STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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On Petition for Writ of Certiorari to the Court of Appeals
The Honorable Perry H. Gravely, Post-Conviction Relief Judge
The Honorable R. Lawton McIntosh, Trial Judge

Op. No. 2021-UP-405 (filed November 17, 2021)

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CHRISTOPHER ERIC RUSSELL,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

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# SUPPLEMENTAL APPENDIX

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STATE OF SOUTH CAROLINA
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On Writ of Certiorari to Greenville County
Perry H. Gravely, Post-Conviction Relief Judge
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Appellate Case No. 2017-002256

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CHRISTOPHER ERIC RUSSELL,

Respondent,

v.

THE STATE OF SOUTH CAROLINA,

Petitioner.

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# PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF ISSUE ON CERTIORARI

I. Did the post-conviction relief court abuse its discretion in denying Petitioner's motion pursuant to Rule 60(b)(1), where the court's order of dismissal was based upon an error in the transcript which Petitioner did not discover until several months after the evidentiary hearing, after which the post-conviction relief court found trial counsel was constitutionally ineffective for failing to convey a plea offer of twenty years, granted Russell relief, and ordered Petitioner to resentence Russell according to the original plea offer?

## STATEMENT OF THE CASE

### Procedural History

Respondent Christopher Eric Russell (Russell) was indicted by the July 2011 term of the Greenville County Grand Jury for conspiracy (2011-GS-23-1118), kidnapping (2011-GS-23-1122), armed robbery (2011-GS-23-1123), and first-degree burglary (2011-GS-23-1124). App. 735-36, 739-40, 743-44, 747-48. Susannah Ross, Esquire, represented him. App. 1. On February 13, 2013, Applicant proceeded to a jury trial and was found guilty as indicted on all charges. App. 1, 512-13. The Honorable R. Lawton McIntosh sentenced Russell to confinement for five years for conspiracy and life without parole for each charge of kidnapping, armed robbery, and first-degree burglary. App. 512-13. The sentences are to run concurrently. App. 512-13.

A notice of appeal was filed on Russell's behalf and an appeal perfected pursuant to Anders v California, 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed Russell's convictions. State v. Russell, Op. No. 2015-UP-435 (filed on August 19, 2015). The Remittitur was issued on September 16, 2015. App. 612.

Thereafter, on June 1, 2016, Russell filed an application for post-conviction relief alleging trial counsel was ineffective for failing to convey a twenty-year plea offer to him prior to trial. App. 616-22. Petitioner made its Return on January 12, 2017, requesting an evidentiary hearing be held. App. 623-28. An evidentiary hearing into the matter was convened on April 19, 2017, at the Greenville County Courthouse. App. 630. Russell was present at the hearing and represented by R. Mills Ariail, Esquire. App. 630. Lindsey A. McCallister, Esquire, of the South Carolina Office of the Attorney General represented Respondent. App. 630. Russell testified on his own behalf. App. 631. Petitioner presented testimony from trial counsel. App. 631.

On June 12, 2017, the post-conviction relief court signed an order granting post-conviction relief, finding trial counsel was ineffective for failing to convey a twenty-year plea offer to Russell prior to trial. App. 702-11. This order was filed by the Greenville County Clerk of Court on June 15, 2017. App. 702. Petitioner received copy of the order via U.S. Mail on June 19, 2017. App. 713. On June 29, 2017, Petitioner filed a motion to reconsider, alter, and amend pursuant to Rule 59(e), SCRCP. App. 713-17. On July 21, 2017, the post-conviction relief court denied Petitioner's motion to reconsider. App. 718.

Thereafter, Petitioner received correspondence indicating trial counsel had contacted the trial court reporter, who reviewed the trial tapes and discovered an error in the transcript. App. 729. Petitioner then filed a motion pursuant to Rule 60(b)(1) asking the post-conviction relief court to reconsider its decision based upon the corrected transcript. App. 719-31. The post-conviction relief court denied Petitioner's motion by order filed October 12, 2017. App. 732-33.

## Factual History

On Saturday night, December 20, 2010, Jeffrey Lyles (Mr. Lyles) was at home relaxing with a fire, when two armed men wearing camouflage clothing and police masks burst through his back door. App. 82-83, 85. The men identified themselves as police officers, shoved Mr. Lyles to the ground, kicked him in the side, and tied his hands behind his back. App. 85-86. The skinnier of the two men shoved a gun into Mr. Lyles' mouth, demanding to know where his money and safe were and threatening to kill him if he did not tell them. App. 88. The men then moved Mr. Lyles to a back bedroom, stole $760 from his wallet, along with his watch and cellphone, and began ransacking the house apparently trying to locate the safe and money they believed to be there. App. 89-90, 94.

Meanwhile, Elaine Lyles (Mrs. Lyles) and her granddaughter were leaving work at the family's restaurant to go get something to eat, but when they were unable to reach Mr. Lyles on his cellphone, they drove to their home to check on him instead. App. 112-14, 154-55. Mrs. Lyles entered the home and walked down the hallway looking for Mr. Lyles. App. 115-16. As she did so, the skinny man with the gun jumped out and forced her to the floor. App. 116. The granddaughter, who had not been seen by the men in the house, immediately ran to a neighbor's house to get help. App. 161-62.

The robber with the gun demanded Mrs. Lyles tell him where the money and the safe were, threatening to kill her husband if she did not comply. App. 117. He took $200 from her, and then both men continued ransacking the house. App. 118-19. By this time, the Lyles' granddaughter and a neighbor, Jimmy McDaniels (McDaniels), had called 911. App. 162, 170. The police arrived approximately two minutes later, and set up a perimeter outside the Lyles' home. App. 163, 170-71, 186, 188-89, 202.

Inside the home, the robbers noticed the arrival of law enforcement and began to panic. App. 120-21. The bigger man ran out the back door, discarding his pistol in the back yard as he did so. App. 189-90, 193. He was quickly apprehended with the help of a police dog and was identified as Antonias Williams. App. 189-90. The skinnier robber took off his mask, and when he turned his attention away from Mrs. Lyles, she got up and ran out the back door as well.[1] App. 122, 202. As she did, the skinny man fled out the front door and escaped into a nearby wooded area while the officers' attention was focused on Williams and Mrs. Lyles. App. 203.

Williams was Mirandized, and he admitted to being in possession of the Lyles' property. App. 193-94. He explained to officers that he and his accomplice believed there was $200,000

[1] At trial, Mrs. Lyles testified that although she did not get a good look at his face, the skin tone, lips, and voice of the skinny man matched those of Russell. App. 122, 144-46.

hidden inside the home. App. 199. Williams also told officers the vehicle used in the crime was parked one street over. App. 244. However, Williams repeatedly refused to name his accomplice. App. 200, 244-45. Using Williams' information, officers located a white van parked in the driveway of a vacant residence one street away from the Lyles home. App. 207. The van was removed from the scene, and investigators obtained a search warrant for it. App. 208-09, 225-26. Inside, they recovered one cell phone next to the driver's seat, another cellphone plugged into the van's charging port, various police costume items, a stocking cap, and a pry bar. App. 248-51.

On January 5, 2011, Investigator Weiner interviewed Williams again, and this time Williams identified Christopher Eric Russell as his accomplice. App. 254-55. Investigator Weiner also asked Williams about the cellphones found in the van, and Williams indicated Russell's cellphone was the one plugged into the charger. App. 255-56. Based on Williams' statement, Investigator Weiner obtained a search warrant for the phone, a subpoena for the phone records, and a warrant for Russell's arrest. App. 256-57, 259-60.

Thereafter, on January 10, 2011, officers located Russell and arrested him after he attempted to flee on a bicycle. App. 195-97. When he was booked at the Greenville County Detention Center, he identified his mother as his next of kin and provided her phone number as part of the booking process. App. 277-78. Officers conducted a forensic examination of the cellphone identified as Russell's by Williams, and the same phone number Russell provided during booking was included in the cellphone's contact list as "Momma."[2] App. 263, 269,

Russell was indicted for first-degree burglary, kidnapping, armed robbery, and conspiracy, and proceeded to trial. App. 1, 735-36, 739-40, 743-44, 747-48.

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[2] The cellphone was pre-paid, and no ownership information was available. App. 256-57.

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, ___ S.C. ___, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

Whether to grant or deny a Rule 60(b) motion is within the sound discretion of the trial judge. Raby Const., LLP v. Orr, 358 S.C. 10, 18, 594 S.E.2d 478, 482 (2004). This Court's review, therefore, "is limited to determining whether there was an abuse of discretion." Id.

## ARGUMENT

**The post-conviction relief court abused its discretion in denying Petitioner's motion pursuant to Rule 60(b)(1), where the court's order of dismissal was based upon an error in the transcript which Petitioner did not discover until several months after the evidentiary hearing, after which the post-conviction relief court found trial counsel was constitutionally ineffective for failing to convey a plea offer of twenty years, granted Russell relief, and ordered Petitioner to resentence Russell according to the original plea offer.**

In granting relief, the lower court found trial counsel was constitutionally ineffective for failing to convey a twenty-year plea offer to Russell prior to trial. App. 702, 705-08. The post-conviction relief court stated it specifically relied on the trial transcript, which confirmed Russell's testimony at the evidentiary hearing. App. 707. That transcript, however, was erroneous and has now been corrected. App. 729-30. Therefore, the post-conviction relief court's reasoning in granting relief is no longer supported by probative evidence, and the court abused its discretion in denying Petitioner's Rule 60(b)(1) motion.

Rule 60(b)(1) of the South Carolina Rules of Civil Procedure provides, "On motion and upon such terms as are just, the court may relieve a party... from a final judgment, order, or proceeding..." on the basis of "mistake, inadvertence, surprise, or excusable neglect." Rule 60(b)(1), SCRCP. "This rule is an appropriate remedy for good faith mistakes of fact if all other applicable factors are met." Hillman v. Pinion, 347 S.C. 253, 256, 554 S.E.2d 427, 439 (2001). "[W]here there is a good faith mistake of fact, and no attempt to thwart the judicial system, there is basis for relief." Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (1986). The decision to deny or grant a motion pursuant to Rule 60(b) is within the sound discretion of the trial judge. Ware v. Ware, 404 S.C. 1, 10, 743 S.E.2d 817, 822 (2013). "An abuse of discretion occurs when the order of the court is controlled by an error of law or *where the order is based on factual findings that are without evidentiary support.*" Id. (emphasis added).

In this case, the post-conviction relief court's order is based on factual findings that are without evidentiary support, as the trial transcript was incorrectly transcribed, and the transcript was the basis of the post-conviction relief court's decision to grant relief. At the evidentiary hearing, Russell testified the only offer ever communicated to him was to plead to life without parole, and he was unaware there was an offer of twenty years until he obtained copies of his file through a Freedom Of Information Act request after his conviction. App. 639-43. In contrast, trial counsel testified she received a plea offer of twenty years in writing from the solicitor in March 2011. App. 671. She testified it was her usual practice to convey all plea offers and discuss the ramifications with her clients, although she did not have any notes in her file confirming the practice was followed in this case, specifically. App. 672-73. Trial counsel testified it was her practice at the time to convey plea offers in person rather than in writing. App. 687. Trial counsel also testified the State served Applicant with notice of its intent to seek life without parole (LWOP) on December 8, 2011, and her notes reflect she made jail visits on December 5, 2011, and December 7, 2011, which she believed were attempts to persuade Russell to avoid LWOP by accepting the plea offer. App. 673.

