

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Greenville County

Honorable John C. Hayes, Circuit Court Judge

RECEIVED

JUL 07 2017

S.C. SUPREME COURT
PETITIONER

JOSEPH WALKER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-000059

JOHNSON PETITION FOR WRIT OF CERTIORARI

Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did trial counsel's failure to communicate a plea offer to Petitioner violate Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel when Petitioner would have accepted the offer had counsel made him aware of the offer before trial and where Petitioner was unquestionably prejudiced because he was sentenced to life without parole after he was convicted at trial?

STATEMENT OF THE CASE

The state alleged at trial that Petitioner fired a pistol at Tyler Mattress, who dated the mother of Petitioner's children, out of jealousy and rage. App. 21, ll. 7-17. Mattress has an extensive criminal record and has been convicted of at least ten burglaries, armed robbery, five counts of grand larceny, malicious injury to property, and attempted burglary. App. 31, l. 18 – 32, l. 4; App. 69, ll. 9-23. Mattress started dating Amanda Ray in July 2011. Petitioner has two children with Ray. App. 33, ll. 4-23. Ray testified that Petitioner was not jealous of Mattress, but he did not like Mattress being around his children. App. 91, l. 20 – 92, l. 11.

Mattress was at Ray's apartment on July 20, 2011 and they spent all day "laying in bed." App. 36, ll. 6-21. Mattress claimed Petitioner continuously called Ray throughout the day, but Ray did not answer the phone. Later that evening, Petitioner called Ray from her sister's telephone and Ray answered. Mattress claimed he overheard Petitioner threatening Ray, and he grabbed the phone from her. Mattress admitted he told Petitioner "since you want to fight a girl, come fight me." App. 36, l. 16 – 37, l. 8. He claimed Petitioner said in response, "[D]on't worry about it, I'll be over there in a minute, I'm [going] to do something to [you]." Petitioner then hung up the phone, and Mattress walked outside. App. 39, ll. 6-16.

Mattress went to Bobby Golden's apartment and got a knife from him. App. 40, ll. 2-10. Mattress admitted he took a knife with him "to fight [Petitioner]." App. 54, ll. 13-24. He testified that when Petitioner arrived, "I got off the sidewalk, I walked up to him – towards him. As he came around the trunk area of the car, I seen he had a gun in his hand. By the time he was getting ready to raise the gun, I took off running up the apartment complex and around the building." App. 41, ll. 13-22. Mattress claimed he did not pull out the knife as he walked towards Petitioner. App. 41, l. 12 – 42, l. 7.

Mattress admitted when Petitioner arrived, Mattress taunted him: “You want to fight a girl, fight me.” He claimed that as Petitioner “came around the truck I seen the gun. And then he shot. And then as I was running off I heard him say, shit real.” App. 42, ll. 14-19.

Amanda Ray testified that when she was talking with Petitioner on the phone that day, Petitioner told her “he was going to crack my skull.” According to Ray, she and Petitioner argued on a regular basis. She said, “[W]e do that all the time. It’s just somebody else was involved this time.” App. 96, l. 23 – 97, l. 18.

Ray said that, while she was talking with Petitioner, Mattress “just took it [the phone] out of [my] hand.” She recalled that Mattress and Petitioner then began arguing on the phone. App. 103, ll. 1-10. Ray maintained that both Petitioner and Mattress were probably upset, but she had “never seen either one of them with a weapon.” App. 108, l. 10 – 109, l. 9.

Law enforcement did very little to investigate the case beyond talking to Mattress. Greenville City Police Officer Jonathan Rackley testified he received a “[s]hots fired call” from dispatch on July 20, 2011. App. 116, ll. 7-24. After responding to the scene, Rackley located Mattress, “the victim,” and “started speaking with him.” App. 117, ll. 2-6.

Rackley acknowledged he did not show Mattress a photographic lineup. Instead, he simply accepted his word that Petitioner was the shooter. App. 123, l. 18 – 124, l. 23. Rackley admitted that, based on Mattress’ statement alone, he “reported to a local judge and warrants were issued for Mr. Walker’s [Petitioner’s] arrest.” App. 125, ll. 13 – 126, l. 1. Rackley said he considered the case “cut and dry” from the time he talked to Mattress. App. 130, ll. 2-11.

A Greenville County Grand Jury ultimately indicted Petitioner on December 20, 2011 for attempted murder. App. 395-396. His case was called to trial on April 1, 2013 before the Honorable C. Victor Pyle, Jr., and a jury. App. 1. Assistant Solicitor L. Mark Moyer represented

the state, and Christopher Lance Sheek represented Petitioner. App. 1. On April 2, 2013, the jury found Petitioner guilty. App. 244, ll. 16-18. Judge Pyle sentenced Petitioner to life without parole pursuant to S.C. Code Ann. § 17-25-45(A). App. 247, ll. 9-11.

