

MARK A. Brown JR. v. The State
Appellate case No. 2011-199906
Date: 7-05-12

CLERK OF COURT

Im writting in the matter of A Pro se
response. LEE correctional institution
was locked down do to a hostage matter.
I received A Letter from the SUPREM
Clerk of court to notifiy me that i
had 45 days to file a pro se
response. MY dead line was the 27th
of June do to the institution lock
down i was not able to meat my
dead line.

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S.C. SUPREME COURT

i.T. J. Goodman Securusly

Appellate Mark Brown

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

certiorari to Bamberg county

James R. Barber, III, circuit court judge.

MARK A. BROWN, JR.,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

Pro se RESPONSE FOR WRIT OF CERTIORARI

ISSUE PRESENTED

was PCR counsel ineffective for failing to raise the fact that, trial counsel was ineffective for making a false statement during applicant guilty plea that he investigate Applicant mental conditions and admitted at state's PCR hearing that he didn't?

STATEMENT

On April 8, 2009, Mark Brown appeared before the Honorable Doyet A. Early, III, and entered a guilty plea to murder after waiving Presentment to the Grand Jury. He was represented by De Grant Gibbons, and the State was represented by Carol J. Summers. Judge Early accepted the recommendation from the State and sentenced Brown to forty years. App. 24, 11, 10-14. Brown did not appeal the conviction or sentence.

On March 12, 2010, Brown filed an application for Post-conviction relief (PCR). The State filed a return on August 9, 2010. An evidentiary hearing was held on July 11, 2011 before the Honorable James R. Barber, III. Brown was represented by Kelsey Kirkland, and the State was represented by Robert D. Corney, Assistant Attorney General. On August 2, 2011, Judge Barber issued an order denying Brown's PCR application, and dismissing it with prejudice. Brown's attorney filed a notice of appeal. This Petition follows.

ISSUE

The PCR counsel was ineffective for failing to raise the fact that, trial counsel was ineffective for making a false statement during Brown's guilty plea, that he had investigate Applicant school records and mental health records.

RELEVANT FACTS

On April 8, 2009, in the case # of 09-GS-05-0144 Brown's Trial counsel made an egregious error by stating that he had investigate Applicant school and mental health records. SEE: TRIAL TRANSCRIPT Page 6 Lines 20-25. EXHIBIT 1

However, this statement stated by trial Counsel was false. SEE: PCR TRANSCRIPT Page 10-16. EXHIBIT 2. Where Brown's Trial Counsel was cross examine by Brown's PCR counsel. During the cross examine PCR counsel asked trial counsel did you order any mental health records or school records to ascertain whether you thought Mr. Brown was competent to stand trial, Brown's trial counsel stated that he did not.

Therefore, based on the trial counsel false statement that he had investigate Applicant school and mental health records during sentence phase made a big impact on the plea judge decision.

IF Brown's PCR counsel would have raise the fact that, trial counsel was ineffective for making a false statement during Brown's sentence phase that he investigated Applicant mental conditions and admitted at state's PCR that he didn't the out come would have been different.

Martinez argued, because he had cause for the default. His first Postconviction counsel was ineffective in failing to raise any claims in the first notice of Post conviction relief and in failing to notify Martinez of his actions. SEE MARTINEZ V. RYAN

The defendant has A Learning Disability and comprehension Problems. SEE EXHIBITS 4, 5, 6 and 7.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of Counsel. First, the Applicant must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

Second, Counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Brown's Trial Counsel's performance was deficient, for failing to notify the court that he did not investigate the Applicant's school records, mental health records nor his mental conditions.

Counsel's deficient performance had prejudiced the defendant. The result of the proceeding would have been different, if trial counsel would have notified the court that he did not investigate the Applicant's mental conditions, the judge would not have accepted the Applicant's guilty plea.

CONCLUSION

Based on the above, certiorari should be granted and the order of the PCR court reversed and the case remanded.

