

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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JUN 28 2013

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Certiorari to Richland County

S.C. Supreme Court

R. Knox McMahon, Circuit Court Judge  
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SYLVESTER BOONE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213338  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
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WANDA H. CARTER  
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ATTORNEY FOR PETITIONER

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### ISSUE PRESENTED

Trial counsel erred in failing to present sufficient evidence establishing petitioner's remorse and low level of culpability during the case in mitigation at the sentencing phase of petitioner's plea proceeding because but for the error in not presenting the proper witnesses and documentation regarding these two points, a reasonable probability exists that petitioner would have received lenient sentences in the case.

## STATEMENT

Petitioner Sylvester Boone pled guilty to kidnapping, armed robbery, and two counts of assault with intent to kill during the May 2010 term of the Richland County General Sessions Court before Judge George C. James. Petitioner was sentenced to two twenty-year prison terms (to run concurrently) on the kidnapping and armed robbery convictions, and two seven-year prison terms on the assault with intent to kill convictions to run concurrently to each other, but consecutively to the twenty-year prison terms. App. 1-81. Petitioner was represented by April Sampson at the plea proceeding. Thereafter, petitioner appealed, but an appeal was never perfected in the case.

On April 15, 2011, petitioner filed a PCR application with the Richland County Office of the Clerk of Court. App. 83-91. On January 31, 2012, the respondent filed a return requesting that a hearing be held in response to petitioner's PCR action. App. 92-97.

A PCR hearing was convened on August 13, 2012, at the Richland County Courthouse before Judge R. Knox McMahan. Petitioner was present at the hearing and represented by Eleanor Duffy Cleary. On October 18, 2012, Judge McMahan issued an order of dismissal therein denying petitioner's allegations of ineffective assistance of counsel in the case. App. 163-173.

Petitioner appealed Judge McMahan's order of dismissal. This petition follows.

## ARGUMENT

Trial counsel erred in failing to present sufficient evidence establishing petitioner's remorse and low level of culpability during the case in mitigation at the sentencing phase of petitioner's plea proceeding because but for the error in not presenting the proper witnesses and documentation regarding these two points, a reasonable probability exists that petitioner would have received lenient sentences in the case.

The solicitor apprised the plea judge of the facts that led to petitioner's arrest. On October 30, 2009, petitioner and Demon Griffin, both of whom were armed with guns, ran up to Charles Humphries, who was manager of an IGA store in Blythewood, accosted him at gun point and took the bank money bags away from him before he could enter the store. Thereafter, petitioner and Griffin fled to the get-away vehicle that was driven by Dwight Davis. James Mitchell, who was standing near the IGA store on that date, witnessed the event and drove his car in hot pursuit of the perpetrators. Mitchell was nearly hit by a bullet fired at him from a gunman firing from the get-away vehicle. Another bullet fired by a gunman from the get-a-way vehicle landed in a SUV driven by Laura Monroe, who was driving on the same highway at the time. App. 58, l. 19-p. 65, l. 2.

During the plea proceeding in question, only two people (excluding trial counsel and petitioner) spoke in mitigation on petitioner's behalf: petitioner's mother and petitioner's father. Petitioner's father stated to the plea judge that he had not been around petitioner a lot, but tried to let petitioner know that he loved him. App. 78, l. 6-p. 79, l. 6. Also, during the plea proceeding, petitioner's mother stated that petitioner had been in special education classes and never fit in, but that he was raised in the church and had been looking for a job. App. 79, l. 11-p. 80, l. 14.

At the end of the plea proceeding, trial counsel pleaded petitioner's case. Trial counsel stated that this incident occurred when petitioner was seventeen years old and that he admitted his

guilt on the charges against him. App. 71, l. 22-p. 72, l. 23. Also, counsel informed the plea judge of the fact that petitioner had returned to school at night and was nearly finished completing a program before this IGA events occurred; and that he had learned various skills after being incarcerated, and was remorseful and depressed (to the point of suicide) about the crimes he committed. App. 73, l. 2 – p. 74, l. 19. Finally, trial counsel submitted to the plea judge numerous favorable letters written on petitioner’s behalf. App. 72, l. 21 – p. 73, l. 6. Counsel did not mention petitioner’s slow learner and special education status as factor in order to show petitioner’s low level of culpability, and counsel did not mention petitioner’s roots in the church to stress the genuineness of his remorse about the crimes committed.

