

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Greenville County

SC SUPREME COURT

Edward W. Miller, Circuit Court Judge

JEFFREY BRIAN DEVALL

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002309

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel was ineffective in failing to subject the State's case to any meaningful adversarial testing?

STATEMENT

On August 26, 2013, petitioner appeared before the Honorable Letitia H. Verdin in Greenville County and pled guilty to trafficking in meth 28 – 100g (conspiracy) and trafficking in meth 28 – 100g. Two sixteen (16) year concurrent sentences were imposed on November 6, 2013. Joseph R. Baldwin, Esquire was plea counsel. Curtis Pauling, Esquire was the solicitor. (App. p. 1 – p. 25)

Petitioner filed an application for post-conviction relief on May 2, 2014. (App. p. 26 – p. 39) Respondent filed a return dated December 10, 2014. (App. p. 40 – p. 45) An evidentiary hearing was held on April 22, 2015, before the Honorable Edward W. Miller. Petitioner was present and was represented by R. Mills Ariail, Esquire. Respondent was represented by LaRone Kashod Washington, Assistant Attorney General. Petitioner and Kenneth Pittman testified. Joseph Baldwin testified in Respondent's behalf. (App. p. 46 – p. 76) On October 20, 2015, Judge Miller issued an order denying and dismissing the application for post-conviction relief. (App. p. 77 – p. 85)

This petition follows.

ARGUMENT

Plea counsel was ineffective in failing to subject the State's case to meaningful adversarial testing.

Petitioner was indicted for two counts of trafficking in meth by the State Grand Jury. (App. p. 91 – p. 96) Pursuant to a plea agreement he pled guilty to trafficking in meth 28 – 100 grams (conspiracy), first offense. He also agreed to plead guilty to trafficking in meth 28 – 100 grams, first offense. (App. p. 86 – p. 87)

Petitioner testified at the evidentiary hearing that plea counsel told him he would get 7, no more than 10 years if he pled guilty. While the plea agreement recommended a sentencing range of 15 – 18 years, petitioner said he never read the plea agreement and plea counsel never went over it with him. Counsel never gave him his Rule 5. (App. p. 50, lines 8-24) Petitioner said he was only guilty of buying 7 grams. He was not told he was pleading to 28 – 100 grams. Petitioner said he was high on meth and oxycontin when he pled. He didn't even know what the judge was saying. Counsel knew that he was high. (App. p. 51, line 2 – p. 52, line 7) Counsel never interviewed the State's key witness. (App. p. 52, lines 15 -17) Counsel told him he never handled a state grand jury case and did not know how to advise him concerning it. (App. p. 54, lines 21 – 23)

As can be seen from petitioner's testimony, plea counsel was deficient in many respects. In Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006) this Court observed how prejudice may be presumed in the context of ineffective assistance of counsel:

The Supreme Court also recognized in both Strickland and Cronic that in certain circumstances "prejudice is presumed" because prejudice "is so likely that case-by-case inquiry...is not worth the cost." Strickland, 466 U.S. at 692, 104 S.Ct. 2052 (citing Cronic, 466 U.S. at 658, 104 S. Ct. 2039). In *552 Cronic, the Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant

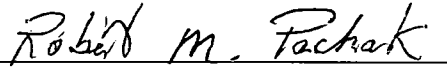
is completely denied counsel “at a critical stage of his trial.” Cronic, 466 U.S. at 659, 104 S.Ct. 2039. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer “entirely fails to subject the prosecution’s case to meaningful adversarial testing,” thus making “the adversary process itself presumptively unreliable.” Id. Third, the Court identified certain instances “when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” Id. (citing Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77, L.Ed. 158 (1932)). A finding of per-se prejudice under any of these three prongs is “an extremely high showing for a criminal defendant to make.” Brown v. French, 147 F.3d 307, 313 (4th Cir. 1998). 367 S.C. at 551-552, 626 S.E.2d at 880.

If counsel had performed a more adversarial role in this case, he could have obtained a better plea agreement or he could have gone to trial.

CONCLUSION

Petitioner's guilty plea should be vacated.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of January, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
EDWARD W. MILLER, CIRCUIT COURT JUDGE

JEFFREY BRIAN DEVALL

PETITIONER,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2015-002309

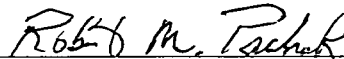
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jeffrey Brian Devall states:

1. He is an 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 April 22, 2015. 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 Jeffrey Brian Devall.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 29th day of January, 2016

STATE OF SOUTH CAROLINA

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Certiorari to Greenville County
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JEFFREY BRIAN DEVALL

PETITIONER,

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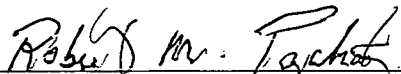
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002309

CERTIFICATE OF SERVICE

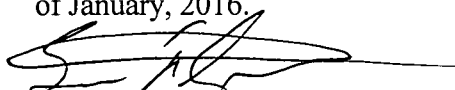
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Jeffrey Brian Devall, #333134, at Perry Correctional Institution this 29th day of January, 2016.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day
of January, 2016.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.