

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Lexington County

Honorable Brooks P. Goldsmith, Circuit Court Judge

RECEIVED

FEB 01 2017

JOSHUA B. PHILLIPS,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001288

JOHNSON PETITION FOR WRIT OF CERTIORARI

David Alexander
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 petitioner's guilty plea was unknowing and involuntary because plea counsel failed to fully investigate petitioner's mental competency by obtaining an independent expert and merely accepted the opinions of the government evaluations?

STATEMENT

In 2009, petitioner pled guilty to armed robbery and voluntary manslaughter before the Honorable Michelle Childs. App. 129. Petitioner filed a PCR application to which the State consented. App. 129. The PCR court vacated petitioner's pleas. App. 129. In October 2012, petitioner was indicted again for armed robbery and murder by a Lexington County grand jury. App. 146-49. On December 5, 2012, petitioner pled guilty before the Honorable R. Knox McMahon. App. 1. Samuel R. Hubbard, III and D. Shawn Graham represented the State. App. 1. Arie D. Bax represented petitioner. App. 1. Judge McMahon sentenced petitioner pursuant to a negotiated plea agreement to concurrent terms of twenty years' imprisonment for armed robbery and voluntary manslaughter. App. 34.

On July 12, 2013, petitioner filed a PCR application. App. 39. On June 8, 2015, the Honorable Brooks P. Goldsmith held a hearing. App. 67. John Walter Whitmire represented the State. App. 67. Aimee J. Zmroczek represented petitioner. App. 67. On March 14, 2016, Judge Goldsmith denied petitioner's application. App. 128. On May 25, 2016, Judge Goldsmith denied petitioner's Rule 59(e) Motion. App. 144. This petition follows.

ARGUMENT

Petitioner's guilty plea was unknowing and involuntary because plea counsel failed to fully investigate petitioner's mental competency by obtaining an independent expert and merely accepted the opinions of the government evaluations.

At the beginning of petitioner's guilty plea hearing, the solicitor informed the Court that there was a Blair issue. App. 3, ll. 15 – 16. See State v. Blair, 275 S.C. 529, 533, 273 S.E.2d 536, 538 (1981). The solicitor told Judge McMahon that petitioner had “been evaluated by DDSM and by [the] Department of Mental Health” and found competent. App. 3, ll. 18 – 22. Plea counsel then stated:

For the record, Your Honor, **we're not contesting the findings of the government agencies** that have examined my client. And **we've certainly had plenty of time since those examinations to look at any other opinions if we had desired to.** It is my opinion and in my experience and in my contact with my client that that would not be necessary in this case.

App. 3, l. 25 – 4, l. 6. Judge McMahon then did not conduct a full Blair hearing and did not hear from the government evaluators, but only reviewed their written evaluations. App. 4, ll. 7 – 13.

The unusual facts of this incident certainly warranted a full investigation of petitioner's mental status. App. 17, l. 15 – 27, l. 6. Petitioner had no prior record. App. 27, ll. 7 – 8. During the plea colloquy, the solicitor told the court that petitioner and his co-defendant showed up at a hospital claiming petitioner had been raped while he was passed out from drinking. App. 17, l. 15 – 27, l. 6. The hospital performed a rape examination and found no physical signs of rape. App. 19, ll. 14 – 19. The blood alcohol test showed no sign of alcohol. App. 22, ll. 3 – 6. The police responded to the home of the alleged perpetrator and found him dead, face down, with a sex object, and the word “rapist” carved into his buttocks. App. 20, ll. 9 – 13. Petitioner ultimately gave

multiple, conflicting statements to the police, some of which incriminated him in the man's death. App. 17, l. 15 – 27, l. 6.

At the PCR hearing, it was clear that neither PCR counsel nor plea counsel were able to effectively communicate with petitioner such that he could meaningfully assist in his defense. App. 72, l. 16 – 75, l. 12. PCR counsel told the court that she had been unable to determine what petitioner's claims of ineffectiveness were. App. 72, l. 16 – 75, l. 12. Petitioner repeatedly claimed that "after-discovered evidence" was the basis of his claim, but would not communicate the substance of this evidence to PCR counsel. App. 72, l. 16 – 75, l. 12. Petitioner's very experienced PCR counsel took the extraordinary step of asking the court to allow petitioner to testify and attempt to explain his claims for himself. App. 72, l. 16 – 75, l. 12. Judge Goldsmith reluctantly agreed. App. 75, ll. 1 – 12.

Plea counsel testified that when he first began representing petitioner, competence was an obvious issue. App. 89, ll. 14 – 22. Plea counsel examined evaluations by DDSN and DMH which held petitioner competent and did some investigation into petitioner's background. App. 91, l. 21 – 92, l. 14. Plea counsel learned that petitioner's IQ was between 60 and 70. App. 91, l. 21 – 92, l. 14. Despite this information, plea counsel did not have petitioner independently evaluated.

Plea counsel candidly admitted his grave concerns about petitioner's competency. App. 106, l. 22 – 108, l. 11. He testified that he still questioned petitioner's ability to understand things. App. 106, l. 22 – 108, l. 11. Plea counsel implied that petitioner's ability to correctly use words like "lawyer and judge and prosecutor" masked his true level of functioning. App. 107, ll. 7 – 17. Plea counsel stated, "I honestly believe Josh can't competently assist his attorney because he cannot let go of things no matter how much the facts contradict it. App. 107, ll. 7 – 17.

