STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Jan 27 2021

S.C. SUPREME COURT

Certiorari to Horry County

William H. Seals, Circuit Court Judge

CLIFFORD WAYNE POWELL, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000754

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred where it found counsel provided effective representation where counsel failed to advise Petitioner that Dr. Morgan believed Petitioner may have been guilty but mentally ill, since counsel's deficient performance resulted in Petitioner's entry of a plea that was not knowingly, voluntarily, and intelligently tendered?

STATEMENT

On September 11, 2014, an Horry County Grand Jury indicted Petitioner for murder. App. 224 – 225. The State alleged that Petitioner shot and killed the decedent, Charles Royal. App. 15, l. 20 – 16, l. 8. Petitioner retained the services of James Irvin for his defense. *See* App. 66, ll. 10-12. Johnny McCoy was later added as co-counsel due to Irvin having cancer. However, Irvin retained primary responsibility for the case, and it was undisputed he handled everything related to plea negotiations. App. 190 – 193; App. 71, l. 18 – 74, l. 14.

On April 26, 2017, Petitioner appeared before the Honorable Larry B. Hyman for a guilty plea hearing. Irvin and McCoy appeared on behalf of Petitioner. Nancy Livesay and Chris Helms prosecuted the case. App. 1. Petitioner pleaded guilty to the lesser-included offense of voluntary manslaughter with a recommended cap of twenty-five years.[1] App. 6, ll. 8-11. Petitioner was sentenced to twenty-five years' imprisonment. App. 32, ll. 19-20; App. 226.

No direct appeal was taken, and attorney Irvin passed away in October of 2017. App. 71, ll. 19-20. On November 28, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 34 – 47. On March 5, 2018, the State made its return and partial motion to dismiss. App. 48 – 60. A hearing was held on the matter on October 9, 2019 before the Honorable William H. Seals. Steven Fowler represented Petitioner. Johnny James, Jr. represented the State. App. 61.

Dr. Harold Morgan testified at the PCR hearing and he was qualified as an expert in medicine and psychiatry without objection. App. 145, ll. 5-13. Dr. Morgan explained that he examined Petitioner in January of 2015, to determine competency and criminal responsibility, at the request of counsel Irvin. App. 146, l. 3 – 147, l. 20. Dr. Morgan determined the evaluation

[1] Related charges of possession of a weapon during the commission of a violent crime, unlawful possession of a firearm by a person convicted of a violent offense, and two counts of attempted murder were dismissed by *nolle prosequi* as part of the plea bargain. App. 63, ll. 6-15; App. 26, ll. 13-19; App. 15, ll. 6-11.

showed Petitioner was "experiencing a sever[e] mental disorder. Further professional observation and inpatient care may be appropriate." App. 149, l. 1 – 150, l. 2. Dr. Morgan made a "probable diagnosis" of "Narcissistic Personality Disorder, Borderline Personality Features, and Depressive Personality Features." App. 150, ll. 5-7. Testing also revealed that "clinical syndromes suggested by [Petitioner's] profile [we]re delusional, that is Paranoid Disorder; **Bipolar Disorder**, Manic Severe without psychotic features; and Adjustment Disorder with anxiety." App. 150, ll. 7-10 (emphasis added).

Dr. Morgan "did not make a diagnosis as a final conclusion," but "said there's enough here to warrant further investigation." App. 150, ll. 14-15. Dr. Morgan believed Petitioner was competent and criminally responsible but thought further evaluation might show that Petitioner was guilty but mentally ill (GBMI). Dr. Morgan emailed attorney Irvin that "guilty but mentally ill may be appropriate." App. 150, l. 25 – 151, l. 22. He opined that Petitioner "needed treatment," and observed that a finding of GBMI "essentially promises treatment even if you're in prison." App. 152, ll. 3-4.

Dr. Morgan explained that he billed Irvin for the evaluation, but the bill was never paid. App. 146, ll. 15-23; App. 195. Dr. Morgan also requested the discovery from counsel, so that he could make a final diagnosis, but he never received anything from counsel. App. 152, ll. 13-18. Dr. Morgan was surprised that Irvin did not follow up, and said, "in the past when I had worked with him, he had always been very thorough in pursuing whatever kind of issues, mental health issue there was." App. 155, ll. 7-15.

