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SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Barnwell County

Honorable Diane Schafer Goodstein, Circuit Court Judge

SAMUEL JOHNICAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000820

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 request an independent mental examination?

STATEMENT

On May 11, 2010, petitioner appeared before the Honorable Doyet A. Early, III in Barnwell County and pled guilty to murder. He was sentenced to life imprisonment. DeGrant Gibbs, Esquire was plea counsel. (App. p. 110) No transcript of the guilty plea is available. (App. p. 1).

Petitioner filed an application for post-conviction relief on August 2, 2010. (App. p. 5 – 11) Respondent filed a return dated February 16, 2011. (App. p. 12 – 17) An evidentiary hearing was held on January 20, 2016, before the Honorable Diane S. Goodstein. Petitioner was present and was represented by Daniel Gourley, Esquire. Respondent was represented by Lance Boozer, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. On March 7, 2016, Judge Goodstein issued an order denying and dismissing the application for post-conviction relief.

This petition follows.

ARGUMENT

Plea counsel was ineffective for failing to request an independent mental examination.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply 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 addition, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Trial counsel can be found ineffective for failing to object to an improper jury instruction or in failing to request a jury instruction that should have been given. He can be held ineffective for failing to object to the improper admission of character evidence, or prior bad acts, or illegally obtained statements, confessions, or improper searches. Failing to move for a continuance may also constitute ineffective assistance of counsel. Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006).

In some instances counsel may be held ineffective without a showing of prejudice when he fails to subject the prosecution's case to a meaningful adversarial testing. In such cases prejudice is presumed. Nance v. Ozmit, 367 S.C. 547, 626 S.E.2d 878 (2006).

In this case petitioner testified that he told plea counsel that he did not intend to murder his wife. He did not know what came over him. He was suicidal at the time. He cried most of the time. (App. p. 23, line 21 – p. 24, line 1) Petitioner said his lawyer failed to request an independent

examiner for a competency examination even though counsel knew of petitioner's impaired mental state. Petitioner testified that he asked for an independent examination. (App. p. 32, line 4 – p. 33, line 10) He did have a court ordered examination but he was not told by counsel that he would have one nor did counsel go over the results of that examination. (App. p. 33, line 11 – p. 34, line 21)

It is well settled that a defendant must be mentally competent to stand trial so as to assist counsel in his defense. Drope v. Missouri, 420 U.S. 162, 95 S. Ct. 896 (1975). In State v. Blair, 275 S.C. 529, 273 S.E. 2d 536 (1981) the court observed that a defendant's failure to request a competency hearing did not waive his right to a hearing where sanity was in issue. In Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006) the court held that the manner in which trial counsel investigated, planned, and conducted the defense was a completed breakdown in the adversarial process. Defense counsel can be held ineffective in failing to request a competency hearing. Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992).

CONCLUSION

Plea counsel was ineffective in failing to request an independent mental examination.

Robert M. Pachak
Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of August, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Barnwell County

Honorable Diane Schafer Goodstein, Circuit Court Judge

SAMUEL JOHNICAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

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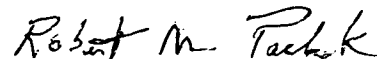
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Samuel Bruce Johnnican states:

1. HE is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. HE has reviewed the record of petitioner's trial before Judge Diane Schafer Goodstein, which was held on January 20, 2015 (Evidentiary hearing), and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. HE has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Samuel Bruce Johnnican.

Respectfully Submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 17th day of August, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Barnwell County

Honorable Diane Schafer Goodstein, Circuit Court Judge

SAMUEL JOHNICAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000820

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Samuel Bruce Johnican, #340693, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 17th day of August, 2016.

Robert M. Pachak

Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 17th day of August, 2016.

Christian Ford (L.S)

Notary Public for South Carolina
My Commission Expires: March 1, 2026