STATE OF SOUTH CAROLINA

IN THE SUPREME COURT



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Certiorari to Sumter County

R. Ferrell Cothran, Jr., Circuit Court Judge

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IKEEF BRAILSFORD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000286

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# JOHNSON PETITION FOR WRIT OF CERTIORARI

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# INDEX

## ISSUE PRESENTED

Whether petitioner's guilty plea was voluntarily, knowingly, and intelligently entered when he thought he was pleading to a second drug offense rather than a third drug offense?

## STATEMENT

On March 1, 2011, petitioner appeared before the Honorable W. Jeffrey Young in Sumter County and pled guilty to distribution of cocaine base, manufacturing of cocaine base, and two more counts of distribution of cocaine base. Respective sentences of fifteen (15) years, suspended upon service of twelve (12) years, ten (10) years, ten (10) years, and ten (10) years were imposed. Charles D. Barr, Esquire, was plea counsel. Bronwyn McKnew, Esquire, was the assistant solicitor. (App. p. 1 – p. 41).

Petitioned filed an application for post-conviction relief on January 26, 2012. (App. p. 42 – p. 48). An amended application dated June 25, 2012, was also filed. (App. p. 49 – p. 51). Respondent filed a return dated June 15, 2012. (App. p. 52 – p. 57). An evidentiary hearing was held on December 20, 2013, before the Honorable R. Ferrell Cothran. Petitioner was present and was represented by Tommy Thomas, Esquire. Respondent was represented by Daniel Gourley, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 58 – p. 120). On January 14, 2014, Judge Cothran issued an order denying and dismissing the application for post-conviction relief. (App. p. 127 – p. 135).

This petition follows.

## ARGUMENT

Petitioner's guilty plea was not voluntarily, knowingly, and intelligently entered when he thought he was pleading to a second drug offense rather than a third drug offense.

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. In 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. 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).

Besides attacking a guilty plea based on ineffective assistance of counsel, a defendant may challenge the guilty plea on other constitutional grounds. The United States Supreme Court explained in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969) that "a plea of guilty is more than admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." 395 U.S. at 242-243, 89 S. Ct. at 1712. As the Court in Boykin held, due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by a jury, and the right to confront one's

accusers. A valid waiver of these rights cannot be presumed from a silent record. 395 U.S. at 243, 89 S. Ct. at 1712. In State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975), the court held that the "essence" of Boykin was to make the requirements of Rule 11 of the Federal Rules of Criminal Procedure applicable to the States. In State v. Patterson, 278 S.C. 319, 295 S.E. 2d 264 (1982), the court held that for there to be a valid waiver under the due process clause of the three constitutional rights listed in Boykin, the record must clearly establish it.

In this case, during petitioner's guilty plea, there was a question as to what offense he was pleading guilty to. The assistant solicitor said petitioner had two counts of distribution of cocaine in July of 2005, and another count of distribution of cocaine in December of 2005. She did not know if petitioner pled to all of the charges at once, but she was treating the current charge as a third offense. Petitioner was counting the current offense as a second offense because he pled to the other offenses all at once. Petitioner ended up pleading to a third offense. (App. p. 5, line 10 – p. 8, line 5).

Petitioner argued in his amended application that he should have only pled to a second offense. (App. p. 49 – p. 50). At the evidentiary hearing, PCR counsel stated that when petitioner pled to the initial two counts that State v. Gordon, 356 S.C. 143, 588 S.E.2d 105 (2003) was in effect and the two counts would be treated as one offense.[1] Gordon was overturned in 2009 by Bryant v. State, 384 S.C. 525, 683 S.E.2d 280 so that in 2011 when petitioner pled guilty, his current drug offenses would be treated as a third offense. Robinson v. State, 387 S.C. 568, 693 S.E.2d 402 (2010), also would make petitioner's most recent plea a third offense. (App. p. 61, line 9 – p. 62, line 14). Petitioner thought he should have been pleading to a second offense since his

[1] Appellate counsel is not certain that even under Gordon that those two offenses would be treated as one offense.

two prior offenses were considered as one. (App. p. 81, lines 12 – 20). Petitioner said plea counsel also thought it was a second offense. (App. p. 85, lines 3 – 8). When petitioner told the judge that he was pleading guilty to a third offense, he knew he was guilty of the drug offense, but he did not want to argue that it was a second offense and upset the judge because any sentence he got was at the mercy of the judge. (App. p. 90, line 17 – p. 92, line 17).

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). As can be seen from petitioner's guilty plea and the testimony at the post-conviction relief hearing, his plea did not represent a voluntary and intelligent choice of the courses of action open to him.

## CONCLUSION

Petitioner's writ should be granted and his guilty plea should be vacated.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of July, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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CERTIORARI TO SUMTER COUNTY
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IKEEF BRAILSFORD,

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Ikeef Brailsford 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 December 20, 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 Ikeef Brailsford.

Respectfully submitted,

Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 15th day of July, 2014

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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 Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Ikeef Brailsford, #264172, at Livesay Pre-Release Center, Post Office Box 580, Una, SC 29378, this 15th day of July, 2014.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day of July, 2014.

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