

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

Certiorari to Anderson County
J. Cordell Maddox, Jr., Circuit Court Judge

HENRY J. GALLOWAY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001537~~8~~

JOHNSON PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the record supports the PCR court's ruling that Petitioner's Sixth Amendment right to effective assistance of counsel was not violated where Petitioner testified that he told trial counsel to accept a favorable plea offer on his behalf and where neither trial counsel's testimony nor any other evidence showed that trial counsel did relay the acceptance.

STATEMENT

An Anderson County Grand Jury indicted Petitioner Henry J. Galloway at the December 2010 term of the Court of General Sessions for second degree burglary (violent) and safecracking. App. 253-256. His case was called to trial on March 12, 2012 before the Honorable R. Lawton McIntosh and a jury. App. 1. Assistant Solicitor Joshua Allen represented the state and Aaron Angell represented Petitioner. App. 1.

On March 13, 2012, the jury found Petitioner guilty. App. 162, l. 22 – 163, l. 10. He was sentenced by Judge McIntosh to fifteen years imprisonment for second degree burglary (violent) and fifteen years concurrent for safecracking. App. 168, ll. 7-16.

The South Carolina Court of Appeals dismissed Petitioner's appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967). *State v. Galloway*, Opinion No. 2013-UP-103 (Ct. App. Filed March 13, 2013); App. 182-183.

On July 9, 2013, Petitioner filed an application for post-conviction relief (PCR) claiming ineffective assistance of trial counsel. App. 184-201. The state filed a return to this application dated December 31, 2013. App. 202-208. The matter proceeded to an evidentiary hearing on February 18, 2014 before the Honorable J. Cordell Maddox, Jr. App. 209. Assistant Attorney General J. Walter Whitmire represented the state, and Hugh W. Welborn represented Petitioner. App. 209.

Petitioner testified that he and trial counsel argued during the representation, and Petitioner told him he no longer wanted counsel to represent him. App. 221, lines 14-17. Petitioner also testified that counsel relayed to him a plea offer from the solicitor for a negotiated sentence of five years' incarceration for the burglary charge in exchange for dropping the safecracking charge; however, when Petitioner told counsel to accept the deal, counsel told him, "we have to go on to

trial.” App. 224, lines 2-8; App. 224, lines 14-20. Trial counsel then appeared and testified that the solicitor did make the offer that Petitioner described, and he believed the codefendant accepted the same offer. He said his advice to Petitioner was to take the offer. App. 234, lines 13-20.

By order dated July 15, 2015, Judge Maddox denied Petitioner relief. App. 242-252. Specifically, the order concluded Petitioner failed to establish ineffective assistance because “compelling testimony” from trial counsel showed that he informed and advised Petitioner about the plea offer. App. 249.

ARGUMENT

The record does not support the PCR court's conclusion that Petitioner was not denied effective assistance of counsel because no evidence showed trial counsel relayed to the solicitor Petitioner's acceptance of the favorable plea offer.

The record does not support the PCR court's conclusion that Petitioner was not denied effective assistance of counsel because no evidence showed trial counsel relayed to the solicitor Petitioner's acceptance of the favorable plea offer. A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687.

Our Supreme Court "has held that a defendant has the right to effective assistance of counsel during the plea bargaining process." *Davie v. State*, 381 S.C. 601, 607, 675 S.E.2d 416, 419 (citing *Judge v. State*, 321 S.C. 554, 471 S.E.2d 146 (1996), overruled on other grounds by *Jackson v. State*, 342 S.C. 95, 535 S.E.2d 926 (2000)). The United States Supreme Court has also "made clear that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Missouri v. Frye*, ___ U.S. ___, 132 S.Ct. 1399, 1406 (2012) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010)) (internal quotations admitted). Thus, "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions favorable to the accused." *Id.* at ___, 132 S.Ct. at 1408.

In order to prove prejudice in these circumstances, “a defendant must show that but for the ineffective advice of counsel there is a reasonable 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 not 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 offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed.” *Id.* at ___, 132 S.Ct. at 1385.

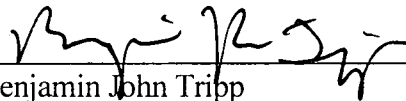
In this case, no evidence showed trial counsel relayed to the solicitor Petitioner’s acceptance of the favorable plea offer. Both Petitioner and trial counsel testified that the solicitor offered a negotiated sentence of five years’ incarceration for the burglary charge in exchange for dropping the safecracking charge. Petitioner also testified that he told trial to accept the offer on his behalf, but trial counsel refused to. Trial counsel never contradicted this account; he merely recollected that he agreed with Petitioner that the offer was favorable. Nothing else in the record shows trial counsel relayed Petitioner’s acceptance to the solicitor. Indeed, Petitioner’s testimony that he and trial counsel argued and that he asked trial counsel not to represent him corroborates his story.

As explained above through *Missouri v. Frye*, trial counsel had a duty relay Petitioner’s acceptance of the favorable plea offer to the solicitor, and his failure to do so was deficient under the Sixth Amendment. The PCR court’s dismissal improperly focused only on whether any evidence showed trial counsel relayed the offer Petitioner, and it failed to consider whether trial counsel relayed the acceptance back. In addition, the record shows trial counsel’s failure caused prejudice because Petitioner was sentenced to fifteen years’ incarceration for both charges, well over the offer for five years for burglary, which Petitioner’s codefendant received for accepting the same plea offer.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of February, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ANDERSON COUNTY
J. CORDELL MADDOX, JR., CIRCUIT COURT JUDGE

HENRY J. GALLOWAY,

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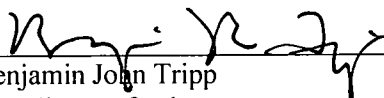
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Henry J. Galloway states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent Petitioner.
2. He has reviewed the records and transcript of Petitioner's post-conviction relief hearing that was held on February 18, 2014. In her opinion, seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Henry J. Galloway.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 17th day of February, 2016

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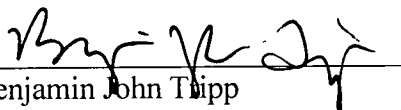
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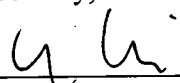
CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Patrick Schmeckpeper, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Henry J. Galloway, #236967, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067, this 5th day of February, 2016.


Benjamin John Tapp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of February, 2016.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.