

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

ARYEE HENDERSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001521

PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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ISSUE PRESENTED

Whether the PCR court erred in finding plea counsel effective where counsel failed to object when the victim's family and the solicitor breached the plea agreement by recommending a specific term of years sentence when the plea agreement was without recommendation?

STATEMENT OF THE CASE

In November 2002, the Richland County grand jury indicted Petitioner for one count of murder. App. 454-455. The case was originally called to trial on September 21, 2004, before the Honorable Alison Renee Lee and a jury. The State was represented by Luck Campbell and Bryan S. Jeffries. Petitioner was represented by Charles Johnson. Petitioner was found guilty as indicted and sentenced to thirty years imprisonment. App. 4, ll. 3-10; App. 93, ll. 8-22.

Petitioner appealed his conviction and sentence. The appeal was eventually dismissed pursuant to *Anders v. California*¹ in an unpublished opinion. *State v. Henderson*, Op. No. 2008-UP-107 (S.C. Ct. App. filed February 12, 2008); App. 93, l. 22-App. 94, l. 5. Petitioner filed an application for post-conviction relief on March 4, 2008. The State made its return on January 30, 2009. An evidentiary hearing was convened on August 12, 2009, before the Honorable G. Thomas Cooper, Jr. Petitioner was represented by Charles T. Brooks, III. The State was represented by Brian Petrano. Judge Cooper signed an order granting Petitioner post-conviction relief which was filed on July 14, 2010. App. 94, ll. 6-15

The State appealed Judge Cooper's grant of relief in a petition for writ of certiorari filed on September 20, 2010. The Court of Appeals affirmed the PCR court's grant of relief. *State v. Henderson*, Op. No. 2014-UP-122 (S. Ct. App. filed March 19, 2014). The State filed a petition for rehearing on April 2, 2014, which was denied on April 24, 2014. Subsequently, the State filed a petition for writ of certiorari to the Court of Appeals on December 17, 2014. The South Carolina Supreme Court ultimately dismissed the writ as improvidently granted. *State v. Henderson*, Op. No. 2015-MO-063 (filed October 28, 2015). App. 94, l. 15-App. 95, l. 1.

¹ 386 U.S. 738 (1967)

Petitioner's case was returned to the Richland County Court of General Sessions. On June 20, 2016, Petitioner appeared before the Honorable Clifton Newman to enter a guilty plea to the lesser included offense of voluntary manslaughter. The State was represented by Luck Campbell. Petitioner was represented by Rhodes Bailey. App. 1; App. 4, ll. 3-17. At the start of the plea hearing, Solicitor Campbell informed the court that the plea was a "straight-up" plea with each side asking for whatever time they "felt was appropriate." App. 4, ll. 14-17.

The mother of the victim spoke during the plea hearing and requested that Petitioner be given the same sentence he received after trial. App. 19, ll. 4-6. Solicitor Campbell then asked the court to follow the victim's request to sentence Petitioner to the same amount of time he had received after trial. App. 23, ll. 1-20. Prior to sentencing Petitioner, Judge Newman stated that, if the victim's mother had not been present or spoken, had he simply heard the case from Petitioner's perspective he could have been swayed to see the matter from his side. App. 56, ll. 6-12. Judge Newman ultimately sentenced Petitioner to twenty-five years imprisonment. App. 58, ll. 16-18. Petitioner did not appeal his conviction or sentence from the guilty plea.

On July 21, 2016, Petitioner filed an application for post-conviction relief alleging, *inter alia*, ineffective assistance of counsel where plea counsel failed to object when the solicitor breached the plea agreement. App. 60-70. The State filed a return on July 13, 2017. App. 71-79. Petitioner filed a *pro se* amended PCR application on August 22, 2017. App. 80-87. PCR Counsel Jonathan Waller filed an amended PCR application dated January 18, 2018. App. 88-89.