Trial counsel testified she believed the transcript reflected a misstatement, and Russell was offered the chance to plead guilty *without* life without parole on the table, but Russell maintained his innocence throughout the case and did not wish to plead guilty. App. 686-87, 697. However, the post-conviction relief court found Russell's testimony to be credible specifically because it was supported by the trial transcript, which, as originally transcribed and presented to the court at the evidentiary hearing, reflected trial counsel stated during sentencing the State offered Russell "opportunities *to plead to life without parole* on the table a number of times." App. 511, 707. Relying on the original transcript, the order granting relief states "[t]his Court

finds the trial transcript confirms [Russell's] testimony. . . . Counsel's statement in the transcript is consistent with [Russell's] testimony that he was unaware of any offers except to plead to a sentence of LWOP. This Court finds there is no evidence that the offer of twenty years was conveyed to [Russell]." App. 707.

Following the evidentiary hearing, however, trial counsel contacted the court reporter from Russell's trial to challenge the transcript. App. 729. By letter dated September 12, 2017, the court reporter sent trial counsel a letter notifying her of an inadvertent mistake in transcription. App. 729. Specifically, the court reporter corrected her transcription of page 511, lines 4-6, so it now reads, "Mr. Russell has been offered opportunities to *plead without life without parole on the table* a number of times. He has consistently maintained his innocence on this case." App. 729-30 (emphasis added). The corrected version of the transcript reflects trial counsel's version of events that Russell was offered the chance to plead *without* life without parole on the table, rendering the post-conviction relief court's credibility finding in Russell's favor now unsupported by the evidence.

Nonetheless, the post-conviction relief court denied Petitioner's motion on the basis that the corrected transcript "confirms offers were made, but it does not confirm any offers were communicated to [Russell]." App. 732. However, the transcript reflects Russell, at the time of sentencing, did not dispute or correct trial counsel's statement that he had been offered the chance to plead to something less than life. App. 510-13. Furthermore, trial counsel's immediate next statement, "He has consistently maintained his innocence on this case," in the context of a discussion about plea bargaining, can reasonably be construed to mean Russell refused to accept a plea offer because it would require him to admit his guilt. App. 511. This is

further supported by trial counsel's testimony at the evidentiary hearing that Russell's "position was always that he was innocent, and he did not want to plead guilty." App. 674.

The post-conviction relief court's order clearly reflects a credibility contest between Russell and trial counsel, in which the transcript was the tiebreaker – because the transcript supported Russell's version of events, the court granted relief. App. 705-08. However, the transcript no longer supports Russell's testimony, and in fact, flatly contradicts it. App. 730. The only remaining evidence in the record to support the post-conviction relief court's grant of relief is Russell's own self-serving testimony that the twenty-year offer was not conveyed to him. App. 639-43. Trial counsel testified, however, her practice at the time was to convey all plea offers to clients in person, and she believed her two visits to the jail in days immediately prior to receiving the State's LWOP notice were an effort to persuade Russell to accept the plea and avoid a possible life sentence. App. 673, 687. This testimony as to trial counsel's usual practice is sufficient to refute Russell's testimony. See, e.g., Simuel v. State, 390 S.C. 267, 269, 710 S.E.2d 738, 738 (2010) (upholding post-conviction relief court's denial of relief where trial counsel testified he normally informed clients of their right to appeal after trial, and although he could not specifically recall informing Simuel, he probably did so); Fraiser v. State, 351 S.C. 385, 388, 570 S.E.2d 172, 174 (2002) (upholding post-conviction relief court's denial of relief where trial counsel testified her normal practice is not to discuss parole eligibility with clients, although she could not recall whether she discussed it with Fraiser).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process

that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, the applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The parties and the court reasonably relied on the accuracy of the transcript, as attested to in the court reporter's accompanying affidavit. App. 514. However, the original version of the transcript was materially inaccurate. App. 729-30. The post-conviction relief court's original findings of fact and conclusions of law center on an error made by a court administration employee, through no fault of either Petitioner or Russell, which has now been corrected. App. 729. The corrected version of the transcript actually confirms trial counsel's testimony, not Russell's, and therefore, the credibility finding made by the post-conviction relief court, on

which the grant of relief is based, is without evidentiary support because there is no longer any credible evidence of deficient performance. "[W]here there is a good faith mistake of fact, and, no attempt to thwart the judicial system, there is basis for relief. Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1986). Russell is not entitled to resentencing predicated on a factual error, and therefore, the post-conviction relief court abused its discretion in denying Petitioner's Rule 60(b)(1) motion for relief from judgment.

**CONCLUSION**

For all the foregoing reasons, the State requests that this Court grant this petition for a writ of certiorari and reverse the post-conviction relief court's denial of its motion for relief from judgment pursuant to Rule 60(b)(1).

Respectfully submitted,

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4/23, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas

The Honorable Perry H Gravely, Circuit Court Judge

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Appellate Case No. 2017-002256

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Christopher Eric Russell, .....Respondent,

v.

State of South Carolina, .....Petitioner.

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## CERTIFICATE OF SERVICE

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I, Lindsey A. McCallister, certify that I have today served the within **Petition for Writ of Certiorari** upon Respondent by depositing a copy of the same in inter-agency mail and addressed to:

**Wanda H. Carter, Esquire**
**SC Commission on Indigent Defense**
**Division of Appellate Defense**
**Post Office Box 11589**
**Columbia SC 29211-1589**

I further certify that all parties required by Rule to be served have been served. This 23rd day of April, 2018.

LINDSEY A. MCCALLISTER
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ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

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CHRISTOPHER ERIC RUSSELL,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO 2017-002256

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# RETURN TO PETITION FOR WRIT OF CERTIORARI

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# INDEX



[1] The transcript at App. 511, lines 1-6 reads as follows: "[the respondent] has been offered opportunities to plead to life without parole on the table a number of times." The corrected transcript reads as follows: "[the respondent] has been offered opportunities to plead without life without parole on the table a number of times." App. 729-730.

## QUESTION PRESENTED

The PCR judge not err in granting PCR relief to the respondent where trial counsel failed to convey a guilty plea offer for a twenty-year sentence in exchange for his guilty pleas prior to his trial because this omission constituted deficient legal representation and resulted in the respondent's receipt of three LWOP sentences after his trial (hence the prejudice), and because the scrivener's error in the transcript regarding whether the respondent was or was not apprised of any LWOP related plea offers[2] had no affect or bearing on the respondent's proof by a preponderance of the evidence that counsel's error denied him a more favorable sentence.

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[2] The transcript reads as follows: "[the respondent] has been offered opportunities to plead to life without parole on the table a number of times." App. 511, l. 1-6. The corrected transcript reads as follows: "[the respondent] has been offered opportunities to plead without life without parole on the table a number of times." App. 729-730.

## STATEMENT OF THE CASE

The respondent Christopher Eric Russell was tried by jury during the February 2013 term of the Greenville County General Sessions Court and found guilty of kidnapping, armed robbery, first degree burglary, and conspiracy. Judge R. Lawton McIntosh presided over the trial. Susannah Ross represented the respondent at trial, and Assistant Solicitor Mark Moyer appeared on behalf of the state. The respondent was sentenced to five years on the conspiracy charge and life without parole on each of the remaining charges for which he was convicted. App. 1-513.

The respondent appealed and after briefing (see App. 515-608), his convictions and sentences were affirmed. See State v. Russell, Unpublished Opinion No. 2015-UP-435 (S.C. Ct. App. filed Aug. 19, 2015). App. 609-611. David B. Morgen, Esq. of Katten Nuchin Rosenman represented the respondent on appeal.

On June 1, 2016, the respondent filed a PCR application with the Greenville County Office of the Clerk of Court. App. 616-622. Petitioner filed a Return dated January 12, 2017, requesting that a hearing be held in response to the respondent's PCR action filed in the case. App. 623-628.

A PCR hearing was convened on April 19, 2017, at the Greenville County Courthouse before Judge Perry H. Gravely. Attorney R. Mills Arial represented the respondent, who was present at the hearing, and Assistant Attorney General Lindsey A. McCallister appeared on behalf of the state at the hearing. App. 630-700.

On June 12, 2017, Judge Gravely signed an Order granting PCR relief to the respondent on the ground that trial counsel erred in failing to convey a plea offer to him, but denied relief on the remaining allegations of ineffective assistance of trial counsel in the case. App. 702-711. On June 29, 2017, petitioner filed a Rule 59(e) motion, which Judge Gravely denied by Order dated

July 21, 2017, and on September 20, 2017, petitioner filed a Rule 60 (B)(1) motion, which Judge Gravely denied on October 17, 2017. App. 713-718; App. 719-723; App. 732-733.

Petitioner appealed and filed a petition for writ of certiorari on April 23, 2018. This return on behalf of the respondent follows.

## ARGUMENT

The PCR judge did not err in granting PCR relief to the respondent where trial counsel failed to convey a guilty plea offer for a twenty-year sentence in exchange for his guilty pleas prior to his trial because this omission constituted deficient legal representation and resulted in the respondent's receipt of three concurrent LWOP sentences after his trial (hence the prejudice), and because the scrivener's error in the transcript regarding whether the respondent was or was not apprised of any LWOP related plea offers[3] had no affect or bearing on the respondent's proof by a preponderance of the evidence that counsel's error denied him the opportunity to obtain a more favorable sentence in his case.

At trial, Jeffrey Lyles testified that when he opened the door at his house on December 18, 2010, he saw two men standing inside wearing masks and holding guns. Lyles stated that the men threw him to the floor and kept asking where the safe was located. Lyles stated that the men took $760.00, and his watch and cell phone from him. App. 78, l. 20 – App. 96, l. 11. Lyles' wife, Elaine Lyles, testified that she entered the house while the perpetrators were inside and that one of the gunmen told her to get on the floor (the other man had her husband detained) and kept asking about a safe until the police arrived on the scene. Tr. 110, l. 7 – App. 123, l. 21. At trial,

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[3] The transcript reads as follows: "[the respondent] has been offered opportunities to plead to life without parole on the table a number of times." App. 511, l. 1-6. The corrected transcript reads as follows: "[the respondent] has been offered opportunities to plead without life without parole on the table a number of times." App. 729-730.

Lyles made an in-court voice identification fingering the respondent as one of the perpetrators. App. 126; App. 146.

State's witness Antonio Williams testified at trial implicating the respondent in the events that transpired at the Lyles home. Williams explained that he and the respondent went into the Lyles home carrying guns and wearing masks, and that they put Jeffery Lyles on the floor and commenced searching for money, but that he (Williams) was caught after the police arrived while the respondent escaped. App. 295, l. 20 – App. 320, l. 7.

During the PCR hearing, the respondent alleged that trial counsel failed to convey to him a plea offer that contained a twenty-year sentence in exchange for his guilty pleas. App. 634, l. 5-7; App. 664, l. 2-15. The respondent testified that trial counsel advised that he was facing LWOP (multiple LWOP) sentences if he went to trial so he saw point in pleading to the state's LWOP plea offers and knew nothing of the twenty-year plea offer. App. 639, l. 4-9. The respondent explained that he understood that he had an opportunity to plead to LWOP only (presumably one LWOP instead of multiple LWOP's), which was in effect not a good deal, and that he was forced into a trial because he had no knowledge that a twenty-year plea option existed in his case as counsel never communicated the twenty-year plea offer to him; and therefore, he never had an opportunity to "weigh [his] options." App. 639, l. 19 – App. 640, l. 1; App. 641, l. 7 – App. 642, l. 3. The respondent made it clear that although he was innocent, he was open to pleading in the event of an offer, but that he was not pleading to any LWOP offer in effect because that was illogical to him. App. 643, l. 2 -15; App. 643, l. 22 – App. 644, l. 22.

