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S.C. Supreme Court

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to York County  
Lee S. Alford, Circuit Court Judge  
\_\_\_\_\_

STEVEN J. FREEMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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

DAYNE C. PHILLIPS  
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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Did the PCR court err in finding that plea counsel provided effective assistance of counsel where plea counsel failed to request a competency hearing to determine Petitioner's fitness to stand trial when there was a reasonable probability that Petitioner was incompetent at the time of the plea, as evinced by Petitioner's suicide attempt after the first day of trial and Petitioner's anxiety attack prior to his plea?

## STATEMENT

### **Indictments**

On November 9, 2006, Petitioner Steven Freeman was indicted by the York County Grand Jury for: (1) murder; (2) burglary in the first degree; and (3) resisting arrest. App. 414 – 419.

### **Plea Hearing**

On March 5, 2007, Petitioner *initially* proceeded to trial before the Honorable John C. Hayes, III, and a jury. App. 1. Petitioner was represented by Harry Dest and B.J. Barrowclough, and the State was represented by Kevin Brackett and Willy Thompson. App. 1. On the second day of trial, Judge Hayes granted a short recess after defense counsel stated they were not ready to proceed. App. 173, ll. 1-11. When court resumed, the Solicitor informed Judge Hayes that “[Petitioner] has indicated through his counsel that he wishes to change his plea from a plea of not guilty to a plea of guilty to these charges. There are no negotiations in the matter.” App. 173, ll. 13-25. Petitioner then pled guilty as charged. App. 174, l. 25 – 177, l. 25.

As part of his mitigating evidence, plea counsel advised Judge Hayes that Petitioner: had been hospitalized twice for attempting suicide; had heavily used anabolic steroids, which “could have [had] detrimental affects on his ability to control himself[;]” and was evaluated by Dr. Harold Morgan, who found that mental condition “did not amount to a mental health defense regarding insanity or guilty but mentally ill, but did say [Petitioner] had a lot of stresses on him during that timeframe . . . .” App. 181, l. 6 – 182, l. 16.

Petitioner stated that he was not under the influence of any intoxicants and was freely and voluntarily pleading guilty. App. 178, ll. 10-23. After Petitioner agreed to the solicitor’s recitation of the facts, Judge Hayes accepted Petitioner’s guilty plea and sentenced Petitioner to: (1) fifty years imprisonment for the murder conviction; (2) fifty years imprisonment for the burglary in the first

degree conviction; and (3) one year imprisonment for the resisting arrest conviction, to run concurrently for a total of fifty years imprisonment. App. 191, l. 19 – 192, l. 11; 224, ll. 2-7.

Petitioner appealed his convictions and sentence.

### **Direct Appeal**

On July 21, 2008, Appellate Defender Joseph Savitz filed an *Anders* brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Petitioner subsequently filed a *pro se* brief. App. 226 – 235. The South Carolina Court of Appeals affirmed Petitioner’s convictions and sentence (*State v. Freeman*, Op. No. 2009-UP-477 (S.C. Ct. App. filed October 13, 2009)). App. 236.

### **PCR Application and Evidentiary Hearing**

On December 18, 2009, Petitioner filed his application requesting post-conviction relief (PCR). App. 237 – 245. The Respondent filed its return on April 7, 2010. App. 257 – 261. Petitioner filed an amended PCR application on September 13, 2010, alleging ineffective assistance of counsel and involuntary guilty plea. App. 246 – 256. An evidentiary hearing was held before the Honorable Lee S. Alford on June 2, 2011. App. 262 – 386. Petitioner was represented by Brian Murphy, and the State was represented by Harrison Brant. App. 262.

Petitioner testified at the evidentiary hearing that he had attempted suicide twice and was admitted to the psychiatric ward of Piedmont Medical Center on August 22, 2006. App. 268, ll. 11-17. Petitioner also testified that he was “diagnosed with borderline personality disorder, depression with anxiety impulse control disorder, adjustment disorder” and was prescribed Zoloft. App. 268, ll. 16-21. Petitioner stated that he was later prescribed Vistaril instead of Zoloft and that the doctor at the detention center stopped prescribing Petitioner Vistaril approximately three weeks prior to his guilty plea. App. 272, l. 21 – 273, l. 25.

