THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Jennifer McCoy, Circuit Court Judge

Appellate Case No. 2021-001164

Case No. 2019-CP-02-0516

Jerry Lee Shaeffer,

Petitioner,

v.

The State of South Carolina,

Respondent.

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

I. Did the PCR Court err in finding Petitioner failed to prove his mental incapacity prevented him from filing a PCR application in the one year following his guilty plea when the PCR Court acknowledged his incompetence based on a subsequent competency evaluation, and the expert witness who conducted the evaluation testified there was a reasonable probability Petitioner was incompetent at the time of his plea?

## STATEMENT OF THE CASE

***Indictments***

On April 10, 2014, the Aiken County Grand Jury issued indictments against Petitioner for four counts of Criminal Sexual Conduct with a Minor, Second Degree (2014-GS-02-000576–579). (App. 50–52; App. 57–58; App. 64–65; App. 71–72).

***Plea Hearing***

On March 18, 2015, Petitioner appeared before the Honorable R. Knox McMahon and pled guilty as charged. (App. 1–23). Michael Routzong represented Petitioner at the plea hearing, and Assistant Solicitor Ashley Hammack represented the State. The Plea Court sentenced Petitioner to twenty (20) years imprisonment for each conviction and ordered Petitioner to serve three of the sentences concurrently and one consecutively.

Petitioner did not file a Notice of Appeal.

***PCR Applications and the State's Return***

On February 28, 2019, Petitioner filed his first application requesting Post-Conviction Relief (PCR) (2019-CP-02-0516). (App. 24–74). The South Carolina Attorney General's Office (Respondent) filed a Return on June 7, 2019, requesting the application be dismissed as untimely pursuant to Section 17-27-45 of the South Carolina Code of Laws. (App. 75–96). Petitioner subsequently filed Amended PCR applications on June 28, 2019, and July 13, 2020, requesting a hearing to present evidence in support of equitable tolling. (App. 87–108).

In his second Amended Application for PCR, Petitioner provided the following allegations of ineffective assistance of counsel:

> (1) Applicant did not voluntarily, knowingly, or intelligently plead guilty based on Plea Counsel's failure to request a competency to stand trial and criminal responsibility evaluations and a *Blair* hearing prior to the plea hearing. *See Boykin v. Alabama*, 395 U.S.

238 (1969); *Monahan v. State*, 365 S.C. 130, 133, 616 S.E.2d 422, 423 (2005) (noting the issue of whether an individual is criminally responsible for a crime due to a mental health condition is separate from the issue of whether an individual is competent to stand trial); *Id.* ("The test for criminal responsibility relates to the time of the alleged offense, while competency to stand trial relates to the time the defendant is before the court for trial.").

(2) Plea Counsel failed to move for the Chief Administrative Judge or presiding judge to sign Orders for Competency to Stand Trial and Criminal Responsibility and Capacity to Conform Evaluations based on Applicant's mental health history and records when it was reasonable and necessary to do so in Applicant's defense. *See State v. Blair*, 275 S.C. 529, 533, 273 S.E.2d 536, 538 (1981) (finding evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion as to his competency to stand trial are all relevant in determining whether a defendant is entitled to a hearing on his competency to stand trial); S.C. Code §§ 44-23-410–430; *Matthews v. State*, 358 S.C. 456, 596 S.E.2d 49 (2004); *State v. Burgess*, 356 S.C. 572, 575, 590 S.E.2d 42, 44 (Ct. App. 2003) ("The question of whether to order a competency examination falls within the discretion of the trial [court] whose decision will not be overturned on appeal absent a clear showing of an abuse of that discretion."); *see also* S.C. Code Ann. § 17-24-20(A) (2014) ("A defendant is guilty but mentally ill if, at the time of . . . 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.").

(3) Plea Counsel failed to have Applicant evaluated by an independent qualified medical professional to conduct a forensic psychological competency to stand trial and criminal responsibility evaluations, or to determine whether Applicant had the requisite mental capacity prior to the plea hearing based on Applicant's mental health history when it was reasonable and necessary to do so in Applicant's defense. *See Jeter v. State*, 308 S.C. 230, 417 S.E.2d 594 (1992); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015). Specifically, Geoffrey R. McKee, PhD, ABPP, conducted a forensic psychological Competency to Stand Trial evaluation of Applicant on December 7, 2018. Dr. McKee provided the following finding in his report dated December 9, 2018: "It is my opinion, based on my clinical interview and psychological testing described within this report, that Mr.