During the PCR hearing held in the case, petitioner’s PCR attorney raised the single issue of trial counsel’s alleged ineffectiveness in failing to “submit sufficient evidence in mitigation” at the plea proceeding and added that had counsel properly done so, then petitioner would “likely have received a lower sentence.” App. 104, lines 6-17. PCR counsel informed the PCR judge that she had fourteen mitigation witnesses present and ready to testify on petitioner’s behalf at the PCR hearing. App. 130, lines 5-9. Only three mitigation witnesses testified at the PCR hearing. Also during the PCR hearing, PCR counsel presented school records verifying petitioner’s slow rate of learning and letters of recommendation on petitioner’s behalf. See Supplemental Appendix.

Mrs. Boone (petitioner’s mother) testified during the PCR hearing and explained again that petitioner was an IEP student until he was dismissed from the specialized program, and that he was “slow in school,” and consequently did not understand what the IGA robbery was all about. Additionally, Mrs. Boone testified that petitioner had been raised in the church. Also, Mrs. Boone complained during the PCR hearing that trial counsel failed to give the plea judge details about petitioner’s church participation and membership. App. 113, l.12; App. 116, lines 12-p. 117, l. 3.

Mrs. Boone complained further during the PCR hearing that trial counsel failed to suggest that she bring family members and other supporters to appear at the plea proceeding to speak in mitigation on petitioner's behalf. App. 117, lines 3-13. Mrs. Boone noted further that trial counsel failed to ensure that petitioner's church minister was present at the plea proceeding to speak in mitigation on his behalf. App. 120, l. 12-p. 121, l.6.

Family friend Ramona Richardson testified at the PCR hearing and explained that she was not called to speak in mitigation at petitioner's plea proceeding; but stated that had that happened, she would have explained that petitioner was a loving and respectful male, who was unfortunately a follower and had passive tendencies. App. 125, l. 23-p. 126, l. 21.

Petitioner's classmate April Oree stated that she was not asked to speak on petitioner's behalf during the mitigation phase of the plea proceeding; but added that if she had been requested to do so, she would have informed the court that petitioner was a "good kid," who hung out with older kids and just did "what everybody else did." App. 128, l. 17-p. 129, l. 22.

Petitioner testified during the PCR hearing and stated that since he has been incarcerated, he received a certificates for carpentry, safety credits and Gospel related services, and that he has been working in the Chaplain's Office (ministering the Word of God) and in the infirmary with hospice patients. App. 133, l. 5-p. 138, l. 4. Petitioner gave the following testimony at the PCR hearing regarding the absence of mitigating witnesses at his plea proceeding:

Defendant: I mean I really didn't talk to nobody to see who I could have. This was -- to tell the truth. I found out about two days before -- two or three days before going. I didn't know, just not knowing I had a month to be aware of it. I believe I found out just two days before, not pretty much time for it...

Defendant: I mean I was young and scared at the time and I ain't (sic) really knowed (sic) what was going on...I can't really say too much, but like I say, I was young, I was scared, and I just ain't (sic) wanted to be in a courtroom at this time. I was nervous and I wasn't ready for all that. App. 141, lines 14-18;App. lines 14-19.

At the PCR hearing, trial counsel testified that she was given the names of people who would speak favorably on petitioner's behalf, but that trial judges limit the number of mitigation witnesses and that she could not present "everybody in the community and allow them to talk" in mitigation at the plea proceeding. App. 148, l. 21-p. 150, l.8. Counsel added that presenting preachers was not always good mitigation in criminal cases. App. 148, l. 21-p. 158, l.22.

The PCR judge ruled that petitioner failed to carry his burden of proving that counsel was ineffective with respect to his case in mitigation at sentencing because counsel made a reasonable strategic decision not to present every individual willing to speak about petitioner, but rather chose to introduce the statements and letters to the plea judge in addition to a moderate number of persons to speak to the plea judge in the matter. App. 170 – 171.