An evidentiary hearing was held before the Honorable Jocelyn Newman on January 24, 2018. Petitioner was represented by Counsel Waller. The State was represented by Jessica Kinard. App. 90. Petitioner testified that after being returned from SCDC to the county jail he filed a speedy trial motion and was brought before Judge C. Newman. At the hearing on the

motion, he informed Judge Newman that he wanted to plead guilty and was appointed Counsel Bailey. App. 97, l. 3-App. 98, l. 21. Although Petitioner had stated he wanted to plead guilty, he changed his mind after Counsel Bailey was appointed and wanted to proceed to trial. App. 104, ll. 13-21.

Petitioner testified that he and Counsel Bailey discussed trial tactics, the evidence, witnesses, the first trial, how the transcripts from the first trial could be used at a second trial, and self-defense. However, Petitioner stated that Counsel Bailey did not independently investigate his case and repeatedly told Petitioner that if he proceeded to trial he would lose. Counsel Bailey also told Petitioner that he would not want him to speak during a trial. This became a point of contention as Petitioner wanted to be able to take the stand and speak on points of law during his trial. App. 99, ll. 14-App. 106, l. 19; App. 109, l. 12-App 110, l. 15

Throughout the pendency of the case Petitioner filed numerous *pro se* motions, including a motion to suppress, a motion to quash, and a writ of mandamus. He discussed these motions with Counsel Bailey and was told the motions were meritless. The conversation about the motions made Petitioner want to proceed to trial *pro se*. Subsequently, Petitioner filed a motion to relieve counsel, but it was never heard. App. 107, l. 1-App. 108, l. 14

Petitioner eventually accepted a guilty plea because he did not think Counsel Bailey was prepared for trial or that he was doing the things necessary to become prepared for trial. App. 143, ll. 2-11. Petitioner testified he pled guilty because he felt that was his only “relief” since he would not be able to present his case the way he felt it needed to be presented at trial. App. 109, ll. 1-11. Regarding the plea agreement, Petitioner stated he understood the plea agreement to be an “open plea” to voluntary manslaughter with no recommendations. No recommendations meant that the State and the victim’s family would not speak about sentencing. App. 112, l. 21-

App. 113, l. 8. When the victim's family asked for a term of years and the State supported the victim's request, Petitioner believed that the State had breached the plea agreement. App. 137, ll. 1-13. Petitioner testified that he would not have pled guilty and would have gone to trial had he known that the State and the victim's family would be allowed to speak during the plea. App. 113, ll. 8- 10.

Counsel Bailey testified that he met with Petitioner at least five times during the five months that he represented Petitioner. During those meetings Petitioner was always focused on entering a guilty plea. He testified that they rarely discussed the facts of the case, although they did discuss that it was a self-defense case. Petitioner told Counsel Bailey that he wanted to plead to the original offer of manslaughter for fifteen years' incarceration but was also "fine with a straight-up plea" to manslaughter. App. 146, l. 1-App. 151, l. 4.

When asked if Petitioner understood the meaning of a straight-up plea with no recommendations, Counsel Bailey testified that they had discussed the plea and Petitioner understood the terms. App. 176, ll. 1-7. Notably, Counsel Bailey testified he thought it was improper that the State and family of the victim mentioned a definite term of years during a plea that was without recommendation. However, he did not think there was a way to control what the victim asked for during a plea. App. 177, ll. 14-23.

Counsel Bailey testified that while waiting for a plea offer Petitioner began stating that he would go to trial because the plea process was taking too long. App. 178, ll. 19-23; App. 183, ll. 4-24. Additionally, immediately following the guilty plea, Petitioner stated he should have gone to trial. App. 158, ll. 4-8. To prepare for the plea, Counsel Bailey reviewed the discovery, read the first trial transcript, and researched unavailable witnesses. He did not go out to the crime scene or hire a private investigator for the case. App. 155, ll. 18-24.

