THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Post-Conviction Relief

George C. James, Jr., Circuit Court Judge

Appellate Case No.: 2014-001649

Michael J. Lackey #340933,.. Appellant,

vs.

State of South Carolina, ...Respondent.

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES. 3

STATEMENT OF ISSUES ON APPEAL 4

STATEMENT OF THE CASE. 5

STATEMENT OF FACTS. 6

ARGUMENT 8

1. **The court erred in denying Appellant's Post-Conviction Relief based on trial counsel's failure to advise of the possibility of an Alford plea (North Carolina v. Alford) 400 U.S. 25 (1970)**

CONCLUSION. 11

TABLE OF AUTHORITIES

Cases:

Carr v. United States, No. 3:08CV123, 2009 WL 1867672, at *8 (N.D.W. Va. June 29, 2009)

Davie v. State, 381 S.C. 601, 609, 675 S.E. 2d 416, 420 (2009)

North Carolina v. Alford 400 U.S. 25 (1970)

STATEMENT OF ISSUES ON APPEAL

1. **The court erred in denying Appellant's Post-Conviction Relief based on trial counsel's failure to advise of the possibility of an Alford plea (North Carolina v. Alford) 400 U.S. 25 (1970)**

STATEMENT OF THE CASE

The Appellant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. The Appellant was indicted in January, 2008 for burglary in the first degree (2008-GS-26-214), armed robbery (2008-GS-26-215), unlawful carrying of a pistol (2008-GS-26-216, and possession of marijuana with intent to distribute (2008-GS-26-217). Ralph J. Wilson, Sr., Esquire ("trial counsel"), represented Appellant. On May 17, 2010, Applicant, along with his co-defendant, proceeded to trial before the Honorable Larry B. Hyman, Jr., and a jury. On May 20, 2010, Judge Hyman sentenced Applicant to concurrent terms of eighteen (18) years for burglary, ten (10) years for armed robbery, to one (1) year for unlawful pistol and to five (5) years for possession with intent to distribute marijuana.

Appellant filed a timely Notice of Appeal and Wanda H. Carter, Esq., of the Office of Appellate Defense, perfected the Appeal with the filing of an Anders brief. The South Carolina Court of Appeals dismissed Applicant's appeal on May 2, 2012. State v. Lackey, Op. No. 2012-UP-257 (S.C. Ct. App. filed May 2, 2012). The remittitur was returned to the Circuit Court on May 22, 2012.

STATEMENT OF FACTS

On October 13, 2007, a call was made to 911 in Horry County. Don Gause told police he was out walking his dog and saw five black males waving guns get into a car and speed out of the Flint Lake apartment complex. (App. pp. 204-217). A short time later, Horry County officers spotted a vehicle matching the description given by Gause and pulled the car over. There were five young black men in the car. Guns and marijuana were found in the car and the men were arrested. (App. pp.218-228; pp.282-287; pp.311-318).

Earlier the same evening, three other men were hanging out in their apartment in the Flint Lake complex. Four intruders barged into the apartment, two held guns. Two of the intruders, one with a gun, went upstairs and assaulted Sean Barrett, one of the apartment tenants. They also took marijuana from Barrett. The other two men took money and cell phones from the other people in the apartment. (App. pp.399-517; pp.535-619; pp.643-730; pp.867-1040).

A DNA expert testified that blood found on one of the guns recovered from the car matched that of Barrett, the victim. (App. pp.777-779).

Appellant was 18 years old at the time of the crime (App. p. 1267, Line 21). He lived in Georgia at the time, but was in Conway visiting his cousin, the co-defendant at trial, that attended Coastal Carolina University (App. p. 1267, lines 22-25, App. p. 1268, lines 1-9). He retained trial counsel. Appellant recalled going through the facts and his version of events with trial counsel "a

good bit". Appellant contended he was not guilty of robbing anyone, and that he was not involved in the crime. (App. p. 1269, lines 9-20)

The State made an initial plea offer for ten (10) years and a subsequent offer for twelve (12) years. The Appellant did not accept the plea offers and proceeded to trial.

ARGUMENT

1. **The court erred in denying Appellant's Post-Conviction Relief based on trial counsel's failure to advise of the possibility of an Alford plea (North Carolina v. Alford) 400 U.S. 25 (1970)**

Evidence was presented at the Post-Conviction Relief hearing by the Applicant that he would have accepted the ten (10) or twelve (12) year offers had he known that he could have accepted these offers and still maintained his innocence. He testified that he was following the advice given to him by his Mother in that he should never admit to something that he did not do. Both the Appellant and his trial counsel testified that the intent was always to take the case to trial. The Appellant contends that this was the case because he could not admit guilt to something that he did not do (App. p. 1284, lines 6-11).

The Appellant stated that he was repeatedly told to accept the plea.

