

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Eugene C. Griffith, Jr., Circuit Court Judge  
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**RECEIVED**

JAN 29 2016

**SC SUPREME COURT**

SAMUEL THOMPSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001420  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
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ATTORNEY FOR PETITIONER

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QUESTION PRESENTED

Whether defense counsel was ineffective for conveying to Petitioner Thompson that he would be sentenced to three to five years imprisonment due to his poor health since the solicitor later objected this requested sentence was too lenient, the judge therefore imposed a nine year sentence, and counsel had an obligation to convey to petitioner that the judge did not promise the three to five year sentence if petitioner pled guilty?

## STATEMENT OF FACTS

Petitioner Samuel Thompson was sixty-one years-old and he had “been a model citizen.” On the day of the tragic automobile accident he had taken his wife to physical therapy and he learned that same day that his “mom was being put in hospice because she was dying.” App. 224, l. 17 – 225, l. 20.

“He was quite distraught. And has a very hazy memory of the events that led up to the accident because he was quite upset about his mom.” He was drinking the night before the mid-day accident, and he had several “shots” after the accident which raised his breathalyzer reading. App. 225, ll. 21 – 23. His mother “died three days after he was put in jail, on that Friday following the incident.” App. 227, ll. 19 – 20.

Petitioner’s sister, Rosa Owens, told the victim’s family during the guilty plea: “I just want you to know that on the 20<sup>th</sup> when the accident happened, we had just taken our mom to hospice because we found out that she was dying. And Sam had gotten upset because he and his Mama were very close. And even while we were in her room and we found out what happened, we took time out to pray for your family.” App. 228, ll. 4 – 12.

Defense Counsel Smiley told the judge: “I don’t know that he [petitioner] can survive more than a three year sentence, Your Honor.” App. 229, l. 22 – 230, l. 1.

Petitioner Thompson would later reflect that he understood at the time of the plea that felony DUI carried a possible sentence of one to twenty-five years. However, petitioner and Smiley agreed a guilty plea would be a good idea if they could get an assurance of a three to five-year prison term in return. Since the state refused to agree to such a sentence, petitioner went to trial. App. 258, l. 2 – 263, l. 24.

During the trial, the judge summoned the attorneys to her chambers to see if a guilty plea could be negotiated. Petitioner recalled that Smiley came out of the judge's chambers, and "[h]e said if I plead [I would get] 3-5." Petitioner agreed to accept that sentence and plead guilty. App. 259, l. 15 – 260, l. 19.

During the guilty plea preceding the following occurred:

Mr. Smiley: You and I have known each other a long time, Judge.

The Court: Time flies, doesn't it?

Mr. Smiley: And I am going to ask you to forgive me being emotional today.

The Court: No, everybody is. This is a hard situation.

Mr. Smiley: I usually don't let representation of a person affect me. We got to do what we got to do. I can't say that's the case here.

I know Margaret Deas was a wonderful woman. I know that. There are wonderful people in this courtroom. I know the woman you are speaking of. I don't know her personally, but I know that woman.

And for me personally, I extend my deepest condolences, and I hope you understand when I'm speaking.

This process that we have, Your Honor, makes healing hard. Because the man that I know, Sam Thompson, and his wife and family, it's not the kind of family that wants to be standoffish, that wants to be closed down.

From day one they wanted to reach out to the Deas family, but couldn't. Which makes the system really hard. Because as his lawyer I have to tell him, you can't. You can't.

App. 223, l. 12 – 224, l. 12

During the guilty plea preceding Judge Deadra Jefferson asked Assistant Solicitor Greg

Voigt: "Does the State have any response to Mr. Smiley's request for a three-year sentence? Does

the State have any position, or is the State opposed to this request?" Voigt responded, "the State believes that's too low." App. 230, ll. 9 – 14.

The judge noted that Petitioner Thompson was in bad health, and that he was disabled. The judge asked Voigt, in response to his objection to a three year sentence: "What range does the State thinks is appropriate?" App. 230, l. 9 – 231, l. 8. Voigt maintained that he was sympathetic to Petitioner Thompson's poor health but he somehow reasoned that imposing a three-year sentence on petitioner because of his poor health prospects would be unfair to younger similarly situated people. Voigt asked for a sentence of "somewhere between seven and twelve years." App. 231, l. 15 – 232, l. 3.

