

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

RECEIVED  
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ORIGINAL  
S.C. SUPREME COURT

BRANDON SCHMAUS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000729

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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Wanda H. Carter  
Deputy Chief Appellate Defender

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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Trial counsel erred in failing to review the discovery materials with petitioner in a timely manner and then advise as to whether to accept the state's plea offer before it expired.

## STATEMENT

Petitioner Brandon Henery Schmaus pled guilty to possession of cocaine with the intent to distribute and possession of marijuana with the intent to distribute during the August 2016 term of the Greenville County General Sessions Court before Judge Edward W. Miller, and was sentenced to an aggregate prison term of fifteen years, suspended upon the service of six years and three years probation. App. 1-12. Richard Warder represented petitioner at the plea proceeding and Assistant Solicitor Justin Holloway appeared on behalf of the state. Petitioner did not appeal his convictions or sentence.

On June 8, 2017, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 14-25. The Respondent filed a return dated November 3, 2017, requesting that a hearing be held in the case. App. 26-30. On December 13, 2017, a PCR hearing was convened at the Greenville County Courthouse before Judge Robin B. Stilwell. App. 31-66. Petitioner was present at the hearing and represented by Susannah C. Ross, and Assistant Attorney General Deshawn Mitchell appeared on behalf of the state.

On March 21, 2018, Judge Stilwell issued an Order of Dismissal denying and dismissing petitioner's allegations of ineffective assistance of counsel in the case. App. 68-77.

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

## ARGUMENT

Trial counsel erred in failing to review the discovery materials with petitioner in a timely manner and then advise as to whether to accept the state's plea offer before it expired.

At the plea proceeding, the plea judge learned about the facts of the case. The case began as a knock at petitioner's apartment based on a tip, police smelled marijuana and the protective sweep that followed yielded the discovery of marijuana inside. App. 4, l. 21 – p.7, l. 11.

During the PCR hearing, petitioner testified that counsel advised him of the state's three-year plea offer, but that counsel stated that it would be best to view the videotape and assess whether the search and seizure were illegal before accepting the plea offer in effect because an argument for the dismissal of the charges would have been possible in the case depending on what the discovery and the tapes revealed about the case. Petitioner added that by the time the videotape footage was reviewed, the plea offer acceptance time had expired. Petitioner explained that he ended up with a sentence that was double what the plea offer would have been by waiting on counsel to secure the tapes and discovery, and that "apparently [there was] an expiration date [to accept] the plea which he wasn't told about," and that he would have accepted the plea if he had known that waiting on the discovery would have led to the expiration of the plea offer, especially since the delay led to his receipt of a sentence that was twice the length of the three year plea offer. App. 37, l. 2- p. 43, l. 18; App. 47, lines. 3-18.

Trial counsel testified at the PCR hearing and stated that petitioner rejected the plea offer because he believed that there was an illegal search and seizure that occurred in in his case, which he wanted raised as a defense at trial, because petitioner insisted on going to trial on the state's charges, and that there was a delay in the case while they waited on the discovery. App. 54, l. 16- p. 57, l. 16; p. 60, lines 3-14; App. 61, l. 20- p. 62, l. 9.

The PCR judge ruled that counsel was not ineffective because counsel communicated the plea offer to petitioner, but petitioner rejected the offer. App.73-76. However, note PCR counsel's argument was that "[trial counsel] clearly relayed the plea offer to [petitioner] ... [but] did not relay that [the] offer would expire. App. 63, l. 22-25.

Clearly, it was counsel's duty to know of and advise petitioner on the expiration date of the state's plea offer. In Lafler v. Cooper, 132 S.Ct. 1376 (2012), the United States Supreme Court held that a defendant has a Sixth Amendment right to effective assistance of counsel that extends to the plea bargaining process, and that defendants are entitled to 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.

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.

