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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to the Court of Appeals
Appeal from Oconee County
Honorable Letitia H. Verdin, Circuit Court Judge

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Opinion No. 2022-UP-362 (S.C. Ct. App. filed Sept. 28, 2022)

Lower Court Case No. 2020-CP-37-00118

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JONATHAN W. DUNCAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000279

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# PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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## CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on November 10, 2022.

## QUESTION PRESENTED

Did the Court of Appeals err in failing to find that the trial judge abused his discretion in failing to conduct a competency hearing prior to accepting the guilty pleas to attempted murder, domestic violence second degree, and possession of a weapon during the commission of a violent crime when Petitioner had three mental health evaluations prior to the guilty pleas and defense counsel told the plea judge that Petitioner was barely competent to enter the guilty pleas?

## STATEMENT OF THE CASE

In September of 2016, the Oconee County Grand Jury indicted Petitioner, Jonathan W. Duncan, for attempted murder, possession of a weapon during the commission of a violent crime, and domestic violence second degree, indictments #2016-GS-37-00911, 912, 913. (App. pp. 36-41). On October 15, 2018, Petitioner appeared before the Honorable R. Scott Sprouse and pled guilty as indicted without negotiation or recommendation as to sentencing. Gordon Senerius represented Petitioner at the plea. Bethany Blundy represented the State. Judge Sprouse sentenced Petitioner to twenty-seven (27) years for attempted murder, five (5) years concurrent for the weapon charge and three (3) years concurrent for domestic violence. (App. pp. 42-44). Petitioner did not appeal the convictions and sentences.

On February 11, 2020, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 45-49). The State filed a return and partial motion to dismiss, as outside the statute of limitations, on all grounds except for the request for a belated appeal. (App. pp. 50-57). On February 1, 2021, an evidentiary hearing was held before the Honorable Letitia H. Verdin. Don A. Thompson represented Petitioner at the PCR hearing. Lillian L. Meadows represented the State. The hearing was held virtually via Cisco WebEx Meetings. In a written order signed February 2, 2021, Judge Verdin granted the belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) but found that all other claims were voluntarily waived and abandoned. (App. pp. 80-85). A timely notice of intent to appeal was served on February 11, 2021. A petition for writ of certiorari and a brief pursuant to White v. State were filed on June 10, 2021.

On November 15, 2021, pursuant to Rule 243(1), SCACR, the South Carolina Supreme Court transferred the case to the South Carolina Court of Appeals. On September 28, 2022, the

Court of Appeals granted the petition for writ of certiorari to allow the belated appeal. The Court of Appeals affirmed the convictions on belated direct appeal. Duncan v. State, Op. No. 2022-UP-362 (S.C. Ct. App. filed September 28, 2022). A timely petition for rehearing was filed and denied on November 10, 2022. This petition for writ of certiorari follows.

## ARGUMENT

**The Court of Appeals erred in failing to find that the trial judge abused his discretion in failing to conduct a competency hearing prior to accepting the guilty pleas to attempted murder, domestic violence second degree, and possession of a weapon during the commission of a violent crime when Petitioner had three mental health evaluations prior to the guilty pleas and defense counsel told the plea judge that Petitioner was barely competent to enter the guilty pleas.**

Petitioner pled guilty to assaulting his wife and attempting to murder an acquaintance who was having a sexual relationship with Petitioner's wife. All three were together on the night of June 6, 2016, using methamphetamine when, according to the State, Petitioner consented to his wife and his friend having sex. (App. p. 7, lines 9-16). During the plea colloquy the assistant solicitor told the judge that the following morning Petitioner had regrets and "flipped out" attacking his wife and then attacking the friend when he intervened. (App. p. 7, line 17 – p. 8, lines 1-3). The assistant solicitor told the judge, "The defendant in this case has undergone three separate mental health evaluations, which is why he has remained incarcerated for a good long period prior to this plea. Each evaluation, your Honor, though, has reached the same conclusion. He is competent. He could form criminal responsibility for his actions that day." (App. p. 9, lines 3-9). None of the three prior mental evaluations were introduced in evidence during the guilty plea and the record is silent on the dates of the evaluations.

