STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Letitia H. Verdin, Circuit Court Judge

WALTER TERRAN GAINES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001988

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in denying Petitioner relief where trial counsel was ineffective by failing to request a competency evaluation in light of Petitioner's severe mental illness and hospitalizations resulting from his mental illness just months before the crime for which he was charged?

STATEMENT

On May 3, 2005, Petitioner was admitted to the Greenville Hospital System. App. 961-963; App. 1006, ll. 11-14. According to the medical record, Petitioner suffered from a number of ailments, including depression, psychosis, auditory hallucinations, and post-traumatic stress disorder manifesting as flashbacks of childhood sexual abuse. App. 961; App. 1006, ll. 15-19. Petitioner was hospitalized for approximately thirteen days, during which he was prescribed numerous medications for mental illness. App. 961-963; App. 1006, ll. 20-22. Subsequently, Petitioner was hospitalized again. App. 1006, ll. 23-25.

T.J. Gordon was friends with Walter Houston Gaines, who was the father of Angela Gaines, April Choice, and Petitioner. App. 506, ll. 17-18; App. 506, l. 25 – App. 507, l. 1; App. 508, ll. 7-14; App. 557, l. 25 – App. 558, l. 2; App. 563, ll. 13-22. Gordon developed a very special relationship with April, who worked at Magnolia Manor, a nursing home not far from Gordon's house. App. 511, ll. 8-25; App. 548, ll. 3-6; App. 557, ll. 14-17; App. 563, ll. 23-25. In fact, shortly before his death, Gordon gave April money to use for a down payment on a car – a white Buick, and he helped her get insurance on the car. App. 513, ll. 2-9; App. 560, ll. 7-9; App. 564, ll. 3-8. Prior to going to work in the mornings, April, and sometimes Angela, frequently visited Gordon at his home. App. 550, l. 22 – App. 551, l. 4. April often allowed Angela to use her car while April worked at the nursing home. App. 517, ll. 2-10; App. 547, ll. 9-18.

Shortly before Gordon's death, Angela and April stole some money from Gordon. App. 548, ll. 7-24; App. 566, ll. 2-11. Later, April claimed she was "joking" when she took Gordon's money, and she further claimed that she returned the portion that she took. App. 566, ll. 2-25.

On November 9, 2005, Gordon's wife, Barbara Gordon, left for work around 6:15 a.m. App. 115, ll. 3-7. At the time, Dashia and Keashia Atkinson lived near the Gordons. App. 171, ll. 19-24; App. 201, ll. 23-25. Dashia and Keashia arrived at their bus stop a little later than usual. App. 173, ll. 7-19; App. 202, ll. 7-12. The teens were trying out for the cheerleading team at their high school; therefore, they practiced cheers while waiting for the bus to arrive. App. 173, ll. 20-22; App. 202, ll. 13-18. They saw a man they later identified as Petitioner, walking toward them. App. 173, ll. 23-24; App. 203, ll. 11-15; App. 204, ll. 5-7. Petitioner walked to the Gordons' home and knocked on the door. App. 176, ll. 3-9; App. 204, l. 21 – App. 205, l. 3. After Petitioner knocked multiple times, a woman answered the door. App. 176, ll. 18-25; App. 205, ll. 4-5; App. 205, ll. 13-17. Dashia and Keashia were certain this woman was not Gordon's wife or daughter. App. 181, l. 25 – App. 182, l. 1. Petitioner then entered the house. App. 177, ll. 3-5; App. 207, l. 10. When their bus arrived shortly thereafter, the teens got on their bus and went to school. App. 179, ll. 2-14; App. 207, ll. 11-12. Importantly, Dashia saw a white car in Gordon's driveway prior to Petitioner's arrival. App. 195, l. 18 – App. 196, l. 5.

Later, Corey Gordon, Gordon's son, found his seventy-year-old father dead in his home around 2:30 p.m. App. 88, ll. 18-21; App. 93, ll. 19-20. According to the medical examiner, "the most likely scenario" for how Gordon died was that he "suffered fatal heart rhythm as a result of the stress of the assault." App. 136, ll. 5-10. Although he could not rule out a fall, the medical examiner opined that Gordon may have been strangled as well. App. 136, l. 21 – App. 137, l. 8.

