RECEIVED
Aug 27 2024
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO OCONEE COUNTY
Court of Common Pleas
H. Steven DeBerry, IV, Post-Conviction Relief Court Judge

Case No. 2022–CP–37–00207

Derek W. Gibson, SCDC #334215, ... Respondent,

v.

State of South Carolina, ... Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable H. Steven DeBerry, IV, order granting post-conviction relief filed on July 1, 2024. Respondent filed a timely motion to reconsider, alter, or amend pursuant to Rule 59(e), SCRCP, which was denied by Judge DeBerry on July 29, 2024. Counsel for Respondent received written notice of the entry of this order on August 1, 2024. A copy of the order granting post-conviction relief, a copy of the Rule 59(e), SCRCP motion, and a copy of the order denying Respondent's 59(e), SCRCP, motion is attached hereto.

August 27, 2024,

Respectfully submitted,

ALAN WILSON
Attorney General

TALIDA BALAJ
Assistant Attorney General
S.C. Bar No. 106523
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

By: 
Attorneys for Petitioner

Other Counsel of Record:
Susannah C. Ross
330 East Coffee St.
Greenville, SC 29601
(864) 242-0029
Attorney for Respondent

cc: Honorable Melissa Burton, Oconee County Clerk of Court

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE) TENTH JUDICIAL CIRCUIT

DEREK GIBSON,)
APPLICANT.) ORDER GRANTING POST
v.) CONVICTION RELIEF
)
THE STATE OF SOUTH CAROLINA,)
RESPONDENT.) CASE # 2022-CP-37-0207

This matter comes before the Court by way of application of post-conviction relief filed March 23, 2022, alleging the indictment was improper. A Return and Motion for a More Definite Statement was made nearly two years after the application on February 9, 2024, with a footnote stating that due to significant caseload and understaffing issues the State was unable to comply with the sixty (60) day timeline and asked that the Court accept the filing because the Applicant showed no demonstrable prejudice from the delay. See Rule 12(a) SCRCP. An Amended Application was made March 29, 2024. An evidentiary hearing was held before me April 9, 2024, in the Anderson County Courthouse. The Applicant was present at the hearing represented by Susannah Ross, Esquire. Assistant Attorney General Talida Balaj represented the State. The Applicant and Kayla Porter, Esquire, testified at the hearing. The court had before it the plea transcript, the Oconee County Clerk of Court records, the SCDC records and the pleadings.

PROCEDURAL HISTORY

The Applicant is incarcerated in the South Carolina Department of Corrections pursuant to orders of commitment from the Oconee County Clerk of Court. In September 2020, the Applicant was arrested for trafficking in meth or cocaine base 10 to 28 grams, 1st offense (2020A3710500101); burglary 3rd degree (2020A3710500102); and grand larceny $2,000 to $10,000 (2020A3710500103). On May 11, 2021, the Oconee County Grand Jury directly

HSD 5

indicted the Applicant for trafficking in meth or cocaine base 10 to 28 grams, 3rd offense (2021-GS-37-00076).

On May 24, 2021, the Applicant was brought to a jury trial before the Honorable R. Scott Sprouse for trafficking in meth or cocaine base 10 to 28 grams, 3rd offense pursuant to indictment 2021-GS-37-00076. Kayla Porter of the Tenth Circuit Public Defender's Office represented the applicant. Assistant Tenth Circuit Solicitor Jason Alderman prosecuted the case. After the jury was selected and the court heard and denied the defense's pretrial motions; the Applicant waived presentment to the grand jury and plead guilty to trafficking in meth or cocaine base 10 to 28 grams, 2nd offense (2021-GS-37-0437); burglary 3rd degree (2021-GS-37-0438); and grand larceny $2,000 to $10,000 (2021-GS-37-0439). Judge Sprouse sentenced the Applicant to concurrent sentences of fifteen, five, and five years respectively.

ALLEGATIONS

The original pro se application alleged that the conviction was unlawful because "current sentence imposed due to wrongful indictment." The March 29, 2024, Amended Application added allegations of ineffective assistance of trial counsel for failure to prevent the direct indictment of the charge as a trafficking third offense less than two weeks prior to trial and failing to effectively communicate and advise the Applicant regarding the State's plea offer. The Amended Application also alleged Due Process violations in the indictment procedure and insufficiencies in the chain of custody which denied the Applicant a fair trial causing him to plea to an enhanced charge when he otherwise would not have.

SUMMARY OF HEARING TESTAMONY

Applicant's Testimony

The applicant testified that he filed for PCR because his lawyer relayed a plea offer of ten

years but advised him not to take it until she had spoken to the prosecutor. He said he would have accepted the ten-year plea offer but was not given an opportunity before being put on trial facing a mandatory twenty-five year sentence. He said the remedy he sought was to have the case remanded and be given an opportunity to accept the original ten-year plea offer. He testified he was never told that the State was about to directly indict his trafficking first warrant as a trafficking third; or that he was facing a mandatory twenty-five-year sentence; or that the plea offer would expire on a certain date. He said he was waiting to hear back from his lawyer about his plea and the next thing he knew, his lawyer was asking him for his clothes size to dress for trial.