The trial transcript is consistent with the respondent's PCR testimony in that prior to sentencing, trial counsel advised the judge that "[the Respondent] has been offered opportunities to plead to life without parole." App. 511, l. 4-6. Later, that same portion of transcript text was

re-transcribed to read that "[the] Respondent has been offered opportunities to plead without life without parole." App. 729. Petitioner admitted that he received the LWOP notice, but knew not of the option of a non-LWOP sentencing plea offer. App. 646, l. 10-16; App. 661, l. 22-25. Petitioner stated that trial counsel never conveyed or communicated to him the twenty-year plea offer that was presented to trial counsel by the solicitor in the case prior to trial. App. 661, l. 22 – App. 663, l. 23. Note the respondent's' PCR testimony that **"if she would have communicated that plea to me...I'd be doing twenty years" at App. 656, lines 11-13.**

Trial counsel testified at the PCR hearing and admitted that she had the twenty-year plea offer noted in her case file for the respondent and that the twenty-year plea offer was submitted in the case on March 29, 2011. App. 672, lines 1-12; App. 686, lines 3-17. Note that the respondent was arrested on January 10, 2011, and tried by jury on February 13, 2013. Trial counsel never testified that she remembered conveying the offer to the respondent, and admitted that she had no transmittal letter or any paperwork indicating that she made the plea offer known to the respondent, and further conceded that she had no notes or documentation in the file showing the she communicated thereafter to the respondent. Counsel added that petitioner asserted his innocence and did not want to plead guilty, and that she did not recall whether the respondent was amendable to pleading guilty if an offer for less than LWOP had been made to him. App. 667, l. 1-12. Regarding this matter, counsel could only assert that her usual practice was to convey plea offers by going down to the jail and discussing the offers with inmates, but that there was nothing in the file to show that this happened in the respondent's case. App. 687, l. 4-16.

In granting petitioner's PCR application based on his allegation that he received ineffective assistance of counsel because counsel failed to convey a plea offer that would have

yielded a substantially lower sentence than the three LWOP sentences he received at trial, the PCR judge ruled that because counsel recalled no specific discussions with the respondent about the plea offer, and had no notes to verify that she discussed the plea offer with the respondent, and because she stated at trial in effect that the only plea offers the respondent received were for life without parole, then these findings coupled with the respondent's testimony constituted proof via a preponderance of the evidence that "counsel's performance was deficient for failing to relay the plea offer of twenty years to [the respondent]" and that "[the respondent] was prejudiced by counsel's deficient performance" because he received three LWOP sentences at the close of his trial and was never afforded the opportunity to accept a twenty-year sentence per the plea offer instead. App. 705-708.

A defendant has a right to effective assistance of counsel during the plea-bargaining process. See Lafler v. Cooper, 566 U.S. --- (2012). See also Judge v. State, 321 S.C. 554, 471 S.E. 2d 146 (1196), overruled on other grounds by Jackson v. State, 342 SC 95, 535 S.E. 2d 926 (2000), to the extent that a petitioner's statement that he was prejudiced by counsel's deficient performance at the plea-bargaining process can satisfy the prejudice prong of the two-pronged test to be met in ineffective assistance of counsel cases. Additionally, a guilty plea must represent a voluntary and intelligent choice among the alternative causes of action open to the defendant. Hill v. Lockhart, 474 U.S. 52 (1985). In Lafler v. Cooper, supra, counsel's incorrect advice led to the rejection of a plea offer in the case.

Moreover, the Sixth Amendment right to effective assistance of counsel extends to cases involving plea offers, particularly where plea offers lapse and where prejudice is shown to the extent that the defendant would have accepted the plea offer. Missouri v. Frye, 132 S.Ct. 1399 (2012). In Missouri v. Frye, counsel did not convey the plea offer to the defendant and as a result, the plea

offer expired. Compare Davie v. State, 381 S.C. 601; 675 S.E. 2d 416 (2009), where the Court held that counsel's failure to inform the defendant of a written plea offer that was substantially less than the sentence he received after pleading guilty constituted ineffective assistance of counsel because the defendant was unaware of the existence of the plea offer (due to counsel's error based on relocation and mail snafu) until after the plea offer had expired, and that he would have accepted that plea offer had it been communicated to him. See also, In Bell v. State, 410 S.C. 436, 765 S.E.2d 4 (2014), where the Court held that counsel was ineffective in failing to extend the state's plea offer of ten years to the defendant prior to sentencing (which was when the defendant first heard of the offer) and that the defendant was prejudiced by counsel's deficient performance in this regard as he received a twenty-year sentence instead. In Bell, the defendant's case had been transferred to counsel, but the attorney who previously represented the defendant had an independent and separate file in the case containing a note indicating that a plea offer of ten years had been made, but said file had no notes or indication showing that said offer was conveyed to the defendant by either counsel who represented the client.

Based on the record in the case at bar, it was obvious that counsel failed to advise the respondent of the twenty-year plea offer made either verbally or in writing. Counsel's testimony, and her notes, and her pre-sentencing remarks all corroborate the respondent's claim that this twenty-year plea offer was never communicated to him. The scrivener's error that supposedly indicated that counsel advised the respondent of the plea offer was of no consequence because the difference in the words "opportunities to plead without parole," and "opportunities to plead without life without parole" had meaningless and confusing and incomprehensible interpretations, and as a matter of semantics, clearly did not evidence any viable translation that would nullify the respondent's showing of ineffective assistance of counsel for failing to

communicate a plea offer to him. The transcript clean-up via the alleged scrivener's error simply had no changeable bearing on the respondent's PCR showing or the PCR judge grant of PCR relief to the respondent.

It was clear that the respondent would have accepted the twenty-year plea offer after being noticed of LWOP because any deal was better than life without parole. Furthermore, the respondent's statement in this regard, i.e., **"if she would have communicated to me...I'd be doing twenty years," at App 565, lines 11-13,** was sufficient to show prejudice. Moreover, the difference between receiving a twenty-year prison sentence rather than receipt of LWOP sentences would be sufficient to show prejudice in and of itself. Note that the applicant is not required to show objective evidence of actual prejudice because a self-serving statement can prove prejudice. A PCR applicant's statement can be sufficient to satisfy prejudice. Jackson v. State, supra. See also Davie v. State, supra.

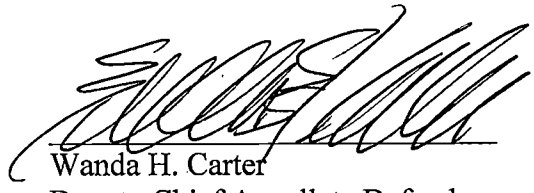
In Jackson v. State, supra, the Court held the petitioner's testimony established prejudice where the issue was trial counsel's ineffectiveness in failing to inform the defendant that the offense of threatening a public official was a felony crime, and that despite the PCR judge's finding of no credibility on behalf of the applicant, nonetheless, the fact that the defendant's unrebutted evidence in the record that he would not have plead guilty if counsel had properly advised him of this was sufficient to establish prejudice. In Bell, the applicant stated that he would have taken the plea offer if he had known about it prior to the verdict and sentencing. The PCR judge in Bell found petitioner's testimony to be credible. Here, the respondent provided a better record than the record in Jackson v. State supra, and was squarely on point with Bell v. State, supra; and here, the PCR judge properly found that the respondent's testimony was credible, and that the respondent's position was unrebutted, and thus prejudice existed despite

the scrivener's error, which in effect did not rebut the respondent's position as the corrected scrivener's error was unclear and not sufficiently definitive to rebut the respondent's PCR case and the PCR judge's findings in this matter. Also, compare Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991), where the Court held that petitioner satisfied the prejudice prong where the only evidence presented in the record was petitioner's own testimony that had counsel not misinformed him that he would face a potential life sentence if he were found guilty at trial, then he would not have pled guilty.

In the case at bar, the PCR judge ruled properly in granting PCR relief to the respondent because trial counsel was ineffective in failing to convey a plea offer for a substantially lesser sentence, which the respondent would have accepted but for counsel's failure to communicate the same, and which violated the respondent's right to receipt of effective legal assistance in a criminal case as guaranteed under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). The respondent was prejudiced as a result of counsel's deficient representation in this regard because he would have accepted the twenty-year sentence plea option had he been privy to the same and avoided the three LWPO sentences that were handed down to him at trial.

## CONCLUSION

Based on the holding in Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984), which outlined the standard of the existence of "any evidence of probative value" in determining whether to uphold the PCR judge's ruling as the scope of review in PCR cases, counsel would request that this Court uphold the grant of PCR relief to the respondent in the case based on the above raised argument in this return to petitioner's petition for writ of certiorari filed in the appeal.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of September, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

---

CHRISTOPHER ERIC RUSSELL,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

---

CERTIFICATE OF SERVICE

---

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Christopher Eric Russell, #0929, at Greenville County Detention Center, 20 McGee Street, Greenville, SC 29601, this 6th day of September, 2018.

Wanda H. Carter
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me this 6th day of September, 2018.

ATTORNEY FOR RESPONDENT

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.

STATE OF SOUTH CAROLINA
In the Supreme Court

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On Writ of Certiorari to Greenville County
Perry H. Gravely, Post-Conviction Relief Judge
R. Lawton McIntosh, Trial Court Judge

Appellate Case No. 2017-002256

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CHRISTOPHER ERIC RUSSELL,

Respondent,

v.

THE STATE OF SOUTH CAROLINA,

Petitioner.

---

**REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI**

---

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General
S.C. Bar No. 79054

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ATTORNEYS FOR PETITIONER

## TABLE OF CONTENTS

## Procedural History

Respondent Christopher Eric Russell (Russell) was indicted by the July 2011 term of the Greenville County Grand Jury for conspiracy (2011-GS-23-1118), kidnapping (2011-GS-23-1122), armed robbery (2011-GS-23-1123), and first-degree burglary (2011-GS-23-1124). App. 735-36, 739-40, 743-44, 747-48. Susannah Ross, Esquire, represented him. App. 1. On February 13, 2013, Applicant proceeded to a jury trial and was found guilty as indicted on all charges. App. 1, 512-13. The Honorable R. Lawton McIntosh sentenced Russell to confinement for five years for conspiracy and life without parole for each charge of kidnapping, armed robbery, and first-degree burglary. App. 512-13. The sentences are to run concurrently. App. 512-13.

A notice of appeal was filed on Russell's behalf and an appeal perfected pursuant to Anders v California, 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed Russell's convictions. State v. Russell, Op. No. 2015-UP-435 (filed on August 19, 2015). The Remittitur was issued on September 16, 2015. App. 612.

Thereafter, on June 1, 2016, Russell filed an application for post-conviction relief alleging trial counsel was ineffective for failing to convey a twenty-year plea offer to him prior to trial. App. 616-22. Petitioner made its Return on January 12, 2017, requesting an evidentiary hearing be held. App. 623-28. An evidentiary hearing into the matter was convened on April 19, 2017, at the Greenville County Courthouse. App. 630. Russell was present at the hearing and represented by R. Mills Ariail, Esquire. App. 630. Lindsey A. McCallister, Esquire, of the South Carolina Office of the Attorney General represented Respondent. App. 630. Russell testified on his own behalf. App. 631. Petitioner presented testimony from trial counsel. App. 631.

On June 12, 2017, the post-conviction relief court signed an order granting post-conviction relief, finding trial counsel was ineffective for failing to convey a twenty-year plea

offer to Russell prior to trial. App. 702-11. This order was filed by the Greenville County Clerk of Court on June 15, 2017. App. 702. Petitioner received copy of the order via U.S. Mail on June 19, 2017. App. 713. On June 29, 2017, Petitioner filed a motion to reconsider, alter, and amend pursuant to Rule 59(e), SCRCP. App. 713-17. On July 21, 2017, the post-conviction relief court denied Petitioner's motion to reconsider. App. 718.

