

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Lexington County,

Brooks P. Goldsmith, Circuit Court Judge

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RECEIVED  
FEB 27 2017  
S.C. SUPREME COURT

SAMMY WIGGINS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-002031

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PETITION FOR WRIT OF CERTIORARI

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**ISSUE PRESENTED**

Did plea counsel's failure to show Petitioner the video footage from the homeowner's surveillance system, which captured the armed robbery and burglary, violate Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel when Petitioner would have accepted a favorable plea offer from the state if he would have viewed the footage before the offer expired?

## STATEMENT OF THE CASE

A Lexington County Grand Jury indicted Petitioner on December 13, 2010 for armed robbery and kidnapping, and on September 10, 2012 for first degree burglary. App. 329-334. In 2011, while Petitioner's charges were still pending, the assistant solicitor offered to allow Petitioner to plead guilty to attempted armed robbery with a sentence recommendation of seven to fifteen years' imprisonment. App. 231, l. 21 – 232, l. 3. Without having seen all of the evidence, specifically video footage from the homeowner's surveillance system, due to plea counsel's unreasonable oversight, Petitioner ultimately rejected this offer based on counsel's advice. The offer expired on June 25, 2012. App. 235, ll. 13-20.

Petitioner's case was called to trial on October 15, 2012 before the Honorable Howard P. King, and a jury. App. 1. After jury selection and pretrial motions, Petitioner, *for the first time*, viewed the surveillance footage that captured the armed robbery and burglary. Immediately upon viewing this footage, Petitioner decided to plead guilty. He ultimately pled guilty on that date to armed robbery, first degree burglary, and kidnapping without a sentence recommendation from the state. App. 101, ll. 19-23. Assistant Solicitor J. Angela Garrick represented the state, and Robert W. Mills represented Petitioner. App. 1. Sentencing was deferred until October 17, 2012. Judge King ultimately sentenced Petitioner to twenty-five years' imprisonment, which is a significantly longer sentence than Petitioner would have received under the terms of the plea offer. App. 162, ll. 9-13.

Plea counsel told Judge King during the plea hearing that Petitioner did not view the surveillance footage until that day due to counsel's faulty assumption that the surveillance footage referred to throughout the discovery materials was merely "still frames" that were "shot every couple of seconds." App. 138, ll. 10-18. Counsel asserted that Petitioner likely would

have pled guilty sooner if he would have watched the video and seen “how things actually occurred.” He also said his “advice may have been different earlier if we’d seen all of the discovery.” App. 138, l. 19 – 139, l. 3. Counsel asked the judge not to hold the fact that Petitioner waited until his case was called to trial to plead guilty against him because “once he saw what the video was . . . he wanted to accept responsibility for his actions.” App. 139, ll. 4-9.

Petitioner likewise testified during the evidentiary hearing that he “absolutely would have” accepted the offer if counsel would have shown him the surveillance footage before the offer expired because it was “in [his] best interest.” App. 202, ll. 13-17. He said he was not aware there was an actual video until the “day of [his] trial.” App. 202, ll. 6-12.

Assistant Solicitor Garrick maintained at the evidentiary hearing that she gave plea counsel a DVD containing the video footage in March 2012, well before the plea offer expired. App. 233, ll. 17-19. While plea counsel acknowledged that he received the DVD of the footage, he claimed he did not realize there was a video because the disk also contained a series of still shots taken from the footage. He explained that he thought the surveillance camera at the homeowner’s residence was programed to take a still shot every few seconds, and that he was not aware until after the offer expired that “there was an actual regular style video.” App. 216, ll. 4-20.

On February 12, 2013, Petitioner filed an application for post-conviction relief (PCR) raising the claim argued in this petition. App. 164-183. The state filed a return to this application dated July 22, 2013. App. 184-189. With the assistance of counsel, Petitioner filed a Supplement to Application for Post-Conviction Relief and Incorporated Memorandum of Law on August 19, 2013. App. 190-193. An evidentiary hearing was convened on April 15, 2014 before the Honorable William P. Keesley. App. 194. Assistant Attorney General Walt Whitmire represented the state,

and Anna R. Good represented Petitioner. App. 194. By order filed April 18, 2014, Judge Keesley elected to recuse himself after discovering he had been involved in Petitioner's underlying criminal case. App. 282.

A second evidentiary hearing was convened on April 23, 2015 before the Honorable Brooks P. Goldsmith. App. 283. The transcript from the previous hearing was incorporated into the record. App. 285, ll. 17-23. By order dated September 11, 2016, Judge Goldsmith denied Petitioner relief. App. 231-328.

