STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

SEP 0 8 2015

S.C. SUPREME COURT

CERTIORARI TO DARLINGTON COUNTY
Thomas A. Russo, Circuit Court Judge

Warren K. Smith,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

APPELLATE CASE NO. 2014-002426

PETITION FOR WRIT OF CERTIORARI

Warren K. Smith, 184653
Pro-Se Brief

INDEX

ISSUE PRESENTED

Petitioner contends his plea counsel was ineffective in failing to communicate the State's intial fifteen-year plea offer to him. Because he would have accepted the offer, Petitioner asserts he was prejudiced by counsel's deficient performance.

STATEMENT

Procedural History

On August 25, 2011, the Darlington County grand jury indicted Petitioner for petit larceny, kidnapping, first degree burglary, and first degree assault and battery. App. 126 – 127, 129, 131 – 132, and 134 – 135. On May 3, 2012, the Darlington County grand jury indicted Petitioner for armed robbery arising from the same alleged events. App. 137 – 138.

On May 7, 2012,[1] Petitioner appeared before the Honorable J. Michael Baxley. App. 1. The case was originally set for trial that afternoon, but was called for a motion to relieve counsel and then a guilty plea. App. 3 – 4. Petitioner was represented by Chelsea McNeill, and the State was represented by assistant solicitor Kendall Burch. App. 1. Judge Baxley denied Petitioner's motion to relieve counsel McNeill and proceed *pro se*. App. 5, l. 13 – 6, l. 24. The Court then accepted Petitioner's guilty plea to the indicted offenses, with the exception of armed robbery. The court reduced the armed robbery charge to common law robbery, also known as strong arm robbery, due to Petitioner's disagreement that he used a brick. App. 19, l. 5 – 25, l. 15.

At sentencing, counsel McNeill told the court that Petitioner was forty-eight years old and that despite his criminal record, this was his first violent offense. She indicated that his actions on the date of the incident were an anomaly caused by drug use. Despite their "communication breakdown," she believed he had a kind heart. She requested a minimum sentence, so that Petitioner would have an opportunity to rejoin his family. App. 25, l. 22 – 27, l. Petitioner apologized to the court and the victim. He expressed that the State had offered him fifteen years

[1] The cover page of the guilty plea transcript is dated August 29, 2012. App. 1. However, page 3 of the transcript indicates that the hearing commenced on May 7, 2012. App. 3. There was evidence at the guilty plea hearing that Petitioner was indicted for armed robbery the week prior to appearing for trial, such that May 7, 2012 appears to be the correct date of the plea hearing. App. 20, ll. 2-15.

when he was represented by a private attorney, Jim Cox, and that he did not know why Mr. Cox was no longer representing him. He asked the court for mercy. App. 29, ll. 4-7. Judge Baxley sentenced Petitioner to concurrent sentences of thirty days for petit larceny, ten years for first degree assault and battery, fifteen years for common law robbery, twenty-five years for first degree burglary, and twenty-five years for kidnapping. App. 33, l. 18 – 34, l. 18.

No direct appeal was filed.

First PCR Application and Hearing (2012-CP-16-732)

On August 28, 2012, Petitioner filed his application for post-conviction relief ("PCR") alleging involuntariness of his plea and ineffective assistance of counsel. App. 37 - 43. The State filed its Return on January 17, 2013. App. 44 – 48. 841-43. Petitioner filed an amended PCR application on April 26, 2013. App. 49 – 54.

On July 16, 2013, an evidentiary hearing was held before the Honorable R. Ferrell Cothran Jr. Petitioner was represented by Parker E. Howle, and the State was represented by Assistant Attorney General Karen C. Ratigan. App. 55. Petitioner and plea counsel McNeill both testified at the hearing.

At the PCR hearing, Petitioner testified that he was originally represented in his case by Jim Cox. Cox had negotiated a fifteen year plea agreement on his behalf, which was to run concurrent to a seven year sentence for a probation violation. He never received an explanation as to why he was appointed a public defender when he paid Cox to represent him. App. 59, ll. 8 – 60, l. 12. He never rejected the fifteen year offer. Petitioner attempted to have counsel McNeill relieved so that he could represent himself but the plea judge denied his motion. Counsel McNeill told the plea court that the fifteen year offer had been rejected . App. 62, l. 5 – 63, l. 16; App. 64, l. 23 – 65, l. 2. When asked why he did not tell the plea judge that he thought he had accepted the fifteen year offer,

Petitioner responded that he did not know that he could raise an objection to that. App. 71, ll. 3 – 72, l. 6. He further testified that counsel McNeill did not advise him of his right to appeal. App. 65, ll. 9-14.