In November 2005, Petitioner continued to suffer from mental illness. App. 1007, l. 13 – App. 1008, l. 1. And, when Petitioner was interrogated by the police on December 2, 2005, he was suffering from his severe mental illnesses. App. 1012, l. 21 – App. 1013, l. 3. Initially,

Petitioner denied any knowledge about Gordon's death to police. App. 396, ll. 10-11. However, when the police informed him that two witnesses saw him enter the house, Petitioner admitted he entered the house. App. 396, ll. 12-17. Petitioner elaborated that he received a phone call from his sister Angela that Gordon wanted him to do some work at his house. App. 398, ll. 10-14. When Petitioner arrived at Gordon's house, he saw that his sisters, Angela and April, were in the living room. App. 398, ll. 15-18. Petitioner saw Gordon's body on the floor. App. 398, ll. 18-19. When Petitioner asked what they had done, the sisters asked him to help them get rid of the body. App. 398, ll. 19-21. Petitioner refused and left. App. 398, ll. 21-23. See also, App. 403, l. 20 – App. 411, l. 18.

A Greenville County grand jury indicted Petitioner for armed robbery (2006-GS-23-1368) and murder (2006-GS-23-1369). App. 1059-1060; App. 1062-1063. While Petitioner was awaiting trial, he informed the jail staff that he was experiencing depression. App. 964. While he was incarcerated, Petitioner received medication for bipolar disorder with psychotic features. App. 964; App. 1009, ll. 22-25. Petitioner informed trial counsel, John Abdalla, that he suffered from multiple mental illnesses and that he had been hospitalized due to those mental illnesses just a few short months earlier. App. 1009, ll. 3-21; App. 1010, ll. 22-25.[1] Instead of requesting a competency evaluation, trial counsel informed Petitioner that he could not use his mental illness in court because the state would use it against him. App. 1011, ll. 6-22. Trial counsel also did not consider using Petitioner's mental illness as a means to challenge the admissibility of his statement. App. 1023, l. 17 – App. 1024, l. 3.

The state, represented by Kris Hodge and Charles Bondurant, called the case to trial on May 19-22, 2008, before the Honorable G. Edward Welmaker and a jury. App. 1. John P.

[1] At the time of the PCR hearing, trial counsel indicated that he had no recollection of Petitioner telling him about any mental problems. App. 1022, ll. 6-22; App. 1028, ll. 7-18.

Abdalla represented Petitioner. App. 1. The state used Petitioner's statement to police against him during his trial. App. 390, l. 23 – App. 411, l. 18. Later, trial counsel opined that the statement hurt Petitioner tremendously, especially because there was no physical evidence connecting Petitioner to the crime. App. 1026, ll. 3-6. The state used Petitioner's statement to accuse him of providing contradictory and confusing information. App. 1026, ll. 7-19; App. 411, l. 20 – App. 412, l. 4. In closing, the solicitor called Petitioner's statement "improbable, impossible." App. 662, ll. 13-15. According to the solicitor, Petitioner's timeline was "totally different" than the one relayed by the teens who were waiting on the bus. App. 663, ll. 9-13. The solicitor argued the jurors should not believe Petitioner because the "statement in and of itself [was] improbable, full of contradictions, contradicting itself, contradicting all the other evidence in the case." App. 667, ll. 3-6. The solicitor claimed the reason for this was "[b]ecause he in fact [was] the person that did it." App. 667, ll. 6-8.

The jury found Petitioner guilty as charged. App. 801, ll. 7-20. Judge Welmaker sentenced Petitioner to thirty years imprisonment for armed robbery and life imprisonment without the possibility of parole for murder. App. 1061; App. 1064. He ordered the sentences to be served concurrently. App. 1061; App. 1064. Trial counsel failed to timely serve the notice of appeal; thus, the Court of Appeals dismissed the notice that had been filed. App. 834, ll. 13-15; App. 1050.

Thereafter, Petitioner filed an application for post-conviction relief (PCR). App. 813-825. The matter proceeded to an evidentiary hearing before the Honorable Robin B. Stilwell on May 27, 2010. App. 831. Caroline Horlbeck represented Petitioner, and Karen Ratigan represented the state. App. 831. The state conceded Petitioner was entitled to a belated direct

appeal. App. 834, ll. 13-21. After hearing from the witnesses, Judge Stilwell granted Petitioner a belated direct appeal, but he denied Petitioner relief on all other grounds. App. 879-887.

