

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 2013-UP-236 (S.C. Ct. App. filed June 5, 2013)

The State of South Carolina..... Respondent,

vs.

Timothy E. Young..... Petitioner.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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SC Court of Appeals

INDEX

INDEX	2
CERTIFICATE OF COUNSEL	3
QUESTIONS PRESENTED	4
STATEMENT OF THE CASE	5
ARGUMENT	7

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that a motion to reconsider was made and finally ruled on by the Court of Appeals on August 22, 2013.

QUESTIONS PRESENTED

Was Young's due process right to gain access to exculpatory, favorable materials violated when he was denied access to all notes in a psychotherapist's file after the trial judge's in camera review of that file for Brady materials?

Did the Court of Appeals err when it held that this issue was not preserved for appellate review, as Young raised the issue and the trial judge ruled on the issue?

STATEMENT OF THE CASE

On April 7, 2011 a jury convicted Timothy Young on indictments that charged him with first-degree criminal sexual conduct with a minor and with committing a lewd act on a minor. The complaining witness, Young's stepdaughter, lived with her biological father and stepmother in North Carolina at the time the allegations arose. The witness and her older sister visited with Young and his wife at their home in Myrtle Beach following the terms of a custody order. (App. p. 79, lines 2-6).

Due to behavior problems with the witness and her sister, the biological father contacted the North Carolina Department of Social Services (NCDSS). NCDSS referred him to a private psychotherapist. Both girls began to attend therapy sessions with Denise Scarce on August 18, 2008. (App. p. 83, line 15-p. 85, line 21). Scarce diagnosed the witness with adjustment disorder and anxious mood. (App. p. 233, lines 6-8).

On November 4, 2008 the witness told her stepmother in North Carolina that her biological mother acted inappropriately towards and around her. The biological father alerted NCDSS, and visitation in Myrtle Beach ceased pending the result of a NCDSS investigation. (App. p. 87, line 15-p. 88, line 8). The witness, who was seven at the time, also met with Scarce about the disclosure on November 6, 2008. (App. p. 216, lines 3-16; App. p. 221, lines 16-18).

On January 14, 2009, without ever seeing Young or his wife again, the witness disclosed a second allegation of sexual abuse to her stepmother. (App. p. 148, lines 5-11). This time she identified Young as another person who had acted inappropriately towards her. NCDSS was again contacted, and, on January 16, 2009, the witness visited Scarce about the second disclosure she made to her stepmother. (App. p. 224, lines 5-23).

The witness continued to see Searce until August 4, 2010. (App. p. 219, lines 4-5). All in all, the witness and the psychotherapist met for nineteen counseling sessions. (App. p. 242, line 19-p. 243, line 19). In preparation for trial, Young's trial counsel filed a motion to access any favorable materials in Searce's file. (App. pp. 66-67). Young's trial counsel and the prosecuting solicitor signed a consent order that provided for the trial judge to receive Searce's file under seal and review it in camera "for the limited purpose of addressing possible exculpatory material for the defense." (App. pp. 64-65)

At a March 17, 2011 pre-trial hearing, Young's trial counsel said he wanted the trial judge "to continue to peruse [Searce's file] to see if there's anything exculpatory in there that I might be entitled to." (App. p. 69, lines 16-18). When he was finished with his review, the trial judge stated that "I have perused it," (App. p. 70, lines 1-2), and "I have excluded the vast majority of what was turned over to me because I do find that those were simply notes that are not subject to disclosure." (App. p. 70, lines 7-10).

The trial judge's ruling on Young's access to favorable materials in that file was reduced to a written order that was signed and clocked before Young's trial began. This order sealed "Court Exhibit #1" and identified the materials in it as "not discoverable." (App. p. 63). On April 4, 2011 the case went before a jury. The jury convicted Young as charged, and the trial judge sentenced him to twenty-five years. (App. p. 268, lines 8-19).

