



ALAN WILSON  
ATTORNEY GENERAL

**RECEIVED**

JUN 10 2014

June 10, 2014

**S.C. Supreme Court**

The Honorable Daniel E. Shearouse  
Clerk of Court, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re:** Johnny Carraway, Respondent v. State of South Carolina, Petitioner  
Civil Action No. 2011-CP-26-155

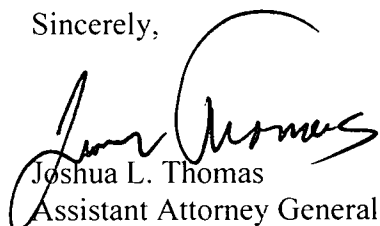
Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the order to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.
3. Correspondence with the court reporter regarding the transcript.

Because we have already received the transcript in this matter, I would respectfully request the due date for the Petition for Writ of Certiorari be calculated from today's date.

Sincerely,



Joshua L. Thomas  
Assistant Attorney General

JLT/jlt

Enclosures

CC: Daniel A. Selwa, II, Esquire  
South Carolina Department of Corrections  
The Honorable Melanie Huggins-Ward, Horry County Clerk of Court  
The Honorable Jimmy A. Richardson, II, Fifteenth Circuit Solicitor  
Office of Appellate Defense  
Ms. Trisha Allen, Victim Services

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

The Honorable George C. James, Jr., Circuit Court Judge

Case No. 2011-CP-26-00155

Johnny R. Carraway, #343576, .....Respondent,

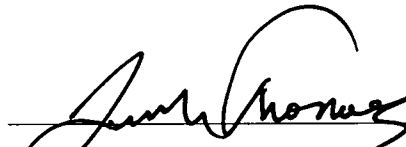
v.

State of South Carolina, ..... Petitioner.

**NOTICE OF APPEAL**

The State of South Carolina appeals the order of the Honorable George C. James, Jr., dated April 24, 2014, and filed May 6, 2014. Petitioner received written notice of entry of this order on May 12, 2014.

June 10, 2014



JOSHUA L. THOMAS  
Assistant Attorney General  
S.C. Bar No. 100777

Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

Other Counsel of Record:

Daniel A. Selwa, II, Esquire  
1053 London Street, Suite A  
Myrtle Beach, South Carolina 29577

STATE OF SOUTH CAROLINA  
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APPEAL FROM HORRY COUNTY  
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The Honorable George C. James, Jr., Circuit Court Judge

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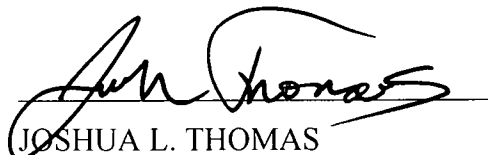
**PROOF OF SERVICE**

I, Joshua L. Thomas, certify that I have served the within Notice of Appeal on Respondent Johnny R. Carraway by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record at the following address:

Daniel A. Selwa, II, Esquire  
1053 London Street, Suite A  
Myrtle Beach, South Carolina 29577

I further certify that all parties required by Rule to be served have been served.

June 10, 2014



JOSHUA L. THOMAS  
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S.C. Bar No. 100777

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STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Johnny R. Carraway, #343576, )

Case No. 2011-CP-26-155

Applicant, )

v. )

**ORDER GRANTING  
POST-CONVICTION RELIEF**

State of South Carolina, )

Respondent. )

FILED  
14 MAY -6 PM 1:29  
Horry County

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed January 6, 2011. Respondent made a timely Return on or about March 3, 2011. The Court convened an evidentiary hearing into the matter on March 17, 2014, at the Horry County Courthouse. Applicant was present at the hearing and represented by Daniel A. Selwa, II, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office represented Respondent.

