STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable George M. McFaddin, Circuit Court Judge

DAVID G. JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000813

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR erred by finding trial counsel provided effective assistance of counsel when he failed to introduce available compelling evidence that Petitioner's intellectual disability prevented him from understanding and voluntarily waiving his rights pursuant to Miranda, where trial counsel's jaded reasoning that the jury would find petitioner's statements were voluntary regardless of the evidence, and that counsel wanted the last argument were not valid strategic reasons not to introduce this compelling evidence where petitioner's case hinged on the jury understanding petitioner was the mental equivalent of a second grader when he was being interrogated?

STATEMENT

During the September 2009 term, the Florence County Grand Jury indicted Petitioner for murder, burglary in the first degree, armed robbery, possession of a weapon during the commission of a violent crime, and criminal conspiracy. App. 1088 – 1089.

On February 9, 2012, Petitioner proceeded to trial before the Honorable Thomas A. Russo, and a jury. App. 1. W. Hames Hoffmeyer represented Petitioner. Id. Solicitor E.L. Clements, III, and deputy solicitor John C. Jepertinger represented the state. Id.

Petitioner was found guilty as indicted. App. 974, l. 25 – 975, l. 21. Petitioner was sentenced to two consecutive sentences of life imprisonment for murder and burglary in the first degree. App. 996, l. 10 – 997, l. 10. Petitioner was sentenced to thirty years' imprisonment for armed robbery; five years' imprisonment for criminal conspiracy; and five years imprisonment for possession of a weapon during the commission of a violent crime to run concurrent to his life sentences. Id.

On October 14, 2016, Petitioner filed an application for post-conviction relief (PCR). App. 999 – 1008. Petitioner alleged, inter alia, that defense counsel was ineffective for failing to introduce evidence of Petitioner's intellectual disability to show that Petitioner did not give the written statement and audio statement voluntarily. Id. On June 30, 2017, the state filed its Return and motion for a more definite statement. App. 1009 – 1013.

On April 3, 2018, Petitioner's PCR hearing was held before the Honorable George M. McFaddin, Jr. App. 1015. Jonathon Waller represented Petitioner. Id. Lindsey McCallister represented the state. Id.

In an order filed on May 8, 2019, Judge McFaddin, Jr., denied Petitioner relief. App. 1064 – 1086. Judge McFaddin found that it was trial counsel's reasonable trial strategy to forego

presenting evidence of Petitioner's intellectual disability to the jury because trial counsel did not think they would believe he had an intellectual disability and because he wanted to preserve the last argument. App. 1081 – 1083. The court stated it "will not second guess Counsel's trial tactics." App. 1083.

This petition for writ of certiorari follows.

ARGUMENT

The PCR erred by finding trial counsel provided effective assistance of counsel when he failed to introduce available compelling evidence that Petitioner's intellectual disability prevented him from understanding and voluntarily waiving his rights pursuant to Miranda, where trial counsel's jaded reasoning that the jury would find petitioner's statements were voluntary regardless of the evidence, and that counsel wanted the last argument were not valid strategic reasons not to introduce this compelling evidence where petitioner's case hinged on the jury understanding petitioner was the mental equivalent of a second grader when he was being interrogated.

Relevant Facts

On August 24, 2008, Petitioner along with three co-defendants allegedly murdered Willie Mae Hayes while they burglarized her home. App. 1088 – 1089.

A pretrial hearing was held to determine if Petitioner gave his DNA and fingerprints as well as two statements to police voluntarily. App. 32, ll. 10 – 13. Trial counsel argued that due to Petitioner's intellectual disability he could not give consent to take DNA and fingerprint samples, and Petitioner could not voluntarily give statements to police. App. 32, l. 15 – 33, l. 23.

