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Aug 17 2023

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Brian M. Gibbons, Circuit Court Judge

DANIEL S. MEANS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000502

JOHNSON PETITION FOR WRIT OF CERTIORARI

Breen Richard Stevens
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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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Counsel's performance was constitutionally deficient for failing to investigate and obtain a psychological evaluation to use for Petitioner's defense and mitigation where both Counsel and Co-counsel were aware of Petitioner's likely condition of PTSD before trial, where the victim killed by Petitioner was the individual who caused Petitioner to have PTSD, and where prior counsel already obtained funding for an evaluation in order to "adequately prepare for [Petitioner's] defense" 8

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ISSUE PRESENTED

Whether Counsel's performance was constitutionally deficient for failing to investigate and obtain a psychological evaluation to use for Petitioner's defense and mitigation where both Counsel and Co-counsel were aware of Petitioner's likely condition of PTSD before trial, where the victim killed by Petitioner was the individual who caused Petitioner to have PTSD, and where prior counsel already obtained funding for an evaluation in order to "adequately prepare for [Petitioner's] defense"?

STATEMENT

Petitioner Daniel S. Means was twenty-two (22) years old in November 2018, and apparently suffering from PTSD due to an incident that occurred approximately two years earlier. App. 156; App. 252; App. 271-277. In June 2016, Damien Young (Young) robbed Petitioner at gunpoint and shot him while he was bent down. App. 140; App. 156-157; App. 170. Young was subsequently permitted to plead guilty to assault and battery, first degree, and served approximately nine (9) months in prison. App. 140-141. After that incident, family members noticed Petitioner changed and acted differently. According to his grandmother, "[Petitioner] started seeing things and talking out of his head. He was thinking that everybody was after him." App. 163. According to his mother, Petitioner suffers from post-traumatic stress disorder (PTSD) as a result of the incident. App. 159. Petitioner's family took him to seek medical help, and were told that he needed "to get mental health." App. 164. However, Petitioner would not go "because he was afraid." App. 164. In the meantime, Petitioner acquired and registered a handgun for personal protection. App. 166.

On November 10, 2018, Petitioner went with two others to the Gravy Grill club in Spartanburg, South Carolina. App. 137-138; App. 167. After arriving at the club, Petitioner asked to be taken home. He had seen Young, became fearful about his safety, and was now paranoid that the person who brought him to the Gravy Grill "was in cahoots with this guy." App. 167. Out of his fear that people were going to follow him and kill him if he tried to simply walk out of the club, Petitioner instead armed himself with the gun he brought inside the club and fired at Young multiple times. Young was killed, and two bystanders were injured. App. 142-143; App. 166; App. 168.

Petitioner was indicted by the Spartanburg County grand jury on February 22, 2019, for murder, possession of a firearm during the commission of a violent crime, and two counts of attempted murder. App. 270-273. Petitioner was initially represented by Andrea Price (Prior

Counsel), and Daniel MacDonald (Co-counsel). App. 126; App. 257. On January 6, 2020, Prior Counsel filed an *ex parte* motion for funding to obtain a psychological evaluation of Petitioner. App. 256-257. In pertinent part, the motion cited the following reasons for the evaluation:

> The [Petitioner] believes that he requires this evaluation in order that counsel may adequately prepare for his defense.
>
> . . . . .
>
> 5. The allegations in this case are that [Petitioner] entered a club and shot into a crowd, killing one and injuring two others. The deceased was charged previously with Attempted Murder, with [Petitioner] as the victim. [Petitioner] now contends that he suffers from PTSD as a result of that assault, which affected his rationalization on the night of the shooting which resulted in these charges.
>
> 6. [Prior Counsel] believes that it is necessary to acquire a psychologist to evaluate [Petitioner] for purposes of preparing for [Petioner's] trial.
>
> 7. [Prior Counsel] has been informed that Dr. Geoffrey McKee, is available and willing to evaluate [Petitioner]. Dr. McKee is experienced in psychological assessments and evaluations for purposes of trial. It is expected, at this time, that the cost of the evaluation and preparing a report will not exceed $1,500.00.
>
> 8. [Prior Counsel] therefore moves for an ex parte order authorizing the expenditure of funds in the amount of $1,500.00 to retain the services of Dr. Geoffrey McKee to evaluate [Petitioner] for purposes of trial.

