THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM PICKENS COUNTY
COMMON PLEAS COURT
Edward W. Miller, Circuit Court Judge

Case No. 2012-CP-39-140

Joshua Johnson, ... Petitioner,

v.

State of South Carolina, ... Appellant.

2013-000478

PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

Questions Presented for Review

The questions presented for review are whether the Applicant's mental retardation and multiple psychiatric disorders could have impacted his ability to understand and participate in his own defense, to understand and appreciate the charges and his waiver of rights, and to be able to freely, voluntarily, knowing and intelligently enter a guilty plea. This includes whether the Applicant's counsel was ineffective for not fully investigating and evaluating the Applicant's mental retardation and psychiatric disorders and the failure to fully disclose them to the plea court. This further includes the question of whether the plea judge's inquiry during the colloquy was sufficient and whether further inquiry was warranted before accepting the plea.

TABLE OF AUTHORITIES

Cases

Bishop v. United States, 350 U.S. 961, 76 S.Ct. 440,
100 L.Ed. 835 (1956) 6

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) . 7

Carnes v. State, 275 S.C. 353, 271 S.E.2d 121 (1980) 7

Cooper v. Oklahoma, 517 U.S. 348, 354 (1996) 4

Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991) 7

Dusky v. United States, 362 U.S. 402 (1960) 6

Godinez v. Moran, 509 U.S. 389, 399, 113 S.Ct. 2680,
125 L.Ed.2d 321 (1993) 4,6,7

Matthews v. State, 358 S.C. 456 (2004) 10

Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836 (1966) 4,6,9

Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999) 7

Roddy v. State, 339 S.C. 29, 528 S.E.2d 418 (2000) 7

Stano v. Dugger, 921 F.2d 1125 (11th Cir. 1991) 9

State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980) 7

State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976) 6

United States v. Barragan-Rangel, 198 F. Supp.2d 973 (N.D. Ill. 2002) . . . 8

United States v. Cross, 57 F.3d 588 (7th Cir. 1995) 8

United States v. Musa, 946 F.2d 1297 (7th Cir. 1991) 8

Watts v. Singletary, 87 F.3d 1282 (11th Cir. 1996) 9

Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984) 6

Other Authority

18 U.S.C. § 4241 9

Federal Rule of Criminal Procedure 11 8

Constitutional Provisions

U. S. Const. Amend 4 8

U. S. Const. Amend 14 8

SCRCP Rule 71.1(e) (formerly Sup. Ct. Rule 50(4) 6

STATEMENT OF THE CASE

Joshua Johnson was indicted by grand jury in Pickens County for the offense of Criminal Sexual Conduct with a Minor, second degree. Appellant pled guilty on June 30, 2011, the Honorable Letitia H. Verdin, presiding. Appellant was represented at the plea by attorney Steven Alexander. The State was represented at trial by Cleveland Baker, Assistant Solicitor for Pickens County. The Appellant was adjudicated guilty and sentenced to a period of twelve years in the South Carolina Department of Corrections. No appeal was filed. Applicant filed for post conviction relief on January 31, 2012. J. Falkner Wilkes, of Greenville, represented Appellant in the post conviction relief action in the Circuit Court and on petition for writ of certiorari in this Court.

ARGUMENT

I. DID THE COURT ERR IN ACCEPTING THE DEFENDANT'S GUILTY PLEA AS FREE AND VOLUNTARY WITHOUT ADEQUATE INQUIRY AND FINDINGS AS TO THE DEFENDANT'S MENTAL ILLNESS AND RETARDATION?

II. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILURE TO INVESTIGATE, RAISE, OBJECT AND PRESERVE THE ISSUE OF COMPETENCE, MENTAL ILLNESS, AND MENTAL RETARDATION, AS TO GUILT, CAPACITY, ABILITY TO UNDERSTAND AND ENTER A PLEA, AND/OR IN MITIGATION? *(Blair hearing)*

Applicant's medical records indicate that he has an IQ of 70 or less. (App. 133; 137). According to the DSM-IV-TR (the standard in psychiatry and psychology for diagnosis of mental illness and retardation) this indicates that the applicant suffers from mental retardation. (App. 97 DSM-IV-TR, Section 317). In addition to mental retardation, the Applicant has also been diagnosis with more than one psychiatric disorders including, Asperger's Syndrome, Attention-Deficit/Hyperactivity Disorder, Impulse-Control Disorder and Bipolar Disorder. (App. 110; 133; 137; 157; 200

According to the DSM-IV-TR, the essential features of Asperger's Disorder include severe and sustained impairment in social interactions. To have been so diagnosed the Applicant must have been found to suffer impairment in social, occupational or other areas of functioning. Most important to this case, as it relates to the charges in particular, is that the

Applicant's suffers from a gross and sustained impairment in reciprocal social interaction. (App. 91 DSM-Section 299.80). According to the DSM, the lack of understanding as to the conventions of social interaction is an essential element of Asperger's Disorder. The Applicant's situation is further complicated by Attention-Deficit/Hyperactivity Disorder. This results in impulsivity which manifests itself in the Applicant engaging in acts which are socially inappropriate or potentially dangerous. (App. 92-95). Appellant's condition is further complicated by his diagnosis of Impulse-Control Disorder and Bipolar Affect Disorder. Medical records pre-dating the offense also establish the existence of psychotic episodes including visual hallucinations. (App. 162; 172). The record further shows that Appellant has suffered from night terrors and extreme cases of sleep walking. (App. 45-48).

