

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Colleton County

Honorable Thomas A. Russo, Circuit Court Judge

RAYMOND POWELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001454

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT

The PCR court erred in finding counsel provided effective representation where counsel did not request that petitioner be evaluated for competency, where petitioner’s mental illness was untreated at the time of the guilty plea and counsel knew petitioner “wasn’t 100 percent,” since petitioner’s mental illness resulted in a plea that was not knowingly, voluntarily, and intelligently entered 5

CONCLUSION 8

PETITION TO BE RELIEVED AS COUNSEL 9

ISSUE PRESENTED

Whether the PCR court erred in finding counsel provided effective representation where counsel did not request that petitioner be evaluated for competency, where petitioner's mental illness was untreated at the time of the guilty plea and counsel knew petitioner "wasn't 100 percent," since petitioner's mental illness resulted in a plea that was not knowingly, voluntarily, and intelligently entered?

STATEMENT

On March 28, 2013, petitioner was indicted for two counts of attempted murder and for the possession of a weapon during the commission of a violent crime by a Colleton County Grand Jury, for the shooting of two men in a parking lot at the Chase Lounge following a “confrontation” “over a female.” App. 125 – 130; App. 20, l. 11 – 21, l. 21.

On November 17, 2014, petitioner pleaded guilty before the Honorable Perry M. Buckner, III. App. 1. David Mathews represented petitioner and Steve Knight represented the state. App. 1. During the plea, the court asked petitioner if he had ever been treated for mental illness, and petitioner replied that he had “[a]nxiety, depression and bipolar.” App. 8, l. 22 – 9, l. 1. However, counsel said he believed petitioner was competent. App. 9, ll. 2-4. Petitioner told the plea judge he was not receiving any medication at that time. App. 9, l. 22 – 10, l. 1.

The court sentenced petitioner to concurrent terms of nineteen years, nineteen years, and five years, respectively. App. 131 – 133. After his direct appeal was dismissed, petitioner filed an application for post-conviction relief (PCR) on February 10, 2016. App. 35 – 44. The state made its return on June 7, 2016. App. 45 – 51. A hearing was held on October 10, 2017, before the Honorable Thomas Russo. App. 52. James Falk represented petitioner and Ruston Neely represented the state. App. 53.

At the PCR hearing, petitioner testified that he told defense counsel he suffered from bipolar disorder and depression, and that counsel “said that’s something maybe we need to look into, but [counsel] never said anything else on it.” App. 61, l. 14 – 62, l. 3. Petitioner said he was prescribed the medications Depakote and Remeron to treat his mental illnesses while he was in pre-trial detention, but that he did not take any medications on the day of the plea. App. 62, l. 19 – 63, l. 1. Petitioner said he last took the medications about one month prior to the plea because

the jail did not have “the order” for his medications. App. 62, l. 19 – 63, l. 9. At the time of his PCR hearing, petitioner was also taking Geodon for “hearing voices.” App. 63, l. 24 – 64, l. 3.

According to petitioner, he understood what was going on at his plea “a little bit.” App. 71, ll. 20-21. Petitioner explained: “Bipolar is something that affects your ability to think, because it’s like you’re bouncing off the wall constantly.” App. 72, ll. 9-11. Petitioner said he believed counsel should have gotten him “an examination.” App. 72, ll. 16-19. “Probably better, probably put me on my medicine, and then would have took me up to trial. It probably would have been a better outcome.” App. 72, ll. 20-22. Petitioner said his guilty plea was involuntary, “Because I did not fully understand, and I was pressured into it. And I was not even on my medication.” App. 74, ll. 11-14.

Defense counsel said he had represented petitioner “five times before this” and “knew him pretty well.” App. 83, ll. 2-3. However, defense counsel had never asked that petitioner be evaluated for competency in the prior cases. App. 98, ll. 8-10. Defense counsel stated, “I felt like he was competent. **I knew he wasn’t 100 percent**, but I did not feel he was incompetent.” App. 83, ll. 3-5 (emphasis added).

Regarding his answers to the court at the plea hearing, petitioner said he only gave the answers that he did because defense counsel told him “that was what was needed to be said for my plea to be accepted.” App. 70, ll. 11-17. Defense counsel agreed that he probably told petitioner that if he did not “follow along” then the court would not accept his plea, because, “Well, I mean, that’s the truth of it.” App. 99, l. 4 – 100, l. 16.