App. 256-257. Sometime afterward, Dr. McKee went to the jail to conduct his evaluation. He was accompanied by Co-counsel. According to Petitioner, he briefly spoke with Dr. McKee, but the evaluation quickly ended when Petitioner expressed his displeasure with Prior Counsel.[1] App. 215; App. 236-237.

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1 Co-counsel's recollection was similar in that Dr. McKee's evaluation "ended before it could even begin." He described the reason as follows: "[B]efore we began at—doing any sort of

Petitioner's case proceeded to trial before the Honorable Grace Gilchrist Knie on May 24, 2022. App. 1-2. By this time, Prior Counsel was removed from representation. Instead, Petitioner was represented by Brendan Delany (Counsel), and Co-counsel. App. 2. A jury was struck, and pretrial motions were held. The next day, the State lowered its plea offer to voluntary manslaughter, two counts of assault and battery of a high and aggravated nature (ABHAN), and possession of a weapon during the commission of a violent crime, with a negotiated sentencing range of 20 to 30 years and all sentences to run concurrently. App. 120. Petitioner pled guilty, and as mitigation during the sentencing phase Counsel asserted *inter alia* that Petitioner suffered from PTSD due to being shot. App. 156-157. Petitioner's mother and grandmother likewise indicated Petitioner suffered from PTSD due to being shot by Young. App. 159; -160; App. 163-164. However, no mental health expert testimony or report was provided in mitigation to the plea court prior to sentencing because Petitioner was never evaluated. The court imposed concurrent sentences as follows: 27 years for voluntary manslaughter; 20 years for each count of ABHAN; and five (5) years for possession of a weapon during the commission of a violent crime. App. 131-32; App. 173-174. No direct appeal was filed. App. 209.

Petitioner filed his application for post-conviction relief (PCR) on April 1, 2022, in the Spartanburg County Court of Common Pleas. On August 3, 2022, the State filed its return. App. 193; App. 203—204. On October 17, 2022, an evidentiary hearing was held before the Honorable Brian M. Gibbons. Petitioner was represented by Rodney Richey, while the State was represented by Chelsea Marto. App. 205.

Co-counsel testified first. He acknowledged that he assisted Prior Counsel, and was familiar with the motion for a psychological evaluation. App. 211. He further acknowledged discussing

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evaluation, [Petitioner] was having complaints with [Prior Counsel]'s representation, and he didn't want to do anything that she suggested." App. 215.

with Petitioner that he had PTSD derived from previously getting shot by Young. App. 213. In fact, Co-counsel was aware that Petitioner's PTSD was once triggered when he simply saw Young walking down the street on a date prior to the Gravy Grill incident. App. 214. However, according to Co-counsel's recollection, the reason for getting an evaluation by Dr. McKee was only for competency. App. 213; App. 216; App. 217; App. 222. Moreover, the trial strategy was not to present an expert to the jury regarding PTSD, insanity, or self-defense; rather, "it was always [Co-counsel's] understanding that the defense was that [Petitioner] was not the shooter." App. 214; App. 224.

Counsel also testified at the hearing. He acknowledged that he reviewed the file, and asked Co-counsel about the psychological evaluation. Counsel also did not doubt Petitioner's competency. App. 226-227. Accordingly, Counsel did not "see any additional need for any future evaluations," and instead "went forward with our defense of [Petitioner], and that was basically he wasn't the shooter." App. 227. However, video footage from inside the Gravy Grill depicting the shooter was digitally enhanced by the state prior to trial, and Counsel's "comfortability level" with that defense strategy "decreased immensely." App. 228-229. Nonetheless, Counsel still did not have Petitioner evaluated for a defense involving Petitioner's PTSD, purportedly because Petitioner denied being the shooter. App. 229.

Finally, Petitioner testified at his PCR hearing. He agreed that he initially wanted to pursue a defense denying the conduct entirely; however, he asserted that he told his attorneys—prior to the attempted evaluation by Dr. McKee—that he wanted to pursue an insanity defense or self-defense in his case due to what previously occurred between him and Young. App. 234-235. Further, after Prior Counsel no longer represented him, Petitioner asked Co-counsel if they were going forward with the evaluation. Petitioner indicated Co-counsel advised him as follows: "No. We're not gonna

do that.... [M]y job is to choose the defense, and we're going with you were not the person who shot this man.... Your job is to choose whether or not you are gonna get on the stand." App. 237; App. 242; App. 247. When discussing an insanity defense with Co-counsel, Petitioner said he was told, "If you say that, then you're saying that you committed this crime." App. 242. Although Petitioner expected "something different," such as an "insanity plea or self-defense" when he arrived for trial, his understanding was that his attorneys had already chosen the defense that Petitioner was not at the scene of the crime. App. 240-241; App. 246. Petitioner further explained that he brought up the defense of insanity when Counsel told him about the new plea deal; he indicated that Counsel told him to "go ahead and take the plea" and they would get someone to speak on his behalf regarding PTSD and the incident that caused it in mitigation even though an evaluation was never done. App. 241-242; App. 252.