Thereafter, Petitioner received correspondence indicating trial counsel had contacted the trial court reporter, who reviewed the trial tapes and discovered an error in the transcript. App. 729. Petitioner then filed a motion pursuant to Rule 60(b)(1), SCRCP, asking the post-conviction relief court to reconsider its decision based upon the corrected transcript. App. 719-31. The post-conviction relief court denied Petitioner's motion by order filed October 12, 2017. App. 732-33.

## Factual History

On Saturday night, December 20, 2010, Jeffrey Lyles (Mr. Lyles) was at home relaxing with a fire, when two armed men wearing camouflage clothing and police masks burst through his back door. App. 82-83, 85. The men identified themselves as police officers, shoved Mr. Lyles to the ground, kicked him in the side, and tied his hands behind his back. App. 85-86. The skinnier of the two men shoved a gun into Mr. Lyles' mouth, demanding to know where his money and safe were and threatening to kill him if he did not tell them. App. 88. The men then moved Mr. Lyles to a back bedroom, stole $760 from his wallet, along with his watch and cellphone, and began ransacking the house apparently trying to locate the safe and money they believed to be there. App. 89-90, 94.

Meanwhile, Elaine Lyles (Mrs. Lyles) and her granddaughter were leaving work at the family's restaurant to go get something to eat, but when they were unable to reach Mr. Lyles on

his cellphone, they drove to their home to check on him instead. App. 112-14, 154-55. Mrs. Lyles entered the home and walked down the hallway looking for Mr. Lyles. App. 115-16. As she did so, the skinny man with the gun jumped out and forced her to the floor. App. 116. The granddaughter, who had not been seen by the men in the house, immediately ran to a neighbor's house to get help. App. 161-62.

The robber with the gun demanded Mrs. Lyles tell him where the money and the safe were, threatening to kill her husband if she did not comply. App. 117. He took $200 from her, and then both men continued ransacking the house. App. 118-19. By this time, the Lyles' granddaughter and a neighbor, Jimmy McDaniels (McDaniels), had called 911. App. 162, 170. The police arrived approximately two minutes later, and set up a perimeter outside the Lyles' home. App. 163, 170-71, 186, 188-89, 202.

Inside the home, the robbers noticed the arrival of law enforcement and began to panic. App. 120-21. The bigger man ran out the back door, discarding his pistol in the back yard as he did so. App. 189-90, 193. He was quickly apprehended with the help of a police dog and was identified as Antonias Williams. App. 189-90. The skinnier robber took off his mask, and when he turned his attention away from Mrs. Lyles, she got up and ran out the back door as well.[1] App. 122, 202. As she did, the skinny man fled out the front door and escaped into a nearby wooded area while the officers' attention was focused on Williams and Mrs. Lyles. App. 203.

Williams was Mirandized, and he admitted to being in possession of the Lyles' property. App. 193-94. He explained to officers that he and his accomplice believed there was $200,000 hidden inside the home. App. 199. Williams also told officers the vehicle used in the crime was parked one street over. App. 244. However, Williams repeatedly refused to name his

[1] At trial, Mrs. Lyles testified that although she did not get a good look at his face, the skin tone, lips, and voice of the skinny man matched those of Russell. App. 122, 144-46.

accomplice. App. 200, 244-45. Using Williams' information, officers located a white van parked in the driveway of a vacant residence one street away from the Lyles home. App. 207. The van was removed from the scene, and investigators obtained a search warrant for it. App. 208-09, 225-26. Inside, they recovered one cell phone next to the driver's seat, another cellphone plugged into the van's charging port, various police costume items, a stocking cap, and a pry bar. App. 248-51.

On January 5, 2011, Investigator Weiner interviewed Williams again, and this time Williams identified Christopher Eric Russell as his accomplice. App. 254-55. Investigator Weiner also asked Williams about the cellphones found in the van, and Williams indicated Russell's cellphone was the one plugged into the charger. App. 255-56. Based on Williams' statement, Investigator Weiner obtained a search warrant for the phone, a subpoena for the phone records, and a warrant for Russell's arrest. App. 256-57, 259-60.

Thereafter, on January 10, 2011, officers located Russell and arrested him after he attempted to flee on a bicycle. App. 195-97. When he was booked at the Greenville County Detention Center, he identified his mother as his next of kin and provided her phone number as part of the booking process. App. 277-78. Officers conducted a forensic examination of the cellphone identified as Russell's by Williams, and the same phone number Russell provided during booking was included in the cellphone's contact list as "Momma."[2] App. 263, 269,

Russell was indicted for first-degree burglary, kidnapping, armed robbery, and conspiracy, and proceeded to trial. App. 1, 735-36, 739-40, 743-44, 747-48.

[2] The cellphone was pre-paid, and no ownership information was available. App. 256-57.

## ARGUMENT

**Contrary to Russell's assertions, the corrected trial transcript does not support his version of events, and there is no longer any probative evidence, other than Russell's own self-serving testimony, to support the credibility findings in the PCR court's order granting relief. Therefore, the PCR court abused its discretion in denying the State's motion pursuant to Rule 60(b).**

In granting relief, the post-conviction relief court found trial counsel was constitutionally ineffective for failing to convey a twenty-year plea offer to Russell prior to trial. App. 702, 705-08. The lower court specifically relied on the trial transcript, which, at the time of the PCR hearing was transcribed in such a way as to confirm Russell's testimony at the evidentiary hearing rather than trial counsel's testimony. App. 511, 707. That transcript, however, was erroneous and has now been corrected so that the opposite is true – trial counsel's version of events is supported by the transcript rather than Russell's. App. 729-30. Therefore, the post-conviction relief court's reasoning in granting relief is no longer supported by probative evidence, and the court abused its discretion in denying Petitioner's Rule 60(b)(1), SCRCP, motion.

In his return to the State's petition for writ of certiorari, Russell repeatedly asserts that even with the corrected transcript, trial counsel's "testimony, and her notes, and her pre-sentencing remarks all corroborate [his] claim that this twenty-year plea offer was never communicated to him." RPWC p. 7. This assertion is clearly inaccurate now that the trial transcript has been corrected. At the evidentiary hearing, trial counsel testified she received a plea offer of twenty years in writing from the solicitor in March 2011. App. 671. She testified it was her usual practice to convey all plea offers and discuss the ramifications of such with her clients in person rather than in writing. App. 672-73, 687. Although she testified she did not

have a note in her file specifically confirming when or how she conveyed the offer, she testified her notes reflected she made jail visits on December 5, 2011, and December 7, 2011. App. 672-73. Trial counsel clearly explained she believed those visits were her attempts to persuade Russell to avoid a sentence of life without parole (LWOP) by accepting the plea offer as the State served Russell with notice of its intent to seek LWOP upon conviction on December 8, 2011, but Russell's "position was always that he was innocent, and he did not want to plead guilty." App. 672-74. This testimony is now corroborated by contemporaneous evidence in the form of the corrected transcript which reflects trial counsel told the trial judge during sentencing, "Mr. Russell has been offered opportunities to plead *without* life without parole on the table a number of times. He has consistently maintained his innocence on this case." App. 729-30 (emphasis added).

Russell testified the only offer ever communicated to him was to plead to life without parole, and if he had known about the twenty-year offer, he would have accepted it. App. 639-43, 656. However, the transcript reflects there was another non-LWOP offer made *during* trial, which trial counsel testified at that point was a "straight-up" plea in exchange for the State withdrawing the LWOP notice. App. pp. 511, 687-88. Importantly, the transcript reflects Russell, at the time of sentencing, did not dispute or correct trial counsel's statement that he had been offered the chance to plead to something less than life. App. 510-13. Further, trial counsel's trial notes reflect Russell refused that offer, along with others which also would have taken LWOP off the table. App. p. 688. Therefore, Russell's testimony insisting the only offer conveyed to him was to plead to LWOP is no longer supported by any evidence, especially given trial counsel's testimony she visited the jail the day before the State served its LWOP notice in order to try to convince him to accept a plea, and Russell's silence during sentencing when trial

counsel and the court discussed the fact that there had been numerous non-LWOP offers made which Russell rejected.

The trial transcript no longer supports Russell's testimony, and in fact, flatly contradicts it. App. 730. Russell's contention trial counsel's notes, testimony, and remarks at trial support his version of events is incorrect. Because the corrected trial transcript now supports trial counsel's testimony rather than Russell's, the post-conviction relief abused its discretion in denying the State's motion pursuant to Rule 60(b), SCRCP.

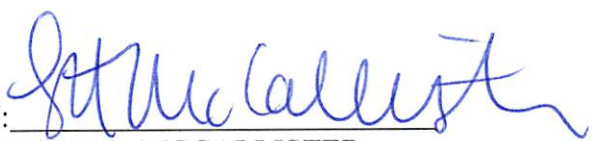
## CONCLUSION

For all the foregoing reasons and the reasons contained in the State's Petition for Writ of Certiorari, the State requests this Court grant this petition for a writ of certiorari and reverse the post-conviction relief court's denial of its motion for relief from judgment pursuant to Rule 60(b)(1).

Respectfully submitted,

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General
S.C. Bar No. 79054

BY: 
LINDSEY A. MCCALLISTER

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ATTORNEYS FOR PETITIONER

October 4, 2018

STATE OF SOUTH CAROLINA
In the Supreme Court

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On Writ of Certiorari to Greenville County
Perry H. Gravely, Post-Conviction Relief Judge
R. Lawton McIntosh, Trial Court Judge

Appellate Case No. 2017-002256

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CHRISTOPHER ERIC RUSSELL,

Respondent,

v.

THE STATE OF SOUTH CAROLINA,

Petitioner.

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## CERTIFICATE OF SERVICE

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I, Lindsey A. McCallister, certify that I have today served the within **Reply to the Return to Petition for Writ of Certiorari** upon Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**Wanda H. Carter, Esquire**
**SC Commission on Indigent Defense**
**Division of Appellate Defense**
**Post Office Box 11589**
**Columbia SC 29211-1589**

I further certify that all parties required by Rule to be served have been served. This 4th day of October, 2018.

LINDSEY A. MCCALLISTER
Assistant Attorney General
S.C. Bar # 79054
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT

# The South Carolina Court of Appeals

Christopher Eric Russell, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2017-002256

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ORDER

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This matter is before the Court on a petition for a writ of certiorari. Based on the vote of the panel, the petition for a writ of certiorari is granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

FOR THE COURT

BY V Claire Allen
CLERK

Columbia, South Carolina
October 28, 2020

cc:
Lindsey Ann McCallister, Esquire
Wanda H. Carter, Esquire

RECEIVED
Mar 05 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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On Writ of Certiorari to Greenville County
Perry H. Gravely, Post-Conviction Relief Judge
R. Lawton McIntosh, Trial Court Judge

Appellate Case No. 2017-002256

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CHRISTOPHER ERIC RUSSELL,

Respondent,

v.

THE STATE OF SOUTH CAROLINA,

Petitioner.

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# BRIEF OF PETITIONER

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## TABLE OF AUTHORITIES

## STATEMENT OF ISSUE ON CERTIORARI

Did the post-conviction relief court abuse its discretion in denying Petitioner's motion pursuant to Rule 60(b)(1), for relief from the order granting Russell's PCR application based upon a mistake made by a third party, where the post-conviction relief court found trial counsel was constitutionally ineffective for allegedly failing to convey a plea offer of twenty years, granted Russell relief, and ordered Petitioner to resentence Russell according to the original plea offer, where the order was premised upon an error in the transcript regarding Counsel's statements to the trial court about the plea offer which Petitioner did not discover until several months after the evidentiary hearing?

