THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2018-001137

John Edward Washington,.....Petitioner,

vs.

State of South Carolina,.....Respondent.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON APPEAL

Whether the lower court erred in failing to find counsel rendered ineffective assistance of counsel that prejudiced Petitioner when he failed to utilize mental health expert(s) prior to and during Petitioner's guilty plea.

STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact but deference is not given to conclusions of law. Smalls v. State, 810 S.E.2d 836 (2018). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling on findings of fact. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984). Questions of law are reviewed *de novo*, and the appellate court "will reverse the decision of the PCR court when it is controlled by an error of law." Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Richland County Clerk of Court. During the March 2014 term, Petitioner was indicted for the offense of murder by the Richland County Grand Jury (Indictment No. 2014-GS-40-00387). App. p. 59.

On February 5, 2015, Petitioner appeared in front of the Honorable Edgar W. Dickson at the Richland County Courthouse. App. p. 1. Petitioner was represented by Johnny S. Gasser, Esquire. The State was represented by Kathryn Cavanaugh, Assistant Solicitor. Petitioner entered a guilty plea to murder. The plea was accepted, and Respondent was sentenced to a term of forty years by the Honorable Edgar W. Dickson App. p. 47. A direct appeal was not filed on Petitioner's behalf.

On December 3, 2015, Petitioner filed an Application for Post Conviction Relief. App. p. 49. On April 27, 2016, a Return was filed. App. p. 61. On March 6, 2018, Petitioner, through counsel, filed an Amendment to his Application, which stated:

> Applicant would move to amend his Application for Post Conviction Relief. In general, Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during his guilty plea. Applicant would further amend and explain the allegations set forth in his Application for Post-Conviction Relief by adding the following specific allegations of ineffective assistance of counsel:
>
> 1. Ineffective assistance of counsel that rendered his guilty plea involuntary due to counsel's failure to utilize mental health experts to review records and evaluate Applicant prior to the entry of his guilty plea and to assist in his plea

proceeding, specifically, as follows:

a. Failure to utilize mental health experts to assist in plea negotiations.

b. Failure to utilize mental health experts to formulate possible defenses and/or in mitigation.

c. Failure to utilize mental health experts to ensure that Applicant's plea was knowingly and voluntarily entered.

App. p. 68.

On March 22, 2018 an evidentiary hearing was conducted at the Richland County Courthouse in front of the Honorable Brooks P. Goldsmith. App. p. 71. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Jessica Kinard, Assistant Attorney General. Respondent proceeded on the allegations set forth in his Application and called Dr. Tora Brawley, Ph.D., Dr. Donna Schwartz Maddox, M.D., Jan Washington Caldwell, Johnny Gasser, Esquire. Petitioner introduced six exhibits during the evidentiary hearing. App. p. 191.

Thereafter, the Honorable Brooks P. Goldsmith requested Respondent propose an Order of Dismissal. The Order of Dismissal was signed on June 25, 2018 and filed on June 29, 2018. App. p. 225. Petitioner, through counsel, received notice of entry of the Order on July 2, 2018. On July 3, 2018, Petitioner, through counsel submitted a Rule 59(a) and (e), Motion. App. p. 242. An Order denying the Motion was issued on August 28, 2018 and filed on August 31, 2018. App. p. 246.

Petitioner, through counsel, filed a timely Notice of Intent to Appeal, from which this Petition follows.

ARGUMENT

I. The lower court erred in failing to find counsel rendered ineffective assistance of counsel that prejudiced Petitioner when he failed to utilize mental health expert(s) prior to and during Petitioner's guilty plea.

It is well established that 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 (1969). In South Carolina, the courts have consistently held that that a defendant must have a full understanding of the consequences of his plea and the charges against him. Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997), Simpson v. State, (317 S.C. 506, 455 S.E.2d 175 (1995). Additionally, a defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution.[1] See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the assistance provided by counsel, "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

In a PCR stemming from a guilty plea, an applicant alleging a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). Therefore, an applicant that entered a plea on

[1] The "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." Montejo v. Louisiana, 556 U.S. 778, 786, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009) (quoting United States v. Wade, 388 U.S. 218, 227-228, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)). Critical stages include arraignments, post-indictment interrogations, post-indictment lineups, and the entry of a guilty plea. See Hamilton v. Alabama, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961)(arraignment); Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964) (postindictment interrogation); Wade, supra (postindictment lineup); Argersinger v.Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972) (guilty plea).

the advice of counsel may only attack the voluntary nature of that 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, applicant would not have pled guilty and insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985), Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000). In Hill, the Supreme Court of the United States made it clear that the "voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." 474 U.S. at 57, 106 S.Ct. at 369. In Hill and Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473 (2010), the Supreme Court of the United States examined the role of advising a client about a plea offer and ensuing guilty plea as was discussed in Missouri v. Frye, 132 S. Ct. 1399, 1405-06 (2012), as follows:

