ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Cherokee County

Honorable R. Ferrell Cothran, Circuit Court Judge

RICKY TATE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002106

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

The PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel erroneously advised Petitioner that, if he was found guilty at trial of trafficking in crack cocaine, he would be sentenced as a first time offender and where Petitioner relied on trial counsel's erroneous advice when he rejected a plea offer of fifteen years from the State prior to being found guilty at trial and being sentenced to twenty-five years imprisonment.

STATEMENT

Indictment

On March 31, 2011, Petitioner was indicted by the Cherokee County Grand Jury for one count of trafficking in cocaine, ten to twenty-eight grams. App. 242 – 243. The indictments did not specify whether the trafficking charge was a first, second, third, or subsequent offense. *Id.*

Trial

Petitioner proceeded to trial on July 19-20, 2011 before the Honorable J. Mark Hayes, III and a jury. App. 1 – 150. William Bean, IV, represented Petitioner. Assistant Solicitor George Kendall represented the State. *Id.*

The State's case against Petitioner centered on the testimony of informant Jeron Stevenson. Stevenson agreed to conduct a controlled buy from Petitioner in order to get a favorable offer from the State on pending trespassing charges. App. 38, l. 3 – 43, l. 25. Stevenson met with Cherokee County Sheriff's Investigator Todd Parker prior to the purchase. *Id.*

Parker gave Stevenson one thousand dollars and fitted him with an audio recorder. Stevenson then took a taxi to his house. Minutes later, Petitioner arrived a Stevenson's house. Petitioner left Stevenson's house a few minutes later. App. 46, l. 20 – 49, l. 9.

Stevenson then called a second taxi and returned to Investigator Parker with 23.5 grams of crack cocaine. Police did not search Stevenson's house for drugs prior to the alleged controlled buy. When police arrested Petitioner a few days later, none of the money supplied for the controlled buy was found. App. 103, ll. 3-16.

At trial, the State called Stevenson and Parker. In addition, the State played the audio recording of the controlled buy and entered into evidence photographs Parker took showing Petitioner outside Stevenson's house.

Petitioner was found guilty by the jury. App. 138, l. 7 – 139, l. 21. Following the verdict, the State argued that Petitioner's prior record made the trafficking conviction a third offense. App. 140, l. 1 – 144, l. 16. Petitioner's indictment did not allege that the trafficking charge was third offense.

In 1998, Petitioner pled guilty to three counts of distribution of crack cocaine. *Id.* The State contended that the three counts were separate incidents, despite Petitioner having pled guilty to all three on the same day. *Id.* Petitioner was given a YOA sentence, but it was revoked in 2003. Therefore, the State argued that the prior distribution of crack cocaine convictions were within ten years of Petitioner's trafficking charge. *Id.*

Defense counsel countered that the failure to include the allegation of prior offenses in the indictment should preclude the State from seeking a third offense sentence. App. 143, l. 5 – 144, l. 7. Counsel further argued the State had not proven that the three counts of distribution were sufficiently distinct so as to constitute separate charges:

> [T]he position of the defense is that the prior convictions having been pled to at one time would constitute one conviction for purposes of sentencing making this a second rather than third or subsequent, it is also our position that the State has the burden of showing that the incidents pled to do not constitute a similar crime or one set of facts.

App. 143, ll. 5-20.

The court concluded that the three counts of distribution, taking place over a period of five days, constituted at least two separate convictions. Accordingly, the court sentenced Petitioner to twenty-five years imprisonment. App. 148, l. 11 – 149, l. 5.

Direct Appeal

Petitioner was represented by Dayne Phillips on direct appeal. App. 151 – 164. On September 12, 2012, a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), was filed on Petitioner's behalf at the South Carolina Court of Appeals. Petitioner filed a *pro se* brief on December 3, 2012. App. 165 – 175. On October 16, 2013, the Court of Appeals dismissed Petitioner's appeal. App. 176 – 177.

