

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2013-000954

Antrown Irby,.....Petitioner,

v.

State of South Carolina,.....Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Did the PCR Court properly hold that Counsel was not ineffective for failing to ensure Petitioner accepted and received a ten year plea offer, when Petitioner failed to prove that the offer incorporated all of Petitioner's outstanding charges and Petitioner failed to prove any resulting prejudice?

STATEMENT OF THE CASE

The Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Petitioner at the July and August 2009 terms of General Sessions for armed robbery (09-GS-42-3515), assault and battery with intent to kill (ABWIK) (09-GS-42-3514), and possession of methamphetamine or crack cocaine (09-GS-42-4471). The Petitioner was represented by Richard H. Whelchel, Esquire. On February 24, 2011, the Petitioner pled guilty as indicted. The Honorable J. Mark Hayes II sentenced the Petitioner, pursuant to a negotiated sentence, to confinement for a period of fifteen (15) years each for ABWIK and armed robbery, and three (3) years for possession of methamphetamine or crack cocaine, sentences to run concurrent. The Petitioner did not appeal his guilty plea or sentence.

The Petitioner subsequently filed a PCR application on January 25, 2012. The Respondent made its Return on or about September 15, 2012. An evidentiary hearing into the matter was convened on January 9, 2013, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and was represented by R. Patrick Martin, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. Following the hearing, The Honorable J. Derham Cole denied the PCR application by written Order dated April 2, 2013.

A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari was submitted. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

- I. **The PCR Court properly held that Counsel was not ineffective for failing to ensure Petitioner accepted and received a ten year plea offer, when Petitioner failed to prove that the offer incorporated all of Petitioner’s outstanding charges and Petitioner failed to prove any resulting prejudice.**

Petitioner faced multiple charges in 2010, including charges of armed robbery, assault and battery with intent to kill and possession of cocaine. Petitioner alleged that the State made a plea offer of ten years to resolve all outstanding charges, but that Counsel failed to accept the plea before the offer was rescinded. Petitioner later accepted a negotiated plea for fifteen years concurrent on the charges of armed robbery, assault and battery with intent to kill, and possession of cocaine. (App. p. 11). Petitioner alleged that because of Counsel’s deficient conduct and failure to accept the plea bargain on Petitioner’s behalf, Petitioner was prejudiced by having to serve a sentence that was longer than the original plea offer.

In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that “Counsel's conduct so undermined the proper functioning of the adversarial process that the trial

cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of Counsel. First, the Petitioner must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland). Second, Counsel's deficient performance must have prejudiced the Petitioner such that “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.

Petitioner testified that he wanted to accept a plea offer of ten years from the Assistant Solicitor – Jacquelyn Moss - initially handling his cases. (App. p. 36). Petitioner testified that Counsel informed him of the plea offer from Ms. Moss for either a straight up plea or a *recommendation* of a ten year cap with a *recommendation* of concurrent sentencing around August 31, 2009. (App. p. 40). Petitioner then testified that he received another communication from Ms. Moss in April 2010 regarding a *recommendation* of concurrent sentencing for the charges of armed robbery, possession of cocaine, and an outstanding receiving stolen goods charge, with no mention of a recommendation of a ten year cap or resolving the assault and battery with intent to kill charge. (App. p. 40). Petitioner testified that he instructed Counsel to

accept the offer on Petitioner's behalf. (App. p. 36). However, a little more than two weeks before his plea in February 2011, Counsel informed Petitioner that another Assistant Solicitor – Michael Morin - had taken over the case and filed a notice to seek a sentence of life without parole if Petitioner were to proceed to trial and be found guilty based upon his two prior strikes. (App. p. 37). Petitioner acknowledged that Mr. Morin withdrew the ten year offer at that time, but Counsel was still able to “work[] the deal” and obtain a fifteen year plea offer. (App. p. 37).