During cross examination the Applicant admitted that he did end up taking a fifteen-year plea offer because he was always going to plead guilty so he felt it was his only choice to avoid trial the next day and a twenty-five-year sentence. He admitted that he said he understood what he was doing, was satisfied with his attorney, and did not object to the terms of his negotiated sentence during his guilty plea. He said at the time of his plea his understanding from his lawyer was that his only options were to plead guilty to a negotiated fifteen years or go to trial and face a mandatory twenty-five years. He said he had never told his lawyer he was not guilty or wanted a trial.

Counsel's Testimony

Ms. Porter testified that she recalled the case and began her representation of the Applicant in September of 2020 on the charge of trafficking 10 to 28 grams, first offense and two other charges. She said the solicitor e-mailed an offer in January of a recommendation of ten years for the charge of trafficking first which carried three to ten years. It noted that due to the Applicant's prior record it could be a trafficking third offense. She said she relayed the offer to

the Applicant, but he wanted to see if he could get five years by working with the narcotics division. She said her notes reflected an e-mail March 16 that said it would be ten years or a trial but that plea negotiations were ongoing with calls and e-mails with the Solicitor still discussing reaching out to the narcotics officers and dismissing pending charges in Anderson County in exchange for the ten-year plea. Ms. Porter said she met with the Applicant in April and discussed whether to plea in April or May and made a plan to plea to the ten-year recommendation in May.

Ms. Porter testified that she was shocked to see that the Applicant was on the May trial docket as her understanding was that negotiations were still ongoing, and she had no warning the plea offer was expiring. Ms. Porter said she was never provided with sentencing sheets or given an expiration date for the offer. She said this was the only trial docket she had ever seen without an indictment number because the charge of trafficking third offense had not even been indicted. The docket said, "to be indicted". Ms. Porter said she felt like she was in crisis mode and reached out to the circuit public defender to help with a motion to quash pursuant to State v. Langford. [1] She said that the motion was ultimately unsuccessful, but the trial judge then nudged the solicitor to allow a plea off the trial docket to a trafficking second offense. The solicitor ultimately agreed to a negotiated fifteen-year sentence despite a Tenth Circuit Solicitor's Office policy of no negotiations once a case is put on the docket.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After review of the record and the testimony and argument presented at the evidentiary hearing, this Court finds that the Applicant established constitutional violations which undermine the outcome of the Applicant's case. I find that the Applicant was credible in his testimony that he would have taken the ten-year plea offer and order the case be remanded to the court of

[1] State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (S.C. 2012).

general sessions for a new plea in accordance with the plea offer of ten years on his original charge of trafficking in meth or cocaine base 10 to 28 grams, 1st offense.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This includes the right to effective assistance of counsel during the plea-bargaining process. Davie v. State, 675 S.E.2d 416, 381 S.C. 601 (S.C. 2009). Strickland v. Washington established a two-prong test for evaluating claims of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The first prong of the test requires that a defendant prove his counsel's deficiency by demonstrating counsel's performance fell below an objective standard of reasonableness. Bennett v. State, 371 S.C. 198, 203, 638 S.E.2d 673, 675 (2006) (citing Strickland). The second part of the test requires a defendant to show there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* "[T]he principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." Strickland, 466 U.S. at 696.

Here, trial counsel's inattention and failure to intervene on Applicant's behalf before his placement on the trial docket for an enhanced charge was ineffective. See, e.g., Sprouse v. State, 355 S.C. 335, 340, 585 S.E.2d 278, 281 (2003) (finding defendant was entitled to post-conviction relief where the State failed to honor the plea agreement it made with defendant and

trial counsel failed to ensure that the State adhered to the original plea agreement). Ms. Porter specifically addressed her notes and emails in March 2021 stating negotiations were ongoing with the solicitor and that the solicitor mentioned ten years or trial. However, the attorney and defendant agreed in April that he would plead guilty. If the attorney had immediately notified the State that they accepted the plea, there is no indication he would have been indicted for a third offense. While pretrial motions were argued after the case was called and jury was selected, the clerk of court records show no written motion was filed prior to the case being called to trial in efforts to avert the clearly detrimental outcome of facing a mandatory twenty-five to thirty year sentence on an enhanced indictment.

Counsel should have communicated with the solicitor and filed a motion upon notice of the trial docket and argued the case was comparably new, just nine months old, when there were backlogs of already indicted cases for the solicitor to choose at this time - during the COVID pandemic. Counsel testified that this was the only trial docket she had ever seen without an indictment number and said the trial docket read "to be indicted". Had she argued before the case was called to trial that the facts of this case would normally appear to be an abusive and arbitrary use of the State's power in violation Langford's 2012 mandate that "the dockets will henceforth be managed pursuant to the administrative order issued in conjunction with this opinion"; the outcome of the proceeding would likely be different. See State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (S.C. 2012). The fact that the Solicitor agreed to go against office policy and allow the Applicant to plead to reduced charge of trafficking 2nd offense on the day of trial suggests that he would likely have been reasonable had communication occurred earlier.[2] I find that had counsel timely notified the State that the offer was accepted, it is likely the defendant would not

[2] The Solicitor who made this decision is still in the Oconee Office and was not called as a witness in this matter.

have been indicted for a third offense. I also find that had counsel effectively argued before the case was called to trial, that to avoid the appearance of unfairness as highlighted by Langford, and specifically caused by the solicitor providing no warning the plea offer was expiring, no expiration date for the offer, and no sentencing sheets, the outcome of the proceeding would likely have been different.

