

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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ORIGINAL

Certiorari to Saluda County

Honorable William P. Keesley, Circuit Court Judge

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APR 24 2017

ALLEN A. RAUCH,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-002054

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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Robert M. Dudek  
Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
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ATTORNEY FOR PETITIONER

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The PCR court erred by ruling counsel was not ineffective for not informing petitioner that the ten year, or ten-fifteen year plea offer expired at the end of the term of court, since petitioner had no way of knowing this fact, and petitioner was prejudiced by the imposition of a seventeen-year year prison term when he was forced to plead guilty with no sentencing recommendation. .... 5

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### **ISSUE PRESENTED**

Whether the PCR court erred by ruling counsel was not ineffective for not informing petitioner that the ten year, or ten-fifteen year plea offer expired at the end of the term of court, since petitioner had no way of knowing this fact, and petitioner was prejudiced by the imposition of a seventeen-year year prison term when he was forced to plead guilty with no sentencing recommendation?

## STATEMENT OF THE CASE

Petitioner Allen Rauch was facing indictments for armed robbery, kidnapping, and possession of a weapon during a violent crime in Saluda County for a single incident that occurred on May 9, 2011, where petitioner allegedly forced the victim to give him money, and then forced her into a beverage cooler. App. 123 – 128. The business was Horne’s Store on Newberry Highway in Saluda County. App. 129.

Petitioner remembered that his public defender, now judge, Greg Siegler, informed him the state had offered a plea deal of ten years imprisonment. App. 64, l. 5 – 65, l. 10. This was in September, 2011. Petitioner remembered he was supposed to have a bond hearing in November, 2011. App. 65, ll. 7-20.

Petitioner said he found the minimum ten year sentence inviting, but he wanted to make bond so he could be with his newborn child for a while. App. 66, ll. 2-20. However, bond was denied at the hearing. App. 66, ll. 23-24.

After he was denied bond, his mother retained private counsel, Greg Siegler, to represent him. Counsel Siegler then informed petitioner the State now had a plea offer of ten to fifteen years, with a cap of 15 years. App. 67, ll. 8-16. Petitioner was never told that the ten year plea offer had an expiration date. Neither was the petitioner told the ten to fifteen year plea offer had an expiration date. App. 72, ll. 10-20; App. 77, ll. 12-15.

Counsel Siegler explained the policy to non-insiders: “Tri-county practice was that if it [the plea offer] wasn’t accepted that term, it would have expired.” App. 93, ll. 5-22. Yet, the record is devoid of any evidence that petitioner was told the plea offer would expire at the end of the term of court, and there was no reason for petitioner to know of this fact.

During the guilty plea proceeding, retained counsel, Benjamin Stitley, told the judge that petitioner had received an offer of ten years imprisonment in November of 2011. That deal was not accepted, and as prior counsel Siegler said, it expired at the end of the term of court. Defense counsel Stitley therefore asked the court to sentence petitioner to the ten year offer in fairness. App. 25, l. 20 – 26, l. 11. However, the judge imposed a seventeen year prison sentence. App. 42, l. 17 – 43, l. 3.

Petitioner filed an application for post-conviction relief on January 6, 2014. App. 45 – 51. <sup>1</sup> The state filed a return asking for an evidentiary hearing dated April 29, 2014. App. 52 – 56.

PCR counsel Christy Goldberg filed an amended PCR application dated June 13, 2014, alleging defense counsel never informed petition “that the initial plea offer would be withdrawn by the solicitor’s office [if it was not accepted within the term of court].” App. 57 – 59.

An evidentiary hearing was convened on July 6, 2016 before the Honorable William T. Keesly. Kristy Goldberg represented petitioner, and Johanna Valenzuela was the Assistant Attorney General. App. 60.

As stated, during the post-conviction relief hearing, petitioner testified that he was never told that either the ten year or the ten to fifteen year plea offer had an expiration date. App. 71, l. 5 – 72, l. 24; App. 77, ll. 12-15. Since Counsel Siegler did not specifically recall the state putting an expiration date on the plea offers, but he said it was “a tri-county **practice**” that the plea offer expired if not accepted by the end of the court term. App. 93, ll. 10-22. Siegler candidly admitted he did not recall ever telling petitioner of this **practice** in the tri-county area of plea offers expiring. App. 93, ll. 20-22.

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<sup>1</sup> The guilty plea proceeding occurred on February 11, 2013, before the Honorable Thomas A. Russo. Ervin Maye was the assistant solicitor and Ben Stitley was defense counsel. App. 1.

At the conclusion of the PCR hearing, counsel argued that there was no evidence before the PCR court that petitioner was ever told or knew that plea offers, either the ten year plea offer, or the ten to fifteen year plea offer, expired at the conclusion of the term of court. App. 107, 1. 25 – 108, 1. 19.

Counsel argued that counsel had a duty to inform the defendant when the plea offer would expire “just by lack of acceptance.” That was not explained to petitioner and he was prejudiced by not being told of the expiration date or the “customary expiration date.” App. 107, 1. 25 – 109, 1. 5.

