

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY  
COURT OF COMMON PLEAS

THE HONORABLE R. LAWTON MCINTOSH  
CASE NO. 2017-CP-42-04446

Stephanie Leigh Howard,  
S.C.D.C. No. 371295

Appellant,

versus

State of South Carolina,

Respondent.

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

- I. Did the trial court err in misapplying South Carolina law, the error being that the Court disregarded the analysis and guidance provided by Garren v. State, 423 S.C. 1, 813 S.E.2d 704 (2018)?
  
- II. Did the trial court err in finding that plea counsel's failure to obtain a mental health evaluation of the Applicant was not ineffective assistance:
  - (i) The error being that plea counsel should have recognized the Applicant's serious mental health issues from the substantial evidence in plea counsel's possession?
  - (ii) The error being that plea counsel should have recognized the importance and the need for having a mental health evaluation?
  - (iii) The error being that plea counsel should have recognized the Applicant's confusion, misunderstanding, and irrational thinking, even at the time of the plea, as additional reasons to obtain a mental health evaluation?
  
- III. Did the trial court err in finding that the Applicant knowing & voluntarily entered her plea of guilty:
  - (i) The error being that the Applicant did not have a full understanding of the consequences of entering the "straight up" plea without recommendations or negotiations?
  - (ii) The error being that the Applicant entered the plea based on the advice of counsel, whose representation fell well below an objective standard of reasonableness?
  - (iii) The error being that there was unchallenged and non-contradicted expert testimony by an experienced forensic psychiatrist, who opined that the Applicant was not competent to enter the plea, and there was substantial evidence to corroborate his opinions?
  - (iv) The error being that the Applicant was under the influence of psychotropic medications, to include an antipsychotic, which the evidenced showed did have an effect on the Applicant's mental capacity?
  
- IV. Did the trial court err in finding that plea counsel was not ineffective or deficient in representing the Applicant, and in finding that the Applicant had failed to establish Strickland prejudice:
  - (i) The error being that plea counsel failed to request a mental health evaluation to determine competency?

- (ii) The error being that plea counsel failed to conduct an adequate consultation, which would have given more understanding of the Applicant's relevant medical and psychosocial history, as well as her mental limitations?
  - (iii) The error being that plea counsel failed to adequately review and understand the Applicant's medical records?
  - (iv) The error being that plea counsel failed to recognize her client's diminished mental capacity and the likelihood that she was not competent to plea?
  - (v) The error being that plea counsel failed to recognize that her client did not have a rational understanding of the plea process and possible outcomes?
  - (vi) The error being that plea counsel failed to advise the plea court that her client was answering questions inaccurately in the colloquy between the court and the Applicant?
  - (vii) The error being that plea counsel failed to advise the plea court at the time of the plea that the Applicant was in need of a mental health evaluation?
  - (viii) The error being that plea counsel failed to adequately prepare her client for a plea to a serious charge?
  - (ix) The error being that plea counsel did not adequately communicate with the Applicant regarding her negotiations with the State?
- V. Did the trial court err in finding that the unchallenged and non-contradicted testimony of the Applicant's expert, who was qualified as a forensic psychiatrist, was not credible and his testimony would therefore not be considered by the Court:
- (i) The error being that the State did not object to the expert's testimony and never questioned his credibility?
  - (ii) The error being that contrary to the statements contained in the Court's Order, there was substantial evidence to corroborate the expert's opinions?
  - (iii) The error being that the expert set forth a sound, rational basis for his opinions, after a thorough examination of the Applicant, and based on his years of experience in forensic psychiatry?
  - (iv) The error being that there was no valid, rational basis for the Court's finding?

## STATEMENT OF THE CASE

On January 25, 2017, the Applicant [Stephanie Howard] entered a “straight up” plea [without recommendation or negotiation] to bank robbery, and she was sentenced to 12 years of incarceration. The Applicant [Ms. Howard] was represented by Andrea Price of the Spartanburg County Public Defender’s Office. Ms. Howard had numerous concerns about Ms. Price’s representation. After the plea, the Applicant’s aunt, Dianne Whitt, retained M. Noel Turner, III, Esq. and William H. Rhodes, Esq. (“Counsel”) because she also believed Ms. Howard received ineffective assistance of counsel.

Counsel filed a Motion for Reconsideration on January 27, 2017, which was denied after a hearing on February 2<sup>nd</sup>. Counsel filed a PCR Application on December 5, 2017. No appeal from the plea was filed, as Counsel did not believe there were appealable issues, and it would cause further delay on the PCR. The critical issues were whether counsel had provided ineffective assistance and whether Ms. Howard was competent (Tr. 19).

The PCR hearing was held on January 14, 2019 before the Honorable R. Lawton McIntosh. Following a lengthy hearing, which included expert testimony from a forensic psychiatrist, the matter was taken under advisement, and the parties were directed to brief certain issues. Judge McIntosh ultimately denied the relief requested in the PCR Application, and he dismissed the action by Order filed June 18, 2019.

