

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

JOE LOUIS BROWN

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S.C. SUPREME COURT
PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APELLATE CASE NO. 2016-001092

JOHNSON PETITION FOR WRIT OF CERTIORARI

Robert M. Pachak
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 giving petitioner incorrect sentencing advice?

STATEMENT

On April 7, 2014, petitioner appeared before the Honorable Benjamin H. Culbertson in Charleston County and pled guilty to two (2) counts of unlawful carry of a pistol, armed robbery, two (2) counts of possession of a firearm or knife, attempted strong armed robbery, and attempted robbery. Sentences totaling eighteen (18) years were imposed. Aaron Mayer, Esquire was plea counsel. Burns Wetmore, Esquire and Kelly Young, Esquire were the assistant solicitors. (App. p. 1-62)

Petitioner filed an application for post-conviction relief on August 28, 2014. (App. p. 63-71) Respondent filed a return dated May 29, 2015. (App. p. 72-77) An evidentiary hearing was held on December 17, 2015 before the Honorable Deadra L. Jefferson. Petitioner was represented by James Kristian Falk, Esquire. Respondent was represented by James Rutledge Johnson, Assistant Attorney General. Petitioner and plea counsel both testified at the hearing. (App. p. 78-132) A second hearing was held on June 13, 2016, in which Melvin Gathers and Burns Wetmore testified. (App. 133-181) On May 16, 2016, Judge Jefferson issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 182-194)

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, 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.

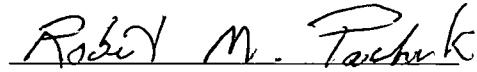
Early on at his guilty plea petitioner stated that he was there because he was promised 10 years on all of his charges. (App. p. 3, ll. 24-25) His attorney guaranteed this. (App. p. 4, ll. 2-4; p. 5, l. 21-p. 6, l. 1; p. 6, ll. 18-21) The court, however, was under the impression petitioner was pleading to a negotiated sentence of 18 years. (App. p. 7, ll. 12-17) Petitioner was convinced he was pleading to a 10 year sentence. (App. p. 8, l. 19 – p. 9, l. 18) Plea counsel never denied promising petitioner a 10 year sentence during the plea.

While petitioner did eventually plead guilty to an 18 year negotiated sentence; that does not mean he was not promised 10 years by plea counsel. At the evidentiary hearing petitioner again said plea counsel promised him 10 years to plead guilty. (App. p. 84, ll. 13-16; p. 85, ll. 20-25; p. 86, l. 23-87, l. 8; p. 88, l. 1-15)

As noted above plea counsel can be held ineffective for giving incorrect sentencing advice. Hinson v. State, Ray v. State.

CONCLUSION

Petitioner's guilty plea should be vacated due to counsel's ineffective assistance.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of October, 2016.

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JOE LOUIS BROWN

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V.

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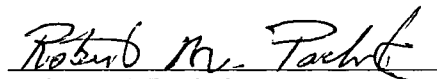
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joe Louis Brown states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's trial before Judge Deadra L. Jefferson, which was held on December 17, 2015, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Joe Louis Brown.

Respectfully Submitted,



Robert M. Pachak


Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of October, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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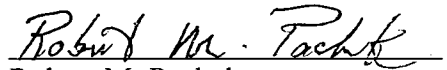
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RESPONDENT


APELLATE CASE NO. 2016-001092

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Ruston Neely, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Joe Louis Brown, #359475, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 26th day of October, 2016.


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 26th day of October, 2016.

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