## STATEMENT OF THE CASE

Respondent Christopher Eric Russell (Russell) was indicted at the July 2011 term of the Greenville County Grand Jury for conspiracy (2011-GS-23-1118), kidnapping (2011-GS-23-1122), armed robbery (2011-GS-23-1123), and first-degree burglary (2011-GS-23-1124). Susannah Ross, Esquire, represented him. On February 13, 2013, Russell proceeded to a jury trial before the Honorable R. Lawton McIntosh, and the jury found him guilty as indicted. Judge McIntosh sentenced Russell to imprisonment for concurrent sentences of five years for conspiracy and life without parole for each charge of kidnapping, armed robbery, and first-degree burglary pursuant to section 17-25-45 of the South Carolina Code based upon his status as a recidivist offender.

A notice of appeal was filed on Russell's behalf, and an appeal perfected by David B. Morgen and Chief Appellate Defender Robert Dudek. Russell raised three issues: (1) whether the trial court erred by allowing rebuttal testimony of the courtroom deputy; (2) whether the trial court erred in denying Russell's motion to suppress; (3) whether the trial court erred by not granting a mistrial based on the solicitor's comments in closing arguments. The South Carolina Court of Appeals affirmed Russell's convictions. State v. Russell, Op. No. 2015-UP-435 (filed on August 19, 2015). The remittitur issued on September 16, 2015.

Thereafter, on June 1, 2016, Russell filed an application for post-conviction relief alleging trial counsel was ineffective for failing to convey a twenty-year plea offer to him prior to trial. The State served its Return on January 12, 2017, requesting an evidentiary hearing be held to resolve the issues raised in Russell's application. An evidentiary hearing into the matter convened on April 19, 2017, at the Greenville County Courthouse before the Honorable Perry H. Gravely. Russell was present at the hearing and represented by R. Mills Ariail, Esquire.

By Order filed June 15, 2017, the post-conviction relief court granted post-conviction relief, finding trial counsel was ineffective for failing to convey a twenty-year plea offer to Russell prior to trial. On June 29, 2017, the State filed a motion to reconsider, alter, and amend pursuant to Rule 59(e), SCRCP, arguing Russell had not met his burden as to both deficiency and prejudice. The post-conviction relief court denied the State's motion to reconsider on July 21, 2017.

Thereafter, trial counsel informed the State she had contacted the trial court reporter after the evidentiary hearing regarding a possible error in transcription, and the court reporter reviewed the trial tapes and issued a corrected transcript. The State then filed a motion pursuant to Rule 60(b)(1), SCRCP, asking the post-conviction relief court to reconsider its decision based upon the corrected transcript. The post-conviction relief court denied the motion by order filed October 12, 2017.

## STATEMENT OF THE FACTS

On Saturday night, December 20, 2010, Jeffrey Lyles (Mr. Lyles) was at home relaxing with a fire when two armed men wearing camouflage clothing and police masks burst through his back door. App. 82-83, 85. The men identified themselves as police officers, shoved Mr. Lyles to the ground, kicked him in the side, and tied his hands behind his back. App. pp. 85-86. The skinnier of the two men shoved a gun into Mr. Lyles' mouth, demanding to know where his money and safe were and threatening to kill him if he did not tell them. App. p. 88. The men then moved Mr. Lyles to a back bedroom, stole $760 from his wallet plus his watch and cellphone, and began ransacking the house apparently trying to locate the safe and money they believed to be there. App. pp. 89-90, 94.

Meanwhile, Elaine Lyles (Mrs. Lyles) and her granddaughter were leaving work at the family's restaurant to get something to eat, but when they were unable to reach Mr. Lyles on his cellphone, they drove to their home to check on him instead. App. pp. 112-14, 154-55. Mrs. Lyles entered the home and walked down the hallway looking for Mr. Lyles. App. pp. 115-16. As she did so, the skinny man with the gun jumped out and forced her to the floor. App. p. 116. The granddaughter, who had not been seen by the men in the house, immediately ran to a neighbor's house to get help. App. pp. 161-62.

The robber with the gun demanded Mrs. Lyles tell him where the money and the safe were, threatening to kill her husband if she did not comply. App. p. 117. He took $200 from her, and then both men continued ransacking the house. App. pp. 118-19. By this time, the Lyles' granddaughter and a neighbor, Jimmy McDaniels (McDaniels), had called 911. App. pp. 162, 170. The police arrived approximately two minutes later, and set up a perimeter outside the Lyles' home. App. pp. 163, 170-71, 186, 188-89, 202.

Inside the home, the robbers noticed the arrival of law enforcement and began to panic. App. pp. 120-21. The bigger man ran out the back door, discarding his pistol in the back yard as he did so. App. pp. 189-90, 193. He was quickly apprehended with the help of a police dog and was identified as Antonias Williams. App. pp. 189-90. The skinnier robber took off his mask and when he turned his attention away from Mrs. Lyles, she got up and ran out the back door as well.[1] App. pp. 122, 202. As she did, the skinny man fled out the front door and escaped into a nearby wooded area while the officers' attention was focused on Williams and Mrs. Lyles. App. p. 203.

Williams was Mirandized, and he admitted to being in possession of the Lyles' property. App. pp. 193-94. He explained to officers that he and his accomplice believed there was $200,000 hidden inside the home. App. p. 199. Williams also told officers the vehicle used in the crime was parked one street over. App. p. 244. However, Williams repeatedly refused to name his accomplice. App. pp. 200, 244-45.

Using Williams' information, officers located a white van parked in the driveway of a vacant residence one street away from the Lyles home. App. p. 207. The van was removed from the scene, and investigators obtained a search warrant for it. App. pp. 208-09, 225-26. Inside, they recovered one cell phone next to the driver's seat, another cellphone plugged into the van's charging port, various police costume items, a stocking cap, and a pry bar. App. pp. 248-51.

On January 5, 2011, Investigator Weiner interviewed Williams again, and this time Williams identified Christopher Eric Russell as his accomplice. App. pp. 254-55. Investigator Weiner also asked Williams about the cellphones found in the van, and Williams indicated Russell's cellphone was the one plugged into the charger. App. pp. 255-56. Based on Williams'

[1] At trial, Mrs. Lyles testified that although she did not get a good look at his face, the skin tone, lips, and voice of the skinny man matched those of Russell. App. pp. 122, 144-46.

statement, Investigator Weiner obtained a search warrant for the phone, a subpoena for the phone records, and a warrant for Russell's arrest. App. pp. 256-57, 259-60.

On January 10, 2011, officers located Russell and arrested him after he attempted to flee on a bicycle. App. pp. 195-97. When he was booked at the Greenville County Detention Center, he identified his mother as his next of kin and provided her phone number as part of the booking process. App. pp. 277-78. Officers conducted a forensic examination of the cellphone identified as Russell's by Williams, and the same phone number Russell provided during booking was included in the cellphone's contact list as "Momma."[2] App. pp. 263, 269.

Russell was indicted for first-degree burglary, kidnapping, armed robbery, and conspiracy, and proceeded to trial. App. pp. 1, 735-36, 739-40, 743-44, 747-48.

[2] The cellphone was pre-paid, and no ownership information was available. App. pp. 256-57.

## STANDARD OF REVIEW

The decision to deny or grant a motion pursuant to Rule 60(b) is within the sound discretion of the trial judge. Ware v. Ware, 404 S.C. 1, 10, 743 S.E.2d 817, 822 (2013). This Court's review, therefore, "is limited to determining whether there was an abuse of discretion." Id. "An abuse of discretion occurs when the order of the court is controlled by an error of law or where the order is based on factual findings that are without evidentiary support." Id.

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

**The post-conviction relief court abused its discretion in denying Petitioner's motion pursuant to Rule 60(b)(1), for relief from the order granting Russell's PCR application based upon a mistake made by a third party, where the post-conviction relief court found trial counsel was constitutionally ineffective for allegedly failing to convey a plea offer of twenty years, granted Russell relief, and ordered Petitioner to resentence Russell according to the original plea offer, but the order was premised upon an error in the transcript regarding Counsel's statements to the trial court about the plea offer which Petitioner did not discover until several months after the evidentiary hearing.**

In granting post-conviction relief, the lower court found trial counsel was constitutionally ineffective for allegedly failing to convey a twenty-year plea offer to Russell prior to trial. App. pp. 702, 705-08. The post-conviction relief court's order specifically stated it relied on the trial transcript, which, at the time of the evidentiary hearing, appeared to confirm Russell's testimony rather than trial counsel's testimony. App. p. 707. In filing its motion for relief from judgment pursuant to Rule 60(b)(1), SCRCP, based on a documented and uncontroverted mistake in this transcript, the State promptly informed the court of this error, explained how the grant of relief was erroneous in light of the corrected transcript, and asked the court to reopen the post-conviction relief proceeding and reverse its grant of relief. Without a hearing, the court summarily dismissed the motion. The lower court's summary dismissal of the Rule 60(b)(1), SCRCP, motion, based on a documented and uncontroverted mistake, was an erroneous abuse of discretion and requires reversal from this Court.

Rule 60(b)(1) of the South Carolina Rules of Civil Procedure provides, "On motion and upon such terms as are just, the court may relieve a party. . . from a final judgment, order, or proceeding. . ." on the basis of "mistake, inadvertence, surprise, or excusable neglect." Rule 60(b)(1), SCRCP. "This rule is an appropriate remedy for good faith mistakes of fact if all other applicable factors are met." Hillman v. Pinion, 347 S.C. 253, 256, 554 S.E.2d 427, 439 (2001). "[W]here there is a good faith mistake of fact, and no attempt to thwart the judicial system, there

is basis for relief." Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (1986). The decision to deny or grant a motion pursuant to Rule 60(b) is within the sound discretion of the trial judge. Ware, 404 S.C. at 10, 743 S.E.2d at 822. "An abuse of discretion occurs when the order of the court is controlled by an error of law or *where the order is based on factual findings that are without evidentiary support*." Id. (emphasis added).

In this case, the post-conviction relief court's denial of the Rule 60(b)(1), SCRCP, motion based on the mistake of a third party was an abuse of discretion. "When determining whether to grant relief, the factors to consider are: (1) the timing of the motion for relief, (2) whether the party requesting relief has a meritorious defense, and (3) the degree of prejudice to the opposing party if relief is granted." Williams v. Watkins, 384 S.C. 319, 324, 681 S.E.2d 914, 916-17 (Ct. App. 2009). Additionally, the party making the motion must show a good-faith mistake of fact has been made. Id.

Here, the record clearly established the trial transcript presented during the evidentiary hearing contained a documented and uncontroverted mistake—a mistake that erroneously changed the meaning of what was discussed between trial counsel and the trial court, and one which goes to the very heart of the PCR court's grant of relief. The State, along with Russell and the trial court, reasonably relied on the court reporter's affidavit attached to the original transcript certifying its accuracy. App. p. 514. When the State realized a mistake in the transcript had been made, it immediately filed its Rule 60(b)(1) motion, well within the one-year timeframe set forth in the rule.[3] App. p. 719. Additionally, the State clearly had a meritorious defense to the allegation that trial counsel had failed to relay the plea offer as both trial counsel's testimony and the

[3] "The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken." Rule 60(b), SCRCP.

corrected transcript establish. See McClurg v. Deaton, 380 S.C. 563, 575, 671 S.E.2d 87, 94 (Ct. App. 2008) (defining a meritorious defense as one "which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence."). Finally, Russell would not have been unfairly prejudiced if the PCR court had granted the motion, as by the trial court's own analysis, it would have denied relief, using the transcript as a tiebreaker between Russell and trial counsel, if it had the correct version of the transcript at the evidentiary hearing. App. pp. 705-08; see also Hummell v. Hall, 868 F.Supp.2d 543, 561 (4th Cir. 2012) (""While setting aside the default judgment here would certainly be an unwelcome outcome from Plaintiff's perspective, it cannot be said that it would represent *unfair* prejudice to him. Indeed, every time a court vacates a judgment, an invariable consequence is that a party is prejudiced, but that is 'not the type of prejudice contemplated by the rule.'") (citations omitted) (emphasis in original). Therefore, in this instance, denying the motion for relief from judgment based on this obvious mistake was a clear abuse of the PCR court's discretion.

