

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Bamberg County

Honorable J. Mark Hayes, Circuit Court Judge

LEWIS GARVIN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002442

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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The PCR court erred in concluding defense counsel was not ineffective where counsel erroneously advised petitioner, who received a forty-year prison sentence for a bank robbery, that he could receive a life without parole sentence if counsel filed a motion to reconsider, where counsel admitted he was not aware of any case where a defendant received “more time” after filing a motion to reconsider, and the state already had waived its right to seek an LWOP sentence in petitioner’s case6

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ISSUE PRESENTED

Whether the PCR court erred in concluding defense counsel was not ineffective where counsel erroneously advised petitioner, who received a forty-year prison sentence for a bank robbery, that he could receive a life without parole sentence if counsel filed a motion to reconsider, where counsel admitted he was not aware of any case where a defendant received “more time” after filing a motion to reconsider, and the state already had waived its right to seek an LWOP sentence?

STATEMENT

Petitioner was indicted at the October 20, 2014 term of the Bamberg County Grand Jury for the offenses of armed robbery, entering a bank with intent to steal, conspiracy, and possession of a weapon during a violent crime. App. 4, l. 7 – 5, l. 12; App. 84 – 91.

It was undisputed that all of the charges -- including the armed robbery and entering a bank with intent to steal charge -- arose from the June 5, 2014 robbery of the Enterprise Bank in Denmark, South Carolina. App. 15, l. 13 – 18, l. 17.

Petitioner appeared on November 30, 2015 before the Honorable Roger Young, and pled guilty to all of the charges with the exception of the possession of a weapon charge which was dismissed. Jason Price represented petitioner. Assistant solicitors David Miller and Jack Hammack represented the state. App. 1.

The state recommended a sentence of forty years imprisonment unless petitioner cooperated, and testified against a co-defendant at his trial the next day. App. 4, ll. 7-12. The solicitor said although this was “a lot of time,” he reasoned that the state had withdrawn its notice of intent to seek a life sentence which was based on petitioner’s two prior armed robbery convictions. App. 17, l. 18 – 19, l. 4.

Defense counsel requested that petitioner be sentenced after the co-defendant’s trial. The state agreed with that procedure, and repeated that if petitioner cooperated, the sentencing recommendation may be different following the co-defendant’s trial. App. 19, l. 6 – 20, l. 13.

Following the co-defendant’s trial on December 3, 2015, petitioner’s guilty plea proceeding reconvened. App. 20, ll. 5-15. Assistant Solicitor Miller alleged that petitioner was not “truthful with his testimony today, at a minimum; that, in fact, he knows exactly who was in that car with him and he knows that there was not a fourth person in that car with them. But that

doesn't comport with his claim that he was being forced into participating in this crime." The assistant solicitor therefore said he was going to "stand by" the forty-year recommendation. App. 20, l. 16 – 21, l. 17.

Defense counsel Price told the judge that petitioner was a graduate of A.C. Flora High School in Columbia in 1998, that he spent four years in the Navy, and he was in the Navy Reserves. Petitioner had mental problems, but he still had done well until his prior armed robbery convictions. Counsel requested a twenty-five year concurrent sentence given petitioner's military background, and his mental problems. App. 21, l. 19 – 23, l. 8.

The judge responded told petitioner that he believed "you backed off on your story, sounded to me like you wanted to say today you were under duress." The judge sentenced petitioner to thirty years imprisonment for armed robbery, and he imposed a ten-year *consecutive* sentence for entering a bank with intent to steal, even though both charges arose from the same conduct. App. 24, ll. 5-21.

Petitioner filed an application for post-conviction relief on August 29, 2015. App. 27 – 33. The state filed a return dated May 25. App. 34 – 39.

An evidentiary hearing was convened on September 19, 2017, before the Honorable J. Mark Hayes. Lance Boozer represented petitioner. The assistant attorney general was Julie A. Coleman. App. 40.