Post-Conviction Relief Proceedings

On March 31, 2014, Petitioner filed an application for post-conviction relief alleging, among other grounds, that trial counsel was ineffective for failing to properly advise Petitioner as to the impact of his prior convictions on the enhancement of his sentence. App. 178 – 189. On October 3, 2014, the State filed a Return. App. 190 - 195

On January 13, 2016, an evidentiary hearing was held before the Honorable R. Ferrell Cothran, Jr. App. 196. Leah B. Moody represented Petitioner. Assistant Solicitor Alicia A. Olive represented the State. Trial counsel and Petitioner both testified.

Petitioner testified that trial counsel never explained to him that his trafficking charge constituted a third offense. App. 203, l. 3 – 205, l. 9. Petitioner had never been charged with trafficking before. Petitioner recalled that he turned down a plea offer of a fifteen year sentence from the State because he assumed that he was facing a first offense trafficking charge. *Id.*

Petitioner stated that, had he known he was facing a third offense sentencing enhancement, he would have accepted the plea offer. *Id.* Petitioner noted that he turned down the plea offer based on trial counsel's advice that he was facing a maximum sentence of ten years:

> That's why I was wanting to go to trial because I know a first offense don't carry fifteen years . . . . I wasn't under the

> assumption that I was being taken to trial on a third offense trafficking. If I'd a known that, I wouldn't have, I wouldn't have went to trial for a trafficking third offense.

App. 216, ll. 14-20.

By contrast, trial counsel claimed that he explained to Petitioner that he was facing a third offense sentencing enhancement. App. 222, l. 13 – 225, l. 22. Trial counsel stated that, prior to trial, he and Petitioner discussed the impact of Petitioner's prior criminal record on his sentencing range. *Id.* Trial counsel believed that Petitioner understood the sentencing enhancement consequences. *Id.*

Trial counsel said that fifteen year plea offer was the best one that the State offered prior to trial. Trial counsel averred that he had advised Petitioner that if he went to trial, he would likely be convicted, but that proceeding to trial was Petitioner's choice. App. 225, ll. 12-22.

Order of Dismissal

On September 16, 2016, Judge Cothran denied Petitioner's application in a written order of dismissal. App. 230 – 241. The Order concluded that Petitioner had "failed to show either deficiency or prejudice" with respect to trial counsel's advice on the applicability of the sentence enhancement statutes. App. 237.

The PCR court noted that trial counsel argued at sentencing that Petitioner's prior offenses should be considered as a single offense. App. 238. Further, the court determined that trial counsel had adequately advised Petitioner of the sentencing enhancement provsions. *Id.*

This petition follows.

ARGUMENT

The PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel erroneously advised Petitioner that, if he was found guilty at trial of trafficking in crack cocaine, he would be sentenced as a first time offender and where Petitioner relied on trial counsel's erroneous advice when he rejected a plea offer of fifteen years from the State prior to being found guilty at trial and being sentenced to twenty-five years imprisonment.

Petitioner testified at the evidentiary hearing that he would have accepted a plea offer of a fifteen year sentence had trial counsel accurately advised him that he was facing an enhanced sentence based on his prior drug convictions. App. 209, l. 3 – 210, l. 20. Nevertheless, the PCR court concluded in the Order of Dismissal that trial counsel had correctly advised Petitioner on the applicability of the sentence enhancement statutes to his case and adequately represented him at trial. App. 237 – 238.

The PCR court erred in finding plea counsel provided effective assistance of counsel. *Id.* *See Lafler v. Cooper*, 566 U.S. ____, 132 S.Ct. 1376 (2012) (holding the Sixth Amendment right to effective assistance of counsel extends to situations where "inadequate assistance of counsel caused nonacceptance of a plea and further proceedings led to a less favorable outcome"); *see also Missouri v. Frye*, 566 U.S. ____, 132 S.Ct. 1399 (2012) (holding the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected, and reaffirming *Hill v. Lockhart*, 474 U.S. 52 (1985) (applying the ineffective assistance of counsel standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) to guilty pleas).

