

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Brian M. Gibbons, Circuit Court Judge

DAVID BOGGS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000760

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance of counsel for failing to proceed to trial on a defense theory that Petitioner could not conform his actions to the law?

STATEMENT

During the June 2015 term, the Spartanburg County Grand Jury indicted Petitioner for murder and possession of a weapon during the commission of a violent crime. App. 138 – 141.

On July 25 – 26, 2016, Petitioner pled guilty but mentally ill (GBMI) before the Honorable Derham Cole. App. 1. Beverly Dorine Jones represented Petitioner. Id. Derrick Bruce Balsa represented the state. Id. Judge Derham Cole accepted Petitioner’s guilty plea and sentenced Petitioner to twenty-five years’ imprisonment for voluntary manslaughter and five years’ imprisonment for possession of a weapon during the commission of a violent crime, to run concurrently. App. 20, ll. 2 – 5; App. 48, l. 17 – 49. l. 2.

On July 18, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 51 – 57. On October 13, 2020, the state filed¹ its Return. App. 58 – 66. On May 28, 2021, Petitioner filed an amended PCR application where he alleged plea counsel was ineffective for: failing to pursue a jury trial, failing to pursue defense that Petitioner was forced to kill Richards by his Griffin; failing to pursue a defense that Petitioner did not have the ability to conform his actions to the law at the time of the incident. App. 67.

On June 1, 2021, Petitioner’s PCR hearing was held before the Honorable Brian M. Gibbons. App. 68. Rodney Richey represented Petitioner. Id. William Ray represented the state. Id.

The PCR court denied Petitioner relief in an order of dismissal filed on July 6, 2021. 125 – 138. The PCR court found that plea counsel was not ineffective for failing to pursue a jury trial because Petitioner “frequently requested a plea offer with reasonable advice of competent counsel and full understanding.” App. 134 – 35. Plea counsel was also not ineffective for failing to pursue a defense of duress because Petitioner testified that his Griffin did not threaten him to

¹ According to the PCR court, the state did not receive Petitioner’s PCR application until July 23, 2020. App. 125.

kill Richards and because Petitioner did not tell plea counsel of his Griffin's influence. App. 135 – 36. Finally, plea counsel was not ineffective for failing to pursue a defense that Petitioner lacked the ability to conform his actions to the requirements of the law because plea counsel ordered two mental health evaluations that stated Petitioner could not conform his actions to the law but he had the competency to know right from wrong. App. 136. Accordingly, the PCR court found there was no prejudice suffered by Petitioner because if plea counsel pursued the mental health defense at a trial, "at best" the jury would have found Petitioner guilty but mentally ill, "which was precisely the plea offer that [Petitioner] accepted." App. 136.

This petition follows.

ARGUMENT

Trial counsel provided ineffective assistance of counsel for failing to proceed to trial on a defense theory that Petitioner could not conform his actions to the law.

Relevant Facts

On February 9, 2015, police officers were called to, Petitioner's stepfather, Roy Griffin's address in Spartanburg County, where Petitioner lived. App. 15, ll. 16 – 16, l. 2. The officers went to Griffin's home and Griffin led them to a "separate out-type building that had been transformed into a living quarters" where Richards's body was found. Id.

The deceased was Griffin's cousin, Eric Richards, who had been staying on the property for "a period of years." App. 16, ll. 3 – 16. Richards was found laying in his bed after having been shot twice in the head with a shotgun. Id.

The officers who found Richards' body began their investigation by talking to the people in the home. App. 16, l. 17 – 17, l. 4. The officers sequestered the residents of the home and when Petitioner was interviewed he "eventually broke down and told them that he had... shot [Richards] ... twice in the head." App. 17, ll. 5 – 18. The officers asked Petitioner why he did it and Petitioner explained there was "some prior sexual contact" but that it was consensual. Id.

A month earlier, on January 7, 2015, Petitioner and his mother went to the sheriff's office to report "some sexual abuse." Id. However, Petitioner told Sergeant Tony Brown that the sexual contact with Richards did not occur until Petitioner was sixteen years' old or older. App. 17, l. 22 – 18, l. 12.

After Petitioner was arrested for the shooting, plea counsel had him evaluated by two different doctors. App. 23, l. 21 – 25, l. 5; App. 39, ll. 4 – 5; App. 114 – 124. Dr. Schwartz's psychological report determined that Petitioner was unable to conform his conduct to the requirements of the law, but that he was able to determine right from wrong. App. 122 – 24.