Shaeffer *does not currently* have a sufficient factual and rational understanding of the proceedings against him and is not now capable of assisting his attorney in his defense due to Mild to Moderate Intellectual Disability." (emphasis in original).

(4) Plea Counsel failed to move for a *Blair* hearing prior to the plea hearing for the Plea Court to determine Applicant's competency to stand trial based on Applicant's mental health history and records. *See State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981); *Matthews v. State*, 358 S.C. 456, 596 S.E.2d 49 (2004); S.C. Code §§ 44-23-410 and 430.

(5) Plea Counsel failed to call an expert witness to testify regarding Applicant's mental health history during the sentencing phase of the plea hearing (competency to stand trial, criminal responsibility, and mitigation) when it was reasonable and necessary to present this critical defense and mitigation evidence.

(6) Plea Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible mitigating evidence in preparation of Applicant's defense. *See Wiggins v. Smith*, 539 U.S. 510 (2003). Specifically, Plea Counsel failed to obtain all necessary records and speak with witnesses regarding Applicant's mental health history to assist in determining competency and capacity to conform (criminal responsibility).

(7) Plea Counsel failed to present all reasonable and necessary evidence to the judge during the sentencing phase in mitigation of Applicant's potential sentence.

(8) Plea Counsel failed to review all potential defenses prior to Applicant's guilty plea. *See Rolen v. State*, 384 S.C. 409, 683 S.E.2d 471 (2009) (citing *Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985) and finding "[a] defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial."); *See Ray v. State*, 303 S.C. 374, 401 S.E.2d 151 (1991) (finding defendant's guilty plea was not intelligently and voluntarily made in light of the erroneous advice given by plea counsel).

(App. 97–108). Petitioner also noted his intent to present evidence in support of equitable tolling of the statute of limitations based on the competency evaluation report of Geoffrey R. McKee,

PhD, ABPP dated December 9, 2018 and cited *Ferguson v. State*, 382 S.C. 615, 619, 677 S.E.2d 600, 602 (2009) (finding the statute of limitations will be tolled where the applicant demonstrates the failure to timely file a PCR application was due to mental incompetency.).[1] (App. 104–106).

***PCR Evidentiary Hearing***

On June 4, 2021, Petitioner appeared before the Honorable Jennifer B. McCoy for a virtual hearing[2] on Respondent's motion to dismiss, and whether Petitioner was entitled to equitable tolling of the one-year statute of limitations pursuant to *Ferguson v. State*, 382 S.C. 615, 620, 677 S.E.2d 600, 602 (2009).[3] (App. 109–173). Dayne Phillips represented Petitioner and called Dr. Geoffrey R. McKee to testify regarding Petitioner's competency. Assistant Deputy Attorney General Lindsey A. McCallister represented the Respondent and called Plea Counsel to testify regarding his representation of Petitioner.

Prior to the hearing, PCR counsel sent an email to the PCR Court attaching the relevant documents, case law, and statutes that counsel would reference during the hearing. (App. 178). PCR Counsel noted at the beginning of the hearing, "[T]he [Petitioner] moves for equitable tolling of the statute of limitations for the PCR court to consider its claims of ineffective

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[1] Petitioner also cited S.C. Code § 17-27-70(b) and (c) (Court procedure on receipt of application); *Gary v. State*, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001); and *Pelzer v. State*, 378 S.C. 516, 521, 662 S.E.2d 618, 620-621 (Ct. App. 2008) (summarizing the doctrine of equitable tolling: "The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine.").

[2] The virtual hearing was held via Cisco WebEx Meeting in accordance with the Chief Justice's administrative memorandum, *Court Operations*, dated September 14, 2020.

[3] (finding "the proper remedy is . . . a hearing as to whether [Applicant's] mental capacity prevented such an application in the one year following his . . . guilty plea. If the PCR Court finds mental incompetence prevented his filing a PCR application, the court should determine the duration of the incompetency, and whether the application was filed within one year of . . . regaining competency.").

assistance of counsel based on a subsequent report done or evaluation done by Dr. Geoffrey McKee on December 9th of 2008" and cited *Ferguson v. State*. (App. 115, lines 3-11). Notably, the PCR Court admitted two of Petitioner's exhibits into evidence without objection. (App. 174–177). At the close of evidence and hearing arguments from counsel, the PCR Court requested that the parties submit proposed orders for her review and consideration. (App. 170, lines 14-22).

