

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County

D. Craig Brown, Circuit Court Judge
—————

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FEB 10 2017

S.C. SUPREME COURT

BRICE DI'VON COLEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-0001759

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JOHNSON PETITION FOR WRIT OF CERTIORARI
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Lara M. Caudy
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ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when plea counsel failed to present Dr. Susan C. Knight as a mitigation witness during Petitioner's sentencing proceeding after he pled guilty to murder where Knight would have opined that Petitioner was suffering from marijuana induced paranoia when he shot the decedent because Petitioner feared, without explanation, that the decedent was going to harm him?

STATEMENT OF THE CASE

Petitioner's mother died when he was six years old. He never met his father. Petitioner spent most of his childhood being "bounced around from family member to family member until he was a teenager" when he ultimately went to live with his grandmother who "by all accounts" only "wanted him there for the government check." App. 22, l. 21 – 23, l. 5. At seventeen, Petitioner moved to Columbia to live with his uncle. His uncle was a truck driver and was rarely home. However, his uncle's wife was able "to provide the closest thing to support [Petitioner] ever had." She "helped make sure that he got through high school" and graduated with a diploma. App. 23, ll. 6-18.

After Petitioner graduated from high school, he worked at Food Lion on Harden Street. He walked over an hour to work every day and was always on time. He also enrolled at Midlands Tech. App. 24, ll. 1-13. His manager at Food Lion and his high school teachers described him as "quiet" and "respectful." App. 24, ll. 8-12.

Around his eighteenth birthday, Petitioner's "mood" and "social life" began to change likely due to "the beginning of drug use" or "increased drug use." App. 24, l. 21 – 25, l. 1. He developed "a fear of people either following him or trying to harm him." App. 25, ll. 5-8. Five months after he turned eighteen, Petitioner was accused of shooting another eighteen year old, Moses McKnight. Without any explanation as to why, Petitioner believed McKnight was an individual who "would harm him." App. 25, ll. 15-22.

A Richland County Grand Jury indicted Petitioner on July 17, 2013 for the offense of murder. App. 105-106. He ultimately pled guilty on April 21, 2015 before the Honorable Alison Renee Lee. App. 1. Assistant Solicitor Margaret Bodham represented the state, and Robert Bank of the Fifth Circuit Public Defender Office represented Petitioner. App. 1. Despite

Petitioner's youth and his chaotic childhood, Judge Lee sentenced Petitioner to fifty years' imprisonment. App. 107. She later denied his motion to reconsider. App.73, ll. 22-24. Petitioner did not appeal his conviction or sentence.

On October 15, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 35-41. The state filed a return to this application dated February 17, 2016. App. 42-47. An evidentiary hearing was convened on July 14, 2016 before the Honorable D. Craig Brown. App. 48. Assistant Attorney General Johnny James represented the state, and David Allen represented Petitioner. App. 48. By order dated August 2, 2016, Judge Brown denied Petitioner relief. App. 93-104.

Plea Counsel Bank admitted at the evidentiary hearing that this was his first murder case. App. 67, ll. 8-13. He explained that because neither he nor Petitioner "felt very strongly" about Petitioner's "chances at" trial, Bank focused on preparing a mitigation case to present during sentencing. Bank believed Petitioner "had a better chance of receiving a lower sentence" if he pled guilty and "accepted responsibility." App. 68, ll. 11-25. Petitioner pled guilty "straight up" because the only plea offer extended by the state was a sentence recommendation of sixty to eighty years' imprisonment. App. 67, l. 20 – 68, l. 6.

Bank told Judge Lee during the plea hearing that Petitioner was evaluated by Dr. Susan Knight, a forensic psychologist who at the time worked at MUSC, and that Knight found Petitioner had "paranoia associated with what's likely marijuana use that was tied to a fear of people either following him or trying to harm him." App. 25, ll. 2-8. However, Bank did not expand on Dr. Knight's findings.

Bank later admitted at the evidentiary hearing that it would have been "helpful" to present Dr. Knight as a mitigation witness during sentencing to testify in detail regarding her

findings related to Petitioner. However, Bank claimed that when it came closer to the date of the plea he “had trouble finding Dr. Knight” and “MUSC told [him] . . . she didn’t work there anymore.” App. 72, l. 20 – 73, l. 2; App. 75, ll. 21-23. Despite the fact that he was “putting all of [his] eggs in [a] mitigation basket,” Bank did not consider asking for a continuance so that he could locate Dr. Knight or hire another forensic psychologist to evaluate Petitioner.¹ App. 73, ll. 9-18.

Joanna Delaney, who represented Petitioner for almost two years before she left the Public Defender Office, testified that she first sought to have Petitioner evaluated when “it appeared that Brice [Petitioner] was fearful of the victim but wasn’t really able to articulate why, and the investigation didn’t really reveal why.” She said she thought it was best to have a psychologist evaluate Petitioner to determine if there was “something internal or biological that caused” his fear. App. 82, ll. 2-8. Delaney confirmed that Dr. Knight opined Petitioner “was suffering from marijuana-induced paranoia at the time.” She said Knight’s opinion was corroborated by Petitioner’s aunt who revealed that Petitioner was “very paranoid in the home in the months leading up to [the murder].” App. 82, ll. 9-17. For example, Petitioner “would see cars driving by and think that they were after him.” App. 82, ll. 18-21.