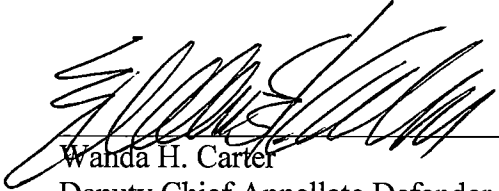
Specifically, with respect to plea offers, the Sixth Amendment right to effective assistance of counsel extends to this area also, particularly where plea offers lapse and where prejudice is shown to the extent that the defendant would have accepted the plea offer and received a more favorable conviction and/or sentence. See Missouri v. Frye, 132 S.Ct. 1399 (2012). In Missouri v. Frye, counsel did not communicate the plea offer to the defendant and as a result, the plea offer expired, and 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. Compare Davie v. State, 381 S.C. 601, 675 S.E. 2d 416 (2009), where the Court held that counsel's failure to inform the defendant of a written plea offer that was substantially less than the sentence he received after pleading guilty constituted ineffective assistance of counsel because the defendant was unaware of the existence of the plea offer (mail snafu after counsel moved to another office) until after the plea offer had expired, and because he would have accepted that plea offer had it been communicated to him. See also Bell v. State, 410 S.C. 436, 765 S.E.2d 4 (2014), where the Court held that counsel was ineffective in failing to extend the state's plea offer of ten years to

the defendant prior to sentencing (which was when he first time he heard of the offer) and that the defendant was prejudiced by counsel's deficient performance as he received a twenty-year sentence instead. In Bell, the case had been transferred to counsel and there was note in the previous attorney's file indicating that a plea offer of ten years had been made, but a review of the file revealed no notes or any indication showing that the plea offer was conveyed to the client by either counsel who represented the client.

Here, it was obvious that counsel failed to advise petitioner on the expiration date on the plea offer extended to him in this case, and to gain the discovery materials for review and discussion prior to the plea offer expiration date. Counsel's error in this regard prejudiced petitioner's case because he ultimately missed the deadline to accept the plea offer and ended up with a greater sentence in the case. Counsel's deficient performance in petitioner's case violated the Sixth Amendment. See Hill v. Lockhart 474 U.S.52 (1985). Moreover, but for counsel's error, a reasonable likelihood existed that petitioner would have accepted the offer and received a lower sentence than the sentence handed down in his case.

### **CONCLUSION**

Based on the foregoing arguments, counsel for petitioner would request that the petition be granted and full briefing allowed on the above-raised issue.



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of November, 2018.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Brandon Henery Schmaus 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 Robin B. Stilwell, which was held on December 13, 2017, 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 Brandon Henery Schmaus.

Respectfully Submitted,



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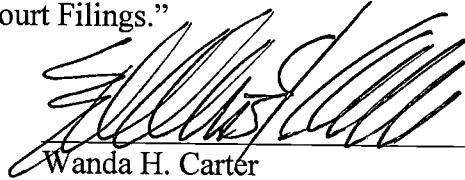
Wanda H. Carter

Deputy Chief Appellate Defender  
ATTORNEY FOR PETITIONER

This 29th day of November, 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."



Wanda H. Carter

Deputy Chief Appellate Defender

South Carolina Commission on Indigent  
Defense

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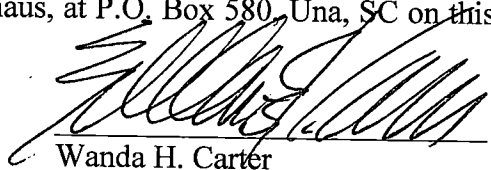
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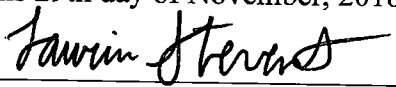
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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, 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 Brandon Schmaus, at P.O. Box 580 Una, SC on this 29th day of November, 2018.



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Wanda H. Carter  
Deputy Chief Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 29th day of November, 2018.

 (L.S)

Notary Public for South Carolina  
My Commission Expires: July 5, 2027.