**Dr. Geoffrey R. McKee**

At the PCR hearing, Dr. Geoffrey R. McKee testified as to his extensive educational background, training, and experience. (App. 116, line 11 – 118, line 20). Specifically, Dr. McKee testified that he has been qualified as an expert in forensic psychology in over 200 cases in South Carolina state courts. (App. 118, lines 3-9). The PCR Court admitted Dr. McKee as an expert in forensic psychology, criminal responsibility, and competency to stand trial without objection. (App. 119, lines 3-17). The PCR Court also admitted Dr. McKee's Curriculum Vitae into evidence as Petitioner's exhibit number one without objection. (App. 119, lines 18-25).

Dr. McKee testified that he conducted a competency to stand trial evaluation of Petitioner on December 7, 2018. (App. 120, lines 11-25). Specifically, he administered the Wechsler Abbreviated Scale of Intelligence (WAIS) that has "two subtests that are directly relevant to the issues of competency to stand trial". (App. 122, lines 2-16). Dr. McKee found that Petitioner "fell within the lowest 1 percent of the population", which "correlates to a diagnosis of intellectual disability or what we used to call mental retardation." (App. 122, line 24 – 123, line 5). Dr. McKee found that Petitioner's IQ score to be "around 60" and "[m]aybe as high as 65." (App. 125, lines 14-18). Dr. McKee further testified that, in his expert opinion, Petitioner "lacked capacity to have a factual or rational understanding of the proceedings against him and lacked the capacity to assist his attorney in his defense due to extremely low intellectual disability" in 2018. (App. 127, lines 4-17).

Dr. McKee also testified that "[i]ntellectual disability is a chronic and fairly unchanging disorder that starts in childhood prior to the age of 18 and persists throughout the lifetime of an individual." (App. 128, lines 6-23). Dr. McKee opined "it is likely that, earlier in [Petitioner's] life, during his - - the proceedings in 2014, he likely had intellectual disability." (App. 128, lines 8-14). PCR counsel specifically inquired, "**Based on your training and experience, is it your expert opinion that there's a reasonable probability that he was incompetent at the time of his plea?**" Dr. McKee replied, "**Yes. It's likely that he was incompetent at the time of his plea.**" (App. 128, line 25 – 129, line 4) (emphasis added).

Dr. McKee further testified that, in his expert opinion, Petitioner does not have the sufficient capacity to consult with his lawyer with a reasonable degree of rational understanding and factual understanding of the proceedings against him. (App. 129, lines 5-10). Dr. McKee testified that, in his expert opinion, he would have recommended a competency evaluation to address this issue prior to Petitioner's plea hearing. (App. 129, lines 11-18). The PCR Court admitted Dr. McKee's report into evidence without objection as Applicant's exhibit number two. (App. 129, lines 19 – 130, line 4). Notably, Dr. McKee testified that, in his expert opinion, it is unlikely that Petitioner's competency could be restored through education: "**Well, I'm saying it's unlikely that he could**" and "**I'm saying it's unlikely that he had that capacity, that's a standard I'm using based on what I found in my own examination of him that it was more likely than not that he was not competent to stand trial.**" (App. 132, line 6; App. 134, line 21 – 135, line 1; App. 137, lines 12-17) (emphasis added).

**Michael Routzong (Plea Counsel)**

Plea Counsel testified at the hearing that he represented Petitioner for about one year. (App. 140, lines 14-22). Plea Counsel admitted on cross-examination that he knew prior to the guilty plea

that Petitioner was previously in special education classes from elementary school until eighth grade because of a sexual recidivism assessment report he had conducted. (App. 149, lines 17-25). Plea Counsel also conceded that he had "no recollection of asking [Petitioner] those specific questions" regarding the judicial system and didn't "see any notes that I ever asked him those specific questions." (App. 150, lines 7-25; App. 151, lines 15-24). Plea Counsel further testified, "I don't have any specific recollection of that conversation[,] nor do I have any notes" regarding whether he inquired about Petitioner's understanding of their conversations, his constitutional rights, and the overall judicial procedure. (App. 150, 18-25; App. 151, lines 15-24). On re-direct examination, Plea Counsel described Petitioner as "slow" but maintained he "never doubted that he was competent" despite the "evidence that [Petitioner] was slow." (App. 155, lines 6-11).