The PCR court relied on the evaluations conducted by the government evaluators to find that petitioner had not met his burden of proof. App. 137. This finding was error. When a trial judge has reason to question a defendant's capacity, "a competency evaluation is compulsory." State v. Colden, 372 S.C. 428, 441, 641 S.E.2d 912, 920 (Ct. App. 2007). See also State v. Blair, 275 S.C. 529, 533, 273 S.E.2d 536, 538 (1981).

The "reason to believe" an evaluation is needed can come from evidence of past and current mental problems and proffer of counsel. See State v. Singleton, 322 S.C. 480, 482-84, 472 S.E.2d 640, 641-42 (Ct. App. 1996). In Singleton, the Court of Appeals reversed because the trial judge abused his discretion in refusing to order an evaluation. Id. Defense counsel told the court that the defendant heard voices and had hallucinations. Id. The attorney suspected the defendant's behavior stemmed from a poisoning incident in his childhood. Id. The defendant was receiving mental health treatment at the time of the hearing. Id.

Petitioner was prejudiced by his attorneys' failure to obtain an independent competency evaluation. Strickland v. Washington, 466 U.S. 668 (1984). "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012). "Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel." Padilla v. Kentucky, 130 S.Ct. 1473, 1480-81 (2010) (internal quotations omitted).

Had plea counsel obtained an independent evaluation, then petitioner would not have pled guilty and, being incompetent, could not have been tried. The conviction of a mentally incompetent person violates due process. Pate v. Robinson, 383 U.S. 375, 378-79 (1966). See also U.S. Const. amends. V, XIV.

While the Strickland standard applies to cases where a defendant alleges ineffective assistance based on issues of competency in a guilty plea, “proof of deficiency of counsel is intertwined with prejudice.” Ramirez v. State, ___ S.C. ___, ___ S.E.2d ___, 2017 WL 56379, *3 (Jan. 5, 2017). In Ramirez, the defendant’s plea was vacated because of trial counsel’s failure to obtain an independent competency examination. Id. at *4-*5. Just like petitioner, Ramirez was initially given a cursory competency examination by a DMH evaluator. Id. at *1. Just like petitioner, DMH found Ramirez competent with little investigation. Id. at *1.

Unlike petitioner’s attorney, Ramirez’s attorney hired an independent psychologist who found that Ramirez was severely intellectually disabled with an IQ between 31 – 44. Id. at *2. Inexplicably, after finding out about his client’s severe disability, Ramirez’s attorney did not seek an opinion on his client’s competency. Id. at *2.

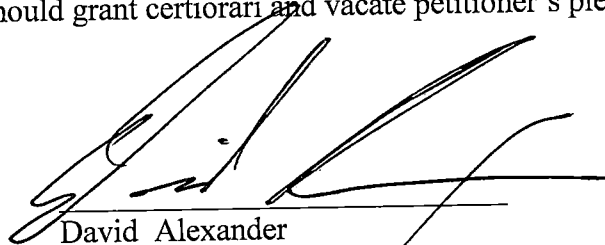
The Supreme Court reversed. Id. at *4-5. Even though (like petitioner) Ramirez produced no new evaluation at the PCR hearing showing that he was incompetent, the Court held that in such a case, “Once a PCR applicant has established his counsel was deficient in failing to obtain a mental competency evaluation, he is entitled to relief if he demonstrates a reasonable probability that he was incompetent at the time he pled guilty. Id. at *4.

Under Ramirez, petitioner is entitled to relief. The PCR court applied the incorrect prejudice standard from the Court of Appeals’ opinion in Ramirez that this Court reversed. App. 137. Plea counsel and PCR counsel both expressed their opinions that petitioner could not assist in his own defense. Plea counsel’s investigation after the government evaluations discovered that petitioner was intellectually disabled. Just as in Ramirez, this discovery about petitioner’s intellectual functioning placed plea counsel “on notice” that an independent competency evaluation was required. Id. at *5. The evidence at the PCR hearing, including counsel’s

opinions and the fact that petitioner's intellectual disability was not fully investigated by a qualified, independent expert, satisfies the burden of proof and this Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and vacate petitioner's plea.

A handwritten signature in black ink, appearing to read 'David Alexander', is written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of February, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Honorable Brooks P. Goldsmith, Circuit Court Judge

JOSHUA B. PHILLIPS,

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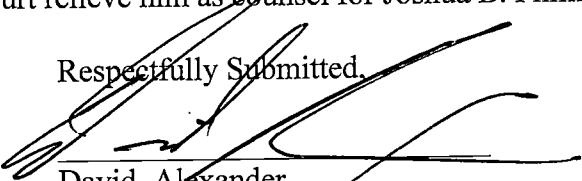
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joshua B. Phillips 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 Brooks P. Goldsmith, which was held on June 8, 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 Joshua B. Phillips.

Respectfully Submitted,

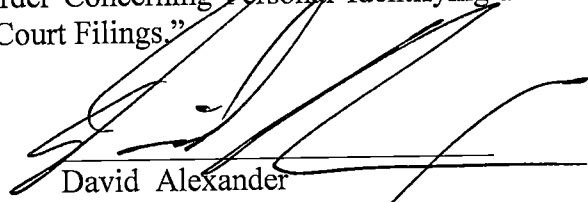


David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 1st day of February, 2017.

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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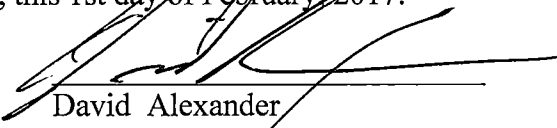
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RESPONDENT

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 Patrick Schmeckpeper, 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 Joshua B. Phillips, #335243, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 1st day of February, 2017.



David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 1st day of February, 2017.

Marisa Muebel (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023