

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Williamsburg County  
William Jeffrey Young, Circuit Court Judge

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SEP 18 2013

S.C. Supreme Court

RAYSHAWN PEARSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213452

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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ROBERT M. DUDEK  
Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Was petitioner ineffectively represented where his defense attorney failed to have him properly evaluated for mental retardation and where counsel failed to stress petitioner's mental deficiencies in mitigation during the plea proceeding which resulted in petitioner receiving a sentence of life without parole where his young age and mental capacity should have been significant mitigation?

## STATEMENT OF FACTS

Petitioner, Adrian McCray, Cedric Butler and Kristella Ham were indicted by the Williamsburg County Grand Jury for murder and armed robbery in connection with a robbery of Workman's grocery store that went awry. Petitioner, McCray and Ham were also indicted for criminal conspiracy and possession of a weapon during a violent crime for that same robbery. App. 124-126.

Petitioner's trial counsel, D. Craig Brown, later testified at the PCR hearing that he filed a motion to have petitioner evaluated by the Department of Mental Health. App. 101, ll. 5-13. Defense counsel also said he thought he got "an authorization to get school records on him." App. 101, ll. 14-24. The following occurred on cross-examination of petitioner at the post-conviction relief hearing:

Ms. Harrigan: Do you recall that Mr. Brown made a motion before the Court to have you evaluated with the Department of Mental Health?

Mr. Pearson: He did that.

Ms. Harrigan: And were you evaluated by the Department of Mental Health?

Mr. Pearson: Not properly. I spoke.

Ms. Harrigan: But you were evaluated by the Department of Mental Health?

Mr. Pearson: Yeah, about an hour. It supposed to be 15 days.

Ms. Harrigan: I just need to know if you were evaluated or not, sir.

Mr. Pearson: Yes, ma'am.

App. 91, ll. 5-17.

Petitioner appeared on February 1, 2007 before the Honorable R. Ferrell Cothran, Jr. Kimberly Barr was the Assistant Solicitor. App. 1. Barr reminded the judge that Adrian McCray and petitioner had pled not guilty “and we selected a jury to try that case [on Tuesday].” App. 3, ll. 3-8. Barr related that petitioner now was going to plead guilty to all of the charges. App. 3, ll. 13-17.

The state agreed to dismiss the criminal conspiracy count and a subsequent escape charge but that was all. App. 3, l. 18 – 4, l. 3. The plea was “without any recommendation or negotiations from the state.” App. 4, ll. 4-6. The state had not served a notice of intent to seek the death penalty, and petitioner was apparently barely eighteen years old when the crime occurred. He was further said to be acting under the influence of the older McCray who did not receive a life sentence.

The solicitor stated that the men planned to rob the “Workman’s Grocery on Highway 527 in Williamsburg County.” Bar said petitioner confessed implicating “himself as well as Adrian McCray and Cedric Butler in the armed robbery and murder.” Sentencing was deferred. App. 10, l. 8 – 11, l. 18.

The sentencing hearing was held on May 3, 2007 before Judge Cothran. Katherine Barr and Ronnie Sabb were the Assistant Solicitors at that hearing. App. 16. Barr told the judge that the first armed robbery occurred on March 26, 2005. App. 19, ll. 10-17. “Several months later, they decided to go back to the store to commit another armed robbery.” App. 20, ll. 1-4. The owner of the store was tragically shot and killed during the fatal encounter. App. 20, ll. 9-15.

Defense counsel informed the court that he was appointed to represent petitioner and that petitioner was eighteen-years-old when the offense occurred. App. 27, l. 16 – 28, l. 11. Counsel said he had subpoenaed records from Clarendon County Department of Mental Health and that petitioner had also been evaluated after his motion to have him evaluated was granted. Defense

counsel offered “that Rayshawn has a - - a very low IQ. He’s got an IQ of approximately 68 which falls into that range, Your Honor, of being mentally retarded.” App. 29, ll. 2-14.

Counsel offered that petitioner had been employed as a brick mason and “that evaluation came to the conclusion that he wasn’t mentally retarded but was educable mentally - - mentally retarded.” App. 29, ll. 15-20. Petitioner also had been attending evaluation or counseling sessions at the Department of Mental Health. App. 31, ll. 2-7. There was no indication petitioner had ever been evaluated by the Department of Disabilities and Special Needs for mental retardation.

Petitioner was sentenced to life imprisonment for murder, a consecutive twenty-five years sentence for armed robbery, and a five year consecutive sentence for possession of a weapon during a violent crime. App. 37, ll. 1-20. Defense counsel later made a motion to reconsider that was denied without a hearing.

Petitioner filed an application for post-conviction relief on April 12, 2010. App. 40-69. Petitioner alleged, inter alia, that his defense attorney was ineffective in handling his evaluation and bringing his mental deficiencies to the attention of the plea court. App. 59.

The state filed a return to this application dated September 21, 2010. App. 70-75. An evidentiary hearing was held on September 21, 2012 before the Honorable William Jeffrey Young. Charles Brooks, III, represented petitioner. Megan Harrigan was the Assistant Attorney General. App. 80.

Petitioner testified, and as seen above complained he was not properly evaluated for his mental deficiencies. The evaluation was short, and as argued below it was conducted by wrong state agency. App. 91, ll. 5-17. Petitioner said his defense counsel only “made a statement about it [the evaluation]” to the sentencing judge. App. 91, ll. 19-23. App. 106, ll. 21-24.