Finally, the Court is deeply concerned regarding two matters. Langford was decided over a decade ago with the clear ruling that solicitor control of the docket was unconstitutional. While the trial judge ultimately determined that the defendant had not suffered prejudice in this matter, it is deeply disturbing to this Court that the solicitor could still control so many aspects of docket control that he could essentially force the defendant to accept five more years than originally offered without explanation. Second, it is unfathomable to this Court how a two-year delay in filing a Return to a PCR is not presumptively prejudicial. Justice delayed is justice denied, and the Court would point out that it may be difficult or impossible to prove prejudice after a two-year delay. The solicitor who prosecuted this case is still employed in the Oconee County Courtouse, but he was not called to offer an explanation as to how or why the applicant was indicted at the last minute and the plea offer withdrawn without explanation.

"The plea process is meant to 'bring[] to the criminal justice system a stability and certainty' that, in this case, were noticeably lacking." Premo v. Moore, 562 U.S. 115, 132 (2011). [Both the Solicitor and Attorney General's] office would do well to remember that it is "the representative ... of a sovereignty whose obligations to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935).United States v. Murraye, 596 Fed.Appx. 219, 229 (4th Cir. 2015). When it appears that

an offer is withdrawn without explanation and the solicitor still has the power to place a defendant on the trial docket without warning, in front of numerous older cases, and without explanation, in a system that our Supreme Court has declared unconstitutional and has acknowledged leaves room for abuse, it is not justice to sentence a man to five years more in prison than he was willing to accept.

The prejudice to the Applicant is apparent in the difference in the fifteen-year sentence he received for trafficking second offense and plea offer of ten years for trafficking first offense. See Davie v. State, 675 S.E.2d 416, 381 S.C. 601 (S.C. 2009). Viewing the testimony and the record before the court, the Applicant has demonstrated in this case that the circumstances of his yet unindicted case being placed on the trial docket produced an outcome that was fundamentally unfair and a product of a breakdown in the adversarial process that our system counts on to produce just results.

IT IS THE ORDER OF THIS COURT that the applicant's sentence and conviction for trafficking in meth or cocaine base 10 to 28 grams, 2nd offense (2021-GS-37-0437) be vacated and his case remanded to General Sessions for resentencing with the offer as it was originally made for a recommendation of ten years for trafficking in meth or cocaine base 10 to 28 grams, 1st offense.

AND IT IS SO ORDERED this 24 day of June, 2024.

Steven DeBerry
Presiding Judge
Tenth Judicial Circuit

Florence, South Carolina.

FILED OCONEE COUNTY, SC
MELISSA C. BURTON
CLERK OF COURT
2024 JUL -1 P 4:02

CERTIFIED TRUE COPY
JUL 01 2024
CLERK OF COURT
OCONEE COUNTY, SC

STATE OF SOUTH CAROLINA COUNTY OF OCONEE	IN THE COURT OF COMMON PLEAS TENTH JUDICIAL CIRCUIT
Derek W. Gibson, #334215; Applicant, v. State of South Carolina, Respondent.	CASE NO. 2022–CP–37–00207 **RESPONDENT'S MOTION TO RECONSIDER, ALTER, OR AMEND PURSUANT TO RULE 59(e), SCRCP**

The matter before this Court is an action for post-conviction relief (PCR) application filed on March 23, 2022, by Derek W. Gibson (Applicant). Respondent, the State of South Carolina, made its Return, dated February 12, 2024, requesting an evidentiary hearing. An evidentiary hearing was convened at the Lancaster County Courthouse on April 9, 2024, before the Honorable H. Steven DeBerry, IV. Applicant was present and represented by Susannah C. Ross, Esquire (PCR Counsel). Assistant Attorney General Talida Balaj represented Respondent. Applicant testified on his own behalf and presented the testimony of Kayle M. Porter (Plea Counsel).

This Court granted relief by filed order on July 1, 2024[1], finding Applicant established the following:

> 1. "Trial counsel's inattention and failure to intervene on Applicant's behalf before his placement on the trial docket for an enhanced charge was ineffective."
> 2. "I find that had counsel timely notified the State that the offer was accepted, it is likely the defendant would not have been indicted for a third offense."
> 3. "I also find that had counsel effectively argued before the case was called to trial, that to avoid the appearance of unfairness as highlighted by Langford, and specifically caused by the solicitor providing no warning the plea offer was expiring, no expiration

[1] Respondent received notice of filing of the "Order Granting Post Conviction Relief" on July 8, 2024, making this Motion due by July 18, 2024.

date for the offer, and no sentencing sheets, the outcome of the proceeding would likely have been different."

4. "The prejudice to Applicant is apparent in the difference in the fifteen-year sentence he received for trafficking second offense and plea offer of ten years for trafficking first offense

(Order Granting Post-Conviction Relief pp. 5 – 8).

