

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Horry County

Honorable H. Steven DeBerry IV, Circuit Court Judge

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JAMES L. ARTHUR,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001486

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
—————

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ATTORNEY FOR PETITIONER

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**Apr 14 2023**

S.C. SUPREME COURT

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**ISSUE PRESENTED**

Did the PCR court err in finding counsel provided effective representation where counsel failed to convey a seven-year plea offer to Petitioner which resulted in Petitioner proceeding to trial and receiving a sentence of twenty-five years imprisonment?

## STATEMENT OF THE CASE

At approximately 2:20 a.m. on May 12, 2016, Officer Marvin Cox was conducting routine patrol on Highway 701 in Horry County, running license plate tag numbers of vehicles he encountered to make sure the vehicles complied with DMV regulations. Cox ran the tag number of the vehicle traveling in front of him, and the system returned the information “suspended for cancellation of insurance.” App. 46, l. 9-App. 48, l. 1; App. 59, ll. 6-10. Cox performed a traffic stop of the vehicle and encountered the sole occupant who identified himself as James Arthur, Petitioner. Cox requested Petitioner’s license and registration to which Petitioner responded that he did not have a license. During the conversation, Cox detected the smell of marijuana. App. 48, ll. 2-25.

After Cox confirmed that Petitioner did not have a valid license, he was arrested for driving under suspension. After being Mirandized, Petitioner informed Cox that the marijuana he had smelled was in the front passenger seat. Cox retrieved a black bag from the front passenger seat which contained a mason jar with marijuana as well as an off-white rock substance, a set of scales, and some loose ammunition. When questioned about a gun, Petitioner admitted one was in the car and stated he believed it was under the seat. A handgun was recovered from between the driver and passenger seat of the vehicle. App. 49, l. 1-App. 52, l. 7.

Officer James Hafner responded to the traffic stop as back-up for Cox. During a search of Petitioner’s vehicle, Hafner located an additional fourteen blue pills and two white oval pills. App. 67, l. 18-App. 68, l. 20. Forensic chemical analysis of the substances revealed that the fourteen blue pills were amphetamine and the white rock like substance was cocaine base weighing 13.4 grams. The white pills were not analyzed as it was determined they were not a controlled substance. App. 81, l. 15-App. 82, l. 7; App. 84, ll. 4-9.

During its June 2016 term, the Horry County grand jury indicted Petitioner for one count of trafficking cocaine base 10-28 grams, one count of possession of a schedule I to IV drug, one count of unlawful carrying of a pistol, and one count of unlawful possession of a pistol. App. 131-138. The State, represented by Mary-Ellen Walter and C. Leigh Andrew called the case to trial on November 6-7, 2017, before the Honorable Steven H. John and a jury. Petitioner was represented by Kenneth B. Massey. App. 1. Petitioner was tried in his absence after the court made a finding that he had received notice of his trial and notice that his trial would proceed without him. App. 35, l. 2-App. 36, l. 10.

Petitioner was found guilty as charged on all four indictments and his sentence was sealed pending his arrest on an outstanding bench warrant. App. 118, l. 16-App. 119, l. 8; App. 122, ll. 7-19. On December 18, 2017, Petitioner appeared before Judge John to have his sentences unsealed. App. 125; App. 127, ll. 5-9. Judge John sentenced Petitioner to twenty-five years<sup>1</sup> imprisonment on the trafficking charge, six months imprisonment on the possession charge, five years imprisonment on the unlawful possession of a pistol charge, and one year imprisonment on the unlawful carrying of a pistol charge, all sentences to be ran concurrently. App. 127, l. 21-App. 128, l. 8.

Petitioner appealed his convictions and sentences. The Court of Appeals dismissed the appeal pursuant to Anders v. California, 386 U.S. 738 (1967) in an unpublished opinion. State v. Arthur, 2019-UP-364 (S.C. Ct. App. Nov. 13, 2019). Petitioner filed a *pro se* application for post-conviction relief on January 27, 2020. App. 143-152. The State filed a return and motion for a more definite statement on July 29, 2020. App. 153-163. An evidentiary hearing was

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<sup>1</sup> Based on Petitioner's prior record, the trafficking conviction was a third offense. The mandatory minimum on a third offense is twenty-five years. App. 121, l. 12-App. 122, l. 5; App. 128, ll. 6-8

convened on June 2, 2022, before the Honorable H. Steven DeBerry, IV. The State was represented by Chelsey F. Marto. Petitioner was represented by James K. Falk. App. 164. The main allegation Petitioner proceeded on at the hearing was the failure of trial counsel to inform him of a seven-year plea offer. App. 167, l. 1-7.

