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FORM 5

S.C. Supreme Court

IN THE COURT OF COMMON PLEAS

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LAURENS)
)
 Kimmie Shipes Heaton, SCDC#00249607,)
 Petitioner,)
)
 v.)
)
 State of South Carolina,)
 Respondent.)

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention:
Camille Griffin Graham Correctional Institute, 4450 Broad River Road, Columbia, SC 29210.
2. Name and location of Court which imposed sentence:
State of South Carolina, Court of General Sessions, Judicial Square, 100 Hillcrest Square, Laurens, SC 29360.
3. Name(s) of co-defendant(s) (if any): William Anthony Cathcart
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) Unknown
 - (b) Unknown

- (c) Unkown
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) May 6, 1998- 50 years
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty X
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
No
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. N/A
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. N/A
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. N/A
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) unknown
- (b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) After discovered evidence, which is material to the issue of guilt or innocence.

(b) Violation of Constitutional Rights of the Fourteenth Amendment.

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Public defender Claude Howe, was unaware I was seeing the local mental health doctor. Therefore, he was unable to request, review, and present the records from Laurens County Mental Health at the time of my plea entry and sentencing hearings. Due to the mental state of psychosis I was suffering from, I was unable to articulate these facts to my attorney and the judge. The records were discovered upon my review of my South Carolina Department of Corrections medical chart for an unrelated reason.

(b) I was denied needed expert assistance at trial/plea hearing in violation of the Fourteenth Amendment. Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985) states that due process entitles indigent defendants to the service of court appointed experts to "conduct appropriate examinations and to assist in evaluation, preparation and presentation of their defense." By my counselor's own admission, Mr. Howe had no knowledge of my mental illness. (See opening statement by Claude Howe, public defender, Page 59, Lines 7-9 of the Sentencing Transcript dated May 6, 1998, attached hereto and marked under Tab "1"). Public defender, Claude Howe, continued to make several contradicting statements (see Sentencing Transcript dated May 6, 1998 attached hereto and marked under Tab "1") demonstrating his lack of knowledge regarding mental illness. Counselor Howe should have known that I was at least on medications upon my plea entry. This was an error overlooked due to ineffective assistance of counsel. People v. Cunningham, 104 Misc. 2d 298, 428, N.Y.S. 2d 183 (1980).

Second, a defendant must be mentally competent to stand trial so that the defendant is able to assist counsel in his own defense. Drope v. Missouri, 420 U.S. 162 (1975). To presume a defendant is competent unless he proves his incompetence by clear and convincing evidence violates due process. Cooper v. Oklahoma, 517 U.S. 348, 369, 116 S. Ct. 1373, 1384, 134 L. Ed.

2d 498 (1996). Failure to prevent an incompetent defendant from being subjected to trial may be ineffective assistance. Additionally, allowing an incompetent defendant to plead guilty would be considered ineffective assistance. I was not given a competency hearing and there is a reasonable probability that I would have been found incompetent at the time of my plea based upon my mental health status, treatment and prescriptions. Several mental health reports noted that I was hearing voices, seeing images and generally being treated only for depression and not my psychosis (see attached mental health reports marked under Tab "2"). Had I been given a competency hearing, it is believed that a sufficient doubt about my competence would have been created to require further inquiry. Jeter v. State, 308 S.C. 230, 417 S.E. 2d 594 (1992). The correct course would have been to suspend my plea hearing or trial until an evaluation could be made. Pate v. Robinson, 383 U.S. 375, 385, 86 S. Ct. 836, 842 15 L. Ed 2d 815 (1966) provides that evidence introduced at state trial entitled petitioner to a competency hearing and the court's failure to make an inquiry deprived the petitioner of the right to a fair trial. In Blazak v. Ricketts, 1 F. 3d 891, 897 (9th Cir. 1993), the failure of a state trial court to conduct a competency hearing violated petitioner's due process rights. Here, in this matter, the Laurens County Mental Health and Dr. Harold Morgan's reports demonstrate a sufficient doubt as to my competency (see mental health records attached hereto and marked under Tab "2"). An error occurred during trial that made the trial fundamentally unfair and in violation of the Fourteenth Amendment. In State v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988); California v. Tombetta, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed 2d 413 (1984); and Silverstein v. Henderson, 706 F.2d 361, 369 (2d Cir. N.Y. 1983), the trial courts failure to hold a competency hearing, even on its own initiative, violated the right to a fair trial when undisputed facts indicated petitioner's incompetence to stand trial. The error that occurred in this matter, was that I gave, unknowingly, false information to the court regarding my mental illness and treatment. My mental disturbance was such that I could not recall that I was taking daily medication and had seen the mental health doctor ten days prior to my guilty plea entry (see Plea Entry Transcript dated March 20, 1998, Page 14, Line 25 and Page 15, Lines 1-9, attached hereto and marked under Tab "3"). Undisputed facts that also support my incompetence are referenced in mental health records and Dr. Harold Morgan's reports (attached hereto and marked under Tab "2").