Respondent, by and through undersigned counsel, making its Motion to Reconsider, Alter, or Amend, pursuant to Rule 59(e), SCRCP, would respectfully show the Court:

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Oconee County Clerk of Court. In the March 2020 term, the Oconee County Grand Jury indicated Applicant of Receiving, Possessing, Concealing, Selling, or Disposing of a Stolen Vehicle, Value of 10,000 or More (2020-GS-37-00281), Removing or Falsifying Identification Number of Vehicle or Engine (2020-GS0-37-00282), and Reckless Driving (2020-GS-37-00283). On September 14, 2020, Applicant was arrested and charged with Trafficking Methamphetamine, First Offense (2020A3710400797). On May 11, 2021, Applicant was indicted for Trafficking Methamphetamine, Third Offense (2021-GS-37-00076). Later, the State directly indicted Applicant on the charges of Trafficking Methamphetamine Between 10-28 grams, Second Offense (2021-GS-37-0437); Burglary, 3rd degree – 1st offense, (2021-GS-37-0438); and Grand Larceny, Value More than $2000 but Less than $10,000 (2021-GS-37-0439). Applicant was represented by Kayla Michelle Porter, Esquire. Deputy Solicitor Jason Alderman prosecuted the case.

On May 24, 2021, Applicant proceeded to a jury trial before the Honorable R. Scott Sprouse on the charge of Trafficking Methamphetamine Between 10-28 grams, Third Offense. On May 25, 2021, Applicant made a global plea, disposing of his Oconee and Anderson charges. Applicant pled guilty off of the trial docket to a negotiated sentence of fifteen (15) years active

time for Trafficking Methamphetamine, 10-28 grams, Second Offense; five (5) years for Burglary, 3rd degree – 1st offense; and five (5) years for Grand Larceny, Value More than $2000 but Less than $10,000—the sentences running concurrently. Applicant waived presentment to these charges. In exchange of Applicant's plea, the State dismissed the charges of possession of stolen vehicle; removing or falsifying identification number of vehicle or engine; reckless driving; distribution of methamphetamine, third offense; and unlawful carrying of a pistol. Applicant did not appeal his convictions or sentences.

CURRENT ACTION BEFORE THIS COURT

In his initial PCR application, Applicant did not include any allegations. On April 8, 2024, Applicant filed an amended application, alleging he is being held in custody unlawfully based on the following:

1. Ineffective Assistance of Counsel
   a. Counsel failed to prevent direct indictment of the charge as a trafficking third offense less than two weeks prior to trial; and
   b. Failed to communicate and advise Applicant regarding the State's plea offer; and
1. Involuntary guilty plea
   a. Due process violation in the indictment procedure and insufficiencies in the chain of custody which denied Applicant a fair trial causing him to plea when he otherwise would not have.

An evidentiary hearing was held on April 9, 2024, before the Honorable H. Steven DeBerry, IV. Applicant was present and represented by Susannah C. Ross, Esquire (PCR Counsel). Assistant Attorney General Talida Balaj represented Respondent. At the outset of the hearing, PCR Counsel indicated Applicant wished to go forward on the allegation related to his initial plea offer, as follows:

> I have spoken to Mr. Gibson this morning, and he wants to go forward on the issue that's sort of outlined in Davie v. State. That case is at 675 SC 2nd at 416. It's a 2009 case, and it basically states

> that counsel is deficient if they don't effectively convey a plea offer, and the client has a meaningful opportunity to accept and -- but for that the outcome would have been different. We'd also argue Sprouse v. State -- or Sprouse v. State. That's 585 SC 2nd 278 at 281, 2003. There's a quote finding defendant was entitled to post-conviction relief where the State failed to honor the plea agreement and made the defendant and trial counsel failed to ensure that the State adhered to the original plea agreement. As stated before, Mr. Gibson was indicted from, I believe, a trafficking first was out there, to a trafficking third on May 11th. And then May 23, they -- 23rd, less than two weeks later, proceeded to trial.

(PCR Tr. p. 6, ll. 8-24). At the close of the evidentiary hearing, this Court took the matter under advisement.

By written Order filed July 1, 2024, this Court granted post-conviction relief and remanded the matter to the Oconee County Court of General Sessions for a new trial, finding Plea Counsel ineffective and Applicant prejudiced by Plea Counsel's deficiencies for failing. This motion to reconsider, alter, and amend pursuant to Rule 59(e), SCRCP, follows:

ARGUMENTS IN SUPPORT OF RECONSIDERATION

Respondent moves this Court to reconsider its earlier decision and deny post-conviction relief because Applicant failed to meet his burden of establishing Plea Counsel was constitutionally deficient and Applicant was prejudiced by Plea Counsel's alleged deficiency.

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 687–88 (1984); Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." Watson v. State, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To establish prejudice, the applicant must prove "there is a reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625.

In its order granting relief, this Court found that Plea Counsel's "inattention and failure to intervene on applicant's behalf before his placement on the trial docket for an enhanced charge was ineffective" and that had Plea Counsel "immediately notified the State that they accepted the plea, there is no indication he would have been indicted for a third offense." (Order Granting Post Conviction Relief pp. 5 – 6).

Respondent respectfully asserts this Court's order is based on numerous factual and legal errors based on the record and that this Court's grant of post-conviction relief should be reconsidered and relief should be denied.