At the conclusion of the hearing, Judge J. Newman orally denied Petitioner's PCR application, finding there was not breach of the plea agreement. Further, to the extent that the facts could be construed to support a breach of the plea agreement, Judge Newman found that Petitioner had to show some detrimental reliance on the agreement to receive relief. App. 194, ll. 9-22. An order of dismissal was filed on March 22, 2018. App. 205-216. The order of dismissal stated that neither the victim nor the solicitor's comments on sentencing were a breach of the plea agreement, as Petitioner had not proved that the solicitor had agreed to remain silent as to sentencing. Further, the order noted that even if such a promise had been made, the fact that the State supported the victim's request for a thirty-year sentence was not a recommendation. App. 211-212.

Counsel Waller failed to file a notice of appeal. On May 22, 2018, Petitioner filed a *pro se* motion² requesting an extension of time to file a Rule 59(e) SCRPC motion. In support of the extension, Petitioner argued that he had not received a copy of the order of dismissal until May 2, 2018, and his ability to respond was limited due to a state-wide institutional lockdown after the riot at Lee Correctional Institution. App. 214-217. Petitioner subsequently mailed a copy of a Rule 59(e) SCRPC motion dated August 7, 2018, to the Attorney General's office, however it does not appear the motion was ever properly filed. In the Rule 59(e) motion, Petitioner urged the PCR court alter or amend its order because it failed to address the claim that counsel was ineffective for failing to advise Petitioner of his right to proceed *pro se* and ensure a hearing was held on his motion to relieve counsel. App. 221-265.

² Petitioner also filed a *pro se* motion for a preliminary injunction against the administrative officials at Lieber Correctional on May 22, 2018, to lift the lock down so that he could access the law library. App. 218-220.

Counsel Waller filed a motion pursuant to Rule 60(b) SCRCF requesting the court grant relief from the order of dismissal issued on March 22, 2018. In requesting relief, Counsel Waller submitted that he had not been properly served with the order by the State. He stated he had been expecting a hard copy of the order but received an email from a member of the Clerk of Court's office with the dismissal order attached to it which he overlooked. App. 266-271. Judge Newman denied the motion pursuant to Rule 60(b) SCRCF on July 21, 2018. App. 272-273.

Petitioner filed a successive PCR application on September 20, 2018, alleging ineffective assistance of PCR Counsel Waller for failing to file an appeal of the denial of his first PCR application. App. 274-317. Petitioner sent an amended PCR application dated November 27, 2018, to the Attorney General's office, though it appears the document was not filed. App. 318-382. However, a second amended application was filed by Petitioner on March 5, 2019. App. 383-419. The State filed a return dated July 19, 2019. App. 420-428.

An evidentiary hearing was convened before the Honorable Roger E. Henderson on August 21, 2019. Petitioner was represented by Arthur Aiken. The State was represented by Lindsey McCallister. App. 429. At the start of the hearing, the State conceded Petitioner was entitled to belated review of the denial of his first PCR under *Austin*. Counsel Aiken informed the court that Petitioner agreed to the dismissal of the other claims against PCR counsel that he had alleged in his application. App. 433, l. 17-App. 434, l. 18.

A consent order granting Petitioner belated review of the denial of his initial PCR application pursuant to *Austin* was filed on November 16, 2021. The order found that the parties agreed Petitioner did not voluntarily waive his right to appeal the denial of his initial PCR application, and this finding was supported by the testimony provided by Counsel Waller. App. 446-451.

ARGUMENT

The PCR court erred in finding plea counsel effective where counsel failed to object when the victim's family and the solicitor breached the plea agreement by recommending a specific term of years sentence when the plea agreement was without recommendation.

Counsel Bailey knew the plea agreement was without recommendation, yet he allowed the solicitor to misstate the plea agreement and did not object when both the victim's family and the solicitor recommended that Petitioner receive the maximum sentence for voluntary manslaughter. This was deficient performance, as defense counsel has a duty to ensure that the plea agreement from the solicitor's office is enforced. *See Jordan v. State*, 297 S.C. 52, 374 S.E.2d 683 (1988); *Thompson v. State*, 340 S.C. 112, 531 S.E.2d 294 (2000). Additionally, the PCR court applied the wrong standard in analyzing whether Petitioner suffered prejudice. Instead of determining whether Petitioner would have proceeded to trial, the PCR court found that Petitioner had failed to show any detrimental reliance on the plea agreement and therefore could not meet his burden of proving prejudice.