The PCR court denied petitioner relief. The order of dismissal states the “transcript reflects the guilty plea was knowingly and voluntarily entered with a full understanding of the

charges and consequences of the plea,” despite petitioner’s testimony that “his medical conditions could have rendered him incompetent.” App. 121 – 122.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding counsel provided effective representation where counsel did not request that petitioner be evaluated for competency, where petitioner's mental illness was untreated at the time of the guilty plea and counsel knew petitioner "wasn't 100 percent," since petitioner's mental illness resulted in a plea that was not knowingly, voluntarily, and intelligently entered.

Counsel was aware that petitioner was mentally ill and his failure to request petitioner be evaluated for competency was deficient performance.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

"In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case." *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (citing *Strickland*, 466 U.S. at 687). "[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill*, 474 U.S. at 58.

"Due process prohibits the conviction of a person who is mentally incompetent." *Jeter v. State*, 308 S.C. 230, 232, 417 S.E.2d 594, 595 (1992) (citing *Bishop v. United States*, 350 U.S. 961 (1956)). "This right cannot be waived by a guilty plea." *Id.* at 232, 417 S.E.2d at 595-96

(citing *Pate v. Robinson*, 383 U.S. 375 (1966)). “The proper avenue in which to challenge a guilty plea which is not objected to at the time of its entry is through post conviction relief.” *In Interest of Antonio H.*, 324 S.C. 120, 122, 477 S.E.2d 713, 714 (1996).

“As to the petitioner’s competency to stand trial, although under an ineffective assistance of counsel claim the petitioner does not bear the burden of the preponderance of the evidence standard, he must still show there is a reasonable probability he would have been determined to be incompetent.” *Jeter*, 308 S.C. at 234, 417 S.E.2d at 596.

Bipolar disorder causes “significant impairment” in functioning. Bipolar Disorder, *The Gale Encyclopedia of Medicine* (Jacqueline L. Longe, ed., 4th ed. 2012). Symptoms of bipolar disorder include, *inter alia*, “racing thoughts,” “unrealistic beliefs,” and “inability to concentrate.” *Id.* Severe episodes “may also include symptoms of **psychosis**. Psychotic symptoms include visual or auditory **hallucinations** and **delusions** (illogical, false, but strongly held beliefs).” *Id.* Depakote is “one of the few drugs available that has been proven effective in treating” certain bipolar patients. *Id.*

Petitioner explained that counsel knew he was mentally ill, and counsel agreed that he knew petitioner “wasn’t 100 percent.” Although petitioner had been prescribed Depakote and Remeron,¹ he had not received his medications for one month prior to entering his plea.

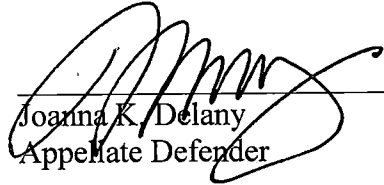
Petitioner’s testimony establishes a reasonable probability he would have been determined to be incompetent, given that bipolar disorder causes “significant impairment” in functioning and can cause hallucinations and delusions.

¹ Remeron is an antidepressant used to treat major depressive disorder. Alam, Abdulkader et al. “A review of therapeutic uses of mirtazapine in psychiatric and medical conditions” *primary care companion for CNS disorders*, vol. 15,5 (2013).

Petitioner was prejudiced because his guilty plea was not a “voluntary and intelligent choice among the alternative courses of action,” since there is a reasonable probability he was incompetent to enter a plea. *Hill v. Lockhart*, 474 U.S. at 56.

CONCLUSION

By reason of the foregoing argument, petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.


Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of January, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Colleton County

Honorable Thomas A. Russo, Circuit Court Judge

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Raymond Powell states:

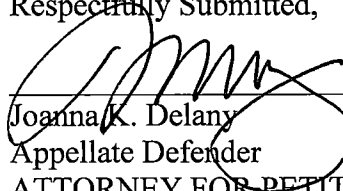
1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Thomas A. Russo, which was held on October 10, 2017, 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 Raymond Powell.

Respectfully Submitted,

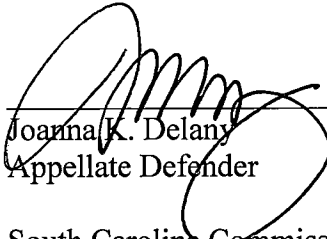


Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 7th day of January, 2019.

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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This 7th day of January, 2019.

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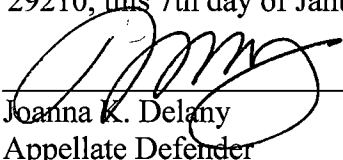
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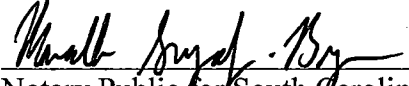
CERTIFICATE OF SERVICE

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 Christian Saville, 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 Raymond Powell, #346648, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 7th day of January, 2019.



Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 7th day of January, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028