

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Brian M. Gibbons, Circuit Court Judge

CALVIN L. PHILLIPS, III,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000640

JOHNSON PETITION FOR WRIT OF CERTIORARI

Wanda H. Carter
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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Dec 21 2023

S.C. SUPREME COURT

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ISSUE PRESENTED

Trial counsel erred in failing to convey the initial negotiated fifteen-year sentencing offer to petitioner before it expired because the last negotiated sentencing offer included a sentencing **range** of five-to-twenty years, which resulted in the issuance of a greater sentence in the case.

STATEMENT

Petitioner Calvin L. Phillips, III, pled guilty to attempted armed robbery, second-degree burglary (violent), first degree assault and battery, kidnapping, and possession of a weapon during the commission of a violent crime during the May 2018 term of the Spartanburg County General Sessions Court before Judge J. Mark Hayes, II, and was sentenced to imprisonment for an aggregate period of twenty years. App. 1-38. William G. Yarborough, Esquire, represented petitioner at the guilty plea proceeding, and Assistant Solicitor Spenser H. Smith appeared on behalf of the state.

Petitioner appealed his guilty pleas and sentences, but his case was affirmed by the South Carolina Court of Appeals. See State v. Phillips, 2021-UP-078 (S.C. Ct. App. Filed March 10, 2021). On March 28, 2022, petitioner filed a PCR application with the Spartanburg County Office of the Clerk of Court. App. 40-47. The respondent filed a Return dated August 11, 2022. App. 48-61.

A PCR hearing in the case was convened on October 19, 2022, at the Spartanburg County Courthouse before Judge Brian M. Gibbons. App. 63-150. Petitioner was present at the hearing and represented by Attorney James C. Thomas, and Assistant Attorney General Chelsey Marto appeared on behalf of the state.

On March 4, 2023, Judge Gibbons issued an Order of Dismissal therein denying petitioner's allegations of ineffective assistance of trial counsel in the case. App. 172-188.

Petitioner appealed Judge Gibbons' Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in failing to convey the initial negotiated fifteen-year sentencing offer to petitioner before it expired because the last negotiated sentencing offer included a sentencing range of five-to-twenty years, which resulted in the issuance of a greater sentence in the case.

During the PCR hearing held in the case, the solicitor who prosecuted petitioner testified that on January 8, 2018, he presented an initial offer for a negotiated sentencing **range** of ten-to-twenty years, or an alternate fifteen-year sentencing offer, along with a warning that the offers would expire during that week. The solicitor testified further that on January 10, 2018, he extended an offer for a five-to-twenty-year negotiated sentencing **range** in the case. The solicitor stated that on February 28, 2018, trial counsel contacted him to see if the negotiated **range** was still in effect. The solicitor claimed that by May 3, 2018, the five-to-twenty-year **range** bargain was the only offer available, and that it was set to expire on May 14, 2018. Petitioner pled guilty on May 16, 2018, and received a twenty-year sentence in the case. App. 74, l. 18 – p. 80, l.9. The solicitor stated that his notes did not indicate whether trial counsel conveyed the offers and/or accepted or rejected them. App. 80, l. 10 – p. 81, l. 20. The solicitor stated that the negotiated fifteen-year offer was the best option in the case. App. 90, l. 23 – p. 91, l. 11.

Petitioner testified that trial counsel presented him with only one plea offer, which was the deal of a five-to-twenty-year sentencing **range** in the case. Petitioner explained that trial counsel never informed him of the alternate negotiated fifteen-year sentencing offer presented by the solicitor. App. 105, lines 17-22; App. 107, l. 7 – p. 110, l. 18; App. 116, l. 13 – p. 117, l. 10. Petitioner stated in effect that the negotiated fifteen-year offer was the better bargain; and that

had he been aware of that same, then he would have agreed to have accepted the fifteen-year offer as opposed to the five-to-twenty-year sentencing **range** offer. App. 122, lines 17-25.

Trial counsel testified that he would have taken the plea offers to petitioner, and that he remembered taking plea offers to petitioner and discussing the plea offers. Trial counsel added that he conveyed the fifteen-year offer to petitioner and told him that the five-to-twenty offer was better. However, it was not better. App. 131, l.23 - p. 132, l.8; App. 133, l.14 - p. 134, l.7.

A defendant has a right to effective assistance of counsel during the plea bargaining process. See Lafler v. Cooper, 132 S.Ct. 1376 (2012). In Lafler v. Cooper, supra, the United States Supreme Court held that counsel was ineffective in advising the defendant to reject a plea offer. Lafler was charged under Michigan law with assault with intent to murder and three other offenses. The prosecution offered to dismiss two of the charges, and to recommend a 51-to-85-month sentence on the other two, in exchange for guilty pleas. Lafler expressed a willingness to accept the offer, but he rejected the offer per his attorney's advice on the ground that the prosecution would be unable to establish intent to murder because the victim had been shot below the waist. Lafler was convicted on all counts at trial and received a mandatory minimum 185-to-360-month sentence.