Delaney asserted that Dr. Knight should have been presented as a mitigation witness during Petitioner’s sentencing because Knight’s testimony would “have given some context to his [Petitioner’s] actions” and “the judge wants to know why someone did what they did.” She explained that Dr. Knight “has a very impeccable background” and “is a very professional witness.” Consequently, Knight would have been able to make a more convincing presentation in mitigation than what Bank presented during sentencing. App. 82, l. 22- 83, l. 9.

¹ Petitioner’s case was scheduled for trial approximately three weeks after he ultimately pled guilty. App. 69, ll. 4-18.

The PCR court ultimately ruled that plea counsel's "failure to call Dr. Knight as a mitigation expert does not fall below prevailing professional norms" and that counsel "clearly and effectively delivered Dr. Knight's findings to the court as part of his mitigation efforts." App. 99. The court further found Petitioner could not prove prejudice because he did not present Dr. Knight as a witness during the evidentiary hearing or offer any other evidence that would show "what her mitigation testimony might have been." App. 99. Therefore, the court denied Petitioner relief.

Because the PCR court erred by finding plea counsel was not ineffective for failing to present Dr. Knight or another forensic psychologist as a mitigation witness during sentencing, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when plea counsel failed to present Dr. Susan C. Knight as a mitigation witness during Petitioner's sentencing proceeding after he pled guilty to murder where Knight would have opined that Petitioner was suffering from marijuana induced paranoia when he shot the decedent because Petitioner feared, without explanation, that the decedent was going to harm him.

Plea counsel was ineffective for failing to present Dr. Susan Knight as a mitigation witness during Petitioner's sentencing. Dr. Knight would have testified that Petitioner suffered from marijuana induced paranoia which caused him to have irrational beliefs that people were following him or were going to harm him. This paranoia is likely what led to Petitioner's actions in this case. Counsel's deficient performance violated Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel. Petitioner was prejudiced because if counsel would have presented Dr. Knight as a mitigation expert during sentencing, there is a strong probability that Petitioner would have received a lesser sentence, particularly given his youth and chaotic childhood.

"The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel." Bailey v. State, 392 S.C. 422, 432, 709 S.E.2d 671, 676 (2011) (citing U.S. Const. amend. VI and Strickland v. Washington, 466 U.S. 668 (1984)). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686; see Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is

whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used to evaluate allegations of ineffective assistance of counsel. Petitioner must prove counsel's performance was deficient and fell below reasonable professional norms, and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

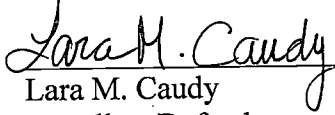
In this case, plea counsel's performance was deficient as it fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-688. Counsel should have presented Dr. Knight, or another forensic psychologist, as a mitigation expert during sentencing. Without providing any specifics, counsel merely told the plea court that Dr. Knight opined Petitioner suffered from "paranoia associated with what's likely marijuana use," which caused Petitioner to have "a fear of people either following him or trying to harm him." App. 25, ll. 2-8. If Dr. Knight would have been called as a mitigation expert during the plea hearing, she would have been able to provide additional details about Petitioner's mental health and present a more thorough and convincing case in mitigation. Petitioner was prejudiced by counsel's deficient performance because if Knight would have testified, there is a reasonable probability Petitioner would have received a lesser sentence.

Respectfully, this Court should reverse the ruling of the PCR court, hold plea counsel was ineffective, and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of February, 2017.

STATE OF SOUTH CAROLINA

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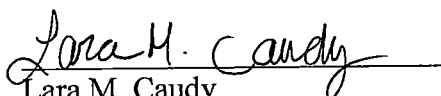
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Brice Di'Von Coley states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.
2. She has reviewed the records and transcript of Petitioner's post-conviction relief hearing, which was held on July 14, 2016 before the Honorable D. Craig Brown. In her opinion, seeking certiorari from the order of dismissal is without merit.
3. She 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 her as counsel for Brice Di'Von Coley.

Respectfully Submitted,

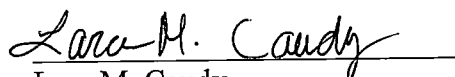

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of February, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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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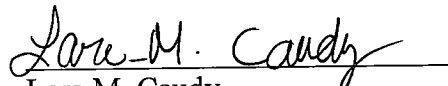
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STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

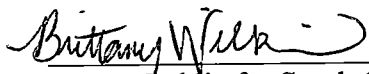
The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case have been served upon Jessica Kinard, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served upon Brice Di'Von Coley, #363771, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 10th day of February, 2017.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 10th day of February, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: November 3, 2026.