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**FEB 29 2016**

**SC SUPREME COURT**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Clarendon County

George C. James, Jr., Circuit Court Judge  
\_\_\_\_\_

CHARLES JUNIOUS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001498  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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ATTORNEY FOR PETITIONER

**CONCLUSION**

Based on the foregoing reasons, Petitioner Charles Junious' petition for writ of certiorari should be granted to allow full briefing on the issue.

Respectfully submitted,

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John H. Strom  
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of February, 2016.

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## ISSUES PRESENTED

### I.

The PCR court properly granted Petitioner's request for a belated PCR appeal pursuant to *Austin v. State*<sup>1</sup> because Petitioner did not knowingly and intelligently waive the right to appellate review of his previous PCR application and Order of Dismissal.

### II.

The PCR court erred in finding that plea counsel provided effective assistance of counsel where plea counsel failed to request a second competency evaluation to determine Petitioner's fitness to stand trial when there was a reasonable probability that Petitioner was incompetent at the time of the plea and, at a minimum, a second competency evaluation would have provided the plea court with additional evidence supporting a plea of guilty but mentally ill.

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<sup>1</sup> 305 S.C. 453, 409 S.E.2d 395 (1991)

## STATEMENT

### **Relevant Facts**

In the early morning hours of November 29, 2007, Clarendon County 911 received an emergency call from Teresa Johnson. App. 17, l. 14 - 18, l. 6. A hysterical Johnson stated that Petitioner Charles Junious, her former boyfriend who was indisputably mentally ill, was standing outside of her bedroom window. Junious refused to leave. *Id.*

Junious and Johnson had broken up a few weeks earlier. App. 13, ll. 10-25. Junious had not taken the break-up well. Co-workers later reported to law enforcement that he had repeatedly come by her place of work and that Johnson had complained about Junious “harassing” her. *Id.*

As Johnson was speaking with the 911 operator, Junious began to bang on the back door. App. 18, ll. 7 -20, l. 7. Junious eventually broke the door down. He then forced his way into Johnson’s bedroom and fatally shot her seven times at close range with a pistol he had stolen from his cousin the day before. *Id.* Junious also killed Barbara Johnson, Teresa’s mother, shooting her five times as she attempted to intervene. *Id.*; App. 26, l. 6-24.

The 911 call recorded the entire event. *Id.* After the shooting Junious walked into the adjoining bedroom which belonged to Franklin Johnson, Barbara’s father and Teresa’s grandfather. Franklin was sheltering Teresa’s fourteen month old child. Junious told him that “I done something bad now.” App. 19, ll. 18-22.

Junious then tried to locate Barbara’s car keys, but was unsuccessful. App. 20, l. 4 - 21, l. 23. He was arrested without incident later that morning when the Johnson’s neighbors called 911 after Junious showed up at their house asking to be let inside. *Id.* After being taken into custody, Junious confessed to killing Barbara and Teresa Johnson. App. 21, ll. 3-23.

## **Indictment**

On March 6, 2008, the Clarendon County Grand Jury indicted Petitioner on two counts of murder, one count of first degree burglary, one count of possession of a firearm during the commission of a violent crime, and one count of the unlawful carry of a pistol. App. 100 - 101.

## **Guilty Plea**

On January 26, 2009, Petitioner pled guilty to all counts at a hearing held before the Honorable R. Ferrell Cothran, Jr. App. 1 - 54. Shawn Kent represented Petitioner and Solicitor C. Kelly Jackson represented the State.

After reciting the facts of the case, the State played the tape of Johnson's 911 call, including the shootings. The State also played a recording of a return call made by the 911 operator after the first call ended. In that call, Petitioner answered the phone. App. 22, ll. 4-23. Members of the Johnson's family spoke at the hearing. The State recommended life without parole.

In mitigation, plea counsel, while conceding that Petitioner had been found competent to stand trial, detailed Petitioner's long history of mental illness. App. 35, l. 11 - 37, l. 25. He theorized that Petitioner may have had "psychotic break" on the night of the murders.

