

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County
Michael G. Nettles, Circuit Court Judge

RECEIVED

SEP 29 2014

S.C. Supreme Court

JIMMY D. MEGGS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE 2014-000548

JOHNSON PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in dismissing Petitioner Meggs' 2013-CP-21-874 PCR application pursuant to Rule 12(b)(8), SCRCP, because his 2009-CP-21-3147 PCR application was still pending? The PCR court should have dismissed the 2009 PCR or, in the alternative combined the 2009 and 2013 PCR applications, and allowed Petitioner Meggs to go forward on his 2013 PCR where an evidentiary hearing could be held that would allow him to testify concerning his PCR issues since he was unable to testify at the first and only PCR hearing.

STATEMENT

In April 2001, the Florence County Grand Jury indicted Jimmy Meggs on two counts of engaging a child for sexual performance and two counts of contributing to the delinquency of a minor. On August 6-9, 2001, Meggs proceeded to trial before the Honorable James E. Brogdon, Jr. and a jury. Meggs was represented by Kernard Redmond and James Cox. The state was represented by Howard L. Steinberg and Jennifer Evans. App. 3. The jury returned verdicts of guilty as indicted. App. 669, ll. 1 – 24. Judge Brogdon sentenced Meggs to twenty years on engaging a child for sexual performance. On the second engaging a child for sexual performance, the sentence was twenty years suspended to five years probation to run consecutive to the first sentence. The judge sentenced Meggs to three years on each of the contributing to the delinquency of a minor to run concurrent to the first sentence. App. 678, ll. 1 – App. 679, ll. 9. Meggs' attorney filed a notice of appeal which was perfected by Jack B. Swerling, Esquire. The South Carolina Court of Appeals affirmed Meggs' convictions and sentences. State v. Meggs, Op. No. 2004-UP-460 (Ct. App. filed August 31, 2004). The South Carolina Supreme Court denied the petition for a writ of certiorari to review the court of Appeals' decision on January 6, 2006. App. 915.

On April 4, 2006, Meggs filed his first PCR application (2006-CP-21-553). An evidentiary hearing was held on December 11, 2007 before the Honorable Thomas A. Russo. Meggs was represented by Desa Ballard, and the state was represented by Julie M. Thames. App. 691. On March 12, 2008, Judge Russo issued an order denying Meggs' PCR application and dismissing it with prejudice. App. 795-App. 811. On May 2, 2008, Judge Russo issued an order denying Meggs' Rule 59(e) Motion for Reconsideration. App. 815-186.

On April 23, 2009, Meggs filed a second PCR application.(2009-CP-21-780). App. 844. The state filed a return and motion to dismiss. Judge Thomas Russo issued a conditional order of

dismissal on July 9, 2009.App. 859. Meggs filed a response, but Judge Russo issued a final order on May 7, 2010 dismissing the second PCR application. App. 864-App. 869.

On December 30, 2009, Meggs filed his third PCR application. (2009-CP-21-3147). App. 870. The state filed a return and motion to dismiss on January 17, 2013. App. 877-App. 882. On January 28, 2013, Judge Michael G. Nettles issued a conditional order of dismissal granting Meggs twenty days from the date of service of the order to show why the order should not become final. App. 884 – App. 889.

On April 1, 2013, Meggs filed his fourth PCR application. App. 892-App. 913. The state filed a return on and motion to dismiss on September 5, 2013. App. 914-App. 918. Judge Michael Nettles issued an order on September 13, 2013 dismissing Meggs' PCR application pursuant to Rule 12(b)(8), SCRCPP, because Meggs 2009 PCR application was still pending. App. 920-App.921. Meggs filed a Rule 59(e), SCRCPP, motion on October 3, 2013. App. 922. On January 31, 2014, Judge Nettles issued an order denying Meggs' Rule 59(e) motion and leaving the final ruling on the still pending 2009 Conditional Order of Dismissal to the current Administrative Judge since Meggs had responded to the 2009 Conditional Order. App. 924. Meggs filed a notice of Appeal on February 14, 2014. App. 925. This petition follows.

