

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2012-212935
Circuit Court Case No. 2010-CP-38-1698

LEVON MINTZ, #303362,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ARGUMENT IN REPLY

- I. The PCR court erred in finding that appellate counsel was not ineffective for failing to file a merits brief on the issue of whether or not the trial court erred in refusing to charge the lesser-included offense of voluntary manslaughter.**

In its Return, the Respondent argues that the Petitioner's claim on appeal is not preserved for appellate review. See generally Return at 10-11; see also Return at 7 (footnote 3). Specifically, the Respondent cites to this Court's decision in Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), and contends that the Petitioner's failure to secure a ruling on the question of appellate counsel's deficient performance renders his claim on appeal unpreserved. The Petitioner respectfully submits that this Court should reject the Respondent's preservation argument because the PCR court's order complies with Marlar and because the Respondent's preservation argument contravenes Strickland v. Washington, 466 U.S. 668 (1984).

Marlar found its grounding in S.C. Code Ann. § 17-27-80, which requires that "[t]he court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." In Marlar, this Court was presented with a PCR court's ruling that stated, in full:

As to any allegations raised in the application or at the hearing not specifically addressed by this Order, this Court finds that the applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds that the applicant failed to meet his burden of proof regarding them. Therefore, any and all allegations not specifically addressed in this Order are hereby denied and dismissed.

375 S.C. at 409, 653 S.E.2d at 266. This Court then held that this ruling did not preserve any claims for appeal because it did not contain any "specific findings of fact and conclusions of law" as required by § 17-27-80. Id. Finally, this Court held that an appellant must file a Rule

59(e), SCRCP, motion to preserve for appeal any claims unaddressed by the order. Id. at 410, 653 S.E.2d at 267. Therefore, in order for a PCR court to comply with Marlar and § 17-27-80 such that a Rule 59(e) motion does not need to be filed, the PCR court's order must contain findings of fact and conclusions of law with regard to each issue presented.

In this case, the issue presented was one of ineffective assistance of counsel—a claim which is governed by Strickland v. Washington, 466 U.S. 668 (1984). In order for relief to be granted on such a claim, a PCR applicant must show that (1) counsel's performance was deficient; and (2) counsel's deficient performance prejudiced him. Id. The United States Supreme Court, however, explicitly held that both prongs do not have to be addressed if the reviewing court concludes that relief should be denied on one inquiry or the other:

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. *In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.* The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Id. at 697 (emphasis added). Stated differently, a reviewing court's order is sufficient under Strickland if it denies relief on either the deficiency prong or the prejudice prong; a reviewing court does not have to analyze both. The Respondent's preservation argument in this case, then, contravenes Strickland in that it requires PCR court's to address both prongs of Strickland even though Strickland explicitly states that a PCR court does not have to do so.

The Petitioner submits that the proper framework for determining if an order complies with § 17-27-80 is to determine the prevailing standard of review and to then see if the order has complied with that standard of review. The prevailing standard of review for a claim of ineffective assistance of counsel is that set forth by the United States Supreme Court in Strickland. In Strickland, the Supreme Court held that a reviewing court need not review both prongs in order to deny relief on a claim. Therefore, in denying a claim for relief, all § 17-27-80 requires is that a PCR court issue an order that complies with Strickland's mandate that only one component of its inquiry be addressed. In this case, the PCR court's order fully complies with Strickland because it denies relief based on its review of Strickland's prejudice prong. Since Strickland's inquiry is satisfied, the PCR court's order complies with § 17-27-80.¹

As this Court has stated, “[i]ssue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.” Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (citing Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). The PCR court's order gives this Court an appropriate “platform” with which to review its findings—accomplishing Marlar's central purpose. The Respondent's attempt to extend Marlar to decisions that are in compliance with Strickland extends that decision too far. Accordingly, this Court should review the claim on the merits.²

¹ The Petitioner submits that his approach is not inconsistent with the approach taken by the Court of Appeals in Burgess v. State, 402 S.C. 92, 738 S.E.2d 264 (Ct. App. 2013). In Burgess, the Court of Appeals held that the State must file a Rule 59(e) motion when a PCR court's order *granting* relief does not address both prongs of Strickland. In a case where relief is granted, as opposed to a case where relief is denied, Strickland requires that both prongs be satisfied; ergo, § 17-27-80 would not be satisfied by an order granting relief that failed to review both prongs of Strickland. Burgess is simply inapplicable to a case where relief is denied as opposed to granted.

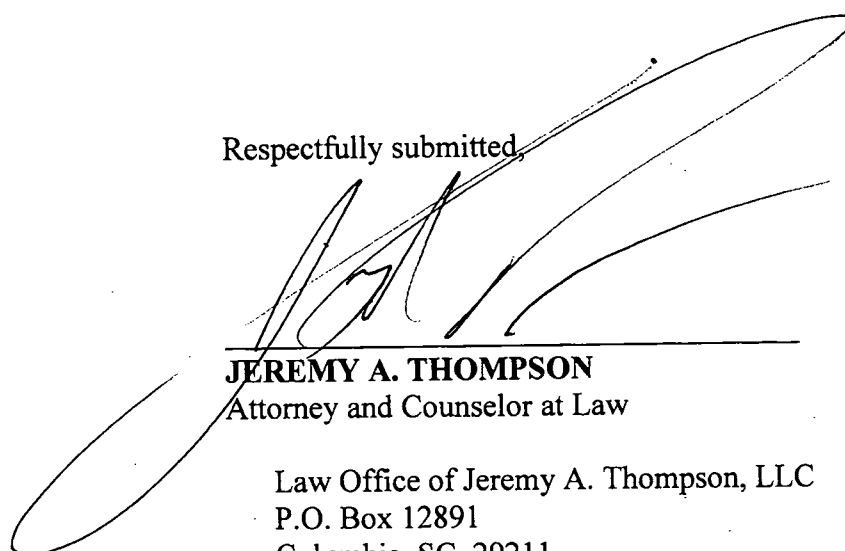
² The Petitioner would also respectfully submit that if this Court is inclined to adopt the State's argument, then this Court should grant certiorari and issue a full opinion doing so, as lower courts, attorneys, and PCR applicants need to be aware that § 17-27-80 requires that orders denying relief contain a more detailed analysis than that required by Strickland.

With regard to any other arguments advanced by the Respondent as to why this certiorari petition should be denied, the Petitioner would rely upon his arguments advanced in his certiorari petition.

CONCLUSION

For the reasons stated, the Petitioner asks this Court to grant the petition and to allow full briefing on these issues.

Respectfully submitted,



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This 28th day of February, 2014.

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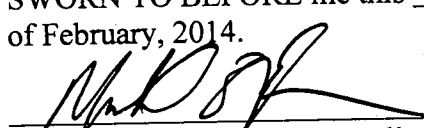
CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Reply to Return to Petition for a Writ of Certiorari has been served upon opposing counsel, Megan E. Harrigan, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 28th day of February, 2014.



JEREMY A. THOMPSON
ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 28th day
of February, 2014.



Notary Public for South Carolina

(L.S.)

My Commission Expires: 7/10/2022