

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Spartanburg County

Honorable Thomas A. Russo, Circuit Court Judge

CHRISTOPHER OCAMPO,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001087

JOHNSON PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
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ATTORNEY FOR PETITIONER

INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT 4

CONCLUSION 8

PETITION TO BE RELIEVED AS COUNSEL 9

ISSUE PRESENTED

Whether the PCR court erred in denying Petitioner relief, where plea counsel rejected a plea offer of fifteen years on Petitioner's behalf, where counsel advised Petitioner he would receive less than the eighteen year sentence Petitioner's co-defendant received, and where Petitioner received an eighteen year sentence?

STATEMENT

Petitioner was indicted by a Spartanburg County grand jury on February 23, 2017 for armed robbery, attempted armed robbery, and two counts of possession of a weapon during the commission of a violent crime. App. 125 – 128. He proceeded to trial before the Honorable R. Keith Kelly on September 7, 2017. App. 1. E. Joshua Schultz represented Petitioner; Spenser Smith appeared on behalf of the state. After a jury was selected, Petitioner pleaded guilty as indicted. App. 39 l. 7 – App. 40 l. 3. The state recommended a maximum sentence of twenty years. The facts alleged by the solicitor were as follows:

On January 23, 2017, Petitioner and two other men robbed a Shell Food Mart and attempted to rob a Family Dollar Store. App. 41 l. 19 – App. 43 l. 20. After they left the Family Dollar, a witness followed their car and called law enforcement. The car containing Petitioner and the two other men was pulled over, and they were all arrested. Id.

The plea judge accepted Petitioner's plea and found it to have been entered freely, intelligently, and voluntarily. App. 44 ll. 1 – 3. The plea judge sentenced Petitioner to eighteen years on the armed robbery and attempted armed robbery charges and five years on each of the weapons charges. App. 53 l. 25 – App. 54 l. 10. The sentences were crafted to run concurrently. Id.

Petitioner filed an application for post-conviction relief on or about May 10, 2018. App. 56 – 64. It contained allegations of ineffective assistance of counsel, including failing to advise Petitioner regarding sentencing. The state filed its Return and a Motion for a More Definite Statement on or about July 26, 2018. App. 65 – 70. An Amended Application for post-conviction relief was filed on or about September 11, 2018. App. 129. It contained additional allegations of ineffective assistance of counsel, including a claim that plea counsel turned down a

plea offer of fifteen years “without advising Applicant and misadvising Applicant as to potential sentence.” Id.

An evidentiary hearing was held before the Honorable Thomas A. Russo on March 7, 2019. App. 71. Susannah C. Ross represented Petitioner; Johnny E. James, Jr. appeared on behalf of the state. Petitioner and plea counsel testified at the hearing. Following Petitioner’s testimony, the state sought a directed verdict as to one of Petitioner’s allegations, a claim that plea counsel failed to present witnesses in mitigation. App. 84 l. 12 – App. 85 l. 11. The PCR court denied the state’s motion.

At the conclusion of the hearing, the PCR court denied relief. App. 109 ll. 11 – 21. An Order of Dismissal was filed on or about June 10, 2019. App. 113 – 124. The PCR court found counsel credible and indicated that Petitioner failed to meet his burden.

This petition follows.

ARGUMENT

The PCR court erred in denying Petitioner relief, where plea counsel rejected a plea offer of fifteen years on Petitioner’s behalf, where counsel advised Petitioner he would receive less than the eighteen year sentence Petitioner’s co-defendant received, and where Petitioner received an eighteen year sentence.

Relevant facts

Petitioner and his family retained plea counsel. App. 93 l. 25 – App. 94 l. 20. During the representation, Petitioner recalled one afternoon when counsel called him and asked him to come by the office. App. 77 ll. 14 – 25. Counsel advised Petitioner that the state had offered a plea with a maximum sentence of fifteen years but declared that he had rejected it. *Id.* Following that conversation, counsel did not discuss with Petitioner the maximum sentence he was facing if the plea was rejected. App. 78 ll. 1 – 3.

Surprisingly, plea counsel then insisted that Petitioner not go to trial. App. 80 l. 16 – App. 81 l. 9. He recommended that Petitioner take a new plea after a jury had been selected in his case. App. 81 ll. 4 – 9. In doing so, counsel outright told Petitioner that he was going to “guarantee ... something good, better than 18 [years].” *Id.* Had counsel not coerced Petitioner into pleading guilty based upon the guarantee of a lighter sentence, Petitioner indicated that he would not have gone to trial. App. 81 ll. 10 – 17.