After the State's presentation, the plea judge asked Petitioner if he agreed with the solicitor's statement of the facts. (App. p. 10, lines 15-19). Petitioner answered, "No, sir." (App. p. 10, line 20). Petitioner and defense counsel conferred off the record and then defense counsel told the judge, "He disagrees with attempting to slit the throat of Mr. Stazney [the friend who was having sex with Petitioner's wife] and with choking his wife." (App. p. 11, lines 2-4). The

judge then took a short break so that Petitioner could confer with his lawyer. (App. p. 11, lines 5-11). After a short recess, the guilty plea continued. (App. p. 11, line 12 – p. 12, lines 1-9).

The plea judge then asked about the previous evaluations. (App. p. 12, lines 10-13). The plea judge asked defense counsel, "And has there been anything that has come out of those evaluations that would make you concerned that he's not competent to enter this plea?" (App. p. 12, lines 14-16). Defense counsel answered, "Nothing out of those evaluations. I think the last two were because of my concerns as to his competency by talking with him at the detention center. I still have some concerns about that - - " (App. p. 12, lines 17-20). Defense counsel commented that he was not a Ph.D. (App. p. 12, line 22). The plea judge then asked, "Do you believe he's competent to make this plea today?" (App. p. 12, lines 23-24). Defense counsel answered, "Barely, yes, your Honor." (App. p. 12, line 25).

In mitigation defense counsel told the judge, "He was raised in kind of a rough environment. Biological mother had a history of alcohol abuse. The records indicate that he has a history - - she had a history of excessive corporal punishment against the kids. Jonathan was sexually abused by babysitters and one of his mother's boyfriends. It's in his psychological reports. He quit school in the tenth grade, had been diagnosed with ADHD, was able to work a variety of jobs but the longest job he ever had was construction for three years." (App. p. 21, line 21 - p. 22, lines 1-7). Defense counsel also told the judge, "At the time of the incident, I believe he was experiencing a psychotic break fueled by excessive use of methamphetamine by all three involved in a menage a trois. He believed that he heard them talking behind his back. They were going to take him out to the lake and dump him overboard and let him drown. The records indicate that he has psychological problems, has had for a long period of time. He has

become stabilized somewhat on the medicine since he's been in the detention center." (App. p. 22, lines 14-23).

Based on the information before the judge at the time of the guilty plea, a competency hearing was required, even though the hearing was not requested by either side. The plea judge failed to conduct a competency hearing to determine if Petitioner was competent to enter the guilty plea. The plea judge erred.

"Due process prohibits the conviction of an incompetent defendant, and this right may not be waived by a guilty plea. Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 595–596 (1992) (citations omitted)." Matthews v. State, 358 S.C. 456, 458, 596 S.E.2d 49, 50 (2004). "The test of competency to enter a plea is the same as required to stand trial. State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976). The accused must have sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him. Carnes v. State, 275 S.C. 353, 271 S.E.2d 121 (1980)." Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 596 (1992).

S.C. Code §44-23-410(A)(1) provides:

> Whenever a judge of the circuit court or family court has reason to believe that a person on trial before him, charged with the commission of a criminal offense or civil contempt, is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity, the judge shall:
>
> order examination of the person by two examiners designated by the Department of Mental Health if the person is suspected of having a mental illness or designated by the Department of Disabilities and Special Needs if the person is suspected of having intellectual disability or having a related disability or by both sets of examiners if the person is suspected of having both mental illness and intellectual disability or a related disability. The examination must be made within thirty days after the receipt of the court's order and may be conducted in any suitable place unless otherwise designated by the court; . . .

