

South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

In Re: James A Tucker #260993 vs. State of South Carolina
Appellate Case # 2016-001844

Dear Clerk,

On April 20, 2017 I received letters from Appellate Defender Lara M. Caudy, and the South Carolina Supreme Court, notifying me Ms. Caudy has filed a Johnson brief, and if I chose to file "pro se", I have 45 days.

So I wish to file these 2 issues, and respectfully request a response to inform me if I've filed correctly. as I am not a lawyer, and I desire to make the deadline.

Thank you for your time, and consideration in the urgent matters.

Sincerely,


James A Tucker

James Tucker #260993
BRCI, Murray 149
4460 Broad River Rd.
Columbia, SC 29210

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MAY 31 2017

S.C. SUPREME COURT

ISSUE PRESENTED

Did the PCR court err by finding Petitioner failed to prove by a preponderance of the evidence that he was incompetent to stand trial at the time of his jury trial where Petitioner testified that he was taking multiple prescribed antidepressants that caused numerous adverse side effects, including abnormal thinking, disorientation, and memory loss, and that he could not comprehend the trial court proceedings?

STATEMENT OF THE CASE

Petitioner's father, Marshall Tucker, was attacked in his own home on the evening of February 9, 2009. Tucker was sitting in a chair at the kitchen table "listening to the police scanner" and watching television when someone entered his back door and struck him from behind with a hammer. This person continued to strike Tucker with the hammer and repeatedly yelled, "I need your money." App. 126, l. 13 – 127, l. 21. During the struggle, the individual reached into Tucker's left front pocket and removed over four hundred dollars in cash. After taking the money, the individual left the home through the front door. App. 128, l. 4 – 129, l. 1.

Tucker claimed that his son, Petitioner, was the person who attacked him. Petitioner was devastated by the accusation and did not understand why his father would make such a claim. App. 34, ll. 18-21. He was so upset that he attempted to commit suicide by ingesting a mixture of over the counter and prescription sleeping pills. He was admitted to the local hospital on February 10, 2009 and treated for an overdose. When officers went to the hospital to interview Petitioner about the attack, he was in and out of consciousness and unable to give a statement. App. 32, l. 21 – 35, l. 7; App. 57, ll. 1-24. He was arrested upon his release from the hospital the following day. App. 58, l. 11 – 59, l. 15.

Petitioner was ultimately indicted by an Anderson County Grand Jury on April 21, 2009 for armed robbery and assault and battery with intent to kill. App. 414-417. His case was called to trial on September 14, 2009 before the Honorable J. Cordell Maddox, Jr., and a jury. App. 1. Assistant Solicitor Rame Campbell represented the state, and Andrew Potter represented

Petitioner. App. 1. On September 16, 2009, the jury found Petitioner guilty. App. 318, ll. 1-10. He was sentenced by Judge Maddox to life without parole.¹ App. 323, ll. 8-23.

While he was incarcerated pretrial, Petitioner was prescribed various antidepressants, including Elavil and Neurontin, to treat his depression. These medications caused Petitioner to have difficulty “comprehending everything that was going on around [him].” App. 353, ll. 3-18. He testified during the evidentiary hearing that “one of the adverse reactions to the medication is amnesia, abnormal thinking, [and] disorientation.” App. 353, ll. 20-22. Petitioner experienced these adverse reactions before and during his trial. Consequently, he did not understand the trial court proceedings. Moreover, he testified that he remembered little from the trial due to the medication. App. 353, ll. 15-25.

Despite being aware of Petitioner’s suicide attempt and mental illness, trial counsel never requested Petitioner be evaluated to determine whether he was competent to stand trial. App. 352, l. 14 – 353, l. 2.

On February 21, 2012, Petitioner filed an application for post-conviction relief. App. 326-332. The state filed a return to this application dated May 22, 2012. App. 333-337. An evidentiary hearing was convened on June 10, 2016 before the Honorable R. Scott Sprouse. App. 1. Assistant Attorney General Johanna C. Valenzuela represented the state, and Hugh W. Welborn represented Petitioner. App. 1.

Andrew Potter, Petitioner’s trial counsel, testified that “there was nothing in [his] . . . interaction with him [Petitioner] in prepping for this trial that would indicate there were any competency issues.” Potter, who is not a medical doctor and is not qualified to make

¹ Before trial, the state served Petitioner and his counsel with notice of its intent to seek a sentence of life without parole pursuant to S.C. Code Ann. § 17-25-45 based on Petitioner’s prior armed robbery conviction from 1999. App. 319, l. 25 – 320, l. 19.

competency determinations, maintained that Petitioner “fully understood what was he was charged with” and was “able to assist” with his defense. App. 381, l. 7 – 382, l. 7. Potter also testified that during trial, Petitioner answered questions “appropriately” and did not appear to be having side effects to any medication he was taking. App. 383, ll. 9-23.

