

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County  
Deadra L. Jefferson, Circuit Court Judge  
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**RECEIVED**

FEB 13 2015

**S.C. Supreme Court**

ERIC SUMTER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001581  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

TIFFANY L. BUTLER  
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ATTORNEY FOR PETITIONER

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## ISSUE PRESENTED

Whether trial counsel was ineffective for telling the jury in closing argument that Petitioner “bought some drugs from a big-time place,” where Petitioner did not give counsel permission to concede that Petitioner possessed the drugs and Petitioner’s defense at trial was that the drugs belonged to his co-defendant, Tiffany Deas?

## STATEMENT OF THE FACTS

On October 6, 2008, a Charleston County Grand Jury indicted Petitioner Eric Sumter of trafficking cocaine, in excess of 105.5 grams. App. 381 – 382. He was convicted during the October 2010 term of the Charleston County General Sessions Court before the Honorable Kristi L. Harrington and a jury. App. 283. Judge Harrington sentenced Petitioner to twenty-five years imprisonment and a \$50,000 fine. App. 288 – 289. William Runyon represented Petitioner. App. 2. Chad Simpson and Adam Yount represented the State. App. 2.

On direct appeal, a brief was filed by Susan Barber Hackett pursuant to the procedure in Anders v. California, 386 U.S. 738 (1967). See State v. Sumter, Op. No. 2012-UP-554 (S.C. Ct. App. filed October 10, 2012). Petitioner's conviction and sentence were affirmed and counsel was relieved pursuant to Anders.

On January 3, 2013, Petitioner filed a PCR application. App. 295 – 304. Respondent filed a return on November 1, 2013, requesting that an evidentiary hearing be held. App. 305 – 309. A PCR hearing was held on May 20, 2014 in Charleston County before the Honorable Deadra L. Jefferson. App. 310. Charles T. Brooks, III. represented Petitioner at the hearing. Ashleigh R. Wilson represented the State. App. 311.

On July 15, 2014, Judge Jefferson issued an order of dismissal. App. 363 – 380. Petitioner appealed Judge Jefferson's order. This petition for writ of certiorari follows.

## ARGUMENT

Trial counsel was ineffective for telling the jury in closing argument that Petitioner “bought some drugs from a big-time place,” where Petitioner did not give counsel permission to concede that he possessed the drugs and Petitioner’s defense at trial was that the drugs belonged to his co-defendant, Tiffany Deas.

### **Relevant Facts**

The State’s case consisted of testimony from several Charleston County police officers and Tiffany Deas, Petitioner’s co-defendant.

The Charleston County Sheriff’s Office placed a residence in Charleston County under surveillance for suspected drug activity. App. 58, lines 1 – 9. On May 7, 2008, Detective Matthew Euper observed a red Mitsubishi Montero pull up in front of the residence. App. 59, line 25 – App. 60, line 1. Deas was driving and Petitioner was the passenger. App. 60, lines 1 – 3.

According to Det. Euper, Petitioner went into the residence for “three or four minutes” then got back into the car. App. 60, lines 7 – 10. Two men walked out of the apartment and up to the car to speak to Petitioner. App. 60, lines 7 – 14. Petitioner then went back inside the residence. App. 60, lines 7 – 14.

When Petitioner got back into the car and left, Euper instructed other officers to follow the vehicle. App. 62, lines 4 – 14. Detective Jack Frost observed the car make several traffic violations and alerted other detectives in a marked car to make a traffic stop. App. 86, line 19 – App. 87, line 5. Detective Andrew Miller initiated the traffic stop. App. 108, lines 16 – 20.

Deas, the driver, consented to a search of the car. App. 123, lines 2 – 5. Detective Costanzo, who assisted Miller, searched the vehicle and located a digital scale with white powder residue in the front passenger seat where Petitioner was sitting. App. 123, lines 18 – 25. After a

check of Deas' driver's license, detectives also discovered a bench warrant had been issued for her. Both Deas and Petitioner were arrested.