Shortly after Petitioner was convicted, he learned the state had made a plea offer before trial, but that counsel had never informed him of the offer. Petitioner first learned of the offer on or about May 29, 2013, which was about two months after his trial, while he was housed at Kirkland Correctional Institution. He explained that Cassandra Gorton, who represented Petitioner on other charges, came to visit him at Kirkland and “brought [him] some emails and additional paperwork showing that Mr. Sheek [trial counsel] dropped the ball [regarding the state’s plea offer].” App. 309, ll. 9-19. Petitioner testified, “Had I known about the plea [offer] prior to trial, I would have taken that plea. And I’m pretty sure whatever the plea [offer] was it would have been way less time than the time that I was given after being found guilty during trial (which was life without parole).” App. 308, ll. 15-23. He said he “heard it [the offer] was a twenty year sentence.” App. 309, ll. 5-8.

In addition to the information provided by Gorton, Petitioner also obtained a copy of part of his file, or perhaps a complete copy of his file, from Mr. Sheek’s paralegal, Katrina Davis. App. 311, ll. 1-16. Within this paperwork was an email from the assistant solicitor to Mr. Sheek dated June 7, 2012, which was about ten months before Petitioner’s trial, regarding a plea offer. While a specific sentence recommendation was not made in the email correspondence, the assistant solicitor informed Mr. Sheek that Petitioner was eligible for a mandatory sentence of life without parole because of his prior convictions if Petitioner was convicted of attempted murder or various other pending charges Petitioner had at the time. App. 382-383. It is clear from this language that the solicitor intended to recommend a sentence less than life without parole, which is what Petitioner was sentenced to after he was convicted at trial, if Petitioner pled guilty.

Again, Petitioner testified that he would have accepted the plea offer and pled guilty if he would have known about the offer prior to trial. However, counsel never informed him of the offer. App. 308, ll. 15-23. Petitioner testified, “I was never told anything about a plea.” App. 313, ll. 4-9. Additionally, Petitioner said counsel never discussed with him a “way to get the life without parole off the table.”¹ App. 313, ll. 19-22. When he asked counsel about a possible plea deal, counsel told him, “There’s no way in hell that they [the state] will consider a plea.” App. 337, ll. 12-22. Counsel said the assistant solicitor “wouldn’t entertain a plea.” App. 337, l. 23 – 338, l. 1.

On July 1, 2015, after his convictions and sentence were affirmed on direct appeal, Petitioner filed an application for post-conviction relief (PCR). App. 247-253. The state filed a return to this application dated December 22, 2015. App. 254-258. Petitioner filed an amended application and a memorandum of law on November 29, 2016 raising the claim argued in this petition. App. 259-296. An evidentiary hearing was convened on December 9, 2016 before the Honorable John C. Hayes, III. App. 297. Assistant Attorney General Patrick Schneckpeper represented the state, and R. Mills Ariail, Jr. represented Petitioner. App. 297.

During the hearing, Lance Sheek, Petitioner’s trial counsel, maintained that he “discussed possible pleas” with Petitioner before trial. He said, “As a matter of fact, Mr. Walker [Petitioner] and I had a discussion regarding pleas prior to the service of the notice [of the state’s intent to seek a sentence] of life without parole because Mr. Moyer [the assistant solicitor] had called me and said if you don’t resolve this by plea, then I’m going to LWOP him [this] term.” App. 342, l. 18 – 343, l. 5.

¹ Before trial, Petitioner was served with notice of the state’s intent to seek a sentence of life without parole pursuant to S.C. Code Ann. § 17-25-45(A) if Petitioner was convicted of attempted murder at trial.

Sheek also maintained that “during the trial Mr. Moyer [the assistant solicitor] reopened an offer, which is something that he had said he wouldn’t do once a jury was picked. And we had several lengthy discussions about those plea offers prior to the case ever going to the jury.” He said he “encouraged him [Petitioner] very strongly to take the plea. To the point that I even said to him at one point I feel like I’m - - I’m really badgering you and twisting your arm.” App. 351, l. 24 – 352, l. 9. However, Sheek never stated what the plea offer entailed or what sentence the state would have recommended if Petitioner pled guilty.

By order filed January 5, 2017, the PCR judge denied Petitioner relief. Notably, the judge did not make any credibility findings. Without any analysis, the judge found “trial counsel was not ineffective in his transmitting and discussing with [Petitioner] the sentences he was facing and the State’s trial offers.” App. 390. In reaching this finding, the judge merely summarized counsel’s testimony that “he did discuss the State’s plea offer both before and after [Petitioner] was noticed as to his facing LWOP [life without parole].” App. 390.