Counsel timely filed a Notice of Intent to Appeal. The PCR Application lists specific grounds for “ineffective assistance of counsel,” and it indicates the plea was “involuntary.” At the hearing, the Application was amended (without objection) to include a lack of mental capacity and inability to assist counsel (incompetency), as well as counsel’s failure to request a psychological evaluation, which rendered the plea involuntary. (Tr. 10-13).

## **STATEMENT OF THE FACTS**

### **Robbery**

On May 10, 2016, Ms. Howard entered a First Citizens Bank, which was her regular banking branch (Tr. 63, 67). She had been to the same branch earlier that day concerning her account (Tr. 63). An hour later, she returned to the bank wearing the same clothes, but she was also wearing a surgical mask and sunglasses (Tr. 63, 67-68). Her mental state was not clear, and she does not have a clear memory of the event (Tr. 63, 68)

She provided a bag to the teller and asked for money (Tr. 68). No weapon was involved, and there was no intent to cause harm (Tr. 68). She left the bank, and she was stopped before even making it home (Tr. 69). She does not remember much, but she recalls that she spoke with the police (Tr. 43-44, 69). Ms. Howard was cooperative and gave a confession (Tr. 70).

### **Applicant's Past – Mental Health**

The Applicant has a long and troubled history. She was physically and sexually abused beginning at the age of 5 (Tr. 47-48). Until 2005, Ms. Howard worked as a medical transcriptionist (Tr. 15, 19). At that time, she filed for Social Security disability for physical and mental problems (Tr. 15-17, 20).

Around 2005, Ms. Howard's mental health substantially declined (Tr. 20, 32-33). In 2009, she was hospitalized for mental issues (Tr. 20). In 2012 and in 2014, she was hospitalized and admitted for inpatient care in the psychiatric ward for suicide attempts and substance abuse (Tr. 20-24). She was admitted for inpatient care in the psychiatric ward on two additional occasions after the robbery (Tr. 34-35).

In March 2016, Ms. Howard was raped by two men (Tr. 24-25). All of Ms. Howard's pertinent medical records were admitted into evidence by stipulation (Tr. 26-27).

At the time that she committed the crime in May 2016, Ms. Howard was impacted by additional major psychosocial stressors: she had lost her job; she had bills and car payments due; she had recently lost custody of her daughter; and she was abusing alcohol (Tr. 31). She had already been diagnosed with Major Depressive Disorder, Posttraumatic Stress Disorder, Borderline Personality Disorder, and Alcohol Abuse Disorder, and she was being treated by her family physician through psychotropic medications, but no counseling (Tr. 32-34, 160-161).

#### **Representation by Andrea Price**

Ms. Howard was able to post bond, and she applied for counsel at the Public Defender's Office (Tr. 25-26). She first met her attorney, Andrea Price, on July 25, 2016 for about 30 minutes, which was the day of her scheduled preliminary hearing (Tr. 28-29, 110-111). At this time, Ms. Howard shared some of her past, to include being recently released from the psychiatric ward for attempted suicide (Tr. 28). After the meeting, Ms. Howard obtained her medical records for Ms. Price (Tr. 29, 113).

Ms. Howard remembered having 3 short meetings with Ms. Price (Tr. 30). There was never any discussion about her medical records, mental health or having a mental health evaluation (Tr. 30-31, 35, 65). Ms. Price even admitted that there were no discussions about mental health defenses or competency (Tr. 36, 128-130).

The State's first offer was 5-7 years, which Ms. Howard rejected at the advice of Ms. Price (Tr. 37, 51, 125). The State's second offer was 1 year incarceration followed by home detention (Tr. 37-38). There is conflicting testimony as to the second offer, but Ms. Howard maintained that Ms. Price advised her to reject the offer, and she said that the State would extend her an offer for home detention, which never happened (Tr. 38-39, 51, 53-54, 58-60, 71, 73, 82-83, 96).

### **Guilty Plea**

At the instruction of her attorney, Ms. Howard entered a “straight up” plea to bank robbery with no recommendation, and she received a sentence of 12 years (Tr. 40).

Significantly, at the time of the plea, Ms. Howard was taking prescription medications for Ativan and Seroquel, both of which have sedating and cognitive effects (Tr. 40-43).

The significant details on Ms. Howard’s mental health were not brought to the plea judge’s attention (Tr. 45-47, 74-75). The plea judge was not made aware of Ms. Howard’s medications, even though they caused her to be “drowsy” and “fog headed” (Tr. 49-50, 75). In fact, Ms. Howard does not remember much of the plea (Tr. 52, 84-87). She just remembers responding to the questions presented to her in the manner that she thought she was supposed to respond, and based on her understanding that she was going to receive a home detention sentence (Tr. 47, 75). There was no mental competency evaluation, and there was no psychiatric expert to testify at the plea (Tr. 94-95, 120-121, 124).

