

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County

S.C. Supreme Court

G. Edward Welmaker, Circuit Court Judge  
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TAWAN O. JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001048  
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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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ROBERT M. PACHAK  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether trial counsel was ineffective in misleading petitioner that he would be pleading guilty in exchange for a five (5) year plea offer?

## STATEMENT

Petitioner was convicted of a first degree burglary after a jury trial held before the Honorable Larry R. Patterson on June 3, 2008, in Greenville County. A fifteen (15) year sentence was imposed. Daniel J. Farnsworth, Esquire, was trial counsel. Julie J. Anders, Esquire, was the assistant solicitor. (App. p. 1 – p. 102). Petitioner appealed his conviction and the Court of Appeals affirmed it on October 12, 2010. State v. Johnson, Op. No. 2010-UP-437. Petitioner filed a petition for writ of certiorari which the South Carolina Supreme Court denied. (App. p. 104 – p. 152).

Petitioner filed an application for post-conviction relief on December 9, 2011. He filed an amended application dated January 11, 2013. (App. p. 153 – p. 178). Respondent's return was dated June 5, 2012. (App. p. 179 – p. 183). An evidentiary hearing was held on April 18, 2013, before the Honorable G. Edward Welmaker. Petitioner was present and was represented by Rodney Richey, Esquire. Respondent was represented by Karen Ratigan, Assistant Attorney General. Petitioner testified at the hearing. (App. p. 184 – p. 195).

On April 30, 2013, Judge Welmaker issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 197 – p. 204).

This petition follows.

## ARGUMENT

Trial counsel was ineffective in misleading petitioner that he would be pleading guilty in exchange for a five (5) year plea offer.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Trial counsel can be found ineffective for failing to object to an improper jury instruction or in failing to request a jury instruction that should have been given. He can be held ineffective for failing to object to the improper admission of character evidence, or prior bad acts, or illegally obtained statements, confessions, or improper searches. Failing to move for a continuance may also constitute ineffective assistance of counsel. Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006).

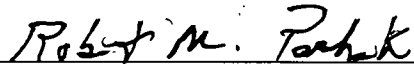
In this case, petitioner explained at the evidentiary hearing that he had a plea offer that was for five (5) years. He talked to his attorney about the offer, but he did not fully understand it. When counsel told petitioner of the offer, he told petitioner to "just stand still." He said he would get back to petitioner. Then, about a month later, he was in the courtroom thinking he was going to get his five years. Instead, there was a jury and they went to trial. (App. p. 190, line 8 – p. 191, line 6).

Giving incorrect sentencing advice in the context of a guilty plea can result in a guilty plea being overturned due to ineffective assistance of counsel. Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989); Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991). The same should apply in this case.

CONCLUSION

Petitioner's writ should be granted and his conviction should be overturned.

Respectfully submitted,

  
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Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of September, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO GREENVILLE COUNTY  
G. EDWARD WELMAKER, CIRCUIT COURT JUDGE

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TAWAN O. JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001048

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PETITION TO BE RELIEVED AS COUNSEL


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Counsel for Tawan O. Johnson states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on April 18, 2013. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He 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 him as counsel for Tawan O. Johnson.

Respectfully submitted,



Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 11th day of September, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County  
G. Edward Welmaker, Circuit Court Judge

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TAWAN O. JOHNSON,

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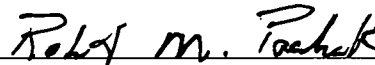
APPELLATE CASE NO. 2013-001048

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CERTIFICATE OF SERVICE

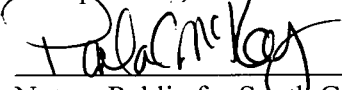
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Tawan O. Johnson, #220256, at Tyger River Correctional Institution, 200 Prison Road, Enoree, SC 29335-9308, this 11th day of September, 2013.

  
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Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day  
of September, 2013.

  
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(L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022.