Petitioner also testified that, had his attorneys prepared for trial and investigated his defense, then he would have been found not guilty by the jury. App. 251. Petitioner further indicated that the only reason he decided to accept the plea was due to the pressure he was under at the time. App. 252.

The PCR court filed its Order of Dismissal on March 17, 2023. App. 258—269. As to the failure of Counsel to have Petitioner evaluated, the court found that the evaluation did not occur because Petitioner refused to cooperate, and that Co-counsel and Counsel "saw no issues with competence, which undercuts the need for the evaluation." The court further determined that, "[c]oncerning mental health, [Petitioner]'s existent mental health issues were before the plea court, who could have taken them into consideration in accepting the plea." App. 267. Additionally, the PCR court held Counsel was not ineffective for failing to pursue the defense of insanity or self-defense because "the right to assert this defense was waived through entry of an otherwise valid

plea." App. 267-268. Finally, the PCR court determined Counsel was not ineffective for failing to mitigate sentencing "by addressing [Petitioner's] mental health issues." Instead, the court found it reasonable for Counsel to address "[Petitioner's] prior history with the victim and his mental health" by having Petitioner's mother and grandmother speak on his behalf. App. 268. As a result, Petitioner's application was dismissed.

This petition follows.

ARGUMENT

Counsel's performance was constitutionally deficient for failing to investigate and obtain a psychological evaluation to use for Petitioner's defense and mitigation where both Counsel and Co-counsel were aware of Petitioner's likely condition of PTSD before trial, where the victim killed by Petitioner was the individual who caused Petitioner to have PTSD, and where prior counsel already obtained funding for an evaluation in order to "adequately prepare for [Petitioner's] defense."

"Guilty pleas are no more foolproof than full trials to the court or jury. Accordingly, we take great precautions against unsound results." Brady v. United States, 397 U.S. 742, 758, 90 S.Ct. 1463, 1474 (1970). The difference "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea." Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). The longstanding test for determining the validity of a plea is whether the plea represents a "voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 369 (1985) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) to claims of the same against plea counsel).

"[T]he voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Id. On the other hand, the prejudice requirement focuses on whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Id. 474 U.S. at 59, 106 S.Ct. at 370. "[T]he voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Holden v. State, 393 S.C. 565, 572-74, 713 S.E.2d 611, 615-12 (2011).

Furthermore, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably

available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); see also Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) ("Without a doubt, '[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.'") (quoting Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986)). "[W]hile the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Lounds, 380 S.C. at 460, 670 S.C. at 649 (quoting Ard, 372 at 331-32, 642 S.E.2d at 597); see also Sneed v. Smith, 670 F.2d 1348, 1353 (4th 1982) ("To meet this standard, an attorney must at a minimum, 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.'") (quoting Coles v. Peyton, 389 F.2d 224, 226 (4th 1968)).

This duty to investigate extends to exploring the medical and mental health history of the defendant by consulting and possibly presenting expert witnesses. See, e.g., McKnight, 378 S.C. at 46, 661 S.E.2d at 361; see also Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004) ("Petitioner has demonstrated his attorneys erred in failing to adequately investigate and prepare expert testimony about his mental condition as it existed at the time of the murder."). "In assessing the reasonableness of an attorney's investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Wiggins v. Smith, 539 U.S. 510, 527, 123 S.Ct. 2527, 2538 (2003).

In the present case, Counsel was unquestionably presented with indicators that Petitioner had mental issues that could have and should have been explored in preparation of his defense.