Petitioner appealed, and Kathrine H. Hudgins represented him on appeal. App. 888-898. Hudgins filed a petition for writ of certiorari raising two issues: (1) whether the PCR judge correctly found that Petitioner was entitled to a belated appeal because he did not knowingly and voluntarily waive his right to a direct appeal and (2) whether the PCR judge erred in refusing to find counsel ineffective for not objecting to the jurors taking notes when counsel later learned that the juror's notes were incorrect. App. 888-898. She also filed a brief of appellant pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). App. 899-909. In the brief, Hudgins challenged the trial judge's refusal to grant a mistrial where the police investigator commented on Petitioner's invocation of his right to counsel. App. 899-909. On October 10, 2013, the South Carolina Court of Appeals held there was sufficient evidence to support the PCR judge's ruling on the belated appeal issue and proceeded with review of the direct appeal issue. App. 932. In an unpublished opinion, the Court of Appeals affirmed Petitioner's convictions and sentences. App. 933-934. Remittitur was sent on June 12, 2014. App. 935.

On October 14, 2015, Petitioner filed an application for PCR. App. 936-944. Subsequently, he filed an amended application for PCR. App. 945-952. The state filed a motion to dismiss. App. 953-958. On November 17, 2016, Petitioner filed a return to the state's motion. App. 959-970. The Honorable Perry H. Gravely denied the state's motion to dismiss and granted Petitioner a full evidentiary hearing. App. 979, ll. 3-8. On November 20, 2017, Petitioner requested a competency evaluation. App. 965-966. On December 13, 2017, Judge Stilwell heard arguments on the Petitioner's request for a competency evaluation. App. 971; App. 974, ll. 9-22. James H. Price, III, represented Petitioner. App. 971. DeShawn H. Mitchell represented

the state. App. 971. At the conclusion of the hearing, Judge Stilwell ordered Petitioner be evaluated for competency. App. 977, l. 23 – App. 978, l. 12; App. 980, ll. 3-7; App. 982-998.

On May 1, 2018, a forensic psychiatrist with the Department of Mental Health evaluated Petitioner. App. 1033-1039; App. 1041-1048. According to the doctor, Petitioner had the capacity to proceed with the PCR hearing and had the capacity to stand trial. App. 1033-1039. Importantly, at the time of the evaluation, Petitioner was not experiencing any auditory or visual hallucinations. App. 1033-1039.

The matter proceeded to an evidentiary hearing before the Honorable Letitia H. Verdin on June 18, 2018. App. 999. By an order filed October 23, 2018, Judge Verdin denied Petitioner relief. App. 1049-1058. Citing Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992), Judge Verdin required Petitioner to show a reasonable probability that he would have been found incompetent at the time of his trial. App. 1055. Thereafter, Judge Verdin found trial counsel "was not ineffective in failing to request a competency evaluation." App. 1055-1056. She found trial counsel's testimony "that he experienced no problems communicating with [Petitioner] as credible." App. 1056. She credited trial counsel's "opinion" that he "believed [Petitioner] was competent to participate in his defense and understand the proceedings at trial." App. 1056. According to Judge Verdin, "[c]ounsel may reasonably rely on his own perceptions in deciding if a client is competent to stand trial." App. 1056. Further, Judge Verdin relied upon the mental health evaluation conducted by DMH shortly before Petitioner's PCR hearing. App. 1056. Thus, Judge Verdin found Petitioner failed to show trial counsel was ineffective because he "failed to establish he currently or previously lacked sufficient competency to stand trial." App. 1056.

On November 6, 2018, Petitioner served his notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in denying Petitioner relief where trial counsel was ineffective by failing to request a competency evaluation in light of Petitioner's severe mental illness and hospitalizations resulting from his mental illness just months before the crime for which he was charged.

Criminal defendants are entitled to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

An individual's constitutional right to due process of law as provided in the Fourteenth Amendment to the United States Constitution prohibits the conviction of an incompetent defendant.