ARGUMENT

The PCR court erred in dismissing Petitioner Meggs' 2013-CP-21-874 PCR application pursuant to Rule 12(b)(8), SCRCP, because his 2009-CP-21-3147 PCR application was still pending? The PCR court should have dismissed the 2009 PCR or, in the alternative combined the 2009 and 2013 PCR applications, and allowed Petitioner Meggs to go forward on his 2013 PCR where an evidentiary hearing could be held that would allow him to testify concerning his PCR issues since he was unable to testify at the first and only PCR hearing.

Meggs was charged with inducing two nine year old twin brothers to perform oral sex on each other during paint ball camp activities from October 1999 and December 1999. Petitioner would pick up the boys in his truck (13 to 15 boys) and transport them to a field where they would play paint ball. The boys had to follow petitioner's orders or else they would be sprayed with petitioner's paint ball gun. App. 190, ll. 1 – App. 191, ll. 25; App. 196, ll. 8 – 21; App. 199, ll. 1 – App. 201, ll. 22; App. 205, ll. 9 – 25; App. 207, ll. 1 – App. 209, ll. 24.

At trial, victim #1 testified that petitioner gave an order involving “suck[ing] each other's (twin brother's) private parts” and “do[ing] push ups over the other wherein they have to use their mouth to remove a paint ball from another boy's genitals. Victim #1 testified that he had to suck his brothers penis and his brother had to suck his penis. App. p. 196, line 10 – p. 222, line 19. Twin #2 testified that petitioner made them suck each other's (brother) penis and take the balls off other boys' private parts as they did push-ups. App. p. 256, line 3 – p. 278, line 23.

A few months after petitioner was convicted and housed at SCDC, he was diagnosed as having a mood disorder (dysthymic disorder), chronic schizophrenia, and paranoia. App. p. 722, lines 11 – 17. During the PCR hearing, petitioner's counsel advanced the position that trial counsels were ineffective in failing to investigate into and develop a mental illness defense because there was

evidence tending to suggest that a mental evaluation would have yielded results in support of a successful guilty but mentally ill defense in the case.

During the PCR hearing, petitioner's mother, Emily Meggs, testified that she informed trial counsels that petitioner had mental problems and that petitioner's grandfather, who ultimately shot himself, was housed at the state hospital for schizophrenia (which was the same diagnosis SCDC doctors gave petitioner). App. p. 697, line 16 – p. 702, line 24. Petitioner's father also testified during the PCR hearing and explained that he informed trial counsels also that petitioner was a compulsive liar. App. p. 705, line 13 – p. 709, line 13. Also, petitioner's aunt, Mary Strickland, stated that she and the family informed counsels that “[petitioner] wasn't right” and requested that petitioner be “checked” out. App. p. 713, line 20 – p. 715, line 14.

Forensic psychiatrist Thomas Victor Martin interviewed petitioner on August 24, 2006, and November 16, 2007, and diagnosed petitioner as suffering from a mental illness: specifically psychotic disorder (psychosis) and major depressive disorder. Dr. Martin testified during the PCR hearing. Dr. Martin acknowledged that SCDC gave a consistent mental diagnosis of petitioner also and began medicating him with seroquel, which is an antipsychotic medicine for people who have “severe mental illness of a psychotic nature.” Dr. Martin opined that petitioner suffered from mental illness at the time of the alleged offense. Dr. Martin stated that he learned that petitioner was sexually abused at the age of seven and that when he began hearing voices during his teenage years, he became depressed and withdrawn and did not develop friendships with others. Petitioner lived in a fantasy world and became a compulsive liar (including fabrications that he was a pilot, a five star general and a college graduate). Petitioner was socially inept, exhibited child-like behavior and was very dysfunctional. In summary, Dr. Martin testified that had petitioner undergone a mental evaluation prior to trial, then the test results would have yielded evidence establishing that he was

suffering from a “psychotic and depressive illness” requiring treatment. App. p. 715, line 15 – p. 732, line 7. Note also that petitioner denied these allegations per a polygraph exam, which according to Dr. Martin was proof of mental illness in that petitioner did not see anything that he had done wrong. App. p. 741, line 15 – p. 742, line 17.

