RECEIVED
Sep 28 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Abbeville County

Honorable L. Casey Manning, Circuit Court Judge

KEITH DENVER TATE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-000496

BRIEF OF PETITIONER

LARA M. CAUDY
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

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUE PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 4

STANDARD OF REVIEW 13

ARGUMENT

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when he failed to communicate a favorable six year plea offer to Petitioner before the offer was withdrawn, and where counsel's deficient performance prejudiced Petitioner since (1) he was ultimately sentenced to sixteen years and (2) there is a reasonable probability Petitioner would have accepted the offer had he known about the offer before it was withdrawn, the state would have honored the offer, and the trial judge would have accepted the terms. 14

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) 14, 15, 18

Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000) 15

Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996) 14

Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010) 17

Lafler v. Cooper, 566 U.S. 156 (2012) 16

Missouri v. Frye, 566 U.S. 134 (2012) 14, 15, 16

North Carolina v. Alford, 400 U.S. 25 (1970) 10

Padilla v. Kentucky, 559 U.S. 356 (2010) 14

Sellner v. State, 416 S.C. 606, 787 S.E.2d 525 (2016) 13

Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) 13

Strickland v. Washington, 466 U.S. 668 (1984) 14

Statutes

S.C. Code Ann. § 16-3-655(B) 11

ISSUE PRESENTED

Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when he failed to communicate a favorable six year plea offer to Petitioner before the offer was withdrawn, and where counsel's deficient performance prejudiced Petitioner since (1) he was ultimately sentenced to sixteen years and (2) there is a reasonable probability Petitioner would have accepted the offer had he known about the offer before it was withdrawn, the state would have honored the offer, and the trial judge would have accepted the terms?

STATEMENT OF THE CASE

An Abbeville County Grand Jury indicted Petitioner on February 4, 2011 for nine counts of criminal sexual conduct (CSC) with a minor in the second degree. App. 765-782. His case was called to trial on May 27, 2014 before the Honorable Donald B. Hocker, and a jury. App. 1. Assistant Solicitors C. Yates Brown and Lance Sheek represented the state. App. 1. Janna Nelson Gregory and Shane Goranson represented Petitioner. App. 1. After a three day trial, the jury acquitted Petitioner of eight of the nine counts of second degree CSC with a minor, but found him guilty of the remaining count. App. 427, l. 1 – 428, l. 7. Judge Hocker sentenced Petitioner to sixteen years' imprisonment. App. 446, ll. 20-22.

On June 5, 2014, Petitioner filed a motion for new trial. App. 449-453. A hearing on Petitioner's motion was held on July 15, 2014 before Judge Hocker. App. 454. Judge Hocker denied the motion by written order filed July 23, 2014. App. 466.

This Court affirmed Petitioner's conviction and sentence. State v. Tate, 2016-UP-436 (S.C. Ct. App. Refiled December 14, 2016); App. 547-550. By order dated October 19, 2017, the Supreme Court denied Petitioner's petition for writ of certiorari. App. 655.

On February 28, 2018, Petitioner filed an application for post-conviction relief (PCR) raising the claim argued in this brief. App. 656-662. The state filed a return to this petition dated June 11, 2018. App. 667-678. With the assistance of counsel, Petitioner filed an amended application dated September 27, 2019, again raising the claim argued in this brief. App. 679-680. An evidentiary hearing was convened on October 14, 2019 before the Honorable L. Casey Manning. App. 681. Assistant Attorney General Janell Gregory represented the state. App. 681. Ashley McMahan represented Petitioner. App. 681. By order filed March 16, 2020, Judge Manning denied Petitioner relief. App. 747-764.

On November 9, 2020, Petitioner filed a petition for writ of certiorari with the Supreme Court. The state filed a return to this petition on March 31, 2021. By order filed April 19, 2021, the Supreme Court transferred this appeal to the Court of Appeals pursuant to Rule 243(l), SCACR. By order filed August 22, 2022, this Court granted the petition for writ of certiorari and ordered further briefing pursuant to Rule 243(j), SCACR.

This brief of petitioner follows.