As a result of the Applicant's condition, he has been declared disabled by the Social Security Administration. Test results show that show that at age 14.5 the Applicant tested at a composite grade level of only 2.1. (App. 213). These records show gross emotional, social, and educational deficits. The Applicant's overall educational and medical records indicate a severely low level of functioning.

In this case the Applicant's testing over a long and consistent period

of time prior to the alleged offense and plea indicate a severely reduced ability to understand, act and conform to social rules. Records show that the Applicant had a Global Assessment of Functioning (GAF) score of as low as 40. (App. 126).According to the DSM-IV-TR, page 34, the Applicant's GAF of 40 indicates impairment in reality testing:

> **Some impairment in reality testing or communication** (e.g., speech is at times illogical, obscure, or irrelevant) **OR major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood** (e.g., depressed man avoids friends, neglects family, and is unable to work; child is frequently beats up younger children, is defiant at home, and is failing at school.).

DSM-IV-TR, (App. 101. **emphasis in original**.)

As a result of the combination of the Applicant's mental illnesses and mental retardation, the Applicant has difficulty in understanding what is reality, as well as suffering from major impaired judgment with relations, thinking or mood.

In this case the trial attorney did not properly investigate his client's condition. Although he admitted that he had been informed that the Applicant had been diagnosed with Asperger's Syndrome, he failed to take any further steps to fully investigate the Applicant's condition. Apparently he didn't even attempt to educate himself as to the effect of Asperger's as he admitted that he "didn't know a whole lot about Asperger's syndrome." (App. 34, l. 19-21. At the time of the plea counsel was unaware of any of

Applicant's other diagnoses, or that the Applicant was mentally retarded. Counsel did not know that the Applicant was under the care of Pickens Mental Health or that he had been committed to William Hall Psychiatric Institute in the past. (App. 41). To the extent that the trial attorney did not investigate and present sufficient information to alert the Court to the need to inquire further, then the counsel's failure to investigate, raise or preserve the issue effectively constitutes deficient representation. In this case a proper investigation by counsel would have revealed that Johnson suffered from a multitude of complicating conditions in addition to mental retardation, all of which would reduced his capacity at the time of the offense and at the time of the plea.

In addition to counsel's failure to investigate and disclose the Applicant's condition, the plea court also failed in conducting a complete and through colloquy. Despite having at least some information about possible psychiatric issues, the plea court failed to make any inquiry as to the Applicant's mental history or current status. (App. 238-241).

It is well established that the conviction of a legally incompetent person violates due process. Pate v. Robinson, 383 U.S. 375, 378 (1966); Cooper v. Oklahoma, 517 U.S. 348, 354 (1996). In the present case the Applicant entered a guilty plea to criminal sexual conduct. During the plea

the court engaged in virtually no colloquy with the Applicant and never actually inquired of the Applicant if he fully understood the offense or the plea process. Nor does it appear that Johnson's family was offered an opportunity to speak or inform the Court of his condition. Nor did the Court expand its colloquy to make further inquiry of Johnson in light of counsel's mention of Aspergers' Syndrome. Prior to accepting the plea the trail court failed to make any inquiry into Johnson's history of mental illness or mental retardation. As a result, the trial judge failed to make a specific finding that Johnson was knowingly and intelligently entering the plea.

In the present case, Johnson's procedural due process rights were violated by the court's failure to conduct further inquiry into his mental status before concluding the plea. *See* Godinez v. Moran, 509 U.S. 389, 403 (1993). If the Court had sufficient notice of the Applicant's condition, it was required to make further inquiry pursuant to S.C. Code Section 44-23-410. In the event that the Court was not provided sufficient information to require additional inquiry or mental evaluation by the Court, then trial counsel erred by failing to investigate, raise, and preserve the issue if necessary for appeal.

In this case trial counsel failed to adequately raise or preserve the issue of appeal. As a result, trial counsel failed to provide effective

assistance of counsel. During the plea counsel stated only that when Johnson was younger that he suffered a mild form of autism (Asperger's Syndrome). T. 18. Plea counsel did not investigate and was therefore unaware of Applicant's mental retardation and psychiatric diagnosis. As a result he did not alert the plea judge that Johnson suffered from mental retardation along with several mental disorders.

Due process prohibits the conviction of a person who is mentally incompetent. Bishop v. United States, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956). This right cannot be waived by a guilty plea. Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). The test of competency to enter a plea is the same as required to stand trial. State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976). The accused must have sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him. Carnes v. State, 275 S.C. 353, 271 S.E.2d 121 (1980).

