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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Newberry County

Honorable R. Kirk Griffin, Circuit Court Judge

BENNIE D. MITCHELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000258

JOHNSON PETITION FOR WRIT OF CERTIORARI

JOANNA K. DELANY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Whether the PCR court erred in finding counsel provided effective representation where Petitioner rejected a favorable plea offer based on counsel's erroneous advice that counsel had valid defense strategy at trial?

STATEMENT

Stephen Potts, Complainant, suffered several thefts in and around his Newberry home. On or about October 18, 2008, someone came into his home and took liquor and beer. Complainant put a motion-activated deer camera on his kitchen refrigerator to try and catch the person. App. 86, ll. 4-7; App. 98, l. 8 – 99, l. 12; App. 108, ll. 4-6; App. 114, ll. 3-23.

On October 28, 2008, Complainant arrived home around 1:00 a.m. and saw that someone had tampered with his window, so he checked his deer camera and saw that it had captured photographs of a stranger in his kitchen. App. 84, l. 5 – 86, l. 3. Several cans of beer and some change had been stolen. App. 105, l. 22 – 106, l. 13. Complainant did not recognize the man in the deer camera photographs and he could not identify the man as Petitioner. App. 104, ll. 1-3.

Complainant made a digital copy of the photographs and gave them to the police. App. 155, l. 14 – 156, l. 8. Lieutenant McClurkin, who had lived in Newberry for over 20 years, recognized the man in the photographs as Petitioner. App. 156, l. 6 – 157, l. 12. Petitioner lived two-tenths of a mile from Complainant. App. 160, ll. 1-3.

Petitioner was indicted by a Newberry County Grand Jury during the January 2009 term, for first-degree burglary and possession of burglary tools. App. 756 – 757; App. 759 – 760. Petitioner was also indicted for petit larceny. App. 5, ll. 2-13. The State made Petitioner a plea offer of 15 years. It appears the offer was a negotiated fifteen-year term of imprisonment for first-degree burglary, with the remaining charges being dismissed by *nolle prosequi*. App. 731, l. 17 – 733, l. 2. This was a favorable plea offer since Petitioner faced the possibility of life

imprisonment plus additional terms if convicted at trial.[1] However, Petitioner would later explain his lawyer convinced him to reject the offer. App. 699, ll. 17-23.

Petitioner proceeded to trial before the Honorable D. Garrison Hill and a jury, on April 19, 2010. Petitioner was represented by Mathias Chaplin. Austin McDaniel prosecuted the case. App. 1. Defense counsel objected to Lt. McClurkin's testimony that he recognized Petitioner from the deer camera pictures pursuant to *State v. Herring*, 387 S.C. 201, 692 S.E.2d 490 (2009), but the judge ruled the evidence was admissible. App. 28, l. 23 – 44, l. 24. Lt. McClurkin told the jury he recognized the man in the deer camera photographs as Petitioner, and the jury focused on the photographs in its deliberations. App. 156, l. 2 – 157, l. 15; App. 231, l. 5 – 234, l. 4.

Although the jury deliberated for close to two hours, it convicted Petitioner of first-degree burglary and possession of burglary tools, and acquitted him of petit larceny. App. 233, l. 22 – 235, l. 5. Petitioner was sentenced to serve concurrent terms of imprisonment of twenty years and five years, respectively. App. 240, ll. 19-23; App. 758; App. 761. Counsel filed post-trial motions for a new trial and a reconsideration of the sentence on April 30, 2010. App. 243 – 250. On May 7, 2010, the trial court denied the motions. App. 251.

After his convictions were affirmed on direct appeal, Petitioner filed an application for post-conviction relief (PCR), which he later amended.[2] App. 598 – 669; App. 677 – 679. The

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[1] *See* S.C. Code Ann. § 16-11-311 (first-degree burglary is punishable by life imprisonment and the court may sentence a defendant to a term of not less than fifteen years); S.C. Code Ann. § 16-11-20 (person convicted of possession of burglary tools may be imprisoned not more than five years); S.C. Code Ann. § 16-13-30 (person convicted of petit larceny may be imprisoned not more than thirty days).

[2] Two of Petitioner's PCR claims involved facts that were not reflected in the original trial transcript. *See* App. 748 – 751. The court reporter produced a second transcription of the trial which included some minor additions but did not include all of the conduct and language Petitioner alleged occurred at trial. *Compare* App. 1 – 242, *with* App. 356 – 596. (For example, the first transcription did not reflect that Complainant's girlfriend and Lt. McClurkin were

State made its return. App. 670 – 676. On October 26, 2021, a hearing was held on the matter before the Honorable R. Kirk Griffin via WebEx. Ashley McMahan represented Petitioner. Michael Neubauer represented the State. App. 680.

Petitioner explained counsel "pressured" him to reject the "plea offer to 15 years when I was guilty and would have accepted the plea . . . But counsel stated that he had a Supreme Court case, the *Herring* case, that said the police cannot even give an opinion who they think is in the image." App. 696, l. 24 – 697, l. 6. Petitioner said he "absolutely" would have taken the plea offer if counsel had not convinced him he had a "valid defensive strategy." App. 699, ll. 17-23. "If I had knew that I didn't have a . . . valid strategy going to trial, I would not have went to trial." App. 708, ll. 3-4.

Defense counsel claimed that he did not try to talk Petitioner out of pleading guilty and convince him to go to trial. App. 720, ll. 20-23. According to defense counsel, Petitioner "never wanted to do the plea offer when I represented him in this matter." App. 719, ll. 24-25.