PCR counsel Boozer told the PCR judge that petitioner did not want his guilty plea vacated. Rather, he wanted the PCR court to rule that a motion to reconsider should have been filed so that a lesser sentence could be imposed, and resentencing should be his relief. App. 43, l. 19 – 46, l. 4.

Petitioner testified at the PCR hearing that he had wanted counsel to file a motion to reconsider his sentence. App. 51, l. 15 – 54, l. 12. Petitioner believed he could have received a sentence of less than forty years if counsel had filed the motion. Indeed, PCR counsel noted that that plea counsel had requested a sentence of twenty-five years during the guilty plea proceeding. App. 54, ll. 1-12; App. 55, l. 22 – 57, l. 4.

Petitioner said he hoped that one of the charges could be “dropped.” In the context of this record, it appeared petitioner was reasoning that he should have gotten concurrent time -- rather than consecutive time -- where the armed robbery and entering a bank with intent to steal charges arose from a single incident, the same conduct. App. 56, l. 22 – 57, l. 18.

Plea counsel Jason Price testified petitioner was found competent prior to the plea, and that there was videotaped evidence against petitioner regarding the bank robbery. In addition, petitioner also gave a statement implicating himself in the robbery. App. 63, l. 8 – 64, l. 21.

Counsel Price noted that petitioner “was looking at life without parole because he had a previous armed robbery conviction . . . he was going to plead to forty years, but if he cooperated with the state with his testimony, then that sentence was going to be reduced. And it would come up after the plea and his co-defendant’s trial.” App. 65, l. 8 – 69, l. 13.

Counsel Price confirmed that he had a conversation with petitioner about “the risk of filing a motion to reconsider and potentially getting LWOP based on that motion, and that conversation had a great deal of influence over petitioner not wanting to pursue the motion to reconsider.” App. 70, l. 19 – 71, l. 20. Counsel said he did advise petitioner he could receive a life without parole sentence if he made a motion to reconsider, and counsel added this would mean “everything opening back up” for his case. Defense counsel admitted he was not aware of

a judge ever giving a defendant a greater sentence after a motion to reconsider. App. 69, ll. 14-25.

An order of dismissal dated October 19, 2017 was issued. The order stated that: "Plea Counsel testified that Applicant asked him to file a motion to reconsider after he pled guilty but before he was sentenced, but Applicant changed his mind after his co-defendants were found guilty at trial." The order also said that plea counsel reasoned the judge would not have granted his motion to reconsider and reduced petitioner's sentence if he had filed the motion. App. 79. The PCR court also reasoned the fact that there was "overwhelming evidence of Applicant's guilt" was somehow relevant to the motion to reconsider issue. App. 82.

From this order, petitioner is seeking a writ of certiorari.

ARGUMENT

The PCR court erred in concluding defense counsel was not ineffective where counsel erroneously advised petitioner, who received a forty-year prison sentence for a bank robbery, that he could receive a life without parole sentence if counsel filed a motion to reconsider, where counsel admitted he was not aware of any case where a defendant received “more time” after filing a motion to reconsider, and the state already had waived its right to seek an LWOP sentence in petitioner’s case.

Defense counsel admitted he advised petitioner that he could receive a sentence of life without parole if he moved to reconsider the forty-year prison sentence imposed by Judge Roger Young. Defense counsel acknowledged that he had practiced law since 1998, and that he had never seen a case where a defendant received a more severe sentence after making a motion to reconsider the sentence imposed.

Petitioner received a ten year consecutive sentence for entering a bank with intent to steal where he had been sentenced to thirty years imprisonment for armed robbery – the same bank robbery incident. Two points: First, The PCR judge erred by not focusing on the erroneous sentencing advice petitioner received which caused petitioner to allegedly no longer request that counsel file a motion to reconsider.