> Hill established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in Strickland. See Hill,supra, at 57, 106 S. Ct. 366, 88 L. Ed. 2d 203. As noted above, in Frye's case, the Missouri Court of Appeals, applying the two part test of Strickland, determined first that defense counsel had been ineffective and second that there was resulting prejudice.
>
> In Hill, the decision turned on the second part of the test. There, a defendant who had entered a guilty plea claimed his counsel had misinformed him of the amount of time he would have to serve before he became eligible for parole. But the defendant had not alleged that, even if adequate advice and assistance had been given, he would have elected to plead not guilty and proceed to trial. Thus, the Court found that no prejudice from the inadequate advice had been shown or alleged. Hill, supra, at 60, 106 S. Ct. 366, 88 L. Ed. 2d 203.
>
> In Padilla, the Court again discussed the duties of counsel in advising a client with respect to a plea offer that leads to a guilty plea. Padilla held that a guilty plea, based on a plea offer, should be set aside because counsel misinformed the defendant of the immigration consequences of the conviction. The Court made clear that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." 559 U.S., at ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284, 298. It also rejected the argument made by

> petitioner in this case that a knowing and voluntary plea supersedes errors by defense counsel. Cf. Brief for Respondent in Padilla v. Kentucky, O. T. 2009, No. 08-651, p. 27 (arguing Sixth Amendment's assurance of effective assistance "does not extend to collateral aspects of the prosecution" because "knowledge of the consequences that are collateral to the guilty plea is not a prerequisite to the entry of a knowing and intelligent plea").

In South Carolina, a substantial number of cases have developed a body of case law that establish which consequences must be explained to a defendant by counsel prior to a plea. Generally speaking, a defense attorney must only inform a defendant of the direct consequences of his plea, and counsel has no obligation to inform his client of the collateral consequences of his plea. See Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983), Frasier v. State, 351 S.C. 395, 570 S.E.2d 172 (2002) (finding that a defendant need not be informed of the collateral consequences of his sentence such as parole eligibility; however if an attorney undertakes to advise a defendant of the collateral consequences of his sentences, then the advice must be accurate).

Direct consequences have a "definite, immediate, and largely automatic effect on the range of the defendant's punishment." Cuthrell v. Director, Paxtuent Institution, 475 F.2d 1364, 1366 (4th Cir. 1973). If a criminal defendant does not properly understand the direct consequences of his plea, then the plea is invalid. State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980). A defense counsel's failure to advise a client of the direct consequences of a guilty plea constitutes ineffective assistance counsel. Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999). Additionally, constitutionally defective performance is found when defense counsel offers erroneous advice concerning an issue that is central to the defendant's decision to plead guilty. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991).

In Glover v. United States, 531 U.S. 198, 203 (2003), the Supreme Court of the United States held "any amount of [additional] jail time has Sixth Amendment significance." In Davie v. State, 381 S.C. 601, 613, 675 S.E.2d 416, 422-23 (2009), the South Carolina Supreme Court reasoned that it is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant's self-serving statement may be sufficient to establish actual prejudice. See Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000) (rejecting objective evidence requirement established in Judge and finding Petitioner proved he was prejudiced by counsel's deficient performance in failing to properly advise the Petitioner that he was pleading to a felony rather than a misdemeanor where Petitioner's uncontradicted testimony established that he would not have pled had he known the charge was a felony), overruling Judge v. State, 321 S.C. 554, 562, 471 S.E.2d 146, 150 (1996) ("The second prong of the ineffective assistance inquiry--prejudice--is shown by demonstrating through objective evidence . . . [the existence of] a reasonable probability that, but for counsel's advice, [the defendant] would have accepted the plea. Mere statements by the PCR petitioner that he would have accepted the plea agreement but for counsel's incompetence are insufficient to show prejudice because they are self-serving and inherently unreliable.") (citation omitted); See also Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) ("The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty."), Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000) (holding that there was enough evidence to demonstrate that there was a reasonable probability that defendant would not have pled guilty even though defendant

did not specifically testify that he would have insisted upon going to trial if he had known the solicitor was going to make a recommendation).

Similarly, in Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991), counsel was found to be ineffective for erroneously advising the defendant regarding the sentence he could receive, thus inducing a guilty plea. On appeal, the State agreed that the advice given was erroneous but argued that the lack of prejudice required reversal. Ray, 303 S.C. at 376, 401 S.E.2d at 153. In addressing the difference between the sentence Ray was advised he could receive (life) versus the actual sentence he could receive (possible 75 years without parole) and the issue of prejudice, this Court reasoned:

> We hold this distinction is sufficient to satisfy prong two of the Hill v. Lockhart test. Ray's steadfast maintenance of his innocence; his uncontroverted testimony that he would not have pled guilty absent the erroneous advice of counsel; and the real distinction between the penalty Ray faces and the advice given him, convince us to *REVERSE* the lower court and *REMAND* for a new trial.

