

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

**Aug 29 2024**

S.C. SUPREME COURT

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Certiorari to Abbeville County

Honorable B. Alex Hyman, Circuit Court Judge

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KYRON J. L. BAILEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2024-000926

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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GARY H JOHNSON  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Did the PCR court err in finding counsel was effective when they failed to enforce the solicitor's agreement that petitioner's sentence would be zero-to-twenty in exchange for his guilty plea and instead allowed petitioner to plead guilty under a ten-to-twenty-year sentence range?

## STATEMENT

Petitioner was indicted over an armed robbery of a residence during which Angela Donald was shot and severely injured. App. 5, ll. 10 – 17. In connection with this incident, he was charged with armed robbery, strong armed robbery, burglary in the first degree<sup>1</sup> and attempted murder. App. 113 – 121. In a separate incident, petitioner was charged with another armed robbery, assault and battery of the first degree<sup>2</sup>, and of being in possession of a weapon during a violent crime from an incident in which Keytorio Evans was robbed at gunpoint of personal items. App. 109 – 113. Petitioner faced charges from another unrelated incident involving a domestic disturbance for which he was charged with a second-degree count of domestic violence. App. 107.

For the charges related to the Donald incident, the state relied heavily on the doubtful testimony of co-defendants who had negotiated with the solicitor's office to implicate Petitioner. App. 75, ll. 8 – 22. These statements were inconsistent and did not conform to one another. App. 67, ll. 8 – 21. The lack of physical evidence and the inconsistent and self-serving statements of the co-defendants made petitioner desire a trial rather than a negotiated plea. App. 67, ll. 8 – 24. Plea counsel, Scarlet Moore, admitted having alibi witness testimony to present related to the Donald charges and that the cases against petitioner would be based upon the credibility of the witnesses involved. App. 83, ll. 2 – 11.

Petitioner was represented by Moore during his plea negotiations and at his guilty plea before the Honorable Eugene C. Griffith, Jr., on September 23, 2020. App. 1. Micah Black

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<sup>1</sup> Petitioner pled guilty to burglary second degree. App. 4, ll. 17 – 19; App. 124.

<sup>2</sup> This charge was dismissed during the guilty plea. App. 4, ll. 14 – 16. The state also dismissed 2<sup>nd</sup> degree assault and battery charges from another unrelated incident involving Mykel Coleman. App. 4, ll. 14 – 16; App.115.

represented the state. App. 1. Upon reliance on the solicitor's agreement to a sentence range of zero to twenty years, petitioner agreed to enter a guilty plea to the charges rather than move forward with his trial. App. 68, l. 16 – 69, l. 15. However, the solicitor backed out of the plea agreement and required a sentence range of ten-to-twenty years' incarceration on the day of the plea. App. 4, l. 20 – 5, l. 6. Plea counsel made no effort to enforce the original plea deal and petitioner was sentenced to 15 years for strong armed robbery and burglary second, 20 years for armed robbery and attempted murder, and 2 years for the domestic violence charge, all to run concurrently. App. 34, ll. 3 – 13.

No direct appeal was filed. Petitioner filed for PCR asserting ineffective assistance of counsel. App. 36 – 43. Following a Return by the State, an amended PCR application was filed by Ashley McMahan, specifically asserting plea counsel was ineffective during plea negotiations. App. 57 – 58. An evidentiary hearing was held before the Honorable B. Alex Hyman on November 28, 2023. App. 59. Ms. McMahan appeared on behalf of petitioner and Cruise Mitchell appeared on behalf of the state. App. 59. By Order of Dismissal dated May 21, 2024, Judge Hyman denied relief. App. 91 – 105.

This petition for certiorari follows.

## ARGUMENT

The PCR court erred in finding counsel was effective when they failed to enforce the solicitor's agreement that petitioner's sentence would be zero-to-twenty in exchange for his guilty plea and instead allowed petitioner to plead guilty under a ten-to-twenty-year sentence range.

### **A. How the issue was raised at PCR.**

Petitioner's amended PCR application specifically alleged plea counsel was ineffective in handling plea negotiations. App. 57. During the evidentiary hearing, petitioner testified about the change to the plea deal on the day of his guilty plea:

Q. So when you went into the courthouse did you talk to Miss Moore that day that you plead guilty?

A. Yes, ma'am.

Q. What did you guys talk about then?

A. That the victim was not in agreement with the plea deal, zero to 20 because they didn't want the possibility of me going home. So the solicitor went back on the plea deal and turned into ten to twenty instead of zero to twenty.

App. 69, ll. 2 – 10.

Plea counsel did not contest this testimony regarding the alteration of the plea agreement.

Q. What were the plea negotiations between you and Mr. Black?

A. So, I knew that -- I do think Mr. Bailey -- *he may recall this more than I do*. I knew that we were talking about some type of cap of twenty and *that very well may be correct that the victim wanted at least ten*. I just don't have any recollection of any of that, but I do know that Mr. Black was okay or the victim was okay with a cap of twenty.