On direct appeal to the Court of Appeals, Young argued that the trial judge erred in denying him access to the notes in the file simply because they were notes. Young argued that the trial judge should have determined whether the substance of the notes themselves contained information that was favorable to him. The Court of Appeals affirmed without reaching the merits on issue preservation grounds in an unpublished

opinion. (App. p. 14). The Court of Appeals also denied Young's motion to reconsider by written order dated August 22, 2013. (App. p. 13).

Young now petitions the Supreme Court for a writ of certiorari to review the opinion of the Court of Appeals that affirms his conviction.

ARGUMENT

I. Young's due process right to gain access to exculpatory, favorable material was violated when he was denied access to all notes in a psychotherapist's file after the trial judge's in camera review of that file for Brady materials.

The trial judge committed reversible error when – both from the bench and in a written order – he denied Young access to all notes in Scarce's file simply because he found they were notes that were “not discoverable.” (App. p. 63). This decision followed an in camera review of the psychotherapist's file for materials favorable to Young.

The written motion Young's trial counsel filed to gain access to Scarce's file was aimed at uncovering exculpatory, favorable material. (App. pp. 66-67). The consent order ultimately entered into clearly stated that the trial judge would review the file in camera for exculpatory material. (App. pp. 64-65). During a pre-trial hearing, Young's trial counsel requested that the trial judge “continue to peruse [Scarce's file] to see if there's anything exculpatory in there that I might be entitled to.” (App. p. 69, lines 16-18). This request falls squarely under and triggers the due process protections afforded to Young under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963).

The case most directly on point is Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989 (1987), a post-Brady due process case. In Ritchie the defendant filed a pre-trial motion to access any favorable material in a file maintained by the state agency that investigated the allegation he committed a sex crime against his daughter. Ritchie, 480

U.S. at 44, 107 S.Ct. at 994. At a hearing on the motion, the trial judge accepted the agency's assertion that the file contained no material favorable to Ritchie without reviewing the file himself and then denied the motion. Id., 107 S.Ct. at 994.

Though portions of the opinion were joined by only a plurality of Justices, the majority observed that “[i]t is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment.” Id. at 57, 107 S.Ct. at 1001 (citing Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196 (1963)). The Court then discussed the impossibility of determining whether any of the records in the agency's file were “material” because “neither the prosecution nor defense counsel has seen the information, and the trial judge acknowledged that he had not reviewed the full file.” Id., 107 S.Ct. at 1001.

The Court held “Ritchie is entitled to have the [agency's] file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial. If it does, he must be given a new trial.” Id., 107 S.Ct. at 1000. The Court did not identify any subset of records – such as notes from a counseling session – as “not discoverable” or protected from release to the defense if favorable and material.

In Young's case, the Record on Appeal supports the view that the trial judge committed error when he refused to turn any notes over to Young regardless of whether the substance of the notes contained exculpatory evidence. Two separate times the trial judge stated, “I do find that those were simply notes that are not subject to disclosure,” (App. p. 70, lines 7-10), and “the rest are just notes that I find are not discoverable.” (App. p. 72, lines 15-16). Young was entitled to (1) have the trial judge review the entire file for favorable material and (2) turn over any such material contained in the file,

regardless of whether the favorable material was contained in the form of a letter, report, note or any other document. The trial judge did not conduct a proper in camera review of the psychotherapist's file. The review that occurred violated Young's right to due process.

II. The Court of Appeals erred when it held that this issue was not preserved for appellate review, as Young raised the issue and the trial judge ruled on the issue.

For an issue to be preserved for review on appeal, "it must have been raised to and ruled upon by the trial judge." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). This Court has recognized that "[e]rror preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review." State v. Brannon 388 S.C. 498, 502, 697 S.E.2d 593, 595-96 (2010) (citing Dunbar, 356 S.C. at 142, 587 S.E.2d at 694). "[A] litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue." Id., 697 S.E.2d at 595-96 (citing Hubbard v. Rowe, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939)).