RECONSIDERATION BASED ON FACTUAL ERRORS

Respondent respectfully moves this Court to reconsider the grant of relief of Applicant's PCR application, as the Court's findings are supported by factual errors. Specifically, the Court based its finding that Plea Counsel was ineffective in part as she failed to communicate Applicant's acceptance of the ten-year plea offer to the State. However, Plea Counsel never indicated in her testimony that Applicant had accepted the ten-year plea offer. Moreover, Applicant's testimony does not support a finding that he accepted the ten-year plea offer.

On direct examination, Applicant testified Plea Counsel advised him of the ten-year plea offer and he never accepted it prior to trial. (PCR Tr. pp. 7 – 8).

On cross-examination, Applicant testified that he understood the terms of the negotiated sentence of fifteen years that he pled to, and that at no time during his plea did he object to the terms of the negotiated sentence. (PCR Tr. p. 10).

On direct examination, Plea Counsel testified, referencing her notes, that on March 12, 2021, she emailed the State about reaching out to the narcotics officer *again* concerning Applicant possibly cooperating. (PCR Tr. p. 13). Plea Counsel testified that on March 16, 2021, the State emailed her stating the case would go to trial or Applicant could accept the ten-year offer. (PCR Tr. p. 14). Plea Counsel testified she met with Applicant on April 19, 2021, advising him of this email. Id. Plea Counsel testified she then strategized with Applicant concerning the possibility of pleading depending on the circumstances, like the judge he would be pleading before or whether he received an offer to cooperate with narcotics. (PCR Tr. p. 14). At no point in her testimony did Plea Counsel state Applicant advised her he wished to accept the plea offer.

In fact, on cross-examination, Plea Counsel testified Applicant **never** said that he would plea, but considered *if* he would take the offer, *waiting* to see whether narcotics would see him. (PCR Tr. p. 19). Plea Counsel testified that Applicant informed her in April that he *may* take the offer, but he **never** advised her that he wanted to take the ten-year offer. (PCR Tr. p. 19). Plea Counsel testified her notes indicate they merely discussed the pros and cons of pleading in front of certain judges. (PCR Tr. pp. 19 – 20). Plea Counsel testified she is not certain whether Applicant said, "Yes, I will take this offer or No, I won't." (PCR Tr. p. 20). However, Plea Counsel testified that had Applicant advised her he would take the offer, she would have sent an email requesting the sentencing sheets, and she did not do that. Id. Plea Counsel testified she could not imagine Applicant advising her he wanted to accept the ten-year plea offer. Id.

On re-direct, Plea Counsel testified that she advised Applicant in April that it is not her job to push Applicant into a plea or tell them to go to trial, and she would not have advised Applicant to not plea and wait on narcotics. (PCR Tr. p. 21).

In its Order, this Court erroneously found that Applicant and Plea Counsel made a plan to plead guilty to the ten-year offer from the State, and that Plea Counsel failed to communicate Applicant's acceptance to the State. (Order Granting Post Conviction Relief p. 6). However, no testimony exists within the record from Applicant or Plea Counsel that Applicant accepted the plea offer—at any point. Applicant testified he never accepted the offer. Plea Counsel *repeatedly* testified Applicant never indicated he wished to accept the ten-year offer but merely considered the possibility of pleading, and had he accepted the offer, Plea Counsel would have sent an email to the State reflecting his acceptance. Additionally, Plea Counsel testified she did not advise Applicant to wait on narcotics before deciding to plea, and she advised Applicant it was his decision whether or not to plea. None of the testimony before this Court establishes that Applicant accepted the offer or that Plea Counsel failed to communicate Applicant's acceptance to the State.

Contrary to the Court's finding, the testimony establishes that (1) Plea Counsel communicated the ten-year plea offer to Applicant in January of 2021, (2) Applicant did not accept the ten-year offer because he hoped he could get a better offer either through negotiations with the State or by cooperating with narcotics, (3) Plea Counsel advised Applicant in March of 2021 that the State advised her that Applicant could accept the ten-year plea offer or proceed to trial on trafficking third offense (4) Plea Counsel and Applicant discussed the pros and cons of pleading, and (5) Applicant did not advise Plea Counsel that he wished to accept the ten-year offer prior to his trial in late May.

Based on this, Plea Counsel cannot be deficient, as Applicant never accepted the offer and the State rightfully withdrew the ten-year offer. See United States v. McQueen, 108 F.3d 64, 66 (4th Cir. 1997) ("The interpretation of plea agreements is guided by contract law, and parties to the agreement should receive the benefit of their bargain."); see also Reed v. Becka,

333 S.C. 676, 688, 511 S.E.2d 396, 402 (Ct. App. 1999) ("A plea agreement is only an "offer" until the defendant enters a court-approved guilty plea. A defendant accepts the "offer" by pleading guilty. Thus, until formal acceptance of the plea by the court has occurred, the plea binds no one, not the defendant, the State, or the court."); Id. (Until formal acceptance, either party may withdraw their offer); See State v. Marlow, 334 N.C. 273, 432 S.E.2d 275 (1993) (prosecutor may rescind his offer of proposed plea arrangement at any time before it is consummated by actual entry of guilty plea and acceptance and approval of proposed sentence by trial judge).