On February 16, 2022, the PCR court issued an order of dismissal. App. 743 – 755. The order of dismissal addressed Petitioner's claim regarding the plea offer. App. 752 – 754. The order concluded that,

> Applicant has failed to demonstrate how Counsel was ineffective for conveying a fifteen-year plea offer. Applicant admitted that he was aware of the fifteen-year plea offer prior to his plea, however, Applicant asserts that Counsel talked him out of accepting a plea offer by convincing Applicant that they had a high chance of success at trial. Counsel testified he spoke with Applicant at length regarding his case, and conveyed all plea offers to Applicant. Counsel testified at no point did Applicant say he wanted to plead

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introduced to potential jurors during jury selection while the second transcription reflected that they were so introduced. *See* App. 54, ll. 1-5; App. 409, ll. 1-5.) Testimony at the PCR hearing referred to the transcription discrepancies, so undersigned counsel has included both the original trial transcript and the second trial transcript in the Appendix to ensure compliance with Rule 243(f), SCACR.

> guilty instead of proceeding to trial. Counsel testified Applicant's focus was on making the State prove that Applicant was the individual pictured inside Mr. Potts' house. Though Applicant now claims he would have plead guilty instead of going to trial if not for counsel's performance, this Court finds Counsel was not deficient in his representation of Applicant, and Applicant cannot demonstrate how he was prejudiced by Counsels performance."

App. 754.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding counsel provided effective representation where Petitioner rejected a favorable plea offer based on counsel's erroneous advice that counsel had a valid defense strategy at trial.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms, and the deficient performance prejudiced petitioner. *Id.* at 687. "[T]he Sixth Amendment protects criminal defendants against ineffective assistance of counsel during the plea bargaining process, even if the plea offered ultimately is rejected." *Judge v. State*, 321 S.C. 554, 560, 471 S.E.2d 146, 149 (1996) (*overruled on other grounds by Jackson v. State*, 342 S.C. 95, 535 S.E.2d 926 (2000)).

A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). Defense counsel's failure to convey a plea offer constitutes deficient performance. *Davie v. State*, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009) (*overruled on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018)). "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Bell v. State*, 410 S.C. 436, 441, 765 S.E.2d 4, 6 (Ct. App. 2014) (quoting *Missouri v. Frye*, 566 U.S. 134, 145 (2012)).

Counsel's performance was deficient here. The State extended a favorable fifteen-year plea offer to Petitioner. Counsel conveyed the plea offer to Petitioner. However, counsel claimed

Petitioner maintained he wanted a trial, while Petitioner explained he rejected the offer because counsel convinced him he would be successful at trial. The PCR court did not find Petitioner's testimony on this point was not credible. Although counsel did convey the offer, he should have also advised Petitioner to accept it. Counsel's failure to advise Petitioner he should accept the favorable plea offer was deficient performance.[3]

The PCR court should have granted Petitioner a new sentencing hearing. Where an applicant did not detrimentally rely on a plea offer because the offer was not conveyed due to counsel's deficient performance, the appropriate remedy is a new sentencing hearing. *Davie v. State*, 381 S.C. at 615-16, 675 S.E.2d at 424 (*overruled on other grounds by Smalls v. State, supra*). *See also Bell v. State*, 410 S.C. 436, 439-40, 765 S.E.2d 4, 6 (Ct. App. 2014) (affirming PCR court's ruling that vacated Bell's twenty-year sentence and remanded the matter for a resentencing hearing on the plea offer of ten years).

Because Petitioner would have accepted the offer had counsel not convinced Petitioner of his likely success at trial, Petitioner has demonstrated prejudice. "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." *Missouri v. Frye*, 566 U.S. at 147. "Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." *Id.*

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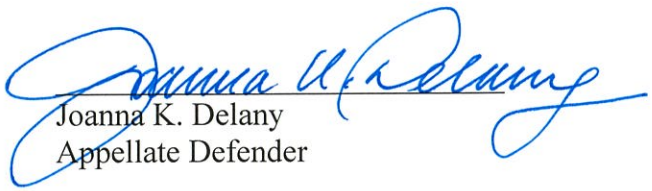
[3] *Contra Judge v. State*, 321 S.C. at 561, 471 S.E.2d at 150 (*overruled on other grounds by Jackson v. State, supra*) ("counsel's advice to reject a plea agreement does not fall below the reasonably effective assistance standard simply because, in hindsight, the advice was wrong or the attorney's trial tactics backfired.")

"To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id. See also Davie v. State*, 381 S.C. at 614, 675 S.E.2d at 423 (*overruled on other grounds by Smalls v. State, supra*) (counsel was ineffective in failing to communicate State's initial fifteen-year plea offer and petitioner was prejudiced because he would have accepted the offer; the difference in the sentence petitioner received and the plea offer is proof of prejudice). Petitioner testified he would have accepted the fifteen-year plea offer had counsel correctly advised him on his likelihood of success at trial. No reason appears in the record that would have caused the State to withdraw the offer or the court to refuse to accept it. The sentence Petitioner would have received pursuant to the plea offer was significantly less than the sentence he received at trial. Therefore, Petitioner has demonstrated prejudice per *Strickland v. Washington*, 466 U.S. at 687.

CONCLUSION

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



Joanna K. Delany
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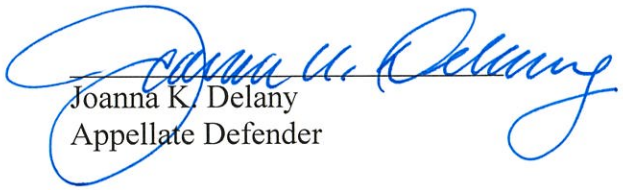
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Bennie D. Mitchell states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge R. Kirk Griffin, which was held on October 26, 2021, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Bennie D. Mitchell.

Respectfully Submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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