STATEMENT OF FACTS

Petitioner and Minor's mother were involved in a romantic relationship and had a child in common. In 2009 and 2010, Petitioner and Minor's mother lived in an apartment in Calhoun Falls. Minor and her two brothers, one of whom was Petitioner's son, lived in the apartment as well. App. 72, l, 1 – 74, l. 16; App. 132, l. 17 – 133, l. 2. The apartment had three bedrooms, one bathroom, a living room, and a kitchen. App. 82, ll. 7-17; App. 322, ll. 5-9.

On March 23, 2010, twelve year old Minor began dating fifteen year old Terrance. Minor's mother did not approve of the relationship and would not let Minor talk to or visit Terrance at his home. App. 97, ll. 16-24; App. 111, l. 15 – 112, l. 17; App. 132, ll. 8-11; App. 168, ll. 7-17; App. 224, ll. 18-24. On August 14 and 15, 2010, Minor received three photographs of Terrance on her phone. The photographs showed Terrance completely nude and with an erect penis. Shortly thereafter, Petitioner and Minor's mother discovered the photographs. Unsurprisingly, they were very concerned and punished Minor. They also informed Terrance's parents of the photographs. App. 99, ll. 9-13; App. 100, l. 11 – App. 104, l. 13; App. 105, l. 11 – 108, l. 24; App. 225, l. 10 – 226, l. 7; App. 312, l. 11 – 313, l. 18.

Less than ten days later, on August 23, 2010, Minor told her band director, Rebecca Holland, that Petitioner had sexually assaulted her ten times. App. 170, ll. 15-23; App. 226, ll. 13-17; App. 232, ll. 13-24; App. 233, ll. 5-23. "[B]ecause it was so late in the afternoon, there were no people at the school" for Holland to make a report. Therefore, she decided she would address the matter the following day at school. App. 233, l. 25 – 234, l. 5; App. 236, ll. 17-20. Holland drove Minor home from school every day because she lived nearby. That evening, Holland took Minor home, where Petitioner lived, as usual. App. 236, ll. 10-13. Holland claimed Minor would cry on the way to her house, but Holland never inquired as to why. Minor would ask not to go home.

Holland also claimed she would see Petitioner waiting for Minor and he would grab Minor by the arm when she arrived home. App. 234, l. 23 – 235, l. 20; App. 236, ll. 14-16. Subsequently on August 25, 2010, Holland informed Lori Lindler, the school's guidance counselor and the assistant principal, about the allegations. App. 170, l. 24 – App. 171, l. 7; App. 235, ll. 21-23; App. 247, ll. 6-16. Lindler contacted the police. App. 171, ll. 8-10; App. 249, ll. 23-24.

Lindler sat down at school with Minor to review the details of her allegations. During their meeting, the two used a school calendar to arrive at ten dates when Petitioner allegedly assaulted Minor, including August 26, 2009, October 31, 2009, December 14, 2009, December 26, 2009, February 6, 2010, February 13, 2010, March 3, 2010, March 14, 2010, March 15, 2010, and March 18, 2010.[1] App. 141, l. 18 – 142, l. 10; App. 142, l. 18 – 143, l. 16; App. 164, ll. 21-25; App. 227, l. 16 – App. 228, l. 3; App. 248, l. 7 – 249, l. 1.[2] Although Minor told Lindler about sexual abuse, she never claimed any type of physical abuse occurred. App. 251, ll. 8-17. The day after Minor talked to the school officials and police officers, her mother took her to the hospital. App. 173, ll. 21-24. Minor also met with a lady at The Child's Place on September 28, 2010. App. 174, ll. 6-13; App. 328, ll. 21-25. Months later, in November 2010, Minor was examined by Dr. Lyle Pritchard. App. 175, ll. 7-18; App. 291, ll. 3-11.

Initially, Minor claimed that on each of the occasions, Petitioner penetrated her vagina with his penis. App. 142, ll. 14-17. However, later, Minor claimed vaginal penetration during every

---

[1] Minor told the nurse that she could remember the dates because she wrote about it in her diary. However, her diary did not contain entries for each of the encounters and did not contain details about the abuse. Instead, the diary contained poetry about her feelings. App. 187, ll. 2-10.

