

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Fairfield County
William Jeffrey Young, Circuit Court Judge

RECEIVED

JAN 28 2015

S.C. Supreme Court

ROBERT J. MILLER III,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002102

JOHNSON PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

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

ATTORNEY FOR PETITIONER

ISSUE PRESENTED

Trial counsel erred in advising petitioner that neither an accountant nor an accounting was necessary in order to ascertain the exact amount owed in restitution since counsel's plan was to abandon "arg[uing] about restitution... "throw [themselves] on the mercy of the court,"¹ and simply consent to any amount of restitution ordered by the plea judge because this strategy violated petitioner's right to a fair sentencing proceeding.

¹ App. 84, l. 19 – 21; App. 89, l. 22 – p. 90, l. 1; App. 95, l. 4 – 12.

STATEMENT

Petitioner Robert J. Miller pled guilty to three counts of financial identity fraud during the April 2012 term of the Fairfield County General Sessions Court before Judge L. Casey Manning. Petitioner was sentenced to two concurrent ten-year terms and ten years, consecutive, suspended upon the service of three years on the last count charged against him. App. 1-38. Also, petitioner was ordered to pay restitution in the amount of \$30,000.00. Mike Lifesey represented petitioner at the plea proceeding, and Assistant Solicitor Riley Maxwell appeared on behalf of the state. Petitioner did not enjoy the benefit of a direct appeal of his convictions and sentences.

On August 30, 2012, petitioner filed a PCR application with the Fairfield County Office of the Clerk of Court. App. 41- 49. The respondent filed a return dated October 31, 2013, requesting that a hearing be held in the case. App. 50 – 55.

A PCR hearing was convened on July 28, 2014, at the Fairfield County Courthouse before Judge W. Jeffrey Young. App. 57 – 96. Petitioner was present at the hearing and represented by W. Michael Hemlepp, and Assistant Attorney General Croom Hunter appeared on behalf of the state. On August 28, 2014, Judge Young issued an Order of Dismissal in the case. App 98 – 108.

Petitioner appealed Judge Young's Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in advising petitioner that neither an accountant nor an accounting was necessary in order to ascertain the exact amount owed in restitution since counsel's plan was to abandon "argu[ing] about restitution ... "throw [themselves] on the mercy of the court,"² and simply consent to any amount of restitution ordered by the plea judge because this strategy violated petitioner's right to a fair sentencing hearing.

During the plea proceeding, the solicitor apprised the plea judge of the facts of the case. Apparently, in the year 2010, petitioner accessed all identification information for William Bundrick, including his checking account containing \$101,718.49, and then depleted the account until "less than....\$15,000.00 remained." Then, petitioner used the same information to set up accounts at Bank of America, Charles Schwab, E-trade, and other financial institutions, and obtained credit and ATM cards as well. App. 19, l. 17 – p. 21, l. 2. The solicitor summarized Bundrick's convoluted money loss as follows.

The Court: So Mr. Bundrick got \$139, or was it \$139,000?

Solicitor: That's for the Provident account, Provident is out of that money.

The Court: \$139.

Solicitor: \$139 just for fees. Mr. Bundrick, initially he was out –he got his whole checking account money back, the 101,000 and some change but did not – was still out of the \$58,000 and change from the stock sale. There was still \$19,000 in the E-trade account in Mr. Bundrick's name, at some point over the past year or so we were able to go on the record before Judge Goldsmith I believe that signed an order that E-trade – basically told E-trade to give that money to Mr. Bundrick so Mr. Bundrick did get \$19,000 back of the \$58,000. We also were able to I think maybe at the same time able to give -- Judge Goldsmith ordered the sheriff's department to give the \$9,000 they got from Mr. Bundrick's (sic) possession when he was arrested.

² App. 84, l. 19 – 21; App. 89, l. 22 – p. 90, l. 1; App. 95, l. 4 – 12.

The Court: So he got – we’re talking about 27 or \$28,000 back from that \$58,000, he’s out of the rest of it. Is that the \$29,000?

Solicitor: Yes, sir.

The Court: ...a loss of \$29,000.
App. 22, l. 24 – p.23, l.22.

Trial counsel explained to the plea judge that petitioner owed Bundrick “a little over \$20,000,” and that “Bundrick was out \$29,000.00,” and to order “whatever restitution [was] appropriate” since the defense “would affirmatively consent to any [amount] of money that had been taken.” App. 28, l. 4 – p. 33, l.4.

Then, immediately prior to sentencing, the solicitor re-briefed the plea judge on the money loss and restitution amounts owed in the case as follows:

Solicitor: The money that was in the checking account the initial fraud was coming from, 101,000 the banks made him whole. Where he is out of the money is after Mr. Bundrick (sic) had liquidated that account he liquidated the stocks in this company up in New York for \$58, 000 and that is the bulk of what Mr. Bundrick is out of because those stocks were sold. Of course, when the fraud was caught they just don’t give him the stocks back, and luckily there was still \$19,000 of that money still in one of the accounts that he was able to get back. And then he got cash back –

The Court: So once again he was out of about \$30,000 basically.

