

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Honorable J. Cordell Maddox, Circuit Court Judge

DONNIE RAY GIBSON,

PETITIONER S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000694

JOHNSON PETITION FOR WRIT OF CERTIORARI

Wanda H. Carter
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
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ISSUE PRESENTED

The PCR judge erred in denying petitioner's allegation that trial counsel's omission in failing to convey the initial ten-year plea offer to the solicitor and petitioner, who was sentenced to LWOP after being convicted of ABIK at trial, constituted ineffective assistance of counsel in the case.

STATEMENT

Petitioner Donnie Ray Gibson was convicted of assault and battery with intent to kill during the December 2011 term of the Anderson County General Sessions Court before Judge R. Lawton McIntosh, who sentenced petitioner to LWOP. Scott McElhannon represented petitioner at trial, and Assistant Solicitors Rame Campbell and Josh Allen appeared on behalf of the state. App. 1- 348. Petitioner appealed, but his conviction and sentence were affirmed on March 30, 2016, by the South Carolina Court of Appeals. See State v. Gibson, Op. No. 2016-UP-142 (S.Ct. App. filed March 30, 2016). Benjamin John Tripp, Esquire, formerly of the South Carolina Office of Appellate Defense, represented petitioner on a direct appeal.

On January 5, 2016, petitioner filed a PCR application with the Anderson County Office of the Clerk of Court. App. 350-360. The respondent filed a return dated September 12, 2017, requesting that a hearing be held in the case. App. 361-366.

A PCR hearing was convened on February 22, 2018, at the Anderson County Courthouse before Judge J. Cordell Maddox. App. 368-398. Petitioner was present at the hearing and represented by Rodney W. Richey, and Assistant Attorney General Jordan Cox appeared on behalf of the state. On March 30, 2018, Judge Maddox issued an Order of Dismissal therein denying petitioner's allegations of ineffective assistance of trial counsel in the case. App. 400-413.

Petitioner appealed Judge Maddox's Order of Dismissal in the case. This petition follows.

ARGUMENT

The PCR judge erred in denying petitioner's allegation that trial counsel's omission in failing to convey the initial ten-year plea offer to the solicitor and petitioner, who was sentenced to LWOP after being convicted of ABIK at trial, constituted ineffective assistance of counsel in the case.

The state charged petitioner with ABIK based on reports that petitioner and Damon Marcengill were involved in an altercation where Marcengill received facial cuts from a knife while fighting at Hog Tail Bar on April 26, 2009, in Anderson, South Carolina. App. 35, l. 10 – p. 37, l. 16. At trial, bartender Julie Whitfield, who worked at the bar on that night, gave a statement indicating that it was petitioner's nephew who had a knife and cut Marcengill, but Whitfield testified at trial that it was petitioner who cut Marcengill as their verbal altercation escalated into a physical fight. App. 47, l. 10 – p. 71, l. 9. Marcengill's brother, who was present at the scene, testified in effect that he did not see petitioner use a knife to cut Marcengill because he was engaged in a fight with petitioner's nephew at that time. App. 96, l. 1 – p. 104, l. 23.

Note that petitioner was acquitted of the offense of possession of a knife during the commission of a crime for which he was also on trial. App. 344, liners 16-24. Apparently, there was some confusion as to who exactly was in possession of the knife and also who used the knife as the melee progressed into pure pandemonium on that night. Also, Damon Marcengill's testimony was just as confusing as well. Damon Marcengill testified at trial and explained that he was drinking on that night and that he had a knife on his person, but declared that it was petitioner who cut him although he (Damon Marcengill) claimed that he didn't see the knife coming at him to cut him. App. 108, l. 1 – p. 116, l. 13.

During the PCR hearing held in the case, petitioner testified that his trial counsel was not effective with respect to conveying a prior pre-trial plea offer to him. App. 375, l. 16-p. 376, l. 5.

Trial counsel testified at the PCR hearing and explained that petitioner's first attorney negotiated a ten-year plea offer with the state, but apparently, his (counsel's) efforts yielded a twenty-year plea bargain only, and ultimately a trial commenced and the LWOP sentence followed. Apparently, the ten-year sentencing sheet had been prepared previously by petitioner's first counsel and signed, but the LWOP notice was subsequently served in the case. The best trial counsel stated he could do was to secure a twenty-year plea offer, which petitioner allegedly refused to accept. App. 383, l.14- p. 385, l. 14; App. 393, l. 14-p. 394, l. 2.

The PCR judge found that counsel's assistance was effective because he presented the last plea offer of twenty years to petitioner. App. 412-413. However, it was the initial plea offer secured by his first counsel that the instant trial counsel should have resurrected; and therefore, trial counsel erred in failing to bring to the solicitor's attention and to petitioner's attention the fact that an initial ten-year plea offer secured by his first counsel existed in the case and if such an offer could have been considered once more.