[2] Despite the dates testified to at trial, the warrants and incident report differed to some degree. For example, the first incident was alleged to have occurred on August 29, 2009, not August 26, 2009 and another incident allegedly occurred on February 14, 2010, not February 13, 2010. App. 270, ll. 9-14; App. 273, ll. 15-21. Initially, Minor said that all ten incidents occurred in Calhoun Falls. However, immediately before trial, she changed her story to say the incident on December 26, 2009 occurred in Greenville County. App. 169, ll. 1-14; App. 271, ll. 2-12.

encounter except the last one. On that date, she alleged Petitioner put his penis in her mouth. App. 151, ll. 10-18. She also changed her story to say that she recalled Petitioner putting his penis in her "butt hole." App. 151, ll. 19-21. Minor testified that she bled the first time Petitioner penetrated her vagina and when he penetrated her anus. App. 151, l. 24 – 152, l. 2.

Concerning the first alleged assault, Minor claimed this occurred at home while her mother and brothers were there. Minor claimed Petitioner assaulted her in the living room on the couch. During her testimony, Minor claimed Petitioner asked to see the sizes of her bra and panties. Then, he started kissing her and rubbing her. Petitioner then removed her clothes and penetrated her vagina with his penis. App. 145, ll. 17-24; App. 146, ll. 4-6; App. 146, l. 10 – 147, l. 11; App. 150, ll. 1-8. Minor previously said that during the first alleged encounter, Petitioner threw her on the couch and hit her in the face with his fist. App. 202, ll. 20-25; App. 344, l. 4 – 345, l. 7. She also claimed that she screamed during this attack. App. 203, ll. 8-10. She claimed there was blood everywhere. App. 203, ll. 11-12.

Regarding the second alleged assault, Minor testified there was a football game on October 30, 2009.[3] App. 189, ll. 22-24; App. 191, ll. 4-8. Minor did not recall saying that Petitioner "stuck it up [her] butt" that time, but she remembered that she screamed and Petitioner hit her busting her lip. App. 191, ll. 9-14. Previously, Minor had stated Petitioner "stuck it up her butt." App. 345, ll. 19-21. The next morning, Minor woke up on the couch in the living room to an empty house. Her shorts were up, but her underwear was down. Her shirt was on a lamp. App. 194, ll. 1-21; App. 346, ll. 16-24; App. 348, l. 14 – 349, l. 3. She admitted that anyone who left the apartment would have had to walk right by her in her disheveled state. App. 195, ll. 23-25. Although the following

[3] Minor claimed the football game on October 30, 2009 was a home game. However, a school calendar showed the game was away in Twiggs County, Georgia. App. 197, l. 9 – 198, l. 1. Then, Minor changed her story to say it may have been after a Junior Varsity football game. App. 198, ll. 11-16.

morning would have been a Saturday based on the date, Minor told the interviewer that she had missed her ride to school that day and her mother had to give her a ride. She also told the interviewer that her brothers were gone because their bus arrived at 7:00 a.m. App. 347, ll. 1-8.

Regarding the last incident, Minor claimed that Petitioner put her on the couch, took out his penis, and placed it in her mouth. She bit his penis and he started screaming. She then ran to her room and placed her dresser in front of the door. App. 208, l. 22 – 209, l. 16.

Minor's mother never saw or heard anything that made her suspect any kind of sexual abuse. App. 80, ll. 18-21. Minor's mother never heard any screaming in the house. App. 81, ll. 22-24.

Supposedly, Minor told Terrance, her fifteen year old boyfriend, that Petitioner had sexually assaulted her months before he told his mother about the alleged abuse on August 26, 2010. Terrance's mother told the school counselor, Lindler. App. 116, ll. 9-25; App. 121, l. 18 – 122, l. 4; App. 136, l. 23 – 137, l. 1; App. 141, ll. 5-19; App. 169, ll. 17-23; App. 247, ll. 17-21. According to Terrance, Minor claimed that during the first assault "he went through her anal and she screamed" then he stopped and "went through the front." Minor told Terrance that her brother walked in during the assault. When Minor told her brother to get her mother, Petitioner told him no, whipped the brother, and slapped Minor. Thereafter, Minor "passed out and woke up in a tub full of bloody water." App. 117, l. 4 – 118, l. 16.[4] Minor told Terrance that during the most recent assault, Petitioner "walked in her room one night and snatched his pants down and hers." App. 119, l. 13 – 120, l. 2. One night while Petitioner was assaulting Minor, Terrance sent a text message to Minor's phone. The phone was in the bedroom with Minor's mother and the text message indication woke

---

[4] Minor denied that her brother ever walked in on one of the alleged sexual assaults. App. 215, ll. 15-19. However, Minor agreed that she passed out and woke up in a tub full of bloody water. App. 215, ll. 20-22; App. 216, ll. 12-20. Minor told Holland that she woke up in bloody water ten times, after each incident. App. 239, ll. 10-18.

Minor's mother. When this happened, Petitioner stopped the alleged assault. App. 120, ll. 3-13.[5] Minor told Terrance that "one night when she was asleep [Petitioner] put his private part in her mouth and she bit it." Petitioner "got mad and grounded her." Minor claimed that Petitioner would not stop the abuse even if she were bleeding. She further claimed "that blood was on the sheets, and it was coming out quick, but he wouldn't stop." App. 120, l. 17 – 121, l. 3.

The jury ultimately acquitted Petitioner of eight of the nine counts of second degree CSC with a minor, but found him guilty of the remaining count. App. 427, l. 1 – 428, l. 7. Petitioner was sentenced to sixteen years' imprisonment. App. 446, ll. 20-22.

Charles Grose, who was then the Eighth Circuit Public Defender, initially represented Petitioner from the date of his arrest until August 2012 when Grose left the Public Defender's Office and went into private practice. App. 687, l. 5 – 688, l. 2. On February 9, 2011, days after Petitioner was indicted on these charges, then Assistant Solicitor Patricia Bolen, who was originally assigned to prosecute the case, emailed Grose and offered to allow Petitioner to plead guilty with a sentence recommendation of a "cap" of six years. App. 746. Grose immediately responded that he would "not be in a position to discuss resolving this case until we get all the evidence examined." App. 746.

After Charles Grose left the Public Defender's Office, Janna Nelson, now known as Janna Gregory, "inherited" Petitioner's case. App. 718, ll. 7-12. Petitioner did not learn that Grose had left the office and that Gregory was his new attorney until he contacted the Public Defender's Office in early 2014 after he applied for a job and "had a red flag" due to his pending charges. App. 697, ll. 5-11. Petitioner thought the charges had been dropped since he had not heard anything about the case in years. App. 697, ll. 15-20.

---

[5] Minor denied this occurred. App. 223, ll. 17-24; App. 224, ll. 8-11.

Petitioner set up an appointment to meet with Janna Gregory. App. 697, ll. 21-25. During their first meeting, Gregory asked Petitioner about the previous offer of a "cap" of six years extended by then Assistant Solicitor Bolen, who by this time was no longer with the Solicitor's Office. This was the first time Petitioner heard of the six year offer. App. 742, ll. 17-20. Petitioner testified at the evidentiary hearing that Charles Grose never communicated this offer to him. App. 698, ll. 1-8; App. 742, ll. 13-16. He asserted, "[I]f they [the state] had offered me the six years from the beginning or offered me a plea deal period from the beginning, I would [have] accepted it." App. 703, ll. 2-4. Petitioner made clear that if the six year offer was still on the table when he learned about it, he would have accepted the offer and pled guilty. He exclaimed, "I would [have taken] the six years." App. 703, ll. 13-22.

Charles Grose testified that he had "no recollection" regarding whether he had communicated the six year offer to Petitioner nor did he have any records in his file indicating he had done so. Grose explained, "When I was looking through the file materials, I was looking for either a written note where I . . . noted that I had discussed it [the offer] with him [Petitioner]. I was looking for a letter that it [the offer] might have been conveyed to him or I was looking for communications with the Solicitor's Office that would have indicated that . . . we [Petitioner and Grose] had discussed it [the offer], and taken a position, and I did not find any of those." App. 690, l. 20 – 691, l. 7.