Medina v. California, 505 U.S. 437, (1992); Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966); Bishop v. United States, 350 U.S. 961 (1956). The test for determining competency to stand trial is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." State v. Weik, 356 S.C. 76, 81, 687 S.E.2d 683, 685 (2002) (citing Dusky v. United States, 362 U.S. 402 (1960)); State v. Bell, 293 S.C. 391, 395-396, 360 S.E.2d 706, 708 (1987). Competency to stand trial relates to the time the defendant is before the court for trial, not the time of the alleged offense. Monahan v. State, 365 S.C. 130, 616 S.E.2d 422 (2005).

In Ramirez v. State, 419 S.C. 14, 16, 795 S.E.2d 841, 842 (2017), this Court held plea counsel provided ineffective assistance by failing to request an independent competency evaluation prior to his guilty plea. Ramirez was sixteen-years-old when he was charged as an adult with very serious criminal offenses. Id. at 17, 795 S.E.2d at 842. According to the DMH doctor who evaluated Ramirez pursuant to a court order, he was competent. Id. at 17, 795 S.E.2d at 843. The DMH doctor's report noted that Ramirez believed he was only facing a few years in DJJ despite the fact that he had been charged as an adult with very serious criminal offenses. Id. The doctor "did not review any collateral sources, nor did he perform any psychological testing or consider a psychological diagnosis." Id.

Upon receipt of the DMH report, plea counsel requested an independent psychological examination. Id. at 18, 795 S.E.2d at 843. The independent psychologist conducted a more thorough evaluation and concluded that Ramirez had been intellectually disabled from birth, did not speak until he was seven years old, was diagnosed with attention deficit-hyperactivity disorder, and had only completed the eighth grade by the time he was sixteen. Id. The

psychologist concluded Ramirez's IQ was between thirty-one and forty-four, placing Ramirez within the range of severe intellectual disability. Id. However, the psychologist rendered no opinion as to Ramirez's competency. Id.

Ultimately, Ramirez pled guilty but mentally ill to all charges. Id. at 19, 795 S.E.2d at 843. Subsequently, Ramirez filed a PCR application. Id. at 19, 795 S.E.2d at 844. At the PCR hearing, plea counsel admitted he should have moved to have Ramirez's competency reevaluated, and he could provide no explanation for his failure to do so. Id. This Court held Ramirez presented sufficient evidence – the prior evaluations and plea counsel's testimony – at the PCR hearing to establish a reasonable probability that he was incompetent at the time of his plea. Id. at 21, 795 S.E.2d at 845. The independent psychologist's "report and plea counsel's own awareness of Ramirez's communicative and intellectual limitations should have prompted plea counsel to seek an additional competency examination." Id. Plea counsel's decision to pursue a guilty but mentally ill plea instead of a second competency evaluation was not a valid strategy. Id. Turning to prejudice, this Court held the independent psychologist's "report and plea counsel's testimony at the PCR hearing clearly established a reasonable, if not strong, likelihood that Ramirez was incompetent to plead guilty." Id. at 23, 795 S.E.2d at 846.

In a similar case, this Court held plea counsel provided ineffective assistance by failing to request a competency hearing to determine the defendant's fitness to stand trial where the defendant presented evidence at his post-conviction relief (PCR) hearing that he was learning disabled, suffered a major head injury from a near-fatal car accident a year before the crimes, and as a result of the accident had severe frontal lobe brain damage. Matthews v. State, 358 S.C. 456, 459-460, 596 S.E.2d 49, 50-51 (2004). The defendant's expert at the PCR hearing testified that the defendant was incompetent and could not assist in his defense. Id. This Court

concluded the defendant "clearly established by a preponderance of the evidence" that he was incompetent at the time he entered his guilty plea.

Likewise, the Court of Appeals held a trial judge erred in failing to order a competency evaluation for a criminal defendant. State v. Buchanan, 302 S.C. 83, 85-86, 394 S.E.2d 1, 2 (Ct. App. 1990). According to the Court, when Buchanan's case was called for trial, "Buchanan's behavior was strange." Id. at 84, 394 S.E.2d at 1. At the request of the solicitor, the judge issued an order for an evaluation of Buchanan's "mental capacity to stand trial" and criminal responsibility. Id. The next day, Buchanan met briefly with a psychiatrist, who testified the encounter was not long enough to enable the doctor to render an opinion on competency. Id. The following day, Buchanan was tried in his absence and without counsel. Id. He was convicted and sentenced. Id. After sentencing, the judge issued a second order to determine "mental capacity to stand trial." Id. The Court held the trial judge abused his discretion by failing to comply with the statute because the trial judge had reason to believe that a competency examination was necessary. Id. at 86, 394 S.E.2d at 2.