The PCR court issued an order of dismissal dated November 1, 2012. App. 113-122. In this order the court wrote that defense counsel had petitioner evaluated by the Department of Mental Health. The evaluation report stated petitioner “had a lower IQ and was borderline mentally retarded.” App. 117. The PCR court found “that counsel’s performance was reasonable and effective.” App. 120.

From this order petitioner is seeking a writ of certiorari pursuant to Rule 243 of the SCACR.

## ARGUMENT

Petitioner was ineffectively represented where his defense attorney failed to have him properly evaluated for mental retardation and where counsel failed to stress petitioner's mental deficiencies in mitigation during the plea proceeding which resulted in petitioner receiving a sentence of life without parole where his young age and mental capacity should have been significant mitigation.

Counsel in non-capital cases also has a duty to investigate and present mental health evidence to the sentencing judge. In Freeman v. State, 167 S.W.3d 114 (Tex. App. 2005), the court held that defense counsel provided ineffective representation at sentencing by failing to adequately investigate and present evidence of the defendant's history of mental illness. While counsel was aware the defendant had previously been hospitalized, counsel only presented testimony from the defendant's mother in sentencing asking the sentencing jury to take his illness into account.

In McCarty v. State, 802 N.E.2d 959 (Ind. App. 2004), the court found defense counsel was ineffective in failing to prepare and present mitigating evidence at sentencing following the defendant's plea to child molestation. McCarty was prejudiced by his attorney's deficient performance because an adequate investigation and presentation of mitigation would have revealed to the sentence that the defendant was mentally retarded, and that he had been molested himself as a child. The PCR court exercised its state's constitutional authority in reducing McCarty's sentence by ten years.

This Court has repeatedly stressed that trial counsel has an obligation to adequately investigate and present mitigating evidence of a defendant's mental health problems. Although these principles were expressed in capital cases their application here is of no less moment. In Council v. State, 380 S.C. 159, 172-177, 670 S.E.2d 356, 362-365 (2008), this Court found defense

counsel was ineffective for failing to present evidence of the defendant's borderline IQ, and that he suffered from schizophrenia, learning disabilities and frontal lobe brain dysfunction.

In Von Dohlen v. State, 360 S.C. 598, 606-607, 602 S.E.2d 738, 742-743 (2004), this Court found defense counsel was ineffective in failing to present penalty phase evidence that Von Dohlen suffered from severe chronic depression at the time of the murder. See, also, Rosemond v. Catoe, 383 S.C. 320, 326-329, 680 S.E.2d 5, 8-10 (2009); Nance v. Ozmint, 367 S.C. 547, 557 n. 8, 626 S.E.2d 878, 883 n. 8 (2006).

Here, it was disclosed that petitioner had an IQ of 69. This was a red flag that petitioner needed to be evaluated by the Department of Disabilities and Special Needs for mental retardation. Instead, petitioner was only evaluated by the Department of Mental Health, the wrong agency, and the mitigation evidence presented to the sentencing judge was woefully inadequate.

Since petitioner may well have been mentally retarded given his IQ of 69 he should have been sent to the Department of Disabilities and Special Needs for testing and evaluation. See S.C. Code § 44-23-410(1). Petitioner instead was sent to the Department of Mental Health and he testified his evaluation was only one day rather than the fifteen days that it should have been under the statute.

This case is striking for several reasons. First, there was some discussion by the trial judge that this could have been a capital case. If petitioner was in fact mentally retarded it obviously could not have been a capital case. See Roper v. Simmons, 543 U.S. 551 (2005). Further, petitioner was only eighteen at the time of the crime which put him on the border of being a minor. Petitioner therefore would have been entitled to special sentencing consideration -- since LWOP was the sentence here -- under Miller v. Alabama, 132 Sup. Ct. 2455 (2012), if he had only been several months younger.

Petitioner submits the record in this case is sufficient to show that his mental disability, his probable mental retardation, and his age were powerful mitigating factors. Consequently, a writ of certiorari should be granted or this case remanded to the PCR court with an order that petitioner be evaluated by the Department of Disabilities and Special Needs for mental retardation.

CONCLUSION

By reason of the foregoing arguments a writ of certiorari should be issued.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R M Dudek", written in a cursive style.

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Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of September, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO WILLIAMSBURG COUNTY  
WILLIAM JEFFREY YOUNG, CIRCUIT COURT JUDGE

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PETITION TO BE RELIEVED AS COUNSEL

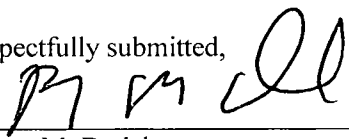
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Counsel for Rayshawn Pearson states:

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 records and transcript of petitioner's post-conviction relief hearing which was held on September 21, 2012. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Rayshawn Pearson.

Respectfully submitted,

  
Robert M. Dudek  
Chief Appellate Defender  
ATTORNEY FOR PETITIONER

This 18th day of September, 2013

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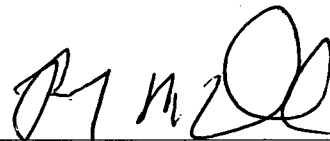
APPELLATE CASE NO. 2012-213452

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CERTIFICATE OF SERVICE

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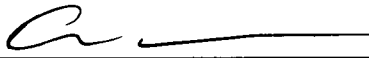
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Rayshawn Pearson, #296097, at Perry Correctional Institution this 18th day of September, 2013.



Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day  
of September, 2013.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: August 21, 2023.