***Order of Dismissal***

On September 7, 2021, the PCR Court filed an Order of Dismissal (i.e., signed Respondent's proposed order). (App. 208–222). Specifically, the PCR Court found that "[Petitioner] ha[d] not established any mental incapacity prevented him from complying with the one-year statue of limitations. Therefore, the State's motion to dismiss this application for post-conviction relief with prejudice is granted." (App. 221).

The PCR Court found that Dr. McKee's expert testimony and report was "insufficient to meet [Petitioner's] burden of proving is incapacity prevented him from timely filing a post-conviction relief application within one year of his guilty plea as required by section 17-27-45 of the South Carolina Code [of Laws]." (App. 218). The PCR Court found, "persuasive Counsel's credible testimony regarding his interactions with [Petitioner] at the time of the plea." (App. 218). The PCR Court noted that Plea Counsel "credibly testified he had no indication [Petitioner] was incompetent during the course of his representation." (App. 218).

The PCR Court acknowledged that Dr. McKee "testified, in his opinion, [Petitioner] was likely incompetent at the time of the plea[.]" (App. 219). The PCR Court also conceded, "The Court does not question Dr. McKee's finding that [Petitioner] was incompetent in December 2018." (App. 220). The PCR Court further found that "[Petitioner] failed to prove when [his] incompetency started" and "conclude[d] [Petitioner] has not established any mental incapacity prevented him from complying with the one-year statute of limitations." (App. 221).

***Petitioner's Motion to Alter or Amend***

On September 17, 2021, Petitioner submitted a Motion to Alter or Amend judgment. (App. 223 – 230). In support of that motion, Petitioner submitted the following arguments:

> (1) Applicant incorporate[d] by reference Applicant's Proposed Order Denying Respondents Motion to Dismiss and Granting Tolling of the Statute of Limitations as if fully set forth verbatim into this motion. Notably, the facts and arguments contained in that memorandum necessitate granting the tolling of the statute of limitations and an evidentiary hearing on the merits of Applicant's PCR action.
>
> (2) Respectfully, although the Court allowed the parties to submit Proposed Orders, the procedure followed by this Court denied Applicant an opportunity to have the PCR tolling issue adjudicated by an independent judicial officer in violation of the separation of powers doctrine. *See* S.C. Art. I, § 8. Specifically, the Court did not provide the State with any basis for denying Applicant's claims other than delegating the responsibility of drafting a proposed order of dismissal to the parties. The Court adopted the State's adversarial proposed Order of Dismissal despite that this independent judicial function cannot be delegated to an executive agency without providing specific instructions and rationale for omitting findings of fact and/or denying each claim. *See generally Marlar v. State*, 375 S.C. 407, 408, 653 S.E.2d 266 (2007) (holding, "Pursuant to S.C. Code Ann. § 17-27-80 . . . , the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented.").
>
> (3) The Order of Dismissal fail[ed] to properly address Applicant's claim that it is reasonable and necessary to toll the statute of limitations in this matter based on Applicant's demonstration that

his failure to timely file the PCR action was due to mental incompetency. *See Ferguson v. State*, 382 S.C. 615, 619, 677 S.E.2d 600, 602 (2009) (finding the statute of limitations will be tolled where the applicant demonstrates the failure to timely file a PCR application was due to mental incompetency); *Pelzer v. State*, 378 S.C. 516, 521, 662 S.E.2d 618, 620-621 (Ct. App. 2008) (summarizing the doctrine of equitable tolling: "The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine."); *Gary v. State*, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001).

(4) The Order of Dismissal fail[ed] to properly address Dr. Geoffrey McKee's evaluation, testimony, findings, and opinions regarding his assessment of Applicant as an expert in forensic psychology. Specifically, the Order of Dismissal incorrectly finds that Dr. McKee's expert opinion is insufficient to meet Applicant's burden of proving "his incapacity prevented him from timely filing a post-conviction relief application within one year of his guilty plea as required by section 17-25-45 of the South Carolina Code." Notably, the Order of Dismissal admits the following:

a. Dr. McKee is an expert in forensic psychology.

b. Dr. McKee conducted a competency evaluation of Applicant.

c. Dr. McKee noted Applicant was in special education programs beginning in elementary school.