The PCR court found Petitioner failed to prove that plea counsel's failure to show Petitioner the actual footage of the armed robbery instead of only the stills induced his decision to reject the favorable plea offer extended by the state. App. 325. Instead, the court believed Petitioner chose to reject the offer because he "was holding out for a more favorable, non-violent plea offer." App. 326. Moreover, the court found plea counsel "reasonably determined the stills . . . were all that came from the home surveillance system" and that Petitioner failed to meet "his burden to overcome the high level of deference required in post-conviction relief proceedings." App. 326-327. Therefore, the court denied Petitioner relief.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when plea counsel failed to show Petitioner the footage from the homeowners' surveillance system and where Petitioner would have accepted the favorable plea offer from the state before the offer expired if he had seen the video footage, this petition for writ of certiorari follows.

## ARGUMENT

Plea counsel's failure to show Petitioner the video footage from the homeowner's surveillance system, which captured the armed robbery and burglary, violated Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel when Petitioner would have accepted a favorable plea offer from the state if he would have viewed the footage before the offer expired.

Plea counsel's failure to show Petitioner the footage from the homeowner's surveillance system, which captured the armed robbery and burglary, violated Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel. Counsel unreasonably believed that the surveillance footage, which was referred to repeatedly throughout the discovery materials, was merely a series of still shots. Petitioner was prejudiced because he would have accepted the state's offer to plead guilty to attempted armed robbery with a sentence recommendation of seven to fifteen years' imprisonment if he would have viewed the footage before the offer expired. Instead, Petitioner pled guilty as indicted without any sentence recommendation and was ultimately sentenced to twenty-five years' imprisonment.

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). Importantly, 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 (2009) (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, 566 U.S. 133, 141 (2012) (quoting Padilla v. Kentucky, 559 U.S. 356, 373 (2010)) (internal quotations admitted).

“The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.” Frye, 566 U.S. at 143. “[A]s 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 145.

To prevail on his claim of ineffective assistance of counsel, Petitioner is required to prove that (1) trial counsel’s failure to communicate the state’s plea offer constituted deficient performance, and (2) he was prejudiced by this deficient performance, *i.e.*, there is a reasonable probability that but for counsel’s deficient performance, he would have accepted the original plea offer. Davie, 381 S.C. at 608, 675 S.E.2d at 420. Additionally, Petitioner must show actual prejudice. “However, it is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant’s self-serving statement may be sufficient to establish actual prejudice.” Id. at 613, 675 S.E.2d at 422 (citing Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000)).

In Davie, our Supreme Court found defense counsel’s failure to convey the state’s initial plea offer of fifteen years imprisonment to the defendant constituted deficient performance when the defendant later pled guilty and was sentenced to an aggregate amount of twenty-seven years’ imprisonment. Davie, 381 S.C. at 610, 675 S.E.2d at 421. This Court further found the defendant was prejudiced by defense counsel’s deficient performance noting “that the difference in the sentence [the defendant] received and the plea offer is proof of prejudice.” Finally, the Court held

that a new sentencing hearing was the proper form of relief for the defendant. Id. at 614, 675 S.E.2d at 423. This Court noted that there was no evidence in the record that the defendant expressed a desire to proceed to trial rather than plead guilty and, therefore, a remand for a new trial was not the proper remedy. Id. at 615, 675 S.E.2d at 423-424.

In Frye, which was decided after Davie, the United States Supreme Court found defense counsel ineffective when he failed to advise the defendant of a plea offer or allow him to consider the offer before it expired. Frye, 566 U.S. at 145. The Court held, “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 that the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it.” Id. at 147. The Court ultimately remanded the case noting that the Court of Appeals of Missouri failed to require Frye to show that the “plea offer, if accepted by Frye, would have been adhered to by the prosecution and accepted by the trial court.” Id. at 150.

In Lafler v. Cooper, 566 U.S. 156, 161-162 (2012), also decided after Davie, the United States Supreme Court found defense counsel ineffective when the defendant rejected a favorable plea offer, despite admitting guilt and expressing a willingness to accept the offer, after defense counsel “convinced [the defendant] that the prosecution would be unable to establish his intent to murder [the victim] because she had been shot below the waist,” which was “an incorrect legal rule.” Id.

In order to prove prejudice in these circumstances, the Court held “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 164. The Court found the defendant in Lafler suffered prejudice because he had shown that but for counsel's deficient performance there was a reasonable probability he would have accepted the offer, the trial court would have accepted its terms, and as a result of not accepting the plea and being convicted at trial, the defendant received a minimum sentence three and a half times greater than he would have received under the plea. Id. at 174.

In Kolle v. State, 386 S.C. 578, 591-592, 690 S.E.2d 73, 80 (2010), this Court found plea counsel was ineffective in advising Kolle that the state's initial plea offer was "not a good deal" and misinforming Kolle that the offer would remain open after a suppression hearing, when the offer did not remain open and was significantly less than the seven year sentence Kolle received. (internal quotations omitted). This Court stated, "Had Kolle known that the state would withdraw this offer after the suppression hearing, he may have decided to accept it and received a lower sentence." Id. This Court thus affirmed the PCR court's decision to grant Kolle relief. Id. at 593, 690 S.E.2d at 81.

