

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Greenville County

S.C. SUPREME COURT

Honorable Daniel D. Hall, Circuit Court Judge

ANTHONY B. LAY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000430

JOHNSON PETITION FOR WRIT OF CERTIORARI

Joanna K. Delany
Appellate Defender

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

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ISSUE PRESENTED

Whether the PCR court erred in finding plea counsel provided effective representation where petitioner testified counsel rejected a fifteen-year plea offer before telling petitioner of the offer, since counsel had a duty to relay the plea offer to petitioner?

STATEMENT

On April 22, 2014, petitioner was indicted by a Greenville County Grand Jury for the offense of unlawful conduct towards a child. App. 101 – 102. On September 16, 2014, petitioner was indicted by a Greenville County Grand Jury for the offenses of attempted murder and possession of a weapon during the commission of a violent crime. App. 104 – 105.

Petitioner pleaded guilty to the offenses “straight up” on April 14, 2016, before the Honorable Perry H. Gravely. App. 1; App. 32, ll. 15-17. Petitioner later said that at the time he pleaded guilty, plea counsel had turned down a fifteen-year plea offer on his behalf without giving petitioner an opportunity to accept the offer. App. 75, ll. 15-17.

Symmes Culbertson represented petitioner and Katrina Salisburg represented the state. App. 1. During the plea, counsel said that petitioner wished to enter “a plea straight-up” as opposed to entering the plea with a recommendation by the state of fifteen years. App. 31, ll. 3-23; App. 35, ll. 14-16. The court asked petitioner to initial the sentence sheets to reflect there was no recommendation. App. 31, l. 24 – 32, l. 20; App. 103; App. 106 – 107. Plea counsel asked the court to sentence petitioner to less than fifteen years: “I would think that somewhere in the range of seven years might be a more appropriate sentence given the facts of this case.” App. 35, ll. 14-20.

Judge Gravely accepted petitioner’s plea and sentenced him to concurrent terms of seventeen years for attempted murder, ten years for unlawful conduct towards a child, and five years for possession of a weapon during the commission of a violent crime. App. 103; App. 106 – 107. Petitioner did not appeal his convictions or sentences. App. 71, ll. 24-25.

On August 23, 2016, petitioner filed an application for post-conviction relief (PCR). App. 53 – 61. The state made its return on April 12, 2017. App. 62 – 68. A hearing was held on June

29, 2017, before the Honorable Daniel Hall. App. 69. Petitioner was represented by Susannah Ross and Deshawn Mitchell represented the state. App. 69. The court heard the testimony of petitioner and of his plea counsel. App. 70, ll. 4-10.

Petitioner testified plea counsel was ineffective because counsel turned down a fifteen-year plea offer without giving petitioner an opportunity to accept the offer. App. 75, ll. 15-17. Petitioner said counsel told him he rejected the offer “because he said I wouldn’t have wanted to take the plea because he said he could get me a better deal.” App. 75, ll. 8-10. “He told me he was going to get me seven years when I went to court. That’s why he denied the 15 year plea.” App. 75, ll. 13-14. “It was already denied when he came to visit me.” App. 76, ll. 18-19.

Plea counsel testified that he met with petitioner on February 19, 2016, went over the plea offer, and petitioner “signed the plea agreement that had been provided to me from the Solicitor’s Office.” App. 80, ll. 13-16; App. 80, ll. 24-26. “That agreement indicated they were going to make a recommendation of 15 years.” App. 80, ll. 22-23. Counsel testified he believed it was petitioner’s decision to plead guilty without a recommendation. App. 83, ll. 12-16.

On March 2, 2018, the PCR court filed an order of dismissal denying petitioner relief. App. 87 – 95. The court found petitioner failed to carry his burden of proof and noted that a review of the transcript of the guilty plea and colloquy reflected that petitioner chose to plead “straight up” rather than proceed with a recommendation. App. 92 – 93. The PCR court also found the record reflected petitioner entered the plea freely, knowingly, voluntarily, and intelligently. App. 93.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding plea counsel provided effective representation where petitioner testified counsel rejected a fifteen-year plea offer before telling petitioner of the offer, since counsel had a duty to relay the plea offer to petitioner.

Petitioner testified plea counsel turned down a fifteen-year plea offer on petitioner's behalf without giving him an opportunity to accept the offer. App. 75, ll. 15-17. Petitioner said Symmes Culbertson had already rejected the plea offer when petitioner was told of it, and Culbertson told petitioner this was because "he was going to get me seven years when I went to court." App. 75, ll. 8-14.

As a general rule, "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, 566 U.S. 134, 145 (2012). "A defendant has the right to effective assistance of counsel during the plea bargaining process." *Bell v. State*, 410 S.C. 436; 440-41, 765 S.E.2d 4, 6 (Ct. App. 2014) (internal quotations and citations omitted).

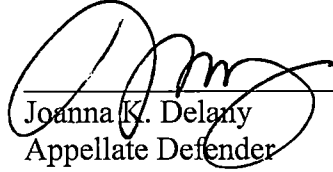
The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. *Gilchrist v. State*, 350 S.C. 221, 226, 565 S.E.2d 281, 284 (2002) (citing *Strickland*, 466 U.S. at 687). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. *Id.*

“[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.” *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). To establish prejudice when challenging a guilty plea, a PCR applicant must prove “there is a reasonable probability that, but for, counsel’s errors, the defendant would not have pled guilty, but would have gone to trial.” *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004).

Plea counsel was ineffective, as shown by petitioner’s testimony that counsel never conveyed the fifteen-year plea offer. Petitioner submits that he was prejudiced because had he known he would receive seventeen years, he would have proceeded to trial rather than pleading guilty. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

CONCLUSION

Based on the foregoing argument, petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.


Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of August, 2018.

STATE OF SOUTH CAROLINA

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V.

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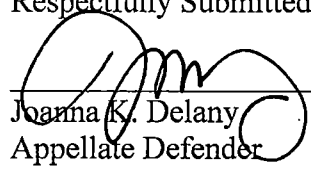
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Anthony B. Lay states:

1. She is 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 post-conviction relief hearing before Judge Daniel D. Hall, which was held on June 29, 2017, 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 Anthony B. Lay.

Respectfully Submitted,

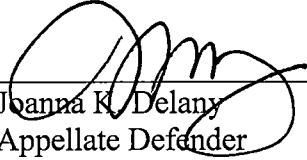


Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 15th day of August, 2018.

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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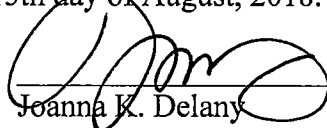
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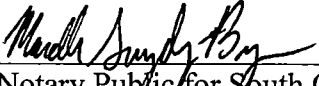
CERTIFICATE OF SERVICE

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 DeShawn H. 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 on Anthony B. Lay, #367845, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 15th day of August, 2018.



Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 15th day of August, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: