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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable Walton J. McLeod, IV, Circuit Court Judge

ROBERT C. CRIBB,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001719

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding plea counsel provided effective representation where counsel failed to call Dr. Mulbry to testify during the plea hearing that the statements made by the solicitor about Petitioner's mental health and future dangerousness were incorrect and misleading?

STATEMENT OF THE CASE

In March of 2018 Petitioner was indicted by a York County grand jury for one count of murder and two counts of possession of a weapon during the commission of a violent crime in the death of Jerry Sonny Proctor. App. 78-79. On August 24, 2018, Petitioner appeared before the Honorable Daniel D. Hall to plead guilty but mentally ill (GBMI) to the lesser included offense of voluntary manslaughter and the two weapons charges as indicted. App. 1; App. 4, l. 16-App. 5, l. 14. The State was represented by Walter Thompson, Sr., and Matthew Hogge. Petitioner was represented by Mindy Lipinski. App. 1.

Prior to the plea the court conducted a short Blair[1] hearing during which it determined that Petitioner was competent to enter a plea and that there was a rational basis for the GBMI plea. App. 5, l. 18-App. 11, l. 14. The GMBI plea was based on Petitioner's psychiatric evaluation, performed by Dr. Leonard William Mulbry, Jr. As detailed in the report, Petitioner had not reported any psychiatric symptoms until August 2017 when he returned from a trip to the beach with his father and uncle. He returned from the beach with the paranoid belief that his father was going to kill him. Petitioner also believed that Proctor was going to kill him and his family. Based on the totality of his symptoms and actions Dr. Mulbry diagnosed Petitioner with schizophrenia. He described Petitioner's behaviors as consistent with a "first break" episode of the onset of schizophrenia. His ultimate finding was that while Petitioner had the capacity to distinguish moral and legal right from wrong, he lacked the capacity to conform his behavior to the law at the time of the incident. App. 57-77.

The incident that led to Petitioner's arrest occurred on August 9, 2017, shortly after he had begun displaying psychiatric symptoms. Proctor had come over to Petitioner's home to pick

[1] State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

up twenty dollars that Petitioner owed him. Proctor was carrying a package containing a phone charger that had just arrived in the mail. The two men sat watching TV together while Petitioner's mother ran short errand. Petitioner contended that when Proctor went to leave, he wrapped the phone charger around Petitioner's neck and began to choke him. Petitioner stated he stabbed behind himself at Proctor, eventually getting away from him and ultimately shooting him with a shotgun. Petitioner believed he was acting in self-defense and did not know why Proctor had attacked him. App. 19, ll. 18-24; App. 38, l. 16-App. 39, l. 5.

The State contended that the physical and forensic evidence did not align with Petitioner's version of events. Petitioner had no ligature marks or bruising around his neck, nor any other wounds to his person that would indicate he had been in a struggle. The trajectory of the stab wound to Proctor's back indicated that he had been stabbed in an upward motion. The shotgun trajectory indicated that Proctor was on the ground with his hand raised when the fatal blast struck him. App. 20, l. 14-App. 23, l. 1; App. 28, ll. 4-19.

The State asked that Petitioner be sentence to the maximum thirty years incarceration due to the brutality of the crime and Petitioner's alleged future dangerousness due to his diagnosis of schizophrenia. App. 31, l. 24-App. 32, l. -15. The solicitor stated

> Schizophrenia, and we've dealt with a lot in the court system; I'm sure you have just as I have had. I even have a relative who suffers from schizophrenia[,] and I've seen the decline of him over the years, and it becomes obvious that it doesn't really get better. At times it can be controlled; at times it can be, you know, therapy and things like that help, and medication help, but eventually it does not. And the mind deteriorates[,] and the Defendant has, or the person has the perplibity [sic] or any probility [sic] toward violence, that shines through and comes out. And I believe that he would be a danger later on in life because I think there's nothing -- if this is the first psychotic episode[,] he shows it is about as bad as you can get.
>
> I think from here on out his mental abilities in ten, fifteen, twenty years or farther will just be worse. And I think that makes him dangerous because if you can't control your conduct[,] you become someone who is very dangerous because you