This Court has consistently held that counsel has a duty to ensure the plea offer is enforced. In *Jordan v. State, supra*, the defendant had repeatedly asserted to his counsel that he wanted to proceed to trial and would only accept a plea deal if the solicitor recommended probation. *Jordan* at 53, 374 S.E.2d at 684. Defense counsel was able to negotiate a deal with a particular solicitor that if the defendant pled guilty, she would neither recommend nor oppose probation. *Id.* Jordan accepted the terms of the agreement. *Id.* At the plea hearing, a different solicitor appeared on behalf of the state and vigorously opposed probation. *Id.* Defense counsel did not move to withdraw Jordan's plea nor did he point out to the judge that the solicitor had altered the terms of the plea agreement. *Id.*

Jordan was sentenced to imprisonment for ten years, suspended upon the service of three years and five years on probation. *Id.* at 52, 374 S.E.2d at 648. This Court held that defense counsel’s conduct in failing to protect Jordan’s right to enforce the original plea agreement fell below the prevailing professional norms as required by *Strickland*, 466 U.S. 668 (1984). Further, this Court held that, based on the “original vehemence” of Jordan in wanting to pursue his right to a jury trial, there was a “reasonable probability that but for the fact that Jordan’s attorney failed to object to the continuation of the guilty plea proceeding once the solicitor reneged on the plea-bargaining agreement, that Jordan would not have pleaded guilty, but would have insisted on going to trial.” *Jordan* at 54–55, 374 S.E.2d 683, 684–85 (1988).

Likewise, in *Thompson v. State*, *supra*, this Court found trial counsel ineffective where counsel failed to object when the solicitor recommended that the trial judge impose the maximum sentence in violation of the plea agreement. *Thompson*, at 115, 531 S.E.2d at 296. Pursuant to the agreement, the solicitor was not supposed to make any recommendation as to sentencing. *Id.* at 116, 531 S.E.2d at 296. However, during the plea hearing, the solicitor requested that Thompson received the thirty year maximum for voluntary manslaughter and Thompson’s counsel failed to object. The PCR court ruled that Thompson’s counsel’s conduct fell below prevailing professional norms. However, the PCR court found Thompson was not prejudiced because Thompson had been adequately informed of the twenty to thirty-year sentencing range. *Id.*

In overturning the PCR court and analyzing the prejudice to Thompson, this Court stated that,

[T]he fact that the judge sentenced Thompson within the range is irrelevant. **To establish prejudice, the proper analysis is to determine whether there was a reasonable probability that, but for counsel's unprofessional errors, the defendant would**

not have pled guilty and would have insisted on going to trial.
See Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203
(1985).

Id. at 116, 531 S.E.2d at 297 (emphasis added). This Court found that, even though Thompson did not explicitly testify that he would have gone to trial if he had known the solicitor was going to make a recommendation, he did testify that he would not have pled guilty if he had known he could have received a sentence of more than twenty years. This was found to be enough evidence to demonstrate a reasonable probability that Thompson would not have pled guilty but for his attorney's deficient performance in failing to object when the solicitor reneged on the plea agreement and recommended the maximum sentence. *Id.* at 117, 531 S.E.2d at 297.

Petitioner's case is on all fours with *Jordan* and *Thompson*. Both Counsel Bailey and Petitioner testified that the plea offer was a straight-up plea to voluntary manslaughter with no recommendations. Despite that understanding, Counsel Bailey did not object when the solicitor misstated the plea agreement at the start of the plea hearing. Further, he did not object when the victim's family requested the maximum sentence nor when the solicitor requested that the court follow the victim's family's wishes. Notably, in his testimony during the PCR hearing, Counsel Bailey admitted that the actions of the solicitor and victim were improper, yet he offered no reason for failing to object to the sentencing recommendation. App. 177, ll. 14-23. The failure to object and move to enforce the plea agreement was deficient performance that resulted in prejudice to Petitioner.