The judge noted that the defense had asked for a three year sentence, and the state opposed that sentence. She said Petitioner was entitled to credit "for his lack of a criminal record," but she imposed a nine-year sentence, and a fine of \$10,000. App. 233, l. 21 – 234, l. 8.

Petitioner filed an application for post-conviction relief on September 27, 2013. App. 238 – 243. The state filed a return requesting an evidentiary hearing dated February 10, 2014. App. 246 – 261.

An evidentiary hearing was convened on February 17, 2015 before the Honorable Eugene C. Griffith, Jr. Jeremy Thompson represented petitioner and Ashleigh Wilson and Suzanne White were the Assistant Attorneys General. App. 252.

PCR counsel Thompson told Judge Griffith that petitioner was told by his trial attorney that he would receive a sentence of no more than three to five years. "[T]hat's why he stopped his trial and pled guilty." Thompson also informed the judge that if "he had known that his plea was actually an open plea for 1 to 25 years, he would not have pled guilty, he would have continued with his trial." App. 255, ll. 10-18.

Petitioner testified that Defense Counsel Smiley told him felony DUI carried a sentence of one to twenty-five years. Petitioner was steadfast that he would have accepted a guilty plea offer if it was in the three to five-year range. App. 258, ll. 2 – 21. That offer finally came during the trial. Petitioner Thompson said that Smiley told him unambiguously during the trial, after coming from the judge's chambers, that if he pled guilty he would receive a sentence of between three to five years imprisonment. That is why Petitioner Thompson pled guilty. He would have continued with his trial had this three to five-year offer not been forthcoming. App. 258, l. 17 – 261, l. 15. "Mr. Smiley told me 3 to 5 if I pled, I thought that was it, the deal." App. 261, ll. 9 – 15.

Defense Counsel Smiley conversely testified that Assistant Solicitor Voight did not make recommendations in felony DUI cases. "He lets you plead to the judge." App. 266, ll. 18 – 22.

Smiley said he explained to Judge Jefferson that: "Sam was in poor health. He's disabled, he's got bad knees, takes all kinds of medicine, that I was concerned that any kind of long-term sentence for him was a life sentence, and that Sam, I felt, would take some responsibility if I could tell him he was coming home. And so that was the discussion back in chambers." App. 268, ll. 18-25.

Smiley maintained after talking with the judge and the solicitor: "I was fairly clear it [the sentence] would be between 3-7." App. 269, ll. 10 – 23. Smiley recalled telling petitioner: "Sam, if you are going to plead, now is the time to do it, I have an indication that we are somewhere between three and seven. I would guess the worst the judge is going to do is split the baby." App. 270, ll. 7 – 20.

Smiley was "surprised very much" when Judge Jefferson "gave him nine years. I was quite shocked. It's not what I contemplated." App. 271, ll.5-7. Smiley admitted what "I expected it to be

no less than three and, quite frankly, no more than seven..." App. 272, ll. 2 – 15. "I conveyed to him what I thought I heard in our pre-trial conference." App. 275, ll. 16-21.

PCR counsel Thompson argued to the judge that a three to five "and three to seven is pretty similar." Given Petitioner's poor health, the nine year sentence was totally unexpected and petitioner had every right to feel misled. It was the *de facto* life sentence that defense counsel said he wanted to avoid. App. 278, l. 6 – 279, l. 18.

An order of dismissal was filed. The order stated that defense counsel was concerned given Petitioner's health that "any long term prison sentence would be a life sentence for the Applicant." App. 284. "Counsel testified the trial judge indicated she could accommodate the range preferred by the Applicant and the State." App. 284 – 285.

The order also stated that defense counsel thought the Court would sentence Petitioner to between three years and seven years. "Counsel testified the Applicant relied on his advice and pled guilty. He testified he was shocked at the Court's nine-year sentence." App. 284 – 285.

The order concluded, *citing Wolfe v. State*, 326 S.C. 158, 485 S.E.2d 367 (1997), that Petitioner's belief regarding his sentence was "wishful thinking." The PCR judge therefore denied relief. App. 289 – 290.

This petitioner for writ of certiorari follows.

## ARGUMENT

Defense counsel was ineffective for conveying to Petitioner Thompson that he would be sentenced to three to five years imprisonment due to his poor health since the solicitor later objected this requested sentence was too lenient, the judge therefore imposed a nine-year sentence, and counsel had an obligation to convey to petitioner that the judge did not promise the three to five-year sentence if petitioner pled guilty.

