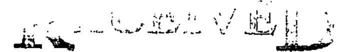

MAR 18 2016

SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Perry H. Gravely, Circuit Court Judge

MICKEY LANE MAYBERRY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001651

JOHNSON PETITION FOR WRIT OF CERTIORARI

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South Carolina Commission on Indigent Defense
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ATTORNEY FOR PETITIONER

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ISSUES PRESENTED

1. Did the PCR judge err in refusing to find counsel ineffective for failing to convey the State's plea offers for the March and April terms of court in 2013, recommending sentencing ranges of between fourteen and sixteen years for the March term and between fifteen and eighteen years for the April term when Petitioner later entered guilty pleas in August of 2013, without a recommendation from the State and received a thirty five year sentence?

2. Did the PCR judge err in refusing to find plea counsel ineffective for not making the judge aware of the earlier plea offers?

STATEMENT

In November of 2012, the Greenville County Grand Jury indicted Petitioner Mayberry, in a nine count indictment, for attempted murder, armed robbery, two counts of attempted armed robbery, three counts of carjacking, possession of a firearm during the commission of a violent crime and pointing and presenting a firearm, indictment #2012-GS-23-9351. On August 15, 2013, Petitioner appeared before the Honorable Brian H. Gibbons and pled guilty to attempted murder, armed robbery, two counts of attempted armed robbery and three counts of carjacking. The State dismissed the possession of a firearm during the commission of a violent crime and pointing and presenting a firearm charges. Scott Robinson represented Petitioner at the guilty plea. Allen Fretwell prosecuted the case. Judge Gibbons sentenced Petitioner to twenty (20) years for attempted murder, thirty (30) years suspended upon the service of twenty five (25) years for armed robbery, ten (10) years concurrent for the two attempted armed robbery charges, ten (10) years concurrent for two of the carjacking charges and ten (10) years consecutive for the third carjacking charge. Petitioner did not appeal.

On February 27, 2014, Petitioner filed an application for post conviction relief. The State filed a return on May 8, 2014. On June 18, 2015, an evidentiary hearing was held before the Honorable Perry H. Gravely. Mills Arial represented Petitioner at the PCR hearing. Karen Ratigan represented the State. In a written order signed July 12, 2015, Judge Gravely denied relief and dismissed the application for post conviction relief. A timely notice of intent to appeal was served on July 29, 2015. This petition for writ of certiorari follows.

ARGUMENTS

1. The PCR judge erred in refusing to find counsel ineffective for failing to convey the State's plea offers for the March and April terms of court in 2013, recommending sentencing ranges of between fourteen and sixteen years for the March term and between fifteen and eighteen years for the April term when Petitioner later entered guilty pleas in August of 2013, without a recommendation from the State and received a thirty five year sentence.

During the evidentiary hearing Petitioner testified he signed a plea agreement for a sentence of between ten (10) and thirty (30) years. (App. p. 54, lines 2-8). Petitioner testified that he was hesitant about the possibility of a thirty year sentence but plea counsel told him, "Well, we've got a good judge again this week. We can go ahead and get this knocked out. I'm pretty sure that we can get you the ten years." (App. p. 54, lines 13-16). Plea counsel denied promising Petitioner a ten year sentence. (App. p. 77, lines 9-12). When asked if the State extended any plea offers, counsel testified, "Nothing that we would accept. I don't believe. I think at some point maybe I'd gotten some plea offers. Anything we would have received would have been not the best plea offers. There were plea offers, but they were nothing you wanted. They were all pretty much the same amount of time, I believe." (App. p. 77, lines 1-8). Plea counsel did not testify about the terms of the plea offers.

The State called the assistant solicitor who prosecuted the case as a witness at the PCR hearing. The assistant solicitor testified about the terms of the plea offers extended to plea counsel on Febraury 27, 2013. The assistant solicitor testified:

> In exchange for early acceptance of responsibility in the form of guilty pleas to all charges during the court terms during the month of March 2013, the State would recommend a sentencing range of fourteen to sixteen years for the armed robbery and attempted murder charges. Further, the State will recommend a twenty year sentence on the attempted armed robbery and carjacking charges, suspended on five-years probation and consecutive active sentences on the armed robbery and attempted murder charge. All other sentences on the remaining charges will run concurrently. This offer will be available to both defendants, but the first to plead

> guilty will have his sentence deferred, if he so desires until the other has pled guilty or until such time as the State sees fit.

(App. p. 81, line 7 – p. 82, line 1). The assistant solicitor testified that if Petitioner waited until April to plead guilty, the State would recommend a sentencing range of between fifteen and eighteen years and the suspended sentence would increase from twenty to twenty five years. (App. p. 82, lines 2-15). On March 5, 2013, plea counsel contacted the assistant solicitor and advised that Petitioner was "on board" to plead guilty but asked for a ten year recommendation. (App. p. 82, lines 16-22). The assistant solicitor testified that he advised plea counsel that he could not recommend a ten year sentence but plea counsel was free to ask for less than the State's recommendation. (App. p. 82, line 23 – p. 83, lines 1-6). Petitioner did not plead guilty in March or April.

Petitioner did not testify about the plea offers referenced by the assistant solicitor at the PCR hearing. Plea counsel seemed unable to recall the specifics of the plea offers referenced by the assistant solicitor. While more than the ten years requested by plea counsel, the fourteen to sixteen and fifteen to eighteen year sentencing recommendations were substantially less than the thirty five year sentence imposed when Petitioner plead guilty in August of 2013.