In another case, the Court of Appeals held a trial court erred in failing to order a competency examination based on the defendant's attorney's report that the defendant

> suffers from symptoms suggestive of schizophrenia and was under psychiatric care at the time of the hearing, along with his mother's testimony regarding the seriousness and duration of his mental problems and the statement of the trial judge at the conclusion of the hearing indicating he believes [the defendant] needs additional treatment for his mental condition.

State v. Singleton, 322 S.C. 480, 483, 472 S.E.2d 640, 642 (Ct. App. 1996). According to the Court, the trial judge had reason to believe that a competency examination was necessary, and failure to order the examination was an abuse of discretion. Id.

As this Court explained, "criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). Although attorneys are not required to investigate every conceivable defense no matter how unlikely the effort would be to assist the defendant, the decision not to investigate must be reasonable. Wiggins v. Smith, 539 U.S. 510, 533 (2003) (holding counsel's decision not to extend their investigation fell short of prevailing professional norms in light of their failure to retain a forensic social worker to prepare a social history report, which was standard practice in the state at the time, and their failure to investigate all reasonably available mitigating evidence); see also Von Dohlen v. State, 360 S.C. 598, 605, 602 S.E.2d 738, 742 (2004) (holding trial counsel's investigation concerning Von Dohlen's mental state was not reasonable despite the fact that counsel made "some effort" where the defense psychiatrist testified during post-conviction proceedings that had he been provided with the additional medical and psychiatric records that post-conviction counsel uncovered, he would have testified Von Dohlen suffered from '"major depressive episodes with severe symptoms of anxiety and possible prepsychotic features'").

Trial counsel failed to discover that Petitioner was suffering from severe mental illness while he was in jail awaiting trial. Had trial counsel conducted a minimal investigation, he would have discovered that the jail was treating Petitioner for his mental illness. Further, Petitioner indicated that he informed trial counsel about his mental illness and recent hospitalizations. Trial counsel could not deny the conversation when questioned at the PCR hearing; he only indicated he had no recollection of such a conversation. Thus, either trial counsel was on notice of Petitioner's severe mental illness based on his communications with

Petitioner directly or he should have been aware of Petitioner's mental illness because a minimal investigation would have uncovered the jail's treatment of Petitioner. Additionally, the records from the jail – or the conversation with Petitioner – would have alerted trial counsel to the other records of Petitioner's mental illness and hospitalizations. Trial counsel's failure to request a competency evaluation was deficient performance.

Petitioner presented sufficient evidence to establish a reasonable probability that he was not competent at the time of his trial. In addition to the hospital and jail records detailing Petitioner's mental illness, the DMH evaluation was helpful to Petitioner. Although the examiner ultimately concluded that Petitioner had the "capacity [to] proceed with [the] Post-Conviction Relief hearing and to stand trial," the examiner's opinion was not related to Petitioner's mental status at the time of his trial. App. 1032-1039. The examiner reviewed records from the Greenville Hospital System, the local jail, and the prison. App. 1032-1039. The records supported Petitioner's contention that he suffered from severe mental illnesses and was being treated for those illnesses. At the time of the evaluation, Petitioner was not experiencing auditory or visual hallucinations as he was being medicated, unlike when he was on trial. Therefore, the evidence before the PCR judge supported a reasonable probability that Petitioner was not competent to stand trial, and the PCR judge erred in finding to the contrary.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants the petition but dispenses with briefing, Petitioner respectfully requests this Court reverse the PCR court, hold trial counsel provided ineffective assistance, and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of July, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Letitia H. Verdin, Circuit Court Judge

WALTER TERRAN GAINES,

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V.

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RESPONDENT

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 Taylor Z. Smith, 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 Walter Terran Gaines, #240407, at Tallahatchie County Correctional Facility, 415 U.S. Highway 49 North, Tutwiler, MS 38963, this 31st day of July, 2019.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 31st day of July, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 26, 2019