have occasionally the psychotic thoughts of whether it's suicide or harming other and it would be others that would be maybe friends of yours or people trying to help you. It could be a stranger[,] or it could be anybody. So[,] I point out that the horrific nature of the crime itself, and the fact that he's unlikely to really truly ever be healed from this mental health problem that he suffers from, makes him a future danger and a danger to the community. And even if we were just sentencing on the punishment alone for the violent nature and the awfulness of this crime, that would warrant a very large sentence and would certainly warrant I think the thirty years that he faces on the manslaughter charge which the State has reduced the crime to basically giving him a break in this case, recognizing the mental health issue that he suffers from but that's a huge break.

And that alone, as I said the brutality of the crime, the nature of it would be enough for the thirty years. And I think when you add in the fact that he will likely never become better than he is now, and only become worse in later years, that that dangerousness is something the Court should consider as well.

App. 32, l. 15-App. 34, l. 5.

During her mitigation presentation Counsel Lipinski responded to the solicitor's comments about Petitioner's mental health stating,

And as much as Mr. Thompson wants to portray that he's gonna be this evil violent person, he is at all times cooperative with law enforcement. He answers their questions; sits in the back of the car. He's not had any violence while he's going to the jail. They've been able to medicate him. He's been in C Block for the better part of this year. This isn't somebody who was going to struggle with all these things and be a violent person because there is no other diagnoses of sociopath or psychopath that you also see with schizophrenics who normally turnout like this.

This is somebody who can appreciate the disease who is intelligent enough to learn from it. But he's also not cunning, he's also not manipulative and he did -- who the family who say we saw all these red flags and comments.

This is what I believe to be a very imperfect self defense case which I think deserves some down grade in consequence because he wouldn't have done this otherwise. And brought on by some mental illness. And while Mr. Thompson would like to say that by reducing this from murder to manslaughter they've given him some break, at thirty years they've cut four years off of it. It's time we as a society respect mental health, respect that when families bring people to us in the emergency room and say help that something extraordinary is going on, and that we don't need to give them five days worth of mental health and then tell 'em to follow up; that if you get to that point that that is significant and we need to address it.

> And we need to train any number of people to step in better and prevent these things. And I'm not saying that to take away from what Mr. Cripp [sic] did but I'm saying that to prove that this is not some ill contrived mental health reached by the Defense that's not really there. This is really the underlying rational for why this crime occurred and what happened to it.

App. 43, l. 24-App. 45, l. 8. Although Dr. Mulbry was present in the courtroom, Counsel Lipinski did not call him to testify during the Blair hearing or during the mitigation presentation. She concluded by asking the court to sentence Petitioner in "the lower third of a voluntary manslaughter range." App. 46, ll. 10-14.

Petitioner was sentence to thirty years imprisonment for voluntary manslaughter and five years imprisonment for each weapons charge, all sentences to run concurrently. App. 53, l. 21-App. 54, l. 5; App. 80-82. Petitioner timely filed a notice of appeal, but the matter was dismissed for failure to provide a sufficient explanation under Rule 203(d)(1)(B)(iv), SCACR. The present PCR application was filed on April 5, 2019. App. 84-90. The State filed a return and motion for more definite statement on July 30, 2019. App. 91-99. PCR Counsel Tommy Thomas filed an amended PCR application on September 24, 2019. The amended application alleged, *inter alia*, that Counsel Lipinski failed to utilize Dr. Mulbry to refute the misleading remarks the solicitor had made about Petitioner's mental illness which Petitioner believed adversely affected his sentencing. App. 100-103.

An evidentiary hearing was held on December 8, 2022, before the Honorable Walton J. McLeod, IV. The State was represented by Cruise Mitchell. Petitioner was represented by Counsel Thomas. App. 104. Petitioner, Dr. Mulbry, Counsel Lipinski, and Solicitor Hogge testified at the hearing. App. 105.

