STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
The Honorable Walton J. McLeod, IV, PCR Judge

Appellate Case No. 2019-001060

ANDREW E. TORRENCE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

I. Whether the lower court erred by failing to find that that trial counsel was deficient in how he handled the matter of Petitioner's mental health to the degree that the outcome of the trial cannot be relied upon as having produced a just result.

II. Whether the lower court erred by not finding that trial counsel rendered ineffective assistance of counsel when he failed to conduct a proper independent investigation into State's position regarding Petitioner's whereabouts in the hours prior to the incident.

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON CERTIORARI

I. The PCR court correctly found Counsel was not ineffective for failing to pursue a mental health defense or otherwise utilize mental health experts at trial where Petitioner was found competent to stand trial and Counsel had no indication Petitioner was insane at the time of the crime.

II. The PCR court correctly concluded Counsel was not ineffective for failing to investigate the State's position regarding Petitioner's whereabouts in the hours prior to the shooting where Petitioner failed to establish any resulting prejudice.

STATEMENT OF THE CASE

In the early morning hours of September 28, 2008, Petitioner and Zachary Chaplin got into a physical altercation while at a bar. Although Petitioner initially exited the bar after the fight, he decided to go back in with his gun to allegedly make a citizen's arrest and detain Chaplin for the earlier assault. Petitioner testified he brought the gun with him as a deterrent against any further violence and had no intent to shoot the gun. However, while Petitioner was conducting the alleged citizen's arrest, Chaplin charged him from across the bar. Petitioner admitted he fired the gun twice at Chaplin. Both bullets struck Chaplin, and he died as a result of the gunshot wounds approximately six weeks later.

In August 2010, the Lexington County Grand Jury indicted Petitioner for murder (2010-GS-32-2318). The Lexington County Grand Jury subsequently indicted Petitioner for possession of a weapon during the commission of a violent crime (2011-GS-32-1440) and carrying a firearm onto the premises of a business selling alcohol for on-premises consumption (2011-GS-32-1440).

On May 31, 2011, Petitioner proceeded to a jury trial before the Honorable R. Knox McMahon. Wayne Floyd, Esquire (Counsel), represented Petitioner. Deputy Solicitor D. Shawn Graham and Assistant Solicitor Alton H. Eargle of the Eleventh Circuit Solicitor's Office prosecuted the case. On June 3, 2011, the jury returned verdicts on each indictment, finding Petitioner guilty of both weapons charges and of the lesser-included offense of voluntary manslaughter. Judge McMahon sentenced Petitioner to concurrent terms of twenty-five years' imprisonment for voluntary manslaughter and five years' imprisonment for each weapons charge.[1] Petitioner filed a timely notice of appeal.

[1] Judge McMahon later amended Petitioner's sentence for carrying a firearm into a business selling alcohol for on-premises consumption (2011-GS-32-1440) from five years to three years. (App. 768).

Blake A. Hewitt, Esquire,[2] (Appellate Counsel) and John C. Nichols, Esquire, perfected the appeal. Following briefing and oral argument, the Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion on April 10, 2013. *State v. Torrence*, Op. No. 2013-UP-152 (S.C. Ct. App. filed April 10, 2013). Petitioner's subsequent petition for rehearing and for writ of certiorari to the South Carolina Supreme Court were denied. The case was remitted back to the circuit court on November 17, 2014.

Petitioner commenced this PCR action on June 1, 2015, and the State made its return on July 12, 2017. Petitioner, through current PCR counsel filed his first and second amended applications on July 13, 2017, and October 26, 2018, respectively. An evidentiary hearing into the matter convened before the Honorable Walton J. McLeod, IV (PCR court), on November 5–6, 2018.[3] Petitioner was present and represented by Tricia A. Blanchette, Esquire. Assistant Attorneys General Kelly Oppenheimer and Sherrie Butterbaugh represented the State. Counsel, Appellate Counsel, Dr. Tora Brawley, Dr. Donna Maddox, Peter Skidmore, Brenda Torrence, and Deputy Solicitor Graham testified at the evidentiary hearing. Petitioner did not testify.

At the close of the evidentiary hearing, the PCR court allowed the parties time to obtain the PCR transcript and submit proposed orders. On April 22, 2019, after a reviewing the entire record and testimony presented, the PCR court issued an order denying relief and dismissing the action with prejudice. Petitioner thereafter filed a motion to alter or amend pursuant to Rule 59(e), SCRCP, and the State filed a return. The PCR court denied the Rule 59(e) motion on May 31, 2019. This appeal follows.

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[2] The Honorable Blake A. Hewitt has since been elected to the South Carolina Court of Appeals.

[3] On April 16, 2018, a motions hearing convened before the Honorable William A. McKinnon. The parties discussed scheduling matters and Dr. Donna Maddox provided testimony regarding Petitioner's competency to testify at the PCR hearing. The transcript of this hearing was provided to the PCR court for its review. (App. 953).

STANDARD OF REVIEW

In PCR matters, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To prove prejudice, the applicant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry,* 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694.