Plea counsel McNeill testified that the Fourth Circuit public defender's office was appointed to represent Petitioner on August 16, 2011. Another public defender was assigned to the case in September, and counsel McNeill took over the case on October 6, 2011. Their first meeting together was in April 2012. App. 77, 2-17. Counsel McNeill contacted Cox's office and was advised that he represented Petitioner on a prior probation violation matter and a bond hearing in the present case, but said that it was her "understanding" that Cox was not retained for the case in chief. She also understood that a fifteen year offer was made at the time of Petitioner's probation revocation hearing, while he was represented by Cox, and the State took his failure to accept it that day as a rejection. Counsel McNeill said "I know that he [Petitioner] did not understand he was rejecting it but the State took it as a rejection." App. 75, l. 2 – 76, l. 18; App. 81, l. 12-14; App. 82, ll. 7-9. App. 76, ll. 4-18. She communicated with the solicitor, but the solicitor adamantly refused to extend any offer. Plea counsel admitted that her relationship with Petitioner was strained because of his frustration that Cox was not representing him and that the fifteen year offer was no longer available. This was compounded when the State indicted him for armed robbery less than one week before trial. App. 77, l. 18 – 78, l. 21.

Order of Dismissal (2012-CP-16-732)

Judge Cothran's Order of Dismissal denying Petitioner's PCR application was filed September 9, 2013. App. 86 – 93. He ruled that trial counsel's representation was not deficient and found that Petitioner did not make any averment that he was represented by a private attorney, Jim Cox, to the judge at the plea hearing. He further found that Petitioner failed to meet his burden

of proving that he was entitled to a review of his direct appeal issues and "failed to articulate [why] a rational defendant would have wanted to appeal in this situation..." App. 91.

PCR counsel did not file a timely Notice of Appeal on Petitioner's behalf.

Second PCR Application and Hearing (2013-CP-16-942)

Petitioner filed a subsequent PCR application on November 20, 2013, asserting that his original PCR counsel, Howle, was ineffective in failing to file a timely notice of appeal. App. 94 – 108. The State filed its Return on May 30, 2014. App. 109 - 113. An evidentiary hearing was held on July 21, 2014 before the Honorable Thomas A. Russo. Petitioner was represented by Tristan M. Shaffer, and the State was represented by Assistant Attorney General Joshua L. Thomas. App. 114. The parties placed a consent agreement on the record in light of that fact that Howle filed an untimely Notice of Appeal from the Order of Dismissal, resulting in its dismissal. The parties agreed that based on the circumstances, Petitioner should be given an opportunity to appeal from Judge Cothran's Order. App. 117 – 119.

Order Granting Belated PCR Appeal Pursuant to Austin (2013-CP-16-942)

On September 12, 2014, Judge Russo entered an Order Granting Appeal Pursuant to Austin v. State, finding that the Notice of Appeal filed by Howle was untimely such that Petitioner requested and was denied an opportunity to seek appellate review. He accordingly granted Petitioner's request for a review of his PCR action pursuant to Austin. App. 121 – 124.

Petitioner is filing his Petition for Writ of Certiorari pursuant to Austin v. State at the same time as this Petition.

ISSUE

Petitioner contends his plea counsel was ineffective in failing to communicate the State's intial fifteen-year plea offer to him. Because he would have accepted the offer, Petitioner asserts he was prejudiced by counsel's deicient performance.

Petitioner primarily contends the PCR judge erred in ruling that plea counsel was not ineffective or failing to communicate a fifteen-year plea offer made by the State.

Pursuant to a plea agreement, Petitioner pled guilty in May, 2012 to Petit Larceny, Kidnapping, First Degree Burglary, and Strong Arm Robbery. In exchange for Petitioner's "straight up" plea. The judge sentenced Petitioner to an aggregate term of twenty-five years imprisonment.

The Solicitor made a brief reference to another plea offer, stating " the original plea offer in this matter has not been accepted by the date which was never explained unto the Petitioner, an so the Solicitor told the court they were ready to go to trial today. See: Trial Transc. pg.11 lines 11-15.

