

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to York County

Honorable J. Cordell Maddox, Circuit Court Judge

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S.C. SUPREME COURT

JOHN BROOKS HALL DUNCAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000712

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 gave petitioner incorrect sentencing advice?

STATEMENT

On October 30, 2015, petitioner appeared before the Honorable Daniel D. Hall in York County and pled under North Carolina v. Alford to seven charges of solicitation to commit a felony. He was sentenced to ten year concurrent terms on six of the charges and to an eight year consecutive term on the seventh charge. Melissa Inzerillo, Esq. was plea counsel. Christopher Epting, Esq. was the assistant solicitor. (App. p. 1- p. 40).

Petitioner filed an application for post-conviction relief on October 26, 2016. (App. p. 41- p. 47). Respondent filed a return dated February 23, 2017. (App. p. 48 -p. 52). An evidentiary hearing was held on November 8, 2017, before the Honorable J. Cordell Maddox, Petitioner was present and was represented by Justin Hunter, Assistant Attorney General. Both Petitioner and plea counsel testified at the hearing. (App. p. 53- p. 75). On March 30, 2018, Judge Maddox issued an order denying and dismissing the application for post-conviction relief. (App. p. 76- p. 82).

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.

Petitioner testified at the evidentiary hearing about the sentence advice plea counsel gave him:

Q What other concerns do you have?

A Well, she – when I took the North Carolina vs. Alford deal, she informed me that, you know, I would be guaranteed tern years, not 18. She said when you go in there, they’re going to give you ten years, I’ve already talked to the solicitor and the judge, I come in the courtroom, I plead guilty, I do everything she says to do, and I get 18.

Q Okay. What about – so you were under the standing (sic) you were getting ten years. Is that right?

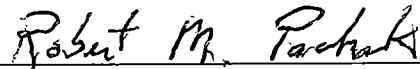
A Yes, sir.

(App. p. 59, lines 8-17).

As noted above, giving incorrect sentencing advice constitutes ineffective assistance of counsel. Hinson v. State, Ray v. State, Morris v. State.

CONCLUSION

Petitioner guilty plea should be vacated.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of July, 2018.

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IN THE SUPREME COURT

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for John Brooks Hall Duncan 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 post-conviction relief hearing before Judge J. Cordell Maddox, which was held on November 6, 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 John Brooks Hall Duncan.

Respectfully Submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 16th day of July, 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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This 16th day of July, 2018.

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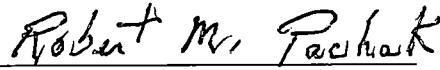
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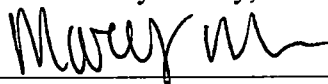
CERTIFICATE OF SERVICE

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 Janell Gregory, 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 John Brooks Hall Duncan, #344423, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 16th day of July, 2018.



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 16th day of July, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.