The standard, as has been repeatedly set forth in both our state and federal jurisprudence, is whether there was a reasonable probability that, but for counsel's unprofessional errors, the defendant would not have pled guilty and would have insisted on going to trial. *See Hill v. Lockhart*, 474 U.S. 52 (1985). The PCR court found that even if the plea agreement had been

breached Petitioner could not show prejudice because he could not prove detrimental reliance upon the original plea offer. The order of dismissal stated,

Even assuming that the promise was made, there has been no real breach of that agreement or negative effective to Applicant. Instead, the victim's mother made a sentencing recommendation. While that recommendation was repeated by the prosecutor, she also subsequently said, "Whatever sentence you feel like would be appropriate, Your Honor," which is not a sentencing recommendation at all. Further, all of this discussion occurred *before* the court accepted Applicant's guilty plea. It is clear that, subsequent to those comments, Applicant had a number of opportunities to withdraw his guilty plea.

App. 211-212 (emphasis in original). This analysis of prejudice was entirely improper.

That Petitioner did not show detrimental reliance on the plea agreement or did not attempt to withdraw his plea were irrelevant factors. Petitioner testified unequivocally that he would have gone to trial if he had known the solicitor and the victim's family were going to speak during the plea. App. 113, ll. 8- 10. Counsel Bailey testified that the first thing Petitioner said to him after the plea was that he should have gone to trial. App. 158, ll. 4-8. Counsel Bailey also stated that Petitioner stated he would go to trial, and that he thought he could win the case because he acted in self-defense. App. 183, ll. 18-21. Under the standard set forth in *Hill*, Petitioner has met his burden of proving prejudice.

Additionally, Petitioner was prejudiced because the court specifically stated that if the victim's family had not spoken, he might have been swayed to Petitioner's request for a lesser sentence. App. 56, ll. 6-20. As the United States Supreme Court stated in Lafler v. Cooper, 566 U.S. 156, 165 (2012), "ineffective assistance of counsel during a sentencing hearing can result in Strickland prejudice because **any amount of additional jail time has Sixth Amendment significance**," (internal quotations and alterations omitted) (quoting Glover v. United States, 531 U.S. 198, 203 (2001)) (emphasis added). By the plea judge's own admission, the victim's family speaking about sentencing directly impacted Petitioner's sentence. That likely led to

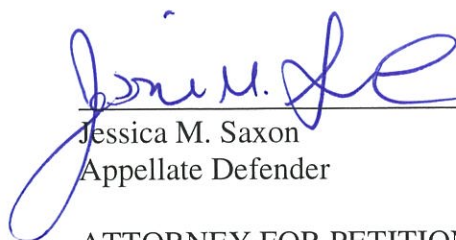
Petitioner receiving a lengthier sentence than if the no recommendation portion of the plea agreement had been enforced.

Finally, the argument that the solicitor did not make a recommendation is rebutted by the record. The solicitor said that it was the State's desire that the court follow the victim's mother's request to impose a thirty-year sentence. The solicitor also stated that even if the court were to impose the thirty year maximum, it would still be less time than Petitioner would have served on the original sentence. App. 23, ll. 1-20. The solicitor made it clear to the court that the State felt a thirty-year sentence was proper in this case.

Counsel Bailey had a duty to ensure the original plea agreement was enforced. That agreement was testified to and accepted as a straight up plea to voluntary manslaughter with no recommendation. No recommendation meant the State was to stand silent on a term of years and let the court decide the sentence without additional input from the solicitor or the victim's family. When the plea agreement was breached, Counsel Bailey failed to object. Under *Jordan* and *Thompson, supra*, this was deficient performance that resulted in prejudice.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.



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Appellate Defender
ATTORNEY FOR PETITIONER

This 29th day of June, 2022.