The PCR court's denial of the State's 60(b)(1) motion was an abuse of discretion which has allowed a decision premised on an error of law and without factual support to stand. The parties and the court reasonably relied on the accuracy of the transcript, as attested to in the court reporter's accompanying affidavit. App. p. 514. However, the original version of the transcript was materially inaccurate, leading the PCR court to base its decision on a "fact" that was actually the opposite of how it appeared. App. pp. 729-30.

At the evidentiary hearing, Russell testified the only offer ever communicated to him was an offer to plead guilty to life without parole, and he was unaware there was an offer of twenty years until he obtained copies of his file through a Freedom of Information Act request after his

conviction. App. pp. 639-43. In contrast, trial counsel testified she received a plea offer of twenty years in writing from the solicitor in March 2011. App. p. 671. She explained it was her usual practice to convey all plea offers and discuss the ramifications with her clients, although she did not have any notes in her file confirming the practice was followed in this case, specifically. App. pp. 672-73. However, trial counsel testified it was her practice at the time to convey plea offers in person rather than in writing, and her notes reflected she made visits to the jail on December 5, 2011, and December 7, 2011, which she stated were attempts to persuade Russell to avoid a potential maximum sentence of life without parole (LWOP) by accepting the plea offer. App. pp. 687, 673. The State served Russel with notice of its intent to seek LWOP on December 8, 2011. App. p. 673.

The trial transcript, as originally transcribed and presented to the PCR court at the evidentiary hearing, reflected that trial counsel stated during sentencing the State had offered Russell "opportunities *to plead to life without parole* on the table a number of times," thus seemingly supporting Russell's testimony App. p. 511. However, trial counsel testified she believed the original transcript reflected a misstatement, and Russell was offered the chance to plead guilty *without* life without parole on the table, but Russell maintained his innocence throughout the case and did not wish to plead guilty. App. pp. 686-87, 697. The post-conviction relief court found Russell's testimony to be credible specifically because it was supported by the record, and trial counsel's testimony was not. App. p. 707. Relying on the original transcript, the order granting relief states "[t]his Court finds the trial transcript confirms [Russell's] testimony. . . Counsel's statement in the transcript is consistent with [Russell's] testimony that he was unaware of any offers except to plead to a sentence of LWOP. This Court finds there is no evidence that the offer of twenty years was conveyed to [Russell]." App. p. 707.

However, the corrected transcript now reads, "Mr. Russell has been offered opportunities to *plead without life without parole on the table* a number of times. He has consistently maintained his innocence on this case." App. pp. 729-30 (emphasis added). Russell repeatedly asserts that even with the corrected transcript, trial counsel's "testimony, and her notes, and her pre-sentencing remarks all corroborate [his] claim that this twenty-year plea offer was never communicated to him." RPWC p. 7. Similarly, the post-conviction relief court denied the State's motion on the basis that the corrected transcript "confirms offers were made, but it does not confirm any offers were communicated to [Russell]." App. p. 732. However, the corrected transcript reflects Russell, at the time of sentencing, did not dispute or correct trial counsel's statement that he had been offered the chance to plead to something less than life. App. pp. 510-13. Importantly, the transcript also reflects there was another non-LWOP offer made *during* trial, which trial counsel testified at that point was a "straight-up" plea in exchange for the State withdrawing the LWOP notice. App. pp. 511, 687-88. Furthermore, trial counsel's immediate next statement, "He has consistently maintained his innocence on this case," in the context of a discussion about plea bargaining, can reasonably be construed to mean Russell refused to accept a plea offer because it would require him to admit his guilt. App. p. 511. This is further supported by trial counsel's testimony at the evidentiary hearing that Russell's "position was always that he was innocent, and he did not want to plead guilty." App. p. 674.

The PCR court's original order clearly reflects a credibility contest between Russell and trial counsel, in which the transcript was the tiebreaker – because the transcript seemingly supported Russell's version of events, the court granted relief. App. pp. 705-08. However, the transcript does not support Russell's testimony, and in fact, flatly contradicts it. App. p. 730. The only remaining evidence in the record to support the PCR court's denial of the Rule 60(b)(1)

motion is Russell's own self-serving testimony that the twenty-year offer was not conveyed to him. App. pp. 639-43. Trial counsel testified, however, her practice at the time was to convey all plea offers to clients in person, and she believed her two visits to the jail in days immediately prior to receiving the State's LWOP notice were an effort to persuade Russell to accept the plea and avoid a possible life sentence. App. pp. 673, 687. This testimony as to trial counsel's usual practice is sufficient to refute Russell's testimony. See, e.g., Simuel v. State, 390 S.C. 267, 269, 710 S.E.2d 738, 738 (2010) (upholding post-conviction relief court's denial of relief where trial counsel testified he normally informed clients of their right to appeal after trial, and although he could not specifically recall informing Simuel, he probably did so); Fraiser v. State, 351 S.C. 385, 388, 570 S.E.2d 172, 174 (2002) (upholding post-conviction relief court's denial of relief where trial counsel testified her normal practice is not to discuss parole eligibility with clients, although she could not recall whether she discussed it with Fraiser).

The PCR court's original findings of fact and conclusions of law center on an error made by a court administration employee, through no fault of either the State or Russell, which has now been corrected. App. p. 729. The corrected version of the transcript actually confirms trial counsel's testimony, not Russell's, and therefore, the credibility finding made by the PCR court, on which the grant of relief is based, is without evidentiary support because there is no longer any credible evidence of deficient performance. By refusing to grant the Rule 60(b)(1) motion, the PCR court abused its discretion and allowed a decision to stand which was based on a "good faith mistake of fact" and, given the corrected record, is now without evidentiary support.

"[W]here there is a good faith mistake of fact, and, no attempt to thwart the judicial system, there is basis for relief. Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1986). Russell is not entitled to resentencing predicated on a factual error, and therefore, this

Court should reverse the PCR court's decision denying Petitioner's Rule 60(b)(1) motion and deny Russell post-conviction relief.

## CONCLUSION

For all the foregoing reasons, the State requests that this Court find the PCR court abused its discretion in denying Petitioner's motion for relief from judgment pursuant to Rule 60(b)(1), SCRCP, and reverse the post-conviction relief court's denial of the motion and the grant of relief to Russell.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

__March 5__, 2021

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

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CHRISTOPHER E. RUSSELL,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO 2017-002256

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# BRIEF OF RESPONDENT

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ATTORNEY FOR RESPONDENT

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[1] The transcript at App. 511, lines 1-6 reads as follows: "[the respondent] has been offered opportunities to plead to life without parole on the table a number of times." The corrected transcript reads as follows: "[the respondent] has been offered opportunities to plead without life without parole on the table a number of times." App. 729-730.

## TABLE OF AUTHORITIES

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## ISSUE PRESENTED

The PCR judge properly granted post-conviction relief after finding that counsel failed to convey a plea offer in the case; and petitioner's argument that the corrected transcript of counsel's comments at sentencing proved that the PCR judge erred is wholly untenable because the correction in question[2] was not sufficient nor significant enough to impact a change in the PCR judge's initial ruling where neither the corrected nor uncorrected transcript cited to in the case constituted tie breaker material, and where the uncorrected transcript was neither relied upon solely nor dominated the PCR judge's findings as there were multiple factors that supported and led to the PCR judge's ruling; and furthermore, based on the same rationale, the PCR judge neither erred nor abused his discretion in denying petitioner's Rule 60(b)(1), SCRCP, motion to consider the corrected transcript where there was no mistake of fact in the PCR judge's initial ruling despite the corrected transcript and where the corrected transcript would not have altered or nullified the PCR judge's grant of post-conviction relief to the respondent.

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[2] The transcript at App. 511, lines 1-6 reads as follows: "[the respondent] has been offered opportunities to plead to life without parole on the table a number of times." The corrected transcript reads as follows: "[the respondent] has been offered opportunities to plead without life without parole on the table a number of times." App. 729-730.

## STATEMENT OF THE CASE

The respondent Christopher Eric Russell was tried by jury during the February 2013 term of the Greenville County General Sessions Court and found guilty of kidnapping, armed robbery, first degree burglary, and conspiracy. Judge R. Lawton McIntosh presided over the trial. Susannah Ross represented the respondent at trial, and Assistant Solicitor Mark Moyer appeared on behalf of the state. The respondent was sentenced to five years on the conspiracy charge and life without parole on each of the remaining charges for which he was convicted. App. 1-513.

The respondent appealed and after briefing (see App. 515-608), his convictions and sentences were affirmed. See State v. Russell, Unpublished Opinion No. 2015-UP-435 (S.C. Ct. App. filed Aug. 19, 2015). App. 609-611. David B. Morgen, Esq. of Katten Nuchin Rosenman represented the respondent on appeal.

On June 1, 2016, the respondent filed a PCR application with the Greenville County Office of the Clerk of Court. App. 616-622. Petitioner filed a Return dated January 12, 2017, requesting that a hearing be held in response to the respondent's PCR action filed in the case. App. 623-628.

A PCR hearing was convened on April 19, 2017, at the Greenville County Courthouse before Judge Perry H. Gravely. Attorney R. Mills Arial represented the respondent, who was present at the hearing, and Assistant Attorney General Lindsey A. McCallister appeared on behalf of the state at the hearing. App. 630-700.

On June 12, 2017, Judge Gravely signed an Order granting PCR relief to the respondent on the ground that trial counsel erred in failing to convey a plea offer to him, but denied relief on the remaining allegations of ineffective assistance of trial counsel in the case. App. 702-711. On June 29, 2017, petitioner filed a Rule 59(e) motion, which Judge Gravely denied by Order dated

July 21, 2017, and on September 20, 2017, petitioner filed a Rule 60(b)(1), SCRCP motion, which Judge Gravely denied on October 17, 2017. App. 713-718; App. 719-723; App. 732-733.

Petitioner appealed and filed a Petition for Writ of Certiorari on April 23, 2018. The respondent filed a Return to Petition for Writ of Certiorari on September 6, 2018. Petitioner filed a Reply on October 5, 2018. On October 28, 2020, this Court granted the Petition for Writ of Certiorari. Petitioner's Brief of Petitioner was filed on March 5, 2021. This Brief of Respondent follows.

## STANDARD OF REVIEW

Our standard of review in PCR case depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 SE.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123,127 (2014)).

The decision to deny or grant a motion pursuant to Rule 60(b)(1), SCRCP is within the sound discretion of the trial judge. Ware v. Ware, 404 S.C. 1, 743 S.E.2d 817 (2017).

## ARGUMENT

The PCR judge properly granted post-conviction relief after finding that counsel failed to convey a plea offer in the case; and petitioner's argument that the corrected transcript of counsel's comments at sentencing proved that the PCR judge erred is wholly untenable because the correction in question[3] was not sufficient nor significant enough to impact a change in the PCR judge's initial ruling where neither the corrected nor uncorrected transcript cited to in the case constituted tie breaker material, and where the uncorrected transcript was neither relied upon solely nor dominated the PCR judge's findings as there were multiple factors that supported and led to the PCR judge's ruling; and furthermore, based on the same rationale, the PCR judge neither erred nor abused his discretion in denying petitioner's Rule 60(b)(1), SCRCP , motion to consider the corrected transcript where there was no mistake of fact in the PCR judge's initial ruling despite the corrected transcript and where the corrected transcript would not have altered or nullified the PCR judge's grant of post-conviction relief to the respondent.