EXHIBIT

6

1 MR. GIBBONS: Yes, sir. We went thoroughly through
2 that. He does not wish to have a jury.

3 THE COURT: And it is my understanding that the
4 recommendation by the state is that there be a 40-year cap
5 on the sentence?

6 MR. GIBBONS: Yes, sir. And we have been over that
7 as well. He does understand that there is a 30-year
8 minimum and the cap is for 40 -- so, anywhere in between
9 those two.

10 THE COURT: That's simply a recommendation?

11 MR. GIBBONS: That's correct.

12 THE COURT: And has he advised you after you have
13 informed him of all of his rights as to how he wishes to
14 plead?

15 MR. GIBBONS: He has, Your Honor. He wishes to enter
16 a plea of guilty to this charge.

17 THE COURT: Mr. Gibbons, as his lawyer and after
18 having reviewed all the evidence and the facts in the case
19 are you in agreement with his decision?

20 MR. GIBBONS: I am, Your Honor. I've gotten a hold
21 of his school records, his mental health records, full
22 SLED report. I've been through it with him. There is
23 nothing in any of the information I have that indicates
24 there is any problem with him being before the court and
25 completely able to make this decision. He understands the

EXHIBIT

DE GRANT GIBBONS - CROSS

1 get.

2 There was never a discussion about going to trial or
3 winning a trial after we discussed the strength of the
4 case.

5 MR. CORNEY: I believe that's all I have, Your
6 Honor.

7 THE COURT: Ms. Kirkland?

8 MS. KIRKLAND: Yes, sir, Your Honor.

9 CROSS-EXAMINATION

10 BY MS. KIRKLAND:

11 Q. Mr. Gibbons, Mr. Brown earlier in his testimony stated
12 that he had a second- or a third-grade reading level. Did
13 you order any mental health records or school records to
14 ascertain whether you thought Mr. Brown was competent to
15 stand trial?

16 A. I did not. All my conversations with him, he seemed
17 to understand everything I was saying. He was making good
18 answers back to all my questions. We never seemed to have
19 any issues that would indicate that I needed to look into
20 his mental status. Everything seemed to be fine.

21 He seemed to be able to read the paperwork that was in
22 front of him. I went over his rights form with him.
23 Everything seemed to be straight, so I had no reason to
24 believe anything was wrong with him as far as competency
25 goes.

1 the court. This happened on August 28 of 2008. Your
2 Honor, the victim was Alfred Edward Myers. He was an
3 88-year-old man who ran a candy store in Denmark. A child
E 4 went in the candy store to buy some candy from Mr. Myers
E 5 and noticed him lying on the floor in there and went and
E 6 contacted an adult who called 9-1-1. It was discovered at
E 7 the hospital that Mr. Myers had a gunshot wound to the
E 8 back and he actually expired very shortly thereafter. He
E 9 underwent cardiac arrest while he was en route to the
E 10 hospital and he passed away shortly thereafter.

11 * South Carolina Law Enforcement Division investigated
12 the case and they began speaking with several witnesses
13 who had seen some individuals walking past this candy
E 14 store. ~~One person that they spoke to was Tiffany Brown~~
E 15 ~~who is the sister of the Defendant and she stated that she~~
E 16 ~~had seen her brother and his friend JJ who ended up being~~
E 17 ~~Jason Wilson that day and that she had seen them in that~~
18 area. They talked with Mr. Wilson. He said that he and
19 Mr. Brown had gone by the store, but had heard something
20 but didn't know anything and gave them no information in
21 that regard.

22 On August 28 -- pardon me, August 29 they spoke to
23 Mr. Brown who told them that they walked past the store
24 but they heard a gunshot. They ran, didn't have any more
25 information about that. That same day Mr. Brown agreed to

—1 THE COURT: And have you advised him that under our
2 statutory laws that murder carries a minimum of 30 years
— 3 and a maximum of life imprisonment?

4 MR. GIBBONS: That's correct, Your Honor.

5 THE COURT: Have you advised him that under our
6 current statutory scheme that you do it day for day, that
7 there is no credit for good time, and whatever it is it
8 is.

