STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Eugene C. Griffith, Circuit Court Judge

MILCIADES ALCANTARA,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001328

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

INDEX

ISSUE PRESENTED

Whether the PCR court erred in denying relief, where Petitioner presented an affidavit from his mother regarding a twenty-year plea offer, where trial counsel never conveyed the offer to Petitioner, and where Petitioner received an aggregate sentence of fifty years?

STATEMENT

On August 20, 2009, a Spartanburg County grand jury indicted Petitioner for two counts of armed robbery, two counts of kidnapping, two counts of possession of a weapon during the commission of a violent crime, and criminal sexual conduct in the first degree. App. 497. On February 8, 2010, Petitioner proceeded to a three-day trial before the Honorable J. Derham Cole, and a jury. App. 1. Richard Whelchel and Tanya Jones represented Petitioner; Howard W. "Trey" Gowdy and Cindy Crick appeared on behalf of the state.

The jury found Petitioner guilty as indicted as to every offense. App. 292 l. 18 – App. 293 l. 6. Judge Cole sentenced Petitioner to fifteen years on the armed robbery charge, five years on the knife possession charge, ten years on the first kidnapping charge, twenty-five years consecutive on the criminal sexual conduct offense, ten years on the second armed robbery charge, five years on the second weapons possession charge, and ten years on the second kidnapping charge. App. 296 l. 13 – App. 298 l. 2.

The South Carolina Court of Appeals dismissed Petitioner's direct appeal pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Alcantara, Op. No. 2012-UP-108 (filed February 22, 2012). Petitioner filed an application for post-conviction relief on January 7, 2013. App. 300. It contained allegations of ineffective assistance of counsel. App. 305. The state made its return on June 6, 2014. App. 309.

An evidentiary hearing was held before the Honorable Roger Couch on September 16, 2014. J. Brandt Rucker represented Petitioner; Suzanne White appeared on behalf of the state. An Order of Dismissal was entered in that case on May 8, 2015.

Petitioner filed a second PCR application on December 19, 2016. App. 367. Petitioner claimed there was newly discovered evidence in his case. App. 371. Attached to the application

was an affidavit from Petitioner's mother regarding a plea offer that as mentioned to her by trial counsel. App. 373 – 374.

The state filed its return and a motion to dismiss on November 3, 2017. App. 380. Remarkably, a Conditional Order of Dismissal was filed the same day. App. 388. Through counsel, an amendment to the PCR application was filed on September 23, 2019. App. 396.

An evidentiary hearing was held before the Honorable Eugene C. Griffith on November 12, 2019. App. 397. Susannah C. Ross represented Petitioner, and Jacob A. Isenberg appeared on behalf of the state. The PCR court heard testimony from Petitioner, a former solicitor who tried the case, and trial counsel. Five exhibits were entered into the record. The matter was taken under advisement. App. 466 ll. 4 – 10. An Order of Dismissal was filed in October 2021. App. 480.

This petition follows.

ARGUMENT

The PCR court erred in denying relief, where Petitioner presented an affidavit from his mother regarding a twenty-year plea offer, where trial counsel never conveyed the offer to Petitioner, and where Petitioner received an aggregate sentence of fifty years.

Relevant facts

At the outset of Petitioner's second PCR evidentiary hearing, the state moved to dismiss based on successiveness. App. 403 – 404. The PCR judge took the matter under advisement and directed that the hearing proceed. Petitioner's first claim was that he was not made aware of a plea offer. App. 406 ll. 1 – 13. In particular, Petitioner testified:

> There was a plea offer that I was not aware of at the time when the trial was in progress, and I was not, you know, not knowing anything about it [and] I ended up going to trial and some time [later] ... my mom told me about a plea offer that was available to me, but it was never given to me, so she told me about it, so as soon as she told me about it, I immediately filed a PCR on it, because of course I would've [taken] the plea offer, because that's what I wanted from the beginning anyways, but ... I ended up getting 50 years instead of a 20 year plea offer that she said that she had talked to my lawyer about, that he had mentioned to her about it, and ... I never knew about it.

App. 406 ll. 1 – 13.

At the time he learned of the plea offer from his mother, petitioner had served almost eleven years of his sentence. App. 407 ll. 3 – 24.

Trial counsel began representing Petitioner in early 2009. App. 450 ll. 7 – 11. He did not recall receiving any plea offers from the state. App. 452 ll. 13 – 15. Counsel requested one from the solicitor while preparing for trial. App. 452 ll. 16 – 22. Counsel recalled receiving an e-mail from the prosecution "saying [they're] not making an offer" but did not substantiate that recollection with any documentation from his file. App. 453 ll. 2 – 5.