The right to effective assistance of counsel during the plea bargaining process applies in South Carolina as well. See Judge v. State, 321 S.C. 554, 471 S.E. 2d 146 (1996), where the Court held that the Sixth Amendment protects defendants against ineffective assistance of counsel during the plea bargaining process. State v. Judge, supra, was overruled on other grounds by Jackson v. State, 342 SC 95, 535 S.E. 2d 926 (2000), to the extent that a statement by petitioner that he was prejudiced by counsel's deficient performance at the plea bargaining process can satisfy the prejudice prong of the two-pronged test to be met in ineffective assistance of counsel cases. In

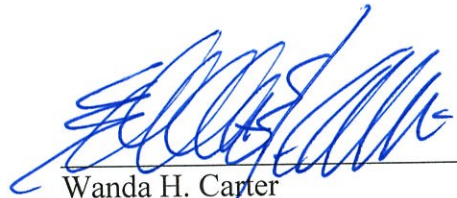
Judge, the issue was whether counsel was ineffective in advising the defendant to reject a plea offer and opt for a trial by jury. In Jackson, *supra*, the Court held that counsel was ineffective in failing to advise the defendant that the crime he was pleading to was a felony and that but for that omission, the defendant would not have plead guilty in the case.

Specifically, with respect to plea offers, the Sixth Amendment right to effective assistance of counsel extends to this area as well. See Missouri v. Frye, 132 S.Ct. 1399 (2012). In Missouri v. Frye, counsel did not communicate the plea offer to the defendant and as a result, the plea offer expired. Note further in Missouri v. Frye, 132 S.Ct. 1399 (2012), that the Court held that counsel was ineffective in allowing a plea offer to a defendant to lapse, which resulted in nonacceptance of the offer, and that “further proceedings led to a less favorable outcome” for the defendant. Compare Davie v. State, 381 S.C. 601, 675 S.E. 2d 416 (2009), where the Court held that counsel’s failure to inform the defendant of a written plea offer that was substantially less than the sentence he received after pleading guilty constituted ineffective assistance of counsel because the defendant was unaware of the existence of the plea offer (mail snafu after counsel moved to another office) until after the plea offer had expired, and because he would have accepted that plea offer had it been communicated to him. See also Bell v. State, 410 S.C. 436, 765 S.E.2d 4 (2014), where the Court held that counsel was ineffective in failing to extend the state’s plea offer of ten years to the defendant prior to sentencing (which was when he first heard of the offer), and that the defendant was prejudiced by counsel’s deficient performance as he received a twenty-year sentence instead. In Bell, the case had been transferred to counsel and there was note in the previous attorney’s file indicating that a plea offer of ten years had been made, but a review of the file revealed no notes or any indication showing that the plea offer was conveyed to the client by either counsel who represented him.

Here, it was obvious that counsel erred in failing to ensure that the fifteen-year plea offer was submitted to petitioner, which would have been accepted by petitioner. Petitioner was prejudiced by counsel's error because he received a greater sentence (twenty-year prison term) in the case. Counsel's deficient performance in petitioner's case violated the Sixth Amendment. See Hill v. Lockhart 474 U.S.52 (1985). Moreover, but for counsel's error, a reasonable likelihood existed that petitioner would have accepted and received a lower prison sentence than the sentence handed down in his case.

CONCLUSION

Based on the foregoing argument, counsel requests that this Court grant the petition and allow full briefing on the above raised issue.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of December, 2023.

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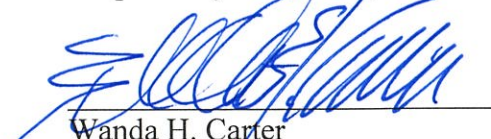
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PETITION TO BE RELIEVED AS COUNSEL
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Counsel for Calvin L. Phillips, III states:

1. She is Deputy Chief 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 Brian M. Gibbons, which was held on October 19, 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 Calvin L. Phillips, III.

Respectfully Submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of December, 2023.

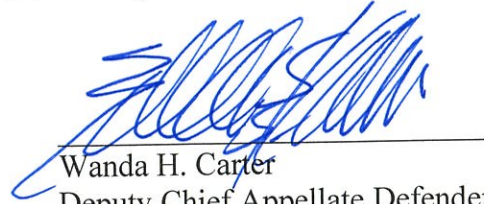
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CERTIFICATE OF COUNSEL

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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