

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Barnwell County

R. Ferrell Cothran, Jr., Circuit Court Judge  
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SEP 10 2014

S.C. Supreme Court

MICHAEL KENNEDY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002334  
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PETITION FOR WRIT OF CERTIORARI  
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## ISSUE PRESENTED

Trial counsel erred in failing to object to the personal opinions of a former circuit court judge who appeared at **all three** of petitioner's court proceedings and acted in the role of a solicitor by opposing petitioner's bond reduction and resentencing requests and asking for harsh sentencing as punishment for the criminal acts perpetrated upon a beloved local icon in order to gain community redemption and send a community message of zero tolerance for crime because such participation by the former judge was improper and the majority of the information submitted by the former judge was irrelevant to sentencing.

## STATEMENT OF THE CASE

Petitioner Michael C. Kennedy pled guilty to armed robbery and assault and battery with intent to kill on May 7, 2007, at the Barnwell County General Sessions Court before Judge Thomas A. Russo. Franchot A. Brown represented appellant at the plea proceeding, and Assistant Solicitor Benjamin R. Moore appeared on behalf of the state. Petitioner was sentenced to imprisonment for a period of thirty years on the armed robbery conviction and twenty years consecutive (suspended upon the service of ninety days and three years probation) on the conviction of assault and battery with intent to kill. App. 1 – 57. On June 26, 2007, a sentencing reconsideration hearing was held in the case, but ultimately Judge Russo denied the motion to reduce petitioner’s sentence. See Supplemental Appendix 1 - 45.

Petitioner appealed; but following the filing of an Anders Brief of Appellant, the appeal was ultimately dismissed by the South Carolina Court of Appeals on January 25, 2011. App. 59 – 72. See State v. Kennedy, Unpublished Op. No. 2011-UP-028 (January 25, 2011). App. 73. Petitioner was represented on appeal by M. Celia Robinson, formerly of the Office of Appellate Defense.

On February 22, 2011, petitioner filed a PCR application with the Barnwell County Office of the Clerk of Court alleging ineffective assistance of trial counsel in his case. App. 74 – 76. The respondent filed a return dated August 4, 2011, requesting that a PCR hearing be held in response to petitioner’s PCR action. App. 77 – 80.

A PCR hearing was convened on July 9, 2013, at the Barnwell County Courthouse before Judge R. Ferrell Cothran. Petitioner was present at the hearing and represented by Melissa J. Armstrong, and Assistant Attorney General David Spencer appeared on behalf of the state. App. 81 – 132. On August 19, 2013, Judge Cothran issued an Order of Dismissal denying petitioner’s PCR action. App. 134 – 140. Petitioner appealed, and this petition for writ of certiorari follows.

## ARGUMENT

Trial counsel erred in failing to object to the personal opinions of a former circuit court judge who appeared at **all three** of petitioner's court proceedings and acted in the role of a solicitor by opposing petitioner's bond reduction and resentencing requests and asking for a harsh sentencing as punishment for the criminal acts perpetrated upon a beloved local icon in order to gain community redemption for him and send a message of zero tolerance for crime because such participation by the former judge was improper and the majority of the information submitted by the former judge was irrelevant to sentencing.

During the plea proceeding, the solicitor apprised the trial judge of the facts of the case. On January 8, 2007, Lugene Tooks appeared at the home of eighty-seven-year old Thomas Richardson and hit him (Richardson) over the head with a bottle. Then, Tooks and Richardson tussled until petitioner assisted Tooks by putting Richardson on the ground. Richardson's wallet was taken by the two men who fled thereafter. App. 9, lines 10 – 16; Supp. App. 15, lines 1 – 5.

In the case at bar, petitioner's plea occurred immediately after a bond reduction hearing was held in the case. When the request to lower the bond (set at \$55,000.00) was denied, petitioner went on to plead guilty as charged. Former Circuit Court Judge Rodney A. Peeples was present at petitioner's bond reduction hearing, his guilty plea proceeding, and the resentencing hearing. At the bond reduction hearing, Judge Peeples voiced his objection to the request for a lower bond. At the guilty plea proceeding, Judge Peeples argued strongly in support of a harsh prison sentence for petitioner. Judge Peeples argued solicitor style to the effect that petitioner should receive a stiff sentence for the crimes perpetrated upon Richardson, who was their community icon, as proper retribution and as a way to send a message to the community that such conduct would not be tolerated.

