STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Perry H. Gravely, Circuit Court Judge

LAQUARIUS J. BRANNON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001722

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Did the PCR court err in finding that plea counsel provided effective assistance of counsel where plea counsel failed to request a competency hearing to determine Petitioner's fitness to stand trial when there was a reasonable probability that Petitioner was incompetent at the time of the plea, as evinced by Petitioner's school records – that plea counsel failed to request – revealing a severe learning disability?

STATEMENT

Relevant Facts and Petitioner's Guilty Plea

Petitioner was indicted at the March 2012 term of the Lexington County Grand jury for burglary, first degree, kidnapping, and armed robbery. App. 94 – 99. On December 17, 2013, Petitioner pled guilty to all charges before the Honorable Robert Hood. Petitioner was represented by Dayne Phillips. The State was represented by Assistant Solicitor Shawn Graham.

At the guilty plea hearing, the State alleged that on September 13, 2011, Petitioner and two friends broke into a house in Batesburg-Leesville armed with a baseball bat, a handgun and a shotgun. App. 20, l. 8 – 24, l. Two women and five minor children were in the house. *Id.* At gunpoint the burglars stole money, jewelry, and drugs. *Id.*

The three men then raped both of the adult women. *Id.* The three then drove away in one of the women's grey Ford Crown Victoria. *Id.* One of the adult women was later able to identify Petitioner and his two friends in a police photo-lineup. The solicitor explained that the State believed a high speed chase and shootout between police and the occupants of a Ford Exhibition on the same night as the burglary was – somehow – related to Petitioner's case.

Petitioner was arrested three days after the burglary following a brief foot chase during a traffic stop. *Id.* According to the solicitor, Petitioner and his co-defendants gave differing statements to the police. All denied any involvement in the robbery. However, their statements, while individually exculpatory, had the collective effect of implicating all three in the crime. *Id.*

In exchange for pleading guilty, the State agreed to dismiss the criminal sexual assault charges, but the kidnapping was classified as sexual. Petitioner has to register as a sex offender and is eligible for rendition into the "civil" SVP "treatment" program after his sentence is complete. App. 11, ll. 2-24.

This condition of the guilty plea caught Petitioner by surprise. *Id.* "You didn't tell me that man." Despite Petitioner's surprise, the plea court did not further explain the implications of pleading guilty to a sex crime and the guilty plea continued. *Id.*

In mediation, plea counsel noted that Petitioner did not dispute the allegations and that he spared the two women the ordeal of a trial. Petitioner was 19 years old at the time of the offense and only had a ninth grade education. App. 27, ll. 1-15. Petitioner then apologized to the two women and begged them to forgive him. App. 28, ll. 14-20. The plea court sentenced Petitioner to thirty years of imprisonment. Petitioner did not file an appeal.

PCR Application and Evidentiary Hearing

Petitioner filed an application for post-conviction relief (PCR) on October 8, 2014. App. 35 – 43. The State filed a return on September 23, 2015. App. 44 – 49.

An evidentiary hearing was held before the Honorable Perry H. Gravely on April 18, 2016. App. 51 – 85. Aimee J. Zmroczek represented Petitioner. Senior Assistant Attorney General Johanna C. Valenzuela represented the State. Petitioner and plea counsel both testified.

Petitioner testified that plea counsel failed to investigate his school records prior to having Petitioner plead guilty. App. 55, l. 8 – 57, l. 23. Petitioner recalled that he asked plea counsel to get the records in order to prove that Petitioner had a severe learning disability. *Id.* Petitioner stated that plea counsel never secured the records. *Id.*

Petitioner then moved to fire appointed counsel after remembering that he had never met appointed counsel prior to the hearing. *Id.* Petitioner did not believe appointed PCR counsel was acting in his best interests and noted that appointed PCR counsel – like plea counsel – had not secured copies of his school records. *Id.* When the PCR court refused to allow Petitioner to

replace appointed counsel, Petitioner asked the court to leave the record open so that the school records could be presented to the court. App. 58, ll. 1 – 63, l. 22.