d. Dr. McKee conducted intelligence tests of Applicant and found Applicant's "scores were in the lowest 1% of the population."

e. Dr. McKee also found that Applicant had a difficulty reading.

f. Dr. McKee "evaluated Applicant for evidence of malingering and found none."

g. Based on the Wexler test, "Applicant has mild-to-moderate intellectual disability" and "Applicant's IQ is around 60-65 and stated below 70 is the red line for mental disability."

h. Applicant "showed deficits in rational understanding", "could not understand the concept of plea bargaining", and "had concerns that if Applicant decided to testify that he would have great difficulty understanding the questions directed towards him, specifically on cross-examination."

i. Dr. "McKee conducted that in December 2018, Applicant lacked the capacity to assist his attorney and lacked the understanding of the proceedings against him."

j. Dr. "McKee further testified intellectual disability begins in childhood and persists through adulthood."

k. Dr. McKee believes that Applicant "likely had this disability at the time of his plea and it likely still persists."

l. Dr. "McKee testified there is a reasonable probability that Applicant was incompetent at the time of his plea."

m. Dr. "McKee further stated he believes it would have been prudent to request a *Blair* hearing prior to Applicant's plea.

n. "The Court does not question Dr. McKee's finding that Applicant was incompetent in December 2018."

(5) The Order of Dismissal fails to properly address Applicant's Proposed Order Denying Respondents Motion to Dismiss, and Granting Tolling of the Statute of Limitations also included the following:

a. On cross-examination, Dr. McKee testified that it is unlikely for Applicant's competency to be "restored", but Applicant could be provided education regarding the legal system and procedure with inpatient treatment.

b. Dr. McKee further noted during redirect examination that there is a difference between the education provided by an attorney and medical professional.

c. Notably, Dr. McKee reiterated and confirmed his prior finding that Applicant does not currently have a sufficient factual and rational understanding of the proceedings against him and is not now capable of assisting his attorney in his defense due to Mild to Moderate Intellectual Disability.

(6) The Order of Dismissal fail[ed] to properly address Plea Counsel's

entire testimony regarding his interactions with Applicant. Specifically, Applicant's Proposed Order provided the following relevant testimony from the hearing:

a. Plea Counsel testified that he knew Applicant had attended special education classes but never had Applicant evaluated to determine whether he was Competent to Stand Trial.

b. Plea Counsel knew Applicant was "slow" but did not conduct any specific colloquy with Applicant to see if Applicant understood their conversations.

c. Plea Counsel maintained that he had no recollection of having an issue communicating with Applicant.

d. Notably, Plea Counsel admitted that his recollection of his conversations with Applicant was vague and that he had no specific notes regarding Applicant's understanding of his rights, discovery, or legal proceedings.

(7) Therefore, this [PCR] Court should reconsider its Order of Dismissal (filed on September 7, 2021), withdraw that order, enter an Order Denying Respondents Motion to Dismiss and Granting Tolling of the Statute of Limitations, and order a hearing on the merits of the PCR action.

(App. 223 – 230).

On October 5, 2021, the PCR Court filed an Order denying Petitioner Motion to Alter or Amend Judgment, and Petitioner received notice of the filed Order on October 8, 2021. (App. 231–231). Petitioner timely filed a Notice of Appeal on October 13, 2021. (App. 232).

***Relief Sought***

Petitioner seeks a writ of certiorari for this Court to review the dismissal of his PCR action.

## STANDARD OF REVIEW

In reviewing a PCR court's decision, this Court will uphold the PCR court's findings if there is any evidence of probative value to support them. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). However, if the PCR court's conclusions are controlled by an error of law or are unsupported by the evidence, this Court must reverse the decision. *Edwards v. State*, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011).

## ARGUMENT

### I. THE PCR COURT ERRED IN FINDING PETITIONER FAILED TO PROVE HIS MENTAL INCAPACITY PREVENTED HIM FROM FILING A PCR APPLICATION IN THE ONE YEAR FOLLOWING HIS GUILTY PLEA BECAUSE THE PCR COURT ACKNOWLEDGED HIS INCOMPETENCE BASED ON A SUBSEQUENT COMPETENCY EVALUATION AND THE EXPERT WITNESS WHO CONDUCTED THE EVALUATION TESTIFIED THERE WAS A REASONABLE PROBABILITY PETITIONER WAS INCOMPETENT AT THE TIME OF HIS PLEA.

