STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO LANCASTER COUNTY
Court of Common Pleas
The Honorable R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2018-000492

JOSEPH D. HILTON, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

The post-conviction relief judge properly dismissed Petitioner's application for relief after finding Plea Counsel was not deficient, nor was Petitioner prejudiced, by Plea Counsel's failures to have a psychiatric evaluation for Petitioner or to investigate and present additional mitigation evidence at the plea hearing.

STATEMENT OF THE CASE

Petitioner is presently confined by the South Carolina Department of Corrections pursuant to orders of commitment by the Lancaster County Clerk of Court. Petitioner waived presentment to the May 2013 term of the Lancaster County Grand Jury for Murder (2013-GS-29-0665). Mike Lifsey, Esquire, represented Petitioner. Assistant Solicitor Doug Barfield represented the State. On April 18, 2013, Petitioner pled guilty to the lesser-included offense of voluntary manslaughter. Pursuant to negotiations, the Honorable J. Ernest Kinard, Jr., sentenced Petitioner to twenty-five years' incarceration. Petitioner did not appeal his plea or sentence.

On March 3, 2014, Petitioner filed an application for post-conviction relief (PCR) alleging he was being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel;

    a. No mental evaluation pursuant to Blair v. State.
    b. Did not seek a sentence reduction.
    c. Did not thoroughly investigate the case.

2. "Solicitor Barfield prejudiced himself in this case when he added 5 yrs. to the sentence just for himself, according to a conversation with my son."

(App.pp.36–40). The State filed its Return on June 18, 2014. (App.pp.41–45).

An evidentiary hearing into the matter was convened on July 18, 2017, at the Lancaster County Courthouse in Lancaster, South Carolina, before the Honorable R. Knox McMahon. At the hearing, Plea Counsel testified he assumed representation of Petitioner shortly after his initial arrest. He met with Petitioner numerous times over the approximate two month period between his arrest and plea hearing. During this period, Plea Counsel questioned Petitioner about his medical history, including his illnesses and long-term medical conditions. Plea Counsel understood Petitioner had some health problems, but Petitioner did not inform him of any issues which appeared to affect his mental health or any issue which would have rendered Petitioner

incompetent at the time of the crime or to stand trial. At some point, Plea Counsel did become aware of Petitioner's use of antidepressants and pain medications. Notably, Plea Counsel had previously represented numerous people with mental illnesses and did not see anything that "raised any read flags" in his mind. (App.pp.50–53).

Plea Counsel noted that from the very beginning, Petitioner intended to plead guilty to the crime and was focused on obtaining a favorable plea offer from the State; the overwhelming evidence of Appellant's guilt, including the 9-1-1 call in which he confessed, made the case against Petitioner ironclad. Initially, the State offered Petitioner a plea deal for a thirty-year sentence for his murder charge. Petitioner was unhappy with the length of the sentence and pushed Plea Counsel to obtain a twenty-year sentence in exchange for a voluntary manslaughter plea. After some negotiation, during which Plea Counsel argued Petitioner's age and poor physical health, the State agreed to allow Petitioner to plead to voluntary manslaughter in exchange for a twenty-five year sentence. Content with the offer, Petitioner ordered Plea Counsel to waive presentment to the grand jury so that the case could be quickly resolved and he could avoid putting his and Victim's families through additional trauma. (App.pp.53–64).

Dr. Donna Maddox, an expert in forensic psychiatry testified for Petitioner. Before the PCR hearing, she performed a psychiatric evaluation on him, including a cognitive function test and a neurological screening. She focused on Petitioner's history of depression, and noted she had "some concerns" that at the time of the offense he had some cognitive impairment. However, she did not that Petitioner suffered from several strokes in between the time he was first incarcerated and her evaluation. Petitioner had a history of lung disease due to asbestos exposure throughout his life, and was receiving disability payments from Duke Power due to the

illness. He informed her he received oxygen treatment in the past, but was not receiving it when Dr. Maddox evaluated him. (App.pp.65–72).

Other events throughout his life impacted his physical well-being. In 2005, Petitioner had his first heart attack. He also had chronic back disease and five herniated disks from a car accident which was the reason he was on pain medications at the time of the offense. In 2009, Petitioner's son died, which was an event which led to his prescription for antidepressants. Petitioner told Dr. Maddox that prior to his arrest, he had stopped taking the antidepressants. (App.pp.72–74).

Dr. Maddox also noted that Plea Counsel's testimony indicated Petitioner was exhibiting signs of depression before his plea; he was willing to take a plea to spare his family further trauma. Further, at the time of his evaluation, Dr. Beverly Wood at the Department of Corrections had been treating Petitioner for his depression with Duloxetine, the same antidepressant he was prescribed before his arrest, and Remeron. She further claimed that Petitioner's history of substance abuse, which included heavy drinking, factored into her diagnosis that Petitioner had a "little bit" of cognitive impairment as well as longstanding depression. Dr. Maddox admitted she had not seen Petitioner's medical history while incarcerated and based information pertaining to that solely on his statements to her. (App.pp.74–78).