For example, during the bond reduction hearing, which immediately preceded the guilty plea proceeding, Judge Peoples made the following remarks:

We submit without question it was premeditated...both of them had hoods over their head... Took with a quart liquor bottle hits him right in the forehead – stitches, blood flowing...[Mr. Richardson... wrestl[ed] Mr. Took, but then [petitioner]...jumps out of the bushes and literally picks Mr. Richardson up and body-slams him on the concrete and brick walkway. That's when he had that broken or fractured hip, and that's why for two months he couldn't get up and walk he was suffering so...and this has been a terrible thing that happened in the Barnwell community, and a lot of people are upset about it. App 12, l. 6 – p. 13, l. 5.

We think [the \$55,000] bond is too low, but...we would urge upon the seriousness of this matter, and these people living in fear of their life, and, hopefully, you will not see fit to reduce the bond because they have enough trouble sleeping at night worrying about somebody coming to their home and stealing...people have a right in the city of Barnwell, the county of Barnwell, the state of South Carolina to be safe and secure in their homes, but not be troubled by people like this who shouldn't remain on the street. App. 13, l. 14 – 25.

Also, during the plea proceeding, Judge Peoples stated the following:

Your Honor...[since petitioner] admit[ted] [his] guilt to such a horrendous crime as this it deserves a lot longer punishment in my view...but it is 0 to 50 or 10 to 50...[Mr. Richardson] has done more for poor people...It just isn't right...you can't buy and sell piece of mind, but it can be stolen from you, and that's what happened. App. 47, lines 6-24; App. 48, l. 7-13.

It just isn't right, your honor...but these people have not been able to sleep at night. They have suffered mentally. They suffered physically, and somewhere along the line we got to send a message to people. What kind of community do we have here if people can't have tranquility and peace in their own home? What kind of community to we live in where things like this happen...[The Richardsons] don't want people like this on the streets of Barnwell County...accountability breeds responsibility and you've got to have some accountability to the city of Barnwell, the county of Barnwell, and the state. App. 49, l. 21 – p. 50, l. 3; App. 50, l. 23; App. 51, lines 5-12.

During the PCR hearing, petitioner testified in effect that counsel did not perform effectively “as an attorney to get [him] a fair sentence.” App. 122, l. 14 – 17. PCR counsel argued that trial counsel erred in failing to object to certain “inflammatory and prejudicial” comments made at the sentencing phase of petitioner’s plea proceeding in light of the fact that this was an emotional case, and particularly since the trial judge commented that maybe petitioner’s sentence “perhaps would stop somebody else from [committing a crime such as this].” App. 86, l. 3 – 20.

Trial counsel testified at the hearing and explained that his attempt to negotiate a plea fell deal on deaf ears in effect due to Richardson’s good standing in the community,<sup>1</sup> but that nonetheless he thought the sentence should have been no more than ten-to-fifteen years, which is why he filed the motion to reconsider the sentence. App. 96, l. 10 – 15. App. 99, lines 17 – p. 100, l. 9. Counsel admitted that he failed to object to the inappropriate, impermissible, and prejudicial comments made by the circuit court judge in the case and testified regarding the matter as follows:

Q. Okay. Well, let me ask you this, once the plea got started, did you ever think that – some of the arguments made about the sort of – and I’m sure you’ve seen the application, send a message to the community – did you ever consider objecting to that sort of argument based on the case law in South Carolina that says those aren’t the source of arguments that need to be considered in determining a sentence? Did you ever consider objecting to any –

A. The statements by the state or by rather, Judge Peoples?

Q. Yes sir.

A. Yeah, yeah. Yeah.

Q. You did consider it? Or did consider objecting?

A. Well, I was greatly concerned about some comments made and I did not object. App.101, l. 14 – p. 102, l. 5.

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<sup>1</sup> “[Richardson] was 86 years old and well known in the community and popular to most people” when these events occurred. App. 93, lines 15 – 17.

[The trial judge]... was fully aware that there were some concerns about the comments made by Rodney Peoples and his presentation... as I did too. App. 105, lines 19-25.