Petitioner testified that he and Counsel Lipinski decided to go "the mental health route" because Counsel Lipinski told him that if he did not plead guilty, he would get life without

parole. App. 113, ll. 9-11. He testified that when the solicitor was speaking about schizophrenia, he made it sound like Petitioner would never get better and was a danger to society. He recalled the solicitor said "I think" a lot when talking about schizophrenia and he felt the solicitor's statements were a biased opinion. Petitioner stated that Counsel Lipinski did not object to any of the statements made by the solicitor. Petitioner stated that he was on the fence about pleading guilty. If he had known that the solicitor was going to make unrefuted remarks about his mental health, he would not have entered the plea. App. 116, l. 9-App. 118, l. 8.

Dr. Mulbry believed that the solicitor had "powerful, emotional beliefs about mental illness and, specifically, schizophrenia" due to some bad personal experiences the solicitor had with the illness. App. 125, ll. 1-5. He stated that the solicitor had depicted schizophrenia "as a progressive, degenerative disease that almost invariably results in decline, worsening, and more danger in the future and that's not an accurate statement at all." App. 125, l. 19-App. 126, l. 4. Dr. Mulrby testified that "schizophrenia can be very effectively treated and not necessarily progressive and people do not become more dangerous as a rule over time." App. 126, ll. 10-16.

The studies showed that individuals with major mental illness, and specifically schizophrenia, had a small increased risk of being dangerous as compared to the general non-mentally ill population. He further stated that the increased risk of danger was "quite small" and that the "most dangerous people out there are people who are abusing substances." App. 126, l. 17-App. 127, l. 10. Dr. Mulbry testified that schizophrenia, if not treated, can get worse with time but that treatment "very, very strongly mitigates that potential risk." App. 127, ll. 5-23. Dr. Mulbry confirmed he was at the plea hearing and if asked he would have said essentially the same thing to the plea court that he testified to during the PCR hearing. App. 129, ll. 13-25.

Counsel Lipinski testified that the purpose of the GBMI plea was to "broadcast to the Court that everybody agreed that that [Petitioner's mental illness] was a factor and that was what was transpiring on the day in question. I thought that it would lead to a more lenient sentence..." App. 136, ll. 14-20. She wanted to convey to the plea court that the incident was not this "malicious, vindictive, you know, personal crime of malice the solicitor presented." She felt she refuted the solicitor's claims that schizophrenia got worse over time when she was presenting mitigation. App. 136, l. 21-App. 137, l. 2. On cross-examination she stated that her concern with using Dr. Mulbry during mitigation to refute the solicitor's comments was that Petitioner's medication had been "dialed back." Due to the change in medication dosage, she stated Dr. Mulbry felt that the foundation for his opinion had been compromised which made her "gun shy" to call him to testify. She continued, "I think that he could have kind of contradicted that and you know, in retrospect, should have." She thought that perhaps she felt the plea court was not giving credence to what the solicitor was saying but recognized the benefit of Dr. Mulbry refuting the solicitor's remarks. App. 141, l. 21-App. 143, l. 15.

Solicitor Hogge testified that the case involved a very brutal murder and that Solicitor Thompson had argued that the brutality alone would justify a thirty-year sentence. App. 145, ll. 14-19. He acknowledged that Solicitor Thompson had raised mental health concerns about Petitioner and felt that discussing those before the court was "gilding the lily" after discussing the facts of the case and hearing from the victim's family. App. 147, l. 9-App. 148, l. 8.

An order of dismissal was filed on August 25, 2023. App. 158-App. 183. The PCR court found that Counsel Lipinski had made "a reasonable strategic decision in not calling Dr. Mulbry to testify" and that she adequately rebutted the solicitor's misleading comments during her mitigation presentation. Further, the PCR court found that Petitioner could not prove prejudice

because the impact of the solicitor's comments on Petitioner's sentence was purely speculative. App. 176-181.

