

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APR 12 2013

SC Court of Appeals

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Appeal from Aiken County

Doyet A. Early, III, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

V.

NOEL GRAY,

APPELLANT

APPELLATE CASE NO. 2012-213607  
\_\_\_\_\_

INITIAL BRIEF OF APPELLANT  
\_\_\_\_\_

ROBERT M. PACHAK  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS .....	1
TABLE OF AUTHORITIES .....	2
STATEMENT OF ISSUES ON APPEAL .....	3
STATEMENT OF THE CASE .....	4
ARGUMENT .....	5
CONCLUSION .....	8

TABLE OF AUTHORITIES

**Cases**

Clark v. State, 365 S.C. 385, 434 S.E.2d 266 (1993)..... 6

Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) ..... 6

Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2005)..... 7

State v. Gray, Op. No. 2008-UP-040..... 4

**Rules**

Rule 243 (c), SCACR ..... 4

Rule 29(b), SCRCrimP ..... 5, 6, 7

STATEMENT OF ISSUES ON APPEAL

Whether appellant's case should be remanded for a hearing and the appointment of counsel on his after discovered evidence claim that trial counsel failed to convey two plea agreement offers to him?

## STATEMENT OF THE CASE

Appellant was convicted of two (2) counts of criminal sexual conduct with a minor in the second degree after a jury trial held before the Honorable Jackson V. Gregory on February 2, 2005. Appellant was sentenced to life imprisonment without the possibility of parole. He was represented by Kelly P. Brown, Esquire.

Appellant appealed his convictions and the appeal was dismissed after a review pursuant to Anders v. California by the Court of Appeals on January 11, 2008. State v. Gray, Op. No. 2008-UP-040.

Appellant filed his first application for post-conviction relief on April 18, 2008. An evidentiary hearing was held on February 2, 2009, before the Honorable Doyet A. Early, III. Appellant was present and was represented by counsel. Both appellant and trial counsel testified at the hearing. On April 2, 2009, Judge Early issued an order denying and dismissing the application for post-conviction relief. A Johnson Petition for Writ of Certiorari was filed with the South Carolina Supreme Court and it was denied on December 2, 2010.

Appellant filed another application for post-conviction relief on December 9, 2011. Appellant alleged newly discovered evidence and ineffective assistance of PCR counsel. Respondent filed a return and motion to dismiss alleging the application to be successive and for failing to meet the filing requirements of the statute of limitations. After a conditional order of dismissal and appellant's response, the application was dismissed by Judge Early on June 26, 2012. Appellant appealed the order of dismissal, but the appeal was dismissed on August 30, 2012, by the South Carolina Supreme Court pursuant to Rule 243 (c), SCACR.

On September 24, 2012, appellant filed a motion for a new trial pursuant to Rule 29(b), SCRCrimP. Appellant also filed a motion for appointment of counsel. On December 4, 2012, Judge Early filed a form order denying the motion for new trial and the motion for appointment of counsel. (ROA. p. 49 – 50). The motions were denied without a hearing and without an explanation.

This appeal follows.

## ARGUMENT

Appellant's case should be remanded for a hearing and the appointment of counsel on his after discovered evidence claim that trial counsel failed to convey two plea agreement offers to him.

Appellant's motion for a new trial pursuant to Rule 29(b), SCPCrimP was filed on September 24, 2012. (ROA. p. 1). In the motion, he wrote that on October 12, 2011, he received a Rule 5 discovery package from trial counsel that contained two plea agreements that counsel failed to disclose to him. Appellant cited Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) which held that the failure to communicate a plea offer to a client constitutes deficient performance. (ROA. p. 2). Any plea offer was better than the life imprisonment without parole sentence that he received. (ROA. p. 3).

In Clark v. State, 365 S.C. 385, 434 S.E.2d 266 (1993), the court wrote that to obtain a new trial based on after discovered evidence, a party must show that the evidence:

- (1) Would probably change the result if a new trial is had;
- (2) Has been discovered since the trial;
- (3) Could not have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and
- (5) Is not merely cumulative or impeaching.

Here the plea agreement would have changed the result because appellant would have pled guilty and avoided a life sentence without parole. Appellant has shown that he discovered the existence of the plea agreement since the trial. He could not have discovered the plea agreements

before trial because they were not disclosed to him. The plea agreements would have been material to guilt or innocence. And, the plea agreements were not merely cumulative or impeaching.<sup>1</sup>

Appellant has alleged facts that have not been refuted. He should be allowed a hearing on his allegations. In Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2005), the Court held that when considering the State's motion for summary dismissal, where no evidentiary hearing has been held, a PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant. Surely, the same rules would apply to a motion for after discovered evidence under Rule 29(b).

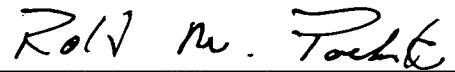
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<sup>1</sup> In McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013), the Court adopted a different after-discovered evidence test as it relates to juror misconduct. The Court may want to look at current after-discovered test as it relates to the failure to disclose plea agreements.

CONCLUSION

Appellant's case should be remanded for a hearing on the merits of his claim and he should have counsel appointed at the local level to assist him.

Respectfully submitted,



Robert M. Pachak  
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of April, 2013.

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**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Rule 29(b) Motion;
- (2) Form Order Denying Rule 29(b) Motion
- (3) Miscellaneous Exhibits
- (4) Prior PCR Application and Supporting Documents
- (5) Return and Motion to Dismiss
- (6) Conditional Order of Dismissal
- (7) Applicant's Response to Conditional Order of Dismissal
- (8) Post-Conviction Relief (Successive Application Amendment)
- (9) Final Order of Dismissal

I certify that this designation contains no matter which is irrelevant to this appeal.

April 12th, 2013

Robert M. Pachak

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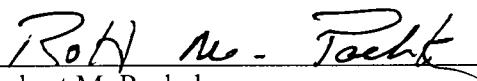
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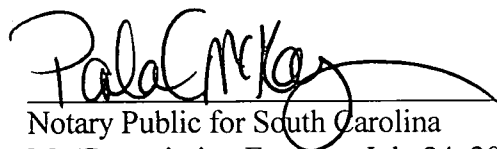
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of April, 2013.

  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 12th day of April, 2013.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022.