The competency standard for pleading guilty is identical to that for standing trial. Godinez, 509 U.S. at 396-97. The inquiry is "whether the defendant has `sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as

factual understanding of the proceedings against him" *Id.*, (*quoting* Dusky v. United States, 362 U.S. 402 (1960)). Godinez v. Moran, 509 U.S. 389, 399, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993).

Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently by defendants. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L. E. 2d 274 (1969). In order for a guilty plea to be knowing and voluntary, a defendant must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived. Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991); State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Roddy v. State, 339 S.C. 29, 33-34, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both." Pittman v.

State, 337 S.C. 597, 600, 524 S.E.2d 623, 625 (1999).

Federal Rule of Criminal Procedure Rule 11 governs federal court pleas and incorporates due process. To the extent that courts have interpreted Rule 11 in light of due process, their analysis is applicable to the States through the Fourteenth Amendment. Due process requires a court to determine whether a defendant is competent to plead guilty. In order to determine whether a defendant's plea is voluntary and intelligent, a court is required to examine the plea in light of the totality of the circumstances. United States v. Cross, 57 F.3d 588, 591 (7th Cir. 1995). Under Rule 11, the court can take into account "the defendant's level of intelligence, whether he was represented by counsel, the complexity of the charge, his own statements, and the evidence recited by the government to which the defendant admits." United States v. Barragan-Rangel, 198 F. Supp.2d 973, 976 (N.D. Ill. 2002) (*citing* United States v. Musa, 946 F.2d 1297, 1304 (7th Cir. 1991)).

In this case, plea counsel had a duty to discover and disclose Johnson's history of mental illness to the court. The plea court likewise had a duty to inquire as to the Applicant's mental status, especially where there had been any mention of the diagnosis of a prior mental illness. The court erred by not expanding its colloquy and inquiring into Applicant's mental

history. Had it done so, it would have learned that the Applicant suffered from mental retardation and plethora of psychiatric disorders. Having not done so, the record fails to show that the Applicant fully understood the myriad of things necessary to validly enter a plea. For a guilty plea to be entered knowingly and intelligently, "the defendant must have not only the mental competence to understand and appreciate the nature and consequences of his plea but he also must be reasonably informed of the nature of the charges against him, the factual basis underlying those charges, and the legal options and alternatives that are available." Stano v. Dugger, 921 F.2d 1125, 1142 (11th Cir. 1991).

A court has a due process obligation to conduct a competency hearing, even if not requested to do so, if there is reasonable cause to believe a defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. Pate v. Robinson, 383 U.S. 375, 385, 86 S.Ct. 836 (1966); 18 U.S.C. § 4241. In order to trigger the trial court's obligation to order a competency evaluation and hearing, the court must have information raising a "bona fide doubt" as to the defendant's competency. Watts v. Singletary, 87 F.3d 1282, 1287 (11th Cir. 1996). In

this case the trial judge was told that Johnson had a form of autism. Although clearly deficient on the part of the trial attorney, this gave the court sufficient information to raise some question as to Johnson's competency. As little as it may have been, it was sufficient to least require the court make some additional inquiry into the Applicant's condition.

In Johnson's case, due process required further inquiry as to his mental illness and retardation, and was necessary for a constitutionally valid determination of whether Johnson's plea was knowing and intelligently entered. Once the court had notice of a prior psychiatric disorder, the court erred in proceeding with the plea without further inquiry and findings as to Johnson's history of retardation and mental illness.

To the extent that counsel failed to provide sufficient information to the court to allow it notice to make further inquiry, then counsel was ineffective under the reasoning in Matthews v. State, 358 S.C. 456 (2004). In Matthews, evidence that an applicant for post conviction relief suffered from Mild Mental Retardation and decreased cognitive functioning, was sufficient to establish ineffective assistance of counsel where counsel failed to request a Blair hearing prior to the plea. In this case, the Applicant not only suffers from a greater level of Mental Retardation than seen in Matthews, but suffers from multiple psychiatric disorders including visual

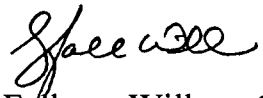
hallucinations. As in Matthews, counsel should have requested a Blair hearing. The failure to do so constitutes ineffective assistance of counsel.

Counsel was also ineffective for failing to raise the Applicant's mental and psychiatric conditions in mitigation of his acts as they may relate to sentencing.

CONCLUSION

Based on the foregoing this Court should grant the Applicant's petition and issue a writ of certiorari in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that I have served the Respondent with the Petitioner's *Petition for Writ of Certiorari*, and the *Appendix* by depositing a copy in the United States Mail, postage prepaid, on August 1, 2013, addressed to counsel of record as follows:

Karen Ratigan
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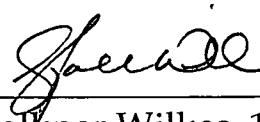

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CERTIFICATE

I certify that the Appendix has been redacted in compliance with the Supreme Court's Order on personal identifiers, financial information and private data.

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