The PCR judge ruled that petitioner failed to establish ineffective assistance of trial counsel in the case because counsel's strategy of avoiding a confrontation, emphasizing petitioner's remorse, and believing that the trial judge could sort out inappropriate sentencing considerations were reasonable trial tactics and that as a result, counsel's assistance was not deficient. App 138-139.

A sentencing judge should know all material facts including any information material to punishment (such as the defendant's criminal record) prior to sentencing. State v. Franklin, 276 S.C. 240, 226 S.E.2d 896 (1976). Although a judge may consider generally broadly an unlimited amount of information; nonetheless, that information considered must be relevant to punishment. State v. Cantrell, 250 S.C. 376, 153 S.E.2d 189 (1967). For instance, compare the case of Simpkins v. Robinson, 2008 WL 3200740 (2008), emanating from Lexington County, South Carolina, where the defendant pled guilty to leaving the scene of an accident resulting in death and obstruction of justice and the Court held that the sentencing judge's inquiry into whether the accident was alcohol-related prior to sentencing the defendant was a relevant matter raised at sentencing despite the fact that the felony DUI offense charged against him had been dismissed.

To the contrary, the sentencing information presented to the trial judge in the case at bar went beyond petitioner's prior record, which he did not have, and into matters irrelevant to sentencing. For example, Judge Peoples made repeated and exaggerated references to the iconic status of Richardson, who helped so many in the community, and offered exaggerations of petitioner's body slamming Richardson when petitioner claimed that Richardson fell or was merely pushed to the ground. Supp. App. 14, lines 18-23. Additionally, references by the former judge to the effect that he and Richardson shared sweet corn at his house after Richardson's exit from the hospital were too

personal to remain under the category of sentencing information and clearly outside the topic heading of information relevant to punishment outlined in Franklin. Supp. App. 31, lines 17-20. The judge's spiel about how Richardson dutifully cared for his sick wife and the manner in which other people not connected to these events viewed what happened to Richardson became personal opinions that were immaterial to the facts of the case and the sentencing of petitioner. App. 48, lines 14-18. App. 49, lines 17-24. In short, the former judge's opinions presented at petitioner's court proceedings far exceeded the boundaries of presentable sentencing matter acceptable under Franklin.

More importantly, the very presence and influence of a former circuit court judge **at all three** of petitioner's court proceedings, who spoke in effect as an advocate for the state, i.e., a solicitor, in the case in and of itself went outside Franklin's sentencing information parameters. Undoubtedly, the judge's opinions constituted an improper influence that prejudiced petitioner's sentencing proceeding. Words uttered from a learned former circuit court judge who volunteered sentencing guidance regarding how to sentence petitioner violated his right to due process at sentencing.

Furthermore, it was error for the former judge to add arguments regarding the importance of using petitioner's sentence to serve as a conscience of the community message of zero tolerance for these types of crimes. This was also prejudicial and resulted in a denial of due process at petitioner's sentencing proceeding. By analogy, compare State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (1990), where the Court found that the argument urging jurors to convict a defendant in order to protect community values, preserve order, or deter future law breaking was improper. In Liberte, the solicitor in effect equated a drug conviction for the defendant with "keep[ing] drugs off our streets." Likewise, Judge Peebles' comments were in effect encouraging the trial judge to sentence petitioner in the harshest manner possible in order to make Barnwell County citizens feel safe and

strike a blow against crime. The former judge's conscience of the community comments denied petitioner of his right to a fair sentencing proceeding as the same interfered with the trial judge's duty to issue a sentence based on relevant information set forth in Franklin.

Had trial counsel objected to Judge Peeples' personal request for severe sentencing for petitioner as redemption for Richardson and his rally cry per the conscience of the community goal at petitioner's sentencing, then a reasonable probability exists that the sentence petitioner received would have been different. Counsel was aware that his inaction resulted in petitioner's receipt of an unfair sentence, which is why he filed a sentencing reconsideration motion, after which time a sentencing reconsideration hearing was held in the case. See Supplemental App. 1-45. Note that the former judge was present at the resentencing consideration hearing as well.