An order of dismissal was filed on September 15, 2016. App 114 – 121. This order stated that defense counsel Siegler conveyed then ten year plea offer to petitioner, and the ten to fifteen year plea offer to petitioner. The order noted that petitioner said he did not know the plea offer would expire. App. 116. The order only noted that “Mr. Siegler explained it was a practice of the prosecutors to withdraw any offer that was not accepted in the term the offer was made.” App. 117. The order concluded petitioner was not ineffectively represented. App. 120.

## ARGUMENT

The PCR court erred by ruling counsel was not ineffective for not informing petitioner that the ten year, or ten-fifteen year plea offer expired at the end of the term of court, since petitioner had no way of knowing this fact, and petitioner was prejudiced by the imposition of a seventeen-year year prison term when he was forced to plead guilty with no sentencing recommendation.

As seen, petitioner testified he received an offer of ten years imprisonment as part of a plea offer, and a second plea offer of ten to fifteen years. Petitioner was not told that either offer had an expiration date. This is a *direct* consequence of the plea sentencing offer, and not a collateral consequence. Therefore, PCR counsel was correct that defense counsel had a duty to tell petitioner the plea offer carried with it an expiration date. Petitioner was a layperson, and there was not any reason to believe petitioner would have known the “customary practice” in the “tri-county” area was that plea offers expired at the end of the term of court.

In Laffer v. Cooper 566 U.S. 156 (2012), the United States Supreme Court held that the proper remedy when defense counsel is ineffective in handling the plea offer from the state is to order the state to reoffer the plea agreement, and if the petitioner accepts the offer, the state court can then exercise its discretion regarding whether to resentence.

In Bell v. State 410 S.C. 436, 765 S.E. 2d (Ct.App. 2014), the Court held defense counsel provided deficient performance by failing to extend a plea offer to the client. The Court of Appeals also found that the defendant was prejudiced by that failure. In Bell, prior counsel was relieved after Bell filed a grievance against that attorney. The second attorney found a note in the file stating the solicitor had made a plea offer of ten years. The second attorney admitted nothing in the file indicated the plea offer was ever extended to the client, Bell. The State

conceded the plea offer was never extended to Bell, but the state contended an offer never existed. The PCR court found an offer was made, and that Bell proved ineffective assistance of counsel by failing to communicate the plea offer. The Court of Appeals reasoned that even if counsel was given the benefit of the doubt, and that he was not aware of the plea offer until after the expiration date, counsel was still deficient in not objecting at the guilty plea hearing. The court noted that during the PCR hearing, defense counsel testified the plea offer was for ten years imprisonment and Bell was ultimately sentenced to twenty years imprisonment. The trial PCR court found that Bell was prejudiced, and the PCR court was affirmed.

The right to effective assistance of counsel under Strickland v. Washington 466 U.S. 668 (1984) has been extended to the right of effective assistance of counsel during the plea bargaining process. Judge v. State 321 S.C. 554, 471 2d 146 (1996).

In Davie v. State, the defendant was sentenced to an aggregate of twenty-seven years imprisonment on various drug charges, conspiracy, unlawful conduct towards a child, and various traffic offenses. Two years after the defendant pled guilty, he discovered the state had extended a plea offer of fifteen years. Defense counsel never communicated that fifteen year offer to Davie. This Court found that Davie received ineffective assistance of counsel when the fifteen year plea offer was not conveyed to him. Therefore, this Court vacated Davies sentence and remanded for a re-sentencing hearing.

The Court instructed the re-sentencing judge to take into consideration the state's prior fifteen year plea offer, and directed the circuit court judge not to impose any sentence exceeding the original sentence imposed. Petitioner here was prejudiced by the failure to convey the ten year, and the ten to fifteen year plea offers. His guilty plea should be vacated.

**CONCLUSION**

By reason of the foregoing arguments, a writ of certiorari should be granted to allow full briefing on this issue.



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Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of April, 2017.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Saluda County

Honorable William P. Keesley, Circuit Court Judge

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ALLEN A. RAUCH,

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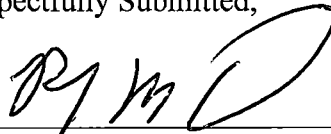
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Allen A. Rauch states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
  2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge William P. Keesley, which was held on July 6, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
  3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.
- Therefore, counsel requests that the Court relieve him as counsel for Allen A. Rauch.

Respectfully Submitted,



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Robert M. Dudek  
Chief Appellate Defender  
ATTORNEY FOR PETITIONER

This 24th day of April, 2017.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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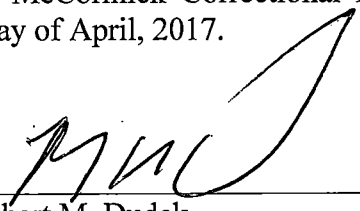
RESPONDENT

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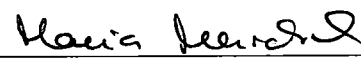
CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Jessica Kinard, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Allen A. Rauch, #260097, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 21st day of April, 2017.

  
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Robert M. Dudek  
Chief Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 24th day of April, 2017.

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