In *Frye*, the "case [arose] in the context of claimed ineffective assistance that led to the lapse of a prosecution offer of a plea bargain, a proposal that offered terms more lenient than the terms of the guilty plea entered later." *Frye*, 132 S.Ct. at 1404. There were two questions before the United States Supreme Court in *Frye*: (1) "whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected[;]" and (2) "If there is a right to

effective assistance with respect to those offers, . . . what a defendant must demonstrate in order to show that prejudice resulted from counsel's deficient performance." *Id.*

The United States Supreme Court noted that the "Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings[, which] . . . include arraignments, postindictment interrogations, postindictment line ups, and the entry of a guilty plea." *Id.* at 1405 (citations and internal quotation omitted).

Ultimately, the Court held that the right to effective assistance of counsel extends not only to those situations in which a criminal defendant accepts a plea bargain and waives his right to trial,[1] but also to situations where plea offers are rejected or allowed to lapse. *Id.* at 1410-11.

In support of its holding, the Court found:

> *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.* Because ours 'is for the most part a system of pleas, not a system of trials,' *Lafler*, *post*, at 11, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.

Id. at 1407 (emphasis added). The Court further emphasized that *"[i]n today's criminal justice system, . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."* *Id.* (emphasis added). Accordingly, "[a]nything less [than effective counsel during plea negotiations] . . . might deny a defendant 'effective representation by

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1 *See Hill v. Lockhart*, 474 U.S. 52 (1985) (finding ineffective assistance of counsel from a guilty plea (1) where counsel's advice was not within the range of competence demanded of attorneys in criminal cases and (2) where "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial"); *see also Padilla v. Kentucky*, 559 U.S. ____, 130 S.Ct. 1473 (2010) (finding an attorney renders ineffective assistance of counsel by failing to advise a defendant that a guilty plea may subject the defendant to automatic deportation).

counsel at the only stage when legal aid and advice would help him.'" *Id.* at 1408 (citing *Massiah v. United States*, 377 U.S. 201 (1964) (quotation citation omitted).

As the companion case to *Frye*, the Court in *Lafler* addressed when "the favorable plea offer was reported to the client but, on advice of counsel, was rejected, there was a full and fair trial before a jury. After a guilty verdict, the defendant received a sentence harsher than that offered in the rejected plea bargain." *Lafler*, 132 S.Ct. at 1383. However, in *Lafler* both parties agreed that counsel's performance was deficient based on his erroneous advice to reject the plea offer. *Id.* at 1384.

Therefore, the main inquiry was how to apply *Strickland's* prejudice prong where a defendant had rejected a plea offer based on ineffective assistance of counsel but was convicted after a full and fair trial. The prejudice analysis for this situation follows:

> In contrast to *Hill*, here the ineffective advice led not to an offer's acceptance but to its rejection. Having to stand trial, not choosing to waive it, is the prejudice alleged. 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 1385; *See Glover v. United States*, 531 U.S. 198, 203 (2001) (finding "any amount of [additional] jail time has Sixth Amendment significance").

The *Lafler* Court noted, "The fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining." *Id.* at 1388. As for the remedy applied by the Court:

> 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 . . . [and] [i]n some situations it may be that resentencing alone will not be full redress for the constitutional injury.

Id. at 1389. In the first set of cases, this occurs "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." *Id.*

"In this situation the court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors he would have accepted the plea. If the showing is made, the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between." *Id.*

In the second set of cases, this occurs when "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." *Id.* (citations omitted).