ARGUMENT

I. The PCR court correctly found Counsel was not ineffective for failing to pursue a mental health defense or otherwise utilize mental health experts at trial where Petitioner was found competent to stand trial and Counsel had no indication Petitioner was insane at the time of the crime.

Petitioner contends that "trial counsel's failure to properly address Petitioner's mental health *infected every aspect of Petitioner's defense* in such a way that it was not reasonable trial strategy . . ." (Pet. 11–12) (emphasis added). Petitioner further contends that the PCR court "erred by failing to find that trial counsel was deficient in how he handled the matter of mental health to the degree that the outcome of the trial cannot be relied upon as having produced a just result. (Pet. 1–2). Petitioner relies on the deterioration in his present mental health as evidence of his condition in 2011, despite the fact that these conditions were not observable at the time of trial.

Petitioner's strained interpretation of *Strickland* ignores the testimony of his own expert, Dr. Maddox, who evaluated Petitioner before trial, and reported to Counsel that she had no concerns regarding Petitioner's competency to stand trial or mental status at the time of the crime. *See Bell v. Thompson*, 545 U.S. 794, 809 (2005) (recognizing that opinions conducted after post-trial deterioration are not likely to alter ruling denying relief). Reliance on this "harsh light of hindsight" to cast doubt on a trial that took place almost nine years ago is precisely what *Strickland* sought to prevent. *Bell v. Cone*, 535 U.S. 685, 702 (2002); *Strickland*, 466 U.S. at 689 (explaining that "fair assessment" of counsel's representation requires the reviewing court make "every effort to . . . eliminate distorting effects of hindsight"). Nonetheless, Petitioner's preferred strategy, concocted with the benefit of hindsight, grows out of his baseless contention that his alleged mental health issues would have exonerated him from killing Zachary Chapin. This Court should deny certiorari and there by "decline to allow an ineffective assistance of counsel claim to create a

situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial." *Mazzell v. Evatt,* 88 F.3d 263, 269 (4th Cir. 1996).

A. Petitioner's Mental Health History

At the PCR hearing, Petitioner presented the testimony of Dr. Tora L. Brawley, Ph.D., and Dr. Donna Schwartz-Maddox, M.D.

2010

Dr. Maddox, an expert in forensic psychiatry, was initially retained by Counsel in 2010 to evaluate Petitioner.[4] (App. 982). During that time, Dr. Maddox spoke with Petitioner's mother about his prior history of concussions from playing football in high school and being struck by a vehicle during a hit-and-run. (App. 982). Ms. Torrence also reported that, shortly before the crime, Petitioner had received lumbar punctures to treat encephalitis. (App. 982).

Dr. Maddox met with Petitioner in 2010 at the Lexington County Detention Center for his evaluation. (App. 982). She "did not detect any symptoms of psychosis" nor did she observe any evidence that Petitioner was psychotic at that time. (App. 1011). Petitioner did not report experiencing any hallucinations nor was Dr. Maddox aware of any history of inpatient or outpatient psychiatric treatment. (App. 987). Dr. Maddox's only concern was that Petitioner showed "symptoms consistent with some organicity," including difficulty with memory and verbal fluency. (App. 983). In light of Petitioner's past head injuries and encephalitis, Dr. Maddox recommended neuropsychological testing, which would "show where [Petitioner's] brain had deficits" and allow her properly diagnose him. (App. 997, 1019). Dr. Maddox recalled one phone

[4] As stated in the Petition, Dr. Maddox explained that she was testifying from memory—her records from the 2010 evaluation were no longer available. (App. 982). Dr. Maddox turned her chart over to appellate counsel during the direct appeal, which got "lost in the mix" and could not be recreated. (App. 990).

conversation with Counsel where they discussed her findings and recommendations. (App. 983). However, Dr. Maddox had no further communication about Petitioner's case until she spoke with his mother after the trial in 2011. (App. 983).

2016

Dr. Maddox was subsequently retained to assist in Petitioner's PCR, and saw him for the second time in March of 2016. (App. 1018). At that time, Dr. Maddox stated that Petitioner's "mental state had dramatically changed" since 2010, and that he was presenting "classic symptoms of psychosis." (App. 989). Dr. Maddox reviewed Petitioner's records from the South Carolina Department of Corrections, which contained reports of similar symptoms beginning in 2016. (App. 989).

Shortly thereafter, Dr. Brawley, an expert in clinical psychology and neuropsychology, evaluated Petitioner's cognitive functioning at the request of Dr. Maddox. (App. 962). Dr. Brawley explained that neuropsychologists examine brain function and how it effects behavior. (App. 962). Dr. Brawley conducted an extended clinical interview and administered a battery of psychological tests to Petitioner as part of her assessment. (App. 962–63).

During this interview, Petitioner informed Dr. Brawley that he was "under remote neuro-monitoring and that this was affecting the way he was thinking." (App. 963). Petitioner reported problems with memory loss, irritability, paranoia, and weight gain. (App. 964). Dr. Brawley testified in detail regarding her findings based on Petitioner's test results, explaining that each test measures different areas of brain function. (App. 964–67). Dr. Brawley concluded that Petitioner suffered from "moderate to severe deficits in cognitive domains, suggestive of brain organicity." (App. 967). In other words, "it appears that there may be some areas of brain damage or areas of the brain that aren't working as well as they should." (App. 969). Dr. Brawley recommended a full

neurological evaluation and provided her report to Dr. Maddox. (App. 968).

