

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

William P. Keesley, Circuit Court Judge

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S.C. Supreme Court

SAMUEL K. CURETON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT,

APPELLATE CASE NO. 2015-000097

JOHNSON PETITION FOR WRIT OF CERTIORARI

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

INDEX

INDEX	1
ISSUE PRESENTED	2
STATEMENT	3
ARGUMENT	4
CONCLUSION	6
PETITION TO BE RELIEVED AS COUNSEL.....	7

QUESTION PRESENTED

Whether plea counsel was ineffective in giving petitioner incorrect sentencing advice?

STATEMENT

On May 23, 2013, petitioner appeared before the Honorable R. Markley Dennis in Lexington County and pled guilty to assault and battery, first degree. A ten (10) year sentence was imposed. Robert M. Madsen, Esquire, was plea counsel. J. Angela Garrick, Esquire, was the assistant solicitor. (App. p. 1 – p. 19.)

Petitioner filed an application for post-conviction relief on July 13, 2013. (App. p. 20 – p. 28.) An amended application was filed on April 1, 2014. (App. p. 29 – 31.) Respondent filed a return dated December 17, 2013. (App. p. 32 – p. 36.) An evidentiary hearing was held before the Honorable William P. Keesley on April 15, 2014. Petitioner was present and was represented by Kristy G. Goldberg, Esquire, Respondent was represented by Walt Whitmire, Assistant Attorney General. Petitioner testified in his own behalf at the hearing and he presented the testimony of Paul Cureton and Mary Cureton. Respondent presented the testimony of Angela Garrick and Robert Madsen. (App. p. 37 – p. 102.) On May 29, 2014, Judge Keesley issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 110 – p. 122.)

This petition follows.

ARGUMENT

Plea counsel was ineffective in giving petitioner 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. 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,


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.

At the evidentiary hearing in this case, petitioner testified that counsel came to see him at the jail the day before they went to court and initially told him they were offering 0 to 10 years, but counsel told him that he and the solicitor had talked and they had agreed on a lesser sentence of 18 months to 3 years or maybe with some probation with time served. (App. p. 44, lines 1-24.) He did not expect the full 10 year sentence that he received. (App. 49, lines 18 – 22.) As noted above, giving incorrect sentencing advice constitutes ineffective assistance of counsel. Hinson v. State; Ray v. State.

CONCLUSION

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

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 24th day of March, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
WILLIAM P. KEESLEY, CIRCUIT COURT JUDGE

SAMUEL K. CURETON,

PETITIONER,

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STATE OF SOUTH CAROLINA,

RESPONDENT,

APPELLATE CASE NO. 2015-000097

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Samuel K. Cureton 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 15, 2014. 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 Samuel K. Cureton.

Respectfully submitted,


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 24th day of March, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
William P. Keesley, Circuit Court Judge

SAMUEL K. CURETON,

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V.

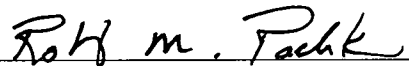
STATE OF SOUTH CAROLINA,

RESPONDENT,

APPELLATE CASE NO. 2015-000097

CERTIFICATE OF SERVICE

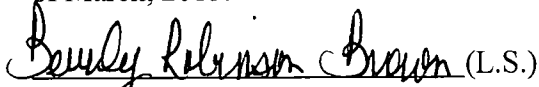
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Samuel K. Cureton, #311561, at Evans Correctional Institution this 24th day of March, 2015.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day
of March, 2015.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: December 9, 2024.