### **PCR and Appeal**

Ms. Howard filed for post-conviction relief on numerous grounds. A hearing was held on January 14, 2019. Testimony was presented by Ms. Price, Ms. Howard, and Ms. Whitt. The Court was given copies of the extensive medical records in Ms. Price’s possession. Additionally, testimony was presented by a forensic psychiatrist, Dr. Thomas Martin. The State stipulated to Dr. Martin being an expert in forensic and general psychiatry (Tr. 152-153). Even though the State never challenged Dr. Martin’s qualifications, never submitted contradictory evidence, and never questioned his credibility, the PCR judge chose to find him not credible, and his testimony was disregarded. The Applicant respectfully submits that the PCR judge committed numerous errors, and his denial of the request for PCR should be reversed.

## ARGUMENT

The Applicant respectfully requests that the Supreme Court issue a Writ of Certiorari to review the questions presented, which arise from the PCR hearing and Judge McIntosh's Order.

### Legal Standard for Ineffective Assistance

Generally, there is a two-prong test for claims of ineffective assistance of counsel. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)): First, the Applicant must establish that counsel's performance was deficient and fell below an objective standard of reasonableness. Second, the Applicant must show a reasonable probability that but for counsel's errors, the result would have been different.

In the context of a guilty plea, the plea is a judicial admission of the truth of the charges, and most guilty pleas should be considered to be final; however, due process prohibits the conviction of an incompetent defendant, and this right cannot be waived by a guilty plea. Matthews v. State, 358 S.C. 456, 458, 596 S.E.2d 49, 50 (2004) (citing Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 595-96 (1992)).

To establish Strickland prejudice in the context of plea counsel's failure to request a mental competency evaluation, an Applicant only needs to show a reasonable probability of incompetency when she entered the plea. Ramirez v. State, 419 S.C. 14, 21, 795 S.E.2d 841, 845 (2017).

Competency to enter a plea is the same as competency to stand trial. A defendant must have sufficient capability to consult with counsel with a reasonable degree of rational understanding, **and** he must have a rational **and** factual understanding of the proceedings. Garren v. State, 423 S.C. 1, 813 S.E.2d 704 (2018) (citing Jeter, 308 S.C. at 232, 417 S.E.2d at 595-96).

### **Standard of Review**

The appellate court will reverse the trial court in a PCR decision when it is controlled by an error of law or it is unsupported by the evidence. Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011). The Court will uphold findings only when there is evidence of probative value to support them. Caprood v. State, 338 S.C. 103, 109-10, 525 S.E.2d 514, 517 (2000).

**I. Incompetency; Involuntary Plea; and *Garren v. State*  
[Issues I, II(i)-(iii), III(i)-(iv), and IV(i)-(ix)]**

The case at bar has striking similarities to Garren v. State, 423 S.C. 1, 813 S.E.2d 704 (2018). Counsel provided copies of this opinion to the Court at the start of the trial. The PCR judge chose to disregard it, stating that the Court “is simply not persuaded by the evidence presented...” (Order, P. 20). This finding is clearly erroneous in light of the evidence.

The Applicant in Garren claimed to be under the influence of medication at the time of his plea. He also claimed he should have been given a psychological evaluation. However, he presented no evidence to show the medication taken prior to the plea. He also presented no evidence of incompetency. The Supreme Court reversed the trial court’s grant of a PCR on the ground that no evidence was presented to support the findings.

One of Ms. Howard’s primary issues was Ms. Price’s failure to obtain a competency evaluation. Unlike Garren, Ms. Howard presented overwhelming evidence to show that a competency evaluation was obviously warranted and necessary. There was extensive evidence of serious mental health problems. Further, Ms. Price was fully aware that Ms. Howard was taking psychotropic antipsychotic medications at the time of the plea that could affect cognition and competency. However, these matters were not properly brought to Judge Couch’s attention.

### **Deficiency of Counsel**

Ms. Price was clearly on notice of Ms. Howard's significant mental health issues. However, she did not devote adequate time and resources to prepare this case.

**Inadequate Consultation** – A valid claim for inadequate consultation arises when an Applicant can show the evidence or arguments that could have been developed had counsel better communicated. Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008).

Ms. Howard only remembered 3 meetings with Ms. Price, each around 30 minutes long (Tr. 28-30, 60), with the remaining communications being by phone. Dianne Whitt recalled 3 meetings [September 2016, October 2016, and January 2017], each around 20-30 minutes (Tr. 98-102). Ms. Price estimated 5 meetings, but she admitted none exceeded 30 minutes. (Tr. 114).

At the first meeting [July 25, 2016], Ms. Price wrote a few notes (Tr. 110). The notes state that Ms. Howard had just been released from the psychiatric ward for a suicide attempt (R. 303-304). They also mention "MHE" (mental health evaluation), depression, and a denial of "psychotic issues (visions, voices)" (Tr. 112, 115; R. 304). Ms. Price was on notice of a potential mental health issue, but she decided no evaluation was necessary (Tr. 114, 124-125).

The overwhelming evidence (medical records, Applicant's testimony, Dr. Martin's testimony) shows that Ms. Price should have seen the need for more face-to-face contact. She could have better assessed Ms. Howard's mental status, to include the effects of her prescribed medications; she could have reviewed and discussed Ms. Howard's medical history, past traumatic history, psychosocial stressors, diagnoses of major mental illnesses, and cognitive limitations, all of which should have led a reasonable attorney to determine that a mental health evaluation was necessary.

