

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

 ORIGINAL

Certiorari to Sumter County

Honorable Brian M. Gibbons, Circuit Court Judge

JAMES EARNEST BUTLER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001197

JOHNSON PETITION FOR WRIT OF CERTIORARI

Wanda H. Carter
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Trial counsel erred in failing to develop a mental illness defense in the case.

STATEMENT

Petitioner James E. Butler pled guilty to voluntary manslaughter during the June 2013 term of the Sumter County General Sessions Court before Judge R. Ferrell Cothran, Junior. Petitioner was sentenced to imprisonment for a period of eighteen years. Timothy Murphy represented petitioner at the plea proceeding and Assistant Solicitor Kirk Griffin appeared on behalf of the state. App. 1-17. A timely notice of appeal was filed, but petitioner subsequently withdrew the appeal. The appeal was dismissed by Order of the South Carolina Court of Appeals dated September 18, 2013.

On May 21, 2014, petitioner filed a PCR application with the Sumter County Office of the Clerk of Court. App. 19-25. The respondent filed a return dated September 26, 2014, requesting that an evidentiary hearing be held in the case. App. 26-30. A PCR hearing was held on November 9, 2016, at the Sumter County Courthouse before Judge Brian M. Gibbons. App. 31-74. On January 13, 2017, Judge Gibbons signed an Order of Dismissal in the case. App. 76-83.

Petitioner appealed Judge Gibbons' Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in failing to develop a mental illness defense in the case.

In the case at bar, the state alleged that appellant hit one James Davis about the head with a pipe wrench while inside his (Davis') house. App. 6, l. 16 – p. 9, l. 3. Appellant in effect informed the plea judge that he was in fear for his life and acted in self-defense at that time. App. 9, l. 4.

During the PCR hearing held in the case, petitioner testified in effect that he did not remember the incident or the legal proceeding because of the medication he had been taking previously due to memory lapses from brain cancer and Hodgkins's lymphoma. It appeared that petitioner was taking Seroquel, Haldol, and Risperdal for mental illness, which erased his memory, and rendered him incapable of being in his right state of mind. Petitioner explained that he needed "psych" medicine instead. Petitioner added that a cousin informed trial counsel of his condition. Note that petitioner admitted that he took Remeron for mood swings and his paranoid schizophrenia. App. 38, l. 13-18; p. 40, l. 7 – p. 43, l. 12; p. 49, l. 16 – p. 51, l. 4; p. 53, l. 4 – p. 54, l. 11.

Trial counsel testified at the hearing as well. Counsel stated that "[petitioner] never told [him] he had any mental conditions," and that he never detected any mental illness on petitioner's behalf. App. p. 64, l. 1-6.

The PCR judge ruled that "...plea counsel properly investigated [petitioner's] case and was not ineffective for failing to...investigate any mental condition." App. 81.

As a rule, counsel has a duty to conduct adequate and appropriate investigations in a case. Strickland v. Washington, 466 U.S. 668 (1984). Also, with respect to cases where mental issues abound, counsel has a duty to investigate, prepare, and present evidence of mental illness on behalf

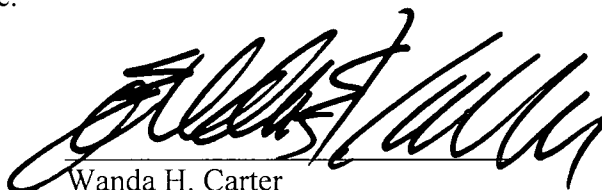
of the defense. See Wiggins v. Smith, 539 U.S. 510 (2003), where trial counsel was found ineffective in failing to expand the investigation into the defendant's background with enough sufficiency to learn of the defendant's diminished mental capacity and childhood abuse, rape, and molestation in order to show his impaired mental and psychological state. Compare Rompilla v. Beard, 545 U.S. 374 (2005), where the Court held that trial counsel erred in failing to investigate into the defendant's prior conviction file in order to uncover his mental health issues for presentation at sentencing.

Our state courts have ruled similarly in cases where counsel were found ineffective in failing to develop mental illness defenses. For example in Von Dohlen v. State, 360 S.C. 598, 601 S.E.2d 738 (2005), the Court found that counsel was ineffective in failing to provide the psychiatrist who testified at trial with all the defendant's extensive medical records and information so that the defendant's true mental diagnosis of major episodes of depression with severe symptoms of anxiety and psychosis could have been presented during the penalty phase. Moreover, in Nance v. Frederick, 358 S.C. 480, 596 S.E.2d 62 (2005), the Court reversed because trial counsel pursued a guilty but mentally ill verdict, but omitted his expert's qualifications and failed to provide the jury with any insight into petitioner's mental illness. Furthermore, in Nance v. Ozmint, 367 S.C. 547, 557 S.E.2d 883 (2006), the Court found that trial counsel erred in failing to investigate into and present evidence of the defendant's mitigating social history documents outlining his troubled childhood and mental illness. Additionally, in Council v. State, 380 S.C.159, 670 S.E.2d 356 (2009), trial counsel was found ineffective in failing to investigate into and present mitigating evidence of petitioner's mental illness at the time of the crime from his background records, and medical records, hospital records, and information from his childhood. Finally, in Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009), the Court held that trial counsel's error in failing to

present evidence of the defendant's mental illness was deficient and that such deficient performance was prejudicial to the case. Moreover, in Nance v. Frederick, 358 S.C. 480, 596 S.E.2d 62 (2005), the Court reversed because trial counsel pursued a guilty but mentally ill verdict, but omitted his expert's qualifications and failed to provide the jury with any insight into petitioner's mental illness. Due process prohibits the conviction of one who is mentally incompetent. Jeter v. State, 308 S.C.230, 417 S.E.2d. 594 (1992). In the case at bar, counsel violated petitioner's Sixth Amendment right to effective assistance of counsel with respect to his guilty plea case by failing to develop a guilty but mentally ill defense in the case; and petitioner was prejudiced by counsel's deficient legal representation because but for the error, the outcome of petitioner's case might have been different. See Hill v. Lockhart, 484 U.S. 50 (1985).

CONCLUSION

Based on the foregoing argument, petitioner requests that the Court grant the petition and allow full briefing on the above-raised issue.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of February, 2018.

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IN THE SUPREME COURT

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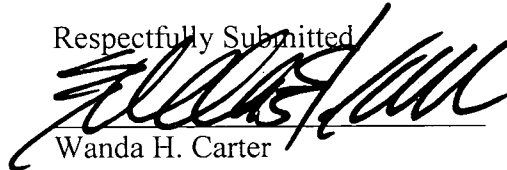
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for James Earnest Butler states that:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's trial before Judge Brian M. Gibbons, which was held on November 9, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
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 James Earnest Butler.

Respectfully Submitted



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 5th day of February, 2018.

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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This 5th day of February, 2018.

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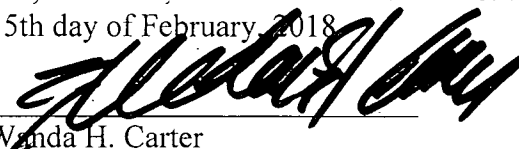
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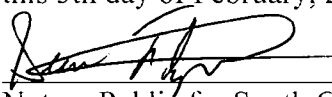
CERTIFICATE OF SERVICE

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 has been served upon Julie Coleman, 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 James Earnest Butler, #232706, at Lee Correctional Institution 990 Wisacky Highway, Bishopville, SC 29010, this 5th day of February, 2018.



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 5th day of February, 2018.



(L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022.