Furthermore, Petitioner testified, “I told [plea counsel] they weren’t giving me my meds.” App. 274, ll. 4-7. Petitioner stated that on the first day of trial he had “a lot of anxiety, a lot of racing thoughts, a lot of . . . panic like the walls are closing in on you and the room’s spinning.” App. 274, ll. 16-22. Petitioner also stated that after the first day of trial, he was crying a lot and attempted suicide by putting a trash bag over his head. App. 276, ll. 5-20.

Petitioner testified that on the morning of the second day of trial, he informed plea counsel that he could not catch his breath and was having racing thoughts. App. 277, l. 4 – 278, l. 11. Petitioner stated that he then decided to plead guilty and that plea counsel did not ask him about his mental health or attempt to discourage him from pleading guilty. App. 278, l. 17 – 279, l. 7. Notably, Petitioner testified that plea counsel failed to ask for a continuance and that he “would not have pled guilty if [he] had time to calm down.” App. 279, l. 11 – 280, l. 1. Petitioner reiterated, had he not been mentally incompetent at that time, he would not have pled guilty to murder. App. 287, ll. 9-11.

Plea counsel, Harry Dest, admitted at the evidentiary hearing that he knew about Petitioner’s prior suicide attempts, bouts with depression, and anabolic steroid usage. App. 299, ll. 10-25. Dest stated that he hired Dr. Harold Morgan to evaluate Petitioner’s mental health condition and that Dr. Morgan’s found Petitioner’s “competency was never an issue, insanity was never an issue.” App. 300, ll. 2-15. Dest also maintained that Petitioner’s testimony “regarding being tearful” was inaccurate because “virtually every single time that I went to see him, he cried.” App. 301, ll. 15-20.

Furthermore, Dest maintained that he had “prepar[ed] for trial the entire time” and was “left with the option of pursuing a defense of voluntary manslaughter by claiming that the legal provocation was [Petitioner] perceiving or observing his girlfriend in the middle of a sexual act.”

App. 302, ll. 15-23. Dest also maintained that Petitioner never told him about not being prescribed medication three weeks prior to the plea hearing. App. 303, ll. 4-13. Dest further claimed that he informed Petitioner about the possibility of receiving a life sentence and was “trying to convince [Petitioner] not to plead.” App. 303, ll. 7-25.

Dest admitted that, although it had been approximately two months after Petitioner was evaluated by Dr. Morgan, he did not request a continuance or a competency hearing prior to Petitioner’s guilty plea. App. 306, ll. 1-7. Dest stated that the plea judge would not have granted a motion for a continuance “to explore a plea offer” and that “as an officer of the court, [he] did not see anything in [his] observations or [his] experience with [Petitioner] from beginning to end which would suggest that [Petitioner] wasn’t competent to stand trial.” App. 306, ll. 15-24.

Dest maintained, “Had I thought for one minute that [Petitioner] was not mentally fit to [plead guilty], I would have asked the judge for a continuance. . . . But as an officer of the court, I can’t say that I observed those types of characteristics that would let . . . me make that motion.” App. 310, ll. 8-13. Dest reiterated that he had Petitioner evaluated prior to trial and “[t]here was never any indication . . . that [Petitioner] didn’t understand what he was doing, or that he had racing thoughts, or that he could not comprehend the consequences of his actions.” App. 311, ll. 7-11. Similarly, B.J Barrowclough’s testimony at the evidentiary hearing mirrored the testimony of his co-counsel, Harry Dest, by stating that Petitioner did not suffer from a mental illness and was competent to plead guilty. App. 326, ll. 8-1.