2017

In June of 2017, Dr. Maddox conducted a full evaluation of Petitioner after reviewing evidence from the case including witness statements, surveillance videos, prior neurology clinic notes, emergency department records emails between attorneys, medical records of the victims, 911 calls, the results of Dr. Brawley's testing, and Petitioner's medical records from SCDC. (App. 986–987). Dr. Maddox noted that she was unable to obtain any family history records since Petitioner was adopted. (App. 987). Dr. Maddox testified that Petitioner's prior head injuries and alcohol abuse were of particular significance in her evaluation. (App. 988).

Dr. Maddox explained that Petitioner currently suffers from "delusions" and believes a remote neuro-monitoring system has been implanted in his brain. (App 931, 991). Petitioner told Dr. Maddox originally that he believed his mother was involved in the monitoring, possibly to help stop his alcohol abuse (App. 991). Petitioner now believes that the government is involved in the neuro-monitoring system, which controls his actions, words, and thoughts. (App. 932). Petitioner reported that the system's "voices" tell him how to act, make him agitated, and affect his ability to function. (App. 992). Dr. Maddox further explained that Petitioner does not believe the victim or his father are dead. (App. 993). Dr. Maddox then testified to the mental status examination—his clean hygiene, rapid rate of speech, jumping from one topic to another and coming back to certain topics, and his disbelief that he is mentally ill. App. 994–95).

Dr. Maddox testified that she ultimately diagnosed Petitioner with three separate disorders. For the psychosis, she diagnosed him with unspecified schizophrenia and psychotic spectrum disorder. (App. 1001). Dr. Maddox explained that she characterized the schizophrenia has "unspecified" because she "can't tell whether the psychosis is coming from his traumatic brain

injury—you can have traumatic brain injuries and develop psychosis over time—or if he, indeed, is very unfortunate and has both oranicity and schizophrenia." (App. 1001–02). Based on Dr. Brawley's testing, Dr. Maddox also diagnosed Petitioner with a "major neurocognitive impairment," secondary to his history of meningitis, his history of closed-head injuries, and alcohol abuse. (App. 1002). Finally, Dr. Maddox diagnosed Petitioner with alcohol abuse disorder based on his longstanding history of alcohol abuse over the years. (App. 1002).

2018

Before Dr. Maddox completed her formal report, an issue arose regarding Petitioner's competency to take the stand at his PCR hearing. (App. 922). Specifically, PCR counsel became concerned when Petitioner was moved to a different correctional facility in February 2018. (App. 911). The move apparently caused Petitioner great distress, and PCR counsel was concerned that his mental state had deteriorated to the point where he could not actively assist her in preparing for his PCR. (App. 911).

Dr. Maddox then met with Petitioner in March and April. Based on these evaluations, Dr. Maddox testified that it was her opinion, to a reasonable degree of medical certainty that, Petitioner was not competent to testify at the PCR hearing. (App 931–32). Dr. Maddox explained that Petitioner is presently unable to tell the difference between a truth and a lie, particularly due to his fixed beliefs about the neuro-monitoring system and resulting paranoia. (App. 932).

B. The PCR court correctly concluded Counsel was not ineffective for failing to pursue a mental health defense because Counsel reasonably pursued a trial strategy based on Petitioner's position he was attempting to effectuate a citizen's arrest on the victim and shot him in self-defense.

In accordance with *Strickland*, "[c]ounsel in criminal cases are charged with the responsibility of conducting 'appropriate investigations, both factual and legal, to determine if matters of defense can be developed." *U.S. v. Mooney*, 497 F.3d 397, 400 (4th Cir. 2007).

Strickland, however, requires trial counsel be given leeway to make reasonable strategic decisions—judicial scrutiny of counsel's performance "must be highly deferential," judged "on the facts of the particular case," and considered "from counsel's perspective at the time." 466 U.S. at 689–690. Thus, counsel's "strategic choices made after thorough investigation . . . are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690–91.

Here, the PCR court correctly found Counsel was not ineffective in declining to further investigate Petitioner's mental health and Counsel's decision not to pursue a mental health defense at trial was reasonable. Following the evaluation of Petitioner prior to trial, Dr. Maddox reported to Counsel that she had no concerns about Petitioner's competency or mental health. (App. 1089). Counsel at that point reasonably decided not to further utilize Dr. Maddox's services since she could not provide anything useful at trial on the issue of guilt or innocence. (App. 1029). *See Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir. 1998) ("To be reasonably effective, counsel was not required to second-guess the contents of [their expert's] report. ... . [C]ounsel understandably decided not to spend valuable time pursuing what appeared to be an unfruitful line of investigation.") (internal citations omitted).