Ray v. State, 303 S.C. 374, 376, 401 S.E.2d 151, 153 (1991).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "Specifically, 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." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000).

A. Summary of the Plea Record

At the outset of plea proceeding in front of the Honorable Edgar W. Dickson, Mr. Gasser informed the court that he had met with Petitioner eighteen times, reviewed the

discovery and applicable case law, and even consulted with other lawyers about possible defenses. App. pp. 3-5. When Judge Dickson asked Petitioner about his mental health, he responded that he was on medication for depression and he understood what was going on. App. pp. 6-7. He further stated he was satisfied with his attorney and understood what his attorney had told him. App. p. 9. The State informed the court that Petitioner did not have a prior record, and the court began reading the indictment. App. pp. 13, 15. After the court asked if Petitioner understood the allegations contained in the indictment, it is reported that Petitioner collapsed. App. p. 15. Mr. Gasser explained that Petitioner locked his knees, and the proceeding resumed. App. p. 16.

When asked how he wanted to plead, it is again reported that Petitioner collapsed. App. p. 17. In response to the court's concern, Petitioner said it was "probably dehydration." App. p. 17, lns. 9-15. Thereafter, the matter of competency was addressed, and counsel explained that he had discussed the matter with Petitioner's ex-wife. App. p. 18. He conferred with Petitioner and informed the court that he was satisfied that Petitioner "knows what he is doing today." App. p. 19, lns. 5-8. App. pp. 20-21.

Petitioner entered his plea, and it was accepted by the court. App. pp. 20-21. The State requested "significantly higher than the minimum." App. p. 24, lns. 13-14. In mitigation, counsel explained that he advised Petitioner it was in his best interest to "plead guilty and ask for whatever mercy this court would be willing to give." App. p. 27, lns. 14-18. He also informed the court about Petitioner's diagnosis of severe depression and the medications he had been prescribed. App. p. 28, ln. 20 – p. 29, ln. 8. He characterized Petitioner as the "perfect soldier." App. p. 30, ln. 5. After hearing from Jan

Washington Caldwell, Petitioner and a letter from Petitioner's daughter, counsel asked the court to consider the lower end of the sentence. App. pp. 34 – 45.

The court stood down for ten minutes, and then, Petitioner was sentenced to forty years. App. pp. 45, 47. The court stated: "I'm hoping that what happened will emphasize the need to address domestic violence and mental-health issues in this state, including, depression. App. p. 46, ln. 14 – p. 47, ln. 1.

B. Summary of the Evidentiary Hearing Record

1. Tora Brawley, Ph.D.

At the outset of the evidentiary hearing, Petitioner called Tora Brawley, Ph.D., to the stand. App. p. 79. Dr. Brawley was admitted as expert in area of clinical neuropsychology. App. p. 80. Dr. Brawley acknowledged that she conducted an evaluation of Petitioner on May 4, 2017 at the request of Dr. Schwartz Maddox and counsel. App. p. 80. She explained the extended clinical interview and battery of tests she conducted on Petitioner. App. pp. 81-84.

Regarding results, she reported, in detail, significant impairments that were present. App. p. 84. In summary, she found the results were consistent with the presence of brain deficiency and dementia. App. p. 85. She recommended that Petitioner undergo an MRI.

After conducting her evaluation, she recalled receiving Petitioner's military records, which contained neuropsychological testing from 2011, a copy of which was admitted. App. p. 85, 197. She explained: "So it was great for me to be able to see where he was in 2011 compared to where he was when I saw him." App. p. 85, lns. 22-24. She explained that the testing was conducted by a traumatic brain injury clinic to see if

Petitioner met military retention standards, which is a different "beast" than early dementia deficits. App. pp. 87-88. Despite the report finding no deficits, Dr. Brawley explained the testing did show seven areas of deficits in 2011.[2] App. p. 87-88. When asked to compare her findings with the deficits reported in 2011, she explained: "Back then, he had the seven areas of deficits. Now, he has many more and many things have gotten much worse over the time. So, I do feel that there's something degenerative going on and I feel he is declining with his cognitive steps." App. p. 90, lns. 6-10.