Plea counsel testified that he visited with Petitioner regularly in the months leading up to the guilty plea. App. 68, ll. 2-21. Plea counsel and Petitioner reviewed discovery together during those meetings and plea counsel never had any concerns regarding Petitioner's competency. App. 69, l. 2 – 72, l. 23.

Plea counsel recalled that Petitioner never "opened up" to him. He did not provide an alibi or other explanation for his whereabouts on the night of the burglary and rape. *Id.* Plea counsel secured funding for an investigator, but Petitioner agreed to plead guilty before the investigator began working on the case. *Id.*

Plea counsel further recollected that there was no DNA linking Petitioner to the rapes, only the identification by one of the women. App. 74, l. 2 – 75, l. 13. According to plea counsel, Petitioner refused to turn State's evidence against his co-defendants. App. 76, l. 2 – 77, l. 24.

On cross-examination, plea counsel repeatedly stated that he and Petitioner "discussed everything, you know, I certainly had no hesitation that he wasn't understanding what I was saying based on the statements and questions he made back to me." App. 82, l. 17 – 83, l. 2. Plea counsel classified the evidence against Petitioner as overwhelming.

Court's Ruling and Written Order Dismissing Petitioner's Application

Judge Hood ruled from the bench that Petitioner had failed to prove that he was incompetent when he entered his guilty plea. App. 83, l. 14 – 54, l. 20. The Court ruled that, even if Petitioner had learning disabilities, his disabilities would not "necessarily relate" to his ability to stand trial. *Id.* Therefore, the court denied Petitioner's application for post-conviction relief. A written order of dismissal was signed by Judge Hood on May 31, 2016. App. 86 – 93.

ARGUMENT

The PCR court erred in finding that plea counsel provided effective assistance of counsel where plea counsel failed to request a competency hearing to determine Petitioner's fitness to stand trial when there was a reasonable probability that Petitioner was incompetent at the time of the plea, as evinced by Petitioner's school records – that plea counsel failed to request – revealed a severe learning disability.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland,* 466 U.S. at 687.

The two-part test adopted in *Strickland* also "applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart,* 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). However, "[p]lea counsel is ineffective within the meaning of the Sixth Amendment only when the applicant satisfies both requirements." *Stalk v. State,* 383 S.C. 559, 561, 681 S.E.2d 592, 593 (2009).

"In order to find that petitioner's [plea] counsel was ineffective for refusing to request a *Blair* hearing[1] on petitioner's competency to stand trial, petitioner must show that counsel was deficient and that the deficiency prejudiced the outcome of petitioner's proceedings." *Matthews v. State,* 358 S.C. 456, 459, 596 S.E.2d 49, 50–51 (2004).

To show "prejudice within the context of counsel's failure to fully investigate the petitioner's mental capacity, 'the [Petitioner] need only show a reasonable probability that he was either insane at the time [the crime was committed] or incompetent at the time of the plea.' "

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

Matthews, 358 S.C. at 459, 596 S.E.2d at 50 (alterations by court) (quoting *Jeter v. State,* 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992)).

Furthermore, the South Carolina Supreme Court has held that the difference "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea." *Berry v. State*, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). However, "the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." *Holden v. State*, 393 S.C. 565, 572-74, 713 S.E.2d 611, 612-15 (2011).

Due process prohibits the conviction of an incompetent defendant, and this right may not be waived by a guilty plea. *Jeter,* 308 S.C. at 232, 417 S.E.2d at 595. To prevail in a PCR action, the petitioner must prove by a preponderance of the evidence he was incompetent when he entered his guilty plea. *Matthews,* 358 S.C. at 458– 59, 596 S.E. 2d at 51; *see also* Rule 71.1(e), SCRCP. Any evidence of probative value to support the PCR court's factual findings is sufficient to uphold those findings on appeal. *Jeter,* 308 S.C. at 232, 417 S.E.2d at 596.