**Failure to Review Medical Records** - Ms. Howard provided her medical records to Ms. Price. (Tr. 113); however, they were never discussed (Tr. 65). Ms. Price claimed she read the records, but she saw no red flags for serious mental issues (Tr. 117). The trial court specifically found that Ms. Price “obviously reviewed Applicant’s medical records” (Order, P. 17). However, the Record shows that this finding is not supported by evidence.

Ms. Price’s ignorance of the records became clear when she stated, “I did not think that her issues were any worse than any of my other clients” (Tr. 118). Then, when asked whether a forensic expert would have been helpful, she stated, “if she’d had a history of schizophrenia or something like that, yes, or a head injury or trauma or anything of that nature, yes, I think that would probably have warranted [an evaluation], but Ms. Howard, no.” (Tr. 118).

Ms. Price’s testimony is not consistent with the medical records. The records show: **two (2) suicide attempts** and admissions to **psychiatric units** before the robbery (R. 309-339); reports of **hearing voices** (R. 334-336, 342-359); **two (2) suicide attempts** and admissions to **psychiatric units** after the robbery (R. 340-367); **auditory hallucinations** (R. 344); **delusional thinking** (R. 344); **altered mental status**, possibly caused by Seroquel (R. 364); **poor and limited insight** (R. 315, 321, 326, 336, 341, 358, 372); **significant concentration impairment** (R. 330); diagnoses of **Major Depressive Disorder** with psychotic features (R. 345, 349), **Post-Traumatic Stress Disorder** (R. 313-321, 375), **Anxiety Disorder** (R. 319, 376, 383), **Panic Disorder** (R. 324, 382, 385), **Borderline Personality Disorder** (R. 337, 366), and **Bipolar Disorder** (R. 337); and current prescriptions for psychotropic medications, to include Seroquel and Ativan (R. 369). Ms. Price did not feel these records warranted a mental evaluation [Tr. 114, 117, 119-121].

There are major inconsistencies in Ms. Price's own testimony. The only reasonable conclusions that can be drawn from the Record are that Ms. Price either failed to review the records, or she failed to understand the mental health issues. Her failure to adequately review the records and further investigate show that her representation fell well below the objective standard of reasonableness.

**Evidence of Diminished Capacity at Plea** - At the plea, Judge Couch asked Ms. Howard if she suffered from conditions that affected her ability to reason or make good decisions. Her response was, "I don't think so. No, sir, Your Honor" (Tr. 45). However, her medical records show numerous mental health conditions (referenced above). She had even been admitted to the psychiatric ward four (4) times over a span of less than 4 years. Two admissions were within 6 months of the plea (Tr. 45, 47; R. 340-367). When asked about her plea response, Ms. Howard stated that she answered the way she thought she was supposed to (Tr. 47).

Judge Couch asked whether Ms. Howard had taken or used any medication that would affect her reasoning abilities, to which she replied "No, sir" (Tr. 49). However, she was regularly taking psychotropic medications, to include Seroquel (an antipsychotic) and Ativan (Tr. 40-43, 50; R. 369). These drugs made her "real drowsy," "groggy," and "kind of fog headed" (Tr. 42, 50, 75). She lacks much memory of the plea (Tr. 43, 84-85).

Ms. Howard entered a "straight up" plea; however, she did not know what that term meant (Tr. 40). She was asked why she entered a plea facing 30 years when she had an offer for 1 year. Her response was that she was "doing what she was instructed to do" (Tr. 40).

Ms. Price claims that she strongly advised Ms. Howard to accept the State's offer for 1 year (Tr. 37-38, 135-136). However, Ms. Howard understood Ms. Price's advice to be that a third offer was coming for just home detention (Tr. 37-39). This third offer was never made, but

Ms. Howard genuinely understood, based on Ms. Price's representations, that she would just receive home detention/probation (Tr. 53-54, 62, 71).

It is clear from the testimony that Ms. Howard's cognitive abilities were impaired, and she was confused at the time of the plea. Ms. Price had not even met with Ms. Howard before the plea (Tr. 60). Ms. Howard did not rationally understand that she could receive 30 years. She did not know whether the 1-year offer was still available, or if the 1-year was a "cap." She just understood she would get home detention (Tr. 54, 71, 76, 95-96). If Ms. Price had acted with the reasonable care expected of an attorney, she would have sufficiently met with her client, and she should have recognized her client's confusion and lack of rational understanding.