Nonetheless, Petitioner contends Counsel's decision not to utilize Dr. Maddox at trial is "troubling" since Counsel did not inform Petitioner's mother of this decision and because Dr. Maddox's name appeared on the witness list. (Pet. 11). Counsel explained that putting someone's name on the witness list does not mean he is going to call them at trial. (App. 1090). "A lot of times," Counsel explained, witnesses are put on the list "just in case something comes up or just because you want to have a smokescreen" up to hide "who you're really going to call." (App.

1091). *See Reeves v. State*, 415 S.C. 366, 377, 782 S.E.2d 747, 752 (Ct. App. 2015) ("Where counsel articulates a valid trial strategy for failing to call an expert witness to testify at trial, such conduct will not be deemed ineffective.").

Strickland further explains that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland,* 466 U.S. at 691. In particular, counsel's investigative decisions are often based on information supplied by the defendant. *Id.* Notwithstanding Dr. Maddox's report, Counsel further testified that insanity was not a viable defense because Petitioner consistently maintained he did not intend to kill the victim, that he was attempting to make a citizen's arrest, and shot the victim in self-defense. (App. 1092). *See Strickland,* 466 U.S. at 691 ("[W]hen the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether."). Counsel developed a theme based on this position, which was wholly consistent with the information Petitioner supplied to Counsel and what Petitioner testified to at trial. (App. 1105). To present simultaneously a defense that Petitioner was insane or lacked the mens rea to commit the crime would have undermined Petitioner's requested strategy and undercut his own credibility.

Counsel testified that he spoke with Petitioner at length in preparing for trial—Petitioner appeared to understand his charges, the law, and the defense strategy as Counsel explained it to him. (App. 1088–89). Other than speaking with Petitioner, Counsel testified that his investigation consisted of studying the evidence, going to the scene, and speaking with potential witnesses. (App. 1041). Counsel also explored the possibility of challenging other portions of the State's cause, including the victim's cause of death. (App. 1039). Counsel thus made a diligent effort to pursue promising lines of investigation, and Petitioner's present attempt to challenge Counsel's

decision not to investigate mental health issues more fully is "a product of hindsight and fails to address the facts reasonably relied upon by counsel at the time." *Roach v. Martin*, 757 F.2d 1463, 1478 (4th Cir.1985).

C. The PCR court correctly concluded Counsel was not ineffective for failing to pursue a mental health defense because no evidence was presented that Petitioner was insane at the time he committed the crimes and because Petitioner's alcohol intoxication at the time of the crimes precluded Counsel from pursuing an insanity defense or guilty but mentally ill verdict.

Counsel may reasonably rely on his own perceptions in determining what, if any, expert evaluation is necessary and appropriate to the determination and development of defenses. *See Jeter v. State.* 308 S.C. 230, 233,417 S.E.2d 594, 596 (1992) (finding counsel reasonably relied on his own perceptions in deciding to not request a mental examination which may have formed the basis of an insanity defense or a determination of incompetency). To show prejudice for failure to pursue an insanity defense, a PCR applicant must produce some evidence of insanity or show that with the exercise of due diligence, an insanity defense could have been developed. *Jeter,* 308 S.C. at 233–34, 417 S.E.2d at 596. In other words, to find counsel ineffective, *Strickland* requires an applicant to demonstrate a reasonable probability he was insane at the time of commission of the crime.

In South Carolina, "the M'Naughten test is the standard for determining whether a defendant's mental condition at the time of the offense rendered him criminally responsible." *State v. South*, 310 S.C. 504, 508, 427 S.E.2d 666, 669 (1993). This Court has made it abundantly clear that the only relevant inquiry in this State of whether an accused is criminally responsible for his actions is whether he, "as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong." *State v. Senter*, 396 S.C. 547, 552, 722 S.E.2d 233, 236 (Ct. App. 2011) (quoting

S.C. Code Ann. § 17-24-10(A) (2003)). "[T]he key to insanity is 'the power [of the defendant] to distinguish right from wrong in the act itself—to recognize the act complained of is either morally or legally wrong.'" *State v. Wilson*, 306 S.C. 498, 506, 413 S.E.2d 19, 23 (1992) (alterations in original) (internal citation omitted). Moreover, a central concept of the M'Naughten test is that "the mental condition which produced such disability must have been brought about by circumstances beyond control of defendant." *Kane v. United States*, 399 F.2d 730 (9th Cir. 1968).

Here, neither Dr. Brawley nor Dr. Maddox could testify to any degree of medical certainty that Petitioner was unable to distinguish between right and wrong. Dr. Brawley testified that it is highly likely that Petitioner's cognitive deficits were present at the time of the crime due to his history of concussions and spinal meningitis. (App. 971). Due to the structured environment, Dr. Brawley testified that it is "highly unusual" to see a patient's functioning begin to decline in prison. (App. 975). However, on cross-examination, Dr. Brawley admitted she could not say to a reasonable degree of medical certainty Petitioner suffered from the aforementioned deficits at the time of the commission of these crimes nor could she say the concussions and the meningitis definitely contributed to the deficits. (App. 972). Dr. Brawley testified there was no way to establish a baseline for his level of functioning at the time of the crimes; however, she explained that "there are certain areas of functioning that are considered crystallized, meaning they hold through early dementia or head injuries and things like that." (App. 972).

