

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Tanya A. Gee, Circuit Court Judge

NATHANIEL MURRAY,

RECEIVED

SEP 23 2016

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000901

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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Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether defense counsel was ineffective in failing to investigate and prepare a defense strategy?

STATEMENT

Petitioner was convicted of failure to stop for a blue light and two (2) counts of armed robbery after a jury trial held before the Honorable L. Casey Manning on October 12 – 14, 2009 in Richland County. A sentence of three (3) years was imposed for failure to stop for a blue light and life without parole was imposed for the armed robbery charges. Mark E. Schnee, Esquire was defense counsel. Luck Campbell, Esquire and Aaron Jophlin, Esquire were the assistance solicitors. (App. p. 1 – p. 396)

Petitioner appealed his convictions and the appeal was dismissed by the South Carolina Court of Appeals in April 12, 2012. The State of South Carolina v. Nathaniel Murray, Opinion No. 2012-UP-228.

Petitioner filed an application for post-conviction relief on December 4, 2014. (App. p. 397 – p. 403) Respondent filed a return dated June 5, 2015. (App. p. 404 – 409) An evidentiary hearing was held on August 27, 2015, before the Honorable Tanya A. Gee. Petitioner was present and was represented by Jonathan D. Waller, Esquire. Respondent was represented by J. Clayton Mitchell, Assistant Attorney General. Both petitioner and trial counsel testified at the hearing. (App. p. 410 – 465) On January 19, 2016, Judge Gee issued an order denying and dismissing the petitioner's application for post-conviction relief. (App. p. 466 – 474)

This petition follows.

ARGUMENT

Defense counsel was ineffective in failing to investigate and prepare a defense strategy.

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 at the evidentiary hearing that he did not meet his trial attorney until around two weeks before his trial. His attorney was appointed. The attorney told him he was going to get an investigator but he didn't hear more about it. His attorney also wanted

to get a video from the scene but petitioner said he never heard anything more about that either.

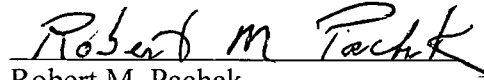
What we have in this case is a failure to investigate. Without investigating no real defense strategy can be prepared. In Ard v. Catoe, 372 S.C. 318, 642 S.E. 2d 590 (2007) the court wrote:

Without a doubt, “[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.” Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986); see also Strickland v. Washington, 466 U.S. At 691, 104 S.Ct. 2052. When evaluating the reasonableness of counsel's conduct, “the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” Strickland v. Washington, 466 U.S. At 690, 104 S.Ct. 2052. Moreover, while the scope of a reasonable investigation depends upon a number of issues, “at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” Trodel v. Wainwright, 667 F. Supp. 1456, 1461 (S.D. Fla. 1986), *aff'd*, 828 F.2d 670 (11th Cir.1987).

The American Bar Association (ABA) has specifically provided guidelines for defense counsel's performance regarding investigation of a capital case: “Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.” *American Bar Association Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases*, reprinted in 31 Hofstra L.Rev. 913, 1015 (2003)(hereinafter “*ABA Guideline*”). With respect to forensic evidence, the ABA directs the following: “With respect to forensic evidence, the ABA directs the following: “With the assistance of appropriate experts, counsel should aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence.” *Id.* at 1020. 372 S.Ct. at 331-332, 642S.E.2d at 597.

CONCLUSION

Because counsel failed to investigate petitioner's case should be reversed.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of September, 2016.

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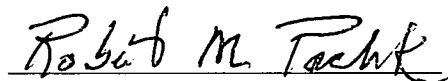
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Nathaniel Murray 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 Tanya A. Gee, which was held on August 27, 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 Nathaniel Murray.

Respectfully Submitted,



Robert M. Pachak

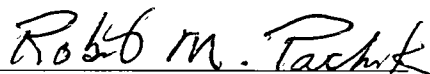
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of September, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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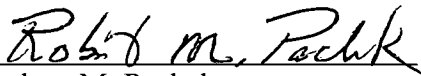
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APPELLATE CASE NO. 2016-000901

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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 Jessica Kinard, 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 Nathaniel Murray, #313891, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 23rd day of September, 2016.


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 23rd day of September, 2016.

Christian Ford (L.S)
Notary Public for South Carolina
My Commission Expires: March 1, 2026.