Dr. Veronen's report determined that Petitioner suffered from Battered Child Syndrome and post-traumatic stress disorder (PTSD). App. 114 – 121. Richards's sexual touching of Petitioner began when Petitioner was underage and progressed to more serious abuse. App. 114; App. 23, l.21 – 25, l. 5. Eventually, Richards would pay Petitioner in money or drugs to allow the abuse. App. 23, l.21 – 25, l. 5; App. 97, l. 23 – 98, l. 22; App. 116. The abuse got as severe as "rear entry sex." App. 116.

One morning in January 2015, Petitioner told his mother of the abuse and his mother had him call the police. App. 118. Importantly, when Petitioner told police of the abuse, he mentioned that he knew of another victim of Richards's sexual abuse and that Petitioner would bring that victim in to make corroborating allegations. App. 18, ll. 1 – 8.

Petitioner's mother confronted Richards who denied the allegations. App. 118. However, Richards became aggressive towards Petitioner, abused Petitioner's dog, and Petitioner feared that Richards would kill Petitioner and his family for reporting the abuse. Id.

Dr. Veronen explained that due to the inaction of the sheriff's department "the month of January passed without any investigation" and Petitioner became anxious and fearful that Richards would harm him or his family as retribution for reporting the abuse to police. App. 118. Petitioner's stepfather Griffin "played on this fear." Id. Griffin brought Petitioner to a pawn shop and bought a shotgun. Id. Griffin told Petitioner that he also had been abused by Richards when he was younger. App. 119.

On the morning of February 9, 2015, Griffin loaded the shotgun, put it in Petitioner's hand, and told him "You have to kill [Richards], it will make everything better, you will not have to hide in a shell, you will not have to worry about being abused ever again." Id. After listening to Griffin, Petitioner took the gun and shot Richards twice in the head. Id. Veronen concluded that, "without the protection of the law, [Petitioner's] fear increased and he was susceptible to Griffin's influence to take his abuser's life so he could again feel safe." Id.

During his PCR hearing, Petitioner testified that he was sexually assaulted by Richards. App. 74, l. 24 – 75, l. 4. Petitioner explained that Griffin convinced him, without threatening him, to kill Richards, but Petitioner did not tell plea counsel about Griffin's influence. App. 74, ll. 5 – 17; App. 85, l. 17 – 86, l. 3.

Petitioner's psychological evaluations were admitted into evidence at the PCR hearing and Petitioner stated he was seeing them for the first time. App. 75, l. 20 – 78, l. 13. Petitioner testified that he never discussed those reports with plea counsel. Id. At the time of the PCR hearing, Petitioner stated he knew what he did was wrong but did not believe it was wrong at the time he did it. App. 87, l. 24 – 88, l. 3. Petitioner also testified that he should have had a trial because he could not conform his actions to the law, that he was wrong to answer at the guilty plea that he was satisfied with plea counsel's representation, and that he wants a new trial. App. 78, l. 19 – 81, l. 20.

Plea counsel testified at the PCR hearing that Petitioner never told her he was coerced and/or manipulated into committing the crime by Griffin; however, she conceded that she knew about Griffin's influence on Petitioner ten months prior to the guilty plea. App. 92, l. 14 – 93, l. 23; App. 102, l. 21 – 103, l. 36. Plea counsel became aware of the that Petitioner was acting under Griffin's influence when he shot Richards because Petitioner mailed a postcard from prison where he said "[Griffin] made me do this." App. 92, l. 14 – 93, l. 23. Furthermore, Petitioner's codefendant girlfriend mailed a letter to Petitioner's biological father where she "set forth the same story." App. 93, l. 25 – 94, l. 5.

In addition to the severe and traumatizing abuse the psychologist reports detailed that Petitioner suffered, the reports also detailed an extensive history of mental health problems and substance abuse. App. 114 – 124. The reports also stated that the abuse Petitioner suffered exacerbated his mental health problems. Id.