"In these circumstances, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." *Id.*

The *Lafler* Court noted, "In implementing a remedy in both of these situations, the trial court must weigh various factors; and the boundaries of proper discretion need not be defined here. . . . At this point, however, it suffices to note two considerations that are of relevance." *Id.*

"First, a court may take account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, it is not necessary here to decide as a constitutional rule that a judge is required to rescind (that is to say disregard) any information concerning the crime that was discovered after the plea offer was made." *Id.*

The *Lafler* Court ultimately held that "[t]he correct remedy in these circumstances . . . is to order the State to reoffer the plea agreement." *Id.* at 1391. The *Lafler* Court noted, "Presuming respondent accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed." *Id.*

Deficient Performance

This case is on all fours with *Lafler*. Trial counsel's performance was deficient, as it fell below "an objective standard of reasonableness" when trial counsel erroneously advised Petitioner that he was facing a first offense trafficking sentence of up to ten years. App. 209, l. 3 – 210, l. 20. This erroneous advice caused Petitioner to reject the State's fifteen year offer and to stand trial where he was convicted and sentenced to twenty-five years.

Counsel's post-verdict efforts to argue that Petitioner's prior offenses constituted a single prior offense for the purposes of the enhancement statute was not an adequate substitute for competent advice on the range of sentence that Petitioner faced if found guilty at trial.

Trial counsel's incorrect advice regarding the enhancement of Petitioner's sentence was deficient performance. Accordingly, the PCR court erred in finding that trial counsel properly communicated the plea offer to Petitioner when trial counsel erroneously led Petitioner to believe

he would only be sentenced to ten years imprisonment if he was found guilty trial. App. 209, l. 3 – 210, l. 20.

Prejudice

Here, Petitioner was prejudiced by trial counsel's deficient performance because both prongs of the adapted *Strickland* standard are satisfied, as there is a reasonable probability Petitioner would have pled guilty, "the court would have accepted its terms[,]" and that the sentence "would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler*, 132 S.Ct. at 1385; *See Glover v. United States*, 531 U.S. 198, 203 (2001) (finding "any amount of [additional] jail time has Sixth Amendment significance").

The central focus of the prejudice prong in the context of an unaccepted plea offer is that the plea offer was extended during trial counsel's representation of Petitioner and trial counsel gave erroneous advice leading to a rejection of the offer. This is evinced best by Petitioner's testimony at the evidentiary hearing:

> That's why I was wanting to go to trial because I know a first offense don't carry fifteen years . . . . I wasn't under the assumption that I was being taken to trial on a third offense trafficking. If I'd a known that, I wouldn't have, I wouldn't have went to trial for a trafficking third offense.

App. 189, ll. 15-25.

Accordingly, the PCR court erred in finding that trial counsel provided effective assistance of counsel where counsel's deficient advice led Petitioner to turn down a favorable plea offer and proceed to trial where a significantly longer sentence was imposed. App. 237 - 238. *See Lafler*, 132 S.Ct. 1376 (holding the Sixth Amendment right to effective assistance of counsel extends to situations where "inadequate assistance of counsel caused nonacceptance of a plea and further proceedings led to a less favorable outcome"); *see also Frye*, 132 S.Ct. 1399 (holding the Sixth

Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected).

CONCLUSION

Based on the foregoing reasons, Petitioner Ricky Tate's petition for writ of certiorari should be granted to allow full briefing on the issue.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of June, 2017.

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RICKY TATE,

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V.

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RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ricky Tate states:

1. He is 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 trial before Judge R. Ferrell Cothran, which was held on January 13, 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 Ricky Tate.

Respectfully Submitted,

John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

This 5th day of June, 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."

John H. Strom
Appellate Defender

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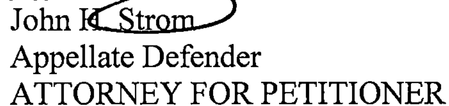
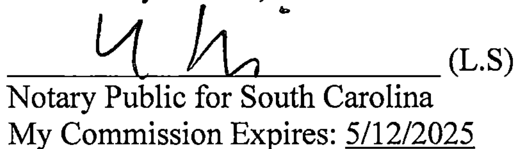
CERTIFICATE OF SERVICE

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 Valerie Garcia Giovaneli, 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 Ricky Tate, #251069, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 5th day of June, 2017.



John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 5th day of June, 2017.


(L.S)

Notary Public for South Carolina
My Commission Expires: 5/12/2025