Solicitor: Yes, sir, that he is out.
App. 37, lines 7-17.

During the PCR hearing, petitioner testified that trial counsel erred in failing to hire an accountant (“forensic accountant”) to determine the exact amount of restitution owed in the case because he believed that he did not owe the restitution amount assigned to him. Petitioner added that his attorney had received approval for funds from the Commission on Indigent Defense to pay for the services of an accountant, but he did not act on the opportunity to do so. Petitioner added

that he asked counsel to request a restitution hearing also, but that counsel advised against doing so for fear of the “risk of getting a ten-year sentence” which he received anyway. Petitioner explained further that he was requested to pay for stock exchanges that he was not charged with in the case. App. 63, l. 23 – p. 65, l. 21.

Trial counsel testified at the PCR hearing and stated that petitioner told him that he stole a little over \$20,000, “but that there was a dispute as to the restitution.” App. 82, l. 1 – p. 83, l. 3. Counsel admitted that petitioner’s position was that the restitution was too “high” and miscalculated, but he chose not to argue over restitution since petitioner admitted guilt even though the Office of Indigent Defense was willing to fund the services of an accountant. App. 93, l. 13 – p. 95, l. 19. App. 83, l. 14 – p. 85, l. 1. Also at the PCR hearing, trial counsel explained his trial strategy as follows:

We thought – and he and I discussed it – that rather than argue about the restitution we would throw ourselves on the mercy of the Court hoping – stressing his medical and health conditions, hoping that the judge would be lenient in light of us pleading rather than make this argument and restitution which, frankly, I doubted would be particularly compelling and had the danger of irritating the sentencing judge. App. 84, l. 19 – p. 85, l. 1.

The PCR judge ruled that “counsel’s decision not to hire a forensic accountant was reasonable.” App. 103.

In light of this convoluted range of what amounts of money that had been taken and owed; clearly, a forensic accountant and a restitution hearing were needed in order to calculate the exact amount of money petitioner owed in restitution. An accountant and an accounting would have sorted out the financial matter.

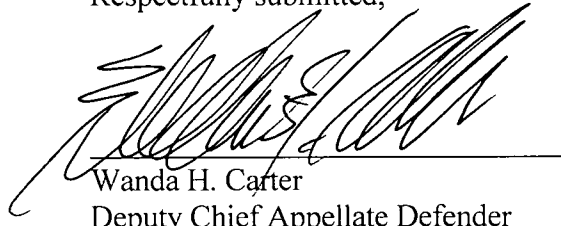
As a rule, when restitution is in dispute, a court must determine the specific amount owed; and before a court may order restitution to a victim, it must hold a hearing to determine the actual

amount of damages or loss. State v. Fussell, 299 S.C. 162, 383 S.E.2d 1 (1989) and State v. Rhinehart, 312 S.C. 36, 403 S.E.2d 536 (1993). In both Fussell and Rhinehart, the Court issued remands for restitution hearings to be held where no such accounting hearings had been conducted in those cases. Here, counsel's errors in failing to move for a restitution hearing and obtain an accountant to uncover the exact figures involved and owed constituted deficient legal representation in violation of the Sixth Amendment to the United States Constitution. See Hill v. Lockhart, 484 U.S. 52 (1985). Counsel's errors regarding the restitution issue deprived petitioner of his right to a fair sentencing proceeding, which in turn prejudiced him because a reasonable probability exists that the amount of restitution owed was different from the amount he was ordered to pay.

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition and allow full briefing on the issue raised above.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of January, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO FAIRFIELD COUNTY
WILLIAM JEFFREY YOUNG, CIRCUIT COURT JUDGE

ROBERT J. MILLER III,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2014-002102

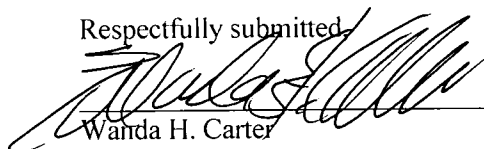
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert J. Miller, III 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 July 28, 2014. 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 Robert J. Miller, III.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 28th day of January, 2015

STATE OF SOUTH CAROLINA

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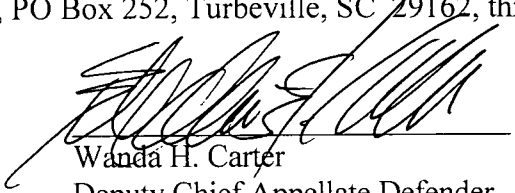
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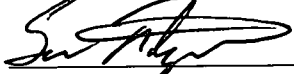
CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Croom Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Robert J. Miller, III, #316047, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 28th day of January, 2015.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day
of January, 2015.


_____(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.