

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. Supreme Court

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Certiorari to Greenwood County

R. Lawton McIntosh, Circuit Court Judge  
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BARRY D. WILLIAMS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001392  
\_\_\_\_\_

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  
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether trial counsel was ineffective in giving incorrect sentencing advice to petitioner?

## STATEMENT

Petitioner was convicted of distribution of crack cocaine and distribution within proximity of a school after a jury trial held before the Honorable John C. Hayes, III, on January 23, 2008, in Greenwood County. Respective sentences of thirty (30) years and fifteen (15) years were imposed. Charles Grose, Esquire, was trial counsel. Elizabeth Phillips-White, Esquire, was the assistant solicitor. (App. p. 1 – p. 127). Petitioner appealed his convictions and the Court of Appeals affirmed them on January 21, 2010. (App. p. 128 – p. 152).

Petitioner filed an application for post-conviction relief on March 29, 2010. (App. p. 153 – p. 158). Respondent filed a return and motion to dismiss dated September 4, 2012. (App. p. 159 – p. 163). Petitioner filed a reply dated September 12, 2012. (App. p. 164 – p. 166). The Honorable Frank R. Addy issued a conditional order of dismissal on September 6, 2012. (App. p. 167 – p. 170). Petitioner filed a response to it on September 28, 2012. (App. p. 171 – p. 178). An evidentiary hearing was held on November 28, 2012, before the Honorable R. Lawton McIntosh. Petitioner was present and was represented by Wes Rutledge, Esquire. Respondent was represented by J. Rutledge Johnson, Assistant Attorney General. Both petitioner and trial counsel testified at the hearing. (App. p. 179 – p. 227). On June 6, 2013, Judge McIntosh issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 228 – p. 236).

This petition follows.

## ARGUMENT

### Trial counsel was ineffective in giving incorrect sentencing advice.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel 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); Stalk v. State, 383 S.C. 559, 681 S.E. 2d 592 (2009). With respect to a guilty plea the second prong above looks at whether defense counsel's deficient performance affected the outcome of the plea process. Stalk v. State, *supra*. This means that there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985). This usually involves counsel's giving of incorrect sentencing advice or legal advice about the charges against his client or failure to investigate. 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); Pelzer v. State, 381 S.C. 217, 672 S.E. 2d 790 (Ct. App. 2009); Morris v. State, 371 S. C. 278, 639 S.E. 2d 53 (2006); Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007); Stalk v. State, *supra*. The post-conviction relief court will normally consider the guilty plea transcript as well as the evidence presented at the post-conviction relief hearing in looking at guilty plea issues. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

In his response to the conditional order of dismissal and amended application, the complaint against trial counsel was that he never advised petitioner of the maximum sentence he could receive if convicted at trial. (App. p. 173). Petitioner testified at the evidentiary hearing that no one ever told him what the maximum sentence could be if he went to trial. (App. p. 186, lines 20 – 24). At one meeting with counsel, he was informed of a ten (10) year plea offer which was rejected. (App.

p. 188, lines 3 – 11). Counsel never told him he could be sentenced up to 30 years. (App. p. 189, lines 14 – 23). Petitioner testified that he did not have the information before him to make an educated decision as to whether or not to accept the plea offer. (App. p. 204, lines 6 – 9).

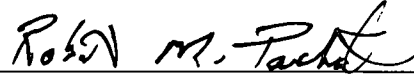
Trial counsel indicated at the evidentiary hearing that he was mistaken about sentencing and thought the maximum sentence was twenty-five (25) years. (App. p. 207, lines 16 – 23).

In Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 369 (1985), the Supreme Court of the United States wrote that the “longstanding test for determining the validity of a guilty plea is ‘whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.’” (citations omitted). This test should apply equally to the defendant who decides to reject a guilty plea and go to trial. If petitioner in this case had known the maximum sentence he was facing he would not have gone to trial, but would have accepted the plea offer.

CONCLUSION

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

Respectfully submitted,

Handwritten signature of Robert M. Pachak in black ink, written over a horizontal line.

Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of December, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO GREENWOOD COUNTY  
R. LAWTON MCINTOSH, CIRCUIT COURT JUDGE

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BARRY D. WILLIAMS,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2013-001392

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PETITION TO BE RELIEVED AS COUNSEL

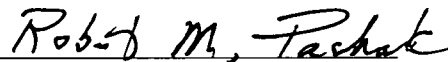
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Counsel for Barry D. Williams states:

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 November 28, 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 Barry D. Williams.

Respectfully submitted,



Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 27th day of December, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenwood County  
R. Lawton McIntosh, Circuit Court Judge

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BARRY D. WILLIAMS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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CERTIFICATE OF SERVICE

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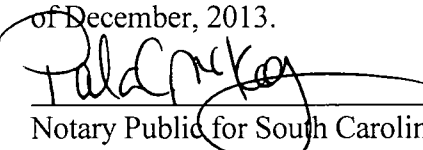
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Barry D. Williams, #171034, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 27th day of December, 2013.



Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

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

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.