

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Horry County

William H. Seals, Circuit Court Judge  
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KENNETH JORDAN BELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002457  
\_\_\_\_\_

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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ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

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Trial counsel erred in advising petitioner to reject a ten-year plea offer and instead exercise his right to a jury trial, which ended in convictions and an aggregate fifteen-year sentence, because counsel’s advice was erroneous and prejudicial, and because counsel **admitted** that rejecting the plea deal was “bad” since “he got five years longer than he would have gotten had he taken the plea.”<sup>1</sup> ..... 3

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<sup>1</sup> App. 594, lines 22-24.

### ISSUE PRESENTED

Trial counsel erred in advising petitioner to reject a ten-year plea offer and instead exercise his right to a jury trial, which ended in convictions and an aggregate fifteen-year prison sentence, because counsel's advice was erroneous and prejudicial, and because counsel **admitted** that rejecting the plea deal was "bad" since "he got five years longer than he would have gotten had he taken the plea."<sup>2</sup>

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<sup>2</sup> App. 594, lines 22-24

## STATEMENT

Petitioner Kenneth Jordan Bell was convicted of first degree burglary, kidnapping, armed robbery, criminal conspiracy, and possession of a weapon during the commission of a violent crime per jury trial held during the August 2013 term of the Horry County General Sessions Court before Judge Roger L. Couch. Petitioner was sentenced to an aggregate fifteen-year prison term. M. Greg McCollum represented petitioner at trial, and Assistant Solicitor Nancy Livesay appeared on behalf of the state. App. 1-527. Petitioner appealed, but his convictions and sentences were affirmed on September 2, 2015, by the South Carolina Court of Appeals. See State v. Bell, Unpublished Op. No. 2015-UP-447 (S.C. Ct. App. September 2, 2015). Appellate Defenders Carmen Vaughn Ganjehsani and Laura Ruth Baer represented petitioner on direct appeal.

On September 14, 2016, petitioner filed a PCR application with the Horry County Office of the Clerk of Court. App. 528-536. Subsequently, the respondent filed a Return and Motion for Move Definite Statement. App. 537-541.

A PCR hearing was convened on September 18, 2007, at the Horry County Courthouse before Judge William H. Seals. App. 542-584. Petitioner was present at the hearing and represented by Steven Fowler, and Assistant Attorney General Johnny E. James, Jr., appeared on behalf of the state. On November 5, 2017, Judge Seals signed an Order of Dismissal therein denying petitioner's allegations of ineffective assistance of counsel in the case. App. 586-595.

Petitioner appealed. This petition follows.

## ARGUMENT

Trial counsel erred in advising petitioner to reject a ten-year plea offer and instead exercise his right to a jury trial, which ended in convictions and an aggregate fifteen-year sentence, because counsel's advice was erroneous and prejudicial, and because counsel **admitted** that rejecting the plea deal was "bad" since "he got five years longer than he would have gotten had he taken the plea."<sup>3</sup> App. 594, l. 22-24.

At trial, Paul Degruccio testified that on February 2, 2013, two masked men burst into his apartment while armed. One man, whom Degruccio stated he recognized as Christopher Bell, held a tire iron, and the other man held a gun. Degruccio stated that he was held at gunpoint while they took his laptop and camera. Degruccio admitted that he owed money to Christopher Bell. App. 104, l. 18 – p. 120, l. 19. Degruccio's roommate, Christopher Tanner, was inside the apartment during the incident and managed to call police. App. 141, l. 16 – p. 163, l. 8.

During the PCR hearing, petitioner testified that he knew nothing about a plea deal or offer and that "the only plea [he] was offered was a ...violent for armed robbery and [that he] was advised not to take it." App. 588, l. 1-9; App. 589, l. 10-17.

Trial counsel testified at the PCR hearing and explained that the state submitted a plea of ten years without parole, but that petitioner "conceivably [could have done] no worse at trial," although petitioner ended up "worse" off after his trial as counsel **admitted** that he advised petitioner to turn down the plea offer and that his advice to reject the plea offer was "bad" because "he got five years longer than he would have gotten had he taken the plea," but that he wanted a better deal for petitioner. App. 593, l. 5 – p. 595, l. 4; App. 596, l. 17 – p. 597, l. 3.

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<sup>3</sup> App. 594, lines 22-24.

The PCR judge ruled that petitioner failed to establish any deficiency on counsel's behalf or any prejudice that arose thereof. App. 623-625.