Dr. Maddox ultimately concluded that there was "no evidence in [her] mind" Petitioner was incompetent at the time of the crime or his plea. Further, he knew the difference between right and wrong at the time of his crime; as shown by the 911 call, he understood and was aware of what he had done and was able to describe the events leading up to the shooting. However, he had several different factors which could have contributed to his depression, and people with

major depressive disorders can be aggressive. Further, the cognitive impairments observed could lead him to be impulsive. Because of his depression, he lacked the capacity to confirm hi conduct to the requirements of South Carolina law. (App.pp.78–82).

Dr. Maddox was unable to give a definitive answer as to how a guilty but mentally ill diagnosis would have impacted Petitioner's case. She noted that any difference in Petitioner's treatment by the law would have been up to the judge, and a judge may have considered that in his sentence. Further, if defendants are found guilty but mentally ill, they are admitted directly into a psychiatric hospital before being sent into a regular correctional facility. However, in Petitioner's case, a guilty but mentally ill finding would not have had much of an impact on Petitioner because he was already receiving "the mental health care that [the] statute [required]." (App.pp.82–83).

On cross-examination, Dr. Maddox testified Petitioner possessed an "above-average" intellect and did not speak with any of Petitioner's physicians regarding his medical history. Further, she stated Petitioner's medical history while incarcerated did play a part in her diagnosis of him. (App.pp.84–85).

Petitioner testified that Plea Counsel's recollection of events was accurate, including his summaries about how often they met, the things discussed at their meetings, his desire to quickly plea and resolve the case so that he could minimize the trauma to his family, and that he knew what he was doing when he committed the crime. Petitioner claimed he was first diagnosed with depression in 2006 and that he told Plea Counsel about his history of depression during their discussions. He noted the plea deal for voluntary manslaughter and a twenty-five year sentence "was about as good as [h]he was going to get" from the State. (App.pp.86–94).

At the conclusion of the hearing, PCR Counsel conceded "there [was] nothing [he] could present that would suggest the outcome [of the plea] would be different" because sentencing is solely within the direction of the judge. He also admitted the plea judge was only able to "take or leave" the negotiated plea. He claimed it Plea Counsel was deficient for not using Petitioner's depression in an attempt to leverage a better plea deal for him. In response, the State argued a plea of guilty mentally ill is not treated different than any normal guilty plea, other than the possibility he would have been housed in a different unit within the South Carolina Department of Corrections. (App.pp.95–101).

On February 21, 2018, the PCR Judge issued an order denying relief. In the order, the PCR Judge found Plea Counsel was not ineffective for failing to have Petitioner evaluated pursuant to State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981), in which this Court found the trial judge should have held a competency to stand trial hearing due to the defendant's history of mental disorders, past admissions to the State psychiatric hospital, and past adjudication of incompetence to stand trial in the same case. He distinguished the instant case from Blair, noting: (1) Plea Counsel never felt Petitioner needed a psychiatric evaluation and the former never showed overt indications of being delusional or suffering any psychosis; (2) Petitioner informed Plea Counsel of physical health problems but never informed him of any mental health issues; (3) Petitioner understood what occurring with his case and was able to engage in topical discussions with Plea Counsel; (4) Dr. Maddox testified Petitioner was competent to stand trial and knew what he was doing at the time of the crime. Accordingly, the PCR Judge found there was no overt indication that Petitioner needed a mental evaluation and Plea Counsel could not be ineffective for failing to request such. (App.pp.118–19).

The PCR Judge also found Plea Counsel was not ineffective for failing to investigate Petitioner's case and present additional mitigation evidence at the plea hearing. Plea Counsel testified he used Petitioner's age and physical condition at mitigating circumstances when negotiating the plea. Further, Plea Counsel and Petitioner testified the latter sought to plead quickly so as to avoid prolonging the case and burdening his family with additional emotional trauma. Plea Counsel noted there was overwhelming evidence of Petitioner's guilt, including his confession to the crime during the 9-1-1 call. Dr. Maddox noted was competent to stand trial at the time of his plea, but opined Petitioner could have pled guilty but mentally ill. Both Petitioner and Dr. Maddox testified the former knew what he was doing when he committed the crime. (App.pp.119–20).

The PCR Judge further noted a verdict of guilty but mentally ill does not change the length of a person's incarcerations: the difference between the two verdicts is that a person found guilty but mentally ill is sent to a facility designated by the Department of Corrections for treatment and remained there until he could be safely moved to a general population facility where he or she will serve the remainder of his or her sentence. Petitioner failed to present evidence that additional mitigating information would have affected the length of the sentence negotiated with the State. The PCR Judge highlighted Dr. Maddox's testimony that Petitioner's sentence was, in effect, the same as he would receive if he had pled guilty but mentally ill because Petitioner was being treated by "the best psychiatrist at the Department of Corrections." (App.pp.120–21).