Prior Counsel and Co-counsel met with Petitioner, and as a result of those meetings filed a motion seeking a psychological evaluation. Two aspects of this motion readily indicate that its purpose was for criminal responsibility, not competency. First and foremost, the language contained in the ex parte motion states its purpose is for preparation of the defense, not for determining whether Petitioner was able to understand proceedings or assist in his defense:

> The [Petitioner] believes that he requires this evaluation *in order that counsel may adequately prepare for his defense.*
>
> . . . . .
>
> 5. The allegations in this case are that [Petitioner] entered a club and shot into a crowd, killing one and injuring two others. The deceased was charged previously with Attempted Murder, with [Petitioner] as the victim. *[Petitioner] now contends that he suffers from PTSD as a result of that assault, which affected his rationalization on the night of the shooting which resulted in these charges.*
>
> 6. [Prior Counsel] believes that it is necessary to acquire a psychologist to evaluate [Petitioner] *for purposes of preparing for [Petitioner's] trial.*
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> 7. [Prior Counsel] has been informed that Dr. Geoffrey McKee, is available and willing to evaluate [Petitioner]. Dr. McKee is experienced in psychological assessments and evaluations for purposes of trial. It is expected, at this time, that the cost of the evaluation and preparing a report will not exceed $1,500.00.
>
> 8. [Prior Counsel] therefore moves for an ex parte order authorizing the expenditure of funds in the amount of $1,500.00 to retain the services of Dr. Geoffrey McKee *to evaluate [Petitioner] for purposes of trial.*

App. 256-257 (emphasis added). The introductory paragraph indicates the need for an evaluation was not to see if Petitioner was able to be tried; rather, was needed to "adequately prepare for his defense." App. 256. When further explaining why, the motion briefly stated the facts, and that PTSD affected Petitioner's "rationalization on the night of the shooting which resulted in these

charges." App. 256. Accordingly, the evaluation by a psychologist was necessary to prepare "for trial." In other words, the plain and unambiguous language of the motion readily shows the evaluation was for criminal responsibility, not competency.

Additionally, Prior Counsel filed the motion pursuant to Section 17-3-50 of the South Carolina Code to obtain funding for expert services that were reasonably necessary for the representation of a defendant. Such a procedural approach is common when seeking an evaluation for criminal responsibility by a private mental health professional. However, a markedly different approach is taken when seeking an evaluation for competency to stand trial. Section 44-23-410 outlines the procedure utilized in South Carolina whenever the court has reason to believe the defendant "lacks the capacity to understand the proceedings against him or assist in his own defense as a result of a lack of mental capacity…." § 44-23-410(A) S.C. Code Ann. Once aware of such concerns, the court either: (1) orders "examination of the person by two examiners designated by the Department of Mental Health if the person is suspected of having a mental illness…."; or (2) orders the defendant "committed for examination and observation to an appropriate facility of the Department of Mental Health or the Department of Disabilities and Special Needs for a period not to exceed fifteen days." § 44-23-410(A)(1) and (2) S.C. Code Ann. Yet in the present case, neither action under Section 44-23-410 was taken by the court once informed by Prior Counsel's motion: Petitioner was neither taken to the Department of Mental Health (DMH), nor was he evaluated by two DMH examiners. The reason is as obvious as it is simple: Petitioner was to be evaluated for criminal responsibility, not competency.

Furthermore, both the language of the motion seeking an evaluation to "adequately prepare for [Petitioner's] defense," as well as the non-utilization of procedures for obtaining a competency evaluation, fly in the face of testimony from Co-counsel and Counsel. Co-counsel indicated he was

aware of the background surrounding the motion filed by Prior Counsel and acknowledged discussing with Petitioner that he had PTSD derived from previously getting shot by Young. App. 213. Yet Co-counsel's claim that the motion seeking a psychological evaluation was to determine Petitioner's competency is belied entirely by the contents of the motion itself.

Counsel's testimony regarding the matter is likewise flawed. He explained that he reviewed Petitioner's file, and "did come across this order regarding the funding for the psychological evaluation." App. 226. As such, Counsel too should have been aware from the face of the motion in Petitioner's file that it was for criminal responsibility.[2] Instead, he "asked [Co-counsel] about it," to which Co-counsel responded, "Yeah. We actually got that, and we went over there and met with him. And then [Petitioner] did not cooperate with the evaluator." App. 227. Counsel then went on to tell the PCR court that he "never had any reason to doubt [Petitioner's] mental *competency*." Further, Counsel "didn't see any additional need *for any future evaluations*" because he "felt like it was an issue that had been addressed." App. 227 (emphasis added). In other words, despite being the lead attorney assigned to Petitioner's defense against Class A felony charges, Counsel simply took the interpretation of motions and orders regarding Petitioner's mental health from Co-counsel and felt the issue had been addressed.

