STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lancaster County

Honorable R. Knox McMahon, Circuit Court Judge

JOSEPH D. HILTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000492

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to find plea counsel ineffective for failing to have Petitioner evaluated for mental illness pursuant to S.C. Code §17-24-20?

STATEMENT

On April 18, 2013, Petitioner, Joseph D. Hilton, appeared before the Honorable Ernest Kinard, Jr., waived grand jury presentment and pled guilty to voluntary manslaughter, indictment #2013-GS-29-665. Mike Lifsey represented Petitioner at the guilty plea. Doug Barfield represented the State. Pursuant to negotiations, Judge Kinard sentenced Petitioner to twenty-five (25) years in prison. Petitioner did not appeal.

On March 3, 2014, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on June 18, 2014. On July 18, 2017, an evidentiary hearing was held before the Honorable R. Knox McMahon. Nathan J. Sheldon represented Petitioner at the PCR hearing. DeShawn H. Mitchell represented the State. In a written order signed February 14, 2018, Judge McMahon denied relief and dismissed the application. A timely notice of intent to appeal was served on March 19, 2018. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find plea counsel ineffective for failing to have Petitioner evaluated for mental illness pursuant to S.C. Code §17-24-20.

Petitioner pled guilty to the fatal shooting of his wife of twenty-five years. At the time of the guilty plea Petitioner was sixty-two years of age and had never been arrested prior to the shooting. (App. p. 11, lines 9-10; p. 24, line 12). Plea counsel told the judge during the guilty plea:

> You know, I can't offer any real explanation for why he did what he did that night. I think some combination of the health problems he suffered and the pain he was under, I can offer no real explanation for this terrible act he did. But I will tell you that I think he does – he can never make up for what he did. But I think by deciding to forgo any trial –you've seen the emotions in this courtroom today, I can only imagine if we would have set up here two or three days and argued about **mental statuses** and argued about what exactly happened, how painful that would be for all involved.

(App. p. 25, lines 4-14)(emphasis added).

In the PCR application Petitioner alleged that plea counsel was ineffective for failing to seek a mental evaluation. (App. p. 37). During the PCR hearing plea counsel admitted that he did not seek a psychiatric evaluation for Petitioner. (App. p. 53, lines 4-8). When asked why he did not seek a psychiatric evaluation, plea counsel testified that Petitioner did not appear to have mental health problems. Plea counsel testified, "I'm certainly no psychiatrist or psychologist, but there was no overt indication of him being delusional or suffering any psychosis that I could see from my perspective." (App. p. 53, lines 18-21). Plea counsel testified that Petitioner did not tell him that he had been diagnosed with a mental illness but admitted that he knew Petitioner took antidepressant medications. (App. p. 63, lines 4-11). Later plea counsel testified that his

notes from his initial meeting with Petitioner reflected that Petitioner took pain medication and Xanax. (App. p. 63, line 22 – p. 64, lines 1-2).

Dr. Donna Schwartz Maddox was hired by PCR counsel to evaluate Petitioner. Dr. Maddox testified that prior to shooting his wife Petitioner had stopped taking his antidepressant medications. (App. p. 74, lines 15-20). During the PCR hearing Dr. Maddox testified, "And so, again, just based on his history, prior treatment for – of depression, present treatment of depression, continued symptoms of depression, and then his reports of being irritable and certainly the 911 transcript, it would have been my opinion that because of his depression and the cognitive impairment that he [Petitioner] lacked the capacity to conform his conduct." (App. p. 82, lines 3-9). A copy of Dr. Maddox's report was entered in evidence as Plaintiff's Exhibit #1. (App. pp. 105-109).

In the order of dismissal the PCR judge first addresses plea counsel's failure to get a mental health evaluation but seems to limit the analysis to competency to stand trial without addressing plea counsel's failure to investigate a plea of guilty but mentally ill. (App. pp. 118-119). In the order of dismissal the PCR judge wrote that plea counsel "testified that Applicant had numerous medical problems but they were physical health problems not mental health problems." (App. p. 119). The order then references plea counsel's testimony that Petitioner did not appear delusional or to be suffering from any psychosis, conditions more related to competency or insanity rather than capacity to conform. The order then references Dr. Maddox's finding that Petitioner was competent.

The order next addresses pleas counsel's failure to investigate and present mitigation evidence. (App. p. 119). The PCR judge wrote, "Here, had the Applicant been tested prior to pleading guilty and been found guilty but mentally ill, the plea judge would have still been

required to sentence Applicant the same way as a person who simply pleads guilty and is treated no different." (App. p. 120). The PCR judge also wrote, "As equally important, this Court finds compelling Dr. Maddox's testimony that Applicant has been treated by the best psychiatrist at the Department of Corrections and is getting the mental health care he would have received if he pled guilty but mentally ill originally. Because of all these things, this Court finds Applicant has failed to meet his burden of proving counsel was ineffective for failing to investigate and present mitigation evidence. Therefore, this allegation is denied and dismissed with prejudice." (App. p. 121). The PCR judge erred. Plea counsel was ineffective in failing to have petitioner evaluated for mental illness pursuant to S.C. Code §17-24-20. Petitioner established at the PCR hearing that at the time of the shooting Petitioner lacked the capacity to conform and could have entered a plea of guilty but mentally ill.