Nevertheless, counsel stated that Petitioner had appeared lucid, rational, and remorseful during their conversations. *Id.* Plea counsel posited that Petitioner's behavioral problems, which dated back to the early 1990s, had been largely ignored by his family and school officials. App. 38, l. 14 - 39, l. 23. Plea counsel requested that the court find Petitioner guilty but mentally ill and impose a sentence of less than life imprisonment. App. 41, l. 4-24.

The trial court found Petitioner guilty and sentenced him to three terms of life imprisonment for the murders and first degree burglary. Petitioner was also sentenced to a concurrent term of five

years imprisonment for possession of a weapon during the commission of a violent crime and one year of imprisonment for the unlawful carry of a pistol.

### **PCR Application**

On October 6, 2009, Petitioner filed an application for post-conviction alleging that he was plea counsel was ineffective for failing to argue that Petitioner was incompetent to stand trial at the time of his guilty plea and for failing to file an appeal. App. 55 - 64. The State filed a Return on January 11, 2010. App. 65 - 69.

### **PCR Evidentiary Hearing**

On March 19, 2010, an evidentiary hearing was held by the Honorable Williams Jeffery Young. App. 70 - 91. William Johnson represented Petitioner and Assistant Attorney General Mary Williams represented the State. Petitioner and plea counsel testified at the hearing.

### *Testimony of Petitioner*

Petitioner testified that he underwent a competency evaluation at the Department of Mental Health, which found him competent to stand trial. App. 75, ll. 12-24. Petitioner stated that plea counsel never reviewed the findings of the examination with him.

Petitioner recalled that plea counsel was planning on arranging a second evaluation, but that it never took place. App. 76, ll. 3-15. Without elaboration, Petitioner testified that this second evaluation would have shown him incompetent to stand trial. *Id.* Petitioner was unable to remember specific events from his plea hearing or the night of the murders. *Id.*

### *Testimony of Plea Counsel*

Plea counsel recollected that he was concerned about Petitioner's mental competency from the start of his representation. The Department of Mental Health Evaluation "showed that there

was a mental illness there, but not mental illness that he couldn't control his actions." App. 79, ll. 8-25.

Plea counsel stated that he had wanted to move for a second mental illness examination, but that Petitioner's family could not afford it. *Id.* Counsel claimed that he used the evidence of Petitioner's mental illness to negotiate with the solicitor and was able to convince the State not to seek the death penalty App. 80, ll. 3-22.

During the evidentiary hearing, plea counsel stated multiple times that, based on his experience, a second competency evaluation was unnecessary. App. 80, l. 4 - 81, l. 20. Plea counsel conceded that he may not have informed Petitioner of his right to appeal his guilty plea, but he believed the trial court had. *Id.*

On cross-examination, counsel recalled that Petitioner did not remember the night of the murder. App. 82, ll. 5-25. Counsel posited that Petitioner would have very likely been convicted of the murders because both killings were recorded by Clarendon County 911. *Id.* Counsel then reiterated that Petitioner's complete lack of emotion regarding the murders is what led him to push for a guilty but mentally ill plea. App. 83, ll. 10-16.

### **Order of Dismissal**

On May 11, 2012, Judge Young denied Petitioner's application by a written order of dismissal. App. 92 - 98. The court ruled that plea counsel was not ineffective in failing to secure a second mental competency evaluation. App. 96. The court specifically noted that plea counsel had used the first evaluation to convince the State not to seek the death penalty. *Id.*

Judge Young also concluded that Petitioner had failed to prove how a second evaluation would have changed the outcome of his case. "One evaluation had already been done and did not

support an insanity defense or incompetence. The evaluation was supported by Counsel's own observations that Applicant was not impaired to the level of incompetence." App. 97.

**April 13, 2015 Hearing**

On April 13, 2015, a hearing was held before the Honorable George C. James, Jr. App. 86 - 91. During the hearing, the parties agreed that Petitioner had not knowingly waived his right to an appeal of the denial of his PCR Application. *Id.* The State consented to a belated appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

## ARGUMENT

### I.

**The PCR court properly granted Petitioner's request for a belated PCR appeal pursuant to *Austin v. State* because Petitioner did not knowingly and intelligently waive the right to appellate review of his previous PCR application and Order of Dismissal.**

The State consented to a belated *Austin* appeal. App. 86 - 91. "All applicants are entitled to a full and fair opportunity to present claims in one PCR application." *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). A PCR appellant is entitled to a full adjudication on the merits of the original petition. This "one bite of the apple" includes an applicant's right to appeal the denial of a PCR application. *Id.* at 261, 523 S.E.2d at 755-56 (internal quotations and citation omitted)).