**Failure to Recognize Incompetency and Request an Evaluation** - Despite all of the evidence produced [see above], Ms. Price stated that Ms. Howard "never appeared to have any issue with what was going on, understanding what was going on, understanding me, or anything of that nature." (Tr. 118). This statement is completely inconsistent with the facts:

- **Expectations / Consequences** - Ms. Price claims she advised Ms. Howard to accept the 1-year offer, as she knew a straight up plea was dangerous (Tr. 116-117, 135-137). Ms. Price knew the State would not offer home detention (Tr. 125-126), and she knew that a straight up plea to bank robbery would likely result in jail time (Tr. 136). She testified that Ms. Howard rejected the offer because "she couldn't go to jail" (Tr. 135-136). She claimed that she told her client she only had two options: (1) accept the offer of 1 year; or (2) plea straight up, and she would likely get even more time. (Tr. 135-137). Despite this advice, Ms. Price insists that Ms. Howard rejected the offer and instructed Ms. Price to ask for home detention (Tr. 126, 136-137).

Ms. Howard, however, had a completely different understanding. She understood that the State would be presenting a third offer for home detention. This was not “wishful thinking;” it was based on representations made by Ms. Price.

Regardless of whose story is true, when Ms. Howard decided to enter the “straight up” plea, Ms. Price should have recognized a competency issue. Ms. Howard wanted to avoid jail, and Ms. Price told her a “straight up” plea would result in more time. There was an obvious lack of rational understanding or ability to rationally communicate. With all that Ms. Price knew, if she had acted as a reasonable attorney, she should have recognized a competency issue, which would require a mental evaluation.

● **Failure to Advise Court** - Ms. Price was “on notice” of her client’s mental health issues (Tr. 129-130). She was also “on notice” of the psychotropic medications, to include the antipsychotic, and she was aware that these medications can cause some cognitive impairment (Tr. 129-130). She heard her client testify in the plea colloquy, and she heard her client deny any mental impairment that would affect her judgment (Tr. 132-134). The plea transcript gives the appearance that Ms. Price directed Ms. Howard on how to answer (Plea, P. 7); however, Ms. Price denied any memory of this (Tr. 132-133). Ms. Price also heard her client deny taking medications that could affect her reasoning (Tr. 134-135). Despite her knowledge, she did not correct the testimony.

Under reasonable professional norms, as well as common sense, these matters should have been brought to the Court’s attention. At the time of the plea, the Garren case had not been decided, but S.C. Code Ann. §44-23-410 was in effect. Ms. Price should have recognized her obligation to inform the Court that a mental evaluation was

necessary to determine competency. Counsel had ample evidence of incompetency, and she should have recognized her client's confusion and inability to think rationally.

### **Prejudice**

To establish Strickland prejudice when plea counsel fails to request a mental evaluation, an Applicant only needs to show a **“reasonable probability that she was incompetent at the time of the plea.”** Garren, 423 S.C. at 13, 813 S.E.2d at 710 [citing Ramirez, 419 S.C. at 21, 795 S.E.2d at 845]. Due Process prohibits the conviction of an incompetent defendant, and this right cannot be waived by a guilty plea. Matthews, 358 S.C. at 458, 596 S.E.2d at 50 [citing Jeter, 308 S.C. at 232, 417 S.E.2d at 595-96]. In order to be competent, the accused must have sufficient capability to consult with counsel with a reasonable degree of rational understanding, and have a rational as well as factual understanding of the proceedings. Id.

The trial court placed great emphasis on the colloquy between Judge Couch and Ms. Howard (Order, P. 7, 9-12, 15, 20). However, Ms. Howard's testimony at the PCR hearing shows that she did not have a rational understanding at the time of the plea. Judge Couch told her he could sentence her to 30 years, but Ms. Howard was still under a firm understanding that she would get home detention (Tr. 71, 73). She did not rationally understand that a 30-year sentence was possible, or that the 1-year offer was no longer available (Tr. 54, 71, 76, 95-96). In answering the questions, she “was doing what [she] was instructed to do” (Tr. 75).

Ms. Howard's understanding of her discussions with counsel were far different than that of Ms. Price. If Ms. Price's story is true [i.e. client chose to reject the 1-year offer and instead pled “straight up” against counsel's advice], this shows a clear disconnect between the attorney and client. Counsel should have recognized a competency issue, as Ms. Howard may have lacked the ability to rationally understand counsel's advice. On the other hand, if Ms. Howard's

understanding is true [i.e. Ms. Price advised her to reject the 1-year offer and plea straight up], then Ms. Price failed to adequately prepare her client for a plea to a serious charge.

Ms. Howard was taking psychotropic medications that affected her cognitive abilities, and she suffered from major mental illnesses that most certainly would affect cognitive abilities if not properly treated. With all that Ms. Price knew, Ms. Price should have recognized that Ms. Howard lacked a rational understanding of the proceedings or a rational understanding of counsel's advice. Had Ms. Price acted within reasonable professional norms, she should have recognized the competency issue and the need for a competency evaluation.

Even without taking Dr. Martin's (forensic psychiatrist) testimony into consideration, there is ample evidence of incompetency. Under the applicable standard, Ms. Howard presented sufficient evidence to show a reasonable probability that she was incompetent at the time of the plea, and she therefore met her burden of establishing prejudice.