She agreed that, she would have been willing to assist the defense and testify as needed if contacted by defense counsel. App. p. 88. She further agreed she would have reviewed the 2011 testing and made the same findings. App. pp. 88-90. She also would have conducted the testing and made the recommendations to counsel she had already explained. App. pp. 88, 90, 93. On cross-examination, she agreed that Petitioner's symptoms would have raised a red flag for dementia in 2011. App. p. 93, lns. 22-25.

Turning to the mental evaluation conducted by the State after the filing of the PCR Application, she explained that she previously worked for the Department of Mental Health in the forensic services unit. App. p. 89. At that time, someone with Petitioner's charges would have undergone formal testing and could have had an MRI or EEG and seen a neurologist. App. p. 89. She noted that no formal testing was done with Petitioner, and the Department of Mental Health only conducted an interview and a "mini mental status" as part of that interview. App. p. 89.

2. Dr. Schwartz Maddox

[2] On cross-examination, she further explained that she had to rescore portions of the 2011 report, and she found inaccurate estimates. App. pp. 91-2.

Following Dr. Brawley, Petitioner called Dr. Donna Schwartz Maddox to the stand. App. p. 95. Dr. Maddox was admitted as an expert in the area of forensic psychiatry. App. p. 96. She explained that she was contacted by counsel and conducted an evaluation of Petitioner at Broad River Correctional Institution. App. p. 96-7. Prior to her evaluation, she recalled reviewing Petitioner's recent evaluation by Dr. Frierson, medical records from his car accident post-offense, records from Moncrief Army Hospital that predated his offense, plea transcript, incident and crime scene reports, investigative notes, statements, autopsy report, Dr. Brawley's report and results of the MRI she ordered. App. p. 97.

Regarding her evaluation of Petitioner, she found him to be "very cooperative" and "remained remorseful," but it was clear he still had "significant depression." App. p. 99. She noted that he was on an anti-depressant, but he was suffering from "lay mild affect," which caused him to cry easily. App. p. 99. In attempting to get a history from him, she recalled he would forget significant details, and she noted: "So it is clear that his anxiety would prevent him from remembering things." App. p. 99, lns. 11-23.

Upon starting her cognitive exam, Petitioner's cognitive impairments became "very apparent." App. p. 99, lns. 24-25. She explained several tests she conducted and the difficulties encountered by Petitioner. App. pp. 100-101. Of significance, she diagnosed Petitioner with confabulation, explaining his brain made up words during testing, which she deemed a "very prominent clinical symptom in dementia." App. p. 100, lns. She also conducted a neurological screening and made a focal finding of nystagmus, which she explained was consistent with his history of closed brain injury. App. p. 101, lns. 6-17. As a result, she recommended further testing. App. p. 101.

Before addressing the further testing, she spoke to the reports from the military and the Department of Mental Health. She explained: "The military, in my opinion and similar to Dr. Frierson, they picked up on the cognitive deficits, but thought it was secondary to depression. And that does happen." App. p. 102, lns. 11-14. She disagreed with Dr. Frierson's report that "the memory difficulties were found not to have a cognitive disorder." App. p. 103, lns. 2-5. She recalled finding the 2011 testing in Petitioner's records, and determining that she did not agree with the percentages reported and deemed the findings abnormal. App. p. 103. So, she asked Dr. Brawley to further review and address. App. p. 103.

After receiving and discussing Dr. Brawley's report, she was able to formulate an opinion and reach a diagnosis: "dementia and it predated this offense." App. p. 104, lns. 2-5. In explanation, she addressed the importance of having the records that predated the offense, which provided data points to allow the doctors "to go back in time and see that those deficits were present then." App. p. 104, lns. 8-21. She addressed here initial findings that Petitioner had diminished capacity and "significant mitigation that could have been presented," which further evolved upon determining that Petitioner's impairments "were significantly in his frontal lobe." App. p. 104, ln. 24 – p. 105, ln. 10. She then provided her ultimate opinion:

> So based on those findings, based on my evaluations of him and his current neurocognitive status, and then based on what he told me, it was my opinion that I would have been able to testify that he could not conform his conduct to the requirements of the law.[3]

[3] On cross-examination, Dr. Maddox was asked about "the difference between knowing what he is doing and not being able to conform his behavior to comply with that." App. p. 116, lns. 17-18. After providing a lengthy explanation, she summarized: "But in my opinion, what capacity to conform means is at the time, at that moment when he was very upset, his judgment was so impaired that couldn't stop himself." App. p. 117, lns. 18-21.

App. p. 105, lns. 11-15. She further explained how individuals with dementia, such as Petitioner, have a symptom called perseveration, which means he would get something in his mind and not be able to change their thinking.[4] App. p. 106, lns. 1-13. Finally, she explained how dementia would have affected Petitioner's impulse control. App. pp. 106-7.