Applicant testified on his own behalf at the PCR hearing. Applicant's plea counsel, James C. Galmore, Esquire, also testified. The Court had before it a copy of the plea transcript, the records of the Horry County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the return, and the exhibits introduced at the hearing. The Court finds as follows:

**I. PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to a conviction from Horry County. Applicant was indicted in March 2010 for armed robbery (2010-GS-26-1552). He was represented by James C. Galmore, Esquire. On November 3, 2010,

Applicant pled guilty before the Honorable Steven H. John. Judge John sentenced the Applicant to eighteen (18) years. A direct appeal was filed, but the appeal was dismissed pursuant to Rule 203(d)(1)(B)(iv), SCACR, on or about December 10, 2010. The matter was remitted to the circuit court on or about January 12, 2011.

## **II. ALLEGATIONS**

In his application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. "Offer was made from solicitor's office on 3-12-10 with a deadline date of 5-7-10 for 10 years to serve. My lawyer never gave me the offer and I never signed the officer - trial or guilty plea. If I had known of this offer, I would not have been in court in November 2010 pleading guilty to 18 years."

Applicant filed an Amended Application on February 16, 2011. In this Amended Application, Applicant raised the following allegations:

1. Ineffective assistance of counsel
  - a. failed to properly review the Applicant's arrest warrant to determine that it was invalid;
  - b. failed to file the appropriate preliminary hearing request and motions on behalf of the Applicant;
  - c. failing to periodically update the Applicant on his case development which resulted in the Applicant not receiving knowledge of the State's plea offer for 10 years; and
  - d. failing to negotiate with the State and transmit the 3/12/10 plea offer to the Applicant.

At the PCR hearing, the Applicant proceeded on only the allegations of ineffective assistance of plea counsel for failure to convey the State's ten (10) year plea offer.

## **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. The Court has further had the opportunity to observe



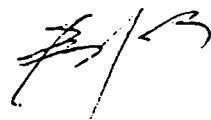
each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

**A. Summary of Testimony**

Applicant testified he does not believe he met with plea counsel enough. He alleged plea counsel explained the charges, but did not go over the evidence or the plea process. Applicant further testified he was never informed of a ten (10) year plea offer. He claimed he only discovered this offer after reviewing his file when he arrived at Kirkland Correctional Institution. Applicant testified plea counsel never discussed a ten (10) year offer with him. However, he maintained he would have accepted a ten (10) year offer had one been relayed to him.

Plea counsel testified he received a written plea offer from the State for ten (10) years and identified Exhibit #1 as the offer sheet. Plea counsel testified he gave the offer to the public defender's office's investigator to deliver to Applicant in the detention center. He testified he met with Applicant many times and discussed the State's evidence. However, plea counsel could not recall specifically discussing the ten (10) year plea offer. Plea counsel reviewed his notes, and testified he made no notation of discussing the offer with Applicant before May 7, 2010.

Plea counsel did testify he recalled continuing to negotiate with the State after receiving the initial offer. Plea counsel recalled attempting to get the State to reduce the charge to strong arm robbery. Plea counsel testified an offer deadline is usually flexible, and he believed the ten (10) year offer was still on the table at the time the case was scheduled for trial. He recalled the offer once the case was on the trial docket was to plead to ten (10) years or go to trial. He admitted Applicant never indicated a desire to accept a plea offer until October 5, 2010. He



testified the State had withdrawn the ten (10) year offer by that time. However, plea counsel could not identify exactly when the offer was withdrawn.

**B. Ineffective Assistance of Plea Counsel**

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant 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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).


Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a

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reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

The Court finds Applicant has met his burden of showing counsel was ineffective in failing to convey the ten (10) year plea offer. In Davie v. State, 381 S.C. 601, 617, 675 S.E.2d 416, 424 (2009), the applicant was granted post-conviction relief based upon ineffective assistance of counsel because counsel did not communicate to the applicant a plea offer made by the State. The South Carolina Supreme Court held the standard to be successful on such a claim required the applicant prove that: (1) plea counsel's failure to communicate the State's initial plea offer constituted deficient performance, and (2) the applicant was prejudiced by the deficient performance, or there was a reasonable probability that but for this deficient performance, he would have accepted he original plea offer. Id. at 608, 675 S.E.2d at 420. The Supreme Court held that, generally, failure to convey a plea offer constitutes deficient performance, although the existence of prejudice needs to be evaluated on a case-by-case basis. Id. at 613, 675 S.E.2d at 422.