Meggs did not testify at his first and only PCR hearing. App. 691 – App. 692.

In his first PCR application, Meggs claims of ineffective assistance of counsel were:

1. Failure to investigate applicant’s mental capacity
2. Failure to request GBMI
3. Failure to move for a directed verdict
4. Failure to request a lesser included charge

App. 798.

In his 2013 PCR application (2013-CP-21-874), Meggs claims were:

1. Meggs was incapable of taking the stand at his first PCR hearing to present the issue that the state did not meet all the necessary elements of the offense he was facing at trial;
2. Meggs was unable to take the stand to present trial counsel’s failure to raise the directed verdict issue
3. Due to Meggs’ mental incapacity he could not object to the PCR judge’s conflict and request for recusal.

App.904- App. 913.

Meggs did not testify at his first and only PCR hearing due to his mental illness. App. 691- App. 692. He argued in his 2013 PCR application that he wanted to testify concerning the ineffectiveness of his trial counsel. No hearing was held in either of his 2009 PCR applications. The judge has now dismissed Meggs’ fourth PCR application without an evidentiary hearing. Meggs has

been denied the opportunity to present his own testimony concerning the ineffectiveness of his trial counsel.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel’s performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In Alvord v. Wainwright, 469 U.S. 956 (1984), the United States Supreme Court ruled that the defendant has the authority to make certain fundamental decisions about his case after thorough consultation with counsel. One of these fundamental decisions is whether to testify on one’s own behalf. Although, this right was discussed in terms of a jury trial, this same legal principle should apply to PCR where the defendant should have the right to testify.

A successive PCR application raises grounds not raised in a prior application, raises grounds previously heard and determined, or raises grounds waived in prior proceedings. Odom v. State, 337


S.C. 256, 523 S.E.2d 753 (1999). Successive PCR applications are disfavored but are allowed in rare circumstances. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991).

It was prejudicial to Meggs to deny him the opportunity to testify to present his own issues concerning his trial counsel. His 2013 PCR application should be heard in an evidentiary hearing where Meggs is allowed to testify on his own behalf. In the alternative, Meggs' 2009 and 2013 PCR applications should be combined for an evidentiary hearing.

CONCLUSION

Based on the above, certiorari should be granted, and the case reversed and remanded for a full evidentiary hearing where Petitioner Meggs is allowed to testify regarding his PCR grounds of ineffective assistance of trial counsel.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of September, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO FLORENCE COUNTY
MICHAEL G. NETTLES, CIRCUIT COURT JUDGE

JIMMY D. MEGGS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

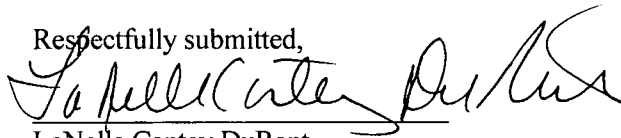
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jimmy D. Meggs, Jr. states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She 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 her as counsel for Jimmy D. Meggs, Jr..

Respectfully submitted,

LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 29th day of September, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Michael G. Nettles, Circuit Court Judge

JIMMY D. MEGGS,

PETITIONER,

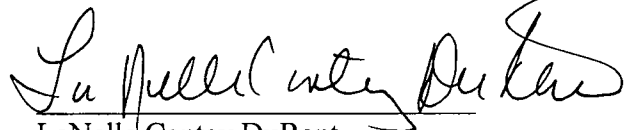
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

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 Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Jimmy D. Meggs, Jr., #277400, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 29th day of September, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day
of September, 2014.

Mark J. [Signature] (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.