ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Robin B. Stilwell, Circuit Court Judge

RICKY DALE GILSTRAP,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2011-190808

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the PCR court err in finding plea counsel provided effective assistance of counsel where Petitioner would have accepted the prior more favorable plea offer had he not been misadvised by plea counsel about the maximum sentence of his charges, as the Sixth Amendment right to effective assistance of counsel now extends to the plea-bargaining stage?

STATEMENT OF THE CASE

On March 17, 2009, the Greenville County Grand Jury indicted Petitioner Ricky Gilstrap for two counts of forgery. App. 72–73; App. 76–77. Petitioner subsequently waived presentment to the Grand Jury on a charge for possession of cocaine base, first offense. App. 68–70.

On October 6, 2009, Petitioner appeared before the Honorable John C. Few for a plea hearing. App. 1–14. George Campbell represented Petitioner, and Assistant Solicitor Brian Johnson represented the State. The plea judge ultimately sentenced Petitioner: (1) to seven years imprisonment for each forgery conviction; and (2) to three years imprisonment and a two-thousand dollar fine for the possession of cocaine base conviction; suspended upon the service of one year imprisonment and a one-thousand dollar fine; followed by three years probation. App. 13, ll. 12-20. The plea judge ordered the sentences to run concurrently for a total of seven years imprisonment. App. 70; 74; 78. Petitioner did not appeal the convictions and sentence from his guilty plea.

On January 25, 2010, Petitioner filed his application requesting post-conviction relief (PCR). App. 15–21. The Respondent filed the Return on April 21, 2010. App. 27–31. Petitioner then filed an amended PCR application on June 4, 2010. App. 22–26. Petitioner appeared before the Honorable Robin B. Stillwell on February 22, 2011, for an evidentiary hearing regarding his PCR claims. App. 32–56. Daniel Farnsworth, Jr., represented Petitioner, and Assistant Attorney General Karen Ratigan represented the State. App. 32. The PCR court denied Petitioner PCR relief in finding Petitioner failed to prove plea counsel provided ineffective assistance of counsel on March 16, 2011. App. 58–66.

On April 4, 2012, Petitioner filed a petition for writ of certiorari with this Court. The State filed the Return to the petition for writ of certiorari on May 29, 2012. This Court subsequently granted the petition for writ of certiorari and ordered briefing on June 5, 2013.

ARGUMENT

The PCR court erred in finding plea counsel provided effective assistance of counsel because Petitioner would have accepted the prior more favorable five year plea offer had he not been misadvised by plea counsel that the maximum sentence on his charges was five years rather than ten years. The Sixth Amendment right to effective assistance of counsel now extends to the plea-bargaining stage.

Background

During Petitioner's plea hearing, the plea judge inquired, "So it appears that he has two counts of forgery, both of which are third or subsequent property offenses and carry up to 10 years in prison?" App. 5, ll. 3-6. Plea counsel replied, "***Judge, that seems to be the case, but to be honest with you that's not something I discussed with my client.***" App. 5, ll. 7-9 (emphasis added). The plea judge then allowed plea counsel the opportunity to confer with Petitioner. App. 5, ll. 13-21. After a short recess, Petitioner pled guilty as charged without a sentencing recommendation from the State. App. 5, ln. 24 – 9, ln. 13.

In mitigation, plea counsel candidly noted:

> "Your Honor, we're here today pleading off the [trial] docket essentially because my client never wanted to go [to] trial[,] he just wanted a better plea deal, if you may. ***The plea that was on the table . . . was a five year sentence. And as [Petitioner] understood it at the time that was going to be the max*** . . . I spoke with [the Solicitor] about this last week, and I gave him no impression that we were ever intending to try this case."

App. 11, ln. 15 – 12, ln. 4 (emphasis added).

Petitioner

In his PCR application, Petitioner wrote, "[C]ounsel informed me that [the] maximum sentence on each charge would carry no more than 5 years." App. 18. Petitioner testified at the evidentiary hearing that prior to the plea hearing, "I was told [by plea counsel] that I would be facing five years on the charge. App. 39, ll. 8-15. Petitioner also testified that plea counsel had

previously informed him of a plea offer for five years imprisonment, but that he did not accept the plea offer because he thought five years was the maximum sentence (i.e., plead as charged). App. 39, ln. 23 – 40, ln. 9. Petitioner recalled plea counsel saying that "[h]e would ask for three years" and that the first time he was told the forgery charges carried a maximum of ten years was "[w]hen [he] came into the court to make [his] plea." App. 40, ll. 23-24; App. 41, ll. 1-19.

