

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to York County
John C. Hayes, III, Circuit Court Judge

S.C. Supreme Court

KEVIN GUNTER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000639

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Was defense counsel ineffective for failing to fully advise petitioner that even if he pled guilty he still faced a possible sentence of life without parole, where petitioner testified he would not have pled guilty had he known a life without parole sentence was possible even though he waived his right to a jury trial?

STATEMENT

Petitioner's trial attorney, James Morton, told the judge that petitioner Kevin Gunter had just turned nineteen when the fatal incident in this case occurred in York County. Petitioner had grown up "in one of the worst housing projects on the east coast, East Baltimore." Morton said petitioner's father was in jail for forty years for attempted murder, and petitioner had been in juvenile institutions and mental institutions "from the time he was a young boy." Petitioner began smoking marijuana at the age of seven and began drinking at twelve. He started doing ecstasy at fourteen. App. 44, ll. 1-25. While in Baltimore petitioner had been convicted of carjacking at a young age. App. 49, ll. 3-12.

Once he moved to South Carolina, and the fatal incident occurred, petitioner was indicted at the November 12, 2009 term of the York County Grand Jury for the murder of Jeffrey Brown, burglary in the first degree, assault and battery with intent to kill (ABIK), armed robbery, possession of a sawed off shotgun, and possession of a firearm during the commission of a violent crime. All the charges arose from the June 21, 2009 burglary and armed robbery which ended in murder. App. 87-98.

At the March 1, 2010 arraignment the deputy solicitor, Willy Thompson, served petitioner and his attorney, James Morton, with notice of intent to seek the sentence of life without parole if petitioner was convicted based upon petitioner's prior carjacking conviction in Maryland. App. 1; app. 5, l. 19 - 6, l. 11.

Petitioner appeared on April 20, 2010 before the Honorable Lee Alford. James Morton represented petitioner and Willy Thompson was the deputy solicitor. App. 8. Petitioner pled guilty to all of the charges against him. App. 11, l. 6- 12, l. 6. Petitioner told the judge he was nineteen

years old, and he had gone to the tenth grade. He was not married and he did not have any children. App. 12, l. 7- 13, l.1.

The judge told petitioner the state was not seeking the death penalty in his case, but that murder carried a potential sentence of life without parole and a minimum sentence of thirty years in prison. App. 13, ll. 5-12; app. 14, ll. 2-14. The deputy solicitor told the judge that petitioner and another man apparently were angry because they thought they were being accused of break-ins in the area. They confronted the victims about the allegations and the situation quickly turned deadly. The deputy solicitor said petitioner ultimately confessed to committing the crimes and to shooting the deceased. App. 19, l. 22- 23, l. 4.

A sentencing hearing was held on April 27, 2010 before Judge Alford. James Morton again represented petitioner and Willy Thompson returned as the deputy solicitor, App 27. Members of the victim's family addressed the court. App 32, l. 3- 34, l. 18.

The deputy solicitor informed the judge that following the incident petitioner gave the police a fake name and told them he was only fourteen-years-old. The deputy solicitor added that petitioner had been in trouble in Baltimore before moving to York County. He noted that the state could have insisted on a sentence of life without parole (LWOP), but they rescinded the LWOP notice and allowed petitioner to plead guilty. The solicitor asked the judge to sentence petitioner to life without parole or a sentence that would essentially be a life without parole sentence anyway. App 39, l. 10- 43, l. 6.

Defense counsel Morton argued to the judge that statistics showed that at the age of twenty-five crime levels drop substantially. Further, at the age thirty-five you "don't have the energy once you become middle aged." Petitioner was young, he could change, and he was not likely to be trouble after serving years in prison. App 45, l. 19- 46, l.4.

Defense counsel Morton asked the judge to fashion a sentence that would one day allow petitioner to be released from prison. App. 47, 1.1 – 48, 1.5. The judge sentenced petitioner life without parole for murder and he imposed a thirty year sentence for burglary in the first degree, twenty years for armed robbery, twenty years for assault and battery with intent to kill, and five years on the gun charges. The sentences were all concurrent. App. 49, 1. 24- 50, 1. 16.

Petitioner filed an application for post-conviction relief on December 28, 2010. App. 53-59. The state filed a return dated August 12, 2011 requesting an evidentiary hearing. App. 60-63.