## PCR RULING

PCR was granted in this case because trial counsel erred in failing to convey the state's twenty-year plea offer to the respondent prior to trial, which led to three LWOP convictions.

## RESPONDENT'S PCR HEARING TESTIMONY

During the PCR hearing, the respondent alleged that trial counsel failed to convey to him a plea offer that contained a twenty-year sentence in exchange for his guilty pleas. App. 634, l. 5-7; App. 664, l. 2-15. The respondent testified that trial counsel advised that he was facing

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[3] The transcript at App. 511, lines 1-6 reads as follows: "[the respondent] has been offered opportunities to plead to life without parole on the table a number of times." The corrected transcript reads as follows: "[the respondent] has been offered opportunities to plead without life without parole on the table a number of times." App. 729-730.

LWOP (multiple LWOP) sentences if he went to trial so he saw point in pleading to the state's LWOP plea offers and knew nothing of the twenty-year offer. App. 639, l. 4-9. The respondent explained that he understood that he had an opportunity to plead to LWOP only (presumably one LWOP instead of multiple LWOP's) which was in effect not a good deal, and that he was forced into a trial because he had no knowledge that a twenty-year plea option existed in his case as counsel never communicated the twenty-year plea offer to him; and therefore, he never had an opportunity to "weigh [his] options." App 639, l. 19-App. 640, l.1; App 641, l.7-App. 642, l.3. The respondent made it clear that although he was innocent, he was open to pleading in the event of an offer, but that he was not pleading to any LWOP offer in effect because that was illogical to him. App 643, l.2-15; App. 643, l.22-App. 644, l.22.

The trial transcript is consistent with the respondent's PCR testimony in that prior to sentencing, trial counsel advised the judge that "[the respondent]" has been offered opportunities to plead to life without parole." App 511, l.4-6. Later, that same portion of transcript text was re-transcribed to read that "[the] Respondent has been offered opportunities to plead without life without parole." App. 729. Petitioner admitted that he received the LWOP notice, but knew not of the option of a non-LWOP sentencing plea offer. App. 646, l. 10-16; App. 661, l. 22-25. Petitioner stated that trial counsel never conveyed or communicated to him the twenty-year plea offer that was presented to trial counsel by the solicitor in the case prior to trial. App. 661, l.22 – App. 663, l. 23. Note the respondent's' PCR testimony that **"if she would have communicated that plea to me...I'd be doing twenty years" at App 656, lines 11-13.**

## TRIAL COUNSEL'S PCR HEARING TESTIMONY

Trial counsel testified at the PCR hearing and admitted that she had the twenty-year plea offer noted in her case file for the respondent and that the twenty-year plea offer was submitted

in the case on March 29, 2011, App. 672, lines 1-12; App 686, lines 3-17. Note that the respondent was arrested on January 10, 2011, and tried by jury on February 13, 2013. Trial counsel never testified that she remembered conveying the offer to the respondent, and admitted that she had no transmittal letter or any paperwork indicating that she made the plea offer known to the respondent, and further conceded that she had no notes or documentation in the file showing the she communicated thereafter to the respondent. Counsel added that petitioner asserted his innocence and did not want to plead guilty, and that she did not recall whether the respondent was amendable to pleading guilty if an offer for less than LWOP had been made to him. App. 667, l. 1-12. Regarding this matter, counsel could only assert that her usual practice was to convey plea offers by going down to the jail and discussing the offers with inmates, but that there was nothing in the file to show that this happened in the respondent's case. App 687, lines 4-16.

**ORDER GRANTING PCR**

The PCR judge ruled that because counsel recalled 1.) no specific discussions with the respondent about the plea offer, and 2.) had no notes to verify that she discussed the plea offer with the respondent, and 3.) because she stated at trial in effect that the only plea offers the respondent received were for life without parole, and 4.) the respondent testified that he was not aware of the plea offer, and 5.) the respondent testified that he would have accepted the offer, and 6.) the offer yielded a substantial lower sentence than the three LWOP sentences he received at trial, then these multiple findings constituted proof via a preponderance of the evidence that "counsel's performance was deficient for failing to relay the plea offer of twenty years to [the respondent]" and that "[the respondent] was prejudiced by counsel's deficient performance"

because he received three LWOP sentences at the close of his trial and was never afforded the opportunity to accept a twenty-year sentence per the plea offer instead. App. 705-708.

**CORRECTED TRANSCRIPT**

The transcript at App. 511, lines 1-6 reads as follows: "[the respondent] has been offered opportunities to plead to life without parole on the table a number of times." The corrected transcript reads as follows: "[the respondent] has been offered opportunities to plead without life without parole on the table a number of times." App. 729-730.

**ANALYSIS**

Despite the corrected transcript, the issue of counsel's failure to convey the plea offer remains supported by the record by a preponderance of the evidence shown at the PCR hearing. The transcript error that was corrected was of no such significant consequence in the case that it would have changed the PCR judge's ruling granting PCR in the case because the PCR judge relied on many factors in the case that led to the grant of PCR, and never relied solely on that portion of the transcript, neither corrected nor uncorrected, and because that portion of the transcript, neither corrected nor uncorrected, did not serve as a tie-breaker in the case. The difference between the transcript at App. 511, lines 1-6 that read as follows: "[the respondent] has been offered opportunities to plead to life without parole on the table a number of times," and the corrected transcript that reads as follows: "[the respondent] has been offered opportunities to plead without life without parole on the table a number of times," again was not sufficiently significant to over shadow the other numerous factors that led to the PCR judge's grant of PCR or change the nature of the PCR judge's ruling in the case. App. 729-730.

Based on the record in the case at bar, it was obvious that counsel failed to advise the respondent of the twenty-year plea offer made either verbally or in writing. Counsel's testimony,

and her notes, and her pre-sentencing remarks all corroborate the respondent's claim that this twenty-year plea offer was never communicated to him. The scrivener's error that supposedly indicated that counsel advised the respondent of the plea offer was of such little consequence that the difference in the words "opportunities to plead without parole," and "opportunities to plead without life without parole" had meaningless and confusing and incomprehensible interpretations, and as a matter of semantics, clearly did not evidence any viable translation that would nullify the respondent's showing of ineffective assistance of counsel for failing to communicate a plea offer and the PCR judge's finding of ineffective assistance of counsel in the case. The transcript clean-up via the alleged scrivener's error simply had no changeable bearing on the respondent's PCR showing or the PCR judge grant of PCR relief to the respondent.

It was clear that trial counsel erred in failing to convey the twenty year plea offer to the respondent, and that the respondent would have accepted the twenty-year plea offer had he known about it after being noticed of LWOP because any deal was better than life without parole. Furthermore, the respondent's statement in this regard, i.e., **"if she would have communicated to me...I'd be doing twenty years," at App 565, lines 11-13,** was sufficient to show prejudice. Moreover, the difference between receiving a twenty-year prison sentence rather than receipt of LWOP sentences would be sufficient to show prejudice in and of itself. Note that the applicant is not required to show objective evidence of actual prejudice because a self-serving statement can prove prejudice. A PCR applicant's statement can be sufficient to satisfy prejudice. Jackson v. State, supra. See also Davie v. State, supra.

## LEGAL ANALYSIS

A defendant has a right to effective assistance of counsel during the plea-bargaining process. See Lafler v. Cooper, 566 U.S. 156 (2012). See also Judge v. State, 321 S.C. 554, 471 S.E. 2d 146 (1996), overruled on other grounds by Jackson v. State, 342 SC 95, 535 S.E. 2d 926 (2000), to the extent that a petitioner's statement that he was prejudiced by counsel's deficient performance at the plea-bargaining process can satisfy the prejudice prong of the two-pronged test to be met in ineffective assistance of counsel cases. Additionally, a guilty plea must represent a voluntary and intelligent choice among the alternative causes of action open to the defendant. Hill v. Lockhart, 474 U.S. 52 (1985). In Lafler v. Cooper, supra, counsel's incorrect advice led to the rejection of a plea offer in the case.

Moreover, the Sixth Amendment right to effective assistance of counsel extends to cases involving plea offers, particularly where plea offers lapse and where prejudice is shown to the extent that the defendant would have accepted the plea offer. Missouri v. Frye, 132 S.Ct. 1399 (2012). In Missouri v. Frye, counsel did not convey the plea offer to the defendant and as a result, the plea offer expired. Compare Davie v. State, 381 S.C. 601; 675 S.E. 2d 416 (2009), where the Court held that counsel's failure to inform the defendant of a written plea offer that was substantially less than the sentence he received after pleading guilty constituted ineffective assistance of counsel because the defendant was unaware of the existence of the plea offer (due to counsel's error based on relocation and mail snafu) until after the plea offer had expired, and that he would have accepted that plea offer had it been communicated to him. See also, In Bell v. State, 410 S.C. 436, 765 S.E.2d 4 (2014), where the Court held that counsel was ineffective in failing to extend the state's plea offer of ten years to the defendant prior to sentencing (which was when the defendant first heard of the offer) and that the defendant was prejudiced by counsel's deficient performance in

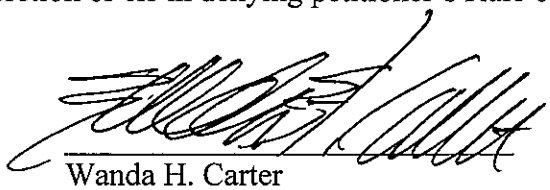
this regard as he received a twenty-year sentence instead. In Bell, the defendant's case had been transferred to counsel, but the attorney who previously represented the defendant had an independent and separate file in the case containing a note indicating that a plea offer of ten years had been made, but said file had no notes or indication showing that said offer was conveyed to the defendant by either counsel who represented the client.

## SUMMARY

Here, the respondent received ineffective assistance of counsel in violation of the Sixth Amendment when counsel failed to convey a plea offer to him prior to trial; and the respondent was prejudiced because the twenty-year plea offer was a lesser sentence in comparison to the respondent's three LWOP sentences received at trial. Lastly, the corrected transcript of counsel's remarks did not alter the substance of the preponderance of the evidence in the case that led to a grant of PCR to respondent, which meant that there was no abuse in discretion or error in the PCR judge's denial of the Rule 60(b)(1), SCRCP, motion to entertain the corrected transcript.

## CONCLUSION

Based on the foregoing argument, the PCR judge's Order granting PCR to the respondent should stand as the PCR judge did not err in granting PCR in the case, and because the PCR judge likewise did not abuse any discretion or err in denying petitioner's Rule 60(b)(1), SCRCP, motion filed in the case.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR RESPONDENT

This 5th day of May, 2021.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

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CHRISTOPHER E. RUSSELL,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

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CERTIFICATE OF SERVICE

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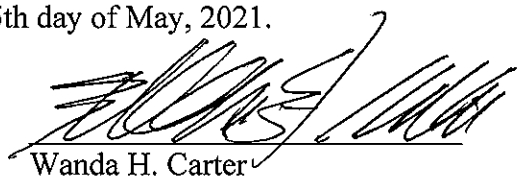
Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Brief of Respondent in the above referenced case has been served upon Lindsey McCallister, Esquire, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Brief of Respondent has been served on Christopher Eric Russell, at02 Bane Rd., Taylors, SC 29687 this 5th day of May, 2021.



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR RESPONDENT

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Christopher Eric Russell, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2017-002256

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Appeal From Greenville County
Perry H. Gravely, Circuit Court Judge

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Unpublished Opinion No. 2021-UP-405
Submitted November 1, 2021 – Filed November 17, 2021

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**AFFIRMED**

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Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Megan Harrigan Jameson, both of Columbia, for Petitioner.

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Respondent.