Notably, Petitioner testified, "***A year before this, if someone had told me you'd be up there facing ten years, I would have gladly accepted the five years*** . . . [because] ***[t]hat would have been half of what the charges carry and I felt like that would have been a good deal.***" App. 43, ll. 1-10 (emphasis added). Petitioner also stated that he "was still under the impression that [he] was going to get the five [year sentence] at the very most" when he pled guilty. Petitioner noted that he was surprised when the State did not provide a favorable sentence recommendation at the plea hearing. App. 43, ln. 25 – 44, ln. 10.

PCR counsel asked, "[I]f you had known your two forgery charges carried up to ten years each, would you have accepted the five-year plea they offered months before?" App. 44, ll. 13-17; App. 46, ll. 13-19. Petitioner reiterated that he "absolutely, without a doubt" would have taken the plea deal had he known each forgery charge carried a maximum of ten years imprisonment. Petitioner testified that after the plea hearing, plea counsel "*apologized and said that it was his fault and [that] he was sorry [h]e didn't tell me about the ten years and I should file a motion for post-conviction relief*[.]" App. 44, ln. 24 – 45, ln. 4 (emphasis added).

Plea Counsel

Plea counsel candidly admitted at the evidentiary hearing that he misadvised Petitioner regarding the maximum penalty of the forgery charges and that the five-year plea deal "was on the table for a good while." App. 49, ln. 6 – 51, ln. 5. Plea counsel also corroborated Petitioner's

testimony that Petitioner would have taken the plea deal had Petitioner known the maximum penalty for each forgery charge was ten years. App. 51, ln. 18 – 52, ln. 1. Plea counsel avowed that Petitioner *did not* accept the prior five-year plea offer because he had "*explained to [Petitioner], five years was the max.*" App. 52, ll. 6-11 (emphasis added).

Order of Dismissal

In denying Petitioner's PCR application, the PCR court astonishingly found that "plea counsel adequately conferred with [Petitioner], conducted a proper investigation, and was thoroughly competent in his representation." App. 63. The PCR court also found, "[B]ased on testimony from both [Petitioner] and plea counsel, [Petitioner] made a knowing decision to proceed with his guilty plea." App. 63. Despite finding plea counsel's corroborating testimony *credible*, the PCR court noted: "[E]ven if the plea judge had proceeded under the notion that the forgery charges would be classified as five (5) year offenses, [Petitioner] still faced a potential maximum sentence of thirteen (13) years of incarceration . . . As such, [Petitioner's] assertion that [he] would have taken the five (5) year plea offer if he had known he was facing a ten (10) year sentences is not compelling." App. 63–64.

Discussion

The Sixth Amendment guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The United States Supreme Court established the constitutional right to *effective* assistance of counsel in *Powell v. Alabama*, 287 U.S. 45 (1932), and subsequently created the standard for ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). The Supreme Court extended this standard to guilty pleas in *Hill v. Lockhart*, 474 U.S. 52 (1985), and recently expanded this standard to apply during the plea-bargaining stage. *See Missouri v. Frye*, 566 U.S. ____, 132 S.Ct. 1399

(2012) (holding the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected); *see also Lafler v. Cooper*, 566 U.S. ____, 132 S.Ct. 1376 (2012) (addressing, as the companion case to *Frye*, cases where "inadequate assistance of counsel caused nonacceptance of a plea and further proceedings led to a less favorable outcome" after a full trial and jury verdict).

In *Missouri v. Frye*, the "case [arose] in the context of claimed ineffective assistance that led to the lapse of a prosecution offer of a plea bargain, a proposal that offered terms more lenient than the terms of the guilty plea entered later." *Frye* , 132 S.Ct. at 1404. There were two questions before the United States Supreme Court in *Frye*: (1) "whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected[;]" and (2) "If there is a right to effective assistance with respect to those offers, . . . what a defendant must demonstrate in order to show that prejudice resulted from counsel's deficient performance." *Frye*, 132 S.Ct. at 1404.

The *Frye* Court noted that the "Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings[, which] . . . include arraignments, post-indictment interrogations, post-indictment line ups, and the entry of a guilty plea." *Id.*, 132 S.Ct. at 1405 (citations and internal quotation omitted). The *Frye* Court held that the right to effective assistance of counsel extends not only to those situations in which a criminal defendant accepts a plea bargain and waives his right to trial,[1] but also to situations where plea offers are rejected or allowed to lapse. *Id.* at 1409.

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[1] *See Hill v. Lockhart*, 474 U.S. 52 (1985) (establishing the standard for ineffective assistance of counsel claims arising from a guilty plea); *see also Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010) (finding ineffective assistance of counsel where counsel failed to advise a defendant regarding the deportation consequences of a conviction).

In support of its holding, the *Frye* Court explained:

> 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. Because ours 'is for the most part a system of pleas, not a system of trials,' *Lafler*, *post*, at 11, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.