One of the tests administered to Petitioner, the Wechsler Adult Reading Test, indicated Petitioner's premorbid IQ was 111 based on these crystallized areas of functioning. (App. 967). Dr. Brawley explained that Petitioner's full scale IQ of 86, based on his current level of functioning places him in the low average range, and that his scores on this test suggest a "decline in overall intellectual functioning." (App. 965). Even with the lowered IQ of 86, however, Dr. Brawley

testified a person with an IQ of 86 can understand the difference between right and wrong, the difference between a truth and a lie, and make decisions for themselves. (App. 975). Therefore, the PCR court correctly concluded that, regardless of whether Petitioner's cognitive deficits were present at the time of the crime, there is no evidence an insanity defense could have been established. *Cf. Mackey v. Dutton,* 217 F.3d 399, 409 (6th Cir.2000) (holding that the petitioner failed to establish that an expert's testimony would have been favorable to his insanity defense because the expert's report failed to speak to the ultimate issue—legal insanity at the time the offenses were committed).

Notwithstanding the fact that no evidence exists suggesting Petitioner was insane under South Carolina law at the time of the shooting, Petitioner cites *Gill v. State* in support of his contention that Counsel should have presented testimony from mental health experts "to address the impulsive actions and irritability addressed by Dr. Maddox." (Pet. 14). In *Gill*, this court found the trial judge did not err in refusing to charge the jury on diminished capacity because it is not recognized in South Carolina. 346 S.C. 209, 220, 552 S.E.2d 26, 32 (2001).[5] Petitioner nonetheless attempts to skirt this Court's express rejection of the diminished capacity defense by pointing out that the mental health expert in *Gill* was "allowed" to testify regarding the defendant's inability to formulate malice aforethought as a result of borderline intellectual capacity and antisocial personality disorder. (Pet. 13–14). On the basis that Petitioner's case is "analogous to *Gill,*" Petitioner concludes that Counsel should have elicited similar testimony from mental health experts. (Pet. 13–14).

[5] *See State v. Santiago*, 370 S.C. 153, 162, 634 S.E.2d 23, 28 (Ct. App. 2006) (finding the trial judge properly excluded expert testimony proffered for the sole purpose of establishing the defendant was guilty of a lesser-included offense due to his diminished capacity); *See Goins v. Warden, Perry Corr. Inst.*, 576 F. App'x 167, 173 (4th Cir. 2014) (explaining that counsel cannot be found ineffective for failing to attempt to introduce inadmissible mental health evidence in pursuit of a diminished capacity defense).

Dr. Maddox explained how people with underlying organicity often "react without thinking," can "become extremely irritable," and that "their mood can change dramatically very quickly. (App. 998, 1017). Dr. Maddox further testified that adding alcohol to an impaired brain often exacerbates these issues and makes the person more impulsive. (App. 998). However, even with the added effects of alcohol, Dr. Maddox never concluded Petitioner would have been unable to distinguish right from wrong. *See State v. Gardner*, 219 S.C. 97, 64 S.E.2d 130, 135 (1951) ("Subnormal mentality is not a defense to crime unless the accused is by reason thereof unable to distinguish between right and wrong with respect to the particular act in question."). Any alleged prejudice suffered as a result of Counsel's failure to present this testimony is speculative at best, and hardly "sufficient to undermine confidence in the outcome" of Petitioner's trial. *Strickland*, 466 U.S. at 694.[6]

To the extent Petitioner suggests his neurocognitive impairments affected his impulsivity to the point where he was acting under an irresistible impulse at the time of the crime, this Court has expressly rejected the "irresistible impulse" test as an insanity defense. *State v. Wilson*, 306 S.C. 498, 508, 413 S.E.2d 19, 25 (1992); *see also State v. Gilstrap*, 205 S.C. 412, 32 S.E.2d 163, 167 (1944) ("[T]o allow a person to escape the consequences of his criminal act by asserting that he acted under an impulse which he could not restrain, although he knew his act to be unlawful, would be dangerous, if not destructive, to the peace of society.") (internal citations omitted). South Carolina does not recognize that one acting under an irresistible impulse is somehow less culpable, and the statutory scheme instead provides that one acting under such an impulse is guilty, albeit "guilty but mentally ill." *Wilson,* 306 S.C. at 508, 413 S.E.2d at 24–25.

"A defendant is guilty but mentally ill if, at the time of the commission of the act

[6] Moreover, Petitioner cannot show prejudice within the context of *Gill* because the jury in that case nonetheless convicted the defendant of murder.

constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong . . . , but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law." S.C. Code Ann. § 17-24-20(A); *see State v. Curry*, 410 S.C. 46, 53, 762 S.E.2d 721, 725 (Ct. App. 2014) (explaining that a person may be mentally ill, but not legally insane). A verdict of GBMI does not absolve a defendant of guilt, and a defendant found GBMI "must be sentenced as provided by law for a defendant found guilty." S.C. Code Ann. § 17-24-70. Because Petitioner is already receiving treatment for his mental health issues, Petitioner has failed to show any deficiency on the part of Counsel or any resulting prejudice in this regard.[7]