9 MR. GIBBONS: That's correct, Your Honor. I told him
10 that that's what the law is right now.

—11 THE COURT: So, if he gets 30 years, he does 30 years
12 day for day. If he gets 40 years, he does 40 day for day.
— 13 Whatever he gets, he does day for day.

14 MR. GIBBONS: Yes, sir, I explained that to him.

15 THE COURT: It is also classified as a most serious
16 offense. So, if he gets out and becomes involved in
17 breaking the law with crimes classified as serious and
18 most serious and he gets a combination of two strikes and
19 most serious or a combination of serious and most serious
20 three strikes he would be subjecting himself to life in
21 prison without the possibility of parole; is that right?

22 MR. GIBBONS: We've discussed that.

23 THE COURT: Have you discussed with him his right to
24 trial by jury -- explained to him his right to trial by
25 jury?

Name: Mark Brown School: Macedonia Elementary
 Disability: Learning Disability Date: 5-24-2001

THE IEP TEAM HAS REVIEWED THE FOLLOWING INFORMATION:

1. Existing evaluation report(s) dated: 9-19-98
2. Current classroom-based assessments provided by: Mrs. Gunnells, Mrs. Collins
3. Teacher observations provided by: Mrs. Collins, Mrs. Bell
4. Related services provider's observations, if applicable, reported by: N/A
5. Parental input provided by: Ms. W. Brown
6. Current IEP dated 8-16-00, including goals, objectives, present levels of performance and educational needs of the student.
7. Need for special education and related services.
8. Need for any additions or modifications to the special education and related services to enable the student to meet the annual goals set forth in the IEP and to participate in the general curriculum.
9. Other: _____

BASED ON THIS REVIEW, THE IEP TEAM HAS DETERMINED:

1. No additional information is needed.
 - a. The student continues to have a disability and needs special education and related services.
 - b. The student continues to have a disability but no longer needs special education and related services.
2. Additional information is needed in order to determine:
 - a. If the student continues to have a disability or to need special education and related services.
 - b. The present levels of performance and educational needs of the student.
 - c. If any additions or modifications to the special education and related services are needed to enable the student to meet the annual goals set forth in the IEP and to participate, as appropriate, in the general curriculum.
3. The following additional information is needed (if checked, complete p.2);

Data	Person Responsible	Timeline

Team Members	Position	Date
<u>John B. Perkins</u>	<u>School Psychologist</u>	<u>5-24-01</u>
<u>Betty Gunnells</u>	<u>Teacher</u>	<u>5-24-01</u>
<u>Tommy Bell</u>	<u>Resource Teacher</u>	<u>5-24-01</u>
<u>Nancy D. Bullock</u>	<u>Guidance Counselor</u>	<u>5-24-01</u>
<u>W. W. Brown</u>	<u>LEA / Principal</u>	<u>5-24-01</u>
<u>Willard Brown</u>	<u>Mother</u>	<u>5/24/01</u>

EXHIBIT 6

REEVALUATION REVIEW/PLAN

NAME: Mark Brown SCHOOL: DoHS
 DISABILITY: LD DATE: _____

THE IEP TEAM HAS REVIEWED THE FOLLOWING INFORMATION:

1. Existing evaluation report(s) dated: 9-19-98 / 1/20/05
2. Current Classroom-based assessments provided by: Mr. Brown
3. Teacher observations provided by: Ms. Dowling
4. Related services provider's observations, if applicable, reported by: _____
5. Parental input provided by: Ms. Brown
6. Current IEP dated 5/1/06, including goals, objectives, present levels of performance
7. And educational needs of the student.
8. Need for any additions or modifications to the special education and related services to Enable the student to meet the annual goals set forth in the IEP and to participate in the general curriculum.
9. Other: _____

BASED ON THIS REVIEW, THE IEP TEAM HAS DETERMINED:

