

2011-191878

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Trial Court Case No. 2010-CP-26-6653

Somjai Fung Fue Starnes

Petitioner,

v.

State of South Carolina

Respondent.

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**PETITION FOR WRIT OF CERTIORARI**

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**CERTIFICATE OF SERVICE**

I certify I transmitted the following in the manner described below:

Date: **August 11, 2011 (Thursday)**

**HAND DELIVERY: SC Supreme Court**

1231 Gervais Street  
Columbia, SC 29201

1 - Original Petition for Writ of Certiorari and Appendix  
6 - copies of Writ of Certiorari  
1 - copy of Appendix

**HAND DELIVERY: Christina J. Catoe  
Office of Attorney General**

Rembert Dennis Building  
1000 Assembly Street,  
Room 519  
Columbia, SC 29221

1 - copy of Writ for Certiorari  
1 - copy of Appendix

Sworn to and subscribed before me on July 11, 2011

Caray L. Hazelwood

Notary for South Carolina.

My Commission expires on 2-22-15.

  
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## TABLE OF AUTHORITIES

### FEDERAL CASES

United States v. Harvey, 791 F.2d 294 (4th Cir. 1986)

United States v. Ringling, 988 F.2d 504 (4th Cir. 1993)

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Bowers v. State, 500 N.E.2d 203, 204 (Ind. 1986)

Custodio v. State, 644 S.E.2d 36, 373 S.C. 4 (2007)

Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999)

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## STATEMENT OF ISSUE ON APPEAL

- I. DID THE TRIAL COURT ERR IN DISMISSING THE APPLICATION FOR POST CONVICTION RELIEF DEPRIVING PETITIONER OF JUDICIAL REVIEW AS TO WHETHER OR NOT HER PLEA WAS ENFORCEABLE AND MADE VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY WHEN PETITIONER WAS JUSTIFIED IN RELYING TO HER DETRIMENT ON THE PLEA DESPITE THE FACT THAT THE STATE HAD INTENTIONALLY BREACHED THE PLEA AGREEMENT WITHOUT PETITIONER'S KNOWLEDGE?

## STATEMENT OF THE CASE

In June of 1986, Ms. Starnes was indicted for criminal sexual conduct with a minor in the first degree (CSC). (Supp. App. 104, ¶ 2). On August 26, 1986, Ms. Starnes was tried and convicted with her husband, Devon Starnes, and sentenced to twenty (20) years (1986-GS-26-838). (Supp. App. 104, ¶ 2).

On December 8, 1987 (1987-MO-416), Ms. Starnes' conviction was affirmed and was remitted to the circuit court on December 21, 1987. (App. 36, ¶ 2).

### First PCR Application

On September 16, 1988, Ms. Starnes filed her first PCR application (1988-CP-26-3346). (App. 37, ¶ 1). On April 5, 1990, Judge James B. Stephen issued an Order finding Ms. Starnes' counsel to have been ineffective and granting a new trial. (Supp. App. 113, ¶ 3). The State appealed. (App. 37, ¶ 1).

On August 5, 1991, this Court affirmed the PCR trial court and the State timely filed a petition for rehearing. (Supp. App. 103, ¶ 2).

On October 24, 1991, while the State's petition for rehearing was pending,

the State offered and Ms. Starnes accepted a "no contest" plea to the offense of lewd act upon a minor (LAOM). (Supp. App. 96). Although LAOM is not a lesser-included offense of the original CSC charge, the State used the same indictment number for Ms. Starnes' plea that was used for her CSC charge. (Supp. App. 97). Ms. Starnes waived presentment of the LAOM charge to the grand jury. (Supp. App. 97). Ms. Starnes was sentenced to ten (10) years suspended on time already served. (Supp. App. 96). Ms. Starnes was released from prison and thereafter could not be located by any of her counsel. (Supp. App. 97; Supp. App. 78, ¶ 2 and fn. 1).

On December 2, 1991, this Court issued its Order pursuant to the State's petition for rehearing and reversed the PCR Trial Court. (Supp. App. 95). Ms. Starnes timely filed a petition for rehearing which was denied. (Supp. App. 82; Supp. App. 66 ¶ 2).

On December 13, 1991, the State filed a motion with this Court requesting that Ms. Starnes' plea agreement be vacated. (Supp. App. 87). The State argued in its motion that, because the State used the same indictment number for both Ms. Starnes' LAOM and CSC charges, jurisdiction was with this Court at the time of the plea and therefore the plea agreement was void, because the plea court lacked subject matter jurisdiction. (Supp. App. 90, ¶ 1).