In fact, Dr. Maddox testified that Petitioner's underlying brain dysfunction may have allowed the defense to pursue a GBMI verdict had Petitioner not been drinking. (App. 997). However, Dr. Maddox correctly concluded that Petitioner's voluntary intoxication on the night in question precluded him from presenting a defense of insanity or obtaining a guilty but mentally ill verdict. (App. 988, 997).[8] *See United States v. Knott*, 894 F.2d 1119, 1122 (9th Cir. 1990) (explaining that "[a] mental disease or defect must be beyond the control of the defendant if it is to vitiate his responsibility for the crime committed" and "[i]nsanity that is in any part due to a defendant's voluntary intoxication is not beyond his control"); *Kane*, 399 F.2d at 734–36 (9th Cir. 1968) (defendant who was schizophrenic and susceptible to pathological intoxication was considered "sane but vulnerable," and remained responsible for actions when insanity was caused

[7] This Court in *Wilson* explained that the purposes for the enactment of GBMI statutes are (1) to reduce the number of defendants being completely relieved of criminal responsibility and (2) to insure mentally ill inmates receive treatment for their benefit as well as society's benefit while incarcerated.

[8] Neither Dr. Brawley nor Dr. Maddox testified that Petitioner's current mental health problems were the result of his alcohol abuse. *State v. Hartfield*, 300 S.C. 469, 473, 388 S.E.2d 802, 804 (1990) (recognizing that insanity caused by the use of drugs or intoxication may be a defense only where the insanity is permanent and destroys the defendant's ability to know right from wrong).

in part by voluntary intoxication). Despite Dr. Maddox's conclusion that Petitioner could not have pursued a GBMI plea, Petitioner nonetheless contends the PCR court erred in finding Counsel was not ineffective for failing to utilize Dr. Maddox in plea negotiations or mitigation. However, Counsel testified that Petitioner refused the State's only plea offer. (App. 1030–31, 1090).

D. The PCR court correctly concluded Counsel was not ineffective for failing to request a competency evaluation or otherwise utilize a mental health expert at trial because Counsel reasonably relied on Petitioner's prior mental health evaluation and Counsel's meaningful, substantive conversations with Petitioner that gave Counsel no reason to question Petitioner's mental competency and because Petitioner failed to demonstrate that he was not competent at the time of his trial.

Petitioner next contends the PCR court erred in finding Counsel was not ineffective for failing to utilize a mental health expert prior to and during trial, specifically with respect to competency. Due process prohibits the conviction of a person who is mentally incompetent. *Bishop v. United States*, 350 U.S. 961 (1956); *Jeter,* 308 S.C. 230, 417 S.E.2d 594. The test for competency to stand trial is whether the defendant has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as a factual, understanding of the proceedings against him. *Drope v. Missouri*, 420 U.S. 162, 172 (1975); *McLaughlin v. State*, 352 S.C. 476, 481, 575 S.E.2d 841, 843 (2003). The focus of a competency inquiry is the defendant's mental capacity—"the question is whether he has the *ability* to understand the proceedings." *Garren v. State*, 423 S.C. 1, 14, 813 S.E.2d 704, 711 (2018) (emphasis in original) (internal citations omitted). In the PCR context, an applicant must show "there is a reasonable probability he would have been determined to be incompetent" at the time of trial. *Jeter*, 308 S.C. at 234, 417 S.E.2d at 596.

As discussed above, it is undisputed that Dr. Maddox found Petitioner competent to stand trial when she evaluated him in 2010. Dr. Maddox confirmed that she would have informed

Counsel if she had any concerns. (App. 1012). Dr. Maddox noted Petitioner had no prior history of psychosis and there was no indication Petitioner was psychotic or suffering from hallucinations at that time. (App. 988, 1012). Dr. Maddox testified that Petitioner "did not have any of the symptoms that he presented with when [she] saw him six years later in 2016." (App. 988). Despite this testimony, Petitioner maintains that, because Dr. Maddox has since found Petitioner not competent to testify at the PCR hearing, Petitioner's main contention regarding competency relates to Petitioner's competency to testify at trial. (Pet. 5, 12).

Dr. Maddox testified that she would have had to see Petitioner the morning of his testimony to determine whether he was competent to testify at that time. (App. 1019–1020). Despite Petitioner's complaint that Counsel did not consider having an expert evaluate Petitioner's impulse control and decisionmaking abilities prior to him taking the stand, Counsel had no reason to second-guess Dr. Maddox's finding regarding Petitioner's competency or question Petitioner's competency on the day he testified. The fact that Dr. Maddox evaluated Petitioner before his trial is of significance in weighing exactly what evidence of illness was available at the time of counsel's representation. *See Bell*, 545 U.S. at 811 (placing emphasis on an evaluation that was contemporaneous with the trial).

As the PCR court noted, it was not until five years after the trial that Petitioner reported hearing voices while he was testifying. (App. 1017–18). As discussed by Petitioner, Dr. Maddox explained in detail how hallucinations would have affected his competency. (App. 998–1000, 1005–06). Dr. Maddox specifically addressed how a delusion that the victim was not dead "could have affected his capacity to assist in his defense" and "his rational competency." (App. 1006). However, nothing in record indicates Petitioner did not believe the victim was dead before 2016, and the fact that Petitioner was found incompetent to testify at his PCR is not probative as to his

competency during his trial.