Id. at 1407.[2] The Court emphasized, "*In today's criminal justice system, . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant*" and "*defense counsel have responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires.*" *Id.* at 1407 (emphasis added). Accordingly, "[a]nything less [than effective counsel during plea negotiations] . . . might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'" *Id.* at 1408 (citing *Massiah v. United States*, 377 U.S. 201 (1964) (quotation citation omitted)).

Having found that the Sixth Amendment right to effective assistance counsel applies to the plea bargaining stage, the *Frye* Court then applied the *Strickland* ineffective assistance of counsel standard to the plea bargaining stage: (1) whether plea counsel's performance was deficient by failing to communicate the prior more favorable plea offer to Frye; and (2) whether Frye was prejudiced as a result of plea counsel's deficient performance. The *Frye* Court held that plea counsel's performance was deficient, as it fell below "an objective standard of reasonableness"

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[2] The *Frye* Court noted, the "simple reality" is that "ours 'is for the most part a system of pleas, not a system of trials.'" *Frye* , 132 S.Ct. at 1407 (citing *Lafler*, 132 S.Ct. at 1388). Specifically, "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Id.*

when he "did not make a meaningful attempt to inform the defendant of a written plea offer before the offer expired." *Id.* at 1410.

As to proving prejudice where a plea offer has lapsed or been rejected because of counsel's deficient performance, the *Frye* Court adapted the *Strickland* standard to require a PCR claimant to show: (1) that there is "a reasonable probability [the defendant] would have accepted the earlier [more favorable] plea offer had [he] been afforded effective assistance of counsel[;]" and (2) that there is "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."[3] *Id.* at 1409.

The *Frye* Court noted, "[I]n most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain." *Id.* at 1410. Therefore, "[t]o 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*." *Frye*, at 1409 (emphasis added); *see also Glover v. United States*, 531 U.S. 198, 203 (2001) ("[A]ny amount of [additional] jail time has Sixth Amendment significance"), quoted with approval in *Lafler*, 132 S.Ct. at 1387.

Applying the modified *Strickland* standard, the *Frye* Court found that "there appears to be a reasonable probability Frye would have accepted the prosecutor's original offer of a plea bargain if the offer had been communicated to him, because he pleaded guilty to a more serious charge, with no promise of a sentencing recommendation from the prosecutor." *Id.* at 1411. Notably, the Court

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[3] The Court noted that its adaptation of the *Strickland* standard "does nothing to alter the standard laid out in *Hill*[, 474 U.S. 52]." *Frye*, 132 S.Ct. at 1409.

noted that Frye had received a "new offense" after having received the former plea offer, and that the lower court failed to address whether the plea offer would have been adhered to by the prosecution and accepted by the court. *Id.* at 1411. Consequently, the Court remanded the case to allow the state court to address that question. *Id.* at 1411.

In this case, Petitioner's plea hearing and the testimony presented at the evidentiary hearing unequivocally supports that Petitioner would have accepted the prior more favorable plea offer had he not been misadvised by plea counsel about the maximum sentence of his charges. App. 43, ll. 1-10; App. 51, ln. – 52, ln. 1; *See Frye*, 132 S.Ct. 1399 (holding the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected); *see also Davie v. State*, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009) (finding "counsel's failure to convey a plea offer constitutes deficient performance."). There is also absolutely no evidence that even suggests the solicitor would have withdrawn the plea offer or that the plea judge would not have accepted Petitioner's plea. Therefore, the PCR court erred in finding plea counsel provided effective assistance of counsel. App. 58–66; *See Frye*, 132 S.Ct. 1399.

Deficient Performance

Plea counsel's performance fell below "an objective standard of reasonableness" when he misadvised Petitioner about the maximum sentence of his charges and Petitioner detrimentally relied on that erroneous advice. *See Frye*, at 1410; *see also Alexander v. State*, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991) (finding ineffective assistance of counsel when plea counsel erroneously advised the defendant regarding his potential sentence prior to his guilty plea).[4]

[4] *Ray v. State*, 303 S.C. 374, 376, 401 S.E.2d 151, 153 (1991) (finding involuntary plea based on plea counsel's erroneous sentencing advice); *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000) ("[A] guilty plea must be aware of . . . the maximum and any mandatory minimum penalty") (emphasis removed and citations omitted).

Specifically, plea counsel admitted to the plea court that he had not accurately informed Petitioner regarding the maximum sentences of his charges: "***Judge, . . . to be honest with you that's not something I discussed with my client.***" App. 5, ll. 7-9 (emphasis added). Petitioner testified at the evidentiary hearing that prior to the plea hearing, "I was told [by plea counsel] that I would be facing five years on the [forgery] charge[s]. App. 39, ll. 8-15. This is supported by plea counsel's statement at the plea hearing: *The plea that was on the table . . . was a five year sentence. And as [Petitioner] understood it at the time that was going to be the max.*" App. 11, ll. 17-20 (emphasis added).