Thereafter, Dr. Maddox acknowledged that she was familiar with Attorney Johnny Gasser and had previously worked with him on cases. App. p. 108. She did not recall him reaching out to her prior to Petitioner's plea, but she stated that she would have "absolutely" been willing to assist in whatever capacity was needed.[5] App. p. 108-11. She agreed that she would have taken the steps she had taken prior to the PCR, including utilizing Dr. Brawley. App. p. 109. She also explained her confidence that she would have reached the same findings prior to Petitioner's plea due to the records pre-dating Petitioner's plea. App. p. 109, lns. 9-24.

Regarding the plea transcript, she agreed that counsel merely mentioned Petitioner's depression and failed to address any cognitive impairments. App. p. 118, lns. 16-24. She acknowledged that Petitioner had two collapsing episodes during the plea and she would have been able to evaluate his competency at the plea, if present. App. p. 119.

3. Jan Washington Caldwell

When Jan Washington Caldwell was called to the stand, she acknowledged that Petitioner was her brother, and she spoke at his plea hearing. App. p. 121. She explained

[4] On cross-examination, Dr. Maddox further explained how dementia affected Petitioner at the time of his offense. App. pp. 112-116. She further opined the dementia also made him aggressive. App. p. 115, lns. 40-5.

[5] On redirect examination, she agreed that she would have informed Attorney Gasser that it was her opinion that Petitioner would qualify as guilty, but mentally ill. App. p. 120, ln. 10-11.

Petitioner is her older brother, so she has known him her entire life and is familiar with his military career. PCR pp. 121-22. She agreed with Mr. Gasser's characterization of her brother as a "good soldier" at the plea proceeding. PCR p. 122.

After Johnny Gasser, Esquire, was retained, she recalled the information she received from family meetings and interaction with Mr. Gasser, and she recalled meeting with him personally two times. PCR pp. 122-23. During the first meeting, she reviewed the 911 audio and recounted the following:

> And when I got through listening to the 911 tape, I said, that is not my brother. That is not my brother. And then I said – I saw his picture. That's not him. Looking in his eyes, that's not my brother. Something took – something took over his mind. And Mr. Gasser said, of course, it did. That's not him. I met him. I know his character. He had an out of body experience. It's nothing new, we see it all the time.

App. p. 123, lns. 10-18. She also recalled Mr. Gasser informing her that her brother wanted to pursue a plea, and Mr. Gasser planned to meet with the Judge and ask him to have mercy on her brother. App. p. 124.

During the second meeting, she recalled Mr. Gasser preparing her to speak at the plea proceeding. App. pp. 124-25. She further recalled him stating again that he would meet with the Judge and ask him to have mercy on her brother. PCR pp. 124-5.

When asked if Mr. Gasser ever discussed her brother's mental health or mental capacity, she responded: "No." PCR p. 125, lns. 4-8, p. 134. Then, she explained an incident she would have told Mr. Gasser about if the matter of mental health was brought up. PCR p. 125, ln. 9- p. 127, ln. 21. She agreed that her brother was a private person, and she only discovered that he was on mental health medication when she was packing up his house after his arrest. PCR pp. 127-29.

Regarding the plea proceeding, it was her understanding that Mr. Gasser "was able to get the death penalty off the table" and her brother was facing thirty years. PCR p. 129, lns. 2-12. She remembered being shocked that media was present and having concerns that her elderly mother would see it on television. PCR p. 130.

Regarding her brother's appearance and the two reported collapsing episodes, she explained:

> I felt like my brother was not in any condition to go further. I felt like he was slurring his words. I mean, I've never been in any type of court proceeding like this. I felt like standing up saying we need to stop with this, but they went on with it. I just don't feel like he was in his right mind to keep going on.

PCR p. 132, lns. 2-7. She also explained that she was not able to share her concerns with Mr. Gasser. PCR p. 133, lns. 4-10. After the plea hearing, she tried to reach Mr. Gasser, but she was unsuccessful. PCR p. 133.

4. Johnny Gasser, Esquire

Following Ms. Caldwell, Johnny Gasser, Esquire, took the stand. He detailed his thirty-one year legal career, including fifteen years in the Richland County Solicitor's Office. PCR p. 137. He recalled being retained by Petitioner's family, communicating with his family, including Ms. Caldwell, and utilizing Ms. Caldwell at the plea hearing. PCR p. 138.

When asked about the track of the case, Mr. Gasser agreed the case was always on a plea track. PCR p. 139. Based upon his discussions with Petitioner and review of the discovery, he put his attention on getting a "plea to something." PCR p. 139, lns. 4-22.