Petitioner testified that he never wanted to take his case to trial and did not know how the case ended up at trial. He believed he would be going into drug court or working with law enforcement to work off the charges. App. 168, l. 10-App. 169, l. 10. Petitioner testified that he discovered a written plea offer for a negotiated seven-year sentence after he had been sent to SCDC. He maintained that the offer had never been presented to him and that if he had been presented with the offer, he would have accepted the seven years. App. 170, l. 4-App. 172, l. 23; App. 189. On cross-examination, Petitioner reiterated that Counsel Massey never discussed a plea with him and only ever discussed the options of drug court or working with law enforcement. App. 174, ll. 7-14.

Counsel Massey testified that Petitioner was not promised drug court because drug court was for addicts and his case was a “dealer issue.” He further testified that he spoke with Petitioner about working for law enforcement, but Petitioner was not receptive to the idea. App. 177, l. 3-App. 178, l. 5. Counsel Massey stated he communicated the seven-year plea offer to Petitioner within twenty-four hours of receiving it on June 3, 2016, but Petitioner was not interested in doing any time. App. 179, ll. 13-15. He also testified that when Solicitor Walter reached out to him on September 5, 2017, about the upcoming trial date that he conveyed that to Petitioner who asked if the State would be willing to do a five-year sentence. He maintained Petitioner asked for a five-year sentence, a year and a half after receiving the seven-year plea offer. App. 178, ll. 6-18. On cross-examination, Counsel Massey stated he talked with

Petitioner in his office in June 2016 about the seven-year plea offer and told him it was a good offer. He also told him that he would ask for probation at a plea but that it was a negotiated plea, so it was “sort of tricky.” He maintained that Petitioner knew the plea offer existed for a year and a half but did not take it because he did not want to do any time. App. 182, ll. 8-17.

In response to Counsel Massey’s testimony, Petitioner was recalled to the stand. He testified that he did ask Counsel Massey about a five-year plea offer but that it was not in response to being told about the seven-year plea offer. He maintained that they did not have a conversation about the seven-year plea offer. He also stated that he knew he could not get probation and had not asked Counsel Massey to ask for probation. On cross-examination, Petitioner stated that a five-year sentence was his ideal outcome but that he was willing to do more time, just not the twenty-five years he was currently serving after trial. App. 183, l. 13-App. 185, l. 12.

At the conclusion of the hearing, the PCR court ruled that because Petitioner was aware of his trial date it was reasonable to conclude that he was also aware of any outstanding plea offers that had been made. The court further noted that the testimony that he requested a five-year sentence corroborated the fact that he had discussed the seven-year plea offer with Counsel Massey, because it was reasonable to believe the request for the five-year sentence was in response to the seven-year offer. App. 186, l. 18-App. 187, l. 10. In the written order of dismissal, the PCR court held that Petitioner’s “claim of ineffective assistance of counsel for failure to convey a fifteen-year [sic] plea offer” was without merit. App. 197. The court found Counsel Massey credibly testified that he conveyed the offer to Petitioner and Petitioner rejected the offer. Thus, there was neither deficient performance nor prejudice. App. 198.

## ARGUMENT

The PCR court erred in finding counsel provided effective representation where counsel failed to convey a seven-year plea offer to Petitioner which resulted in Petitioner proceeding to trial and receiving a sentence of twenty-five years incarceration.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The right to the effective assistance of counsel extends to the plea-bargaining process, even if the plea offer is ultimately rejected. Lafler v. Cooper, 566 U.S. 156 (2012); Missouri v. Frye, 566 U.S. 134 (2012); Hill v. Lockhart, 474 U.S. 52, 57-59 (1985); 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).

In Davie v. State, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009), this Court adopted the rule that “counsel’s failure to convey a plea offer constitutes deficient performance.” To determine prejudice, this Court announced a case-by-case approach assessing “whether but for counsel’s deficient performance a defendant would have accepted the state’s proposed plea bargain and that he would have benefited from the offer.” Id. at 613, 675 S.E.2d at 422.

