

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Newberry County

Honorable R. Scott Sprouse, Circuit Court Judge  
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RICHARD F.V. BOWMAN III,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000034  
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JOHNSON PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

Kathrine H. Hudgins  
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ATTORNEY FOR PETITIONER

ORIGINAL

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AUG 29 2018

PETITIONER  
S.C. SUPREME COURT

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**ISSUE PRESENTED**

Did the judge err in refusing to find counsel ineffective for not obtaining and presenting in mitigation Petitioner's records from the Veteran's Administration documenting that Petitioner suffered from post-traumatic stress disorder?

## STATEMENT

In May of 2016, the Newberry County Grand Jury indicted Petitioner, Richard Frank Vernon Bowman, for aiding and abetting homicide by child abuse, indictment #2016-GS-36-0305. On July 18, 2016, Petitioner appeared before the Honorable Frank Addy, Jr. and pled guilty. Russell Brown represented Petitioner. Taylor Daniels represented the State. Judge Addy sentenced Petitioner to fifteen (15) years in prison. A notice of intent to appeal was not filed.

On December 22, 2016, Petitioner filed an application for post-conviction relief [PCR]. On March 30, 2017, the State filed a return. On September 13, 2017, Petitioner filed an amended PCR application. On October 10, 2017, an evidentiary hearing was held before the Honorable R. Scott Sprouse. Ashley McMahan represented Petitioner. Justin Hunter represented the State. In a written order filed December 29, 2017, Judge Sprouse denied relief and dismissed the application. A timely notice of intent to appeal was served on January 7, 2018. This appeal follows.

## ARGUMENT

**The judge erred in refusing to find counsel ineffective for not obtaining and presenting in mitigation Petitioner's records from the Veteran's Administration documenting that Petitioner suffered from post-traumatic stress disorder.**

In the amended PCR application Petitioner alleges that counsel was ineffective because, "Counsel failed to use Applicant's VA records as mitigation during sentencing." (App. p. 37). During the PCR hearing Petitioner testified, "I have PTSD that is actually on there. I had to go to combat stress mode in Afghanistan due to some issues that I was having while I was deployed as well." (App. p. 231, lines 15-17). Petitioner testified that he was first deployed when he was twenty years old and spent eighteen months in Iraq, two years in Afghanistan and nine months in Kosovo. (App. p. 231, lines 18-24). At the time of the guilty plea Petitioner was twenty-seven years old and had been honorably discharged from the United States Army. (App. p. 14, lines 4-7). Petitioner had no prior criminal record. (App. p. 14, lines 9-10).

During the PCR hearing plea counsel admitted that Petitioner asked him to obtain his records from the Veteran's Administration [VA]. (App. p. 245, lines 2-6). Counsel testified that he was unable to obtain those records. (App. p. 245, lines 7-13). Counsel, however, testified that he believed he did not need the records because he believed Petitioner was competent. (App. p. 245, lines 14-19). PCR counsel then asked, "the whole point of getting the records, I guess, was the conversation revolving around competency and not necessarily for mitigation, like PTSD?" (App. p. 249, lines 5-7). Plea counsel answered, "I would say maybe for mitigation but not necessarily for competency, you know, at that time." (App. p. 249, lines 8-9).

In the order of dismissal the PCR judge wrote:

This Court finds that Mr. Brown [plea counsel] was not deficient for failing to provide Applicant's VA records in mitigation. This Court also finds Mr. Brown testified that he attempted to access Applicant's VA records but was unable to do

so due to HIPPA restrictions. This Court finds that Mr. Brown's performance was not deficient in this regard. "Strickland does not require counsel investigate every conceivable line of mitigating evidence or require the submission of such evidence in every case." Wiggins v. Smith, 539 U.S. 510, 533 (2003). This Court finds Mr. Brown's actions were reasonable and that he was not deficient for failing to present Applicant's VA records in mitigation.

(App. p. 262). Additionally, the PCR judge wrote, "Applicant has failed to produce his VA records to this Court and this Court will not speculate as to its contents and whether the records would have been beneficial." (App. p. 262). At the close of the PCR hearing the judge agreed to hold the record open for thirty days so that Petitioner could obtain and submit the VA records. (App. p. 254, lines 13-20). It appears that the VA records were not made available to Petitioner. The PCR judge erred in refusing to find counsel ineffective for failing to obtain and use the VA records as mitigation.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in

the outcome.” Id. The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). “The second, or ‘prejudice,’ requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. 52 at 59, 106 S.Ct. 366.

In Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009), a capital case, the South Carolina Supreme Court found that trial counsel’s failure to present Rosemond’s mental illness constituted deficient performance. Addressing the prejudice prong, the Court wrote:


When determining if want of mitigation evidence resulted in prejudice, we must determine whether the “mitigating evidence, taken as a whole, ‘might well have influenced the jury's appraisal’ of [the defendant's] culpability.” Wiggins v. Smith 539 U.S. 510, 538, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (quoting Williams v. Taylor, 529 U.S. 362, 398, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)); see also Rompilla v. Beard, 545 U.S. 374, 393, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). In this regard, the United States Supreme Court held, “the likelihood of a different result if the [mitigation] evidence had gone in is ‘sufficient to undermine confidence in the outcome’ actually reached at sentencing.” Rompilla, 545 U.S. at 393, 125 S.Ct. 2456 (quoting Strickland, 466 U.S. at 694, 104 S.Ct. 2052). Accordingly, if trial counsel's complete failure to present mitigation evidence undermines confidence in the outcome, then Rosemond suffered prejudice.

Rosemond v. Catoe, 383 S.C. at 326–27, 680 S.E.2d at 9.

While the present case is not a capital case and some mitigation was presented, counsel was ineffective in failing to present evidence that Petitioner suffered from PTSD. Petitioner was prejudiced by the deficient performance. Counsel’s constitutionally ineffective performance affected the outcome of the plea process and undermined confidence in the outcome. There is a reasonable probability that if counsel had obtained and submitted the VA records documenting that Petitioner suffered from PTSD, the judge would have considered that mitigating information and sentenced Petitioner to less than the fifteen year sentence imposed.

**CONCLUSION**

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue. Alternatively, this Court should remand the case to allow further time to obtain and consider the VA records.

  
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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of August, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Newberry County

Honorable R. Scott Sprouse, Circuit Court Judge

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RICHARD F.V. BOWMAN III,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Richard F.V. Bowman III states:

1. She is 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 post-conviction relief hearing before Judge R. Scott Sprouse, which was held on October 10, 2017, 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 Richard F.V. Bowman III.

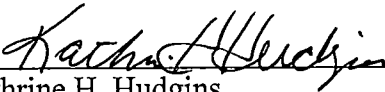
Respectfully Submitted,

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 29th day of August, 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."

  
Kathrine H. Hudgins  
Appellate Defender

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

This 29th day of August, 2018.

STATE OF SOUTH CAROLINA

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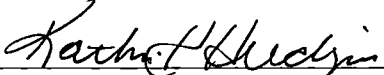
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STATE OF SOUTH CAROLINA,

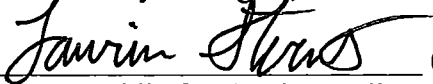
RESPONDENT

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CERTIFICATE OF SERVICE  
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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 Janell Gregory, 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 Richard F.V. Bowman III, #369067, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 29th day of August, 2018.

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 29th day of August, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027.