#### **Improper Analysis by Court**

In applying the prejudice analysis for Ms. Price's failure to request a psychological evaluation, the trial court looked to S.C. Code Ann §44-23-410. Strangely, the trial court's Order states that Ms. Howard's grounds for relief were based on "intellectual disabilities" and "intellectual disorders" (Order, P. 16-17). There is absolutely no evidence in the Record to support this finding. In 2011, this statute was amended [2011 Act No. 47, §13] to use the term "intellectual disability" in place of the former terms, "mental retardation" and "mentally retarded." Ms. Howard never claimed an "intellectual disability." Ms. Howard asserted "mental illnesses."

The Court still addressed the issues presented, in that the Order references: Counsel's failure to fully investigate Ms. Howard's condition; Ms. Howard's inability to assist counsel and

understand the proceedings; Ms. Howard's failure to enter a plea freely, voluntarily and knowingly; and Counsel's failure to request a competency evaluation.

The trial court's error in using the wrong terminology may constitute harmless error; however, it does call into question whether the trial court was properly considering the facts and legal arguments presented, and whether the Court understood the applicable law.

The trial court rejected Dr. Martin's testimony before analyzing the issues of competency and prejudice. In conducting its analysis, the trial court added facts that were not contained in the record, and it reached conclusions that were not supported by the evidence. The Court found that Ms. Howard took thoughtful measures to conceal her identity by entering the bank wearing gloves, sunglasses, a hat, and a surgical mask (Order, P. 19). The Court also found that Ms. Howard had a clearly planned bank robbery with an escape plan, and this evidenced a "rational understanding" of what she was doing (Order, P. 20).

The trial court's findings are clearly erroneous. Ms. Howard's actions did not show rational thinking or a rational understanding. This branch was her regular banking branch; she had been to the bank earlier that day; and when she returned an hour later, she was wearing the same clothes. These facts, along with a rather pathetic disguise, do not reveal a clear, rational understanding of a planned robbery and concealment of her identity.

The trial court's analysis of the colloquy is also questionable. The Court specifically referred to Judge Couch's question about whether Ms. Howard suffered from any conditions that would affect her ability to reason or make good decisions. The trial court made findings that Ms. Howard "answered the plea court's question correctly," as well as "accurately." The Court then stated that the "Applicant has presented no credible evidence to the contrary" (Order, P. 20).

The trial court did not have any basis to make these findings, and the findings are clearly erroneous and unsupported by the evidence. Furthermore, the trial court failed to conduct the proper legal analysis. The Court was not asked to find whether Ms. Howard's answers were "correct." The issue before the Court was whether Ms. Howard was incompetent at the time of the plea. Under the proper analysis, the Court was obligated to determine whether there was a reasonable probability of incompetency at the time of the plea. Ramirez, supra. The Court was to further determine whether Ms. Howard had the sufficient capability to consult with Ms. Price with a reasonable degree of rational understanding, and whether she had a rational as well as a factual understanding of the proceedings. Garren, supra. The Court was given an overwhelming amount of evidence to show a lack of competency under the cited tests.

#### **Garren Analysis**

Even though the trial court chose to specifically disregard Garren v. State (Order, P. 20), the trial court did correctly state that in order to have competency, the defendant: (i) must have the ability to consult with counsel with a reasonable degree of rational understanding; (ii) must have a rational understanding of the proceedings; and (iii) must have a factual understanding of the proceedings (Order, P. 16). However, the trial court failed to follow this analysis.

The procedural history in the case at bar is almost identical to Garren. In Garren, the defendant entered a "straight up" plea. He answered all of the plea judge's questions favorably in a thorough colloquy. Plea counsel, in mitigation, related that the defendant "obviously had some mental problems," and counsel indicated that the defendant was abusing prescription medications to the point that he had little memory of the criminal act. Garren, 423 S.C. at 7.

The defendant filed a PCR for plea counsel's failure to request a mental evaluation, and he claimed the plea was involuntary due to medications he was taking in jail, which made him

lethargic. Id. Plea counsel testified that he never saw mental health issues at the time of the plea, and he never saw the need for a competency evaluation. Id. at 8. While plea counsel believed his client was competent, in hindsight he felt that a psychological evaluation would have been helpful for mitigation purposes. Id. (emphasis added). Like the case at bar, the defendant denied much memory of the plea. Id. at 9. The defendant's PCR was granted, but the Supreme Court reversed.

The Supreme Court stressed that there was no evidence as to the medications and dosages taken before the plea. Id. at 8. The defendant was not able to identify the medication that he took. Id. at 9. He also failed to introduce any medical records into evidence or any other evidence to indicate the medication taken on the day of the plea that rendered him incompetent. Id. at 11. Further, the defendant offered no evidence to show what benefit would have come from a mental health evaluation. Id. at 9.

**Deficiency for Failure to Request Competency Evaluation** - Unlike Garren, in the case at bar, the incredible amount of evidence (to include Ms. Howard's medical records, her traumatic past, her diagnoses, her previous admissions to psychiatric units [even before the plea], her psychotropic medications, and the disconnect between attorney and client in discussions) that was available to Ms. Price clearly put her on notice of a competency issue. Under an objective standard of reasonableness and professional norms, Ms. Price's failure to request a competency evaluation was a deficiency.

