

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Oconee County

RECEIVED

Honorable R. Scott Sprouse, Circuit Court Judge

MAY 08 2018

S.C. SUPREME COURT

JOHN FITZGERALD OGLESBY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001798

JOHNSON PETITION FOR WRIT OF CERTIORARI

Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether trial counsel was ineffective in misadvising petitioner about parole eligibility?

STATEMENT

Petitioner filed an application for post-conviction relief on July 17, 2014. (App. p. 1-p. 8). He was convicted of murder in 1994 and was sentenced to life imprisonment. The Honorable Don S. Rushing was the trial judge. R. Daniel Day, Esq. was trial counsel. (App. p. 9). Respondent filed a return and motion to dismiss dated February 2, 2015. (App. p. 9-p. 18). On June 6, 2016, a motion hearing was held before the Honorable R. Scott Sprouse. The hearing was based on after discovered evidence in that petitioner would not be eligible for parole because he had two violent crimes. Petitioner was notified of this by probation and parole in a letter dated February 19, 2014. (App. p. 83). At the motion hearing, petitioner was represented by Tommy Thomas, Esq. Respondent was represented by Johanna Valenzuela, Assistant Attorney General. (App. p. 18-p. 36). An evidentiary hearing on the issue was held on March 1, 2017, again before Judge Sprouse. Petitioner was present and was represented again by Tommy Thomas, Esq. Respondent was represented by Lindsey McCallister, Assistant Attorney General. Petitioner, his sister, and trial counsel testified at the hearing. (App. p. 37- p. 83). On July 27, 2017, Judge Sprouse issued an order denying and dismissing petitioner's application for post-conviction relief. He found petitioner was not entitled to relief because parole eligibility or ineligibility was a collateral consequence of sentencing and petitioner did not have to be informed of it. (App. p. 102-p. 103)

This petition follows.

ARGUMENT

Trial counsel was ineffective in misleading petitioner about parole eligibility.

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 he was offered a plea to the lesser included offense of voluntary manslaughter with a 30 year sentence suspended on 6 years with 5 years probation thereafter. (App. p. 43, lines 8-22). He turned the plea down but he did

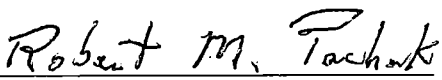
not know that if he were convicted he would receive a life without parole sentence. His understanding was that he would be parole eligible after 20 years. (App. p. 44, lines 4-14) Petitioner said he and his attorney never discussed parole eligibility until after the trial when he was informed by his attorney that he would have parole eligibility after 20 years. (App. p. 50, lines 9-19). He said he would not have gone to trial if he had known he was going to get a pure life sentence. (App. p. 50, line 23-p, 51, line 14).

Mary Oglesby, petitioner's sister testified next. She said she was in the courtroom when petitioner was convicted and his attorney said that petitioner would be parole eligible after 20 years. (App. p. 58, line 17-p. 59, line 1).

The PCR court found that parole eligibility or ineligibility was a collateral consequence of sentencing which one does not have to be informed. (App. p. 98; p. 102). Trial counsel is not supposed to be a potted plant. He had at least an ethical obligation to inform petitioner of what he was facing.

CONCLUSION

Petitioner should be parole eligible.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of May, 2018.

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Honorable R. Scott Sprouse, Circuit Court Judge

JOHN FITZGERALD OGLESBY,

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V.

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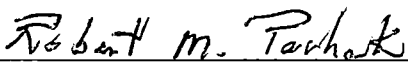
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for John Fitzgerald Oglesby 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 R. Scott Sprouse, which was held on March 1, 2017, 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 John Fitzgerald Oglesby.

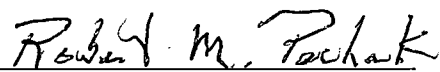
Respectfully Submitted,


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 8th day of May, 2018.

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."


Robert M. Pachak
Appellate Defender

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ATTORNEY FOR PETITIONER

This 8th day of May, 2018.

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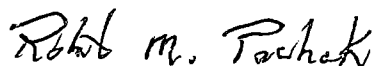
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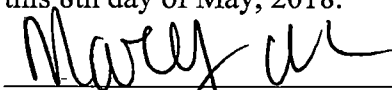
CERTIFICATE OF SERVICE

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 Kelly Oppenheimer, 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 John Fitzgerald Oglesby, #194567, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 8th day of May, 2018.'



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 8th day of May, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: May 12, 2027.