Petitioner’s father, Randall Freeman, testified that Petitioner acted “very strange” on the day of the plea and that Petitioner “[d]idn’t quite understand what was going on.” App. 331, ll. 14-17. Petitioner’s father also testified that it was not normal for Petitioner to cry and be emotional. App. 332, ll. 1-11. Petitioner’s mother, Evette Freeman, testified that Petitioner was crying and appeared

to be dazed prior to pleading guilty. App. 336, ll. 2-7. Petitioner's mother recalled that Petitioner "was very, very remorseful" and only seemed "clear-headed" for part of the guilty plea proceeding. App. 339, ll. 12-20. Additionally, Henry Terry, a pastor who visited Petitioner in jail, testified that Petitioner "looked like a beaten person, a depressed person, a person that didn't know what was going on." App. 342, ll. 9-13.

Dr. Harold Morgan, a forensic psychiatrist, maintained at the evidentiary hearing that he reviewed the incident report, witness statements, investigative reports, and interviewed Petitioner in preparation for his evaluation of Petitioner. App. 347, ll. 15-21. Dr. Morgan testified about Petitioner's hospitalizations after attempting suicide and Petitioner's diagnosis, which included: adjustment disorder; impulsive control disorder; depression; alcohol dependence; and borderline personality disorder. App. 348, l. 5 – 350, l. 20. Dr. Morgan recalled that Petitioner was not taking any medication when he interviewed Petitioner for the second time. App. 348, ll. 1-4.

Dr. Morgan admitted that "severe anxiety could erode the ability to make a competent decision" and that Petitioner had not been taking his anxiety medication. App. 352, l. 8 – 353, l. 9. Dr. Morgan also admitted that Petitioner's anxiety at trial could have overcome Petitioner's ability to make competent, rational, and informed decisions leading up to his decision to plead guilty. App. 352, ll. 5-7; 355, ll. 4-10. Dr. Morgan further testified that Petitioner's suicide attempt the night before Petitioner decided to plead guilty illustrates that Petitioner was not thinking rationally. App. 360, ll. 16-24.

Additionally, Dr. Morgan also testified that anxiety and depression can make a person "briefly incompetent." App. 361, ll. 7-11. However, Dr. Morgan maintained that Petitioner "was clearly competent to stand trial on both times that I saw him. And that [Petitioner] did not meet the standard for an insanity defense." App. 357, ll. 16-20. Dr. Morgan also claimed that he has not

been provided with any information that would make him change his opinion that Petitioner was competent to stand trial. App. 361, l. 24 – 362, l. 2.

### **Order of Dismissal**

On August 3, 2011, Judge Alford ruled in his Order of Dismissal that Petitioner failed to prove plea counsel provided ineffective assistance of counsel and denied Petitioner PCR relief. App. 387 – 410. Relevant to this petition, the PCR court found that Petitioner “failed to prove he was incompetent at the time of his plea” because Petitioner’s “own testimony established he was able to communicate with his lawyers in preparation for trial, during trial, and immediately before he pled guilty.” App. 403. The PCR court also found that “the testimonies of [Petitioner’s] mother and father, and their pastor, not persuasive on the issue. App. 403. Specifically, the PCR court noted that “[t]hese witnesses failed to otherwise present any credible testimony indicating [Petitioner] did not understand what he was doing when he pled guilty, or did not understand the consequences of doing so.” App. 403 – 404.

Furthermore, the PCR court noted that plea counsel’s “testimony in this case established that they both had extensive direct interaction with [Petitioner], and neither one of them ever observed any behavior from [Petitioner] indicative of incompetency. [Plea counsel’s] testimony established [Petitioner’s] tearful and emotional behavior at the plea was not unusual; to the contrary, they observed this behavior every time they met with [Petitioner].” App. 404. The PCR court further found that “[t]he testimony of [Petitioner’s] expert, Dr. Morgan, did not help his case. He testified he examined [Petitioner] and found him to be clearly competent on two occasions, the second of which as a month before trial.” App. 404. The PCR court concluded that Petitioner “failed to meet his burden of proving he was incompetent at the time of his plea” and found that “counsel was not ineffective for failing to further investigate [Petitioner’s] alleged incompetency, request a *Blair*

hearing, or request a continuance to have [Petitioner] further evaluated because the evidence before this Court clearly refutes [Petitioner's] claim of mental incompetency.” App. 405.

