

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Honorable Frank R. Addy, Circuit Court Judge

JAMAL RASHAD BROWN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001357

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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S.C. SUPREME COURT

INDEX

INDEX..... i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT 3

CONCLUSION 5

PETITION TO BE RELIEVED AS COUNSEL..... 6

ISSUE PRESENTED

Whether defense counsel was ineffective in failing to investigate?

STATEMENT

On May 29, 2014, petitioner appeared before the Honorable Alexander Macaulay in Anderson County and pled guilty to voluntary manslaughter as a lesser included of murder for which he was indicted. A twelve (12) year sentence was imposed. Scott Robinson, Esquire was plea counsel. Kristen Reeves, Esquire was the assistant solicitor. (App. p. 1-19).

On January 15, 2015, petitioner filed an application for post-conviction relief. (App. p. 20-40) Respondent filed a return dated July 16, 2015. (App. p. 41-45) On September 2, 2015, an evidentiary hearing was held before the Honorable Frank R. Addy, Jr. Petitioner was present and was represented by Hugh Wingo Welborn, Esquire. Respondent was represented by John Walter Whitmire, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 46-72) On September 28, 2015, Judge Addy issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 73-80)

This petition follows.

ARGUMENT

Defense counsel was ineffective in failing to investigate.

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).

At the evidentiary hearing in this case, petitioner testified that counsel failed to investigate witnesses. There were several witnesses who gave statements. There was Xavier Johnson, Donald Starkes, Jr., and Donald Starkes, III. He brought this to counsel's attention but

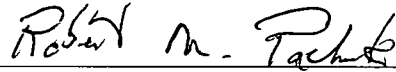
counsel brushed it off. (App. p. 51, ll. 8-23) These witnesses gave statements that could have been challenged. Xavier Johnson said he just saw petitioner with a gun. But he did not say that he saw him kill the victim. (App. p. 52, l. 1 – p. 53, l. 19) Counsel also failed to investigate forensic reports. There was a gunshot residue which was inconclusive which would have been exculpatory for him. (App. p. 56, ll. 12-22)

In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) the court wrote the following:

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. 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) (emphasis in original). 372 S.C. at 331-332, 642 S.E.2d at 597.

CONCLUSION

Counsel's failure to investigate was not reasonable in this case. He was ineffective and petitioner's guilty plea should be vacated.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of November, 2016.

STATE OF SOUTH CAROLINA

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Honorable Frank R. Addy, Circuit Court Judge

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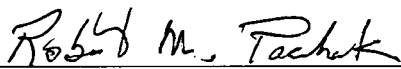
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jamal Rashad Brown 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 Frank R. Addy, which was held on September 2, 2015, 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 Jamal Rashad Brown.

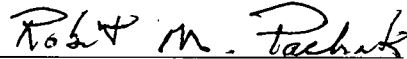
Respectfully Submitted,


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 18th day of November, 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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This 18th day of November, 2016.

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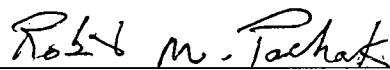
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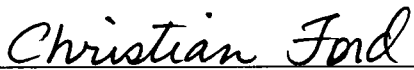
RESPONDENT

—————
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 Johanna C. Valenzuela, 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 Jamal Rashad Brown, #322838, at Goodman Correctional Institution, 4556 Broad River Road, Columbia, SC 29210, this 18th day of November, 2016.


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 18th day of November, 2016.

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