The record in the present case reflects that three separate competency evaluations were completed for Petitioner. (App. p. 9, lines 3-9). Pursuant to S.C. Code §44-23-420, 430, once the examinations were completed, the examiners were required to make written reports and the judge was required to hold a competency hearing. S.C. Code §44-23-420 provides that. "Within ten days of examination under Section 44-23-410(A)(1) or at the conclusion of the observation period under Section 44-23-410(A)(2), the designated examiners shall make a written report to the court which shall include . . . " In the present case it does not appear that the written reports were presented to the plea judge. The written reports should have been presented to the plea judge. S.C. Code §44-23-430 provides, "Upon receiving the report of the designated examiners, the court shall set a date for and notify the person and his counsel of a hearing on the issue of his fitness to stand trial." Although it does not appear that the judge received the reports from the designated examiners, the judge was aware of the three prior mental evaluations and should have conducted a competency hearing. Additionally, defense counsel told the judge that Petitioner was "barely" competent to enter the pleas. The plea judge erred in failing to conduct a competency hearing as required by S.C. Code §44-23-430 to determine if Petitioner was competent to enter guilty pleas.

In State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981), the defendant argued that the trial judge erred in failing to conduct a competency hearing pursuant to S.C. Code §44-23-430. The State argued that the defendant waived the right by failing to request a hearing. The South Carolina Supreme Court wrote:

> In a similar case, the United States Supreme Court found a sanity hearing cannot be waived. Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). In Pate, the accused failed to demand a sanity hearing. The hearing was provided by Illinois law. The Supreme Court found the fact counsel placed the accused's sanity in issue throughout the proceedings indicated the right was not waived. In the case at bar, Blair's sanity was the crucial issue throughout the trial.

> Therefore, we find failure to request the hearing did not waive the right to such hearing.

State v. Blair, 275 S.C. 529, 532, 273 S.E.2d 536, 537 (1981). In the present case, Petitioner's failure to demand a competency hearing prior to the guilty plea did not waive the right to a hearing.

In Blair the court discussed when a competency hearing was required writing:

> The standard for determining whether an accused is entitled to a competency to stand trial hearing has been set forth in a recent case interpreting Pate v. Robinson, supra: "The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors, standing alone, may, in some circumstances, be sufficient." Drope v. Missouri, 420 U.S. 162, 180, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

Blair, 275 S.C. at 533, 273 S.E.2d at 538. Further inquiry and a competency hearing was required in the present case. Competency was clearly an issue as evidenced by the need for three separate competency evaluations.

The present case is distinguished from State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), overruled by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), and overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019) and State v. Hall, 312 S.C. 95, 99, 439 S.E.2d 278, 281 (1994). In Elmore the South Carolina Supreme Court wrote, "Here, the Petitioner underwent psychiatric examination on two occasions prior to the commencement of trial and was adjudged competent. Further, both the defense and the State introduced evidence of Petitioner's intelligence and emotional stability on numerous occasions during the trial. We find no error." 279 S.C. at 420, 308 S.E.2d at 783. In the present case neither the State nor Petitioner introduced evidence of Petitioner's intelligence or emotional stability or competency. The assistant solicitor advised the judge that Petitioner had been found competent on three different

occasions but the written reports were not introduced and defense counsel believed that Petitioner was "barely" competent to plead guilty.

In State v. Hall, 312 S.C. 95, 99, 439 S.E.2d 278, 281 (1994)(n. 1 omitted), the South Carolina Supreme Court wrote:

> Finally, Hall asserts reversible error in trial court's failure to conduct a hearing, pursuant to State v. Blair, to determine his competence to stand trial. We disagree. Prior to trial, the State's psychologist determined that Hall was, in fact, competent. Moreover, Hall himself indicated that he understood the proceedings. The evidence of record negates the necessity of a competency hearing. State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), *overruled, in part, on other grounds*, State v. Torrence, *supra.*

In contrast to Hall, the evidence of record in the present case supports that a competency hearing was required. Petitioner seemed confused at the guilty plea proceeding and the judge took a short recess so that Petitioner could speak with his lawyer. As discussed above, defense counsel told the judge that Petitioner was "barely" competent to plead guilty. A competency hearing was required in the present case.

