

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County
Maite Murphy, Circuit Court Judge

RECEIVED

JUN 30 2016

SC SUPREME COURT

MICHAEL ALLEN CARTER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002510

JOHNSON PETITION FOR WRIT OF CERTIORARI

DAVID ALEXANDER
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

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ISSUE PRESENTED

Whether petitioner's sentence is illegal because his probation sentence, when added to his sentence of imprisonment, exceeds the statutory maximum sentence for his offense?

STATEMENT

On March 11, 2013, petitioner was indicted for criminal domestic violence of a high and aggravated nature (“CDVHAN”). App. 123. On August 5, 2013, petitioner pled guilty before the Honorable Kristi Lea Harrington. App. 1. Kyle Leo Ward represented the State. App. 2. Ashley D. Chisholm represented petitioner. App. 2. Judge Harrington deferred sentencing. App. 13, ll. 1 – 3. On November 13, 2013, Judge Harrington held a sentencing hearing. App. 15. Judge Harrington sentenced petitioner to ten years’ imprisonment, suspended upon the service of eight years’ imprisonment and three years’ probation. App. 35, ll. 11 – 17.

On December 23, 2013, petitioner filed a PCR application. App. 40. On May 20, 2015, a hearing was held before the Honorable Maite Murphy. App. 57. Rodney D. Davis represented petitioner. App. 57. J. Clayton Mitchell represented the State. App. 57. On October 13, 2015, Judge Murphy denied petitioner’s application. App. 112. This petition follows.

ARGUMENT

Petitioner's sentence is illegal because his probation sentence, when added to his sentence of imprisonment, exceeds the statutory maximum sentence for his offense.

Petitioner received an illegal sentence. At the time of petitioner's offense, the maximum penalty for CDVHAN was ten years. See 2005 S.C. Acts 166 (eff. Jan. 1, 2006). Compare current S.C. Code Ann. § 16-25-65(B) (providing for maximum sentence of twenty years). Judge Harrington sentenced petitioner to ten years' imprisonment, suspended upon the service of eight years' imprisonment with three years' probation. App. 35, ll. 11 – 17. The minimum sentence petitioner can serve is eleven years (eight years in prison and three years of probation)—one year more than the maximum sentence provided by the statute. Potentially, petitioner could serve a sentence of thirteen years—three more than the maximum. If petitioner is released after eight years and is revoked at the end of his probation, he will then serve two additional years' imprisonment for a total of thirteen years.

Petitioner raised this issue at the PCR hearing. App. 78, ll. 3 – 22. Petitioner testified that he had “an illegal sentence . . . because my sentence totals 11 years on a maximum of a 1 to 10. App. 78, ll. 17 – 20. The PCR Act expressly authorized petitioner to raise the issue of whether his “sentence exceeds the maximum authorized by law.” S.C. Code Ann. § 17-27-20(A)(3).

The PCR court cited no specific authority for its denial of petitioner's claim. App. 119. First, the court cited the statute governing probation revocation. S.C. Code Ann. § 24-21-460. This statute authorizes circuit judges to revoke probation in part or in full. Id. It does not give the circuit court power to issue a sentence that exceeds the statutory maximum. Id. In fact, a

circuit court only has power over a defendant pursuant to this statute “so long as all of his sentence has not been served and the period of probation has not expired.” Id.

Nor do the other statutes authorizing the suspension of sentences and giving the power to impose probation allow sentences exceeding the statutory maximum for the offense. S.C. Code Ann. § 24-21-460, *et seq.* Section 24-21-460 contains the general grant of power to impose probation, but says nothing about whether a probationary sentence can extend past the statutory limit. S.C. Code Ann. § 24-21-460. Nothing in the section governing the conditions of probation address this issue. S.C. Code Ann. § 24-21-430. The statute governing the length of probation imposes a general five-year limit on probation, but is silent on whether probation can extend past the statutory maximum for an offense. S.C. Code Ann. § 24-21-440 (“The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended within the above limit.”). Because these statutes are general, then the specific statutes setting the maximum length of a sentence must control. See Atlas Food Sys. & Servs. v. Crane Nat. Vendors, 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995) (“The general rule of statutory construction is that a specific statute prevails over a more general one.”).

The lone South Carolina case cited by the PCR court (with a “Cf.” signal) supports petitioner’s argument. App. 119 citing Sanders v. MacDougall, 244 S.C. 160, 135 S.E.2d 836 (1964). In Sanders, the defendant received a five-year sentence suspended upon the service of three years’ imprisonment and five years’ probation. Sanders at 161, 135 S.E.2d at 836-37. After serving approximately a year and a half in prison, the defendant was paroled. Id. at 161, 135 S.E.2d at 837. The defendant continued on parole until the original three-year suspended

sentence expired. Id. After the three years had passed, the parole board revoked and attempted to send the defendant back to prison. Id.