After Petitioner and Deas were transported to the detention center, a female officer initiated a strip search of Deas. App. 150, line 15 – App. 151, line 1. However, as the officer explained to Deas the procedure for the search, Deas pulled out two bags of drugs from inside of her clothing. App. 151, lines 13 – 9. The contents of one of the bags tested positive for cocaine and weighed 102.85 grams. App. 168, lines 7 – 9. The contents of the other bag tested positive for cocaine and weighed 1.73 grams. App. 168, lines 15 – 17. And the white powder residue on the scale tested positive for cocaine and weighed 0.01 grams. App. 168, lines 21 – 23.

Deas and Petitioner were in a romantic relationship at the time. App. 184, lines 9 – 11. She claimed that when detectives initiated a traffic stop, Petitioner handed the drugs to her. App. 197, lines 1 – 7. She then placed the bags in her pants. App. 197, lines 22 – 25. She stated that when the officer at the detention center told her that she would be strip searched, she gave her the drugs. App. 203, lines 3 – 6. Deas claimed that she was lying to the detectives when she admitted that the drugs were hers. App. 223, lines 20 – 24.

### **Closing Argument**

Judge Harrington denied defense counsel's request to charge the jury the lesser-included charge of possession with intent to distribute cocaine. During closing argument, defense counsel argued to the jury that even though the weight of the drugs found by detectives is sufficient under the trafficking statute, Petitioner should not be found guilty of trafficking. App. 266, lines 1 – 4. Counsel argued the State had not shown the jury that Petitioner was part of "some sort of big old operation." App. 267, lines 9 – 19. According to defense counsel, the only thing the State presented was

“[T]wo people, two wretched people, who bought some drugs from a big-time place and now they want the penalty and the verdict of guilty of that and that the problem of this is all you’re going to have to decide is trafficking or nothing...”

App. 264, line 22 – App. 265, line 2.

### **PCR Hearing**

During the PCR hearing, Petitioner stated his trial counsel conceded his guilt during trial, which negated his defense that the drugs were his co-defendant’s drugs. App. 325, lines 12 – 13. Consequently, Petitioner argued, he was denied a fair trial. App. 325, lines 18 – 23.

Trial counsel reasoned that because there was testimony from Det. Euper that the amount of drugs recovered could be a quantity small enough for someone who is a user rather than trafficker, he wanted the jury to know that if it found Petitioner guilty of something other than trafficking, it should find him not guilty. App. 346, line 16 – App. 347, line 1. Trial counsel agreed that he conceded the point that Petitioner possessed the drugs. App. 347, lines 1 – 2.

### **Order of Dismissal**

Judge Jefferson dismissed Petitioner’s allegation. App. 379. The PCR judge did not agree that trial counsel conceded Petitioner’s guilt. App. 378. Rather, trial counsel attempted to “minimize the deficits in [Petitioner’s] defense and argue an alternate finding if the jury concluded that the State failed to meet its burden of proof on the trafficking charge. App. 378 – 379. The PCR judge concluded that trial counsel’s “strategy and argument” were valid. App. 379.

### **Discussion**

A criminal defendant has the ultimate authority to determine whether to waive a jury and admit guilt. Florida v. Nixon, 543 U.S. 175, 187 (2004). An attorney must both consult with the defendant and obtain the defendant’s consent before conceding guilt. Id. at 187. Therefore, trial counsel was ineffective for telling the jury in closing argument that Petitioner “bought some drugs

from a big-time place.” Petitioner did not give counsel permission to concede that Petitioner possessed the drugs and Petitioner’s defense at trial was that the drugs belonged to his co-defendant, Tiffany Deas.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result,” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Pursuant to Strickland v. Washington, a court will conduct a two-prong test when determining whether trial counsel’s assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel’s performance was deficient. Strickland, 466 U.S. at 687. In analyzing this prong, a court will use an objective standard of reasonableness. *Id.* Under this prong, “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688).

Second, the applicant must show that counsel’s “deficient performance prejudiced the defendant to the extent that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

However, there exist “circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.” United States v. Cronin, 466 U.S. 648,

658 (1984). When defense counsel “admits his client’s guilt without first obtaining the client’s consent, the client’s rights to a fair trial and to put the State to [its] burden of proof are completely swept away.” State v. Harbison, 315 N.C. 175, 180 (1985). The client makes the ultimate decision whether to waive a jury trial and admit guilt in a criminal case. Rule 1.2(a), RPC, Rule 407, SCACR.