Counsel testified he typically does not have defendants testify because they will get confused during cross-examination, but Petitioner was adamant about telling his side of the story. (App. 1092). Counsel further explained that in cases like Petitioner's, where there is "a video of him with a weapon and somebody dead," "you almost have to have the person testify." (App. 1092). Moreover, the record indicates Petitioner coherently recounted his version of what happened on the night in question during his testimony. *See State v. Bradford*, 256 S.C. 51, 180 S.E.2d 632 (1971) (where defendant charged with rape testified in his own defense, denied charges of rape, and intelligibly related his version of what happened, motion to quash indictment on the grounds that the defendant did not have the mental capacity to meaningfully participate in his defense or to understand nature of proceedings against him was properly denied).

Counsel testified that he did not notice any confusion unusual to what a normal defendant experiences on cross-examination. (App. 1036). As the United States Supreme Court has noted, "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense." *Medina v. California*, 505 U.S. 437, 450 (1992) (noting the significance of trial counsel's opinion regarding competency because trial counsel interacts with the defendant on a daily basis and is in the best position to evaluate whether the defendant is able to participate meaningfully in the proceedings). Counsel further testified he did not conduct redirect examination of Petitioner because he felt Petitioner had done well and did not want to expose him to additional re-cross. (App. 1036).

Petitioner's own mother merely stated that Petitioner laid his head down during cross-examination, not that he was exhibiting any signs of hearing voices or experiencing hallucinations. (App. 1235, 1242). Petitioner's statements during the colloquy with the trial judge further indicate

he understood what was going on and did not suffer from any physical or mental problem that would affect his ability to think clearly. (App. 456–457).[9] Nothing in the record suggests that Petitioner exhibited any type of disruptive behavior or that his demeanor in the courtroom might have suggested that he was incompetent to stand trial.

Petitioner similarly contends the PCR court erred in finding Counsel was not ineffective for failing to procure mental health expert testimony during sentencing. (Pet. 14). In the sentencing context, the "highly deferential" standard outlined in *Strickland* "means that defense counsel have the flexibility to vary their approach given their client's unique circumstances." *Meyer v. Branker,* 506 F.3d 358, 371 (4th Cir. 2007); see also *Lovitt v. True,* 403 F.3d 171, 179 (4th Cir.2005) (noting that counsel's decision to pursue a particular approach at sentencing often "reflects not incompetence, but rather a sound strategic choice."). Consistent with the overall defense theory, Counsel highlighted Petitioner's good moral character during sentencing by presenting statements from several of Petitioner's family members and a life-long friend. (App. 732–743). The PCR court correctly found that Counsel had no reason to consult with an expert in preparation for sentencing, especially in light of the fact that Petitioner exhibited no signs of psychosis prior to or during his trial. Moreover, given that Petitioner received a sentence well within the statutory range, Petitioner failed to show any resulting prejudice.

II. The PCR court correctly concluded Counsel was not ineffective for failing to investigate the State's position regarding Petitioner's whereabouts in the hours prior to the shooting where Petitioner failed to establish any resulting prejudice

Petitioner further claims trial counsel was ineffective for failing to obtain an incident report

[9]Additionally, on April 25, 2011, approximately a month prior to trial, Petitioner pleaded guilty to an unrelated assault and battery charge. (App. 1382–1405). Upon inquiry from the plea court, Petitioner affirmed that he was not aware of "any physical, emotional, or nervous problems" that would affect his ability to understand the plea proceedings. (App. 1391).

and surveillance video from Petitioner's place of employment to refute or impeach the State's witnesses regarding Petitioner's whereabouts during the hours prior to the commission of these crimes. As noted by the PCR court, while counsel should conduct a reasonable investigation, *Strickland* "does not impose a constitutional requirement that counsel uncover every scrap of evidence that could conceivably help their client." *Tucker v. Ozmint,* 350 F.3d 433, 442 (4th Cir. 2003) (internal citations omitted); *Cf. Atkins v. Singletary,* 965 F.2d 952, 959–60 (11th Cir. 1992) (noting that "[a]t some point, a trial lawyer has done enough," and that "[a] lawyer can almost always do something more in every case").

A. Trial Testimony

State Street Pub

At trial, Petitioner's former employer, Tonya Mozenko, testified that she met up with a friend, Stephen Smith, at State Street Pub around midnight on September 27, 2008. (App. 166–67, 190). She testified that she saw Petitioner as soon as they got in the bar. (App. 167). As they sat down, Petitioner sat down and began talking with them. (App. 167). Steve also testified, and recalled Petitioner stating that he had been drinking since six o'clock that evening. (App. 213–15). Petitioner continued to consume alcohol and take shots while Tonya and Steve were at State Street Pub. (App. 169, 185). As Petitioner became more intoxicated, he acted increasingly inappropriate toward Tonya. (App. 169–170, 214). It was at that point that Tonya and Steve left State Street, walked around for approximately fifteen to twenty minutes, and then returned to State Street. (App. 169–72, 214–15). Tonya and Steve testified that they stayed at State Street until about 3:30 A.M., at which point they went to Shaggy's Bar. (App. 173, 215).

