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SC SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County

Tanya A. Gee, The Honorable Tanya A. Gee

JUMAR MCLEOD

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002661

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel was ineffective in failing to file a notice of appeal?

ARGUMENT

Plea counsel was ineffective in failing to file a notice of appeal.

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 the order of dismissal stated that counsel only had a constitutional duty to consult with a defendant about an appeal when there is reason to think either: (1) that a rational defendant would want to appeal; or (2) that this particular person reasonably demonstrated to counsel that he was interested in appealing, citing Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029 (2000). (App. p. 60 – p. 61) But States can impose stricter requirements. State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987). As far back as White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) the court held that counsel can not rest on assumptions. He should be certain to make sure his client is fully aware of his appeal rights and in the absence of an intelligent waiver by the client he should pursue an appeal on the client’s behalf. In Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989), the court wrote that an indigent defendant has the right to be informed of an appeal and the manner and method for taking the appeal. In Matter of Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991), the court wrote that after a client is convicted and sentenced, trial counsel in all cases has a duty to make certain that his client is fully aware of the right to appeal and ascertain whether his client wishes to appeal. Counsel in this case made no effort to determine what his client wished to do.

CONCLUSION

Petitioner's guilty plea should be reversed.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of March, 2016.

STATEMENT OF ISSUES ON APPEAL

Whether petitioner's guilty plea complied with the mandates set forth in Boykin v. Alabama?

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SUMTER COUNTY
TANYA A. GEE, THE HONORABLE TANYA A. GEE

JUMAR MCLEOD

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2015-002661

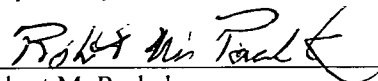
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jumar McLeod 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 November 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 Jumar McLeod.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 16th day of March, 2016

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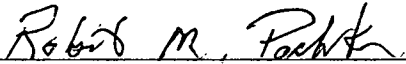
STATE OF SOUTH CAROLINA,

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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 Daniel Gourley, Esquire and Jumar McLeod, #315368, at the Sumter/Lee Detention Center, 1250 Winkles Road, Sumter, SC 29153, this 16th day of March, 2016.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day
of March, 2016.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1, 2026.