Because Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to communicate the twenty year plea offer to Petitioner, who would have accepted the offer had counsel made him aware of the offer before trial, this petition for writ of certiorari follows.

ARGUMENT

Trial counsel's failure to communicate a plea offer to Petitioner violated Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel when Petitioner would have accepted the offer had counsel made him aware of the offer before trial and where Petitioner was unquestionably prejudiced because he was sentenced to life without parole after he was convicted at trial.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to communicate a plea offer to Petitioner before trial. If counsel had told Petitioner of this offer, Petitioner would have accepted the offer and pled guilty. Petitioner was unquestionably prejudiced because he was sentenced to life without parole pursuant to the recidivism statute after he was convicted at trial, which is a much more severe sentence than he would have received if he had been informed of the offer and pled guilty accordingly.

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). 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, 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.” Id. 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. 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 held 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. 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. Because there was no evidence in the record that the defendant expressed a desire to proceed to trial rather than plead guilty, the Court held 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 (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.”

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.

Furthermore, in Lafler, the Court rejected the Solicitor General’s argument that “there can be no finding of Strickland prejudice arising from plea bargaining if the defendant is later convicted at a fair trial.” The Court stated, “Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence.” Id. at 166.

Additionally, 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, at least ten months before trial, the assistant solicitor offered to allow Petitioner to plead guilty in order to avoid a mandatory sentence of life without parole pursuant to the recidivism statute. This offer was documented in an email correspondence sent by the assistant solicitor to trial counsel on June 7, 2012. App. 382-383. After he was convicted, Petitioner also

learned from documents he received from Cassandra Gorton, an attorney who represented him on other charges, that the state had extended a twenty year plea offer before trial. App. 309, ll. 5-19. However, trial counsel never informed Petitioner of the state's plea offer. Instead, counsel told him, "There's no way in hell that they [the state] will consider a plea [deal]." App. 337, ll. 12-22. This conduct constitutes deficient performance. Trial counsel was clearly ineffective for failing to properly advise Petitioner of the state's offer before the offer expired and Petitioner proceeded to trial.

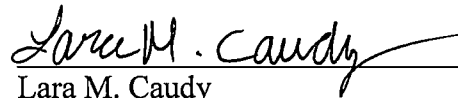
Having established the first prong of the Strickland test, the remaining question is prejudice. Petitioner was unquestionably prejudiced by counsel's ineffectiveness. First and foremost, Petitioner was sentenced to life without parole, which is obviously a more severe sentence than Petitioner would have received under the terms of the plea offer. The difference in the sentence Petitioner received and the plea offer alone is proof of prejudice. See Davie, 381 S.C. at 614, 675 S.E.2d at 423 (holding "the difference in the sentence Petitioner received and the plea offer is proof of prejudice."). Second, Petitioner testified that had he known about the plea offer before trial, he would have accepted the offer and pled guilty in order to avoid a mandatory life sentence. And finally, it is very likely that the twenty year plea offer would have been accepted by the trial judge if Petitioner pled guilty, particularly given the facts of this case.

Respectfully, this Court should reverse Petitioner's sentence and remand for resentencing with the requirement that the prosecution reoffer the plea proposal. Additionally, Petitioner requests this Court to further instruct the state and trial court to take into consideration the twenty year offer extended by the state before trial. 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,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of July, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Honorable John C. Hayes, Circuit Court Judge

JOSEPH WALKER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

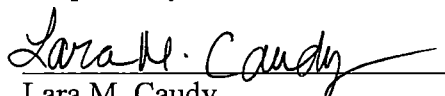
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joseph C. Walker 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 record and transcript of Petitioner's post-conviction relief hearing, which was held on December 9, 2016 before the Honorable John C. Hayes. 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 an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Joseph C. Walker.

Respectfully Submitted,

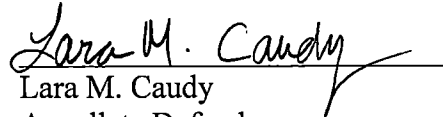

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of July, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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.”


Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 7th day of July, 2017.

STATE OF SOUTH CAROLINA

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JOSEPH WALKER,

PETITIONER

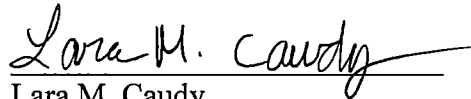
V.

STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE
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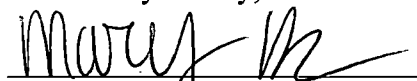
The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case have been served upon DeShawn Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served upon Joseph C. Walker, #285497, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 7th day of July, 2017.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 7th day of July, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: May 12, 2027.