 1-9. Moreover, no intervening facts or circumstances occurred to cause the prosecutor to withdraw the offer or the judge to refuse to accept the plea. Petitioner has thereby established *Strickland* prejudice. *Lafler*, 566 U.S. at 163.

Where the offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted, the proper remedy “may be to require the prosecution to reoffer the plea proposal.” *Lafler*, 566 U.S. at 171. “Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.” *Id.* See *Sprouse v. State*, 355 S.C. 335, 340, 585 S.E.2d 278, 281 (2003) (requiring specific performance of plea agreement “is the most efficient option because it eliminates the need for a new trial or new plea hearings, and also grants the parties nothing more and nothing less than the benefit for which they originally bargained”); *Custodio v. State*, 373 S.C. 4, 13, 644 S.E.2d 36, 40 (2007).<sup>2</sup> Therefore, specific enforcement of the December 2013 plea offer would be the proper remedy here.

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<sup>2</sup> But see *Reed v. Becka*, 333 S.C. 676, 688, 511 S.E.2d 396, 402 (Ct. App. 1999) (“Absent a plea of guilt, a defendant may only enforce an oral plea agreement upon a showing of detrimental reliance.”)

**CONCLUSION**

Based on the foregoing argument, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.

*s/ Joanna K. Delany*

Joanna K. Delany  
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of November, 2021.

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Philenza Pritchett states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Jennifer B. McCoy, which was held on November 4, 2019, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Philenza Pritchett.

Respectfully Submitted,

*s/ Joanna K. Delany*

Joanna K. Delany  
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of November, 2021.

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Nov 03 2021

S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson 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."

s/ Joanna K. Delany

Joanna K. Delany  
Appellate Defender

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