Second, the PCR judge’s conclusion – and plea counsel’s as well – that because there was allegedly overwhelming evidence of petitioner’s guilt, that that was further evidence that the failure to file a motion to reconsider was reasonable. Again, the judge imposed consecutive punishments on two different indictments for the same conduct. See State v. Greene, Op. No. 27802, Shearouse’s Adv. Sh. #21, at 18-47 (filed May 23, 2018). Although the state had the right

to proceed on different charges for the same bank robber and conduct, consecutive sentences, respectfully, should not have been imposed.

In Robinson v. State, 422 S.C. 79, 810 S.E.2d 32 (2018), this Court found that trial counsel provided deficient sentencing advice where he advised Robinson to plead guilty to avoid a sentence of twenty-five years to life imprisonment. That erroneous sentencing advice was based on a new law that did not apply to Robinson's sentencing exposure at the time he committed his crime.

This Court found that Robinson was prejudiced by the trial counsel's erroneous sentencing advice, and that the guilty plea colloquy did not cure the deficient advice or remove any prejudice. This Court noted that when a defendant enters a guilty plea upon the advice of his counsel, the voluntariness of the guilty plea depends upon whether counsel's advice was "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985) quoting McMann v. Richardson, 397 U.S. 759, 771 (1970).

Similarly, in Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991), this Court found plea counsel provided ineffective assistance of counsel where petitioner pled guilty based on the erroneous advice that he could be sentenced to life imprisonment if he proceeded to trial. That sentencing advice did not accurately reflect the defendant's sentencing exposure.

In this case, petitioner agreed counsel should not file a motion to reconsider because counsel erroneously advised him the judge could impose a sentence of life without parole. Life without parole was not sought by the state in this case, and the judge would not have imposed an LWOP sentence following a motion to reconsider.

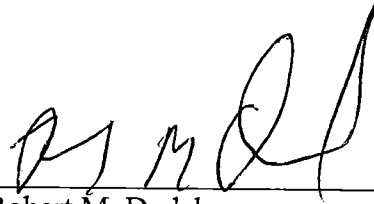
Further, counsel admitted that he gave this LWOP advice even though he was not aware of any case in which a defendant received a harsher sentence for making a motion to reconsider the sentence.

Petitioner's waiver of his right to move to reconsider the harsh forty-year sentence he received in consecutive time for the same conduct should not be considered a voluntary and intelligent waiver of the right to that motion to reconsider his sentence. Cf. Boykin v. Alabama, 395 U.S. 238, 243-244 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991).

Since petitioner was given erroneous sentencing advice pertaining to his right to move to reconsider his sentence, he should be entitled to resentencing as his PCR remedy. Cf. Ray v. State, 303 S.C. 374, 376, 401 S.E.2d 151, 152-153 (1991).

CONCLUSION

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

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 22nd day of June, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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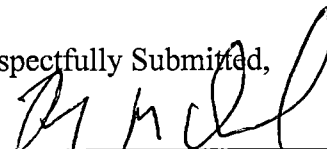
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Lewis Garvin states:

1. He is Chief 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 post-conviction hearing before Judge J. Mark Hayes, which was held on September 19, 2017, 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 Lewis Garvin.

Respectfully Submitted,

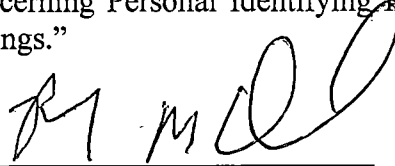


Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 22nd day of June, 2018.

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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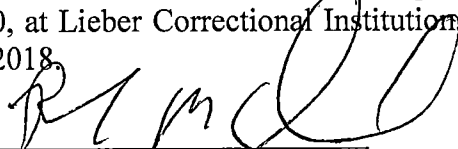
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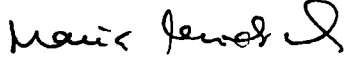
CERTIFICATE OF SERVICE

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 Julie Coleman, 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 Lewis Garvin, #272550, at Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472, this 22nd day of June, 2018.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 22nd day of June, 2018.



(L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023