This Court has explained "[i]ssue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide a platform for meaningful appellate review." Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (quoting Queen's Grant Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 918 (Ct. App. 2006)).

[T]his is not a "gotcha" game aimed at embarrassing attorney or harming litigants, but rather is an adherence to settled principles that serve an important function. While it may be good practice for us to reach the merits of an issue where error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved.

Id. at 329-30, 730 S.E.2d at 285.

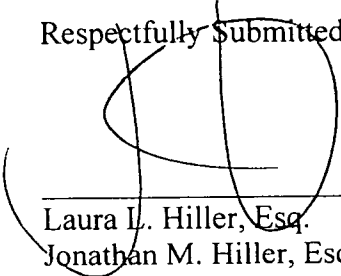
Young respectfully submits to this Court that the issue regarding his due process right to access favorable materials is not clearly unpreserved for appellate review. Young

first raised the issue of his right to access any favorable materials in Scarce's file when his trial counsel filed a written motion to access the file. (App. pp. 66-67). Ultimately Young entered into a consent order that allowed the trial judge to conduct an in camera review of the file. (App. pp. 64-65). On the record at the March 17, 2011 pre-trial hearing, Young's trial counsel made it very clear that he wanted the trial judge to review the file for favorable, exculpatory material. (App. p. 69, lines 16-18).

The trial judge then ruled on the issue when he determined what Young was entitled to access from the file. (App. p. 69, line 25-p. 12, line 19). Further, on March 22, 2011, before trial commenced, he issued a written order that specifically found "Court Exhibit #1" was not discoverable and further ordered that the file be sealed only to be opened at the "direction of an appellate court with jurisdiction in this case." (App. p. 63). On appeal, Young asserts this ruling was an error of law that resulted in prejudice to him.

As it was raised by Young and ruled upon by the trial judge, the issue on appeal is preserved for appellate review. Accordingly, Young respectfully requests the Supreme Court to grant certiorari in this case, address the merits of Young's appeal and ultimately remand Young's case to the trial court with instructions to review the entirety of the psychotherapist's file for materials favorable to him.

Respectfully Submitted,



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September 23, 2013

ATTORNEYS FOR PETITIONER

STATE OF SOUTH CAROLINA
In the Court of Appeals

On Writ of Certiorari to the Court of Appeals
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Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 2013-UP-236 (S.C. Ct. App. filed June 5, 2013)

The State of South Carolina Respondent,

vs.

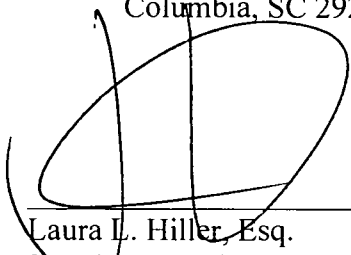
Timothy E. Young Petitioner.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 23rd day of September, 2013 he served a true copy of the Petition for Writ of Certiorari to the Court of Appeals on the **Court of Appeals** and also served a true copy of the Petitioner for Writ of Certiorari and Appendix on **Julie Kate Keeney**, Assistant Attorney General, by mailing the same via First Class U.S. Mail to the following addresses with sufficient postage attached:

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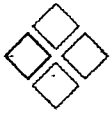
September 23, 2013

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ATTORNEYS FOR PETITIONER

SC Court of Appeals



HILLER & HILLER, PA
Defense Lawyers. We Defend to Restore.

September 23, 2013

The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: State v. Timothy Young – Tracking No. 2011119348

Dear Madame Clerk:

Enclosed for filing, please find a copy of the petition for writ of certiorari filed today in the Supreme Court regarding the above-referenced appeal. I have also enclosed my original certificate of service regarding the same.

Sincerely,

Jonathan Hiller
Attorney at Law

cc: Court Administration
Julie Kate Keeney, Esq.
Timothy Young

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SEP 24 2013
SC Court of Appeals