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**PER CURIAM:** The State appeals the post-conviction relief (PCR) court's order denying its Rule 60(b)(1), SCRCP, motion. On appeal, the State argues the PCR court abused its discretion because the corrected trial transcript showed a defect with the original transcript and the only remaining evidence to support granting

relief was Christopher Eric Russell's own self-serving testimony. We find the PCR court did not abuse its discretion in denying the State's motion because the corrected transcript does not dispositively indicate trial counsel conveyed the twenty-year plea offer to Russell, Russell testified he did not receive the twenty-year plea offer, and the PCR court found his testimony credible. Accordingly, we affirm pursuant to Rule 220(b), SCACR, and the following authorities: Rule 60(b)(1), SCRCP ("On motion and upon such terms as are just, the [PCR] court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . [a] mistake, inadvertence, surprise, or excusable neglect . . . ."); *Rouvet v. Rouvet*, 388 S.C. 301, 308, 696 S.E.2d 204, 207 (Ct. App. 2010) ("The decision to grant or deny a motion made pursuant to Rule 60(b) is within the sound discretion of the [PCR court]."); *Mangal v. State*, 421 S.C. 85, 92, 805 S.E.2d 568, 571 (2017) ("On review of a PCR court's resolution of procedural questions arising under . . . the South Carolina Rules of Civil Procedure, we apply an abuse of discretion standard."); *Rouvet*, 388 S.C. at 308, 696 S.E.2d at 207 ("An abuse of discretion occurs when the order of the [PCR] court is controlled by an error of law or where the order is based on factual findings that are without evidentiary support."); *id.* at 309, 696 S.E.2d at 208 ("In determining whether to grant relief under Rule 60(b)(1), the court must consider the following factors: '(1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party.'" (quoting *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct. App. 2001))); *Thompson v. State*, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018) (explaining this court defers to "the PCR court's credibility findings as to witnesses who testified before the PCR court"); *Jackson v. State*, 342 S.C. 95, 97-98, 535 S.E.2d 926, 927 (2000) (reversing the PCR court's denial of relief when counsel failed to properly advise the petitioner about whether the crime was a misdemeanor or felony, the petitioner testified he would not have pled guilty had he known the crime was a felony, and "there was no evidence contradicting or conflicting with petitioner's testimony that would support the PCR [court's] finding that petitioner would not have pled"); *Bell v. State*, 410 S.C. 436, 440-44, 765 S.E.2d 4, 6-8 (Ct. App. 2014) (acknowledging Bell's testimony was self-serving but noting this court defers to the PCR court's findings on credibility), *overruled on other grounds by Smalls v. State*, 422 S.C. 174, 181 n.2, 810 S.E.2d 836, 839 n.2 (2018).

**AFFIRMED.**[1]

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

**HUFF, THOMAS, and GEATHERS, JJ., concur.**

RECEIVED
Nov 30 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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On Petition for Writ of Certiorari to Greenville County

The Honorable R. Lawton McIntosh, Trial Judge
The Honorable Perry. H. Gravely, PCR Judge

Appellate Case No. 2017-002256

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CHRISTOPHER ERIC RUSSELL, Respondent,

v.

STATE OF SOUTH CAROLINA, Appellant.

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**PETITION FOR REHEARING**

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On November 17, 2021, this Court issued an opinion affirming the PCR court's order denying the State's motion for relief from judgment, which was made pursuant to Rule 60(b)(1), SCRCP, and in which the State prayed that the PCR court would set aside a finding that Christopher Russell's testimony was credible in light of the discovery of a typographical error in the transcript from Russell's trial that materially affected the meaning of the text, a discovery that was not made until after the PCR court had issued its order granting post-conviction relief to Russell. App. 721-22. In its opinion, this Court found that the PCR court did not abuse its discretion in denying the State's motion because: (1) the corrected transcript is not dispositive as to whether Russell's trial counsel conveyed to Russell a twenty-year plea offer; (2) Russell testified before the PCR court that he did not receive the twenty-year plea offer; and (3) the PCR court found that Russell's testimony about not receiving a twenty-year plea offer was credible.

Russell v. State, Op. No. 2021-UP-405 (S.C. Ct. App. filed November 17, 2021 at 1-2) (per curiam).

This Court, in affirming the PCR court's denial of the State's motion, overlooked or misapprehended the centrality of the error in the transcript to the PCR court's grant of relief to Russell. The error in the transcript was essential to the PCR court's factual findings. Those findings were: (1) that the trial transcript "confirms" Russell's testimony at the PCR hearing; (2) that trial counsel's statement to the trial court during the sentencing portion of trial was "consistent" with Russell's testimony at the PCR hearing that he knew of no plea offers but the offer for him to plead for a sentence of life without the possibility of parole; (3) that there is no evidence that a plea offer for twenty years' imprisonment was ever conveyed to Russell; and (4) that Russell's testimony that he would have accepted an offer of twenty years' imprisonment had he known of such an offer was credible. App. 707.

Those factual findings, in turn, were essential to the PCR court's findings that Russell had proven that trial counsel was constitutionally ineffective. After finding that Russell's testimony was credible and consistent with trial counsel's post-trial statement to the trial court, the PCR court "[a]ccordingly" found that trial counsel's performance was deficient in that she failed to convey the twenty-year plea offer to Russell. App. 730. After finding that Russell's testimony that he would have taken a twenty-year deal was credible, the PCR court "therefore" found that Russell had proven that he suffered prejudice from the alleged deficiency in trial counsel's performance. App. 730. "In order to establish a claim for ineffective assistance of counsel, the applicant must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the

applicant's case." Weldon v. State, Op. No. 5867 (S.C. Ct. App. filed Oct. 6, 2021) (Howard Adv. Sheet No. 35 at 59) (quoting Speaks v. State, 377 S.C. 396, 660 S.E.2d 512 (2008)). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Id. (quoting Strickland v. Washington, 466 U.S. 668 (1984)).

If the PCR court's factual findings were made in error, then the PCR court's findings that Russell proved both prongs of the Strickland test must be erroneous, too. If either of the PCR court's findings regarding the Strickland prongs are erroneous, this Court should reverse the PCR court's grant of relief to Russell. This Court, then, should reverse the PCR court's denial of the State's 60(b) motion and reverse the grant of relief to Russell because, now that the error in the transcript has been discovered, there is no probative evidence to support the PCR court's factual findings.

First, the trial transcript, as corrected, does not "confirm" Russell's testimony at the PCR hearing and is not "consistent" with it. Russell testified that he had no choice but to go to trial because "[his] plea was life without parole." App. 639. Russell denied that trial counsel had ever told him that the State had offered a plea deal to him. App. 639-40. Russell specifically mentioned that he wanted the PCR court to take note of page 511 of his trial transcript because he felt that it verified the credibility of his testimony. App. 640. Russell testified that he later learned that the State had extended a twenty-year offer and that he learned of the offer only through correspondence with the Thirteenth Circuit Solicitor's Office. App. 641-42. Russell insisted that trial counsel never told him about any plea offers except for an offer for life without

the possibility of parole. App. 643.[1] The corrected transcript shows that trial counsel told the trial court that Russell "[had] been offered opportunities to plead without life without parole on the table a number of times. He has consistently maintained his innocence on this case." App. 730. The corrected transcript does not "confirm" Russell's testimony; it refutes it. The correction does not merely add a layer of nuance to trial counsel's post-trial statement, it reverses the meaning of the statement entirely.

Second, there is evidence that the twenty-year plea offer was conveyed to Russell. Trial counsel's statement to the trial court that Russell had been given chances to plead in exchange for a sentence "without life without parole on the table a number of times," juxtaposed with her next sentence that Russell "[had] consistently maintained his innocence" is evidence that multiple plea offers more favorable to Russell than a sentence of life without the possibility of parole had been communicated to Russell, yet rejected by him. App. 730.[2] It was trial counsel's practice to convey all plea offers to her clients and she believed that she visited with Russell at the jail on more than one day to try to persuade Russell to take the twenty-year deal offered by the State. App. 706-07. Trial counsel testified that she "certainly" would have discussed the twenty-year deal with Russell before trying his case with life without parole on the table. App. 672. It is true that trial counsel's post-trial statement did not specifically reference a twenty-year deal, but the most logical inference is that trial counsel did inform Russell of the offer. On the other hand, it is not reasonable to conclude that trial counsel's post-trial statement, as shown in

[1] It would make no sense for the State to offer a plea offer to Russell in an attempt to get him to plead guilty instead of going to trial when that offer was for the maximum punishment to which Russell would have been exposed if he had not taken the offer.

[2] Even the trial court knew that Russell had rejected a plea offer extended to him by the State on the day of trial. App. 730.

the corrected transcript, is evidence that trial counsel did not convey the twenty-year offer to Russell.

Third, Russell's testimony that he would have accepted an offer of twenty years' imprisonment had he known of such an offer was not credible. Trial counsel testified that "Russell was pretty adamant that he wasn't guilty . . . ." App. 670. Trial counsel testified that Russell's "position was always that he was innocent and he did not want to plead guilty." App. 674. Trial counsel testified that Russell "was not accepting the twenty years or even a straight-up with the mandatory minimum of ten." App. 674. Trial counsel testified that Russell was not interested in discussing potential sentences because "[h]e was saying he was not guilty." App. 686. Trial counsel's notes reflected that Russell wanted to go to trial because she had written, "not guilty, all trial." App. 686. Trial counsel affirmed that Russell told her that he was not interested in pleading guilty. App. 687. Because the PCR court found that Russell's testimony was credible because his testimony was "confirmed" by or "consistent" with trial counsel's post-trial statement, and the meaning of that post-trial statement upon which the PCR court relied has now been proven to have been the opposite of what was apparent at the time of the PCR hearing, the credibility finding has no evidentiary support. In light of the correction, no evidence from the trial transcript or from trial counsel's testimony supports the veracity of Russell's testimony. It is not only that Russell's testimony alone does not support the PCR court's credibility finding, but all of the evidence now, in light of the corrected error in the transcript, supports only a finding that Russell's testimony was not credible.

When reviewing the PCR court's findings of fact, this Court is to defer to those findings and uphold them if there is probative evidence in the record to support them. Buckson v. State,

423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018) (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). In this case, there is no probative evidence to support the PCR court's factual findings. Trial counsel's testimony at the PCR hearing contradicted Russell's testimony. The corrected trial transcript now contradicts Russell's testimony and instead confirms the credibility of trial counsel's testimony. The PCR court's factual findings were in error. The PCR court's Strickland findings were therefore in error. The State respectfully urges this Court to reconsider this matter, grant rehearing, provide the State with an opportunity to be heard, vacate its prior opinion, and issue a new opinion that reverses the PCR court's factual findings.

Respectfully submitted,

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Attorney General

TAYLOR ZANE SMITH
Assistant Attorney General
S.C. Bar No. 103282

By: s/Taylor Zane Smith
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November 30, 2021

RECEIVED
Nov 30 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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On Petition for Writ of Certiorari to Greenville County

The Honorable R. Lawton McIntosh, Trial Judge
The Honorable Perry. H. Gravely, PCR Judge

Appellate Case No. 2017-002256

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CHRISTOPHER ERIC RUSSELL, Respondent,

v.

STATE OF SOUTH CAROLINA, Appellant.

**PROOF OF SERVICE**

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Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies that a copy of the petition for rehearing has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

**Wanda H. Carter, Esquire**
**wcarter@sccid.sc.gov**

This 30th day of November, 2021.

s/Taylor Zane Smith
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# The South Carolina Court of Appeals

Christopher Eric Russell, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2017-002256

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ORDER

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Huff J.

Paula A. Thomas J.

John D. Pierce J.

Columbia, South Carolina

cc:
Wanda H. Carter, Esquire
Alan McCrory Wilson, Esquire
Taylor Zane Smith, Esquire
The Honorable Perry H. Gravely

FILED
Dec 16 2021