

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Certiorari to Greenville County

G. Edward Welmaker, Circuit Court Judge

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RUBEN RAMIREZ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-208626

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BRIEF OF PETITIONER

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ISSUE PRESENTED

The PCR judge erred in denying petitioner's Rule 59(e), SCRCP, motion filed in the case because there was newly discovered evidence presented in that motion establishing that trial counsel erred in failing to arrange for an independent competency evaluation for petitioner, particularly where the newly discovered evidence was actually a report containing proof that petitioner was not competent to stand trial in the case.

## STATEMENT

Petitioner Ruben Ramirez pled guilty but mentally ill to assault and battery with intent to kill, kidnapping, first degree burglary, first degree criminal sexual conduct, and lewd act upon a child during the November 2008 term of the Greenville County General Sessions Court before Judge Edward Miller. Petitioner received concurrent twenty-year prison sentences for all of his convictions, save his lewd act conviction for which Judge Miller imposed a consecutive fifteen-year sentence, suspended upon five years probation. App. 1-25. Petitioner did not enjoy the benefit of a direct appeal in the case. Monti Desai represented petitioner at the plea proceeding.

On November 2, 2009, petitioner filed a PCR application with the Greenville Office of the Clerk of Court. App. 27-34. The respondent filed a return dated April 7, 2010, requesting that a hearing be held in response to petitioner's PCR action. App. 35-38. A PCR hearing was convened on May 9, 2011, at the Greenville County Courthouse before Judge G. Edward Welmaker. App. 40-81. Petitioner did not appear at the PCR hearing, but was represented at that hearing by Matt Kappel.

On May 23, 2011, PCR counsel filed a motion to hold the record open to allow a new competency evaluation. Supp App. 1-3. On July 27, 2011, Judge Welmaker issued an order of dismissal in the case therein denying petitioner's allegations of ineffective assistance of trial counsel in the case. App. 114-121. On August 11, 2011, PCR counsel filed a Rule 59(e), SCRPC, motion in the case. App. 122-126. Thereafter, the respondent filed a return to the Rule 59(e), SCRPC, motion. App. 128-130. On November 22, 2011, Judge Welmaker issued an order denying the Rule 59(e), SCRPC, motion, but granted petitioner's request for a belated direct appeal. App. 132-133.

Petitioner appealed Judge Welmaker's Orders and filed a petition for writ of certiorari, which was granted on June 25, 2014. This brief of petitioner follows.

## ARGUMENT

The PCR judge erred in denying petitioner's Rule 59(e), SCRCP, motion filed in the case because there was newly discovered evidence presented in that motion establishing that trial counsel erred in failing to arrange for an independent competency evaluation for petitioner, particularly where the newly discovered evidence was a report containing proof that petitioner was not competent to stand trial in the case.

Petitioner pled guilty but mentally ill to assault and battery with intent to kill, kidnapping, first degree burglary, first degree criminal sexual conduct, and lewd act upon a child. The solicitor summarized the facts of the case at the plea proceeding. According to the state's version of the case, petitioner knocked on the door of the prosecutrix's residence, forced his way through the door when it was opened, took the prosecutrix to the woods nearby, beat her, took off her underwear, rubbed his penis on her vagina, and touched her breasts. App. 12, l. 18 – p. 14, l. 9.

Petitioner received a state mental evaluation from a state doctor and an independent psychological evaluation scheduled by trial counsel. The state's forensic psychiatrist found that petitioner was competent to stand trial. App. 83-85. Subsequently, at the behest of trial counsel, an independent psychological examination was conducted by Stephen M. Gedo, Jr., PH.D, who found that petitioner had no psychosis, but suffered from severe mental retardation, intellectual impairment, ADHD, and possessed the intellectual functioning of a 4-to-7-year old child. App. 86-90. However, Gedo failed to make a finding regarding petitioner's competency to stand trial, and trial counsel did not request a competency finding.

Petitioner was not present at the PCR hearing, but petitioner's trial counsel was present at the PCR hearing and testified at the hearing. The chief issue raised at the PCR hearing was whether counsel erred in failing to have an independent re-evaluation performed on petitioner solely on the

question of whether he was competent to stand trial. The independent examination of petitioner that was arranged by trial counsel was limited to a psychological/mental illness examination. Gedo made no independent finding of whether petitioner was competent to stand trial. Trial counsel in effect admitted that he erred in failing to have petitioner examined independently and solely on the question of competency in order to challenge to the state's medical doctor's finding that he (petitioner) was competent to stand trial. App. 47, lines 6-15; App. 50, lines 1-8; App. 55, l. 18-p. 57, l. 7; Counsel admitted his error as follows:

PCR Counsel: Now, once again, having looked at Dr. Gedo's report, looking at the DSM, looking at his IQ, looking at his global assessment and then revisiting the competency exam, would it not seem to be prudent to have potentially reevaluated his competency?

Trial Counsel: I think you can say that.

PCR Counsel: The question is would you say that?

Trial Counsel: Uh, probably.

App. 65, l. 21-p. 66, l. 3.

At the close of the PCR hearing held on May 9, 2011, PCR counsel implored the PCR judge to hold the record open to obtain an independent competency evaluation of petitioner (App. 74, l. 25 – p. 81, l. 7), which trial counsel failed to do, but the PCR judge denied the request. Then, 14 days later on May 23, 2011, PCR counsel filed a motion to hold the record open in order to obtain a competency evaluation of petitioner (Supp App 1-3), but the PCR judge denied the motion to hold the open the record.<sup>1</sup> App. 132-133. Thereafter, on July 27, 2011, the PCR judge issued an order of

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<sup>1</sup> The Motion to Hold the Record Open and Allow Submission of a New Competency Evaluation was denied by the PCR judge in the order of dismissal filed on July 27, 2011, based on the following rationale: Two (2) weeks after the PCR hearing in this case (and while the matter was still under advisement), counsel for the Applicant filed a Motion to Hold the Record Open and Allow Submission of a New Competency Evaluation. That Motion is denied. A full PCR hearing was held on any and all issues the Applicant wished to litigate. The Applicant was notified of

dismissal (written) containing a finding that trial counsel was not ineffective in failing to have pursued a second competency evaluation of petitioner in the case. App. 116-118.

In response to the order of dismissal filed by the PCR judge, PCR counsel filed a timely Rule 59(e), SCRCP, motion on August 11, 2011, revealing that on May 31, 2011, which was 22 days after the PCR hearing was held, and 8 days after the motion to hold the record open was filed, and 57 days **before** the PCR judge issued the order of dismissal in the case, petitioner was independently evaluated for competency by Dr. Thomas Martin, M.D., who subsequently diagnosed petitioner as not competent to stand trial. Dr. Martin's report included the following findings:

Dr. Martin issued his report on June 10, 2011 and concluded that the Plaintiff is not competent to stand trial today and would not have been competent to stand trial on November 3, 2008. In essence, the Dr. Martin stated that the Plaintiff suffers from "severe mental retardation with coexistence maladaptive social and language skills." These disabilities would have been equal present in the Plaintiff at the time of the incident as well as Plaintiff's court date in 2008 because there is "no medical or psychiatric treatment for severe mental retardation." Dr. Martin further concluded that "in light of [Ruben's] history and current presentation is remains unclear...how [he] was ever found 'competent to stand trial.'"

App. 124, paragraph 6; Supp. App. 4-7.

Despite the veritable newly discovered findings by Dr. Martin that were represented on the issue of competency in the Rule 59(e), SCRCP, motion filed on August 11, 2011, the PCR judge ruled by order dated November 22, 2011, (App. 132-133), that the order of dismissal issued on July 27, 2011, would not be amended and that the PCR case would not be re-opened to determine what

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the date of the PCR hearing approximately one (1) month in advance and was on notice to present any and all pertinent evidence to this Court during this hearing. Given that the PCR hearing took place eighteen (18) months after the PCR application was filed, there was ample time for evidence to be obtained for submission at that hearing. As such, allowing the record to remain open for the submission of a competency evaluation, especially since this issue was known to the Applicant and was, in fact, the sole issue argued at the hearing-would give the Applicant a second opportunity to marshal facts and evidence to support his position. This Court finds this would be

bearing Dr. Martin's evaluation and his finding that petitioner was not competent to stand trial would have had had on petitioner's case. App. 132-133.

**A.) Newly Discovered Evidence Regarding Petitioner's Incompetence**

A party requesting a new trial based on after discovered evidence must show that the evidence:

- 1.) is such that it would probably change the result if a new trial were had;
- 2.) has been discovered since the trial;
- 3.) could not by the exercise of due diligence have been discovered before the trial;
- 4.) is material is to the issue of guilt or innocence and;
- 5.) is not merely cumulative or impeaching.

State v. Freeman, 319 S.C. 110, 459 S.E. 2d 867 (1995) citing to Hayden v. State, 278 S.C. 610, 299 S.E. 2d 854 (1983). In this case, petitioner presented newly discovered evidence subsequent to the PCR hearing by Dr. Martin establishing that petitioner was incompetent at the time he entered his guilty plea. In order to show that trial counsel was ineffective in failing to develop the defense that the defendant was not competent to stand trial, the defendant must show that an attorney was deficient in failing to investigate into the defendant's mental capacity and that the defendant was either insane at the time the crime was committed or incompetent at the time of the plea, Jeter v. State, 308 S.C. 230, 417 S.E. 2d 594 (1992); Matthews v. State, 358 S.C. 456, 596 S.E. 2d 49 (2004). In a PCR action challenging mental competency, a petitioner must prove by a preponderance of the evidence that he was incompetent at the time he entered his plea. Lee v. State, 396 S.C. 314, 721 S.E. 2d 442 (2011); Matthews v. State, supra.