The state presented the testimony of Dr. Alicia V. Hall from the Department of Disability and Special Needs. App 5, l. 7 – 14. Dr. Hall determined that Petitioner suffered from an intellectual disability, formerly called mental retardation, but that Petitioner was competent to stand trial. App. 10, l. 8 – 12, l. 21. She classified Petitioner as in the mild range of mental retardation. Id. Dr. Hall testified that, while Petitioner was capable of understanding what he was told, he "required more time to understand and answer questions than a person who did not have intellectual disability." App. 18, ll. 13 – 17. Dr. Hall stated Petitioner was competent to enter a guilty plea *"as long as with*

the caveat that he was given ample time to understand." App. 19, ll. 9 – 13. (emphasis added) Dr. Hall also that Petitioner could comprehend the consequences of giving statements to police, if he was given "more time to answer questions and [officers needed to] make sure that he's fully understanding what is being asked of him." App. 27, ll. 18 – 24.

On cross-examination, Dr. Hall admitted that Petitioner's school records indicated a *full-scale IQ score of 58 in September 1993 and a score of 51 in September 1996.* App. 23, ll. 18 – 23; App. 24, ll. 2 – 6. She testified that Petitioner's test scores were in the "extremely low range." App. 24, ll. 11 – 12. During the competency evaluation, Petitioner struggled to understand what a "conspiracy" was and the concept of "bargain." App.25, l. 15 – 26, l. 12. According to Dr. Hall, a finding of competency required "a fairly low standard" of understanding. App. 27, ll. 4 – 7.

Petitioner called Dr. David Richard Price to testify as an expert witness. Dr. Price's testing revealed Petitioner had an IQ of 59, which placed Petitioner at the low end of mild mental retardation. App. 110, ll. 11 – 25. Additionally, testing showed Petitioner was *at the mental equivalent of a kindergartner.* App. 112, ll. 14 – 24.

In Dr. Price's expert opinion, Petitioner lacked the ability to understand "complex words, complex sentences, complex phrases." App. 113, ll. 16 – 17. For reading, Petitioner showed a grade equivalency of a second grader, but he showed severe deficiencies in sentence and verbal comprehension meaning he could read the words but he would not internalize them. App. 113, l. 17 –114, l. 2. Petitioner's school records supported Dr. Price's results. App. 114, ll. 3 – 17. Petitioner could write and read "very simply," but that did not amount to comprehending. App. 114, ll. 18 – 23.

Regarding the Miranda v. Arizona, 384 U.S. 436 (1966) rights waiver, Dr. Price testified that Petitioner "would have understood them *as well as any kindergartner* would have understood

them." App. 116, ll. 19 – 119, l. 6. (emphasis added) Petitioner could not have understood the warnings "as far as the implications for stating them." Id. Due to these deficiencies, in Dr. Price's opinion, Petitioner did not understand the Miranda waiver. Id.

People with intellectual disabilities learn to adapt through acquiescence – they claim to understand when they do not and laugh at jokes they do not understand. Id. Petitioner also did this when Dr. Price discussed the Miranda warnings with him. Id. Petitioner could not define "waive." App. 119, ll. 7 – 17. Dr. Price had to spend a considerable amount of time explaining each right and the implications of each right to Petitioner. Id.

According to Dr. Price, Petitioner was more agreeable with the officers because he had been in custody for over eleven hours, it was the middle of the night, and at least three officers were present for the interrogation. App. 120, l. 11 – 121, l. 2. Dr. Price explained that individuals with mental disabilities "just cannot factor and process information about what's going on and understanding what's happening around them, [and] cannot make rational decisions" in periods of unusual stress. App. 133, ll. 13 – 24. Being under police investigation and being in custody for over eleven hours would lower an intellectually disabled person's ability to comprehend and make informed choices and decisions. App. 133, l. 25 – R. 134, l. 19.

On cross-examination, Dr. Price testified that individuals with mild mental retardation can, under the right circumstances, hold a job. App. 124, ll. 13 – 18. Petitioner worked at McDonald's. App. 124, l. 19 – 125, l. 16. Dr. Price explained that even kindergartners can perform routine skills. Id. The solicitor noted on the fact that Petitioner had entered guilty pleas previously; and therefore, he had been informed of his rights and waived those rights. App. 129, ll. 1 – 11. However, Dr. Price explained, again, this was an example of acquiescence as all that was required of Petitioner was agreement. App. 129, ll. 12 – 21. Dr. Price, like Dr. Hall, clarified that competency to stand

trial is not the same as competency to enter a guilty plea because Petitioner would require "special education" in order to enter a guilty plea. App. 135, ll. 10 – 15. Moreover, the courts typically take more time during guilty plea colloquies and ask the defendant if they understand after every question in the colloquy. Most importantly, Dr. Price testified that Petitioner "never profited from any of those experiences and *he really doesn't have an ability to learn.*" App. 138, l. 24 – 140, l. 8. (emphasis added)