Had Counsel actually considered the plain and unambiguous language in the document, then he would have realized the matter being asserted by Petitioner was for criminal responsibility, and that is what the psychological evaluation was intended to assess. Instead, no psychological evaluation was ever completed. Accordingly, Counsel's performance was constitutionally deficient, as it fell below an objective standard of reasonableness. McKnight, 378 S.C. at 46, 661

2 The document flatly stated Petitioner "contend[ed] that he suffers from PTSD as a result of the assault, which affected his rationalization on the night of the shooting which resulted in these charges." App. 256-257.

S.E.2d at 361; see also Von Dohlen, 360 S.C. at 607, 602 S.E.2d at 743 ("Petitioner has demonstrated his attorneys erred in failing to adequately investigate and prepare expert testimony about his mental condition as it existed at the time of the murder."). As such, Petitioner's plea could not be considered voluntary. Lockhart, 474 U.S. at 56, 106 S.Ct. at 369 ("[T]he voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.").

Petitioner was also prejudiced by Council's failure to investigate and obtain a psychological evaluation. The standard is whether Counsel's performance prejudiced Petitioner to the extent that "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Id. 474 U.S. at 59, 106 S.Ct. at 370. At the very least, Counsel's failure to investigate Petitioner's mental health issue and obtain a mental health evaluation, which would have been critical to Petitioner's defense, "clearly shows that [Counsel] inadequately prepared for trial." Lounds v. State, 380 S.C. 454, 462, 670 S.C. 646, 650 (2008).

Because Counsel failed to investigate Petitioner's mental health as it pertained to his state of minds on November 10, 2018, he likewise failed to fully investigate the defenses of either insanity or self-defense. Instead, Counsel and Co-counsel proceeded under the theory that Petitioner was not at the Gravy Grill on the night of the incident. Yet even Counsel admitted the untenability of such a defense after the State digitally clarified the video evidence from the incident. Although Counsel was able to leverage a potential juror issue against the State for a better guilty plea offer, such a plea may not have been needed had Counsel investigated and prepared other defenses premised on Petitioner's mental health. More importantly, had Counsel been properly prepared with such a defense or defenses, then Petitioner would have chosen to reject the plea offer and testify at his trial.

App. 251. Instead, given the circumstances, Petitioner felt pressured to accept. App. 252. Accordingly, Petitioner was prejudiced. Lockhart, 474 U.S. at 59, 106 S.Ct. at 370 ("[T]here is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.").

Additionally, the mental health evaluation would have aided in sentencing mitigation. It is likely that the plea court would have weighed Petitioner's mental health conditions as mitigating circumstances even more with the testimony and report of a mental health professional such as Dr. McKee regarding the effects of living with PTSD, and how such a condition colored the entire set of facts in the case. While Petitioner's mother and grandmother provided some insight, a mental health professional who performed a full psychological examination could have presented more material facts that the judge should have known prior to sentencing and could have potentially resulted in a sentence lower than 27 years. See, e.g., State v. Franklin, 267 S.C. 240, 245-46, 226 S.E.2d 896, 897 (1976) ("If justice is to be done, a sentencing judge should know all the material facts. Fair administration of justice demands that the judge will not act on surmise or suspicion but will impose sentences with insight and understanding. Hence, the judge is required to listen and give serious consideration to any information material to punishment."); see also Council v. State, 380 S.C. 159, 173, 670 S.E.2d 356, 363 (2008) ("Even the limited information obtained should have put counsel on notice that Respondents background, with additional investigation, could potentially yield powerful mitigating evidence."). Accordingly, Petitioner was prejudiced by Counsel's failure to investigate or present evidence regarding the psychological condition of his mind at the time of the incident. Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

CONCLUSION

Petitioner Daniel Means respectfully requests this Court to grant his petition for writ of certiorari, reverse the PCR court's order of dismissal, and grant a new trial.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of August, 2023.

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DANIEL S MEANS,

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Daniel S Means 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 Brian M. Gibbons, which was held on October 17, 2022, 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 Daniel S Means.

Respectfully Submitted,

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of August, 2023.

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Aug 17 2023

S.C. SUPREME COURT

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."

Breen Richard Stevens
Appellate Defender

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ATTORNEY FOR PETITIONER

This 17th day of August, 2023.