Petitioner testified and explained that counsel told him, "Doctor Morgan said you're fine, there's no mental health issues with you whatsoever." App. 66, ll. 21-24. Petitioner also said he felt "frightened" and "coerced" into accepting the plea bargain. App. 134, ll. 5-7.

The discovery materials in Petitioner's case were made an exhibit at the PCR hearing and the exhibit, Plaintiff's Exhibit #5, is on file with this Court. The exhibit reflects that two witnesses in the case, Petitioner's ex-wife and his roommate, both said that Petitioner was "bipolar" during their audio-recorded interviews with law enforcement. *See* Plaintiff's Exhibit #5.[2]

On April 23, 2020, the PCR court issued an order of dismissal, in which it addressed Petitioner's claim that counsel was "ineffective in failing to investigate, prepare, present, and advise him of potential mental health defenses." App. 196 – 223; App. 205. The order stated the PCR court found counsel was not ineffective because he had "exhausted" "the mental health lead." App. 214. The PCR court "d[id] not concur in Dr. Morgan's preliminary conclusion that Applicant was a good candidate for a plea of guilty-but-mentally-ill." App. 215. The order of dismissal stated the facts of the case did not "reflect the actions of a man who was incapable of conforming his conduct to the confines of the law," since, *inter alia*, Petitioner was alleged to have lain in wait and disposed of evidence to conceal his culpability. App. 215.

The PCR court further found that Petitioner did not establish prejudice because the court was "presented no evidence to show that had Applicant known of the GBMI statute, he would have turned down the State's offer and insisted on proceeding to trial." App. 215. The order of dismissal continued that, "even if Applicant could have theoretically pled GBMI, Applicant's knowledge of as much would not have changed the outcome of Applicant's plea, as a guilty-but-mentally-ill plea is still a guilty plea, and would have only impacted the conditions of Applicant's incarceration." App. 215.

[2] The witnesses' audio-recorded statements are located in a subfolder on the drive, Plaintiff's Exhibit #5, titled "CLIFFORD POWELL DISCS."

The order of dismissal concluded that Petitioner's guilty plea was not coerced. "Applicant presented no evidence in support of the claim at the evidentiary hearing. In any event, advice by counsel to accept an offer and plead guilty does not amount to undue coercion." App. 219.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred where it found counsel provided effective representation where counsel failed to advise Petitioner that Dr. Morgan believed Petitioner may have been guilty but mentally ill, since counsel's deficient performance resulted in Petitioner's entry of a plea that was not knowingly, voluntarily, and intelligently tendered.

Dr. Morgan informed counsel that he suspected Petitioner may have been GBMI, and Dr. Morgan requested discovery from counsel so that he could render an opinion on the matter. However, counsel did not follow up with Dr. Morgan. The PCR court erred here, where it found counsel "exhausted" "the mental health lead." Instead, counsel rendered ineffective assistance when he failed to follow up with Dr. Morgan.

Two of the witnesses in the case said that Petitioner was "bipolar." Plaintiff's Exhibit #5. Dr. Morgan opined that Petitioner was "experiencing a sever[e] mental disorder." App. 149, l. 1 – 150, l. 1. Bipolar disorder is classified as a "severe mental illness." David L. Faigman et al., *Major psychoses—Introduction*, 2 Mod. Sci. Evidence § 8:16 (2020-2021 Edition).

Petitioner was entitled to have a jury determine whether he was guilty but mentally ill. S.C. Code Ann. § 17-24-20 governs GBMI verdicts and pleas in South Carolina, and it provides,

> (A) A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.
>
> (B) To return a verdict of "guilty but mentally ill" the burden of proof is upon the State to prove beyond a reasonable doubt to the trier of fact that the defendant committed the crime, and the burden of proof is upon the defendant to prove by a preponderance of evidence that when he committed the crime he was mentally ill as defined in subsection (A).