In *Ferguson v. State*, 382 S.C. 615, 620, 677 S.E.2d 600, 602 (2009), this Court addressed whether the one-year statute of limitations set forth in Section 17-27-45 of the South Carolina Code of Laws is tolled by a PCR applicant's mental incapacity.[4] This Court found that "the proper remedy is . . . a hearing as to whether [an applicant's] mental capacity prevented such an application in the one year following his . . . guilty plea." *Id.*, 382 S.C. at 620, 677 S.E.2d at 602. This Court also held, "If the PCR Court finds mental incompetence prevented [an applicant's] filing [of] a PCR application, the court should determine the duration of the incompetency, and whether the application was filed within one year of . . . regaining competency." *Id.*

"When a PCR applicant raises issues of competency in the context of a plea proceeding, the two-prong *Strickland* analysis[5] still applies; however, because of the nature of the claim, proof of deficiency of counsel is intertwined with prejudice." *Ramirez v. State*, 419 S.C. 14, 21, 795 S.E.2d 841, 844–845 (2017) (footnote not in original). "Specifically, when establishing *Strickland* prejudice in the context of plea counsel's failure to request a mental competency

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[4] S.C. Code § 17-27-45(a) provides, in relevant part: "An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later." *See Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996).

[5] *See Hill v. Lockhart*, 474 U.S. 52 (1985) (applying the *Strickland v. Washington*, 466 U.S. 668 (1984) standard to guilty plea challenges of ineffective assistance of counsel and finding ineffective assistance of counsel from a guilty plea where: (1) counsel's advice was not within the range of competence demanded of attorneys in criminal cases; and (2) "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial")).

evaluation, 'the [applicant] need only show a 'reasonable probability' that he was ... incompetent at the time of the plea." *Id.* 419 S.C. at 21, 795 S.E.2d at 845 (citing *Jeter v. State*, 308 S.C. 230, 232–33, 417 S.E.2d 594, 595–596 (1992) and *Matthews v. State*, 358 S.C. 456, 458–460, 596 S.E.2d 49, 50–51 (2004) (expanding the reasonable probability standard as the burden for proving both the deficiency of counsel and the prejudice prongs)).

This Court has reiterated that the "opinions in *Jeter* and *Matthews* make it clear that when competency to enter a plea is at issue, a PCR applicant need only to show there was a reasonable probability he was incompetent at the time of his plea." *See Jeter*, 308 S.C. at 232–33, 417 S.E.2d at 595–596 (finding due process prohibits the conviction of an incompetent defendant, and this right may not be waived by a guilty plea). *Id.*, 419 S.C. at 23, 795 S.E.2d at 846. Notably, "[o]nce such a reasonable probability has been established, prejudice is also demonstrated." *Id.* (citing *Matthews*, 358 S.C. at 456–460, 596 S.E.2d at 51 (finding "trial counsel's failure to request a *Blair* hearing prejudiced petitioner under the *Jeter* standard")).

***Discussion***

In this case, the PCR Court erred in finding Petitioner failed to prove his mental incapacity prevented him from filing a PCR application in the one year following his guilty plea because the PCR Court acknowledged his incompetence based on a subsequent competency evaluation, and the expert witness who conducted the evaluation testified there was a reasonable probability Petitioner was incompetent at the time of his plea. *See Ferguson*, 382 S.C. at 619, 677 S.E.2d at 602. Specifically, Petitioner presented sufficient evidence at the PCR hearing to establish by a preponderance of the evidence, and at a minimum, a reasonable probability that he was incompetent at the time of his plea. *See Ramirez v. State*, 419 S.C. at 23, 795 S.E.2d at 846; *Matthews*, 358 S.C. at 456–460, 596 S.E.2d at 51. Therefore, the PCR erred in granting

Respondent's Motion to Dismiss because equitable tolling of the statute of limitations was necessary based on the reasonable probability of Petitioner's mental incompetency at the time of his plea.