**Prejudice** - Unlike Garren, Ms. Howard presented substantial evidence of a reasonable probability that she would have been found incompetent to enter the plea. The Record contains ample proof of identifiable mental health issues that undermined competency. She was under the influence of prescribed psychotropic medications, to include an antipsychotic, which affected cognition. Furthermore, Ms. Howard presented the testimony of a qualified expert who performed

a psychological evaluation of Ms. Howard, and he opined that she was not competent to enter the plea (Tr. 158-159). Ms. Howard, therefore, satisfied the prejudice analysis.

**Involuntary Plea** - Unlike Garren, Ms. Howard presented ample evidence of an involuntary plea due to her prescribed medications. She clearly lacked a reasonable degree of a rational understanding of the proceedings. She was under a real belief that she would receive home detention, and this was not mere wishful thinking. Ms. Price knew that Judge Couch would not give home detention on a “straight up” plea to bank robbery, and she knew that Ms. Howard was making an irrational decision to plea “straight up” instead of accepting the State’s offer of 1-year. At the plea, Ms. Howard was not in a proper state of mind to rationally understand what she was doing, and this is well-supported by the evidence. She was under the influence of Seroquel and Ativan, both of which have sedative effects, and Ms. Price admitted that she knew this. Seroquel is also an antipsychotic. As Dr. Martin explained, this drug is intended to “break up thoughts” (Tr. 165-166). Inherent in these statements is that Ms. Howard’s mental state was altered by the drug, and it affected her ability to process thoughts.

The evidence presented in the case at bar is substantially different from the evidence in Garren. In Garren, the only testimony was from the Applicant, who said he was under the influence of medication, but he could not even identify the medication. Here, the medical records show the medications that Ms. Howard was prescribed, to include Seroquel and Ativan. Ms. Howard testified that her mental state was compromised, and she was “groggy” and “in a fog.” Instead of answering questions in the colloquy with meaningful thought, she answered questions as she believed she was supposed to answer. Ms. Howard lacked a meaningful appreciation of the proceedings, to include the potential sentence. Ms. Howard was confused about negotiations and statements by her own attorney. Lastly, Ms. Howard was engaging in irrational decision-making

by entering the “straight up” plea. In addition to all of this, Ms. Howard presented the testimony of a qualified forensic psychiatrist, who was able to describe the effects of the medications taken, as well as render his opinion on her state of mind at the time of the plea.

The fundamental right to due process includes a right to have meaningful participation in the plea process, which Ms. Howard lacked, and her plea should have been set aside.

## **II. Disregarding Expert Testimony and Findings on Credibility**

Ms. Howard presented expert testimony at the PCR hearing from a forensic psychiatrist, Dr. Thomas Martin (Tr. 149-203). Dr. Martin’s curriculum vitae was admitted into evidence (Tr. 151, R. 390-392), and he testified to his extensive experience as a general and forensic psychiatrist (Tr. 150-152). He began his private practice in 2001, where he provides treatment for patients, and he also provides assessments of patients for various kinds of court proceedings (Tr. 151). He has testified as an expert in more than 250 cases in South Carolina (Tr. 151-152).

The State stipulated that Dr. Martin was qualified as an expert in both forensic and general psychiatry (Tr. 153). The State never objected to his qualifications, and his credibility was never brought into question. The State offered no testimony to challenge or contradict his “expert testimony,” which the trial court acknowledged (Order, P. 20). Additionally, his testimony did not conflict with the other evidence presented or the testimony provided by other witnesses, with the exception that he opined that Ms. Howard was not competent at the time of the plea. Strangely, the PCR judge *sua sponte* found that Dr. Martin was not credible “in light of the other evidence in the case and the unconvincing basis and reasoning for his opinion” (Order, P. 19). The Court then chose to disregard his opinions (Order, P. 20).

The PCR judge seemed to take issue with the fact that Dr. Martin only had one three-hour evaluation with Ms. Howard at the prison on May 9, 2018<sup>1</sup> (Order, P. 18). The Order is suggestive that the PCR judge failed to recognize the extent of information that Dr. Martin received and reviewed from other sources, and the judge viewed his evaluation as being inferior by comparison to the evaluation in Ramirez, *supra*.

Dr. Martin had Ms. Howard's medical records, to include the admissions to the psychiatric ward before and after the robbery (Tr. 154; R. 309-367). He had records showing that her only form of treatment was psychotropic medications prescribed by her family physician, which was not adequate treatment (Tr.160-161, 171). In fact, the medical records show that the family physician even advised Ms. Howard to see a psychiatrist (R. 373). Furthermore, through his training, Dr. Martin had a greater understanding of Ms. Howard's diagnoses, her treatment, and the medications she was taking.

Dr. Martin provided a well-reasoned basis for his opinion that Ms. Howard was not competent to enter the plea on January 25, 2017 (Tr. 158-163, 175). He was aware of the medications that she was prescribed and taking at that time, and he explained how these medications affect people (Tr. 162-163). He opined that a mental evaluation was necessary, even based solely on her medications (Tr. 162-163).