Petitioner, however, alleged he was working at Rush's on September 27, 2008; that he clocked in at 9:00 P.M. and did not clock out until 1:50 A.M. (App. 472–73, 501). Petitioner

testified he never left Rush's that night, and did not arrive at State Street Pub until about 2:25 or 3:00 A.M. (App. 474, 503). On cross-examination, however, Petitioner ultimately responded that he did see Tonya and Steve in the early morning hours of September 27, 2008, at State Street Pub. (App. 523–24). Petitioner testified that he left State Street at 3:30 or 3:35 A.M, and arrived at Shaggy's around 3:45 A.M. (App. 476).

Shaggy's Bar

Tonya and Steve testified that they ran into Petitioner for a second time that evening at Shaggy's Bar. (App. 173, 216). Petitioner told Tonya and Steve that he tried to buy Donna Muszynski a drink earlier that night, and he was upset Donna gave all her attention to Zach. (App. 174, 216). Petitioner referred to Zach as a "wolverine" and "faggot." (App. 177, 216, 366). Tonya and Steve testified that Petitioner repeatedly stated: "I should go to my truck and get my gun and shoot him." (App. 177–78, 217). Tonya and Steve testified they left Shaggy's at 5:00 or 5:30 A.M. (App. 180, 217). The shooting occurred at approximately 6:30 A.M. (App. 225).

B. The PCR court correctly found Counsel was not ineffective for failing to investigate Petitioner's place of employment obtain the Rush's incident report where the report could would have only been useful for impeachment purposes and Counsel used other means at trial to impeach Tonya and Steve's testimony.

Petitioner contends the incident report introduced at the PCR hearing "could have been utilized to impeach the timeline and testimony of Tonya and Steve." (Pet. 24). Counsel testified that he would have used the incident report to show that Tonya and Steve "were incorrect in their testimony." (App. 1058). However, the incident report merely indicates Petitioner was at Rush's some time between 11:44 P.M. and 12:42 A.M. (App. 1342–45). It does not show whether Petitioner remained at Rush's during the duration of that incident. Indeed, Petitioner testified at trial that Rush's is about a fifteen-minute drive from State Street Pub. (App. 521). Therefore, as

noted by the PCR court, it is entirely conceivable Petitioner could have been at Rush's at some point during the incident and left.

At trial, Petitioner maintained that Tonya and Steve were confused or lying about seeing him at State Street on the night of the incident. (App. 522–23). While Counsel did not obtain the specific incident report, he nonetheless attempted to corroborate Petitioner's testimony through various other means. For example, Counsel questioned Tonya and Steve on cross-examination about whether they were sure they "had the right night." (App. 182, 290, 219–20). Counsel called their memory into question by eliciting testimony that they had a lot to drink that night. (Tr. 185–88, 190–92). Counsel further challenged their credibility by highlighting the late date on which they gave their statements to law enforcement and by highlighting missing facts in their statements. (App. 183–85, 220). Counsel further testified that he obtained the timesheets from Rush's and reviewed the summary of the solicitor's meeting with the Rush's manager. The timesheets from Rush's indeed corroborated Petitioner's timeline, showing he clocked in at 9:00 P.M. on September 27, 2008, and clocked out at 1:50 A.M. on September 28, 2008. (App. 473). Counsel used the timesheet during his direct examination of Petitioner and cross-examination of the Rush's manager. (App 473, 606–10).

At the PCR hearing, Counsel did testify that Tonya and Steve's testimony was "very damaging." (App. 1046). Counsel was clearly referring to Tonya and Steve's testimony about Petitioner's behavior towards Zach and statements that he should go get his gun and shoot him. Counsel explained that this testimony provided a motive that counteracted the defense's position that Petitioner was trying to effectuate a citizen's arrest on the victim at the time of the shooting. (App. 1046). Crucially, however, these statements were made at Shaggy's—*not State Street Pub.* (App. 173–77, 216–17, 1106). Moreover, Tonya and Steve's testimony was offered to prove

malice. Because Petitioner was found guilty of manslaughter—an offense for which malice is not an element—the PCR court correctly concluded that there is no reasonable probability the result of the proceeding would have been different even if Counsel had introduced the incident report.

CONCLUSION

Based on the foregoing argument, this Court should deny certiorari and affirm the PCR court's dismissal of Petitioner's PCR application for failure to prosecute. Should this Court grant the petition, the State seeks permission to more fully brief the issues discussed above.

Respectfully submitted,

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March 4, 2020

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
The Honorable Walton J. McLeod, IV, PCR Judge

Appellate Case No. 2019-001060

ANDREW E. TORRENCE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served on Petitioner by placing two (2) copies in the United States Mail, addressed to:

Tricia A. Blanchette, Esq.
Post Office Box 2147
Leesville, South Carolina 29070

This 4th day of March, 2020.

Lillian L. Meadows, AAG
Attorney for Respondent