

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Court of Appeals
and Richland County
L. Casey Manning, Circuit Court Judge
2008-CP-40-7794

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JAN 22 2015

S.C. Supreme Court

Gerald Smith,

Respondent,

vs.

State of South Carolina,

Petitioner.

REPLY BRIEF OF PETITIONER

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General
Bar # 68571

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR PETITIONER

STATEMENT OF ISSUE ON APPEAL

Probative evidence supports the PCR court's denial of relief where Respondent failed to follow the plea bargain, so counsel would be unable to enforce the agreement; and where counsel's performance did not fall below professional norms; and where the sentencing court took into consideration Respondent's assistance and lack of assistance in his co-defendant's prosecution. The Court of Appeals erred in failing to give deference to the PCR court's findings that are supported by probative evidence.

REPLY ARGUMENT

Out of an abundance of caution, Petitioner would incorporate and crave reference to all arguments stated in the State's Brief of Petitioner. The State replies as follows:

The Court of Appeals reversed Smith's denial of post-conviction relief on the basis that counsel should have objected when the State, based on a prior agreement (which Smith breeched), that the State would reduce the murder charge to voluntary manslaughter and the State was not going to recommend a sentence at the sentencing hearing. Although generally biased or deferential to her former client, Counsel acknowledged that Smith breeched the agreement. App. p. 169, lines 13-20. Counsel recalled chambers meetings where the judge was advised that the original plea agreement was an open plea in which the State was not going to take a position. App. p. 171.

Without explanation, Smith errantly claims in his brief that the sentencing court was never made aware of the original plea agreement. Br. of Resp. p. 8 (citing Pet. for Cert. p. 12, but the statement and citation also appears in Br. of App. p. 8; p. 12).

However, as referenced by the State in its previous submissions to this Court, Counsel testified as follows:

I have to rely that day on what I can remember, and my memory of it was that we had said that at some point, that his plea offer was that it was an open plea and that they were going to not take a position.

Having looked at the transcript, apparently that was not said on the record, but we had chamber meetings with him. So it's my fault for not being sure that it's on the record, but the problem is, you talk to the judge you go in front of him, it's hard sometimes to remember what was said when.

App. p. 171, lines 1-11. Accordingly, the sentencing court was aware of the original offer, based on counsel's testimony. Therefore, probative evidence supports the denial of relief, and the Court of Appeal's opinion should be reversed. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (The PCR court's denial of an application for post-conviction relief will be upheld when supported by probative evidence).

CONCLUSION

For all of the foregoing reasons, this Court should reverse the Court of Appeals decision and affirm the PCR court's denial of relief.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General
Bar No. 68571

BY: 

DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR PETITIONER

January 22, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

Appellate Case No. 2014-000951

Gerald Smith,.....Respondent,

v.


State of South Carolina,.....Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Reply Brief of Petitioner** has been served upon the applicant by mailing two (2) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

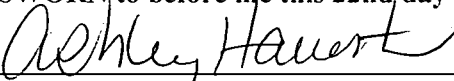
**Robert M. Pachak, Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211**

This 22nd day of January, 2015.



DAVID SPENCER, #68571
ATTORNEY FOR PETITIONER

SWORN to before me this 22nd day of January, 2015.



Notary Public for South Carolina.
My Commission Expires: 3-18-13



ALAN WILSON
ATTORNEY GENERAL

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JAN 22 2015

January 22, 2015

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Gerald Smith v. State of South Carolina
Appellate Case No. 2014-000951

Dear Mr. Shearouse:

Enclosed for filing are the original and fifteen (15) copies of the Petitioner's Reply Brief of Petitioner.

Sincerely,

David Spencer
Senior Assistant Attorney General
S.C. Bar No. 68571

MEH/sbm
Enclosures

cc: Robert M. Pachak, Appellate Defense
Trisha Allen, Victim's Services