1. No additional information is needed.
 - a. The student continues to have a disability and needs a special education and related services.
 - b. The student continues to have a disability but no longer needs special education and related services.
2. Additional information is needed in order to determine:
 - a. if the student continues to have a disability or to need special education and related services.
 - b. the present levels of performance and educational needs of the student.
 - c. if any additions or modifications to the special education and related services are needed to enable the student to meet the annual goals set forth in the IEP and to participate, as appropriate, in the general curriculum.
3. The following additional information is needed (if checked, complete p.2);

DATA	PERSON RESPONSIBLE	TIMELINE
<u>Academic / Psychological</u>	<u>Dr. Dellad</u>	<u>If Mark agrees to evaluate - 10/06</u>

TEAM MEMBERS	POSITION	DATE
<u>Renee Scott</u>	<u>Guidance Coun.</u>	<u>9/18/06</u>
<u>David Dellad</u>	<u>School Psychol</u>	<u>9/18/06</u>
<u>Robert Walker</u>	<u>Asst. Principal</u>	<u>9/18/06</u>
<u>Emma Dowling</u>	<u>Teacher</u>	<u>9/18/06</u>
<u>William Brown</u>	<u>Math</u>	<u>9/18/06</u>
<u>Danica Wade</u>	<u>Teacher</u>	<u>9/18/2006</u>
<u>Kim M. Speedly</u>	<u>Dir. SE</u>	<u>9/18/06</u>

EXHIBIT 7

BARNWELL COUNTY SCHOOL DISTRICT #19
Blackville, SC

Psychological Evaluation Report
Confidential

Name: Mark Brown
School: Macedonia Elementary
Grade: 4th
Sex: Male

Evaluation Date: 9-19-98
Birthdate: 9-6-89
Chronological Age: 9-0
Examiner: Tim Britt

REASON FOR REFERRAL:

Mark was referred for assessment due to concerns regarding reading and math achievement. Request for evaluation was also made by his mother.

BACKGROUND AND TEST BEHAVIOR INFORMATION:

Mark is a nine year old male who is currently in the fourth grade. Mark lives at home with both parents and two older sisters. His mother reports no unusual problems during pregnancy or at birth. He has also experienced no serious illnesses or accidents. He takes no medication on a regular basis and his overall health is described as fair. Mark does have problems following oral directions as reported by his mother while she feels that he puts forth very little effort to learn. Mark has also received counseling through the Polly Best Mental Health Clinic.

Mark's teacher reports that he has a short attention span, daydreams, seems preoccupied or withdrawn and cannot complete work independently. He also has difficulty beginning tasks when assigned and demonstrates inconsistency in his work performance. Problems with math includes writing numbers backwards and difficulty with subtraction and borrowing. Mark has some basic reading problems but especially has difficulty with reading comprehension as reported by his teacher. His teacher reports that Mark is somewhat lethargic and avoids participation with other children. Mark has also missed several days from school this year.

Mark was polite with the examiner and cooperative in responding to questioning. He was however somewhat quiet and reluctant to talk as he first entered the testing session. He responded appropriately to questioning but offered no spontaneous conversation. Facial expression was appropriate and eye contact with the examiner was normal. Mark was a slow worker who took his time in completing each task presented. He often

seemed to lack confidence in his responses. He was however persistent in completing each task even difficult items. He appeared to be motivated to do well and was attentive to the requests of the examiner.

TESTS ADMINISTERED/SOURCES OF INFORMATION:

Wechsler Intelligence Scale for Children - 3rd Edition
 Wechsler Individual Achievement Test (WIAT)
 Wide Range Achievement Test - Revision 3
 Woodcock Reading Mastery Tests - Revised
 Developmental Test of Visual-Motor Integration (Beery)
 Vineland Adaptive Behavior Scales - Classroom Edition

TESTS RESULTS:

The Wechsler Intelligence Scale for Children - 3rd Edition (WISC III) is a test of general intelligence for use with students from 8 through 16 years of age. Quotient and factor scores are based on a mean, or average of 100, with scores of 90-109 considered to be within the "average range".

