

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable George M. McFaddin, Circuit Court Judge

FLOYD G. OWEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001542

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Jun 07 2023

S.C. SUPREME COURT

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The lower court erred denying PCR where: 1) defense counsel failed to present sufficient mitigation at petitioner’s sentencing hearing; 2) defense counsel was unsure how long prior to petitioner’s sentencing he submitted the presentencing report to the plea court; and 3) defense counsel admitted at PCR he failed to emphasize the report, which contained significant information regarding petitioner’s history and complex relationship with the decedent.3

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ISSUE PRESENTED

Whether the lower court erred denying PCR where: 1) defense counsel failed to present sufficient mitigation at petitioner's sentencing hearing; 2) defense counsel was unsure how long prior to petitioner's sentencing he submitted the presentencing report to the plea court; and 3) defense counsel admitted at PCR he failed to emphasize the report, which contained significant information regarding petitioner's history and complex relationship with the decedent?

STATEMENT

On December 6, 2017, a Richland County grand jury indicted petitioner for criminal conspiracy, murder, first degree burglary, and possession of a weapon during the commission of a violent crime. App. 109-16. On August 20, 2019, petitioner pled guilty as indicted before the Honorable Deandrea Benjamin. App. 1-12. Rhodes Bailey represented petitioner and Vance Eaton, assistant solicitor, represented the state. App. 1. Judge Benjamin deferred sentencing until after petitioner's testimony in his co-defendant, Charles Barham's, trial.

On November 18, 2019, Judge Benjamin sentenced petitioner to an aggregate term of forty-eight years' imprisonment. App. 29, 1. 18-30, 1. 9; 117-20. Defense counsel, Rhodes Bailey, filed a motion to reconsider petitioner's sentence. Judge Benjamin denied the motion without a hearing. App. 32-33.

Thereafter petitioner filed an application for PCR. App. 34-39; 47-48. On May 25, 2022, an evidentiary hearing was held before the Honorable George McFaddin, Jr. App. 49-85. Ola Johnson represented petitioner and D. Russell Barlow, II, assistant attorney general, represented the state. App. 49.

On October 3, 2022, Judge McFaddin signed an order denying PCR. App. 86-108. The court found defense counsel was not ineffective for failure to provide the plea court with the presentencing report in a timely manner so that the plea court could review it and consider all petitioner's mitigation before sentencing. App. 103. The PCR court found petitioner presented no evidence or testimony as to how this alleged error prejudiced him or how defense counsel was deficient. The court further found that, whether the plea court having the report earlier would have impacted petitioner's sentencing, was "mere speculation." App. 103-04.

This petition follows.

ARGUMENT

The lower court erred denying PCR where: 1) defense counsel failed to present sufficient mitigation at petitioner's sentencing hearing; 2) defense counsel was unsure how long prior to petitioner's sentencing he submitted the presentencing report to the plea court; and 3) defense counsel admitted at PCR he failed to emphasize the report, which contained significant information regarding petitioner's history and complex relationship with the decedent.

Relevant facts

While being questioned by law enforcement about an unrelated incident petitioner confessed to having killed Charles Kusko in 2015. App. 4, l. 23-5, l. 11; 23, ll. 9-13; 69, l. 13-70, l. 8. Petitioner also gave important information to law enforcement regarding his co-defendant, Charles Barham, and testified for the state in Mr. Barham's trial. App. 23, ll. 21-25; 26, ll. 2-9; 27, ll. 4-25; 29, ll. 9-17; 71, l. 24-72, l. 13.

During petitioner's sentencing hearing defense counsel told Judge Benjamin that petitioner had a difficult life, "which was emphasized in the report," including having been "taken advantage of sexually." App. 23, ll. 14-17; 25, ll. 2-6. Counsel also described petitioner as remorseful. He explained to the court that because of his remorse petitioner had done everything possible to help the state obtain a conviction in Mr. Barham's case. App. 23, ll. 18-25; 26, l. 18-27, l. 3. Counsel asked the court to consider the minimum sentence of thirty years' imprisonment where petitioner pled without negotiation or recommendation and cooperated with the state. App. 27, ll. 11-18. Ultimately, Judge Benjamin sentenced petitioner to forty-eight years' imprisonment. App. 29, ll. 1-23.