In 2010, the United States Supreme Court 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.” Padilla v. Kentucky, 599 U.S. 356, 373 (2010). Two years later, the Court decided two companion cases concerning a defendant’s right to effective assistance of counsel during the plea-bargaining process. In Frye and Lafler, *supra*, the Supreme Court held that failure of counsel to communicate a plea offer and properly advise a defendant as to the

acceptance or rejection of that plea offer constituted deficient performance under the standards set forth in Strickland and Hill, *supra*.

Petitioner vehemently maintained that Counsel Massey never discussed the seven-year plea offer with him. In support of his contention, he provided the PCR court with the written plea offer which had been extended by the State. At the bottom of the plea offer, there was an area where defendant responds either accepting the plea or requesting a trial. The plea offer in Petitioner's case was not filled out – presumably because it was never discussed with Petitioner. However, instead of considering that piece of evidence, the PCR court determined that Petitioner knew about the plea offer because he admitted that Counsel Massey had informed him of his trial date. The PCR court dismissed Petitioner's application not based on the evidence produced at the hearing but on an assumption that it made which was not supported by the record.

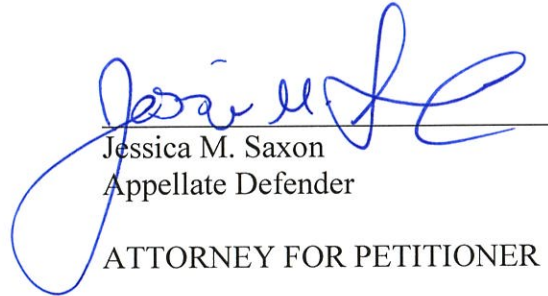
The PCR court also found that Counsel Massey credibly testified he conveyed the offer to Petitioner. However, that testimony was directly rebutted not only by the testimony of Petitioner but by the unsigned plea offer that was entered into evidence during the PCR hearing. Further, the court somehow determined that Petitioner's request for a five-year plea offer could only have been in response to the State's offer of seven years, even though Petitioner made the request over a year and a half after Counsel Massey allegedly presented him with the seven-year plea offer. The PCR court's reasoning was not supported by the evidence in the record.

Petitioner's testimony was consistent, credible, and corroborated by the unsigned plea offer. He showed that Counsel Massey did not discuss the plea offer with him but instead talked to him about other options such as drug court or working with law enforcement. The failure of Counsel Massey to convey the plea offer and promptly fill out the plea offer sheet was deficient performance.

Petitioner never wanted to take his case to trial and at no point during the PCR hearing did Counsel Massey contradict that testimony. Nevertheless, Counsel Massey failed to communicate the plea offer to Petitioner which resulted in his going to trial and receiving a sentence more than three times greater than what he would have received under the terms of the plea. The record supports that Petitioner would have accepted the plea and greatly benefited from it. Accordingly, he has shown prejudice. Under the standards set forth in Strickland, Hill, and Davie, *supra*, Petitioner has shown ineffective assistance of counsel.

**CONCLUSION**

Based on the foregoing argument, Petitioner respectfully requests that this Court grant the petition for writ of certiorari to allow full briefing of this issue.



Jessica M. Saxon  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 14th day of April, 2023.

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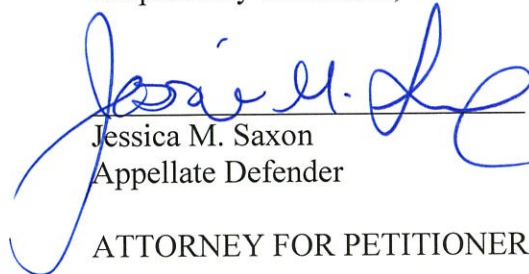
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Counsel for James Lamont Arthur states:

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 H. Steven DeBerry IV, which was held on June 2, 2022, 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 James Lamont Arthur.

Respectfully Submitted,

  
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Jessica M. Saxon  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 14th day of April, 2023.

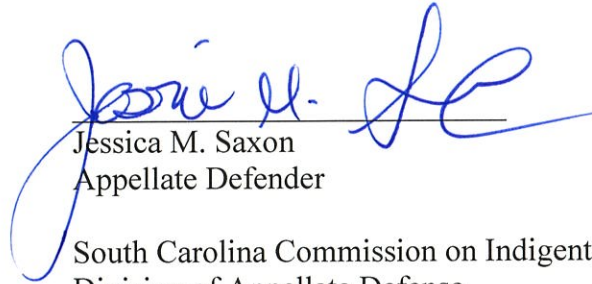
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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

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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This 14th day of April, 2023.