Petitioner suffered from Battered Child Syndrome. Id.; David L. Faigman, Modern Scientific Evidence: The Law and Science of Expert Testimony, § 13:3. The battered child syndrome: The psychological model, 2 Mod. Sci. Evidence § 13:3 (2021-2022 Edition). Petitioner's Battered Child Syndrome arose when Petitioner experienced "violence or sexual trauma" where Petitioner was traumatized by the victimization "to the extent that it impair[ed] his ability to formulate independent intention and actions." App. 114 – 121. Veronen's report opined "When Battered Child Syndrome is used as a defense for the child who has killed or injured the abuser, it appears that the fear response of 'fight, flight, or freeze' of the primitive brain is highly activated. The child may act to destroy the abuser without consideration for other courses of action." Id. Accordingly, "the child may not engage in thoughtful or intentional behavior, but appears to instinctively respond in ways to stop the abuser." Id.

Petitioner was also diagnosed with post-traumatic stress disorder. Id.; Mayo Clinic, Post-traumatic stress disorder, <https://www.mayoclinic.org/diseases-conditions/post-traumatic-stress-disorder/symptoms-causes/syc-20355967> (Last visited Feb. 21, 2022). Since plea counsel was on notice that the report by Dr. Veronen explicitly stated Petitioner was incapable of forming "independent intention," plea counsel erred when she failed to proceed to trial on the defense theory that Petitioner did not intentionally kill Richards because the years of sexual abuse he suffered rendered him unable to conform his actions to the requirements of the law. App. 118 – 121.

The PCR court erroneously found that Petitioner suffered no prejudice from plea counsel's failure to proceed to trial on a defense theory that Petitioner could not conform his actions to the law because Petitioner pled guilty to voluntary manslaughter and that was the best possible outcome he would have received had he proceeded to trial. App. 136 – 37. However, that finding failed to recognize that Petitioner could have successfully argued that he acted in self-defense given his diagnosed conditions of Battered Child Syndrome and PTSD. Id. Thus,

plea counsel provided ineffective assistance of counsel when she failed to proceed to trial on a defense of that Petitioner could not conform his actions to the law and acted in self-defense when killing Richards.

Discussion

South Carolina jurisprudence holds that for a defendant to claim self-defense as a defense to a homicide, he or she must be in fear for their life or serious bodily injury when using lethal force on an aggressor. State v. Wiggins, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998). Moreover, in South Carolina a defendant on trial for murder who cannot conform their actions to the law, but does know right from wrong is guilty of voluntary manslaughter. See State v. Lewis, 328 S.C. 273, 494 S.E.2d 115 (1997); see also S.C. Code Ann. § 17-24-20(a).

However, under limited circumstances, such as the circumstances presented in this case, appellate courts have held that a defendant who could not conform his actions to the law, coupled with suffering from Battered Child Syndrome and PTSD, could properly argue that he was acting in self-defense when killing his abuser even when the abuser did not put him in fear of death or serious bodily injury at the moment of the killing.

A defendant's claim that counsel's ineffective assistance required reversal of a conviction has two components. Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." Id. Prejudice means that defense counsel's errors deprived the defendant of a fair trial whose result was reliable. Id. The two-part Strickland v. Washington, supra, test applies to challenges to guilty pleas based on ineffective assistance of counsel. Hill v. Lockhart, 106 S. Ct. 366, 370 (1985).

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, Strickland asks whether it is “reasonably likely” the result would have been different. Harrington v. Richter, 131 S. Ct. 770, 791–92, (2011) (citing Strickland v. Arizona, 104 S.Ct. 2052, 2069) (also citing Wong v. Belmontes, 130 S.Ct. 383, 390 (2009)).

The Fourteenth District Texas Court of Appeals held in the case of In re E.C.L., 278 S.W.3d 510 (Tex. App. 2009) that the lower court erred when it denied E.C.L.’s requested jury instruction on the defenses of necessity, self-defense, and defense of others. In re E.C.L., at 512. E.C.L. was born in 1994 and his younger brother was born two years later. Id. E.C.L. witnessed several instances where their parents were abusive to one another. Id., at 512 – 13.

On April 1, 2002, E.C.L.’s mother (‘Mother’) discovered E.C.L. and his brother both naked from the waist down “discussing ‘sexual types of behavior.’” Id., at 513. After questioning E.C.L. further, Mother reported their father to Children’s Protective Services (CPS) because they were abused by their father. Id. An investigation into alleged sexual abuse began, which required E.C.L. to be interviewed by CPS workers, a counselor, and police officers; however, the allegations could not be substantiated and no charges were filed. Id.