Verbal Intelligence Quotient = 79
 Performance Intelligence Quotient = 80
 Full Scale Intelligence Quotient = 77

The following scores reflect strengths and weaknesses as measured by the WISC-III. The column of numbers lists the scaled scores attained on the various subtests. A scaled score of 8 to 12, inclusive, is indicative of "average" performance.

VERBAL SUBTESTS	GENERAL SIGNIFICANCE OF SUBTEST	SCALED SCORES
Information	General fund of information	6
Similarities	Use of abstract language	5
Arithmetic	Numerical reasoning ability at a required speed	9
Vocabulary	Verbal fluency	7
Comprehension	Practical judgment and reasoning	4

EXHIBIT

PERFORMANCE SUBTESTS	GENERAL SIGNIFICANCE OF SUBTEST	SCALED SCORES
Picture Completion	Visual differentiation of essential from nonessential detail	8
Coding	Learning and rapidly copying symbols	7
Picture Arrangement	Predicting outcomes of social experience	6
Block Design	Synthesizing and reproducing abstract designs by visual-motor means	8
Object Assembly	Synthesizing concrete parts into meaningful wholes	5

Overall scoring was in the borderline range of intellectual functioning with no significant difference between verbal skills and hands-on performance skills.

Note: Intelligence tests are best interpreted as predictors of performance in school. They do not measure innate capacity and their scores are not fixed. Some people exhibit significant increases or decreases in measured intelligence from one testing to another. As a result of chance factors, the "true" IQ score may vary several points from the obtained IQ score.

Wechsler Individual Achievement Test (WIAT) is a comprehensive individually administered battery for assessing the achievement of children who are in grades K-12 and ages 5-19. The standard score is based upon an arithmetic average of 100 and standard deviation of 15; therefore, approximately two-thirds of students will score between 85 and 115. Grade equivalent scores are based on performance on a small sample of the broad range of skills and knowledge required at a specific grade level. Grade ratings do not necessarily indicate that the subject is actually functioning at the specific level indicated.

SUBTEST	STANDARD SCORE	%TILE	GRADE EQUIV.
Basic Reading	68	2	K.9
Reading Comprehension	62	1	1.3
Total Reading	62	1	1.3
Mathematics Reasoning	72	3	1.7
Numerical Operations	79	8	2.7
Total Math	73	4	2.4

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The Wide Range Achievement Test - Revision 3 (WRAT-3) is a measure of academic achievement and provides a gross indication of performance in reading, spelling and arithmetic. The standard score is based on a normal distribution with a deviation of 15; approximately 2/3 of students score between 85 and 115. A given equivalent score represents performance on a small sample of the broad range of skills and knowledge required at a specific grade level. Grade equivalents do not necessarily indicate that the student is actually functioning at the specific level indicated. Results were as follows:

SUBTEST	STANDARD SCORE	PERCENTILE	GRADE SCORE
Reading	73	4	1
Arithmetic	85	16	2

Woodcock Reading Mastery Tests - Revised are a battery of two readiness tests and four reading achievement tests. Two of the reading achievement tests were administered with the results reported below.

SUBTEST	STANDARD SCORE	AGE EQUIVALENT	GRADE EQUIVALENT
Word Identification	56	6-11	1.7
Passage Comprehension	58	6-11	1.7

Results of achievement testing indicate that Mark demonstrates reading and math skills that are below grade level. Mark is especially weak in regard to his basic reading skills and reading comprehension skills. He does exhibit a significant discrepancy between intellectual ability and reading skills.

Developmental Test of Visual-Motor Integration (Beery) was administered. This test involves asking the student to copy basic geometric designs, which are arranged in a developmental sequence. The following results were obtained:

Age Equivalent:	7-0
Percentile:	21
Standard Score:	88

These results suggest that visual-motor skills are slightly delayed for his age but consistent with his measured level of cognitive ability.

The Vineland Adaptive Behavior Scales - Classroom Edition assesses personal and social sufficiency of individuals from birth to adulthood in four domains. Standard scores are

EXHIBIT

reported based on a mean or average of 100 with scoring from 85 to 115 considered to be within the "adequate" range. The classroom edition was administered with the following results obtained.