In affirming the convictions the Court of Appeals wrote:

> We hold the plea court did not abuse its discretion by failing to sua sponte conduct a competency hearing. See State v. White, 364 S.C. 143, 147, 611 S.E.2d 927, 929 (Ct. App. 2005) ("The statutory injunction, that an examination be ordered when the circuit judge 'has reason to believe' that a defendant is not mentally competent to stand trial, involves the exercise of the discretion of the trial judge in evaluating the facts presented on the question of competency." (quoting State v. Drayton, 270 S.C. 582, 584, 243 S.E.2d 458, 459 (1978))); id. ("Thus, despite the mandatory language contained in § 44-23-410, the decision of whether to order a competency examination is within the discretion of the trial judge, whose decision will not be overturned absent a clear showing of abuse of discretion."). Petitioner underwent three mental health examinations and was **adjudged** competent before he pled guilty.

Duncan v. State, Op. No. 2022-UP-362 (S.C.Ct.App. Filed September 28, 2022)(emphasis added). The reliance on White and Drayton is misplaced because those cases involved the decision to order a competency evaluation pursuant to S.C. Code §44-23-410(A). In the present

case, the competency evaluations had already been done, presumably ordered by a judge. Additionally, although Petitioner underwent three mental evaluations, and counsel informed the judge of the findings of competency, Petitioner was not **adjudged** competent by a judge because a hearing was not held as is required by the statute. Additionally, in Drayton a previous presiding judge, two months earlier, found Drayton competent. There is no judicial finding of competency in the record of the present case.

The Court of Appeals additionally wrote:

> Further, plea counsel not only believed Petitioner understood his rights, he also agreed there was nothing in the evaluations that would cause him to question Petitioner's competency to enter a plea. Moreover, Petitioner appeared to understand the plea proceeding based on his responses to the questions from the plea court. See State v. Hall, 312 S.C. 95, 99, 439 S.E.2d 278, 281 (1994) (holding the trial court did not err by failing to conduct a competency hearing because "[t]he evidence of record negate[d] the necessity" and noting the State's psychologist determined the defendant was competent and the defendant himself indicated he understood the proceedings). Thus, based on the record before this court, we hold the plea court did not abuse its discretion by failing to order a competency hearing prior to Petitioner entering his guilty pleas.

Plea counsel still had concerns about Petitioner's competency and when asked about competency, plea counsel told the judge that Petitioner was "barely" competent. (App. p. 12, lines17-25). Additionally, the plea judge paused the guilty plea so that plea counsel could try to explain the proceedings. (App. p. 11, lines 5-11). Plea counsel told the judge that Petitioner has a long history of psychological problems. (App. p.22, lines 14-23). The fact that there were three separate competency evaluations certainly indicated competency was an issue. Competency was not at issue in Hall in the way competency is at issue in the present case. Unlike the lengthy trial record in the Hall capital trial where it appears a defense psychologist also testified, the record of the guilty plea in the present case supports a finding that a competency hearing was required. Additionally, the Court in Hall noted that the that the State psychologist determined Hall was

competent. While it is unclear from the opinion how the Court in Hall became aware that the State psychologist determined Hall was competent, pursuant to S.C. Code §44-23-420, the State psychologist would have submitted a written report to the Court and the report would have become part of the record. No such report is contained in the record of the present case and the identity and employment of the examiners is unknown. The reliance on Hall is misplaced.

The trial judge's failure to receive the written mental evaluation reports and conduct a competency hearing pursuant to S.C. Code §§44-23-420, 430 constitutes an error of law requiring reversal.

## CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of December, 2022.