

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

Certiorari to Jasper County

Edgar W. Dickson, Circuit Court Judge

JASON L. MIXON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001944

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
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ATTORNEY FOR PETITIONER

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QUESTION PRESENTED

Whether plea counsel was ineffective in failing to investigate?

STATEMENT

On April 16, 2013, petitioner appeared before the Honorable Perry M. Buckner, III in Jasper County and pled guilty to possession of contraband by a prisoner and possession with intent to distribute marijuana. He was sentenced to two (2) years on each charge. Steven T. Plexico, Esq. was plea counsel. Erin G. Vaux, Esquire was the assistant solicitor. (App. p.1 – p.14)

Petitioner filed an application for post-conviction relief on November 7, 2013. (App. p.15 – p.21) Respondent filed a return dated May 29, 2014. (App. p.22 - p.26) An evidentiary hearing was held on October 30, 2014, before the Honorable Edgar W. Dickson. Petitioner was present and was represented by Tristan M. Shaffer, Esq. Respondent was represented by Ashleigh R. Wilson, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p.27 – p.62) On August 14, 2015, Judge Dickson issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p.75 – p.80)

This petition follows.

ARGUMENT

Plea counsel was ineffective in failing to investigate.

Petitioner alleged in his application for post-conviction relief that his attorney was ineffective in failing to conduct a pre-trial investigation which would have resulted in a different outcome. (App. p.17)

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).

At the evidentiary hearing in this case, petitioner explained that he had a co-defendant that said an officer saw him hand contraband to another inmate. At an in-house institution hearing the inmate told them petitioner did not hand him anything. (App. p.35, lines 16-23) Petitioner said he pled because he was close to getting out. In the meantime, the investigator at SCDC was fired for misconduct. As a result the solicitor threw out the co-defendant's case. (App. p.36, lines 2-24) On September 23, 2015, the investigator said he spoke to petitioner and co-defendant and neither of

them wished to make a statement. (App. p.73-74) A review of SCDC records show that the investigator did not meet with either of them on September 23. (App. p. 67-68)

Petitioner said he knew what the investigator had written was a lie because he never talked to the investigator. If he could have proved the investigator lied, he would not have pled guilty but would have gone to trial. (App. p.42, line 14 - p.43, line 17) If plea counsel had properly investigated petitioner's case, petitioner would have gone to trial. In Ard v. Cato, 372 S.C. 318, 642 S.E.2d 590 (2007) the Court wrote:

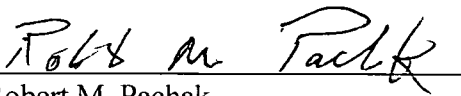
When evaluating the reasonableness of counsel's conduct, "the Court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland v. Washington, 466 U.S. at 690, 104 S.Ct. 2052. Moreover, while the scope of a reasonable investigation depends upon a number of issues, "at a minimum, counsel has the duty to interview potential witnesses and make an **independent** investigation of the facts and circumstances of the case." Troedel v. Wainwright, 667 F. Supp. 1456, 1461 (S.D.Fla 1986), aff'd, 828 F.2d 670 (11th Cir. 1987) (emphasis in original). 372 S.C. at 331-332, 642 S.E., 2d at 597.

In this case, plea counsel was ineffective in failing to investigate.

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 6th day of January, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO JASPER COUNTY
EDGAR W. DICKSON, CIRCUIT COURT JUDGE

JASON L. MIXON,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2015-001944

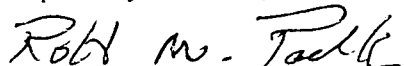
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jason L. Mixon 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 October 30, 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 Jason L. Mixon.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 6th day of January, 2016

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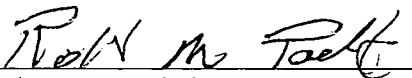
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001944

CERTIFICATE OF SERVICE

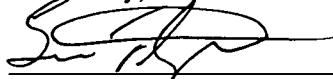
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Jason L. Mixon, at 106 Melrose Lane, Anderson SC 29626, this 6th day of January, 2016.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6th day
of January, 2016.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.