The fact that his evaluation wasn't until May 2018 did not prevent Dr. Martin from determining competency at the time of the plea (Tr. 164-165, 166). He considered her medications at the time of the plea, her perceptions at the time of the plea, her diagnoses, her psychosocial stressors, and the contents of her medical records, all of which he reviewed with her. From this, he opined that she was not competent to plea, and she should have undergone a

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<sup>1</sup> The PCR court mistakenly says, "four months after her guilty plea." The evaluation was actually around sixteen months after the plea.

mental competency evaluation (Tr. 164-167, 171). He opined that at the time of the plea, she was not able to rationally process what was going on at the proceedings (Tr. 178).

The Order shows that the trial judge had different opinions about the commission of this crime than Dr. Martin. Dr. Martin looked at all of the facts surrounding the crime, and he viewed it as being a poorly thought out crime, where Ms. Howard basically set herself up to get caught (Tr. 169). At the time of the crime, Ms. Howard was thinking in a self-destructive manner, which is consistent with her past history (Tr. 161, 167).

Contrary to the trial court's analysis (Order, P. 19), there is no evidence in the Record that conflicts with Dr. Martin's testimony. It is apparent that the Court did not like the testimony; however, this is not a legitimate reason to dismiss it. The trial court's assessment of Dr. Martin's testimony is not even factually accurate:

- The Court states Dr. Martin gave no opinion about Ms. Howard's educational or intellectual limitations (Order, P. 19). However, Dr. Martin specifically stated that she is "not an uneducated person" (Tr. 159); he stated that she's not "dumb;" and he ruled out intelligence as being an issue (Tr. 169).
- The Court did not seem to understand Dr. Martin's testimony that even though Ms. Howard knew what was going on factually, and she did know right from wrong, she was not able to rationally process things. Because she lacked the ability to rationally process the proceedings at the plea, he found her to be legally incompetent.
- The Court states that Dr. Martin did not express concerns about Ms. Howard's testimony at the PCR hearing (Order, P. 19). However, Dr. Martin testified that "[a]s seen in the testimony today by Ms. Howard..., she's easily confused." (Tr. 159). This served to corroborate his opinions.
- The Court states that it was undisputed that Ms. Howard had "significant intellectual health problems" (Order, P. 20). However, there is absolutely no evidence in the Record to support any "intellectual health" issues. The evidence is on "mental health" issues.

The fact that testimony is not directly contradicted does not make it undisputed. Black v. Hodge, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991) (citing Terwilliger v. Marion, 222 S.C. 185, 72 S.E.2d 165 (1952)). However, the appellate court qualified this holding by stating,

"[i]f there is anything tending to create distrust in his [or her] truthfulness, the question must be left to the [trier of fact]." Terwilliger, 222 S.C. at 188, 72 S.E.2d at 166. See also Johnson v. Painter, 279 S.C. 390, 392, 307 S.E.2d 860, 861 (1983) (The Court is not required to accept undisputed evidence as establishing the truth where there is reason for disbelief).

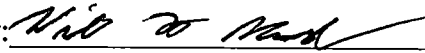
In this case, the trial court found that the only expert witness who testified was "not credible" (Order, P. 19), and it chose to disregard his medical conclusions (Order, P. 21). However, the trial court failed to articulate any valid, rational basis for this conclusion. The testimony was not contradicted; it was not inconsistent with other evidence; and the State never raised any issue on credibility. Because there was no valid articulated basis for the finding, or evidence to support it, Ms. Howard submits that this was error.

### CONCLUSION

In light of the foregoing, the Applicant respectfully submits that plea counsel's representation was ineffective and deficient, such that it fell well below the objective standard of reasonableness. The Applicant submitted more than adequate proof to establish counsel's deficiencies and Strickland prejudice. The Applicant respectfully asks this Court to review the Record and briefs submitted and grant the Applicant's request for Certiorari.

Respectfully submitted,

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By:   
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September 25, 2019

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY  
COURT OF COMMON PLEAS

THE HONORABLE R. LAWTON MCINTOSH  
CASE NO. 2017-CP-42-04446  
APPELLATE CASE NO.: 2019-001130

Stephanie Leigh Howard,  
S.C.D.C. No. 371295

Appellant,

versus

State of South Carolina,

Respondent.


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PROOF OF DELIVERY  
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This is to certify that on the 25<sup>th</sup> day of September, 2019, the undersigned, secretary to William H. Rhodes, Esq., and M. Noel Turner, III, Esq., served a copy of the PETITION FOR WRIT OF CERTIORARI by depositing a copy of the same into the United States Mail, postage pre-paid and in the correct amount to the following:

Jordan Cox, Esquire  
Johnny Ellis James, Jr., Esquire  
S.C. Attorney General's Office  
Rembert C. Dennis Building  
1000 Assembly Street  
Columbia, SC 29201

  
JO ANN CHAMPION

SWORN to before me this 25<sup>th</sup>  
day of September, 2019.

 (SEAL)  
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 4-19-2021

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SEP 30 2019

S.C. SUPREME COURT