

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Lexington County

DeAndrea G. Benjamin, Circuit Court Judge

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NATHANIEL MCMILLIAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000204

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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Deputy Chief Appellate Defender

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ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

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**ISSUE PRESENTED**

Trial counsel erred in failing to object to certain improper remarks made by the state's detective at petitioner's plea proceeding because this negatively impacted the sentences handed down to petitioner in the case.

## STATEMENT

Petitioner Nathaniel McMillan pled guilty to attempted first degree burglary, first degree burglary, first degree criminal sexual conduct, armed robbery, and possession of a weapon during the commission of a violent crime during the October 2012 term of the Lexington County General Sessions Court before Judge Roger M. Young. Petitioner was sentenced to imprisonment for an aggregate twenty-five-year term. App. 1-34. Robert M. Madsen represented petitioner at the plea proceeding and Assistant Solicitor L. Suzanne Mayes appeared on behalf of the state.

On September 27, 2013, petitioner filed a PCR application with the Lexington County Office of the Clerk of Court, and an Amended PCR application on May 19, 2014. App. 35-45; App.51. The respondent filed a return dated April 28, 2014, requesting that a return be held in response to petitioner's PCR action. App. 46-49.

A PCR hearing was convened on October 14, 2014, at the Lexington County Courthouse before Judge DeAndrea G. Benjamin. App. 52-77. Petitioner was present at the PCR hearing and represented by Anna R. Good, and Assistant Attorney General Walt Whitmire appeared on behalf of the state. On January 30, 2018, Judge Benjamin issued an Order of Dismissal in the case. App.79-96.

Petitioner appealed Judge Benjamin's Order of Dismissal. This petition follows.

## ARGUMENT

Trial counsel erred in failing to object to certain improper remarks made by the state's detective at petitioner's plea proceeding because this negatively impacted the sentences handed down to petitioner in the case.

At the plea proceeding, the solicitor recommended the negotiated 25-year sentencing cap and apprised the plea judge of the facts of the case. Apparently, there were three different incidents. The solicitor informed the court that petitioner was charged with burglarizing the home of Lindsey Nelson, and sexually assaulting and robbing Tiarra Tucker, and attempting to burglarize the home of Pamela Mack, all of which occurred on November 22, 2011, November 27, 2011, and December 1, 2011, respectively. App. 12, l. 4 – p. 26, l. 16.

During the guilty plea proceeding, Detective Neal made the following remarks about the case:

Detective Neal: As you can tell, the victim in this case, Ms. Tucker, she's very shy and probably one of the nicest people I've ever met in my life...She's a 21-year-old Benedict College student. She's tried very hard...She has aspirations to be a teacher.

In regard to [petitioner], he had only been staying in West Columbia for a short period of time, and as you've heard earlier, he's caused a lot of issues and a lot of problems for us. This is a community that's not used to these kinds of things happening... The attack on Ms. Tucker was in broad daylight...[on]a Sunday afternoon as she was walking to the library.

These things don't happen in West Columbia, in particular in this neighborhood, in this area that all this stuff happened. Everything that he's charged with all occurred within probably a half mile of each other in this neighborhood. And then Ms. Mack, the other victim in the attempted burglary...[was] a relative of Ms. Tucker, so this whole family has been affected... We ask that you give him the maximum sentence possible due to the issues that he's cause us and due to the problems and the pain he has given to this community. App. 29, l. 21 – p. 30, l. 22.

The Court: What's that basis for the State's recommendation of a 25-year cap?

Ms. Mayes: Your Honor, I will say that he confessed to all of the offenses when he was interviewed by Investigator Neal...So we do view a 25-year sentence of the potential of a 25-year sentence as a significant sentence since he would serve 85 percent of whatever sentence he receives. There's also the mandatory minimum of at least 15 years because he's pleading to the burglary 1<sup>st</sup>. Tr. 30, l. 23- Tr. 31, l. 12.