In Lafler v. Cooper, 132 S.Ct. 1376 (2012), the United States Supreme Court held that defendants have a Sixth Amendment right to effective assistance of counsel that extends to the plea bargaining process, and that defendants are entitled to the effective assistance of counsel even during plea negotiations. In Lafler v. Cooper, *supra*, the Court held that counsel was ineffective in advising the defendant to reject a plea offer. Lafler was charged under Michigan law with assault with intent to murder and three other offenses and the prosecution offered to dismiss two of the charges, and to recommend a 51-to-85-month sentence on the other two, in exchange for a guilty plea, and Lafler expressed a willingness to accept the offer, but he rejected the offer per his attorney's advice on the ground that the prosecution would be unable to establish intent to murder because the victim had been shot below the waist. Lafler was convicted on all counts at trial and received a mandatory minimum 185-to-360-month sentence. Note also Missouri v. Frye, 132 S.Ct. 1399 (2012), where the court held that counsel was ineffective in allowing a plea offer to a defendant to lapse, which resulted in nonacceptance of the offer and "further proceedings led to a less favorable outcome" for the defendant.

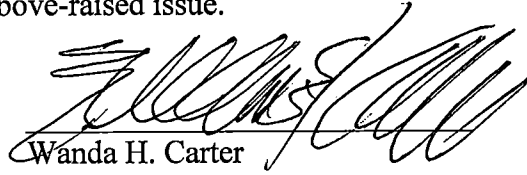
In Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), the South Carolina Supreme Court held that the Sixth Amendment protects criminal defendants against ineffective assistance of counsel during the plea bargaining process, and further found that ineffective assistance of counsel would occur if counsel advised a defendant to reject a plea offer without evaluating the "merits of the case and of the risks borne by the defendant," and went on to refer to the case of Turner v. Tennessee, 664 F. Supp. 1113 (M.D. Tenn. 1987), where counsel was found ineffective in advising the defendant to reject the offer of a guilty plea to a felony with a two-year sentence,

in order to avoid what would certainly have been lengthy sentences on charges of first murder and two counts of aggravated kidnapping. Note the State v. Judge was overruled on other grounds by Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000), to the extent that the complainant's statement that he was prejudiced by counsel's deficient performance at the plea bargaining process can satisfy the prejudice prong of the two-pronged test to be met in ineffective assistance of counsel cases. In Jackson, supra, counsel was found ineffective in failing to advise the defendant that the crime he was pleading to was a felony because but for that omission, the defendant would not have plead guilty in the case.

In the case at bar, counsel's reasoning for the rejection of the ten-year plea offer was presumably because ten years was too high of a sentence and that a sentence lower than ten years was the desire for the defense. This position taken by counsel was unreasonable and unsound because the mandatory minimum term for an armed robbery conviction was ten years, so it would have been statutorily impossible for a plea offer to contain a sentence of less than ten years, (see S.C. Code Ann. §16-11-330 (A), particularly in light of what could have been considered substantial evidence of petitioner's guilt in the case. Thus, counsel's advice to petitioner to reject the ten-year plea offer and opt for a trial constituted deficient legal representation in violation of the Sixth Amendment; and the prejudice was obvious in that petitioner received a greater sentence after being convicted on all charges by the jury in the case.

**CONCLUSION**

Based on the foregoing argument, counsel for petitioner would request that this Court grant the petition and allow full briefing on the above-raised issue.

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 30th day of July, 2018.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Horry County

William H. Seals, Circuit Court Judge

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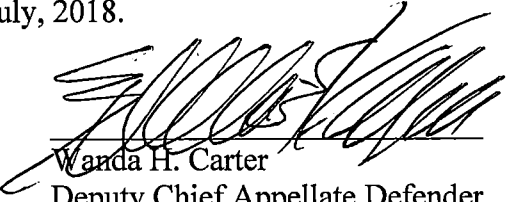
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STATE OF SOUTH CAROLINA,

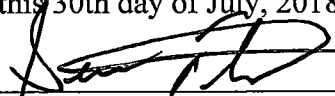
RESPONDENT

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

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Kenneth Jordan Bell, #356689, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 30th day of July, 2018.

  
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Wanda H. Carter  
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me    ATTORNEY FOR PETITIONER  
this 30th day of July, 2018.

  
\_\_\_\_\_  
(L.S)  
Notary Public for South Carolina  
My Commission Expires: 10/30/2022.