The PCR Court failed to properly address Dr. McKee's expert testimony and competency report regarding his assessment of Petitioner's competency. Notably, the PCR Court acknowledged the following critical facts in the Order of Dismissal:

a. Dr. McKee is an expert in forensic psychology.

b. Dr. McKee conducted a competency evaluation of Applicant.

c. Dr. McKee noted Applicant was in special education programs beginning in elementary school.

d. Dr. McKee conducted intelligence tests of Applicant and found Applicant's "scores were in the lowest 1% of the population."

e. Dr. McKee also found that Applicant had a difficulty reading.

f. Dr. McKee "evaluated Applicant for evidence of malingering and found none."

g. Based on the Wexler test, "Applicant has mild-to-moderate intellectual disability" and "Applicant's IQ is around 60-65 and stated below 70 is the red line for mental disability."[6]

h. Applicant "showed deficits in rational understanding", "could not understand the concept of plea bargaining", and "had concerns that if Applicant decided to testify that he would have great difficulty understanding the questions directed towards him, specifically on cross-examination."

i. Dr. "McKee conducted that in December 2018, Applicant lacked the capacity to assist his attorney and lacked the understanding of the proceedings against him."

[6] *See* Ramirez, 419 S.C. at 18, 795 S.E.2d at 843 (n.3) ("For reference, 'an IQ of approximately [seventy] or below" indicates '[s]ignificantly subaverage intellectual functioning.' Am. Psychiatric ass'n, Diagnostic and Statistical Manual of Mental Disorders 49 (4th ed. 2000) [hereinafter DSM-IV].").

j. Dr. "McKee further testified intellectual disability begins in childhood and persists through adulthood."

k. Dr. McKee believes that Applicant "likely had this disability at the time of his plea and it likely still persists."

l. Dr. "McKee testified there is a reasonable probability that Applicant was incompetent at the time of his plea."

m. Dr. "McKee further stated he believes it would have been prudent to request a *Blair* hearing prior to Applicant's plea.

n. "The Court does not question Dr. McKee's finding that Applicant was incompetent in December 2018."

(App. 218–221).

At the PCR hearing, Dr. McKee testified that he has been qualified as an expert in forensic psychology in over 200 cases in South Carolina state courts. (App. 118, lines 3-9). The PCR Court admitted Dr. McKee as an expert in forensic psychology, criminal responsibility, and competency to stand trial without objection. (App. 119, lines 3-17). Dr. McKee testified that he conducted a competency to stand trial evaluation of Petitioner on December 7, 2018 and found that Petitioner "fell within the lowest 1 percent of the population", which "correlates to a diagnosis of intellectual disability or what we used to call mental retardation." (App. 120, lines 11-25; App. 122, line 24 – 123, line 5). Dr. McKee also found that Petitioner's IQ score to be "around 60" and "[m]aybe as high as 65." (App. 125, lines 14-18). Dr. McKee further testified that, in his expert opinion, Petitioner "lacked capacity to have a factual or rational understanding of the proceedings against him and lacked the capacity to assist his attorney in his defense due to extremely low intellectual disability" in 2018. (App. 127, lines 4-17).

Furthermore, Dr. McKee testified that "[i]ntellectual disability is a chronic and fairly unchanging disorder that starts in childhood prior to the age of 18 and persists throughout the lifetime of an individual." (App. 128, lines 6-23). Dr. McKee also opined "it is likely that, earlier

in [Petitioner's] life, during his - - the proceedings in 2014, he likely had intellectual disability." (App. 128, lines 8-14). PCR counsel specifically inquired, "**Based on your training and experience, is it your expert opinion that there's a reasonable probability that he was incompetent at the time of his plea?**" and Dr. McKee replied, "**Yes. It's likely that he was incompetent at the time of his plea.**" (App. 128, line 25 – 129, line 4) (emphasis added). The PCR Court admitted Dr. McKee's report into evidence without objection as Applicant's exhibit number two. (App. 129, lines 19 – 130, line 4).

Dr. McKee further testified that, in his expert opinion, Petitioner does not have the sufficient capacity to consult with his lawyer with a reasonable degree of rational understanding and factual understanding of the proceedings against him. (App. 129, lines 5-10). Dr. McKee testified that, in his expert opinion, he would have recommended a competency evaluation to address this issue prior to Petitioner's plea hearing. (App. 129, lines 11-18). Notably, Dr. McKee testified that, in his expert opinion, it is unlikely that Petitioner's competency could be restored through education: "**Well, I'm saying it's unlikely that he could**" and "**I'm saying it's unlikely that he had that capacity, that's a standard I'm using based on what I found in my own examination of him that it was more likely than not that he was not competent to stand trial.**" (App. 132, line 6; App. 134, line 21 – 135, line 1; App. 137, lines 12-17) (emphasis added).