Additionally, Plea Counsel testified that on January 12, 2021, the State sent an email with the ten-year offer, noting that Applicant's charges were more appropriately charged as a third offense, and she conveyed that to Applicant. (PCR Tr. pp. 12 – 13). Plea Counsel testified that on April 19, 2021, she advised Applicant that the State informed her that Applicant could accept the offer or go to trial. (PCR Tr. p. 14). Plea Counsel testified she advised Applicant that it was not her "job to push you into a plea or to tell you to go to trial, so I wouldn't have told him don't plead until we see what happens." (PCR Tr. pp. 20 – 21).

Based on Plea Counsel's testimony, Applicant not only knew about the offer and failed to accept it, but he considered the offer for six months knowing that trafficking third offense was the appropriate charge he was facing, was advised the State intended to proceed to trial if he did not accept the offer, and was advised by Plea Counsel that it was his decision whether or not to plead. Plea Counsel fulfilled her duty under the law and offered no misadvice that prompted Applicant to improvidently reject the offer.

Therefore, Respondent moves this Court to reconsider its decision granting relief as the testimony does not establish Applicant accepted the ten-year plea offer. As such, Plea Counsel cannot be ineffective for failing to communicate Applicant's acceptance to the State

where no evidence or testimony was presented that Applicant expressed his acceptance of the offer to Plea Counsel; rather, Applicant's own testimony precludes this finding where he testified that he never accepted the plea offer. Alternatively, Respondent requests this Court amend its Order to accurately reflect the testimony presented at the evidentiary hearing concerning this matter.

RECONSIDERATION BASED ON MULTIPLE LEGALS ERRORS

Respondent respectfully moves this Court to reconsider the grant of relief of Applicant's PCR application, as the outcome of Applicant's case would not have been different had Plea Counsel argued Langford[2] prior to Applicant's trial commencing rather than in her pre-trial motion before the trial court. Further, Davie[3] is not applicable in Applicant's case to establish he suffered prejudice.

Plea Counsel Did Argue Langford

In its Order, this Court found that "had [Plea Counsel] argued before the case was called to trial that the facts of this case would normally appear to be an abusive and arbitrary use of the State's power in violation of Langford's 2012 mandate that "the dockets will henceforth be managed pursuant to the administrative order issued in conjunction with this opinion"; the outcome of the proceeding would have likely been different." (Order Granting Post-0Conviction Relief p. 6). However, this finding ignores the fact that the trial court denied Plea Counsel's motion to dismiss Applicant's case pursuant to Langford and that the record establishes the scheduling of Applicant's trial was not abusive or arbitrary. Additionally, it ignores the fact that Applicant had knowledge of his own prior trafficking

---

[2] State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012).
[3] Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009), abrogated by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018)

charges and his impending trial. Further, it ignores the fact Applicant was **expressly notified** in January 2021 and early April 2021 that he would be charged with trafficking-third offense at trial.

In pre-trial motions, Plea Counsel moved the trial court to dismiss Applicant's case as it was unconstitutional pursuant to Langford, as follows:

> Under the Langford case, which is the -- why am I not finding my case number. I have an opinion number, 27195, wherein our South Carolina Supreme Court says that the exclusive jurisdiction is in the hands of the Solicitor's office to make and publish dockets. It is an unconstitutional separation of powers violation as members of the executive branch. And docketing is inherently a judicial function. As though is the case, the Court has the inherent power to control the order of business. Setting the trial docket is, therefore, the prerogative of the Court. This is a situation, this particular docket, and there are one, two, three, four, five cases, including one that was indicted to be -- so, I don't know if it has been indicted -- subsequently been indicted, but that are listed on the case. These cases are not done in any sort of consultation with the Court. They were not done with oversight from the Court. This was a docket that was prepared, as we have historically prepared them, which the solicitor says that these are the ones that we are putting on there, these are the ones that we have chosen to indict. And Your Honor, it is -- it is, while I understand that the courts have struggled in the weight of the 2012 Langford decision to replace with a constitutional model, this docket clearly on its face does not conform with the auspices of Langford. The, again, citing from Langford, this is not a gray area where some encroachment can be tolerated, but rather a complete division of the Court's domain. For this reason, we are asking that it be quashed.

(Transcript pp. 20 – 21). Additionally, Plea Counsel and her co-counsel mentioned Judge Maddox's *unsigned* administrative order which offered guidance on docketing that would be in conformity with Langford. (Transcript pp. 21 – 22). Further, Plea Counsel and co-counsel argued that the Solicitor's scheduling of Applicant's trial was abusive. (Transcript p. 23).

In response, the Solicitor advised the trial court that a series of orders had been issued to provide guidance in how to implement Langford and that the State was in compliance with the current order and rules of court. (Transcript p. 24).

The trial court provided the following in support of its decision denying Plea Counsel's motion to dismiss pursuant to Langford:

> I am aware of the proposed administrative order, having been provided a draft. And I'll just back up and give a little history in the situation. In the wake of the Langford decision, as has been alluded to, it's been a gradual process of the courts asserting control over the criminal docket. We were called to Columbia in 2019 for a chief administrative judge meeting, and as you know, both of you are aware, I served as chief administrative judge in 2019 and 2020. And we had a meeting on this very issue for the purpose of establishing guidelines for how courts were going to manage the criminal dockets. It was clear that, for the lack of a better phrase, one size didn't fit all. Each circuit has unique needs, each circuit has its own issues. So, we were not directed to have a uniform order that made everyone operate the administrative side of it the same way. At that point a formal administrative order came from the chief justice at the end of June 2019, which it did give courts general authority to manage the docket. It didn't direct us to set the docket. It just said "manage". Now, as you know, the steps we took in the tenth circuit were to prioritize old cases, in which we started roster meetings. All of you participated in the roster meetings and a number of the old cases were moved and taken off of the docket. The newer cases were left in the discretion of the solicitor to set the docket. That is the current order that is in place. Now, if the draft order is signed, the effective date of the draft is October the 1st, so even if the order was signed, it still would not be applicable to this case. And it just -- just waiting on the chief justice to approve that order. So, the docket is going to change and there will be significant changes. Again, this is gradual, but once this order is signed the new procedure will start for cases, I think, after October the 1st. So, with that said, Ms. Johnson, I am going to deny your motion.