An evidentiary hearing was convened on May 9, 2012 before the Honorable John C. Hayes III. Eric Davis now represented the petitioner, and J. Rutledge Martin was the Assistant Attorney General. App. 65

Petitioner testified that he was never told he faced a sentence of life without parole if he pled guilty. Defense counsel Morton told him if he that he could face the death penalty if he went to trial. Petitioner believed he was facing a sentence of between thirty years and life, but not LWOP if he waived a jury trial and pled guilty. App. 69, 1 22- 72, 1 .18.

Defense counsel Morton testified that he thought petitioner understood he could face a sentence an LWOP sentence even though he was pleading guilty. App. 77, ll. 2-6. Morton said he did not think the state was ever serious about pursuing the death penalty.

Morton stated that he had petitioner evaluated because petitioner told him he suffered from a bipolar disorder, App. 77 ll. 7-9. Forensic psychiatrist Dr. Harold Morgan conducted the evaluation. However, Dr. Morgan “could not find any diagnosis or disease that he thought he could honestly attribute to Kevin that would somehow minimize his responsibility in this situation,” according to defense counsel. App. 77, ll. 5-22.

Morton also stated he told petitioner that Judge Alford “was a tough sentencing judge” but that he hoped when Judge Alford heard the mitigation that he would impose a sentence of less than LWOP. App. 78, l. 16- 80, l.5.

An order of dismissal was filed on May 17, 2012. App. 82- 86. In this order the judge stated that petitioner testified he would not have pled guilty if he had known he could receive a LWOP sentence. Petitioner testified that had he known that LWOP sentence was possible “he would have gone to trial.” App. 84. The post-conviction relief judge found “the record clearly reflects applicant was advised he could be sentenced life without parole by the trial judge.” App. 85. The judge denied relief, App. 86.

From this order, petitioner seeking a writ of certiorari pursuant to Rule 243 of the SCACR.

ARGUMENT

Defense counsel ineffective for failing to fully advise petitioner that even if he pled guilty he still faced a possible sentence of life without parole, where petitioner testified he would not have pled guilty had he known a life without parole sentence was possible even though he waived his right to a jury trial.

Petitioner testified he would not have pled guilty and he would have gone to trial had he known that a LWOP sentence was possible even though he pled guilty. Defense counsel only stated that he thought appellant understood that a LWOP sentence was possible when he pled guilty.

Petitioner further told the post-conviction relief judge that he thought a sentence between thirty years and his life expectancy would be the outcome, but he repeated that he would not have pled guilty if he knew he could be sentenced to life without parole.

In Hill v. Lockhart, 474 US 52 (1985), the United States Supreme Court held that for a defendant to prevail in post-conviction after a plea of guilty he must prove that his attorney gave him deficient advise that led to his guilty plea. To satisfy the prejudice prong the defendant must show that but for counsel's erroneous advise he would have gone to trial rather than have pled guilty. Petitioner has satisfied the prejudice prong of Hill v. Lockhart.

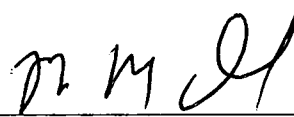
In Alexander v. State, 303 S.C. 539, 402, S.E.2d 484 (1991), this Court held that a defendant who was misinformed he could face a potential life sentence if he proceeded to trial satisfied the prejudice requirement of an ineffective assistance of counsel claim where he pled guilty out of fear of that life sentence. Here, petitioner testified he would *not* have pled guilty, and he would have gone to trial had he realized his sentencing exposure was life imprisonment without parole. Petitioner received deficient and incorrect sentencing exposure advice which prompted him to

tender his guilty plea. His guilty plea therefore should be vacated. Cf. Hinson v. State 297 S.C. 456, 377, S.E.2d 338 (1989).

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on this issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of November, 2013.

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CERTIORARI TO YORK COUNTY
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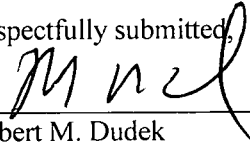
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kevin Gunter states:

1. He is a Chief 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 May 9, 2012. 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 Kevin Gunter.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 27th day of November, 2013

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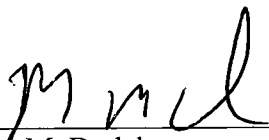
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CERTIFICATE OF SERVICE


I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the App in this case have been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Kevin Gunter, #340548, at Lieber Correctional Institution this 27th day of November, 2013.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day
of November, 2013.


_____(L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021.