Additionally, my guilty plea was unconstitutional because I plead guilty involuntarily. In Fontaine v. United States, 411 U.S. 213, 93 S. Ct. 1461, 36 L. Ed. 2d 169 (1973), a petitioner

was entitled to a hearing to determine whether or not his guilty plea was voluntary even though he had declared in open court that his plea was given voluntarily and knowingly. In People v. Fixter, 79 A.D.2d 861, 434 N.Y.S.2d 484 (N.Y. App. Div. 4th Dep't 1980) a prisoner claimed he did not remember or understand his plea or the sentencing proceedings. The prisoner noted that he had been diagnosed after the judgment as suffering from psychosis associated with brain trauma. In light of this fact, the court held that there should be a hearing on the motion to vacate the conviction for manslaughter. Similarly as in the People case, and according to the Laurens County Mental Health records, I was still suffering from psychotic features at the time of my plea entry. I was not on medication for psychotic features, as was recommended. Therefore, I was still having "out of touch with reality" symptoms.

Furthermore, my guilty plea was unconstitutional because I plead guilty involuntarily and based on incorrect advice from my attorney or erroneous advice by the court as to parole eligibility. Once counsel undertakes giving advice to the defendant about parole eligibility, the plea may become involuntary if counsel gives incorrect advice. Hinson v. State, 297 S.C. 456, 377 S.E. 2d 338 (1989). Erroneous advice by the court may also render a plea involuntary. Brown v. State, 306 S.C. 381, 412 S.E. 2d 399 (1991). Here, I was told by my counsel and by the court that I would be parole eligible after serving eighty-five percent of a fifty-year sentence, but as the record now stands, I am not parole eligible.

(c) _____

12. Prior to this application have you filed with respect to this conviction:
 - (a) any petition in a State Court under South Carolina Law? No
 - (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes
 - (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
 - (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
 - (a) the specific nature thereof:
 - i. Application for Post-Conviction Relief (Ineffective Counsel)
 - ii. Application for Post-Conviction Relief (Illegal Plea Entry)

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. Laurens County Court of Common Pleas, Laurens, SC

ii. Laurens County Court of Common Pleas, Laurens, SC

iii. _____

iv. _____

(c) the disposition thereof:

i. Denied.

ii. Dismissed.

iii. _____

iv. _____

(d) the date of each such disposition:

i. 1999

ii. 2012

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. --Unknown--

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No.

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

- i. N/A
 - ii. _____
 - iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
 - (a) New evidence has been discovered.
 - (b) _____
 - (c) _____
17. Were you represented by an attorney at any time during the course of:
 - (a) your arraignment and plea? Yes.
 - (b) your trial, if any? No.
 - (c) your sentencing? Yes.
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? No.
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No.
18. If you answered "yes" to one or more parts of (17), list:
 - (a) the name and address of each attorney who represented you:
 - i. Claude Howe, III, 509 North Broad Street, Clinton, SC 29325
 - ii. Richard Townsend, PO Box 215, Laurens, SC 29360
 - iii. _____
 - (b) the proceedings at which each such attorney represented you:
 - i. Plea entry and sentencing hearing.
 - ii. Post-Conviction Relief Hearing in 2000.
 - iii. _____
19. State clearly the relief you seek in filing this application:
New Trial.
20. Are you now under sentence from any other court that you have not challenged?
No.

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Kimmie Shipes Heaton, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Kimmie Shipes Heaton

SWORN or affirmed to and subscribed before me this
_____ day of _____, 2014.

Notary Public

My Commission Expires: _____