In the order of dismissal the PCR judge wrote, "This Court finds the State's plea offers for the March and April terms of court in 2013 were conveyed to the Applicant, who chose not to accept them." (App. p. 101). The record does not support this finding. Plea counsel did not testify as to specific terms of the plea agreements referenced by the assistant solicitor. Instead, when asked if the State extended any plea offers, counsel testified, "Nothing that we would accept. I don't believe. I think at some point maybe I'd gotten some plea offers. Anything we would have received would have been not the best plea offers. There were plea offers, but they were nothing

you wanted. They were all pretty much the same amount of time, I believe." (App. p. 77, lines 1-8). Petitioner did not testify that plea counsel conveyed the fourteen to sixteen year and fifteen to eighteen year sentencing ranges offered by the State. Petitioner did not testify that he rejected the offers. Petitioner only testified about a plea offer for a sentencing range of ten to thirty years and appeared unaware of other plea offers. The record does not support the finding that the plea offers were conveyed to Petitioner and he rejected the offers.

Plea counsel was ineffective in failing to convey the plea offers to Petitioner. Petitioner was prejudiced by the deficient performance. There is a reasonable probability that if counsel had conveyed the plea offers made by the State, Petitioner would have accepted and received a sentence in line with the recommendation rather than the thirty five year sentence imposed.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694,

104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' " Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

"The second, or 'prejudice,' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. at 59, 106 S.Ct. 366. "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

In Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009), this Court found that counsel's failure to convey the State's initial plea offer of fifteen years constituted prejudicial deficient performance and remanded for a new sentencing hearing. In Missouri v. Frye, 132 S. Ct. 1399, 1408, 182 L. Ed. 2d 379 (2012) the United States Supreme Court wrote, "This Court now holds 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." Addressing prejudice, the Court in Frye wrote:

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants 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. Cf. Glover v. United States, 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001) ("[A]ny amount of [additional] jail time has Sixth Amendment significance").

132 S. Ct. 1399, 1409, 182 L. Ed. 2d 379.

Plea counsel was ineffective in failing to convey the plea offers to Petitioner. There is a reasonable probability that Petitioner would have accepted the earlier plea offers resulting in substantially less prison time. Additionally, there is a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept the plea.

2. The PCR judge erred in refusing to find plea counsel ineffective for not making the judge aware of the earlier plea offers.

Three to four months after the State made the initial plea offers discussed in issue one above, Petitioner entered guilty pleas without negotiations or recommendations from the State. Plea counsel asked the judge for mercy but failed to advise the judge of the earlier plea offers. The previous plea offers were never discussed by the State during the guilty plea. Plea counsel was ineffective in not alerting the sentencing judge that just three to four months earlier the State had been willing to recommend sentencing ranges between fourteen and eighteen years.

In Davie v. State, 381 S.C. 601, 610-11, 675 S.E.2d 416, 421 (2009) this Court noted:

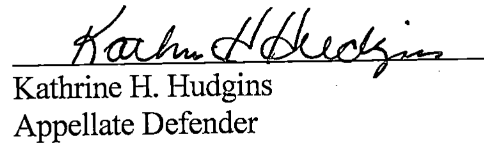
> During the plea hearing, the solicitor informed the circuit court judge that "[t]he original plea offer in this matter has not been accepted by the due date of September 11th of this year, and so we told the defendant we were ready to go to trial." In view of the solicitor's statement, it was incumbent upon plea counsel to object or in some way indicate to the court that he had no knowledge of the original plea offer. Had counsel done so, he 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 interests regarding this significantly lower sentence, we conclude counsel's performance fell below the prevailing professional norms and, thus, constituted deficient performance.

If plea counsel had made the judge aware of the prior plea offers, he might have been able to persuade the judge to impose a sentence closer to the sentencing ranges contained in the earlier offers instead of the thirty five year sentence imposed. Plea counsel failed to protect Petitioner's interests regarding the significantly lower sentences from the plea offers. Petitioner was prejudiced by plea counsel's deficient performance.

CONCLUSION

Based on the above arguments, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of March, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
PERRY H. GRAVELY, CIRCUIT COURT JUDGE

MICKEY LANE MAYBERRY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001651

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Mickey Lane Mayberry states:

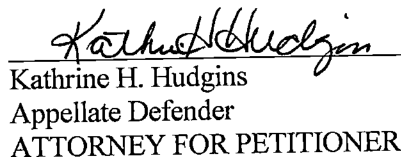
1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on June 15, 2015. In her opinion seeking certiorari from the order of dismissal is without merit.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Mickey Lane Mayberry.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 18th day of March, 2016

STATE OF SOUTH CAROLINA
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MICKEY LANE MAYBERRY,

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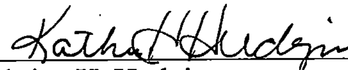
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001651

CERTIFICATE OF SERVICE

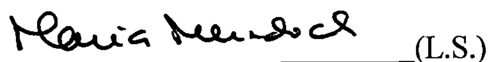
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mickey Lane Mayberry, #356630, at Lieber Correctional Institution this 18th day of March, 2016.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of March, 2016.



_______________(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.