In Lafler v. Cooper, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1376 (2012) and Missouri v. Frye, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1399 (2012), the Supreme Court of the United States analyzed ineffective assistance of counsel in the context of lapsed or rejected plea offers. In Frye, the Court determined a criminal defendant must prove three things to demonstrate prejudice for ineffective assistance of counsel for a plea that lapsed:



[D]efendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate 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. 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.

Frye, 132 S.Ct. at 1409. The Court articulated a similar standard for prejudice in Lafler. Lafler, 132 S. Ct. at 1385. The Lafler Court went on to say “[t]he correct remedy in these circumstances [...] is to order the State to reoffer the plea agreement.” Id. at 1391. Once the plea is re-offered, the sentencing judge can then “exercise [his] discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed. Id.

Here, the greater weight of the evidence establishes plea counsel did not effectively communicate the plea offer to Applicant or otherwise discuss it with him before the May 7, 2010, deadline. Plea counsel testified his investigator delivered the letter containing the plea offer to the detention center with other mail going to other inmates. There is no evidence plea counsel ever talked to Applicant about the plea offer and there is no evidence Applicant received the plea offer. It is clear Applicant would have accepted the ten (10) year offer because he has never denied guilt for his crime. It seems most of plea counsel’s efforts were aimed at investigating mental health issues and trying to get a reduction in the charge from armed robbery to strong arm robbery. Plea counsel wrote Applicant on October 21, 2010 – five (5) months after the offer expired – and advised him that he would either have to take the 10 year offer or go to

trial. Four days later, Applicant told plea counsel he would accept the offer. However, by that time the offer had been officially off the table for five (5) months. Therefore, the Court finds plea counsel was ineffective for failing to communicate the plea offer to Applicant. Furthermore, Applicant has shown prejudice in that he has demonstrated a reasonable probability he would have accepted the plea offer. There is also a reasonable probability the plea would have been entered without the prosecutor cancelling the agreement or the trial court refusing to accept it. Pursuant to Lafler, the State will be required to reoffer the ten (10) year plea, and sentencing will be left to the discretion of the sentencing judge.

**C. All Other Allegations**

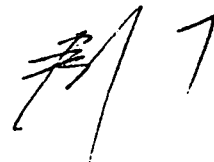
As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, the Court finds Applicant failed to present sufficient evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

**IV. CONCLUSION**

Based on the foregoing, this application for post-conviction relief must be granted and the State will be required to reoffer the ten (10) year plea, and sentencing will be left to the discretion of the sentencing judge.

**IT IS THEREFORE ORDERED THAT:**

1. The Application for Post-Conviction Relief is granted; and
2. The State will be required to reoffer the ten (10) year plea, and sentencing will be left to the discretion of the sentencing judge.



AND IT IS SO ORDERED this 24 day of April, 2014.

[Signature]  
THE HONORABLE GEORGE C. JAMES, JR.  
Presiding Judge

[Signature], South Carolina

[Signature] 8



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JUN 10 2014

**S.C. Supreme Court**

ALAN WILSON  
ATTORNEY GENERAL

June 10, 2014

The Honorable Melanie Huggins-Ward  
Horry County Clerk of Court  
Post Office Box 677  
Conway, South Carolina 29528

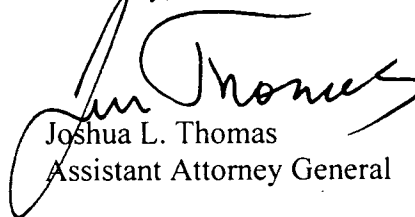
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Civil Action No. 2011-CP-26-155

Dear Ms. Huggins-Ward:

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2. Proof of service of notice of appeal on the Respondent.
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Assistant Attorney General

JLT/jlt

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