App. 80, ll. 17 – 25 (emphasis added).

**B. How the PCR court ruled.**

The PCR court failed to specifically rule on the change in the plea negotiation from a zero-to-twenty to a ten-to-twenty sentence range. Instead, the PCR court found petitioner “failed to present any evidence or testimony that Counsel failed to communicate a more favorable plea offer to him, or that a more favorable plea offer would have been made had Counsel more adequately engaged in the negotiations.” App. 103.

**C. How the PCR court erred.**

In the present case, petitioner testified that he relied upon the solicitor’s zero-to-twenty-year sentence range in electing to pled guilty and he was not informed of the solicitor’s change of heart until just before his plea hearing. App. 68, l. 11 – 69, l. 10. The fact that the victim did not like the plea arrangement was not a basis for the solicitor to change the agreed upon terms just before the plea was entered. *See Reed v. Becka*, 333 S.C. 676, 683, 511 S.E.2d 396, 400 (Ct. App. 1999) (“[W]hile victims clearly have numerous valuable rights at the trial level protected by our laws and enforceable by writ of mandamus, these rights fall short of giving the victim the right to veto a proposed plea agreement. The Solicitor has unfettered discretion in that regard. Although victims must be notified of plea offers, the General Assembly has not empowered victims with the right to reject a proposed plea offer and force a prosecutor to trial or back into negotiations.”). While the solicitor could have withdrawn the plea offer before the plea hearing under *Becka*, it was improper to alter the terms of the plea and counsel was ineffective in allowing the altered plea to proceed. *See Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 499, 30 L. Ed. 2d 427 (1971) (noting “when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.”). Plea counsel was ineffective in failing to advise

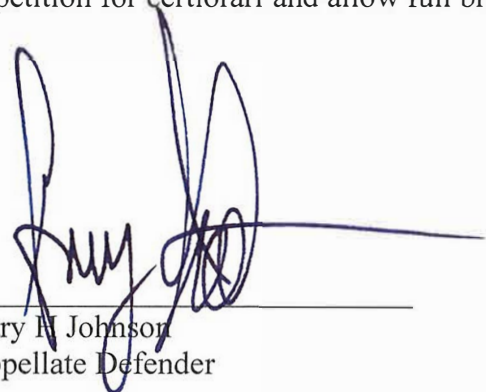
petitioner regarding the ability of the state to alter the terms of the plea bargain and there is a reasonable probability that petitioner would not have pled guilty absent counsel's ineffective advice. *See Hill v. Lockhart*, 474 U.S. 52 (1985).<sup>3</sup> As noted, the cases depended on the credibility of the witnesses and, at least for the charges related to the Donald incidents, petitioner had alibi witnesses available. App. 83, ll. 2 – 11.

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<sup>3</sup> Detrimental reliance is a factor in enforcing plea agreements. *See Reed v. Becka*, 333 S.C. 676, 689, 511 S.E.2d 396, 403 (Ct. App. 1999)(noting a “defendant relies upon a solicitor's plea offer by taking some substantial step or accepting serious risk of an adverse result following acceptance of the plea offer.”). The PCR court made no findings of fact or conclusions of law regarding petitioner’s potential detrimental reliance on the state’s plea offer. A remand for specific findings of fact and conclusions of law of petitioner’s potential detrimental reliance may be appropriate under *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019).

**CONCLUSION**

The appropriate remedy when plea counsel was ineffective in holding the state to the benefits of the plea bargain are “either specific performance of the plea agreement and resentencing or for a new trial.” Jordan v. State, 297 S.C. 52, 55, 374 S.E.2d 683, 685 (1988). Since plea counsel was ineffective in failing to object to the state’s alteration of the zero to twenty sentence range, and since petitioner would not have pled guilty and would have instead insisted on going to trial, this Court should grant the petition for certiorari and allow full briefing on this issue.

A handwritten signature in blue ink, appearing to read 'Gary H. Johnson', is written over a horizontal line. The signature is stylized and somewhat illegible.

Gary H. Johnson  
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of August, 2024.

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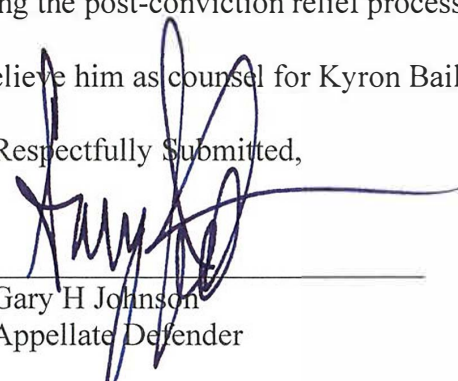
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PETITION TO BE RELIEVED AS COUNSEL  
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Counsel for Kyron Bailey states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge B. Alex Hyman, which was held on November 28, 2023, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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 him as counsel for Kyron Bailey.

Respectfully Submitted,

  
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Gary H Johnson  
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of August, 2024.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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 29th day of August, 2024.