## ARGUMENT

**The PCR court erred in finding that plea counsel provided effective assistance of counsel because plea counsel failed to request a competency hearing to determine Petitioner's fitness to stand trial when there was a reasonable probability that Petitioner was incompetent at the time of the plea, as evinced by Petitioner's suicide attempt after the first day of trial and Petitioner's anxiety attack prior to his plea.**

Petitioner testified at the evidentiary hearing that after the first day of trial, he was crying a lot and attempted suicide by putting a trash bag over his head. App. 276, ll. 5-20. Petitioner also testified that on the morning of the second day of trial, he could not catch his breath and was having racing thoughts. App. 277, l. 4 – 278, l. 11. Moments later, Petitioner decided to forego his trial and plead guilty as charged. App. 173, l. – 177, l. 25. Petitioner recalled that plea counsel never inquired about his mental health or attempted to discourage him from pleading guilty. App. 278, l. 17 – 279, l. 7. Petitioner emphasized, had he not been mentally incompetent at that time, he would not have pled guilty to murder. App. 287, ll. 9-11. Therefore, plea counsel provided ineffective assistance of counsel for failing to request a competency hearing to determine Petitioner's fitness to stand trial when there was a reasonable probability that Petitioner was incompetent at the time of the plea. App. 403 – 405.

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). The United States Supreme Court has created 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). However, “[p]lea counsel is ineffective within the

meaning of the Sixth Amendment only when the applicant satisfies both requirements.” *Stalk v. State*, 383 S.C. 559, 561, 681 S.E.2d 592, 593 (2009).

“In order to find that petitioner's [plea] counsel was ineffective for refusing to request a *Blair* hearing<sup>1</sup> on petitioner's competency to stand trial, petitioner must show that counsel was deficient and that the deficiency prejudiced the outcome of petitioner's proceedings.” *Matthews v. State*, 358 S.C. 456, 459, 596 S.E.2d 49, 50–51 (2004). 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) (quoting *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. *Jeter*, 308 S.C. at 232, 417 S.E.2d at 595. To prevail in a PCR action, the petitioner must prove by a preponderance of the evidence he was incompetent when he entered his guilty plea. *Matthews*, 358 S.C. at 458– 59, 596 S.E. 2d at 51; *see also* Rule 71.1(e), SCRPC. Any evidence of probative value to support the PCR court's factual findings is sufficient to uphold those findings on appeal. *Jeter*, 308 S.C. at 232, 417 S.E.2d at 596.

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.*

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<sup>1</sup> *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981).

## Deficient Performance

In this case, plea counsel should have fully investigated whether Petitioner was competent to plead guilty because plea counsel knew of Petitioner's prior mental conditions and increasing elevated level of anxiety. App. 181, l. 6 – 182, l. 16; 299, ll. 10-25.; *Compare with 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”). The doctor, who evaluated Petitioner’s competency two months prior to trial, admitted at the evidentiary hearing that “severe anxiety could erode the ability to make a competent decision” and that Petitioner had not been taking his anxiety medication. App. 352, l. 8 – 353, l. 9. Dr. Morgan also admitted that Petitioner’s anxiety at trial could have overcome Petitioner’s ability to make competent, rational, and informed decisions leading up to his decision to plead guilty. App. 353, ll. 5-7; 354, ll. 4-10.

Furthermore, although Dr. Morgan had previously found Petitioner competent to stand trial, Dr. Morgan testified that anxiety and depression can make a person “briefly incompetent.” App. 357, l. 16 – 361, l. 11. Dr. Morgan further testified that Petitioner’s suicide attempt the night before Petitioner decided to plead guilty illustrates that Petitioner was not thinking rationally. App. 360, ll. 16-24. Petitioner asserted that he became briefly incompetent for several reasons. First, the doctor at the detention center stopped prescribing Petitioner Vistaril approximately three weeks prior to his guilty plea. App. 272, l. 21 – 13, l. 7. Second, on the first day of trial Petitioner had “a lot of anxiety, a lot of racing thoughts, a lot of . . . panic like the walls are closing in on you and the room’s spinning.” App. 274, ll. 16-22. Third, Petitioner also stated that after the first day of trial, he was crying a lot and attempted suicide by putting a trash bag over his head. App. 376, ll. 5-20.