The PCR court found Petitioner failed to meet his burden of proving he was incompetent at the time of his trial by a preponderance of the evidence. App. 410. After noting that Petitioner testified he was taking multiple antidepressants, the court emphasized that aside from Petitioner’s own assertions, he “presented no evidence of how much of this medication he was taking, the effects of these medications, or that these medications had an effect on [Petitioner] that prevented him from having the ability to consult with his lawyer and understand the proceedings.” App. 409-410. Consequently, the court denied Petitioner relief. App. 412.

Because Petitioner proved by a preponderance of the evidence that he was incompetent at the time of his trial and that counsel was ineffective for failing to have him evaluated pretrial, this petition for writ of certiorari follows.

ARGUMENT

The PCR court erred by finding Petitioner failed to prove by a preponderance of the evidence that he was incompetent to stand trial at the time of his jury trial where Petitioner testified that he was taking multiple prescribed antidepressants that caused numerous adverse side effects, including abnormal thinking, disorientation, and memory loss, and that he could not comprehend the trial court proceedings.

Petitioner suffers from depression and tried to commit suicide by ingesting a large quantity of sleeping pills when he learned of his father's accusations against him. Petitioner was arrested upon his release from the hospital and prescribed multiple antidepressants while he was incarcerated pretrial. These antidepressants caused numerous adverse reactions or side effects that prevented Petitioner from understanding the trial court proceedings against him. Despite being aware of Petitioner's suicide attempt, counsel did not seek to have Petitioner evaluated for competency to stand trial. His failure to do so constitutes deficient performance. Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability that he was incompetent at the time of his jury trial.

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 on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); 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 in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that 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 would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "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) (citing Strickland, 466 U.S. at 668).

"Due process prohibits the conviction of a person who is mentally incompetent." Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992) (citing Bishop v. United States, 350 U.S. 961 (1956)). "The test for competency to stand trial or continue trial is whether the defendant has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he had a rational, as well as a factual, understanding of the proceedings against him." McLaughlin v. State, 352 S.C. 476, 481, 575 S.E.2d 841, 843 (2003) (citing State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998)). "The defendant bears the burden of proving his incompetence by a preponderance of the evidence." Id.

Before Petitioner's trial, counsel was put on notice that Petitioner suffered from mental illness and had attempted to commit suicide shortly before his arrest. Despite this knowledge, trial counsel did not seek to have Petitioner evaluated for competency to stand trial. Moreover, counsel failed to inquire into what medications Petitioner was prescribed while incarcerated pretrial and how these medications may have affected Petitioner. These failures constitute deficient performance. A reasonable attorney would have ensured Petitioner, particularly with his background, was competent to stand trial.

Moreover, there is a reasonable probability that Petitioner was incompetent at the time of his trial due to his mental illness and his use of antidepressants. Petitioner testified at the evidentiary hearing that the medications he was prescribed caused numerous adverse reactions,

including amnesia, abnormal thinking, and disorientation. Petitioner was experiencing these side effects before and during trial his trial. Consequently, he had a hard time comprehending the trial court proceedings and had little memory of his trial. These adverse reactions also likely prevented Petitioner from properly consulting with his attorney and assisting with his defense.

Because Petitioner proved by a preponderance of the evidence that he was incompetent at the time of his trial and that counsel was ineffective for failing to have him evaluated, this Court should reverse the ruling of the PCR court and remand for a new trial.

ARGUMENT

The PCR court erred by finding Petitioner failed to prove by a preponderance of the evidence that he received ineffective assistance of counsel, when trial counsel failed to object to jury instructions that the jury could not ask questions.

During trial the jury foreman sent a note to the judge asking "Can jurors ask a question for clarification? Two examples, need more information or don't understand something. I'm just going to tell them no" (Trail Tr. p.223, 19-23)

Therefore trial counsel was deficient in failure to object to the jury instructions as the judge perpetuated the jury's confusion, creating a Structural Due Process Defect that deprived defendant of a fair trial.

Because Petitioner proved by a preponderance of the evidence that counsel was ineffective for failing to object to jury instructions this Court should reverse the ruling of the PCR court, and remand for a new trial.

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CONCLUSION

Petitioner Respectfully request this Court to vacate Petitioners conviction, and sentence, and remand the case for a new trial.

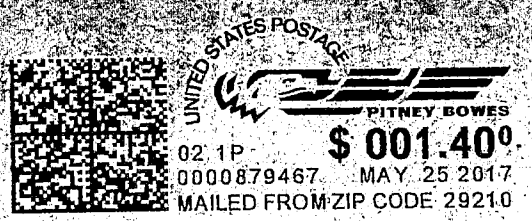
Respectfully Submitted,



James A Tucker

Petitioner

cket 260993
ey 149
River Rd
C 29210



The Supreme Court of S.C
Daniel Shearouse
Clerk of Court
PO. Box 11330
Columbia, S.C 29211