Here, counsel's belief that the video surveillance footage, *which was referred to repeatedly throughout the discovery*, meant only a series of still shots was unreasonable under the circumstances and constituted deficient performance. Counsel should have inquired further regarding the existence of this video footage and properly communicated with the assistant solicitor instead of unreasonably assuming the still shots were all that was available from the surveillance system. A competent criminal defense attorney would have ensured that he had all

of the evidence before advising his client regarding a favorable plea offer from the state, particularly where the defendant was facing life without parole.

Petitioner was prejudiced because there is a reasonable probability that he would have accepted the favorable offer before it expired if counsel would have showed him the video footage that vividly captured the armed robbery and burglary. Petitioner testified at the evidentiary hearing that he “absolutely would have” accepted the offer because it “would have been in [his] best interest.” App. 202, ll. 13-17. This assertion is supported by the fact that, upon finally viewing the footage on the day of trial, Petitioner immediately decided to plead guilty despite that fact that a favorable offer was no longer on the table. Moreover, before this post-conviction relief action even arose, plea counsel told the sentencing judge that if the defense, including Petitioner, would have viewed the video footage earlier, Petitioner would have pled guilty sooner and counsel’s advice concerning the favorable plea offer “may have been different.” App. 138, l. 10 – 139, l. 9.

There is also a reasonable probability that the assistant solicitor would have adhered to the favorable plea offer if Petitioner would have accepted the offer after the footage was originally given to counsel. The solicitor testified at the evidentiary hearing that she gave the surveillance footage to counsel in March 2012 and that she did not revoke the offer until June 25, 2012, over three months later. App. 234, ll. 7-14; App. 235, ll. 13-20. If Petitioner would have accepted the offer to plead guilty to attempted armed robbery with a sentence recommendation of seven to fifteen years’ imprisonment during that three month period it is extremely probable that the solicitor would have adhered to the offer. Moreover, there is a reasonable probability that the seven to fifteen year sentence recommendation would have been accepted by the trial court,

particularly where attempted armed robbery only carries up to twenty years' imprisonment. See S.C. Code Ann. § 16-11-330(B).

Additionally, the difference in the sentence Petitioner received and the plea offer is proof of prejudice. See Davie, 381 S.C. at 614, 675 S.E.2d at 423 (noting "the difference in the sentence [the defendant] received and the plea offer is proof of prejudice"). Petitioner ultimately pled guilty to armed robbery, first degree burglary, and kidnapping and was sentenced to twenty-five years' imprisonment. However, under the plea offer, Petitioner would have only pled guilty to attempted armed robbery with a much lower sentence recommendation of seven to fifteen years' imprisonment.

### **Remedy**

"The specific injury suffered by defendants who decline a plea offer as a result of ineffective assistance of counsel and then receive a greater sentence as a result of trial can come in at least one of two forms. In some cases, the sole advantage a defendant would have received under the plea is a lesser sentence. This is typically the case when the charges that would have been admitted as part of the plea bargain are the same as the charges the defendant was convicted of after trial." In this situation, a resentencing hearing would be the proper remedy. Lafler, 566 U.S. at 170-171.

However, "[i]n some situations it may be that resentencing alone will not be full redress for the constitutional injury. If, for example, an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial, or if a mandatory sentence confines a judge's sentencing discretion after trial, a resentencing based on the conviction at trial may not suffice. In these circumstances, the proper exercise of discretion to

remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal.”

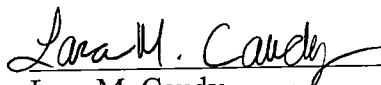
Id. at 171.

Because Petitioner pled guilty to more serious offenses than he would have pled guilty to under the terms of the offer, specifically armed robbery, first degree burglary, and kidnapping as opposed to only attempted armed robbery, a new sentencing hearing is not a sufficient remedy. Petitioner respectfully requests this Court reverse his convictions and sentence and remand for a new trial, with the requirement that the prosecution reoffer the plea proposal. See Davie, 381 S.C. at 616, 675 S.E.2d at 424.

**CONCLUSION**

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

Respectfully submitted,

  
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Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of February, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Lexington County

Brooks P. Goldsmith, Circuit Court Judge

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SAMMY WIGGINS,

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V.

STATE OF SOUTH CAROLINA,

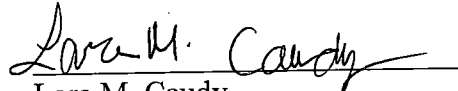
RESPONDENT

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CERTIFICATE OF SERVICE

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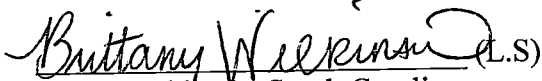
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case have been served upon Jessica Kinard, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served upon Sammy Wiggins, #334667, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 27th day of February, 2017.



Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 27th day of February, 2017.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: November 3, 2026.