DOMAIN	STANDARD SCORE	AGE EQUIVALENT
Communication	69	5-8
Daily Living Skills	73	6-4
Socialization	74	4-9
Composite	69	5-6

SUMMARY AND RECOMMENDATIONS:

Mark was referred for assessment primarily due to concerns regarding poor reading and math achievement. Analysis of psychoeducational test data indicates that both verbal and nonverbal mental ability, as measured by the WISC- III, were in the slow learner to low average range of intellectual ability. Visual-motor skills were delayed but consistent with intellectual ability. Achievement results indicate that Mark is functioning below grade level with both reading and math skills. A significant discrepancy between ability and reading achievement is indicated. This would suggest a learning disability and the need for special education services. The Multidisciplinary Team will need to meet to determine appropriate educational services for Mark. It should be noted that no student is to be placed in a special education program on the basis of this report alone.

When giving instructions to Mark always be sure to establish eye contact whenever possible and ask him to repeat the directions. Also give directions and information in small units so as not to overwhelm him.

To help to maintain attention be sure to change your voice tone and inflection and support your presentation with gestures and movement as much as possible.

Try to rely on positive reinforcement to change behavior; many inattentive students have received more than their share of negative reinforcement and punishment.

Consider using a buddy system so that a child with attention problems is coached and encouraged by a child with good work habits.

Teach students how to listen and arrange for them to use a secret signal such as folding their arms when they don't understand.

Use of a highlighter to mark key words or directions to a task may be helpful in improving Mark's attention to a task or task directions. Also emphasize a sight word vocabulary of key words and phrases that are used in directions such as "circle,

underline, match, etc.” The highlighter could also be used to identify these words and phrases when directions are given on a worksheet or test.

Use advanced organizers to cue Mark. The purpose of listening can be established by telling students how they will use the information and by explaining what will be learned. Words such as first, second, and next also help students organize information given orally.

Use visual cue cards and posters containing currently taught academic information. Examples: Spelling words in bright colors on 5x8 index cards, vocabulary in context areas on 8x11 paper with word in one color and definition in another color. These materials should be posted in areas where students would be most likely to look when they go off task (windows, ceilings, around pencil sharpeners, etc.) Students should help make and put as much of the material up as possible.

One way to help develop vocabulary, reading, spelling and writing skills is the “Word-a-Day” program. A list of words is derived from teacher recommendations or the child’s interests. Each day one word is chosen. First the student says it 5 times, spells it aloud 5 times, and writes it 5 times. Then he looks it up and writes down the definition, reading it aloud. Next the student uses it in 5 sentences aloud, writing at least one down. Throughout the day he would look for chances to use that word and to notice it if others use it. Then at night he would review to see if he can read it, spell it, write it out, define it, and use it in a sentence.

Emphasize that Mark learn a root word sight vocabulary in order to be able to add various prefixes and suffixes to develop word attack skills. Mark is going to need to develop a good sight vocabulary to support weaknesses with phonetic skills. It will also be helpful to use a multisensory approach when teaching reading skills.

Teach for automaticity. As basic decoding skills are mastered, regularly expose Mark to decodable words so that these words become automatically accessible. As core sight vocabulary is acquired, expose children to more irregular words to increase reading accuracy. Reading-while-listening and repeated reading are useful techniques for developing fluency.

Make a list of those words for which Mark has omission, addition, substitution, or reversal errors. Have him practice reading these words.

Introduce new words and their meanings to Mark before he reads new materials. These may be entered in a “vocabulary” notebook kept by Mark.

To help with reading comprehension have Mark verbally paraphrase material just read in order to assess his comprehension. Also underline or highlight important points before

Mark reads the material silently. As he reads encourage him to give attention to "who, what, when, and where" facts. Also allow Mark to work cooperatively with other students on some occasions to share what he understands and to develop questions about what he does not understand.

Tim Britt

Tim Britt
School Psychologist, Level I

Gloria Smith

Gloria Smith
School Psychologist, Level II