(Transcript pp. 24 – 26). Plea Counsel's co-counsel then argued that there were priority cases from 2019 that have not been disposed of, acknowledging that COVID had affected docketing. (Transcript pp. 26 – 27). The trial court noted that COVID "changed all of that" and that many of the older cases required lengthy trials, and the court's instruction to the solicitor was to set cases that would take one day. (Transcript p. 27). Ultimately, the trial court denied the motion. Id.

The record plainly establishes that the Solicitor did not schedule the case in an abusive or arbitrary manner and was in compliance with the current administrative order in place. In its Order, this Court noted Plea Counsel's testimony that she was shocked when that

Applicant's case had been scheduled for trial, and she had never seen a trial docket without an indictment number. (Order Granting Post-Conviction Relief pp. 4; 6). However, Plea Counsel's subjective shock that the State had called her client's pending eight-month-old case to trial is not sufficient to meet the standard that Plea Counsel was deficient and Applicant suffered prejudice. This is especially true considering Plea Counsel testified *repeatedly* that she advised Applicant of the ten-year plea offer multiple times and that he could be charged with trafficking third offense months prior to his trial. (PCR Tr. pp. 13 – 14; 19 – 21).

Whether Plea Counsel argued this case in a motion prior to trial or in pre-trial motions would not change the fact that the State was in compliance with the rules of court and current administrative order, as the trial court ruled. Applicant cannot suffer prejudice for Plea Counsel's failure to make her same motion two weeks earlier rather than at trial, especially where the motion would not have been successful. Additionally, Applicant had more than ample time to consider and accept the ten-year plea but elected not to, instead taking his chances that he could receive a better sentence—or evade imprisonment altogether. Whether Plea Counsel argued her same Langford motion prior to trial versus in pre-trial motions would not have changed the outcome of Applicant's case.

Therefore, Respondent moves this Court to reconsider its grant of relief as Plea Counsel cannot be deficient for failing to argue her same motion two weeks earlier where the motion would not have been successful, as shown by the trial court's ruling on the motion in pre-trial motions. The outcome of Applicant's case would not have been different had Plea Counsel made the motion prior to trial after this matter was already ruled upon.

Davie v. State is Not Applicable to Applicant's Case

In its Order, this Court found "The prejudice to the Applicant is apparent in the difference in the fifteen-year sentence he received for trafficking second offense and plea

offer of ten years for trafficking first offense." See Davie v. State, 675 S.E.2d 416, 381 S.C. 601 (S.C. 2009)." However, the facts of Davie are distinguishable from Applicant's.

In Davie, the Supreme Court found that trial counsel was deficient for failing to communicate the State's initial plea offer to the defendant where plea counsel testified he was not aware of the offer and did not object at applicant's plea hearing when made aware of an initial offer. 381 S.C. 601, 675 S.E.2d 416. The Supreme Court analyzed the prejudice Davie suffered on a case-by-case basis, finding the following:

> Initially, we conclude that the difference in the sentence Petitioner received and the plea offer is proof of prejudice. We reach this conclusion for several reasons. First, the solicitor and plea counsel both acknowledged that the State originally offered a fifteen-year sentence in exchange for Petitioner's guilty plea. Secondly, plea counsel admitted that he failed to communicate this offer to Petitioner. Thirdly, both plea counsel and Petitioner testified that had this offer been communicated Petitioner would have accepted the plea agreement. Finally, had Petitioner accepted the original offer, he would have received a significantly lower sentence than the twenty-seven-year sentence that was imposed.

Id.

In Applicant's case, it is undisputed that Plea Counsel communicated the ten-year plea offer to Applicant, as established through Applicant's and Plea Counsel's testimony. Additionally, Applicant and Plea Counsel testified Applicant never accepted the ten-year offer. The Court in Davie based its findings of prejudice on plea counsel's outright failure to communicate the initial plea offer to the applicant. As it is undisputed that Plea Counsel communicated the ten-year offer to Applicant, Davie is inapplicable to analyzing Applicant's case.

Therefore, Respondent moves this Court to reconsider it's grant of relief as Davie is not applicable to Applicant's case and does not support a finding of prejudice where Applicant knew of and considered the ten-year plea offer months in advance to his trial. The prejudice

that Applicant suffered in this case was due to his own actions, and not Plea Counsel's performance.