He acknowledged that he obtained Petitioner's medical records from the military. PCR p. 140. He recalled reviewing the records himself and not utilizing anyone else to

review the records. When asked about whether he considered consulting with a mental health expert, he responded:

> I thought about that, but the records were actually very – I mean, the records indicated what treatment he was receiving, what diagnosis the medical personnel had reached, a change in dosage, I remember – or a change in medication when it appeared to be not helping Mr. Washington. And then it appeared that things were going well for a period of time prior to the incident.
>
> So I felt that -- I'm familiar with the symptoms of depression, which was primarily one of the things Mr. Washington was being treated by. But I felt at that time nothing jumped out at me to the point where I felt it was necessary to obtain the services of an expert medical, you know, psychologist or psychiatrist.

App. p. 141, lns. 9-22. Based upon his interaction with Petitioner and information from his ex-wife, he determined that competency was not an issue and that "the treatment he was receiving at the time was appropriate." App. p. 142, ln. 9 – p. 143, ln. 7.

Mr. Gasser acknowledged his familiarity with Dr. Maddox and prior experience with her, as an expert. App. p. 143. From his review of the records, he determined that Petitioner suffered from depression, but he did recall a cognitive impairment being addressed in the records but nothing regarding "diminishing." App. p. 143, ln. 17 – p. 144, ln. 3. He acknowledged that he received and reviewed the reports addressed by Dr. Brawley and Dr. Maddox. App. pp. 144-45. In response to whether he ever contemplated Petitioner's diagnosis being something greater or different than depression, he stated: "I didn't." App. p. 145, lns. 12-16.

After being asked how Dr. Brawley's and Dr. Maddox's diagnosis and opinions would have factored into plea negotiations and mitigation, Mr. Gasser provided a lengthy response. App. p. 146-149. He explained how and why he focused on Petitioner's military service in negotiations and mitigation. He also explained that he addressed

Petitioner's depression in negotiations, but the Solicitor's office had a position of not setting a standard for reducing charges for suffering from depression. App. p. 148, ln. 18 – p. 149, ln. 13. He did not recall ever discussing a GBMI plea. App. p. 150, lns. 1-4.

Regarding his advice to Petitioner about the plea, he detailed the advice he provided, which included that the minimum sentence was a mandatory thirty years. App. pp. 150-1. He identified a letter he provided of the same, which was signed by Petitioner. App. p. 151. When asked about the sentence he anticipated, he responded he was hoping for a "32-to-33 year range or somewhere between 32 and 35 years." App. p. 152, lns. 17-18. As to the State's request, he recalled knowing the State would ask for "significant sentence and oppose the minimum sentence." App .p. 153, lns. 17-19. He indicated he was sure he conveyed the State's position to Petitioner. App. p. 153, lns. 20-21.

Turning to the plea hearing, Mr. Gasser definitely remembered one of Petitioner's two collapses. App. pp. 154-5. He explained that he was familiar with fainting from locking your knees and that is what he observed in Petitioner. App. p. 155. Regarding the colloquy regarding competency following the second episode, he indicated it was "normal." App. p. 155, ln. 15 – p. 156, ln. 6. He also explained the break was needed because it was an extremely difficult time for Petitioner. App. pp. 156-7.

C. Discussion

Petitioner submits that the lower court erred in failing to find counsel rendered ineffective assistance of counsel that prejudiced Petitioner when he failed to utilize mental health expert(s) prior to and during Petitioner's guilty plea. As raised in Petitioner's Rule 59, SCRCP, Motion, the lower court's Order of Dismissal provides a short discussion prior to concluding: "This Court finds Counsel did not err in declining to

call upon the assistance of a mental health expert in plea negotiations, the formulation of defenses, the formulation of mitigation evidence, or in determining Applicant's competency." App. p. 240. Petitioner submits that trial counsel rendered ineffective assistance and the lower court erred in finding otherwise.

As the Order acknowledges and the record reflects, counsel readily admitted that he relied upon his own knowledge in reviewing Petitioner's mental health records and chose not to utilize a mental health expert. At the evidentiary hearing, Petitioner called Dr. Maddox and Dr. Brawley and established that the records counsel reviewed allowed their findings of cognitive impairment in the form of dementia to be backdated to 2011 and prior to Petitioner's plea. Counsel utilized his own expertise in reviewing Petitioner's mental health records and reaching a conclusion that Petitioner suffered from depression, which he shared with the plea court and the solicitor, but his conclusion was incomplete and resulted in performance that was deficient. See Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015) (finding counsel deficient for failing to call an expert witness at trial to challenge the medical evidence presented by the State), Ramirez v. State, 419 S.C. 14, 795 S.E.2d 841 (2017) (finding counsel deficient for failing to obtain an independent competency evaluation prior to the entry of a guilty plea).