At the conclusion of the testimony, trial counsel argued the issue was whether Petitioner understood his Miranda rights and then freely and voluntarily chose to give up those rights. App. 156, l. 18 – 158, l. 6. Judge Russo ruled Petitioner's statements were admissible. App. 229, l. 2 – 230, l. 24. However, he emphasized that the issue of the voluntariness of Petitioner's statements to police was still an issue for the jury to determine. App. 609, l. 11 – 611, l. 24.

During the trial, trial counsel's strategy was focused on expressing to the jury that Petitioner did not voluntarily give those statements. Trial counsel made multiple attempts at introducing Petitioner's intellectual disabilities during the state's case in chief, but the court would not allow it. For example, during the testimony of officers Compton, Godwin, and Drayton trial counsel proffered cross-examination testimony of the interviewing police officers on when they discovered Petitioner's intellectual disability. App. 658, l. 4 – 663, l. 6; App. 733, l. 19 – 734, l. 16; App. 858, l. 10 – 860, l. 23. The court ruled that while trial counsel could ask about their knowledge of Petitioner's level of education, he could not ask about Petitioner's intellectual disability because it was a fact not in evidence. App. 661, l. 24 – 662, l. 14.

Trial counsel even asked the court to take judicial notice of Petitioner's intellectual disability. App. 654, ll. 15 – 19. Moreover, trial counsel requested a charge on mere presence because he thought the jury might believe that that Petitioner did not have the mental capability

to voluntarily participate in the incident. App. 609, l. 11 – 611, l. 24. Due to trial counsel's failure to introduce evidence of Petitioner's intellectual disability, the state's testimony about Petitioner's competency from the police officers who interrogated him went uncontradicted. Those officers all testified that Petitioner's statement was "completely voluntary." App. 621, l. 23 – 624, l. 20; App. 641, ll. 7 – 11; App. 716, l. 13 – 723, l. 19; App. 849, l. 18 – 856, l. 9.

Trial counsel testified at Petitioner's PCR that his decision to not introduce evidence of Petitioner's intellectual disability was because he thought the jury would still think that Petitioner gave the inculpatory statements to police voluntarily. App. 1041, l. 19 – 1042, l. 18. Trial counsel said he did not want to lose last argument by presenting evidence of Petitioner's intellectual disability if the jury was not likely to believe Petitioner's statements were involuntary. Id.

The PCR court found that trial counsel's decision to not introduce evidence of Petitioner's intellectual disability was a reasonable trial strategy and would not "second guess Counsel's trial tactics." App. 1081 – 1083.

Discussion

The crux of the Petitioner's case was whether Petitioner's intellectual disability rendered him unable to voluntarily give the inculpatory statements to police. Trial counsel provided ineffective assistance of counsel when he failed to introduce evidence to the jury of Petitioner's intellectual disability to prove that Petitioner could not voluntarily give a statement to police.

When alleging ineffective assistance of counsel, a PCR applicant must satisfy the two-prong Strickland test. Strickland v. Washington, 466 U.S. 668, 687 (1984). First, the applicant must establish plea counsel's performance was deficient. Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64. Second, generally the applicant must demonstrate plea counsel's "deficient

performance prejudiced the [applicant] to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 694). But see Sellner v. State, 416 S.C. 606, 612, 787 S.E.2d 525, 528 (2016) (holding petitioner was entitled to relief without needing to establish prejudice where plea counsel advised petitioner to plead guilty to an offense unsupported by the facts).

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 426 (1966). State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007). In South Carolina, a court must examine the totality of the circumstances surrounding the custodial statement. The examining court must answer the question: did totality of the circumstances surrounding the custodial statement defeat the defendant's will? State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010).

> Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; ***physical condition and mental health***; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; ***direct or indirect promises***, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (emphasis added).

An examination of the totality of the circumstances reveals Petitioner did not provide a knowing, voluntary, and free statement to law enforcement as there was evidence that Petitioner suffered from an intellectual disability that rendered him unable to comprehend the consequences of giving a statement to police. The statements by Petitioner were crucial in his case, and showing the jury that he was incapable of voluntarily making those statements was paramount. Thus, it was incumbent upon trial counsel to present evidence of Petitioner's intellectual disability to the jury to properly argue in Petitioner's defense. Trial counsel's failure to do so amounted to deficient performance and because the outcome of Petitioner's trial would likely have been different, Petitioner was prejudiced by that deficient performance.

In Ramirez v. State, 419 S.C. 14, 795 S.E.2d 841 (2017) this Court held that Ramirez's plea counsel provided ineffective assistance of counsel for failing to request an independent competency evaluation prior to Ramirez's guilty plea. Id. at 16, 795 S.E.2d at 842. Ramirez was indicted for assault and battery with intent to kill, kidnapping, first-degree criminal sexual conduct with a minor, first-degree burglary, and lewd act upon a child. Id. at 17, 795 S.E.2d at 842.

Prior to pleading guilty, Ramirez was sent to the Department of Mental Health to undergo a competency evaluation. Id. Dr. Dalal found Ramirez was competent to stand trial; however, "Dr. Dalal did not review any collateral sources, nor did he perform any psychological testing or consider a psychological diagnosis." Id. at 17, 795 S.E.2d at 843.

Following Dalal's report, plea counsel requested that Ramirez undergo a psychological examination with Dr. Stephen Gedo. Id. at 18, 795 S.E.2d at 843. Dr. Gedo determined Ramirez had a general IQ level between thirty-one and forty-four, falling within the range of Severe Mental Retardation and was functioning at the intellectual level of a four to seven-year-old child.

Dr. Gedo diagnosed Ramirez with an adjustment disorder with mixed disturbance of emotions and conduct, severe mental retardation; however, Dr. Gedo rendered no opinion as to Ramirez's competency to stand trial. Id. at 18, 795 S.E.2d at 843.

Ramirez pled guilty but mentally ill to all charges and both evaluations were submitted into evidence; however, there was no request for a further competency evaluation. Id. at 19; 795 S.E.2d at 843 – 844. Ramirez argued in PCR that plea counsel was deficient for failing to obtain an independent mental examination. Id. at 19, 795 S.E.2d at 844.

At Ramirez's PCR hearing, plea counsel testified that Ramirez was "very naïve and he questioned whether Ramirez fully understood what was going on prior to and at the plea hearing." Id. Plea counsel then admitted he should have moved to have Ramirez's competency reevaluated but gave no explanation for his failure to do so. Id.

The PCR court dismissed Ramirez's application finding that plea counsel was not deficient, and Ramirez was not prejudiced by plea counsel's representation. Id. The court of appeals held that that although plea counsel was deficient, they were constrained by the "any evidence" standard to affirm the PCR court's decision. Id.

This Court affirmed the court of appeals holding that plea counsel provided deficient performance but overturned the determination that the any evidence standard prevented Petitioner from receiving relief. Id. at 21, 795 S.E.2d at 845. This Court stated that plea counsel was on notice of Ramirez's intellectual shortcomings and that established a reasonable, "if not strong, likelihood that Ramirez was incompetent at the time of the plea." Id. at 23, 795 S.E.2d at 846. Once Ramirez established that reasonable probability, "prejudice [was] also demonstrated." Id. Accordingly, Ramirez's guilty plea was vacated and his case remanded to the court of general sessions. Id.

In the death penalty context, this Court decided in Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009) that the PCR court erred in denying Rosemond relief where he alleged ineffective assistance of counsel for failure to introduce mitigation evidence of Rosemond's mental illness at the sentencing phase of his trial. Id. at 324, 680 S.E.2d at 7.