The Court ruled that the defendant could not be sent back to prison because the “unsuspended portion of petitioner’s sentence expired.” Id. at 164, 135 S.E.2d at 837. “Had he never been paroled, he would have been entitled to a discharge by that date.” Id. The Court reasoned that a “prisoner on parole continues to serve his sentence outside the prison walls.” Id. If, as in Sanders, a defendant could not continue on parole past the unsuspended portion of his prison sentence, it follows that a defendant cannot serve probation past the statutory maximum sentence. Furthermore, Sanders only deals with the expiration of the trial court’s sentence, not the statutory maximum set by the Legislature for the defendant’s offense (the opinion does not state the defendant’s crime). Petitioner’s argument is stronger than the defendant’s in Sanders because his sentence extends past the maximum sentence allowable by law.

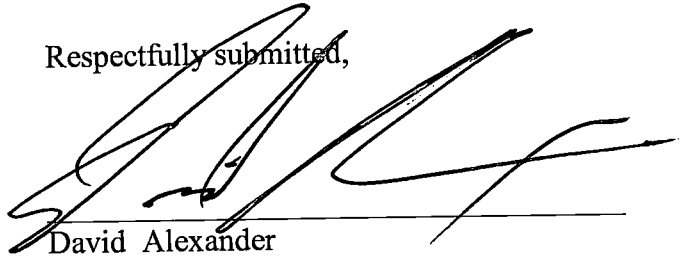
For purposes of calculating whether petitioner’s sentence exceeds the statutory maximum, the term of probation counts just as the unsuspended portion of imprisonment. Thompson v. S.C. Dep’t Pub. Safety, 335 S.C. 52, 55-56, 515 S.E.2d 761, 763 (1999). “Probation, a suspension of the period of incarceration, is clearly part of a criminal defendant’s “term of imprisonment,” as is actual incarceration, parole, and the suspended portion of a sentence or ‘supervised furlough.’” Id. (internal citations omitted). Because “probation” is included within the definition of “imprisonment,” then the CDVHAN statute’s limitation of a sentence to ten years’ imprisonment controls and petitioner’s sentence exceeds the maximum allowed. See State v. Picklesimer, 388 S.C. 264, 695 S.E.2d 845 (2010). But see State v. Wickenhauser, 309 S.C. 377, 382, 423 S.E.2d 344, 347 (1992) (“Although Wickenhauser’s term of imprisonment plus the probationary period exceeds five years, any actual period of

incarceration under this sentence will not exceed the maximum statutory limit of five years.”). Therefore, this Court should reverse the PCR court and remand for resentencing within the limits of the statutory maximum. See State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999).

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate relief of remanding for resentencing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of June, 2016.

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IN THE SUPREME COURT

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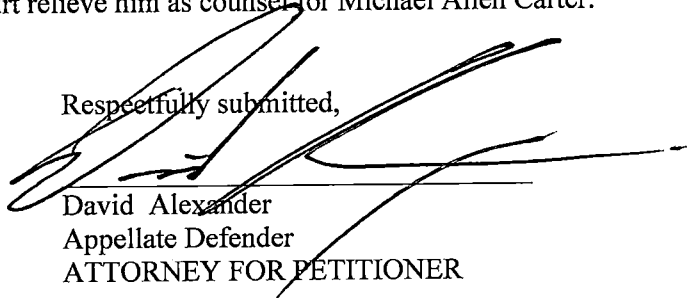
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael Allen Carter 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 May 20, 2015 (PCR Hearing). 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 Michael Allen Carter.

Respectfully submitted,



David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 30th day of June, 2016

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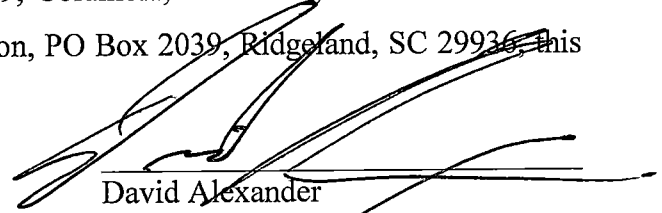
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case have been served on Clay Mitchell, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Michael Allen Carter, #357867 at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 30th day of June, 2016.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day
of June, 2016

 (L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.