Grose testified that it was his typical practice to communicate offers to clients. However, it was also his typical practice to record that he had communicated any such offers and the absence of any record indicating he had communicated the six year offer to Petitioner was "concerning to [him]." App. 692, l. 21 – 693, l. 1; App. 694, ll. 20-25.

Janna Gregory testified that she learned of the six year offer extended by then Assistant Solicitor Bolen when she was reviewing the file before her first meeting with Petitioner in early 2014 after he called to complain that his pending charges were interfering with him obtaining employment. App. 711, l. 8 – 712, l. 8. When Gregory mentioned the offer to Petitioner, he told her it was the first he had heard of it. App. 712, ll. 9-12.

Gregory brought the six year offer to the attention of Assistant Solicitor Lance Sheek, who was assigned to prosecute the case after Patricia Bolen left the Solicitor's Office. Gregory told Sheek that she "had found the offer in the file" and "asked if he would honor that offer." App. 712, l. 13 – 713, l. 10. Sheek originally stated through email that he would speak with the complainant and her family to see if they would be agreeable with the state offering to recommend a sentence of ten years if Petitioner pled guilty. App. 712, l. 23 – 713, l. 10. However, about an hour and fifteen minutes later, Sheek emailed Gregory again stating he had discussed the case with the circuit solicitor and he would be willing to dismiss nine counts if Petitioner pled guilty "straight up" to one count.[6] App. 713, ll. 11-17. Gregory and Sheek further discussed whether the plea "could be an Alford[7] plea" since Petitioner consistently maintained his innocence. Sheek had no "opposition" to an Alford plea. App. 713, ll. 17-20; App. 714, ll. 8-20.

Gregory testified that she saw no "benefit" to Petitioner by accepting the offer to plead guilty "straight up" to one count. In her opinion, it was unlikely that a trial judge would sentence Petitioner to consecutive time if he was found guilty at trial of all ten counts. Therefore, whether he

---

[6] Petitioner was originally indicted for ten counts of second degree CSC with a minor. However, he was only tried for nine counts after the complainant remembered shortly before trial that one of the alleged events occurred in a different county.

[7] North Carolina v. Alford, 400 U.S. 25 (1970).

pled guilty to one count or was convicted at trial of multiple counts, Petitioner was facing the same amount of time: twenty years.[8] App. 722, l. 18 – 724, l. 1.

Lance Sheek, the assistant solicitor who ultimately prosecuted the case, testified that he "inherited" Petitioner's case in 2013. He initially was unaware of the six year offer extended to Petitioner by Patricia Bolen. He first learned of the offer from Janna Gregory. App. 728, ll. 2-13. Sheek made clear to Gregory that the six year offer was no longer on the table. He originally offered to recommend a sentence of ten years if the complainant and her family were amendable. However, he quickly changed his mind and told Gregory that he would be willing to dismiss nine counts if Petitioner pled "straight up" to one count. App. 730, l. 13 – 731, l. 11.

Sheek asserted that while it was the Solicitor's Office's "general policy" not to "allow Alford pleas in sexual assault cases," he was "willing to" in this case. App. 737, ll. 2-5. Furthermore, Sheek admitted that if he had been told at the time that Grose never communicated the six year offer to Petitioner, "it may have made a difference to me." He testified, "If they [the defense] had come to me and said we failed to do something we're supposed to do, our bad to use your language, I would of certainly considered it [reextending the six year offer]. I mean it would not have been my desire to, to put an attorney in a bad [position]." App. 738, l. 10 – 739, l. 11.