> (C) **The verdict of guilty but mentally ill may be rendered only during the phase of a trial which determines guilt or innocence** and is not a form of verdict which may be rendered in the penalty phase.
>
> (D) A court may not accept a plea of guilty but mentally ill unless, after a hearing, the court makes a finding upon the record that the defendant proved by a preponderance of the evidence that when he committed the crime he was mentally ill as provided in Section 17-24-20(A).

(emphasis added). Therefore, pursuant to 17-24-20(C), a determination of whether a defendant is GBMI may be an issue of fact for the jury, since it is a verdict that can be returned during the guilt phase of a trial. *See also State v. Hornsby*, 326 S.C. 121, 127, 484 S.E.2d 869, 872 (1997) (law "provides a guide for a jury" when considering whether a defendant is GBMI); *State v. Lewis*, 328 S.C. 273, 277 n. 4, 494 S.E.2d 115 n. 4, 116 (1997) (testimony supported jury charge on GBMI).

S.C. Code Ann. § 17-24-70 provides for sentencing upon a finding of GBMI as follows.

> **If a verdict is returned of "guilty but mentally ill"** the defendant must be sentenced by the trial judge as provided by law for a defendant found guilty, however:
>
> (A) If the sentence imposed upon the defendant includes the incarceration of the defendant, **the defendant must first be taken to a facility designated by the Department of Corrections for treatment** and retained there until in the opinion of the staff at that facility the defendant may safely be moved to the general population of the Department of Corrections to serve the remainder of his sentence . . .

In *State v. Hornsby*, 326 S.C. 121, 127, 484 S.E.2d 869, 872 (1997), this Court explained that "GBMI prisoners do benefit from the GBMI statute in that they are automatically sent to special centers for evaluation and treatment while guilty inmates in need of mental health care are directly integrated into the prison system." Here, Petitioner was denied that benefit due to counsel's deficient performance.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. *Gilchrist v. State*, 350 S.C. 221, 226, 565 S.E.2d 281, 284 (2002) (citing *Strickland*, 466 U.S. at 687).

"[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill*, 474 U.S. at 56.

As seen, counsel provided deficient representation here when he failed to follow up with Dr. Morgan after he knew Dr. Morgan thought Petitioner might be GBMI.

To establish prejudice when challenging a guilty plea, a PCR applicant must prove "there is a reasonable probability that, but for, counsel's errors, the defendant would not have pled guilty, but would have gone to trial." *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). "The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial." *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018).

"[I]n proving *Strickland* prejudice within the context of counsel's failure to fully investigate the petitioner's mental capacity, the petitioner need only show a reasonable

probability that he was either insane at the time the crime was committed or incompetent at the time of the plea." *Matthews v. State*, 358 S.C. 456, 459, 596 S.E.2d 49, 51 (2004) (citing *Jeter v. State*, 308 S.C. 230, 233, 417 S.E.2d 594, 596) (internal quotations and alterations omitted); *see also Ramirez v. State*, 419 S.C. 14, 22, 795 S.E.2d 841, 845 (2017) ("[o]nce a PCR applicant has established his counsel was deficient in failing to obtain a mental competency evaluation, he is entitled to relief if he demonstrates a reasonable probability that he was incompetent at the time he pled guilty"). By extension, where a PCR applicant shows counsel was deficient for failing to fully explore whether the applicant was GBMI, he should be entitled to relief if he demonstrates a reasonable probability that he was GBMI. *See Matthews*, 358 S.C. at 459, 596 S.E.2d at 51.

The PCR court's finding that Petitioner's guilty plea was voluntarily, knowingly, and intelligently made, was error. The testimony of Dr. Morgan, who was qualified as an expert in psychiatry, established prejudice. Dr. Morgan examined Petitioner prior to his plea, found he was experiencing a "severe mental disorder," and thought Petitioner may have been guilty but mentally ill. App. 149, l. 1 – 150, l. 2; App. 150, l. 25 – 151, l. 22. Therefore, Petitioner demonstrated a reasonable probability he was GBMI.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of January, 2021.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Clifford Wayne Powell states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge William H. Seals, which was held on October 9, 2019, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Clifford Wayne Powell.

Respectfully Submitted,

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 27th day of January, 2021.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

s/ *Joanna K. Delany*
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This 27th day of January, 2021.