On August 28,2012, Petitioner filed a PCR application. In his application, Petitioner moved for the PCR court to vacate his guilty plea and sentence on the ground the State reneged on a fifteen year sentence. Additionally, Petitioner alleged he was denied efective assistance of counsel on the ground his plea counsel failed to properly advise him of the sentence enhancement. Petitioner's PCR counsel reiterated Petitioner's claim that plea counsel had failed to inorm Petitioner of the offer no longer being available in which the State offered a fifteen-year sentence in exchange for Petitioner's plea to all of the pending charfes unto Mr. Jim Cox. See: App.59 8-25 & 60 1-12.

At the PCR hearing, Petitioner testified that the State intially extended a plea offer of fifteen years. Because counsel never communicated this offer to

him, Petitioner claimed ineffective assitance of counsel. Petitioner stated he would have accepted the fifteen-year deal had he been aware of it prior to the plea proceeding.

Plea counsel testified she was aware of the State's offered plea agreement for a fifteen-year sentence but never told Petitioner the offer had expired. Attorney McNeill believed Petitioner would have accepted the plea offer had it been communicated to him. See: Trial Transc. pg. 12 lines 7-10. Counsel further testified that the only subsequent offer was the one Petitioner accepted at his plea hearing, wherein Petitoner pled "straight up". See: Trial Transc. pg 12 lines 17-18. to the five charges in return for twenty-five years.

At the conclusion of the PCR hearing, the judge denied Petitioner's request or relief, finding " no proof of ineffective assistance of counsel regarding the unfortunate circumstances, which caused a plea offer to lapse prior to [Petitioner's] consideration of the same." The judge stated it was " unfortunate " that Petitioner did not have the opportunity to consider the fifteen-year plea offer. However, the judge noted the offer was not available to Petitioner at the time of his guilty plea. Additionally, the judge found Petitioner knowingly and voluntarily pled guilty given he was fully advised of the rights he was waiving by pleading guilty and he understood the underlying charges of his guilty plea. The judge also concluded Petitioner ultimately benefited from the State's agreement.

DISCUSSION

Petitioner contends his plea counsel was inefective in failing to communicate the State's intial fifteen-year plea offer to him. Because have accepted the offer, Petitioner asserts he was prejudiced by counsel's deficient performance.

STANDARD OF REVIEW

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. See: Strickland v. Washington, 104 S.CT. 2052, (1984). This Court has held that a defendant has the right to effective assistance of counsel during the plea bargaining process. See: Judge v. State, 471 S.E.2d 146 (1996), overruled on other grounds by Jackson v. State, 535 S.E.2d 926 (2000). In the underlying case there is not astrong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.

The Petitioner should have prevail on his claim of ineffective assistance of counsel because (1) Plea Counsel's failure to communicate the State's intial, fifteen-year plea offer constituted deficient performance, and (2) he was prejudiced by this deficient performance, i.e., there is a reasonable probabilty that but for counsel's deficient performance, he would have accepted the original plea offer,

To satisfy the first prong of Strickland, a Petitioner must show that trail counsel's errors were so serious that his performance was below the objective standard of reasonableness guaranteed by the Sixth Amendment to the United States Constitution. With regard to the second prong of Strickland, aPetitioner must show that there is a reasonable probabilty that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See: Strickland v. Washington, 102 S.CT. 2052, (1984).

The United States Supreme Court has cautioned federal habeas courts to guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254 (D). Harrington v. Richter, 131 S.CT. 770 (2011). The Court observed that while [s]lurmounting Strickland's high bar is never san easy task. [e]stablishing that a state court's application of Strickland was unreasonable

under §2254 (D) is all the more difficult." ID. (quoting Padilla v. Kentucky, 130 S.CT 1473, (2010). The Court instructed that the standards created under Strickland and §2254 (D) are both " highly deferential," and when the two apply in tandem, review is 'doubly' so, Thus, when a federal habeas cort reviews a state courts determination regarding an ineffective assistance of counsel claim [t]he question is not whether counsel's actions were reasonable. The question is whether there is any resonable argument that counsel satisfied Strickland's deferential standard.