Cesar Mendez-Martinez, Petitioner’s co-defendant, was the ringleader of the three men. App. 45 ll. 126 – 20; App. 92 l. 15 – App. 93 l. 16. He received an eighteen year sentence following a guilty plea. App. 80 ll. 7 – 18. Plea counsel was hoping Petitioner would receive a lighter sentence than Mendez-Martinez. App. 92 l. 15 – App. 93 l. 5.

Plea counsel testified that he met with Petitioner around ten or twelve times. App. 86 l. 25 – App. 87 l. 1. The two discussed the discovery in the case and the extent of the evidence against Petitioner. According to counsel, at least one of Petitioner’s co-defendants was going to testify against him at trial. App. 91 l. 12 – App. 92 l. 7.

Plea counsel admitted to informing Petitioner that he “had turned down a plea offer for him” App. 90 ll. 14 – 18. He recalled an offer of between fifteen and twenty years which he took to Petitioner. App. 90 l. 19 – App. 91 l. 8. Counsel stated that Petitioner “did not seem interested in that 15 year offer or that 15 to 20 year offer.” *Id.* Counsel denied promising any particular sentences to Petitioner. App. 92 ll. 8 – 17. He indicated that he was prepared to proceed with trial. App. 93 ll. 17 – 24.

Following jury selection and pre-trial motions, the plea judge gave Petitioner time to speak with his wife and plea counsel. App. 33 l. 17 – App. 34 l. 20. Plea counsel recalled notifying Petitioner that he may face a lengthy sentence if convicted by a jury. App. 98 l. 9 – App. 99 l. 5; App. 101 ll. 9 – 18. Therefore, plea counsel convinced Petitioner to plead guilty. App. 99 ll. 6 – 20.

Discussion

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, 685–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To overcome the presumption that counsel has rendered adequate assistance, the defendant must show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness; and (2) counsel's deficient performance prejudiced the defendant such that “there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694, 104 S.Ct. 2052.

A defendant who pleads guilty on advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases and there is a reasonable probability that, but for counsel's errors, defendant would not have pled guilty and would have insisted on going to trial. Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

The United States Supreme Court has held that “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, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012). Generally, where defense counsel does not communicate such an offer to the defendant, counsel has rendered ineffective assistance. Id.

Petitioner’s matter is much like that of the petitioner in Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000). In that case, Thompson alleged he was under the assumption that he would receive a youthful offender sentence of no more than twenty years. Id. at 114, 531 S.E.2d at 295. Much like Petitioner, Thompson testified that he would not have pleaded guilty but for his attorney’s advice. Id. In Thompson, the PCR court found that Thompson was not prejudiced because he was adequately apprised of the twenty to thirty year sentencing range. Id. at 116, 531 S.E.2d at 297. This Court, citing Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988), held that Thompson’s assertion that he would not have pled guilty if he had known that he could have

been sentenced to more than twenty years satisfied the prejudice requirement set forth in Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

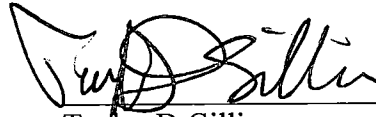
Notably, in Thompson, this Court held:

The fact that Thompson was unsure whether to plead guilty up until the last minutes before trial coupled with the fact that he was under the impression the solicitor would not make a sentencing request is enough evidence to demonstrate a reasonable probability that Thompson would not have pled guilty but for his attorney's ineffective assistance.

Id. at 117, 531 S.E.2d at 297. Similarly, Petitioner in the case at bar would not have pleaded guilty but for the guarantee that he would receive less than eighteen years. Accordingly, he was prejudiced by plea counsel's ineffectiveness.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant the petition for writ of certiorari and allow further briefing on the issue raised herein.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of January, 2020.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Thomas A. Russo, Circuit Court Judge

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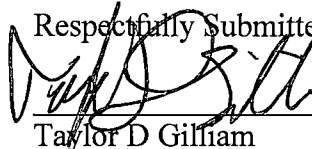
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Christopher Ocampo 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 post-conviction relief hearing before Judge Thomas A. Russo, which was held on March 7, 2019, 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 Christopher Ocampo.

Respectfully Submitted,

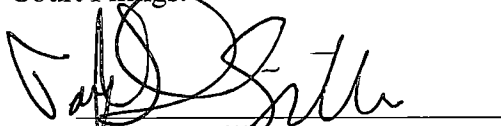


Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

This 13th day of January, 2020.

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."

A handwritten signature in black ink, appearing to read "Taylor D Gilham", written over a horizontal line.

Taylor D Gilham
Appellate Defender

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Division of Appellate Defense
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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 Johnny Ellis James, Jr., 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 Christopher Ocampo, #373835, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 13th day of January, 2020.

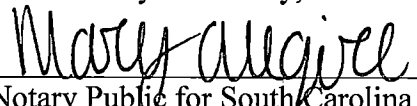


Taylor D Gilliam

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 13th day of January, 2020.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027