ARGUMENT

The PCR court erred in finding plea counsel provided effective representation where counsel failed to call Dr. Mulbry to testify during the plea hearing that the statements made by the solicitor about Petitioner's mental health and future dangerousness were incorrect and misleading?

"[S]entencing is a critical stage of the criminal proceeding at which [a defendant] is entitled to the effective assistance of counsel." Gardner v. Florida, 430 U.S. 349, 358 (1977). The Sixth Amendment provides a right to counsel during sentencing in both noncapital and capital cases. Lafler v. Cooper, 566 U.S. 156, 165 (2012). "Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in Strickland prejudice because *any amount of additional jail time has Sixth Amendment significance*." Id. (internal quotations and alterations omitted) (quoting Glover v. United States, 531 U.S. 198, 203 (2001)) (emphasis added).

Importantly, the jurisprudence of this state sets forth the principle that, where it falls to the court to determine the appropriate punishment to be imposed, and there is any discretion as to the punishment, it is the correct practice that the court hear evidence in mitigation or aggravation of the punishment. See, State v. Adcock, 194 S.C. 234, 9 S.E.2d 730, 732 (1940); State v. Green, 220 S.C. 315, 318, 67 S.E.2d 509, 510 (1951). It is incumbent upon counsel to bring to the court's attention any relevant mitigating evidence prior to sentencing.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, 466 U.S. 668, 691, (1984). Counsel's failure to either discover reasonably available mitigating evidence or present mitigating evidence at sentencing can support a finding of ineffective assistance of counsel. See

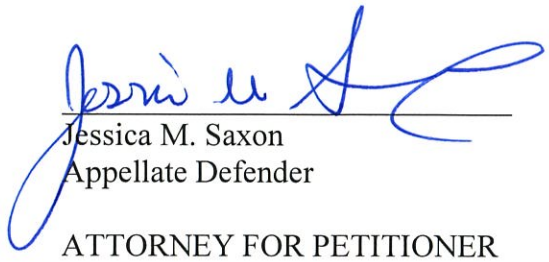
Pike v. Gross, 936 F.3d 372, 379 (6th Cir. 2019) *citing* Williams v. Taylor, 529 U.S. 362, 395-96 (2000); *citing* Wiggins v. Smith, 539 U.S. 510, 521 (2003). See also Campbell v. Polk, 447 F.3d 270, 282 (4th Cir. 2006). In Council v. State, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008), this Court held that counsel was ineffective for failing to adequately investigate and present mitigating evidence. This Court further held that counsel's failure to present mitigating evidence could not be excused as a reasonable strategic decision. Id. at 175, 670 S.E.2d at 363.

Counsel Lipinski provided deficient representation when she failed to call Dr. Mulbry to rebut the inflammatory, incorrect, and misleading statements made by the State regarding Petitioner's mental health and future dangerousness. The PCR court found that Counsel Lipinski's failure to call Dr. Mulbry was based on a valid reason strategy. However, her testimony from the PCR hearing was that the entire defense strategy was to highlight the mental illness of Petitioner so that the plea court understood that the crime was not malicious or pre-meditated but based on Petitioner's active psychosis at the time. To not call the defense mental health expert to rebut the extremely harmful and incorrect statements by the State regarding Petitioner's mental health was in direct conflict with the stated defense strategy.

Petitioner was prejudiced by counsel's failure because the State was able to use Petitioner's mental health as an aggravating factor in sentencing. This completely undermined the purported strategy of the GBMI plea. The plea court did not consider Petitioner's mental health as a mitigating factor that would weigh toward a lesser sentence but as an aggravating factor for the maximum sentence. Had Counsel Lipinski called Dr. Mulbry to testify, he could have corrected the damaging statements made by the State and reframed Petitioner's mental health as a mitigating factor for a more lenient sentence.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully request this Court grant the petition for writ of certiorari to allow full briefing of this issue.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of May, 2024.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert C. Cribb 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 Walton J. McLeod, IV, which was held on December 8, 2022, 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 Robert C. Cribb.

Respectfully Submitted,

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of May, 2024.

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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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