Rosemond was on trial for the murder of his live-in girlfriend. Id. This Court determined there was, "no dispute regarding guilt." Id. However, trial counsel did not present evidence of Rosemond's mental illness as a mitigating factor because he wrongfully believed that he was precluded from doing so after the trial court found Rosemond competent to stand trial. Id. at 326, 680 S.E.2d at 7.

At a pretrial competency hearing Dr. Harold Morgan testified that Rosemond was "clearly paranoid," and Rosemond prematurely terminated the interview. Id. at 327, 680 S.E.2d at 9. At that same hearing, Dr. Shea testified that his diagnosis of Rosemond was that he had "suffered from a delusional disorder or schizophrenia." Id. Thus, this Court held that trial was on notice of Petitioner's mental illness. Id.

However, during the sentencing phase, trial counsel only called five witnesses, none of whom mentioned Rosemond's mental health issues. Id. at 328, 680 S.E.2d at 9 – 10. "Given the jury's struggle during the sentencing phase and the want of any mental health mitigation evidence," this Court held that the known evidence of Rosemond's mental health issues "'might well have influenced the jury's appraisal' of culpability." Id. at 329, 680 S.E.2d at 10 (quoting Rompilla v. Beard, 545 U.S. 374, 393 (2005)). As a result, Rosemond was prejudiced, because the confidence in the outcome of his case was substantially undermined by his counsel's failure to present mental health mitigation evidence. Id.

Trial counsel here provided deficient performance when he failed to introduce evidence of Petitioner's intellectual disability because his actions during the trial show that he was on notice of his disability and show that he knew that presenting evidence of that disability was crucial in this case. Ramirez, at 23, 795 S.E.2d at 846. Trial counsel repeatedly tried to cross examine the interrogating officers regarding Petitioner's intellectual disability, but the trial court would not allow him to do so until he introduced evidence of Petitioner's disability. App. 661, l. 24 – 662, l. 14. Trial counsel proffered the cross examination of those officers on Petitioner's intellectual disability to put it on the record. App. 658, l. 4 – 663, l. 6; App. 733, l. 19 – 734, l. 16; App. 858, l. 10 – 860, l. 23. He even attempted to get the court to take judicial notice of the fact that Petitioner had an intellectual disability. App. 654, ll. 14 – 19. Trial counsel's actions showed he understood the importance of Petitioner's intellectual disability.

Trial counsel's explanation at PCR did not absolve his deficient performance. App. 1045, l. 1 – 1047, l. 23. Trial counsel's jaded belief that it was a foregone conclusion for the jury to conclude Petitioner gave those statements voluntarily, even if he introduced evidence of Petitioner's intellectual disability, was not a valid reason for failure to introduce that evidence. Id.; See Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995) (holding that trial counsel's belief that requesting an alibi charge would not "come off too well in front of the jury" was not a valid strategic reason to forego requesting the alibi charge). Having last argument did not outweigh presenting crucial evidence that went directly to the main issue in Petitioner's case, namely whether Petitioner was mentally capable of voluntarily giving inculpatory statements to police. See Vail v. State, 402 S.C. 77, 88, 738 S.E.2d 503, 509 (Ct. App. 2013) ("Counsel must articulate a *valid* reason for employing a certain strategy to avoid a finding of ineffectiveness.") (quoting Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). (emphasis in original)

The crux of the case was whether Petitioner gave those inculpatory statements voluntarily. The only evidence that Petitioner could present to show he could not voluntarily give those inculpatory statements was that he suffered from an intellectual disability and trial counsel failed to present that to the jury. Thus, trial counsel's deficient performance prejudiced the outcome of Petitioner's case because his failure allowed the jury to unknowingly convict a man *with the mental capabilities of a kindergartener* to consecutive life sentences of imprisonment. App. 111, l. 6 – 112, l. 24; App. 965, 25 – 966, l. 21.

CONCLUSION

By reason of the foregoing argument Petitioner respectfully requests that this Court grant certiorari to allow for full briefing on this issue.

Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of January, 2020.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable George M. McFaddin, Circuit Court Judge

DAVID G. JOHNSON,

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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 Lindsey McCallister, 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 David Gerrard Johnson, #312138, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 10th day of January, 2020.

Victor R. Seeger

Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 10th day of January, 2020.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 30, 2029