In Council v. State, 380 S.C. 159, 670 S.E. 2d 356 (2008), the Court held that counsel's failure to adequately investigate and present mental illness and competency issues as strong mitigating evidence for the defendant was deemed ineffective assistance of counsel in that case. In Nance v. Ozmint, 367 S.C. 547, 626 S.E. 2d 878 (2006), the Court found ineffective assistance of counsel where counsel's mitigation case at sentencing lasted only seven minutes and where counsel failed to provide the jury with any insight concerning petitioner's mental illness. See Wiggins v. Smith, 539 U.S. 510 (2000), where the United States Supreme Court held that when determining if a lack of mitigation resulted in prejudice, there must be a determination of whether the mitigating evidence taken as a whole would influence the defendant's culpability.

Here, counsel's failure to highlight thoroughly petitioner's extremely low cognitive skills, which contributed to his follower mindset, denied the plea judge the opportunity to consider petitioner's low level of culpability in the case and proof that petitioner was operating at the behest of others. A complete case in mitigation would have emphasized petitioner's low level of

culpability via the presentation of teachers and other educators would have supported and added credence to this point by explaining that anyone categorized as a special education student could not formulate and execute an armed robbery, but rather, would follow the crowd. Note that trial counsel did admit, however, that it might have made a difference in sentencing if the trial judge had known that petitioner was not only slower than his peers, but he was a follower of his peers also. App. 158, l. 24-p. 159-l.7.

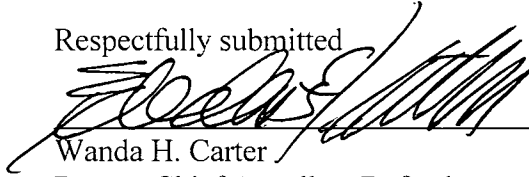
Moreover, the presence of preacher or reverend to speak in mitigation would have highlighted petitioner's church roots and how this would have made more genuine his remorse about the crimes committed. Therefore, educator and preachers are examples of additional witnesses who would have bolstered petitioner's case in mitigation and most probably would have resulted in petitioner's receipt of lenient sentences in the case.

Clearly, trial counsel was deficient in her representation of petitioner in reference to his case in mitigation at the sentencing portion of his plea proceeding. This meant that petitioner received ineffective assistance of counsel at his plea proceeding in violation of the Sixth Amendment to the United States Constitution. See Hill v. Lockhart, 484 U.S. 52 (1985). But for counsel's error in handling petitioner's case in mitigation, a reasonable probability exists that petitioner would have received lenient sentences in the case.

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 28th day of June, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO RICHLAND COUNTY  
R. KNOX MCMAHON, CIRCUIT COURT JUDGE

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SYLVESTER BOONE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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PETITION TO BE RELIEVED AS COUNSEL

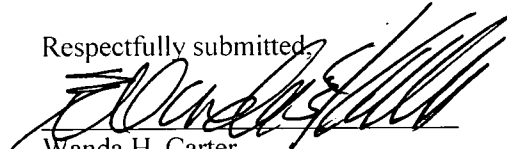
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Counsel for Sylvester Boone states:

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 records and transcript of petitioner's post-conviction relief hearing which was held on August 13, 2012. 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 Sylvester Boone.

Respectfully submitted,



Wanda H. Carter  
Deputy Chief Appellate Defender  
ATTORNEY FOR PETITIONER

This 28th day of June, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County

R. Knox McMahon, Circuit Court Judge

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SYLVESTER BOONE,

PETITIONER,

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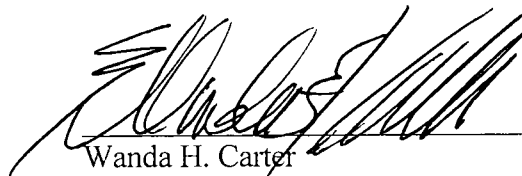
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CERTIFICATE OF SERVICE

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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 Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Sylvester Boone, #341082, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 28th day of June, 2013.



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day  
of June, 2013.

 (T.S.)

Notary Public for South Carolina

My Commission Expires: November 16, 2022.