

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Aiken County

James R. Barber, III, Circuit Court Judge

SHERROD MILLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

JOHNSON PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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Columbia, SC 29211-1589
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Trial counsel erred in failing to zealously represent petitioner during plea negotiations in the case despite the solicitor's refusal to entertain plea bargain options, particularly since counsel admitted that he did not want to "burn that bridge" with the solicitor by continuing to seek a plea agreement in the case.

STATEMENT

Petitioner Sherrod Miller pled guilty to entering a bank with intent to steal during the April 2010 term of the Aiken County General Sessions Court before Judge Edgar W. Dickson. Petitioner was sentenced to imprisonment for a period of eighteen years. C. David Hayes represented petitioner at the plea proceeding. App. 5-18. Petitioner appealed, but his case was dismissed on July 19, 2010, by the South Carolina Court of Appeals. App. 19.

On August 17, 2010, petitioner filed a PCR application with the Aiken County Office of the Clerk of Court. App. 20-27. The respondent filed a return dated December 16, 2010, requesting that a hearing be held in the case. App. 28-31. Petitioner filed an amended PCR application on July 11, 2011. App. 33-40.

A hearing was convened on July 13, 2011, at the Aiken County Courthouse before Judge James R. Barber. App. 42-75. Tanya D. Jeffords represented petitioner at the plea proceeding. On August 17, 2011, Judge Barber issued an order of dismissal in the case therein denying petitioner's allegations of ineffective assistance of counsel in his case. App. 77-84.

Petitioner appealed Judge Barber's order of dismissal in the case. This petition follows.

ARGUMENT

Trial counsel erred in failing to zealously represent petitioner in plea negotiations in the case despite the solicitor's refusal to entertain plea bargain options, particularly since counsel admitted that he did not want to "burn that bridge" with the solicitor by continuing to seek a plea agreement in the case.

The state alleged that on October 8, 2009, petitioner walked into a Wachovia Bank in North Augusta, South Carolina, and presented to a teller with a note that read "give me the money now." The teller gave petitioner the money in a bag that contained an exploding dye pack. Petitioner fled in a burgundy Mercury vehicle containing a Michigan license plate. Subsequently, petitioner was apprehended by the Atlanta Police Department and charged in the case. App. 10, l. 7 – p. 11, l. 1.

During the PCR hearing, petitioner testified that when he asked counsel if a plea bargain deal had been negotiated, counsel responded that he (counsel) "couldn't get a deal and that he (counsel) wasn't going to ask [the solicitor] any longer." App. 71, l. 25 – p. 72, l. 3. Petitioner stated in effect that counsel seemed too preoccupied with working in harmony with the solicitor rather than working zealously on behalf of his defense. App. 72, ll. 3-5.

Trial counsel testified at the PCR hearing and explained that when his research revealed that robbery was a lesser offense of entering a bank with intent to steal, he asked the solicitor for a plea offer on the lesser offense, but that the solicitor refused and only offered a cap of twenty years in exchange for a plea on the bank charge. App. 47, l. 9 – p. 48, l. 9. Counsel stated that he had multiple discussions with the solicitor regarding a bargain on the lesser offense and added that he asked for "probation to PTUP" upon service of ten years, and e-mailed the request, but that the solicitor's response was always "no." App. 59, ll. 16-23; App. 63, ll. 1-6.

Note that prior to the plea proceeding, a pre-trial hearing was held on February 11, 2010, before Judge R. Ferrell Cothran, Jr., where petitioner requested “new counsel” because counsel appeared to be working with the solicitor’s office rather than working for him (petitioner). App. 2, ll. 13-18. Counsel responded as follows:

Just to put it in context. He was asking for me to ask for a certain deal repeatedly. I did ask several - - quite a few times. The solicitor finally he said, it’s not going to happen, please don’t ask any more. He asked me to ask again. At that time I informed that I cannot, that I did not want to burn that bridge, that [the solicitor] respectfully asked me not to ask him again and I would not.