Unlike in *Lee v. State*, 396 S.C. 314, 721 S.E.2d 442 (2011), Plea Counsel admitted on cross-examination that he knew prior to the guilty plea that Petitioner took special education classes in school and described Petitioner as "slow". (App. 149, lines 17-25; App. 155, lines 6-11). *See generally McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) ("A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any

aggravating evidence introduced by the State.").[7] Plea Counsel also Plea Counsel conceded that he had "no recollection of asking [Petitioner] those specific questions" regarding the judicial system and didn't "see any notes that I ever asked him those specific questions." (App. 150, lines 7-25; App. 151, lines 15-24). Notably, Plea Counsel further testified, "I don't have any specific recollection of that conversation[,] nor do I have any notes" regarding whether he inquired about Petitioner's understanding of their conversations, his constitutional rights, and the overall judicial procedure. (App. 150, 18-25; App. 151, lines 15-24).

Accordingly, the PCR erred in granting Respondent's Motion to Dismiss because equitable tolling of the statute of limitations was necessary based on the reasonable probability of Petitioner's mental incompetency.

***Per se Prejudice***

Plea Counsel's performance was deficient, as it fell below an objective standard of reasonableness because there is a reasonable probability that Petitioner was incompetent at the time of his plea. *See Hill*, 474 U.S. at 57-59; *see generally Praylow v. Martin*, 761 F.2d 179 (4th Cir. 1985) (provides that a defendant's stated interest in pleading guilty does not relieve counsel of his duty to investigate possible defenses); *Cf. Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness").

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[7] *Wiggins v. Smith*, 539 U.S. 510 (2003) ("In assessing the reasonableness of an attorney's investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."); *Lounds v. State*, 380 S.C. 454, 460, 670 S.C. 646, 649 (2008) ("while the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.") (quotation citation omitted).

Petitioner did not voluntarily, knowingly, or intelligently plead guilty based on Plea Counsel's failure to request a competency to stand trial and criminal responsibility evaluations and a *Blair* hearing prior to the plea hearing. *See Boykin v. Alabama*, 395 U.S. 238 (1969); *Monahan v. State*, 365 S.C. 130, 133, 616 S.E.2d 422, 423 (2005) (noting the issue of whether an individual is criminally responsible for a crime due to a mental health condition is separate from the issue of whether an individual is competent to stand trial); *Id.* ("The test for criminal responsibility relates to the time of the alleged offense, while competency to stand trial relates to the time the defendant is before the court for trial.").

Plea Counsel failed to move for the Chief Administrative Judge or presiding judge to sign Orders for Competency to Stand Trial and Criminal Responsibility and Capacity to Conform Evaluations based on Applicant's mental health history and records when it was reasonable and necessary to do so in Applicant's defense. *See State v. Blair*, 275 S.C. 529, 533, 273 S.E.2d 536, 538 (1981) (finding evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion as to his competency to stand trial are all relevant in determining whether a defendant is entitled to a hearing on his competency to stand trial); S.C. Code §§ 44-23-410–430; *Matthews v. State*, 358 S.C. 456, 596 S.E.2d 49 (2004); *State v. Burgess*, 356 S.C. 572, 575, 590 S.E.2d 42, 44 (Ct. App. 2003) ("The question of whether to order a competency examination falls within the discretion of the trial [court] whose decision will not be overturned on appeal absent a clear showing of an abuse of that discretion."); *see also* S.C. Code Ann. § 17-24-20(A) (2014) ("A defendant is guilty but mentally ill if, at the time of . . . 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.").

Therefore, Plea Counsel's unreasonably deficient performance prejudiced Petitioner because there is a reasonable probability that, but for Plea Counsel's errors, Petitioner would not have pled guilty and been found not competent to stand trial. *See Hill*, 474 U.S. 52 (applying the *Strickland* standard to guilty plea challenges of ineffective assistance of counsel).

**[Conclusion and Signature Page to Follow]**

## CONCLUSION

Based on the foregoing reasons, Petitioner Jerry Shaeffer respectfully requests that this Court grant his Petition for Writ of Certiorari. *See* U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6); *Ferguson*, 382 S.C. at 619, 677 S.E.2d at 602.

Respectfully submitted,

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