By order filed March 16, 2020, the PCR judge denied Petitioner relief. App. 747-764. The judge found Janna Gregory's testimony established that Petitioner would not have accepted Assistant Solicitor Patricia Bolen's offer to recommend a sentence of a "cap" of six years if Petitioner pled guilty because it was not an Alford plea. App. 760. The judge maintained that both Gregory and Sheek testified Petitioner "was maintaining his innocence and was not interested in any plea offer that was not an Alford plea." App. 760. The judge concluded Petitioner "failed to meet

[8] Second degree CSC with a minor carries up to twenty years imprisonment. See S.C. Code Ann. § 16-3-655(B).

his burden to show he would have accepted the original cap of six offer from Bolen as it was not an Alford plea and the credible testimony of Nelson [Gregory] and Sheek show [Petitioner] was only interested in an Alford plea as he was adamant about maintaining his innocence." App. 760.

STANDARD OF REVIEW

The standard of review in post-conviction relief (PCR) cases depends on the specific issue before the Court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). The Court reviews questions of law de novo, with no deference to trial courts. Id. at 180-181, 810 S.E.2d at 839-840 (citing Sellner, 416 S.C. at 610, 787 S.E.2d at 527).

ARGUMENT

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when he failed to communicate a favorable six year plea offer to Petitioner before the offer was withdrawn, and where counsel's deficient performance prejudiced Petitioner since (1) he was ultimately sentenced to sixteen years and (2) there is a reasonable probability Petitioner would have accepted the offer had he known about the offer before it was withdrawn, the state would have honored the offer, and the trial judge would have accepted the terms.

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). Our Supreme Court "has held that a defendant has the right to effective assistance of counsel during the plea bargaining process." Davie v. State, 381 S.C. 601, 607, 675 S.E.2d 416, 419 (2009) (citing Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), *overruled on other grounds by* Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000)). The United States Supreme Court has also "made clear that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." Missouri v. Frye, 566 U.S. 134, 141 (2012) (quoting Padilla v. Kentucky, 559 U.S. 356, 373 (2010)) (internal quotations admitted).

"The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." Frye, 566 U.S. at 143. "[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 favorable to the accused." Id. at 145.

To prevail on his claim of ineffective assistance of counsel, Petitioner is required to prove that (1) trial counsel's failure to communicate the state's plea offer constituted deficient performance, and (2) he was prejudiced by this deficient performance, *i.e.*, there is a reasonable probability that but for counsel's deficient performance, he would have accepted the original plea offer. Davie, 381 S.C. at 608, 675 S.E.2d at 420. Additionally, Petitioner must show actual prejudice. "However, it is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant's self-serving statement may be sufficient to establish actual prejudice." Id. at 613, 675 S.E.2d at 422 (citing Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000)).

In Davie, our Supreme Court held defense counsel's failure to convey the state's initial plea offer of fifteen years imprisonment to the defendant constituted deficient performance when the defendant later pled guilty and was sentenced to an aggregate amount of twenty-seven years imprisonment. 381 S.C. at 610, 675 S.E.2d at 421. The Court further held the defendant was prejudiced by defense counsel's deficient performance noting "that the difference in the sentence [the defendant] received and the plea offer is proof of prejudice." Finally, the Court determined that a new sentencing hearing was the proper form of relief for the defendant. Id. at 614, 675 S.E.2d at 423. This Court noted that there was no evidence in the record that the defendant expressed a desire to proceed to trial rather than plead guilty and, therefore, a remand for a new trial was not the proper remedy. Id. at 615, 675 S.E.2d at 423-424.

In Frye, which was decided after Davie, the United States Supreme Court found defense counsel ineffective when he failed to advise the defendant of a plea offer or allow him to consider the offer before it expired. Frye, 566 U.S. at 145. The Court held, "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. Defendants must also demonstrate a reasonable probability that the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it." Id. at 147. The Court ultimately remanded the case noting that the Court of Appeals of Missouri failed to require Frye to show that the "plea offer, if accepted by Frye, would have been adhered to by the prosecution and accepted by the trial court." Id. at 150-151.