Petitioner testified at the evidentiary hearing that Rhodes Bailey represented him. App. 53, ll. 9-15. He explained that while he understood *generally* about his guilty plea there were

details, he did not fully comprehend. App. 53, l. 16-55, l. 19. Petitioner understood he had done something wrong and that he would be admitting guilt and taking responsibility for his actions at the guilty plea. App. 54, ll. 1-7. Petitioner contended that the solicitor indicated to him that he would receive a lesser sentence than his co-defendant, Barham, which ultimately proved untrue. App. 55, ll. 20-25. Petitioner did not understand that, while counsel was *requesting* a thirty-year sentence, he was not *guaranteed* to receive that sentence. App. 55, ll. 11-25; 59, ll. 23-25; 65, ll. 12-18.

Petitioner acknowledged he was not coerced or forced to plead guilty, but he said that he did so because it was the right thing to do, and because he was fearful of receiving a life-sentence. However, petitioner contended the plea court was not informed by defense counsel regarding the full context surrounding his actions that resulted in the death of Kusko. App. 60, ll. 1-4. Petitioner contended, regardless of his efforts to take responsibility for his actions and cooperate fully with the state, he received the equivalent of a life-sentence. App. 60, ll. 13-20.

Defense counsel, Rhodes Bailey testified he was appointed in petitioner's case and that they met frequently during his representation. App. 68, l. 12-69, l. 6. He said that petitioner was uninterested in going to trial. App. 76, ll. 7-13. Therefore, counsel singularly focused on "extensive mitigation research" in petitioner's case and tried to negotiate a recommended sentence with the state in exchange for petitioner's cooperation in their prosecution of his co-defendant, Barham. App. 71, l. 6-73, l. 14; 74, ll. 1-11; 76, l. 13-77, 10. He stated that in his discussion of the case with the solicitor the solicitor told him that he believed Barham, was the principal actor in the plan to kill Kusko. App. 72, ll. 16-24. Counsel testified he did his best to leverage petitioner's cooperation with the state into a deal but that ultimately there was no official deal with the state. App. 73, ll. 8-22. He admitted he wished he had gotten more

assurance from the state regarding petitioner's sentencing and that he was disappointed and surprised that petitioner received such a harsh sentence. App. 74-75.

Counsel testified that petitioner had a difficult history with the victim that was complicated and resulted in petitioner's having been traumatized. App. 77, ll. 4-9. He admitted that he should have put more emphasis on the report during sentencing and put more evidence of mitigation on the record. App. 77, ll. 10-16.

Discussion

While counsel is not required to investigate or submit every imaginable line of mitigating evidence, a decision not to investigate must be reasonable. Strategic choices made after less than complete investigation are only reasonable if reasonable professional judgment supports the limits on the investigation. *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2009) (holding counsel's investigation as to mitigation evidence was inadequate and incomplete).

Here, defense counsel testified he did extensive mitigation investigation and that there was significant evidence of mitigation to present to the plea court. *See Judge v. State*, 312 S.C. 554, 471 S.E.2d 143 (1996) (a defendant is entitled to effective assistance of counsel during plea negotiations). However, counsel was deficient for admittedly failing to present that evidence during petitioner's sentencing.

Additionally, defense counsel failed to call any witnesses in mitigation or discuss the presentencing report with the plea court in order to obtain a more favorable sentence for petitioner who pled guilty as indicted without recommendation or negotiation. During the evidentiary hearing defense counsel testified there was evidence of mitigation and that most of his work in petitioner's case was centered on uncovering this evidence. Defense counsel

admitted that he should have emphasized the information in the presentencing report to the plea court during the sentencing.

Counsel advised petitioner to plead guilty to conspiracy, murder, and first-degree burglary, which are all, standing alone, very serious crimes without any benefit from the state on the *hope* that there would be some leniency shown by the court. Like a capital case where guilt has already been established prior to the sentencing phase, petitioner was entitled to have evidence presented in mitigation during sentencing. *See Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008) (Trial counsel's failure to adequately investigate and present mitigating evidence during the penalty phase of defendant's capital murder trial was deficient performance, thus supporting claim of ineffective assistance.). Thus, petitioner was prejudiced where he received a lengthy sentence even after having cooperated with the state to convict his co-defendant, Barham, who received a lesser sentence.

CONCLUSION

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



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of June 2023.

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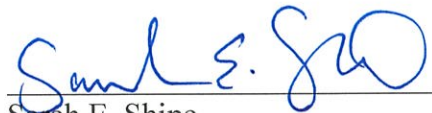
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Floyd G. Owen states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge George M. McFaddin, which was held on May 25, 2022, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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 her as counsel for Floyd G. Owen.

Respectfully Submitted,



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of June, 2023.

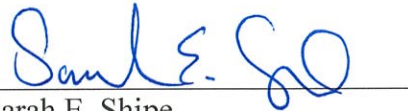
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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of her 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 7th day of June, 2023.