As seen, the PCR court relied on Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997), in denying petitioner relief. However, the facts of this case are readily distinguishable from the facts of Wolfe v. State. In Wolfe, the guilty plea lawyer, in open court, said: “[J]ust so the record is correct, Your Honor, I did indicate to the defendant here, whether rightly or wrongly, that his counsel, trying to do my job, Your Honor, I did explain to the defendant that it would be my hope that by, as I say, standing up here like a man and admitting to the wrongful act that took place and perhaps that the court may take that into consideration as some mitigation towards his sentence. But *I told him there is no promise from the Court or anything like that, and there is no negotiations from the State at all.*” Immediately after counsel’s statement, the judge also told Defendant Wolfe that he was not bound by anything until he heard the facts of the case. Defendant Wolfe responded that he understood. Under those circumstances, this Court held that Wolfe could not assert he was misled by trial counsel about his possible sentence. Wolfe v. State, 326 S.C. at 161–162, 485 S.E.2d at 369 (emphasis added).

PCR counsel in this case argued that a three to five-year sentence or a three to seven year sentence was clearly contemplated, and it was conveyed to petitioner. Even Defense Counsel Smiley acknowledged he told Petitioner Thompson that he should expect a sentence of between three to seven years.

Given Petitioner's undisputed poor health, a nine-year prison term was substantially different. Petitioner's very poor health made that nine-year sentence a life sentence for the automobile accident that the state alleged alcohol contributed to here. Petitioner was sixty-one years old at the time of the guilty plea. He is presently sixty-four years old, and in poor health in the Department of Corrections.<sup>1</sup>

This case is similar to Alexander v. State, 303 S.C. 539, 402 S.E.2d 454 (1991), where the sentencing advice from defense counsel was essentially undisputed. In Alexander, the defendant and the interpreter both testified that defense counsel told the defendant he was facing a life sentence if he did not plead guilty to trafficking in cocaine. This Court found that because the sentencing advice was erroneous the PCR court's ruling denying Alexander relief had to be reversed, and the guilty plea vacated. See Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989). Although an attorney does not have to give advice on a sentence outside of the minimum and maximum sentences that the law provides, a lawyer is ineffective if he gives sentencing advice or parole eligibility advice that is erroneous.

Here, Petitioner Thompson was in poor health, and he testified he would not have pled guilty had he known the sentence would be outside of the three to five (or even the three to seven year range) that defense counsel told him would be imposed. Petitioner said he would have gone to trial instead of pleading guilty had he known that a nine-year sentence could be imposed. Consequently, the erroneous sentencing advice resulted in what defense counsel agreed was a *de facto* life sentence for Petitioner. See Hill v. Lockhart, 474 U.S. 52 (1985).

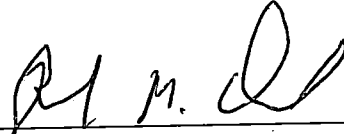
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<sup>1</sup> SCDC Inmate Search Detailed Report on the SCDC Incarcerated Inmate website.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on this issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. M. Dudek", written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of January, 2016.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO CHARLESTON COUNTY  
EUGENE C. GRIFFITH, JR., CIRCUIT COURT JUDGE

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SAMUEL THOMPSON,

PETITIONER,

V.

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APPELLATE CASE NO. 2015-001420

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PETITION TO BE RELIEVED AS COUNSEL

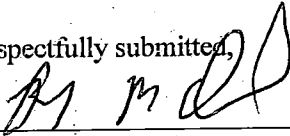
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Counsel for Samuel Thompson, Jr. states:

1. He is an Chief 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 February 17, 2015. 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 Thompson, Jr..

Respectfully submitted,

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender  
ATTORNEY FOR PETITIONER

This 29th day of January, 2016

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IN THE SUPREME COURT

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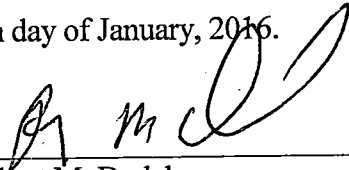
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CERTIFICATE OF SERVICE

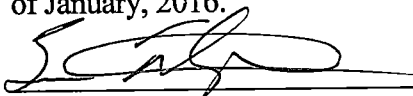
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Samuel Thompson, Jr., #124650, at Macdougall Correctional Institution this 29th day of January, 2016.

  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day  
of January, 2016.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 30, 2022.