S.C. Code Ann. § 17-24-20 provides:

> (A) A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.
>
> (B) To return a verdict of "guilty but mentally ill" the burden of proof is upon the State to prove beyond a reasonable doubt to the trier of fact that the defendant committed the crime, and the burden of proof is upon the defendant to prove by a preponderance of evidence that when he committed the crime he was mentally ill as defined in subsection (A).
>
> (C) The verdict of guilty but mentally ill may be rendered only during the phase of a trial which determines guilt or innocence and is not a form of verdict which may be rendered in the penalty phase.
>
> (D) A court may not accept a plea of guilty but mentally ill unless, after a hearing, the court makes a finding upon the record that the defendant proved by a preponderance of the evidence that when he committed the crime he was mentally ill as provided in Section 17-24-20(A).

In State v. Curry, 410 S.C. 46, 52–53, 762 S.E.2d 721, 724–25 (Ct. App. 2014) (fn. #3 omitted), the South Carolina Court of Appeals wrote:

> As defined by section 17–24–20(A) of the South Carolina Code (2014), A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in [s]ection 17–24–10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law. S.C.Code Ann. § 17–24–20(A) (2014). The guilty but mentally ill statute ensures the jury applies the legal definition of insanity properly by emphasizing that a person may be mentally ill, yet not legally insane. State v. Hornsby, 326 S.C. 121, 130, 484 S.E.2d 869, 874 (1997). "The [guilty but mentally ill] verdict clarifies the distinction between a defendant who is not guilty by reason of insanity and one who is mentally ill yet not criminally insane and, therefore, is criminally liable." Id.

Petitioner established at the PCR hearing that he was mentally ill at the time of the shooting and should have pled guilty but mentally ill.

S.C. Code Ann. § 17-24-70 provides:

> If a verdict is returned of "guilty but mentally ill" the defendant must be sentenced by the trial judge as provided by law for a defendant found guilty, however:
>
> (A) If the sentence imposed upon the defendant includes the incarceration of the defendant, the defendant must first be taken to a facility designated by the Department of Corrections for treatment and retained there until in the opinion of the staff at that facility the defendant may safely be moved to the general population of the Department of Corrections to serve the remainder of his sentence.
>
> (B) If the sentence includes a probationary sentence, the judge may impose those conditions and restrictions on the release of the defendant as the judge considers necessary for the safety of the defendant and of the community.

As noted by the Court in Curry:

> We are aware that a defendant found guilty but mentally ill "must be sentenced as provided by law for a defendant found guilty." Hornsby, 326 S.C. at 126, 484 S.E.2d at 872. Although a defendant's sentence is the same regardless of whether he is merely guilty or guilty but mentally ill, a defendant found guilty but

> mentally ill "is entitled to immediate treatment and evaluation." 726 Id. (citing S.C.Code Ann. § 17–24–70 (Supp.1995)). The circuit court included a recommendation for mental health treatment when it issued Curry's sentence, but the court did not mandate treatment as is required for a defendant found guilty but mentally ill pursuant to section 17–24–70 of the South Carolina Code (2014). Because evidence was presented from which the jury could have concluded Curry was guilty but mentally ill under section 17–24–70, the circuit court's failure to include this jury charge amounted to reversible error.

410 S.C. at 54–55, 762 S.E.2d at 725–26 (Ct. App. 2014) (footnotes omitted). Plea counsel should have discovered that Petitioner was mentally ill. By entering a plea of guilty but mentally ill, Petitioner would have been entitled to immediate treatment and evaluation pursuant to S.C. Code Ann. § 17-24-70.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' " Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

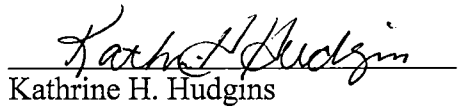
"The second, or 'prejudice,' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. at 59, 106 S.Ct. 366. "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

Plea counsel was ineffective in failing to investigate and discover that Petitioner was but mentally ill and qualified to enter a plea of guilty but mentally ill. The nature of the crime,

fatally shooting his wife of twenty-five years (App. p. 106) when Petitioner had never been arrested previously, the fact that plea counsel admitted knowing that Petitioner suffered from depression, noted that Petitioner took Xanax and even referenced "mental statuses" during the guilty plea all support a finding that plea counsel should have investigated the possibility that Petitioner was mentally ill, lacking the capacity to conform. Petitioner was prejudiced by the deficient performance. While Dr. Maddox testified that Petitioner currently receives mental health treatment, Petitioner was entitled to the mandatory evaluation and treatment provided by S.C. Code Ann. § 17-24-70. Additionally, because plea counsel failed to discover that Petitioner was mentally ill, lacking the capacity to conform at the time of the shooting, this factor was not used to try and obtain a more favorable negotiated sentence or obtain a plea to voluntary manslaughter without negotiations or recommendations and present this factor to the judge as additional mitigation in the hopes of receiving a sentence of less than the twenty-five year sentence imposed pursuant to the negotiation.

CONCLUSION

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



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of September, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon DeShawn H. Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Joseph D. Hilton, #355069, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 21st day of September, 2018.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 21st day of September, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.