On March 24, 1992, this Court vacated the LAOM plea, holding that the plea court lacked jurisdiction to accept the plea. (Supp. App. 66 ¶ 2). Furthermore, this Court stated that "[b]y accepting the plea and allowing respondent released on time served; however, the State evidenced its judgment against any further

imprisonment of respondent" and modified Ms. Starnes' sentence from twenty (20) years to thirty (30) years satisfied on time served. (Supp. App. 66-67).

### **Second PCR Application**

Prior to filing her second PCR Application, Ms. Starnes learned that her CSC conviction had been reinstated. As a consequence, Ms. Starnes learned she was being deported from the United States because of the CSC and LAOM convictions. (App. 54, # 10). Up until that time, Ms. Starnes understood her LAOM would not subject her to deportation. (Supp. App. 61, L 2 - 6). She also knew she no longer had a CSC so she could not understand how she was targeted for deportation. (App. 54 # 10, 11).

On July 23, 2010, Ms. Starnes timely filed her second PCR Application in this case. (App. 52). On August 21, 2011, the State filed its Return. (App. 49).

On January 25, 2011, Ms. Starnes filed an Amended PCR Application. (App. 45). On the same day, the State filed its Return with a Motion to Dismiss. (App. 41).

At the evidentiary hearing held on February 1, 2011, the trial court announced it was dismissing Ms. Starnes' PCR Application. (App. 19, L 3-10). By Order dated March 1, 2011, Judge Benjamin H. Culbertson held that because this Court had already vacated Ms. Starnes' LAOM plea, it was a nullity and Ms. Starnes' claim must fail. (App. 39, ¶ 2; 40, ¶ 1). Moreover, the Trial Court held that even if plea counsel had rendered ineffective assistance, it could not be deemed prejudicial to Ms. Starnes because when this Court reinstated her CSC conviction it superceded the plea. (App. 39, ¶ 2). Furthermore, the trial court held that the only

remaining avenue for appeal was Ms. Starnes' CSC conviction, for which Ms. Starnes set forth no valid grounds to attack. (App. 39, ¶ 2).

On April 4, 2011, Ms. Starnes filed a Rule 59(e) Motion with respect to the trial court's order. (App. 25). On April 19, 2011, the trial court filed its Order denying her motion. (App. 23).

## **ARGUMENT**

- I. IN DISMISSING THE PCR APPLICATION, THE TRIAL COURT ERRONEOUSLY DEPRIVED PETITIONER OF JUDICIAL REVIEW AS TO WHETHER OR NOT HER PLEA WAS ENFORCEABLE AND MADE VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY BECAUSE PETITIONER WAS JUSTIFIED IN RELYING TO HER DETRIMENT ON THE PLEA DESPITE THE FACT THAT THE STATE HAD INTENTIONALLY BREACHED THE PLEA AGREEMENT WITHOUT PETITIONER'S KNOWLEDGE.

Although plea agreements are a matter of criminal jurisprudence, most courts have held they are subject to contract principles. United States v. Ringling, 988 F.2d 504, 505 (4th Cir. 1993); United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986), State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (2007). South Carolina has held that a plea bargain is governed by contract principles. Rollison v. State, 346 S.C. 506, 552 S.E.2d 290 (2001).

In 1999, this Court first applied the concept of detrimental reliance to plea enforcement in criminal cases. Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999) Unlike a civil contract, a plea offer does not bind the defendant, the State, or the court until the defendant actually enters a plea. Reed, 333 S.C. at

687-688, 511 at 403. Therefore, it remains an offer until it is accepted by the defendant via a court-approved plea. Custodio v State, 644 S.E.2d 36,39, 373 S.C. 4, 11 (2007). However, an exception to this general rule occurs when there has been a change in the defendant's position as a result of his detrimental reliance on the offer. Id. Where an oral plea offer has not been properly finalized by the court, the defendant may seek to enforce the plea offer by showing he has relied on the offer to his detriment. Reed, 333 S.C. at 688, 511 S.E.2d at 402-403. The defendant can prove his detrimental reliance by partial performance of some part of the bargain. Custodio, 644 S.E.2d at 39, 373 S.C. at 11; Reed, 333 S.C. at 688, 511 S.E.2d at 403.

State prosecutors are obligated to fulfill the promises they make to defendants when those promises serve to induce the defendant to plead. Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). When the State makes a promise as part of a plea bargain, the promise is a "pledge of the public faith and is not to be lightly disregarded. The public justifiably expects the State, above all others, to keep its bond." Bowers v. State, 500 N.E.2d 203, 204 (Ind. 1986).