In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), this Court found trial counsel ineffective for offering, during closing arguments, a characterization of events of an alleged kidnapping that did not support the defendant’s version of the facts. While pounding his fist, defense counsel argued that the defendant brought another person with him as “muscle” when he went to ask the victim for money. Id. at 464, 670 S.E.2d at 651. Such a characterization gave the jury the impression that the defendant used force, which was an element of kidnapping that the State had to prove. Id. The Court found that, because counsel’s argument was contradictory to Petitioner’s defense, Petitioner was prejudiced. Id. at 465, 670 S.E.2d at 651 – 52.

Courts in other states have addressed the issue of trial counsel conceding a client’s guilt without the client’s consent. See State v. Harrington, 310 N.J.Super. 272 (1998) (Counsel was ineffective in felony-murder trial for admitting during closing argument that defendant participated in the robbery.); State v. Carter, 270 Kan. 426 (2000) (Counsel’s concession of defendant’s guilt of robbery is equivalent to entering a guilty plea and cannot be made over defendant’s objection.); State v. Moore, 458 N.W.2d 90 (Minn. 1990) (Court orders new trial for defendant when defense counsel made concession that the defendant “was guilty of heat-of-passion manslaughter” without defendant’s consent.); State v. Harbison, 315 N.C. 175 (1985) (Counsel was ineffective for arguing to the jury that the defendant should not be found innocent but should be found guilty of manslaughter.).

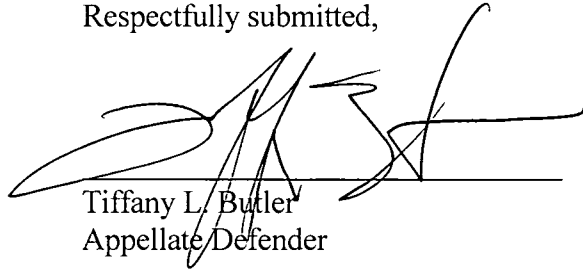
Here, nothing in the record indicates Petitioner wanted trial counsel to argue that he possessed the drugs. There is nothing in the record that indicates Petitioner wanted to admit guilt. Throughout counsel's cross-examination of the State's witnesses, he elicited testimony that was consistent with Petitioner's defense that the drugs belonged to his co-defendant, Deas. In fact, trial counsel admitted during his PCR testimony that he conceded the point that Petitioner possessed the drugs. App. 347, lines 1 – 2.

Conceding possession in a trafficking case is conceding guilt. S.C. Code Ann. § 44-53-370(e)(2)(c) (1976). Because Petitioner was deprived of his right to have a jury determine whether he was in possession of the drugs and, therefore, guilty of trafficking he was denied a fair trial. But for counsel's improper comments during closing argument, the result of Petitioner's trial would have been different.

CONCLUSION

For the grounds argued, Petitioner Eric Sumter respectfully requests this Court to grant his petition with the ultimate relief of a new trial on the charge of trafficking cocaine.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Butler', is written over a horizontal line. The signature is stylized and somewhat illegible.

Tiffany L. Butler  
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of February, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County  
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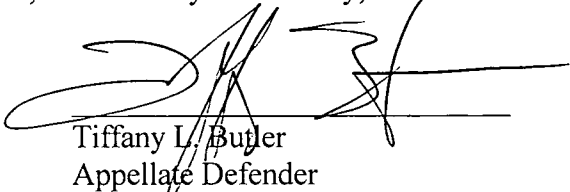
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APPELLATE CASE NO. 2014-001581

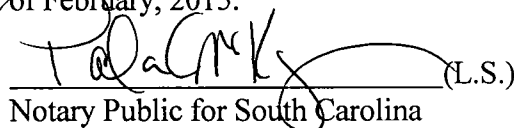
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CERTIFICATE OF SERVICE  
\_\_\_\_\_

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of February, 2015.

  
\_\_\_\_\_  
Tiffany L. Butler  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day  
of February, 2015.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022.