Ultimately, "[t]he test of competency to enter a plea is the same as required to stand trial." *Id.* "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." *Id.*

Deficient Performance

In this case, Petitioner testified at the evidentiary hearing that plea counsel never secured copies of Petitioner's school records. These records would have shown that Petitioner had only a ninth grade education and severe learning disabilities. App. 27, ll. 1-15; App. 55, l. 15 – 57, l. 16;

Cf: Lee v. State, 396 S.C. 314, 322, 721 S.E.2d 442, 447 (2011) (finding "[p]lea counsel could not be deficient if she had no indication of [Petitioner's] mental status").

Based on the testimony presented at the plea and PCR hearings, Petitioner clearly established by a preponderance of the evidence that he was incompetent at the time he entered his guilty plea. Consequently, petitioner's counsel was deficient for failing to request copies of Petitioner's school records, which at a minimum would have provided strong mitigation evidence regarding Petitioner's degree of criminal culpability in light of his severe learning disabilities.

Prejudice

Plea counsel failed to fully explore and investigate Petitioner's incompetence. Even without the school records, there were substantial signs pointing to Petitioner's reduced intellectual ability. Petitioner never "opened up" to defense counsel and was – for all practical purposes – totally unable to assist in his own defense. App. 70, l. 1 – 778, l. 21. Again, Petitioner was nineteen years old with a ninth grade education. App. 27, ll.1-15.

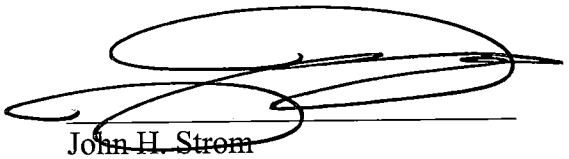
He provided no alibi or other information to plea counsel about who he was with on the night of the incident. App. 70, l. 1 – 778, l. 21. These warning signs should have caused plea counsel to pause. Plea counsel should have conducted further investigation. A logical first step would have been Petitioner's school records.

Although Petitioner pled guilty, an "unsound result" occurred in this case because the record does not reflect that Petitioner knowingly, freely, and intelligently waived his constitutional trial rights when pled guilty on plea counsel's advice and that Petitioner was likely incompetent when he pled. *See Brady*, 397 U.S. at 758; *see also Boykin*, 395 U.S. 238; *accord Hazel*, 275 S.C. 392, 271 S.E.2d 602; *Berry*, 381 S.C. at 635, 675 S.E.2d at 427.

Therefore, the PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty. Plea counsel's failure to investigate Petitioner's school records and then request a *Blair* hearing prejudiced petitioner under the *Jeter* standard because there was, at minimum, a "reasonable probability" that petitioner was incompetent at the time of his guilty plea." App. 86–93; *see Boykin*, 395 U.S. 238; *see also Hill*, 474 U.S. at 57-59; *see also Matthews*, 358 S.C. at 460, 596 S.E.2d at 51.

CONCLUSION

Based on the foregoing reasons, LaQuarius J. Brannon's petition for writ of certiorari should be granted in order to allow full briefing on the issue.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of March, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Perry H. Gravely, Circuit Court Judge

LAQUARIUS J. BRANNON,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Laquarius J. Brannon states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. He has reviewed the record of petitioner's trial before Judge Perry H. Gravely, which was held on April 18, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He 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 him as counsel for Laquarius J. Brannon.

Respectfully Submitted,

John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

This 31st day of March, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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."

John H. Strom
Appellate Defender

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ATTORNEY FOR PETITIONER

This 31st day of March, 2017.

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CERTIFICATE OF SERVICE

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 Justin J. Hunter, 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 Laquarius J. Brannon, #338615, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 31st day of March, 2017.

John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 31st day of March, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025