A defendant has a right to effective assistance of counsel during the plea-bargaining process. See Lafler v. Cooper, 566 U.S. --- (2012). See also 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. Additionally, a guilty plea must represent a voluntary and intelligent choice among the alternative causes of action open to the

defendant. Hill v. Lockhart, 474 U.S. 52 (1985). In Lafler v. Cooper, *supra*, counsel's incorrect advice led to the rejection of a plea offer in the case.

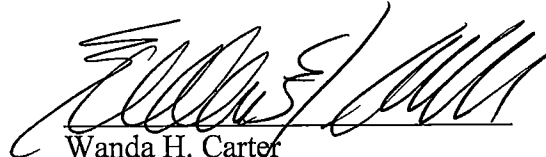
Moreover, the Sixth Amendment right to effective assistance of counsel extends to cases involving plea offers. Missouri v. Frye, 132 S.Ct. 1399 (2012). In Missouri v. Frye, counsel did not convey the plea offer to the defendant and as a result, the plea offer expired. Compare Davie v. State, 381 S.C. 601; 675 S.E. 2d 416 (2009), where the Court held that counsel's failure to inform the defendant of a written plea offer that was substantially less than the sentence he received after pleading guilty constituted ineffective assistance of counsel because the defendant was unaware of the existence of the plea offer (due to counsel's error based on relocation and mail snafu) until after the plea offer had expired, and that he would have accepted that plea offer had it been communicated to him. See also, Bell v. State, 410 S.C. 436, 765 S.E.2d 4 (2014), where the Court held that counsel was ineffective in failing to extend the state's plea offer of ten years to the defendant prior to sentencing (which was when the defendant first heard of the offer), and that the defendant was prejudiced by counsel's deficient performance in this regard as he received a twenty-year sentence instead. In Bell, the defendant's case had been transferred to counsel, but the attorney who previously represented the defendant had an independent and separate file in the case containing a note indicating that a plea offer of ten years had been made, but said file had no notes or indication showing that said offer was conveyed to the defendant by either counsel who represented the client.

Based on the record in the case at bar, it was obvious that counsel failed to advise petitioner and the solicitor of the initial ten-year plea that was secured by petitioner's first counsel. It was clear that petitioner would have accepted the ten-year plea offer as this was better than a life without parole sentence.

In the case at bar, the PCR judge erred in denying PCR relief to petitioner because trial counsel was ineffective in failing to convey the initial a plea offer secured previously by petitioner's first counsel in the case for a substantially lesser sentence, which the respondent would have accepted but for counsel's failure to communicate the same, and which violated the respondent's right to receive effective legal assistance in a criminal case as guaranteed under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). Petitioner was prejudiced as a result of counsel's deficient representation in this regard because he would have accepted the ten-year sentence plea option had he been privy to the same and avoided the three LWOP sentence that was handed down to him at trial.

CONCLUSION

Based on the foregoing argument, counsel for petitioner would request that this court grant the petition and allow briefing on the above-raised issue.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of October, 2018.

STATE OF SOUTH CAROLINA

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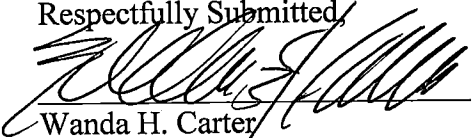
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Donnie Ray Gibson 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 post-conviction relief hearing before Judge J. Cordell Maddox, which was held on February 22, 2018, 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 Donnie Ray Gibson.

Respectfully Submitted,

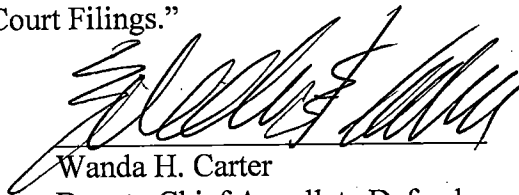


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 15th day of October, 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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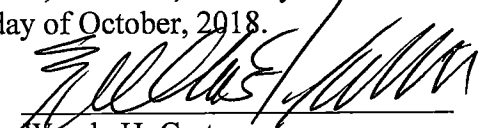
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CERTIFICATE OF SERVICE

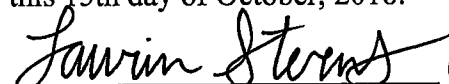
The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Kelly Oppenheimer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Donnie Ray Gibson, #082710, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 15th day of October, 2018.



Wanda H. Carter

Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

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

 (L.S)

Notary Public for South Carolina

My Commission Expires: July 5, 2027.