In 2012, the Supreme Court decided Lafler v. Cooper, 132 S.CT. 1376,(2012), and Missouri v. Frye, 132 S.CT. 1399,(2012). I those cases, the Supreme Court held that a Defendant's Sixth Amendment right to effective assistance of counsel extends to the plea-bargaing process. Lafler, 132 S.CT at 1384; Frye, 132 S.CT. at 1408. Uder those cases, the Court explained that as a general rule defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Id.

Even if a Petitioner establishes that his counsel failed to communicate a plea offer, however, he must still establish prejudice. That is, Defendant must show that but for the ineffective assistance of counsel, there is:

a resonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offers terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler, 132 S.CT. at 1385. In Missouri v. Frye, the Court recognized that South Carolina had already adopted a similar assessment to the claims before the

decision in Davie v. State, 675 S.E.2d 416 (2009):

Through the standard for counsel's performance is not determined solely by reference to codified standards of profesional practice, these standards can be important guides. The American Bar Association recommends defense counsel promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney. ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2 (a) (3d ed. 1999), and this standard has been adopted by numerous state and federal courts over the last thirty years. See: Davie v. State, 675 S.E. 2d 416,420 (2009). and also Missouri v. Frye, 132 S.CT. 1399 (2012).

In Davie v. State, supra, the South Carolina Supreme Court found that a defense counsel performed deficiently in ailing to communicate a plea offer to the Petitioner before it had expired where evidence supported that the Defendant would have accepted the plea offer if he had been made aware of it. In Davie, the South Carolina Supreme Court adopted the rule-prior to the decisions in Lafler and Frye based upon its assessment of the decisions, from other jurisdictions.

DEFICIENT PERFORMANCE

Counsel's failure to communicate a plea offer to his or her client constitutes deficient performance, other cases of deficient performance in the context of plea bargaining would appear to support Petitioner's position. See: Sprouse v. State, 585 S.E. 2d 278, 281 (2003) (finding deendant 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); See: Thompson v. State, 531 S.E.2d 294, 296-297 (2000) (concluding defendant established a claim for ineffective assistance of counsel where trial counsel failed to object when the solicitor recommended the maximum sentence in violation of the plea agreement); See: Jordan v. State, 374 S.E.2d 683, 684-85

(1988) (holding trial counsel rendered ineffective assistance of counsel in failing to withdraw the guilty plea after the State reneged on a plea, and reasoning that the counsel's conduct in not protecting the defendant's right to enforce the plea agreement with the solicitor's office fell below " prevailing professional norms"). Counsel's failure to convey a plea offer constitutes deficient performance, such conduct displays an tremendous amount of unreasonable performance under the prevailing professional standards established by the American Bar Association or state. And also the specific ethical rules of conduct. Pursuant to those professional standards, counsel is required to fully communicate with the client so that the client can make an informed decision regarding any proposals by the State. See: **United States v. Rodriquez, 929 F.2d 747, 752-53** (1st Cir. 1991); Pham v.United State, 317 F.3d 178, 182 (2nd Cir. 2003); United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 438 (3rd Cir. 1982); Barentine v. United States, 728 F. Supp. 1241, 1251 (W.D.N.C.), aff'd 908 F.2d 968 (4th Cir. 1990) ; Griffin v. United States, 330 F.3d 733, 737 (6th Cir. 2003); Johnson v. Duckworth, 793 F.2d 898, 902 (7th Cir. 1986); United States v. Baylock, 20 F.3d 1458, 1465 (9th Cir. 1994); Diaz v. United States, 930 F.2d 832, 834 (11th Cir. 1991); see also Rasmussen v. State, 280 Ark. 472 658 S.E.2d 867, 867-68 (1983); Cottle v. State, 733 So. 2d 963, 964-65 (Fla. 1999); Lloyd v. State, 373 S.E.2d 1,3 (1988); People v. Whitfield, 239 N.E.2d 850, 852 (1968); Lyles v. State, 382 N.E.2d 991, 993-94 (1978); Williams v. State, 605 A.2d 103, 108 (1992); People v. Alexander, 518 N.Y.S.2d 872, 879 (1987); State v. Simmons, 309 S.E.2d 493, 497 (1983); Jiminez v, State, 144 P.3d 903, 906 (Okla. Crim. App. 2006); Commonwealth v. Copeland, 554 A.2d 54, 60-61 (1988); Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994); Hanzelka v. State, 682 S.W.2d 385,387 (Tex. Ct. App. 1984); State v. James, 739 P.2d 1161, 1166,67 (1987); Becton v. Hun, 516 S.E.2d 762, 766,67 (1999); State v. Ludwig,

369 N.W.2d 722, 726,27 (1985); see generally Gregory G. Sarna, Annotation, Adequacy of Defense Counsel's Representation of Criminal Client Regarding Plea Bargaining, 8 A.L.R. 4th 660 (1981 & Supp. 2008) (discussing state and federal decisions determining the adequacy, competency, or effectiveness of defense counsel's representation of a criminal accused in connection with plea bargaining and negotiating).

Turning to the facts of the instant case, we find that plea counsel's failure to convey the State's intial plea offer to Petitioner constitutes deficient performance. Although counsel's failure to do so could be construed as excusable neglect if one believes that the State's offer was no longer available, thus expired, that neglect still do not negate the deficient performance. Even if counsel is given the benefit of doubt that she was not aware of the plea offer until after the expiration date, counel was deficient in not objecting at the plea hearing. During the plea hearing, the solicior informed the circuit court judge that " [t]he original plea offer in this matter has not been accepted by the due date, and so now we're here ready to go to trial". See: Trial Transc. pg. 11 lines 11-15. In view of the solicitor's statement, it was incumbent upon plea counsel to object or in some way indicate to the court that she had no knowledge of the original plea offer expiring Had counsel done so, she might have been able to convince the solicitor to reinstate this plea offer or persuade the circuit court judge to impose a fifteen-year sentence. Because counsel failed to make any attempt to protect Petitioner's interest regarding this significantly lower sentence, counsel's performance fell bwlow the prevailing professional norms and, thus, constituted deficient performance.

PREJUDICE

Given the finding that plea counsel failed to communicate the State's intial plea offer constituted deficient performance, the question becomes whether Petiti-

oner was prejudiced by this deficient performance. Some state courts have essentially presumed prejudiced merely based on the fact that the plea counsel failed to communicate a plea offer, whatever the terms, was inherently prejudicial because the deficient conduct prevented the defendant from making an informed decision. See: State v. Simmons, 309 S.E.2d 493 (1983) (concluding defendant was " clearly prejudiced by his attorney's failure to inform him of the [plea bargain] offer".) Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994). (" There is no doubt that the prejudice suffered by defendant was the direct result of failure on the part of defense counsel to discuss the plea bargain offer with his client and his failure to respond timely to the State's offer".) See: State v. James, 739 P.2d 1161, 1167 (1987). ("If we were presented with a finding, supported by substantial evidence, that in fact [counsel] failed to convey the plea negotitaition to his clients, we would have no hesitation in concluding they were denied effective assistance of counsel on this error alone.").

Other state courts have found prejudice based on the defendant's self serving statements that he would have accepted the plea offer had he been made aware of it. See: People v. Culpepper, 567 N.Y.S.2d 327,328 (1990) (finding no prejudice where defendant did not say that he would have accepted the alleged plea offer if it had been transmitted "). Courts have utilized a burden of proof that is seemingly higher and requires objective evidence to show prejudice. In those cases, the defendant must show not only that he would have accepted the offer, but also that he would have received a lesser sentence than that which he received or acted differentlty had he been aware of the plea offer. See: Cottle v. State, 733 So.2d 963, 967 (Fla.1999). (" Courts in this state have recognized claims arising out of counsel's failure to inform a defendant of a plea offer, and have required a claimant to show that: (1) counsel failed to communicate a plea offer..., (2) defendant would have accepted the plea offer but for the inadequate notice, and (3) acceptance

of the State's plea offer would have resulted in alesser sentence."); Williams v. State, 605 A.2d 103,110 (1992) (holding evidence of prejudice was "ample" where the inference was supported by " objective evidence " that the outcome would have been different had petitioner accepted the State's plea offer); Commonwealth v. Copeland, 554 A.2d 54,61 (1988) (vacating defendant's sentence and remanding or an evidentary hearing during which defendant would have the burden of proving that: (1) an offer for a plea was made; (2) trial counsel failed to inform him of such offer; (3) trial counsel had no reasonable basis or failing to inform him of the plea offer; and (4) he was prejudiced thereby); State v. Lopez, 743 N.W.2d 351,358 (2008) (defendant failed to establish that she was prejudiced by counsel's failure to communicate offer of plea agreement where defendant'sa claims were contradicted by evidence introduced by the State and defense counsel).

