

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable D. Craig Brown, Circuit Court Judge

JOHNELL RICHARDSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000222

JOHNSON PETITION FOR WRIT OF CERTIORARI

Wanda H. Carter
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South Carolina Commission on Indigent Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Trial counsel erred in failing to explain to petitioner that his rejection of the solicitor's fifteen-year plea offer and request for a jury trial would probably result in the expiration of the plea offer irrespective of the fact that that he interrupted his jury trial and subsequently pled guilty in the case.

STATEMENT

Petitioner Johnell Richardson pled guilty to five counts of kidnapping and six counts of armed robbery during the April 2013 term of the Florence County General Sessions Court before Judge William H. Seals, Jr., and was sentenced to imprisonment for an aggregate period of twenty five years. App. 1-74. Karen Parrot represented petitioner at the plea proceeding and Assistant Solicitor John Jepertinger appeared on behalf of the state. Petitioner did not enjoy the benefit of a direct appeal of his convictions and sentences.

On April 10, 2014, petitioner filed a PCR application with the Florence County Office of the Clerk of Court. App. 76 – 82. On November 5, 2016, the respondent filed a return requesting that a hearing be held in response to petitioner’s PCR action. App. 83 – 86. A PCR hearing was convened on November 7, 2016, at the Florence County Courthouse before Judge D. Craig Brown. App. 88 – 128. Petitioner was present at the hearing and represented by Tristan Shaffer, and Assistant Attorney General Lindsey McCallister appeared on behalf of the state.

On December 21, 2016, Judge Brown signed an Order of Dismissal in the case. App. 130 – 139. Petitioner appealed Judge Brown’s Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in failing to explain to petitioner that his rejection of the solicitor's fifteen-year plea offer and request for a jury trial would probably result in the expiration of the plea offer irrespective of the fact that he interrupted his jury trial and subsequently pled guilty in the case.

During the plea proceeding, the solicitor apprised the plea judge of the status of the case as follows:

“This plea is without negotiations or recommendations.” App.47
lines 15-16.

The solicitor stated that this case involved a conspiracy between Jeff Gordon, Joseph Backus, Matrez Baccus, and petitioner to commit armed robbery of R & J Billiards on September 13, 2011, and that the people who were held inside the establishment at the time of the robbery gave rise to the kidnapping charges. App. 52, l. 16 – p. 60, l. 17.

During the PCR hearing, petitioner testified that he rejected the state's fifteen-year plea offer because he wanted a trial, and that he was not advised by counsel that there was a likelihood that the plea offer would not be re-offered or resurrected. App. 97, l. 21 – p. 98, l. 9; App. 102, l. 7-11; App. 103, l. 6-15; App. 104, l. 24 – p. 105, l. 8; App. 108, l. 25 – p. 109, l. 8. Petitioner's testimony explains the misunderstanding as follows:

Q. Why did you end up pleading guilty?

A. I felt like okay, I'll plead guilty and ...I was supposed to have a 15-year plea..

Q. Okay. So you thought there was going to be a 15-year plea or there was a 15-year plea offer prior to trial...and then you ended up pleading guilty, that offer had been taken away; correct?

A. Correct. App. 97, l. 14 – p. 98, l. 9.

Q. Okay...because you refused that offer at the time that it was going to be up to the Judge to determine the sentence when you went back into court to take the plea, correct?

A. I understand that now.

Q. Did you understand that at the time.

A. No. App. 107, l. 22 – p. 108, l. 3.

Trial counsel testified at the PCR hearing and explained that on January 8, 2013, the state offered a twenty-year plea deal, which petitioner rejected, and that on April 1, 2013, the state offered a fifteen-year plea deal, which petitioner rejected on April 10, 2013, and again (he rejected the same) on April 12, 2013. Then, petitioner went to trial on April 15, 2017, but opted to abandon the trial and then pled guilty on April 17, 2014, during which time there was no recommendation or offer in existence in the case. App. 117, l. 11 – p. 119, l. 10.