During that sentencing reconsideration hearing, the former judge's sales pitch became flat-out inflammatory and laced with character attacks against petitioner and extremely contentious arguments against lowering petitioner's sentence. For example, Judge Peeples turned up the heat and attacked petitioner's mitigation evidence by arguing that petitioner's youthful age of 19 meant nothing and did not mitigate the crimes committed or render the crimes lessened, and that he was lucky that he did not get the maximum fifty-five-year sentence, **and** that in light of how much Richardson suffered, "we should get on our knees and thank the Lord that Richardson is still [alive]." Supp. App 28, lines 1-24; Supp. App. 30, lines 17-19. Petitioner was 18 years old when the crime was committed and 19 years old at sentencing. App. 7, lines 22-24; Supp. App 13, l. 22. Judge Peeples added that petitioner was "mean" and filled with premeditated ill-will, and that he "probably" had a juvenile criminal record, and "probably" the crimes for money to buy drugs. Supp. App. 31, lines 4-13; Supp. App. 33, lines 5-8; Supp. App. 32, l. 19. The truth was that petitioner had no prior record. Supp. App. 13, lines 23-25. Additionally, Judge Peeples brought out

the conscience of the community argument **again** and reminded the trial judge that petitioner's sentence was directly connected and inextricably linked to the local citizens' right to feel safe in their homes. Supp. App. 29, lines 9-13; Supp. App. 31, lines 14-17; Supp. App. 33, lines 10-17. Judge Peoples concluded that he "[felt] strongly" that petitioner "deserved" to be in jail. Supp. App. 32, lines 16-17

Apparently, Judge Peoples' solicitor style argument had an affect on the trial judge because he denied petitioner's motion to reconsider his sentence and went on to adopt the following conscience of the community rationale in support of his decision to deny resentencing as follows:

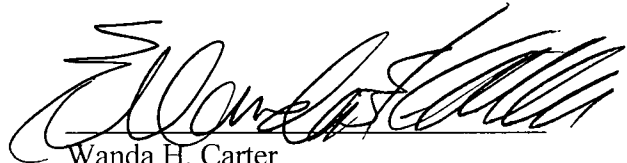
It's the fact that two young men went into a man's home and...beat him down and took his property. That's what this sentence is reflecting -- -Whether it's in Barnwell County or Aiken County or Florence County, that is absolutely unacceptable behavior. It absolutely will not be tolerated and there are severe penalties for doing it. People are going to be comfortable and safe in their own home to the extent that we can make it. We can't, obviously, make it because we can make laws that say you go to prison for a long time and it's 85 percent and it's no parole if you do it. If that doesn't stop this man from doing that to that gentlemen right there and it didn't stop Mr. Tooks from doing it to that gentlemen right there, now maybe it'll stop somebody else from doing it if they know that this is the consequence of doing this. You cannot live in a society that allows this type of activity to go on. Supp App. 44, l. 12- p. 45, l. 5.

Trial counsel's error in failing to object to Judge Peoples' presence and improper comments at **all three** of petitioner's court proceedings violated petitioner's Sixth Amendment right to effective assistance of counsel at his plea proceeding; and but for counsel's omission in this regard, petitioner would have received a sentencing hearing that comported with due process and the outcome of his sentence might have been different. See Hill v. Lockhart, 484 U.S. 52 (1985).

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition and allow full briefing on the issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of September, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Barnwell County

R. Ferrell Cothran, Jr., Circuit Court Judge

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MICHAEL KENNEDY,

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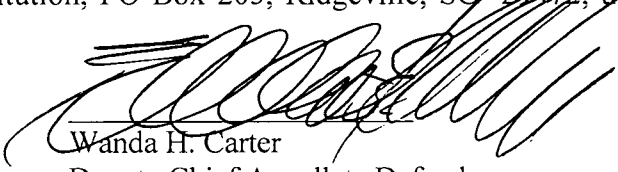
RESPONDENT

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CERTIFICATE OF SERVICE

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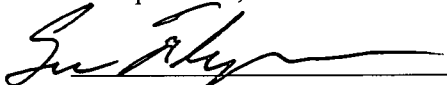
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on Daniel Gourley, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Michael C. Kennedy #321820, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 10th day of September, 2014.



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 10th day  
of September, 2014.



(L.S.)  
Notary Public for South Carolina

My Commission Expires: October 30, 2022.