E.C.L.’s father continued to abuse him and his brother. Id., at 513 – 15. On August 27, 2004, E.C.L. and his brother were packing to go to their father’s house for the next week. Id., at 515. When his father arrived Mother’s house to pick the boys up, his father called to let Mother know he was outside in his car. Id. Mother brought up new allegations that E.C.L. made and his father denied them. Id. While E.C.L.’s parents were in a heated argument over the phone, E.C.L. went outside and shot his father while he sat in the car to take them away. Id.

E.C.L. was charged and convicted with engaging in delinquent conduct by shooting his father with a deadly weapon. Id., at 517. E.C.L. was sentenced with ten years’ confinement. Id.

On appeal, the Fourteenth District Texas Court of Appeals determined, the trial court erred in excluding expert testimony on E.C.L.'s justification for the defenses of self-defense and defense of another. Id.

At his trial, E.C.L. attempted to introduce the testimony of Dr. Joseph Glenmullen that "because E.C.L. suffered from *battered-child syndrome*, he believed his conduct was immediately necessary to avoid harm to himself or his brother." Id., at 518. (emphasis added) The trial court excluded testimony from Dr. Glenmullen about whether E.C.L. believed force was immediately necessary at the time he shot his father. Id. The defense proffered testimony that, "E.C.L.'s mental condition and state of mind at the time he shot his father [was] that he reasonably believed he was justified in using force or deadly force to protect himself or his brother against the unlawful acts of his father," and, "at the time he shot his father, E.C.L. did not believe he could retreat." Id., at 518. The state argued that there was "no evidence to suggest that E.C.L. believed he immediately needed to respond to an imminent threat from his father." Id., at 518.

The Fourteenth District Texas Court of Appeals determined that the exclusion of Glenmullen's testimony was an error because it would have aided the jury in understanding that a reasonable person who experienced the "sum of abuses" that E.C.L. suffered from his father would have "a just apprehension of fear," and the testimony provided a frame of reference for a lay person to fully understand "why a child in E.C.L.'s position might have felt that deadly force was immediately necessary to protect himself and/or his brother." Id., at 519 – 20. Furthermore, the exclusion of Glenmullen's testimony substantially affected E.C.L.'s constitutional rights because it directly affected the court's decision not to charge the jury on self-defense and defense of another. Id., at 522. The trial court's "refusal to instruct the jury on E.C.L.'s right to assert self-defense and defense of another [prejudiced] E.C.L. because the trial court's refusals denied

him the opportunity of requiring the jury to find against these defenses before assessing his guilt for the charged offenses.” Id.

In this case, the psychologist reports determined that, like In re E.C.L., supra, Petitioner suffered from Battered-Child Syndrome, in addition to a number of other psychological disorders like PTSD and schizophrenia. App. 114 – 124. Akin to the defense theory in In re E.C.L., supra, had defense counsel proceeded to trial she could have argued that due to the “sum of abuses” that Petitioner suffered at the hands of Richards, he reasonably believed that “deadly force was immediately necessary to protect himself” and the other victim of Richards’s sexual abuse. App. 18, ll. 1 – 8; In re E.C.L., at 519 – 20. Accordingly, the PCR court’s finding that Petitioner suffered no prejudice from plea counsel’s failure to proceed to trial because the best-case scenario of proceeding to trial on the defense theory that Petitioner was unable to conform his actions to the requirements of the law would have been a GBMI conviction for voluntary manslaughter was erroneous. App. 136 – 37. Petitioner was prejudiced by plea counsel’s failure to proceed to trial because he would have been able to argue self-defense, or defense of another, at trial and had a chance to be acquitted for the shooting of Richards.

CONCLUSION

Based on the foregoing arguments, Petitioner respectfully requests that this Court grant certiorari and allow for full briefing on this issue.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of February, 2022.

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RESPONDENT

APPELLATE CASE NO. 2021-000760

PETITION TO BE RELIEVED AS COUNSEL

Counsel for David Boggs states:

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

He has reviewed the record of petitioner's post-conviction relief hearing before Judge Brian M. Gibbons, which was held on June 1, 2021, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

He 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 him as counsel for David Boggs.

Respectfully Submitted,



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of February, 2022.

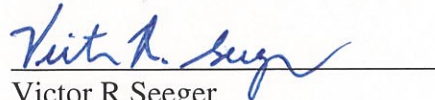
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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of his 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."



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