The PCR judge found that counsel's representation was effective with respect to the handling of the plea offers to the extent that counsel "conveyed all plea offers to [petitioner], which he rejected on numerous occasions, despite counsel's advice to the contrary." App. 136.

Apparently, counsel did not make it clear to petitioner that the plea offer would likely expire if it had not been accepted prior trial. Petitioner labored under the misunderstanding that he could have the plea resurrected if he forfeited his right to a trial and subsequently pled guilty.

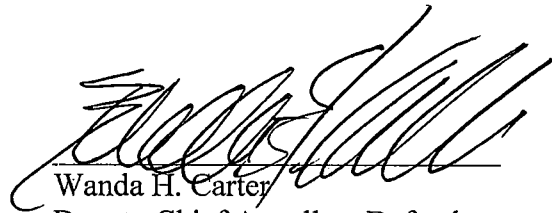
The Sixth Amendment right to effective assistance of counsel extends to cases involving plea offers, particularly where plea offers lapse and where prejudice is shown, i.e. that the defendant would have accepted the plea before the expiration date but for counsel's error in allowing the expiration date to pass before acceptance of the offer. Missouri v. Frye, 132 S.Ct. 1399 (2012). In Missouri v. Frye, counsel did not convey the plea offer to the defendant and as a result, the plea offer expired. See Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010), where the Court held

that counsel erred in advising the defendant that the plea offer would have remained open until after the suppression hearing ended, when in reality the offer expired at the close of the suppression hearing held in the case.

A defendant has a right to effective assistance of counsel during the plea bargaining process. Judge v. State, 321 S.C. 554, 471 S.E. 2d 146 (1196), overruled on other grounds by Jackson v. State, 342 SC 95, 535 S.E. 2d 926 (2000), to the extent that a petitioner's statement that he was prejudiced by counsel's deficient performance at the plea bargaining process can satisfy the prejudice prong of the two-pronged test to be met in ineffective assistance of counsel cases. Here, counsel's error in failing to communicate to petitioner the likely expiration date of the plea offer constituted ineffective legal assistance in his case in violation of the Sixth Amendment to the United States Constitution. See Hill v. Lockhart, 484 U.S. 52 (1985). Petitioner was prejudiced because he would have accepted the plea offer had he known the expiration date of the same.

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that the Court grant the petition on the above-raised issue in the case.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of September, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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PETITIONER

V.

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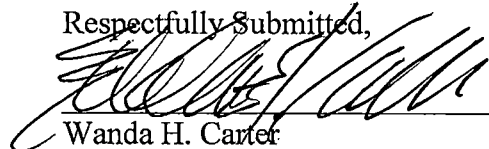
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Johnell Richardson states that:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's trial before Judge D. Craig Brown, which was held on November 7, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
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 Johnell Richardson.

Respectfully Submitted,



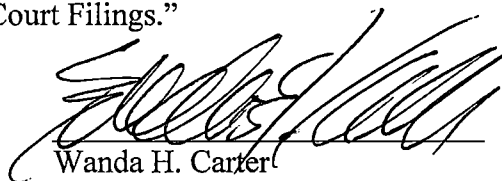
Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of September, 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."



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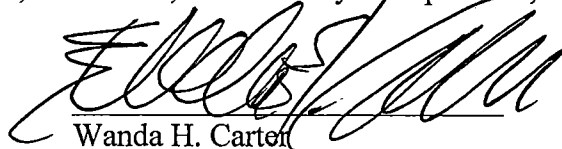
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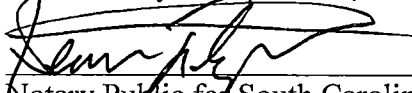
CERTIFICATE OF SERVICE

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 Lindsey McCallister, 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 Johnell Richardson, #355032, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 12th day of September, 2017.



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 12th day of September, 2017.



(L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022.