Furthermore, plea counsel candidly admitted at the evidentiary hearing that he misadvised Petitioner regarding the maximum penalty of each forgery charge. App. 49, ln. 6 – 51, ln. 5. Plea counsel further corroborated Petitioner's testimony by also admitting that the reason Petitioner did not accept the five year plea deal was because he had "*explained to [Petitioner], five years was the max.*" App. 52, ll. 6-11 (emphasis added). Accordingly, the PCR court erred in finding "plea counsel adequately conferred with [Petitioner], conducted a proper investigation, and was thoroughly competent in his representation." App. 63.

Prejudice

As to prejudice, both prongs of the modified *Strickland* standard are satisfied for two reasons. First, there is "a reasonable probability [Petitioner] would have accepted the earlier [more favorable] plea offer had [he] been afforded effective assistance of counsel." *See Frye*, at 1409. This is evinced best by Petitioner's testimony at the evidentiary hearing: "*A year before this, if someone had told me you'd be up there facing ten years, I would have gladly accepted the five years . . .* [because] *[t]hat would have been half of what the charges carry and I felt like that would have been a good deal.*" App. 43, ll. 1-10 (emphasis added). *See Id.* ("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.").

Plea counsel's testimony supported Petitioner's stance that he would have taken the plea deal had he known the maximum penalty was ten years for each forgery charge. App. 51, ln. 18 – 52, ln. 1. Similar to *Frye*, Petitioner faced a harsher sentence "with no promise of a sentencing recommendation from the prosecutor" because of plea counsel's deficient performance. App. 5, ln. 24 – 9, ln. 13; App. 13, ll. 12-20; App. 70; 74; 78; *Frye*, at 1411. Therefore, the PCR court erroneously found, "[Petitioner's] assertion that [he] would have taken the five (5) year plea offer if he had known he was facing a ten (10) year sentences is not compelling." App. 63–64; *Id.* at 11 (comparing *Glover*, 531 U.S. at 203 ("[A]ny amount of [additional] jail time has Sixth Amendment significance")).

Second, there is "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.* at 1410. Unlike in *Frye*, there is no evidence that would give "reason to doubt that the prosecution would not have adhered to the agreement or that the trial court would have accepted it." *Id.* 1410-11. To the contrary, plea counsel stated at the plea hearing that "[Petitioner] never wanted to go [to] trial" and that he never "gave [the solicitor the] impression that we were ever intending to try this case." App. 11, ln. 15 – 12, ln. 4. Accordingly, the PCR court erred in finding that plea counsel provided effective assistance of counsel. App. 58–66. *See Frye*, 132 S.Ct. 1399; *Cf. Brady v. United States*, 397 U.S. 742, 758 (1970) (finding "[g]uilty pleas are no more foolproof than full trials to the court or jury . . . Accordingly, we take great precautions against unsound results").

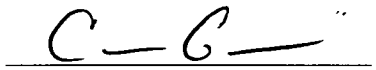
The remedy for a constitutional violation "must closely fit the constitutional violation." *United States v. Virginia*, 518 U.S. 515, 547 (1996). The remedy must be designed to restore the victim to the position he or she would have occupied absent the constitutional violation. *Milliken v. Bradley*, 418 U.S. 717, 746 (1974). "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation." *United States v. Morrison*, 449 U.S. 361, 364 (1981). When ineffective assistance of counsel happens at a stage other than trial, courts order a remedy tailored to cure the violation. For example, if the violation occurs during sentencing, then a new sentencing hearing is ordered. *Rompilla v. Beard*, 545 U.S. 374, 393 (2005). If the violation occurs on appeal, then the remedy is to order a new appeal. *Evitts v. Lucey*, 469 U.S. at 390-39.

Here, the appropriate remedy for Petitioner is to place him in the position he would have been prior to plea counsel's ineffective assistance of counsel.

CONCLUSION

Based on the foregoing reasons, Petitioner respectfully requests that this Court reverse the PCR court's dismissal and grant Petitioner post-conviction relief.

Respectfully submitted,



Dayne C. Phillips
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ATTORNEYS FOR PETITIONER

This 5th day of August, 2013.

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CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Karen Ratigan, Esquire , at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Ricky Dale Gilstrap , at 107 Symbolic Ct., Greenville, SC 29617, this 5th day of August, 2013.

Dayne Phillips
Assistant Public Defender

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ATTORNEYS FOR PETITIONER

SWORN TO BEFORE ME this 5th day
of August, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.