In Lafler v. Cooper, 566 U.S. 156, 161 (2012), the United States Supreme Court found defense counsel ineffective when the defendant rejected a favorable plea offer, despite admitting guilt and expressing a willingness to accept the offer, after defense counsel "convinced [the defendant] that the prosecution would be unable to establish his intent to murder [the decedent] because she had been shot below the waist," which was "an incorrect legal rule." In order to prove prejudice in these circumstances, the Court held "a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.,* that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." Id. at 164. The Court found the defendant in Lafler suffered prejudice because he had shown that but for counsel's deficient performance there was a reasonable probability he would have accepted the offer, the trial court would have accepted its terms, and as a result of not accepting the plea and being convicted at trial, the defendant received a minimum sentence three and a half times greater than he would have received under the plea. Id. at 174.

Additionally, in Kolle v. State, 386 S.C. 578, 591-592, 690 S.E.2d 73, 80 (2010), our Supreme Court held plea counsel was ineffective in advising Kolle that the state's initial plea offer was "not a good deal" and misinforming Kolle that the offer would remain open after a suppression hearing, when the offer did not remain open and was significantly less than the seven year sentence Kolle received. The Court stated, "Had Kolle known that the state would withdraw this offer after the suppression hearing, he may have decided to accept it and received a lower sentence." Id. Thus, the Court affirmed the PCR court's decision to grant Kolle relief. Id. at 593, 690 S.E.2d at 81.

In this case, Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when counsel Charles Grose failed to communicate the offer extended by then Assistant Solicitor Patricia Bolen on February 9, 2011 to recommend a sentence of a "cap of six" years. See App. 746. Grose admitted he had no records indicating he communicated the offer to Petitioner. This caused him concern because he normally notes when he communicates an offer to a client.

Petitioner first learned of the offer after Grose left the Eighth Circuit Public Defender's Office and Petitioner was assigned a new public defender, Janna Nelson Gregory. By the time Petitioner learned of the offer from Gregory in March 2014, more than three years had passed since the offer was first made, and a new assistant solicitor, Lance Sheek, was assigned to prosecute the case. When Gregory reached out to Sheek about the six year offer previously made by Bolen, Sheek indicated he would not honor the offer. Grose's failure to communicate the six year offer to Petitioner in time for him to accept the offer before it was withdrawn constitutes deficient performance. Significantly, the PCR judge did not find Grose had communicated the offer to Petitioner. Rather, the judge merely concluded Petitioner could not prove prejudice because,

according to the PCR judge, the evidence showed Petitioner would not have accepted the offer. See App. 760.

Petitioner was prejudiced by counsel's deficient performance because he would have accepted the "cap of six" offer and pled guilty if he would have known about the offer before it was withdrawn. Petitioner testified that, *despite the fact that he had always maintained his innocence*, he "would of took the six years" had the offer still "been on the table" when he learned about it. App. 702, l. 22 – 703, l. 22; See Davie, 381 S.C. at 613, 675 S.E.2d at 422 ("It is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant's self-serving statement may be sufficient to establish actual prejudice.").

Moreover, if counsel had timely communicated the offer to Petitioner, there is a reasonable probability that the state, specifically Assistant Solicitor Bolen, would have honored the offer, and the trial judge would have accepted the terms. Sheek admitted even he "would have considered" honoring the offer extended by Bolen if he would have known Grose had never communicated the offer to Petitioner. See App. 738, l. 10 – 739, l. 11. Additionally, Gregory wrote in her email to Sheek dated May 14, 2014 that "I don't think Judge Hocker would have a problem" accepting "a negotiated six year cap." See App. 717, ll. 2-9. This statement supports that the trial judge would have accepted the terms of the six year plea offer, whether it was an Alford plea or not.

Petitioner was further prejudiced because under the state's initial offer he would have been sentenced to a maximum of six years imprisonment. However, he was ultimately sentenced to sixteen years incarceration after he was convicted at trial. See Davie, 381 S.C. at 614, 675 S.E.2d at 423 (finding "the difference in the sentence [the defendant] received and the plea offer is proof of prejudice").

Respectfully, this Court should hold the PCR judge erred by denying Petitioner relief, reverse Petitioner's sixteen year sentence, and remand for a new sentencing hearing.

CONCLUSION

Petitioner respectfully requests this Court reverse his sentence and remand for a new sentence proceeding.

Respectfully submitted,

s/ Lara M. Caudy________________
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of September, 2022.