MOTION TO AMEND AND REMOVE IRRELEVANT PORTIONS OF THE ORDER[4]

Respondent respectfully moves this Court to reconsider the language in the irrelevant portions of the Order that do not go to the issue before the Court, whether Plea Counsel was ineffective. Specifically, Respondent respectfully requests the Court reconsider and remove the following portion of the Order:

> Finally, the Court is deeply concerned regarding two matters. Langford was decided over a decade ago with the clear ruling that solicitor control of the docket was unconstitutional. While the trial judge ultimately determined that the defendant had not suffered prejudice in this matter, it is deeply disturbing to this Court that the solicitor could still control so many aspects of docket control that he could essentially force the defendant to accept five more years than originally offered without explanation. Second, it is unfathomable to this Court how a two-year delay in filing a Return to a PCR is not presumptively prejudicial. Justice delayed is justice denied, and the Court would point out that it may be difficult or impossible to prove prejudice after a two-year delay. The solicitor who prosecuted this case is still employed in the Oconee County Courthouse, but he was not called to offer an explanation as to how or why the applicant was indicted at the last minute and the plea offer withdrawn without explanation.
>
> "The plea process is meant to 'bring[] to the criminal justice system a stability and certainty' that, in this case, were noticeably lacking." Premo v. Moore,

---

[4] PCR Counsel provided Respondent with a copy of the proposed order by email on June 7, 2024, consistent with Fishburne v. State. 427 S.C. 505, 832 S.E.2d 584 (2019) ("A copy of the proposed order should be transmitted to opposing counsel. Opposing counsel should promptly review the proposed order and alert preparing counsel and the PCR court as to any deficiencies in the proposed order."). Upon reviewing the proposed order, Respondent had no objections to the version provided. On June 13, 2024, PCR Counsel provided this Court with the proposed order, however, the proposed order contained additional paragraphs that were not included in the proposed order sent to Respondent on June 7th. Specifically, the additions are the paragraphs Respondent now argues should be removed. Notably, PCR Counsel did not inform Respondent or this Court that the proposed order provided for this Court's consideration was not the order provided to Respondent previously. Had PCR Counsel notified Respondent that she was submitting an altered proposed order and not the order previously sent and reviewed by Respondent without objections, then Respondent would have objected to the additional language prior to the Court signing the order. For these reasons, Respondent requests this Court reconsider and remove the additions as argued herein.

> 562 U.S. 115, 132 (2011). [Both the Solicitor and Attorney General's] office would do well to remember that it is "the representative ... of a sovereignty whose obligations to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). United States v. Murraye, 596 Fed.Appx. 219, 229 (4th Cir. 2015). When it appears that an offer is withdrawn without explanation and the solicitor still had the power to place a defendant on the trial docket without warning, in front of numerous older cases, and without explanation, in a system that our Supreme Court had declared unconstitutional and has acknowledged leaves room for abuse, it is not justice to sentence a man to five years more in prison than he was willing to accept.

(Order Granting Post Conviction Relief pp. 7 – 8).

The question before this Court is whether Plea Counsel's representation was constitutionally deficient, not whether the trial court's ruling concerning Plea Counsel's Langford motion was correct nor whether Applicant suffered prejudice from the delay in this PCR action.

This Court is not positioned to determine whether the trial court and its rulings were correct or not at Applicant's trial. See S.C. Code § 17-27-20; Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) (PCR relief is only proper when the application collaterally attacks the validity of the conviction or sentence); Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings."). Additionally, Respondent's delay in responding to the application is not at issue and has no bearing on the prejudice Applicant allegedly suffered from Plea Counsel's representation. Notably, in its Return, Respondent requested the Court to accept its Return as timely filed based on significant staffing issues, high workload, and where there was no demonstrable prejudice to Applicant, and this Court accepted the Return.

Therefore, Respondent respectfully requests the above portions of the Order be reconsidered and removed, as they are irrelevant and beyond the scope of the Court's authority in this action.

|CONCLUSION PAGE FOLLOWS|

CONCLUSION

For all the foregoing reasons, the State asks this Court to reconsider its prior ruling, alter or amend its judgment pursuant to Rule 59(e), SCRCP, and find Applicant failed to meet his burden of proving he was entitled to a grant of relief and deny and dismiss his application.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

TALIDA BALAJ
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-0386

July 18, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	TENTH JUDICIAL CIRCUIT
COUNTY OF OCONEE	)	
	)	CASE NO.: 2022-CP-37-00207
Derek W. Gibson,	)	ORDER
Applicant,	)	
vs.	)	
State of South Carolina,	)	
Respondent.	)	

FILED OCONEE COUNTY SC
MELISSA C. BURTON
CLERK OF COURT
2024 JUL 29 P 1:51

The State of South Carolina, requests the Court to reconsider the Order dated and filed July 1st 2024 in the Oconee County Clerk of Court's office.

Having duly considered the motion of the Respondent, this Court has determined that its original ruling of July 1st, 2024 is fully supported by the law and the evidence and is hereby ratified and reconfirmed. The motion is therefore DENIED.

AND IT IS SO ORDERED.

H. Steven DeBerry, IV
Judge, Twelfth Judicial Circuit

Dated: July 24, 2024

Copies to:
Atty___(P) Ross (D) Daley
DSS_____ other_____
Mailed ✓ Boxed____ handed_____

ENTERED COMPUTER

CERTIFIED TRUE COPY
JUL 29 2024
CLERK OF COURT
OCONEE COUNTY, SC