Finally, some jurisdictions have declined to adopt a defintive rule, and instead, advocated a case-by-case analysis looking strictly at the facts of each case. See: Lloyd v. State, 373 S.E.2d 1,3 (1988) (finding defendant was not prejudiced by counsel's deficient performance, and stating [w]e prefer to examine the facts of each case and grant relief where there is at least an inference from the evidence that the defendant would have accepted the offer as made or something similar"); Hanzelka v. State, 682 S.W.2d 385,387 (Tex.CT.App. 1984) ("Tis Court has concluded further that counsel's deficient performance prejudiced Hanzelka in that under the terms of the plea bargain he would not have served any time in jail.").

Depending on the facts of the case, a defendant's self-serving statement may be sufficient to establish actual prejudice. See: Jackson v. State, 535 S.E.2d 926,927 (200) (rejecting objective evidence requirement established in Judge and finding Petitioner proved he was prejudiced by counsel's deficient performance in failing to properly advise the Petitioner that he was pleading to a felony rather than a misdemeanor where Petitioner's uncontradicted testimony established that he would not have pled had he known the charge was a felony.) overruling Judge v. State,

471 S.E.2d 146,150 (1996) (" The second prong of the ineffective assistance inquiry-prejudice- is shown by demonstrating through objective evidence...[the existence of] a reasonable probability that, but for cousel's advice, [the defendant] would have accepted the plea. Mere statements by the PCR petitioner that he would have accepted the plea agreement but for counsel's incompetence are insufficient to show prejudice because they are self-serving and inherently unreliable.") (citation omitted); See Also: Smith v. State, 631 S.E.2d 260,261 (2006) (" The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty.").

Applying these principles to the acts of the instant case, the Petitioner has proven he was prejudiced by plea counsel's deficient performance. Intially, the difference in the sentence Petitioner has proven he was prejudiced by plea counsel's performance. The concusion for this case to be reversed can be based on the following reasons. First, the solicitor and plea counsel both acknowledged that the State originally offered a fifteen-year sentence in exchange for Petitoner's guilty plea. Secondly, plea counsel admitted that she failed to communicate this offer to the Solicitor. 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-five year sentence that was imposed.

REMEDY

The final issue to be resolved is the relief to which Petitioner is entitled. Te Petitioner seeks relief in the form of a new sentencing hearing. Ther United States Supreme Court has expressed when a criminal defendant successfully achives relief, either through a direct or collateral attack to the conviction, he " may

not be subjected to greater punishment for exercising that right." (citing Blackledge v. Perry, 94 S.Ct. 2098 (1974). Petitioner request is that the State be compel to reinstate the original, fifteen-year plea offer, with the limitation that Petitioner's sentence should not exceed the original sentence of twenty-five years imprisonment.

The State and the circuit court judge should take into consideration the prior fifteen-year plea offer. See: Harris v. State, 974 So.2d 1149,1151 (Fla, Dist. Ct. App. 2008) (concluding that, if on remand, counsel is found to have been ineffective in failing to properly advise defendant prior to revocation then there should be a " good faith resumption of plea negotiations "); Lyles v. State, 382 N.E.2d 991,994 (1978) (holding counsel was ineffective in failing to convey State's plea bargain offer and remanding " with instructions to conduct a guilty plea hearing, assuming, as equity indicates under the limited facts of this case, the State's offer continues") ; Becton v. Hun, 516 S.E.2d 762,768 (1999) (finding counsel was ineffective in failing to convey State's plea offer and remanding for a new sentencing hearing, but recognizing that the trial court would not be bound by the State's original sentencing recommendation.).

CONCLUSION

Based on the forgoing, cousel was deficient in failing to communicate the State's fifteen-year plea offer to Petitioner. Given that both Petitioner and plea counsel testiied Petitioner would have accepted the fifteen-year offer, an offer that was ten years less than what Petitioner received. Please consider in re-sentencing Petitioner, the circuit court judge shall take into consideration the Sate's prior fifteen-year plea offer. Futhermore, in any sentence the Petitioner receives it should not exceed the original twenty-five year sentence.

Mr. Warren K. Smith

Warren K. Smith, #184653