At the evidentiary hearing, the mental health experts explained that Petitioner's diagnosis was dementia not depression and his cognitive impairment directly impacted his ability to understand, comprehend and conform his conduct to the requirements of the law. Dr. Maddox explained that Petitioner's diagnosis affected his impulse control, made him aggressive and he suffered from perseveration. Specifically, she stated that he could not conform his conduct to the requirements of the law.

It is evident from the record that counsel did not consider Petitioner's proper diagnosis in formulating possible defense before advising Petitioner to enter a guilty plea nor in determining if Petitioner had the mental capacity to even enter a voluntary guilty plea. During the plea proceeding, the court questioned Petitioner's capacity, but counsel stayed the course addressing depression and dehydration. Petitioner submits that the record before this Court calls into question the knowing and voluntary nature of Petitioner's guilty plea, which requires that it be set aside as counsel did not ensure that it was understandingly and knowingly made.

Additionally, counsel's failure to utilize mental health experts affected plea negotiations and mitigation. As addressed above, counsel admitted that he did not consider Petitioner's diagnosis being something greater or different than depression, and he opined that the Solicitor did not want to set a standard for lesser charges and sentences due to depression medication. Clearly, counsel's reliance on his own deficient mental health expertise and failure to utilize a properly qualified expert resulted in the Solicitor and the sentencing court not considering Petitioner's proper mental health diagnosis. Petitioner submits counsel's failure to utilize mental health expert(s) in negotiations and mitigation was deficient and fell below professional norms. See Rosemond v. Catoe, 680 S.E.2d 5, 383 S.C. 320 (S.C. 2009) (relief granted for counsel's failure to present mental health mitigation evidence in the sentencing phase of a capital trial).[6]

Regarding prejudice, the lower court analysis cites to a threefold basis to support the finding that "Applicant has not shown any prejudice from Counsel's decisions." App.

[6] As stated at the evidentiary hearing, Petitioner understands Rosemond involves capital sentencing, but Petitioner submits it is analogous to counsel's failure to offer mental health expert(s) in mitigation at the sentencing phase of his guilty plea proceeding.

p. 239. The first basis notes counsel's view of the evidence as "overwhelming" and overwhelming evidence of guilt was argued by Respondent at the evidentiary hearing. App. pp. 186, 239. As argued in the Rule 59, SCRCP, Motion, Petitioner submits that the lower court's reliance on overwhelming evidence in his analysis is error under Frierson v. State, 815 S.E.2d 433, 436 (2018). App. p. 244. In Frierson, this Court addressed the prejudice analysis in a case stemming from a guilty plea and noted: "The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991)." Id. In affirming as modified, this Court held:

> Because the prejudice inquiry in a case involving a guilty plea is so limited, it was error for the court of appeals to conduct an overwhelming evidence analysis in this case. See Smalls, 422 S.C. at ___, 810 S.E.2d at 843-47 (surveying cases that discuss overwhelming evidence - all of which involved a conviction obtained at trial).

Id. Here, counsel's ineffective performance directly impacted the outcome of the plea process.

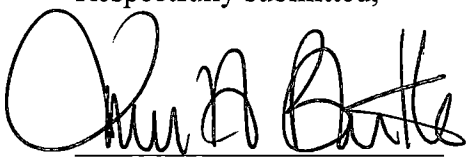
Additionally, Petitioner submits he has shown prejudice in that counsel's deficient performance resulted in a straight up plea to murder and a forty year sentence. See Glover v. United States, 531 U.S. 198 (2003), Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009). Petitioner's charge was not negotiated down nor did he receive the minimum sentence. Clearly, Petitioner was prejudiced by counsel's deficient performance. As is addressed above and recognized by the lower court, counsel utilized his own expertise in the reviewing Petitioner's mental health records and chose to not utilize an expert to render an opinion that

could have been utilized in plea negotiations and mitigation. Furthermore, counsel failed to utilize a mental health expert to ensure that Petitioner's plea was knowingly and voluntarily entered. As a result, Petitioner submits the lower court erred in his prejudice analysis and must be reversed.

CONCLUSION

Based upon the above argument and record before this Court, Petitioner would respectfully ask that this Court grant certiorari, allow briefing of the issues addressed herein, and/or reverse the denial of post conviction relief.

Respectfully submitted,



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January 28, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2018-001137

John Edward Washington,.....Petitioner,

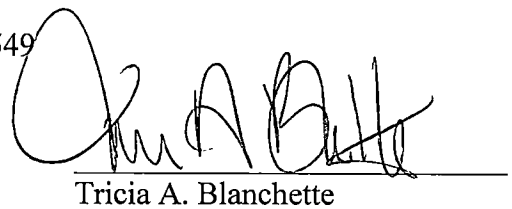
vs.