This Court has recognized the principles set forth in Santobello and has held that when a defendant pleads based upon the promise of a prosecutor, then the plea agreement must be fulfilled. Sprouse v. State, 355 S.C. 335, 338, 585 S.E.2d 278, 280 (2003). If the State were allowed to renege on its promises with impunity, particularly when doing so injures defendants who relied on those same promises, defendants would certainly lose confidence in both the plea bargaining process and

the criminal justice system.

After this Court affirmed Ms. Starnes' grant of a new trial, the State offered her a "no contest" plea to LAOM. She accepted the State's offer as did the trial court. She received a sentence of ten (10) years. She believed her plea would bring include all things inherent to the plea including the impossibility of a future CSC conviction and the resulting consequences, her release from prison, and the opportunity to put her past behind her so that she could live in the United States without fear of deportation. All these inherent promises were the benefit of her bargained for plea agreement. These benefits were inherently promised as part of her plea agreement and she relied on them. Moreover, her reliance and expectations were reasonable, they were foreseeable to both Ms. Starnes and the State, and they were the sole reasons she accepted the State's plea offer.

After this Court issued its Order of December 2, 1991, reinstating Ms. Starnes' original CSC conviction, the State found itself in an extraordinary position which afforded it both hindsight and its choice of two different penalties to impose on Ms. Starnes. The State chose the harsher sentence of twenty (20) years which would require Ms. Starnes to return to prison and remain incarcerated for almost fifteen (15) additional years and automatically subject her to deportation upon her release from prison. That choice enabled the State to abandoned explicitly all the good faith on the part of the State's prosecutor in entering into the plea agreement with Ms. Starnes. Consequently, the State was able to breach the plea agreement intentionally. The results contradict the fundamental fairness that due process requires.

In order to effectuate its choice, the State sought to invalidate the underlying plea based on the mistake of using the same indictment number as the case on appeal, which deprived the trial court of subject matter jurisdiction to accept Ms. Starnes' plea. On March 24, 1992, before South Carolina jurisprudence recognized the use of detrimental reliance to enforce plea agreements in criminal cases, Custodio, 644 S.E.2d at 39, 373 S.C. at 11; Reed, 333 S.C. at 688, 511 S.E.2d at 403, this Court granted the State's request to vacate Ms. Starnes' plea agreement and reinstated her CSC, conviction but modified her sentence from twenty (20) years upward to thirty (30) years satisfied on time served. This Court justified its actions by stating that "[b]y accepting the plea and allowing [Ms. Starnes] released on time served, however, the State evidenced its judgment against any further imprisonment of [Ms. Starnes]."

Although the issues here were not before this Court previously, the State also evidenced by entering into the plea that it clearly did not believe Ms. Starnes should face the possibility of being convicted of CSC again.

Ms. Starnes is about to be removed from her family and home in the United States and deported because her CSC conviction was reinstated and because her lawyer mistakenly believed that her LAOM plea did not subject her to deportation. This issue illustrates how she relied to her detriment on the identical plea that the State asked this Court to vacate. Had the State honored its plea agreement rather than asking this Court to vacate Ms. Starnes' plea and reinstate her CSC conviction, Ms. Starnes would not now be facing automatic deportation for her CSC conviction. Furthermore, she would have a clear path to challenge the ineffective

assistance of counsel she received regarding her LAOM plea which subjects her to discretionary deportation.

Due to the lack of subject matter jurisdiction that led to the vacation of her actual plea, Ms. Starnes is left only with an oral plea on which she justifiedly relied for almost twenty-one (21) years. As a result of that reliance, she has a new family and a new life. Yet she is about to be separated from her family and deprived of that life. because the Stated breached the plea agreement, which led to the subsequent reinstatement of her CSC conviction.

Due to the circumstances of this case, Ms. Starnes cannot ask for specific performance since her plea has already been vacated. Furthermore, she now knows that although she agreed to plea to LAOM, her plea was not made voluntarily, knowingly or intelligently. The application of South Carolina law with respect to her detrimental reliance would enable her to receive the benefit for which she bargained. As a consequence, there would have been no further action regarding her case and this Court would have had no basis for reinstating her CSC conviction.

The only suitable remedy that would approximate the benefit of Ms. Starnes' plea bargain would be a new trial. That would prevent the irreparable harm she now faces as a result of the reinstatement of her CSC conviction. It would also provide Ms. Starnes and the State the opportunity to enter into a new plea agreement which Ms. Starnes could make voluntarily, knowingly and intelligently. If such an agreement could not be made, the State would be free to try Ms. Starnes again on whatever charges it thought appropriate.

## CONCLUSION

For the reasons stated herein, this Court should reverse the judgment of the trial court or, in the alternative, provide any remedy this Court deems just and proper given these unusual circumstances.



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