Finally, the PCR Judge dismissed Petitioner's allegation that five years were added to his sentence "just for" the solicitor, because Petitioner failed to present any evidence of this allegation or any prosecutorial misconduct at the PCR Hearing. (App.p.121).

On March 19, 2018, Petitioner filed a Notice of Appeal, appealing the PCR Judge's denial of his application for relief. He filed his Petition for Writ of Certiorari and the Appendix on September 21, 2018. This Return on behalf of the State now follows.

STANDARD OF REVIEW

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). With respect to guilty plea counsel, the applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

To be found "guilty but mentally ill," a defendant must show that at the time of the commission of the crime constituting the charged offense, he had the capacity to distinguish right from wrong 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). "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)." S.C. Code Ann. § 17-24-20(D). A verdict of guilty but mentally ill does not absolve a defendant of guilt and the defendant found guilty but mentally ill must be sentenced as provided by law for a defendant found guilty. State v. Hornsby, 326 S.C. 121, 126, 484 S.E.2d 869, 872 (1997). The difference between a defendant found guilty and one found guilty but mentally ill is the latter is entitled to immediate treatment and evaluation. Id. Section 17-24-20 is not designed to "benefit" guilty but mentally ill inmates and they should not receive better treatment than other inmates. Id. at 127, 484 S.E.2d at 872.

ARGUMENT

The post-conviction relief judge properly dismissed Petitioner's application for relief after finding Plea Counsel was not deficient, nor was Petitioner prejudiced, by Plea Counsel's failures to have a psychiatric evaluation for Petitioner or to investigate and present additional mitigation evidence at the plea hearing.

Petitioner argues the PCR Judge erred in denying his application for PCR because Plea Counsel was ineffective for failing to have Petitioner evaluated for mental illness pursuant to S.C. Code Ann. § 17-24-20. The State disagrees with this allegation of error. Petitioner did not give Plea Counsel any indications that he suffered from a mental illness when he killed Victim. Further, even if Plea Counsel were deficient, Petitioner failed to provide any evidence that he was prejudiced by the alleged mistake.

In Petitioner's case, there is substantial evidence which supports the PCR Judge's finding that Plea Counsel was not deficient. Plea Counsel testified Petitioner only informed him of his physical health problems and failed to mention anything related to potential mental health problems. Both Plea Counsel and Petitioner testified the latter wanted to plead as soon as possible to minimize the pain on his family. Dr. Maddox opined, after reviewing the entirety of Petitioner's medical history, he may have been suffering from depression at the time of the crime. However, she failed to testify that the alleged depression should have been obvious to Plea Counsel or other outside observers. Further, Dr. Maddox admitted Petitioner knew the difference between right and wrong at the commission of the crime and that he was competent to stand trial at the time of his plea. Accordingly, Plea Counsel was not deficient in failing order a psychiatric evaluation for Petitioner.

Further, even if Plea Counsel were deficient in failing to order a psychiatric evaluation, Petitioner failed to demonstrate he was prejudiced by the alleged deficiency. Here, Petitioner

pled guilty to a negotiated sentence with the State; the Plea Judge did not have the discretion to modify the sentence and Petitioner failed to provide any evidence that the State would have given him a more favorable plea deal if it had known he had issues with depression. Additionally, as noted by Dr. Maddox and the PCR Judge in his order, a defendant found "guilty but mentally ill" must be sentenced by the trial judge as provided by law for a defendant found guilty of the crime. S.C. Code Ann. § 17-24-70. The only difference is that a defendant will be sent temporarily to a treatment facility until he can be moved to the general population of the Department of Corrections to serve the remainder of his sentence. S.C. Code Ann. § 17-24-70(A). Dr. Maddox testified Petitioner is being treated by the best psychiatrist at the Department of Corrections and is receiving the same mental health care he would have received had he pled guilty by mentally ill. If resentenced, Petitioner would end up in the identical situation he is presently in; Petitioner failed to present any evidence that he needs to be temporarily transferred to a special treatment facility or that he would receive different, long-term treatment within the Department of Corrections.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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February 1, 2019.

STATE OF SOUTH CAROLINA
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The Honorable R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2018-000492

JOSEPH D. HILTON, Petitioner,

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PROOF OF SERVICE

I, William F. Schumacher, IV, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 1st day of February, 2019.

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ALAN WILSON
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February 1, 2019

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

Re: **Joseph D. Hilton v. State of South Carolina**
Appellate Case No. 2018-000492
Lower Court Case No. 2014-CP-29-0250

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

William F. Schumacher, IV
Assistant Attorney General
SC Bar No. 100231

WFS/cc
Enclosures

cc: Kathrine H. Hudgins, Esquire (2 copies)