One of the solicitors from Petitioner's trial, Cindy Crick, testified about her usual procedure when making offers:

> If I made an offer in a case, I would write it down, send it to the defense attorney usually via email if they were represented. If not, there were times I could convey it to them face-to-face if we were at an initial appearance or something of that nature, but if they had a defense attorney, it certainly would go to them in writing.

App. 440 l. 23 – App. 441 l. 3.

Crick testified she would not have offered a plea in this case due to the "level of DNA and identification of the defendant and an unwillingness to accept responsibility or to say that it was consensual." App. 444 ll. 13 – 19.

Discussion

A PCR application ordinarily must be filed within one year after a conviction or, if a direct appeal is taken, one year after the remittitur is sent to the trial court. S.C. Code Ann. § 17–27–45(A). However, section 17–27–45(C) provides that if a PCR applicant discovers "material facts not previously presented and heard that require[ ] vacation of [his] conviction or sentence," he may file a PCR application "within one year after the date of actual discovery ... or after the date when the facts could have been ascertained by the exercise of reasonable diligence."

The PCR Act provides that "[a]ny person who has been convicted of, or sentenced for, a crime and who claims ... that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice" is entitled to seek post-conviction relief. S.C. Code Ann. § 17–27–20(A)(4). Thus, by its plain language, the PCR Act affords "any person" the ability to seek post-conviction relief on the basis of newly discovered evidence. Jamison v. State, 410 S.C. 456, 468, 765 S.E.2d 123, 129 (2014).

Traditionally, in South Carolina, " '[t]o obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.' " McCoy v. State, 401 S.C. 363, 368 n. 1, 737 S.E.2d 623, 625 n. 1 (2013) (quoting Clark v. State, 315 S.C. 385, 387–88, 434 S.E.2d 266, 267 (1993)).

The standard test governing newly discovered evidence is properly applied when relief is sought based on evidence discovered post-trial that is material to the accused's guilt or innocence. See, e.g., State v. South, 310 S.C. 504, 507, 427 S.E.2d 666, 668 (1993) (noting that to obtain a new trial based on newly discovered evidence, the evidence must be material to the issue of guilt or innocence).

It may have made sense for the state to offer a plea deal. Petitioner had no prior record. App. 294 l. 6. Further, the former solicitor could not recall outright whether a plea offer was actually made; she could only testify as to what her standard practice would have been.

Petitioner's testimony that he would have accepted the plea offer satisfied the first prong from Clark, supra. Further, the undisclosed plea offer was undiscoverable prior to trial based simply on the fact that it was not conveyed to Petitioner. As such, the PCR court erred in denying relief.

"An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (citation omitted). "To establish deficient performance, a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.' " Id. (quoting Strickland v. Washington, 466

U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "[T]o establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 534, 123 S.Ct. 2527 (quotations and citation omitted). In assessing prejudice, appellate courts "reweigh the evidence in aggravation against the totality of available mitigating evidence." Id. Prejudice is established where "there is a reasonable probability that at least one juror would have struck a different balance." Id. at 537, 123 S.Ct. 2527 (citation omitted). A "reasonable probability" is less than a preponderance of the evidence but still "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 693–94, 104 S.Ct. 2052.

Counsel has a duty to convey plea offers to a client. Missouri v. Frye, 566 U.S. 134, 145 (2012). As correctly noted in the Order of Dismissal in the subject case, an attorney provides ineffective assistance of counsel "[w]hen defense counsel allows the [plea] offer to expire without advising the defendant or allowing him to consider [the plea]." Id.

As to the findings of fact and conclusions of law, the PCR court found "it is unlikely that a plea offer was ever extended to Applicant at all." App. 495. The testimony of trial counsel and the former solicitor was found to be credible. Id. Therefore, the PCR court concluded that this claim was based upon evidence that was "likely fabricated." Id.

The PCR court did not definitively conclude that a plea offer was never made. The determination that it was "unlikely" a plea offer was extended leaves open the possibility that an offer *was* extended. Therefore, the PCR court should be reversed and Petitioner given a new trial.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant certiorari and allow further briefing.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of May, 2022.

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MILCIADES ALCANTARA,

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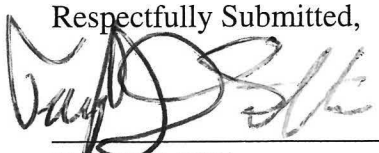
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Milciades Mendoza Alcantara 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 Eugene C. Griffith, which was held on November 12, 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 Milciades Mendoza Alcantara.

Respectfully Submitted,



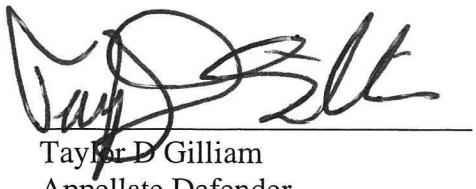
Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of May, 2022.

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."



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