> "I felt if I didn't do nothing wrong, and I have so much ahead of me, I was in college, ain't never been in trouble before in my life, not even a traffic ticket, nothing, so why would I throw my life away? I'm a young kid in college. Why would I get a plea and get locked up for something I didn't do?" (App. p. 1272, lines 20-25, App. p. 1273, lines 1-12)

The Appellant further testified:

> "Now, the other problem was that you had contended all along you were not guilty of this crime?
> Appellant: Yes, sir.
> PCR Counsel: Did you know that there was a way that you could have plead under North Carolina verses Alford?
> Appellant: No, sir, I never had any knowledge of that before my trial. The only time I found out about that was after I had already got convicted and I was already in prison trying to go back over my case and learn the

stuff about, you know the system and the different laws. I started going through the library and I started figuring out different things.

PCR Counsel: Had you known that you could have pled to this and not have to admit your guilt, would you have done that?

Appellant: Yeah.

PCR Counsel: And that was why you didn't accept that plea?

Appellant replied: That's correct."

(App. p. 1275, lines 17-25, App. p. 1276, lines 1-9)

Trial counsel was asked at the PCR hearing about discussion with the Appellant regarding an Alford plea.

Counsel responded as follows:

> "I can't honestly sit here and say I have a specific recollection of having done that, I just do not have a recollection of it. I wish I could say I did, but I don't. I don't have a recollection of it. I would tell you that knowing me, if we discussed pleas, I probably did it. If you asked me do I have a specific recollection of having done it, I would have to say I do not have a specific recollection, no, I do not." (App. p. 1326, lines 18-25, App. p. 1327, line1)

Appellant's parents testified that they spoke with trial counsel about the plea offers, but that trial counsel never advised them of the availability of an Alford plea. They testified that Appellant was raised to be honest, and that they did not want him to plead guilty and admit to a crime that he did not commit. (App. p. 1301, lines 9-25 - App. p. 1302, lines 1-25).

When negotiating a plea on behalf of a Defendant, counsel is required to "fully communicate with the client so that the client can make an informed decision regarding any proposals by the State. Davie v. State, 381 S.C. 601, 609, 675 S.E. 2d 416, 420 (2009). In advising a client about a plea offer, trial counsel must:

> "1) notify the client of a plea offer; 2) advise the client of the option to proceed to trial; 3) present the client with the probable outcomes of both the guilty and sentencing phases of each alternative; and 4) permit the

client to make the ultimate decision." Carr v. United States, No. 3:08CV123, 2009 WL 1867672, at 8 (N.D.W. Va. June 29, 2009)

The PCR Judge found that the Court was unaware of any case precedent holding that counsel must pursue an Alford plea. Further the Court notes that he had not found any case that holds that an attorney must inform or advise a client to consider entering an Alford plea. The Court found that there is no constitutional requirement that the meaning of an Alford plea be explained to a criminal defendant.

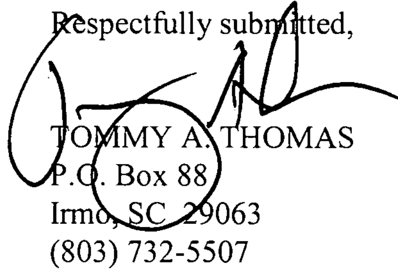
In this case, the Appellant contends that had trial counsel explained an Alford plea, that he would have accepted the State's plea offer pursuant to Alford. It is clear the obstacle to accepting the plea was the admission of guilt. Testimony of both the Appellant and trial counsel indicates that Counsel continuously encouraged the Appellant to accept the plea offers. But the obstacle was always the admission of guilt.

The Appellant received a sentence of 18 years, 85%. He will be required to serve approximately fifteen years three months. His max out date is currently 2026 (App. p. 1267, line 18). Had he accepted the State's plea offer, he would be serving a substantially shorter sentence. In addition, it does not appear to be speculation that the State would have allowed an Alford plea as one of the co-defendant's was allowed to plea prior to trial under Alford. The Appellant contends that trial counsel was ineffective for not advising him that he could take advantage of the State's plea offer under Alford.

CONCLUSION

For the reasons stated above, Appellant respectfully requests that this Court reverse his convictions.

Respectfully submitted,



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PROOF OF SERVICE

I, Tommy A. Thomas, Attorney for Petitioner certify that I have served the Petition for Writ of Certiorari and Appendix on the Office of the Attorney General, on January 20, 2015, by hand delivery:

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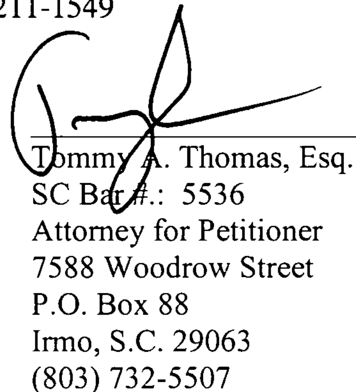

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