During the PCR hearing, petitioner testified that he was referred to in effect as a "menace" by the state's detective at the guilty plea proceeding, and also that this was in effect objectionable. App. 60, l. 10-21. Petitioner stated that he understood that the sentencing cap was a negotiated recommendation of twenty-five years. App. 60, l. 5-9.

Trial counsel testified at the hearing and explained that he did not believe that he should have objected to the detective's comments in question. App. 73, l. 10 – p. 75, l. 10.

The PCR judge ruled that the detective's comments were not a "ripe for an objection," and that no prejudice resulted from his comments, and that there was no proof that an objection would have resulted in a different sentence, which in turn meant no finding that counsel was ineffective with regard to his failure to object to the detective's comments. App. 88-90.

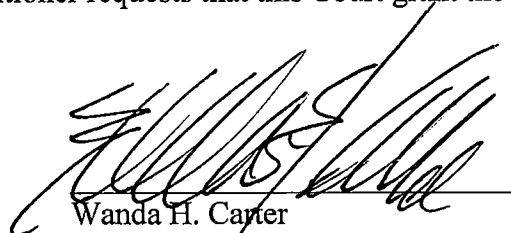
As a rule, a sentence can be reviewed for reasonableness under an abuse of discretion claim against the trial judge. Gall v. United States, 552, U.S. 38 (2007); State v. Franklin, 276 S.C. 240, 226 S.E.2d 896 (1976). A trial judge must not consider prejudicial and improper matters at sentencing. State v. Franklin, supra. By analogy, compare State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (1999), where the defendant's case was reversed due to the solicitor's plea to convict in order to maintain law and order and protect community values.

Here, the trial judge was most likely improperly influenced to ignore a sentence below the twenty-five-year cap because the detective asked for a harsh, i.e. maximum, sentence based

on his negative feelings about petitioner's threat to a peaceful community, which in turn worked probably to overshadow the facts and circumstances of the crimes charged in the case. As it stood, sentencing under the fifteen-year minimum or a sentence of less than 25 years would not have been likely to have occurred in light of the detective's comments at the plea proceeding. Hence, the prejudice. Trial counsel erred in failing to object to the detective's comments at the plea proceeding and but for the omission, a reasonable probability exists that more favorable sentences would have been handed down to petitioner in the case. Counsel's deficient representation in this regard at petitioner's plea proceeding violated his Sixth Amendment right to competent legal assistance in a criminal case. See Hill v. Lockhart, 484 U.S. 52 (1985).

### **CONCLUSION**

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



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of August, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Lexington County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

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NATHANIEL MCMILLIAN,

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PETITION TO BE RELIEVED AS COUNSEL

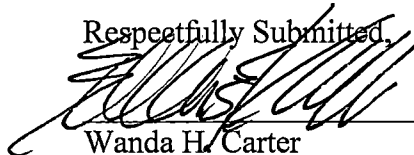
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Counsel for Nathaniel McMillian states that:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge DeAndrea G. Benjamin, which was held on October 14, 2014, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Nathaniel McMillian.

Respectfully Submitted,



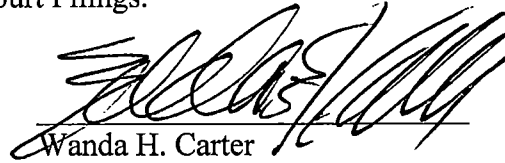
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Wanda H. Carter  
Deputy Chief Appellate Defender  
ATTORNEY FOR PETITIONER

This 17th day of August, 2018.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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CERTIFICATE OF SERVICE

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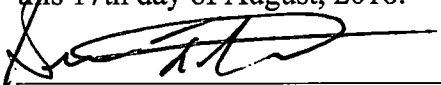
The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Kelly Oppenheimer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Nathaniel McMillian, #320977, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 17th day of August, 2018.

  
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Wanda H. Carter

Deputy Chief Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 17th day of August, 2018.

  
\_\_\_\_\_ (L.S)

Notary Public for South Carolina  
My Commission Expires: 10/30/2022.