Counsel testified that he made the Petitioner aware of the plea offers made by Ms. Moss. (App. p. 45). However, Counsel testified that Mr. Morin filed notice to seek a sentence of life without parole a few weeks before Petitioner pled. (App. p. 46). At that time, Counsel testified that Petitioner indicated that he did not want to face that possibility. (App. p. 46). Counsel informed Petitioner that the ten years was no longer an option and Petitioner expressed that he wanted “something concrete.” (App. p. 46). Counsel testified that he explained the difference between a negotiated sentence and a recommendation with Petitioner when they discussed the possibilities following the negotiated plea offer. (App p. 46).

This Court has established that a case-by-case approach is most consistent with and achieves the “ultimate goal of assessing whether but for counsel's deficient performance a defendant would have accepted the State's proposed plea bargain and that he would have benefited from the offer.” Davie v. State, 381 S.C. 601, 613, 675 S.E.2d 416, 422 (2009). Because presumed prejudice is reserved to very limited situations, a defendant must show actual prejudice. Id. To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, (1) not only must the Petitioner show that they would have accepted the earlier plea offer, but (2) they must also show that the plea would have been entered without the State withdrawing the offer or the trial court

refusing to accept it. Missouri v. Frye, 132 S. Ct. 1399, 1409, 182 L. Ed. 2d 379 (2012). “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.” Id.

In this case, it is clear that the offer was conveyed by Counsel, but questions remain as to whether or not the plea offer incorporated all pending charges and whether or not Petitioner was prejudiced by Counsel’s failure to accept the offer on Petitioner’s behalf before the offer was withdrawn. Although Petitioner alleged that he would have accepted the prior ten year offer, as the testimony indicated, the offer was simply to make a *recommendation* of a cap of ten years with concurrent sentencing. Respondent submits that the Petitioner failed in demonstrating the requisite prejudice resulting from the failure to convey the plea offer of a recommendation for a ten year cap with concurrent sentencing. Because this was a *recommendation and not a negotiated plea*, the court could still take into account all of the information presented regarding the Petitioner’s prior record when issuing a sentence. The court was not obliged to accept the *recommendation* of the State for a ten year cap.

Further, all testimony indicates that the Petitioner wanted to plead guilty from the beginning and failed to prove that “but for counsel's deficient performance [Petitioner] would have accepted the State's proposed plea bargain and that [Petitioner] would have benefited from the offer.” Davie v. State, 381 S.C. 601, 613, 675 S.E.2d 416, 422 (2009). Although he clearly wanted the least amount of time possible, Petitioner failed to prove that the plea recommendation would have been accepted by the court. Therefore, the Petitioner failed to meet his burden of establishing prejudice.

Respondent submits that the Petitioner failed to meet his required burden of proof and probative evidence exists to support the court's denial of his post-conviction relief application.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

SUZANNE H. WHITE
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By: 
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April 16, 2014

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

Circuit Case No. 2012-CP-42-0348
Appellate Case No. 2013-000954

ANTROWN A. IRBY,

Petitioner,


v.

STATE OF SOUTH CAROLINA,

Respondent.

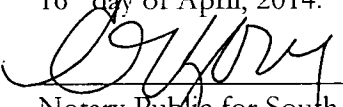
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, Benjamin J. Tripp, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211, on this the 16th day of April, 2014.



Anne A. Mueller
Legal Assistant for Respondent

SWORN to before me this
16th day of April, 2014.



Notary Public for South Carolina.
My Commission Expires: 10/28/2014

(L.S.)



ALAN WILSON
ATTORNEY GENERAL

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April 16, 2014

Via Hand Delivery

Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
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Columbia, South Carolina 29211

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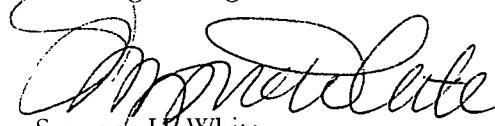
S.C. Supreme Court

RE: Antrown A. Irby v. State of South Carolina
Circuit Court Case No: 2012-CP-41-0348
Appellate Case No.: 2013-000954

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this return today.

With highest regards,


Suzanne H. White
Assistant Deputy Attorney General

SHW/aam
Enclosures

cc: Benjamin J. Tripp, Esquire (w/enclosure)