App. 3, ll. 2-9. The trial judge denied petitioner’s motion for new counsel in effect on the ground that there was no absolute right to a choice of counsel in the case.

Nonetheless, the PCR judge ruled that petitioner failed to establish that counsel was ineffective with respect to plea negotiations in the case. App. 81-83.

In the case at bar, it appeared that trial counsel was more concerned with not overly angering the solicitor with repeated requests for a plea bargain on a lesser offense, or any advantageous negotiation, rather than zealously representing petitioner as an advocate by continuing to press the solicitor for a deal regardless of the solicitor’s irritation with him. Counsel’s duty as advocate for petitioner should have superseded cooperating with the solicitor and retreating from zealous representation of petitioner for fear of “burning that bridge” with the solicitor. Also, counsel’s failure to zealously negotiate a plea bargain was prejudicial because the maximum sentencing time for robbery was fifteen years as opposed to the maximum thirty-year sentencing time attached to the bank charge. Also, note that the state’s case against petitioner was not overwhelming. The case consisted of a picture from the bank video tape showing the perpetrator

wearing a baseball cap and sunglasses and two eye witnesses, one of whom described the perpetrator's height as ranging from a 5' 5" male to a 5' 7" male, and the other who stated that the perpetrator's height was 5' 3". App. 49, l. 2 – p. 53, l. 20; Supp. App. 1-3.

The negotiation of a plea bargain is recognized as a critical phase of litigation for the purpose of the Sixth Amendment right to effective assistance of counsel. Padilla v. Kentucky, 130 S.Ct. 1473 (2010), citing to Hill v. Lockhart, 484 U.S. 52 (1985); McMann v. Richardson, 397 U.S. 759 (1970). Also, counsel has a duty to be a zealous advocate for his client. ABA Model Code of Professional Responsibility, Canon 7-1. Apparently, in the case at bar, petitioner was straddling the fence between appeasing the solicitor and appeasing his client, and where ultimately, counsel bowed to the solicitor rather than to his client. This representation by counsel in this regard constituted deficient representation to the extent that the solicitor's will was an uncontestable priority to counsel, which was less than the required zealousness demanded of competent counsel during plea negotiations. Petitioner was prejudiced as a result of counsel's ineffectiveness because but for counsel's error, he (petitioner) might have received a conviction on a lesser offense and a lesser sentence by three years. Counsel's poor performance violated Hill v. Lockhart, 484 U.S. 52 (1985), supra, and the Sixth Amendment to the United States Constitution.

CONCLUSION

Based on the foregoing argument, petitioner requests that the 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', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of May, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO AIKEN COUNTY
JAMES R. BARBER, III, CIRCUIT COURT JUDGE

SHERROD MILLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

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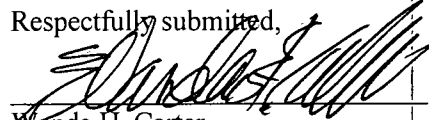
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Sherrod Miller states:

1. She is a Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on July 13, 2011. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Sherrod Miller.

Respectfully submitted,


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 7th day of May, 2012

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IN THE SUPREME COURT

Certiorari to Aiken County
James R. Barber, III, Circuit Court Judge

SHERROD MILLER,

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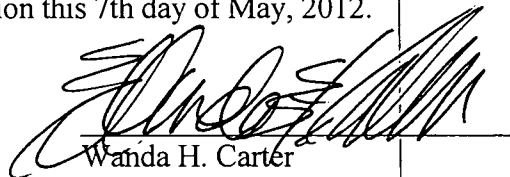
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

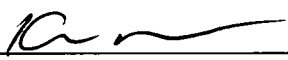
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on Mary S. Williams, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Sherrod Miller, #340737, at Lieber Correctional Institution this 7th day of May, 2012.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of May, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.