In the case at bar, the report of Dr. Martin clearly reported that petitioner was neither competent to stand trial at the time of testing nor at the time of his plea. See Supp. App. 4-7. Thus, per the newly discovered evidence report, Dr. Martin's evaluation results yielded a finding that petitioner was incompetent to stand trial or plead guilty and that his incompetence was discovered

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[not one as granted but] a second "bite at the apple" and contrary to the position expressed by the South Carolina

subsequent to his plea, which could not have been discovered previously because of trial counsel's ineffectiveness in failing to obtain an independent test of petitioner's competency in addition to his goal of securing a psychological profile of petitioner prior to trial, and that the evidence was material to guilt or innocence and not merely cumulative or impeaching.

Due process prohibits the conviction of a person who is mentally incompetent and this right cannot be waived by a guilty plea. Jeter v. State, *supra*, citing to Bishop v. United States, 350 U.S. 961 (1956); Pate v. Robinson, 383 U.S. 375 (1966). Also, the test of competency to enter a plea is the same as required to stand trial, which is 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. Jeter v. State, *supra*; Matthews v. State, *supra*.

Clearly, the newly discovered evidence in this case established petitioner's mental incompetence in fact and that he was incompetent at the time of the plea, and that as a result, petitioner's Rule 59(e), SCRCP, motion should have been granted based on this newly discovered evidence.

**B.) Newly Discovered Evidence Regarding Ineffective Assistance of Counsel**

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove that counsel's performance was deficient, and that the deficient performance prejudiced his case. Strickland v. Washington, 466 U.S. 668 (1984). In order to find that trial was ineffective in failing to develop a mental illness defense, petitioner must show that counsel was deficient in this regard, i.e., that there was the possibility of the existence of a mental illness defense, and that counsel's failure to develop this defense prejudiced petitioner because but for the omissions

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Supreme Court. See, e.g., Odom v. State, 337 S.C. 256, 523 S.E. 2d 753 (1999). App. 114-120.

petitioner would have been able to show that he was either insane at the time of the crime or incompetence at the time of the plea. Matthews v. State, *supra*. Jeter v. State, *supra*. In the case at bar, it is evident from the newly discovered evidence adduced per Dr. Martin's report that petitioner was incompetent to plead guilty to the charges at the plea proceeding that if counsel had properly investigated into this matter by scheduling an independent evaluation of petitioner's competency rather than seeking a psychological evaluation only, then counsel would have known that petitioner was incompetent to plead guilty and been able to apprise the plea judge of the same at the plea proceeding. Thus, the PCR court erred in denying petitioner's Rule 59(e), SCRPC, motion containing newly discovered evidence that petitioner was incompetent to stand trial and that trial counsel erred in failing to uncover this information before the plea proceeding was held in the case. Counsel's deficient performance in this regard violated petitioner's Sixth Amendment right to effective assistance of counsel guaranteed under the United States Constitution and article 1, 14 of the South Carolina State Constitution. See also Hill v. Lockhart, 484 U.S. 52 (1985).

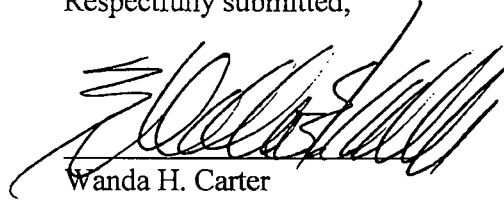
**C.) Summary**

Therefore, based on the newly discovered evidence that established petitioner's incompetence in the case, the PCR judge erred in not granting the Rule 59(e), SCRPC, motion and in not amending the order of dismissal to reflect an order that included a finding that trial counsel was ineffective in failing to investigate properly into petitioner's competency to stand trial or plead guilty, especially since the newly discovered evidence proved petitioner to be incompetent, and that petitioner's was prejudiced as a result, obviously, because he pled (albeit guilty but mentally ill) to the state's charges.

CONCLUSION

Petitioner requests that this Court rule that the PCR judge erred in dismissing petitioner's PCR action and the Rule 59(e), SCRCF, motion filed in the case because petitioner established by a preponderance of the evidence that there was proof that trial counsel erred in failing to obtain an independent evaluation of his (petitioner's) competency to stand trial where the newly discovered evidence in the Rule 59(e), SCRCF, motion proved that he (petitioner) was incompetent to stand trial and was prejudiced by pleading guilty nonetheless at the plea proceeding.

Respectfully submitted,



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 23rd day of July, 2014

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Certiorari to Greenville County

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RUBEN RAMIREZ,

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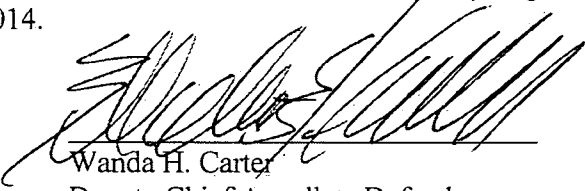
RESPONDENT

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CERTIFICATE OF SERVICE

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I certify that a true copy of the brief of petitioner, in this case has been served on Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Ruben Ramirez, #331556, at Lee Correctional Institution, 990 Wisacky Highway Bishopville, SC 29010, this 23rd day of July, 2014.




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Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day  
of July, 2014.



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