Successive PCR applications and appeals are disfavored. Nevertheless, this Court has allowed successive PCR applications where an applicant has been denied complete access to the appellate process. *See Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). "An *Austin* appeal is used when an applicant is prevented from seeking appellate review of a denial of his or her PCR application, such as when an attorney fails to seek timely review." *Odom*, 337 S.C. at 262, 523 S.E.2d at 756 (citing *Aice*, 305 S.C. at 448, 409 S.E.2d at 392);

Accordingly, a petitioner is entitled to belated appellate review of his prior PCR application and Order of Dismissal when: (1) he requested, yet was denied an opportunity to seek appellate review; or (2) his right to appellate review was not knowingly and intelligently waived. *Id.*, 337 S.C. at 262, 523 S.E.2d at 756 (citing *King v. State*, 308 S.C. 348, 417 S.E.2d 868 (1992)).

In this case, Petitioner never received his full "bite at the apple" as he was prevented from seeking a review of the denial of his PCR application." *Id.*, 337 S.C. at 262, 523 S.E.2d at 756 (citing *Aice*, 305 S.C. at 452, 409 S.E.2d at 395). PCR counsel conceded that he never filed a notice of appeal and had no recollection of advising Petitioner of his right to appeal the Order of

Dismissal. App. 86 - 91. Moreover, the State consented to the belated appeal. *Id.*

Therefore, the PCR court properly granted Petitioner's request for a belated PCR appeal pursuant to *Austin v. State* because Petitioner did not knowingly and intelligently waive the right to appellate review of his previous PCR application and Order of Dismissal. *See Odom*, 337 S.C. at 262, 523 S.E.2d at 756 (citing *King*, 308 S.C. 348, 417 S.E.2d 868); *see also Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (holding that a finding of any evidence of probative value is sufficient to uphold the PCR judge's findings).

## II.

**The PCR court erred in finding that plea counsel provided effective assistance of counsel where plea counsel failed to request a second competency evaluation to determine Petitioner's fitness to stand trial when there was a reasonable probability that Petitioner was incompetent at the time of the plea and, at a minimum, a second competency evaluation would have provided the plea court with additional evidence supporting a plea of guilty but mentally ill.**

### Relevant Facts

An initial competency evaluation was conducted prior to plea counsel's appointment. App. 5, ll. 15-23. This evaluation found Petitioner competent to stand trial, but indicated that Petitioner suffered from some form of previously undiagnosed psychosis. App. 33, l. 3 - 40, l. 24. At the guilty plea hearing, plea counsel argued that Petitioner should be allowed to plead guilty but mentally ill. App. 41, l. 4 - 42, l. 23.

Plea counsel presented the court with the initial competency evaluation and other documents - school disciplinary records, Department of Mental Health records, and others - purporting to show that Petitioner suffered from "an untreated level of psychosis". App. 37, l. 3-15.

The court rejected Petitioner's request to plead guilty but mentally ill. In reaching its conclusion, the court relied exclusively on the initial evaluation finding Petitioner's competent. App. 51, ll. 12-22. "My problem is that you want me to make a finding that he's guilty but mentally ill so I'm making some kind of judicial finding that he's mentally ill and I have nothing to base that on, based on what I have before me." App. 52, ll. 16-20.

At the PCR hearing, plea counsel stated that he did not move for a second competency evaluation because he did not believe it was necessary. App. 79, l. 8 - 81, l. 6. Moreover, plea counsel did not believe that Petitioner's "untreated psychosis" which rendered him incompetent to stand trial. *Id.*

## Discussion

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There is a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. The two-part test adopted in *Strickland* also applies to challenges to guilty pleas based on ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

To prevail, applicant must satisfy both prongs of the *Strickland* test. *Stalk v. State*, 383 S.C. 559, 561, 681 S.E.2d 592, 593 (2009). Any evidence of probative value supporting the PCR court's factual findings is sufficient to uphold those findings on appeal. *Jeter v. State*, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992)

Due process prohibits the conviction of an incompetent defendant, and this right may not be waived by a guilty plea. *Id.* To show “prejudice within the context of counsel's failure to fully investigate the petitioner's mental capacity, ‘the [Petitioner] need only show a reasonable probability that he was either insane at the time [the crime was committed] or incompetent at the time of the plea.’” *Matthews*, 358 S.C. at 459, 596 S.E.2d at 50 (alterations by court).