Petitioner’s incompetence at the time of the plea is supported by the testimony of his father, mother, and their pastor at the evidentiary hearing. Petitioner’s father testified that

Petitioner acted “very strange” on the day of the plea and that Petitioner “[d]idn’t quite understand what was going on.” App. 331, ll. 14-17. Petitioner’s mother testified that Petitioner was crying and appeared to be dazed prior to pleading guilty. App. 336, ll. 2-7. Petitioner’s mother recalled that Petitioner only seemed “clear-headed” for part of the guilty plea proceeding. App. 339, ll. 12-20. Additionally, their pastor visited Petitioner in jail and testified that Petitioner “looked like a beaten person, a depressed person, a person that didn’t know what was going on.” App. 342, ll. 9-13.

Based on the testimony presented at the plea and PCR hearings, “Petitioner clearly established by a preponderance of the evidence that he was incompetent at the time he entered his guilty plea. Consequently, petitioner’s [plea] counsel was deficient for failing to request a *Blair* hearing so that the court could examine petitioner’s fitness to stand trial.” App. 403 – 405; *Matthews*, 358 S.C. at 460, 596 S.E.2d at 51; *See generally Pate v. Robinson*, 383 U.S. 375, 384, 86 S.Ct. 836 (1966) (finding when evidence of a defendant’s mental deficiencies raise doubt as to his competence, due process requires the judge to order a competency hearing).

### **Prejudice**

As to prejudice, plea counsel failed to fully explore and investigate Petitioner’s temporary incompetence because he maintained that “[t]here was never any indication . . . that [Petitioner] didn’t understand what he was doing, or that he had racing thoughts, or that he could not comprehend the consequences of his actions.” App. 311, ll. 7-11. Notably, Petitioner testified that had he not been mentally incompetent at that time, he would not have pled guilty to murder. App. 287, ll. 9-11. “[Plea] counsel’s failure to request a *Blair* hearing prejudiced petitioner under the *Jeter* standard because there was, at minimum, a ‘reasonable probability’ that petitioner was incompetent at the time of 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. 403 – 405.

**CONCLUSION**

Based on the foregoing reasons, Steven Freeman's petition for writ of certiorari should be granted to allow full briefing on the issue.

Respectfully submitted,

  
Dayne C. Phillips  
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of May, 2012.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO YORK COUNTY  
LEE S. ALFORD, CIRCUIT COURT JUDGE

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STEVEN J. FREEMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Steven J. Freeman 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 June 2, 2011. 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 Steven J. Freeman.

Respectfully submitted,

  
Dayne C. Phillips  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 4th day of May, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to York County

Lee S. Alford, Circuit Court Judge  
\_\_\_\_\_

STEVEN J. FREEMAN,

PETITIONER,

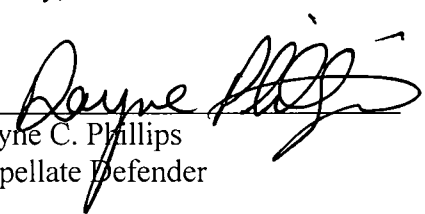
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STATE OF SOUTH CAROLINA,

RESPONDENT

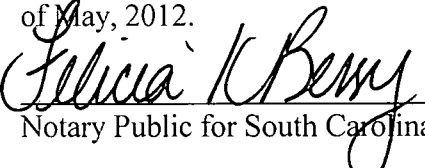
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CERTIFICATE OF SERVICE  
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire and Steven J. Freeman, #320516, at Perry Correctional Institution this 4th day of May, 2012.

  
\_\_\_\_\_  
Dayne C. Phillips  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day  
of May, 2012.

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

My Commission Expires: \_.