State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that I placed in the United States mail this 28th day of January 2019 the Petition for Writ of Certiorari and Appendix to Lindsey McCallister of the Attorney General's Office, at:

Office of the Attorney General
Att: Lindsey McCallister, Ast. AG
P.O. Box 11549
Columbia, SC 29211-1549



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January 28, 2019

LAW OFFICE OF
TRICIA A. BLANCHETTE

January 28, 2019

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: John Edward Washington v. State; App. Case No. 2018-001735

Dear Sir:

For filing in the above referenced PCR appeal, please find an original and six copies of the Petition for Writ of Certiorari, the Certificate of Service, and one unbound and one bound copy of the Appendix.

I appreciate your assistance in this matter. Please contact me if anything further is needed.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Lindsey McCallister, Asst. Attorney General
John Edward Washington

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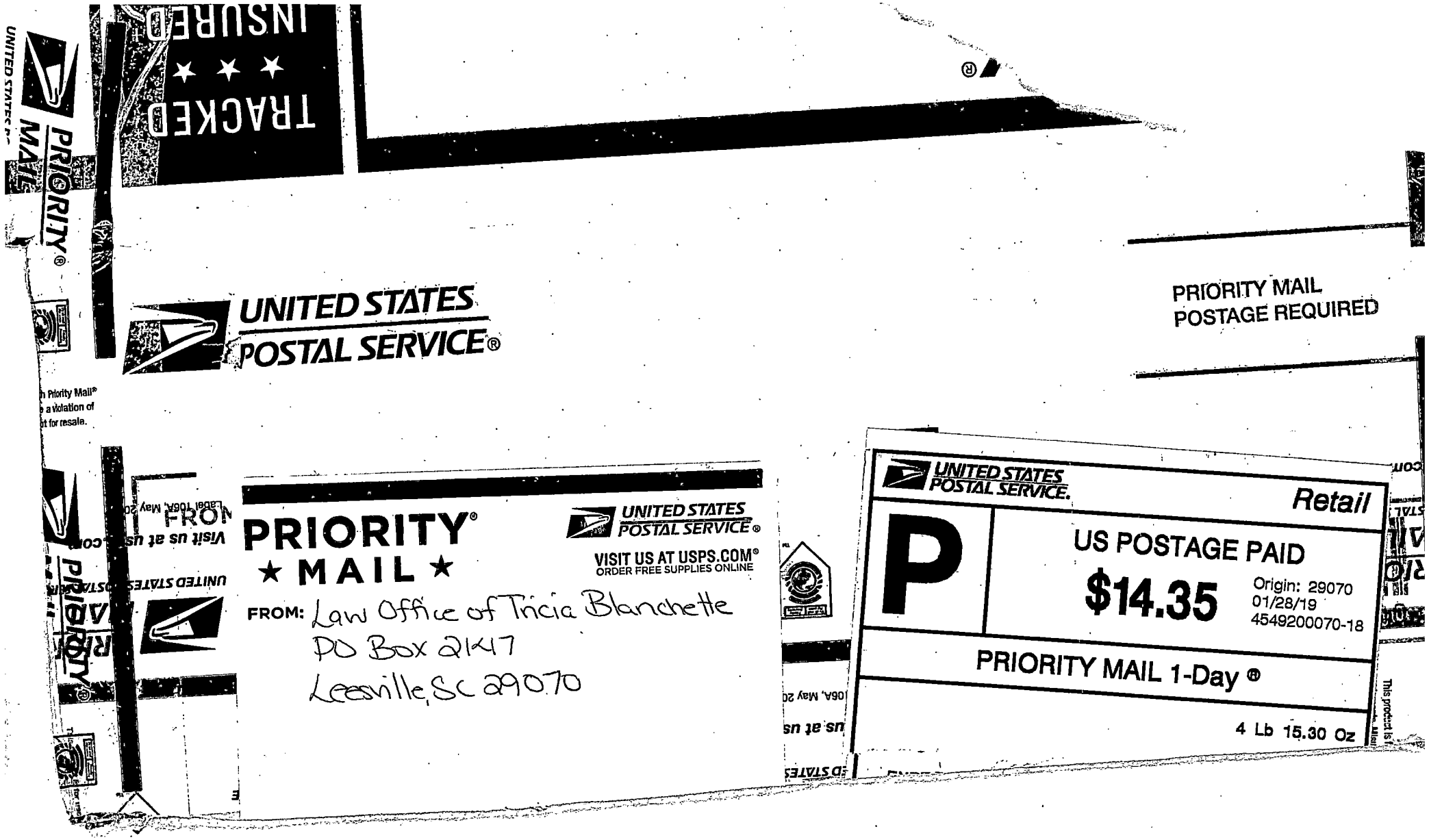
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