

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Roger M. Young, Circuit Court Judge

BENJAMIN L. SMALLS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001586

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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ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

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ISSUE PRESENTED

Trial counsel erred in failing to advise petitioner as to whether to accept or reject the plea offer in the case.

STATEMENT

Petitioner Benjamin L. Smalls was convicted of armed robbery and possession of a firearm during the commission of a violent crime per jury trial held during the July 2014 term of the Charleston County General Sessions Court before Judge Deadra L. Jefferson and was sentenced to imprisonment for an aggregate twelve-year term. App. 1- 338. Petitioner was represented at trial by Robert L. Gaillard, and Assistant Solicitors David Osborne and Greg Voight appeared on behalf of the State. Petitioner appealed, but his convictions and sentences were affirmed on appeal. See State v. Smalls, Op. No. 2015-UP-468 (S.C.Ct. App. filed October 17, 2015). Appellate Defender LaNelle Cantey DuRant, of the South Carolina Office of Appellate Defense, represented petitioner on direct appeal.

Petitioner filed a PCR application dated July 19, 2016, with the Charleston County Office of the Clerk of Court. App. 340-370. The respondent filed a Return dated July 21, 2017, requesting that a hearing be held in response to petitioner's PCR application. App. 371-377. On April 25, 2018, petitioner filed an Amended PCR application in the case. App. 379-380.

A PCR hearing was convened on May 22, 2018, at the Charleston County Courthouse before Judge Roger M. Young, Sr. App. 381-415. Petitioner was present at the PCR hearing and represented by Charles Falk, and Assistant Attorney General Kelly Oppenheimer appeared on behalf of the state.

On August 20, 2018, Judge Young issued an Order of Dismissal in the case. App. 420-435. Petitioner appealed. This petition follows.

ARGUMENT

Trial counsel erred in failing to advise petitioner as to whether to accept or reject the plea offer in the case.

At trial, Ronzell Olds testified that on May 25, 2011, petitioner and David Capers held guns to his head and took money from him. App. 92, l. 18- p. 108, l. 6. Prior to trial, the matter of handling of the plea offer of a fifteen-year sentence was addressed by the trial judge, petitioner, and defense counsel, and the end result was that petitioner rejected the offer. App. 291, l. 21- p. 36, l. 24. With respect to the matter of the state's offer, trial counsel gave this pre-trial response to the trial judge before the trial commenced regarding whether he explained and advised petitioner regarding the offer as follows:

I didn't advise [petitioner] one way or another... I just presented it to him. App. 34, lines 1-2.

During the PCR hearing, no testimony was taken from petitioner, but trial counsel testified at the PCR hearing regarding the plea offer issue in question. Counsel's testimony follows:

Q. What was the status of any plea offers that were made in this case?

A. When I got the case, the solicitor who was handling the case did not offer any kind of plea offer to me, If there was one made, it was certainly prior to when I got the case. By the time it got to me, it was we were going forward with a straight armed robbery, and he wasn't willing to take anything off the table.
App. 408, lines 16-23.

An appellate court can review issues of ineffective assistance of counsel in cases where counsel offers advice regarding what action to take on plea offers. Hyman v. State, 397 S.C. 35, 723 S.E.2d 375 (2012). In Hyman, the Court held that counsel was not ineffective in advising the

defendant to accept a plea offer despite the fact that the defendant rejected the plea offer in light of counsel's advice. In Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010), the Court found trial counsel ineffective in advising the defendant to reject the state's initial plea offer of a 10-year sentence suspended upon five years and three years probation where the defendant faced 7 to 25 years. Compare Stalk v. State¹ where the issue was whether counsel was effective in advising a defendant to accept the state's plea deal without doing any investigation or preparation into matters of defense in the case. Ultimately, the Stalk Court found that counsel's advice would have remained the same even if he had conducted proper pre-trial investigations in the case.

The PCR Court ruled that petitioner failed to show any alleged deficiencies from the allegation that trial counsel was ineffective with respect to the handling of the state's plea offer presented in the case. App. 433-435.

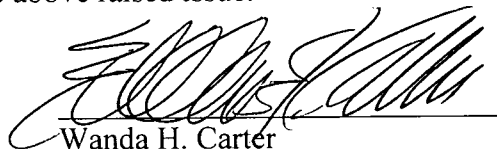
Here, counsel's hands off approach where he offered no guidance for or against the plea offer to petitioner constituted ineffective assistance of counsel in violation of the Sixth Amendment (See Strickland v. Washington, 466 U.S. 668 (1984)), because a defendant has a right to effective assistance of counsel during the plea bargaining process. See Lafler v. Cooper, 132 S.Ct. 1376 (2012). In Lafler v. Cooper, *supra*, the Supreme 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. Ultimately, Lafler

¹ Stalk v. State, 375 S.C. 289, 652 S.E.2d 402 (2007); affirmed as modified at 383 S.C. 559, 681 S.E.2d 592 (2009).

was convicted on all counts at trial and received a mandatory minimum 185-to-360-month sentence. The rule regarding competent counsel during the plea bargaining process applies in South Carolina as well. See Judge v. State, 321 S.C. 554, 471 S.E. 2d 146 (1196), where the Court held that the Sixth Amendment protects defendants against ineffective assistance of counsel during the plea bargaining process. State v. Judge, supra, was overruled on other grounds by Jackson v. State, 342 SC 95, 535 S.E. 2d 926 (2000), to the extent that a petitioner'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 Judge, the issue was whether counsel was ineffective in advising the defendant to reject a plea offer and opt for a trial by jury. In Jackson, supra, the Court held that counsel was ineffective in failing to advise the defendant that the crime he was pleading to was a felony and that but for that omission, the defendant would not have plead guilty in his case. Here, counsel erred in not advising petitioner at all on the pros and/or cons of accepting or rejecting the plea offer in the case. This was ineffective assistance of counsel in violation of the Sixth Amendment.

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.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of May, 2019.

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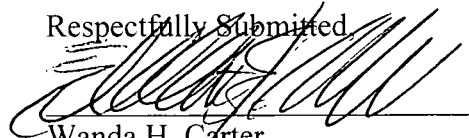
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Benjamin Lavon Smalls 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 Roger M. Young, which was held on May 22, 2018, 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 Benjamin Lavon Smalls.

Respectfully Submitted

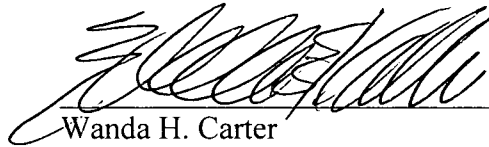


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 6th day of May, 2019.

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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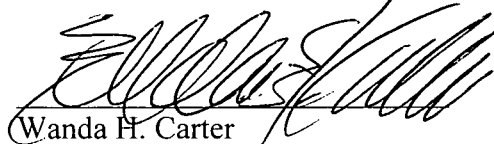
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RESPONDENT

CERTIFICATE OF SERVICE

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 Benjamin Limbaugh, 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 Benjamin Lavon Smalls, #337071, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 6th day of May, 2019.



Wanda H. Carter

Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 6th day of May, 2019.

Courtney Powers (L.S)

Notary Public for South Carolina

My Commission Expires: May 2, 2021.