Furthermore, “[t]he test of competency to enter a plea is the same as required to stand trial.” *Id.* “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.” *Id.* Independent of defense counsel, the court has a duty to order a competency hearing if a defendant has a history of mental illness or other erratic behavior.

*State v. Blair*, 275 S.C. 529, 532, 273 S.E.2d 536, 537 (1981).

### **Deficient Performance**

Counsel should have sought a second competency evaluation prior to allowing Petitioner to plead guilty. App. 69; *Cf. Lee v. State*, 396 S.C. 314, 322, 721 S.E.2d 442, 447 (2011) (finding “[p]lea counsel could not be deficient if she had no indication of [Petitioner’s] mental status”). Petitioner’s first evaluation only assessed whether Petitioner was competent to stand trial, it did not address whether Petitioner suffered from any mental illness. App. 51, ll. 12-22.

Counsel evidently believed that Petitioner exhibited signs of having an “untreated psychosis” dating back to the 1990s. Furthermore, counsel thought that Petitioner should seek to enter a plea of guilty but mentally ill. Yet, when asked by the court to explain why Petitioner should be allowed to enter such a plea, counsel had to rely on school disciplinary records and decades old assessments from the Department of Mental Health. App. 35, l. 11 - 37, l. 25.

The court ultimately found that Petitioner was competent to stand trial largely because plea counsel had failed to provide the court with any evidence to the contrary. *Cf. Pate v. Robinson*, 383 U.S. 375 (1966) (defendant’s demeanor, medical history, and irrational behavior are all factors to determine whether or not further inquiry into defendant’s mental health is required). Petitioner was also denied the opportunity to plead guilty but mentally ill, decreasing his chance of receiving mental health treatment while incarcerated, because of plea counsel’s refusal to seek a second evaluation. App. 51, l.12 - 53, l. 22.

Plea counsel was deficient for failing to request a second competency evaluation so that the court could accurately assess Petitioner’s fitness to stand trial and the propriety of permitting Petitioner to enter a plea of guilty but mentally ill. App. 95 - 97; *Matthews*, 358 S.C. at 460, 596 S.E.2d at 51.

## **Prejudice**

As to prejudice, plea counsel failed to fully explore and investigate Petitioner's temporary incompetence because he maintained that "I thought there was some psychosis there but it wasn't the level of psychosis that rose to the level that would differentiate the difference between right and wrong." App. 79, l. 25 - 80, l. 3.

Notably, Petitioner testified that had he had no recollection of his actions on the night of the murder. App. 74, l. 6 - 75, l. 19. Petitioner also stated at the PCR hearing that he had no memory of his guilty plea. App. 75, l. 20 - 77, l. 20.

Counsel's failure to request a second competence evaluation prejudiced Petitioner as there was a reasonable probability that petitioner was incompetent on the night of the murders and when he entered his guilty plea. *Matthews*, 358 S.C. at 460, 596 S.E.2d at 51. Therefore, the PCR court erred in finding that plea counsel provided effective assistance of counsel. App. 96 - 97.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO CLARENDON COUNTY  
GEORGE C. JAMES, JR., CIRCUIT COURT JUDGE

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CHARLES JUNIOUS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001498

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Charles Junious 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 January 15, 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 Charles Junious.

Respectfully submitted,



John H. Strom  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 29th day of February, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Clarendon County

George C. James, Jr., Circuit Court Judge

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CHARLES JUNIOUS,

PETITIONER,

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CERTIFICATE OF SERVICE

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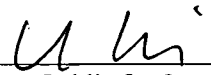
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Daniel Gourley, Esquire and Charles Junious, #332874, at Lee Correctional Institution this 29th day of February, 2016.



John H. Strom  
Appellate Defender

ATTORNEY FOR PETITIONER

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

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina

My Commission Expires: May 12, 2025.