

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2014-000956

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MAR - 9 2015

S.C. Supreme Court

Terrence D. Terry, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General
S.C. Bar # 68331

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

1. Whether the PCR court erred by refusing to grant Petitioner a belated appellate review of his original PCR claims pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) where there was no evidence Petitioner knowingly and intelligently waived his right to appeal or that PCR counsel ever advised Petitioner of his right to appeal and where it was clear by Petitioner's actions, including following the Federal Court's instruction to file a second PCR application, that he wished to seek appellate review?

STATEMENT OF THE CASE

A.

The Greenville County Grand Jury indicted Petitioner at the February 2005 term of General Sessions for two counts of lewd act upon a child (2005-CP-23-1157, -1158) and first-degree criminal sexual conduct (CSC) with a minor (2005-GS-23-1274). (App.pp.874-79). Ernest Hamilton, Esquire represented Petitioner.

On March 8, 2005, Petitioner pled guilty. The Honorable Edward W. Miller sentenced Petitioner to concurrent terms of 15 years for each count of lewd act upon a child and 20 years for first-degree CSC with a minor. (App.p.13; pp.880-82). Petitioner did not appeal.

B.

Petitioner filed an application for post-conviction relief (PCR) on November 11, 2005 (2005-CP-23-7327) and an amended application on February 5, 2007. (App.pp.17-23; pp.29-30). A hearing was held at the Greenville County Courthouse on March 1, 2007. (App.pp.31-107). Petitioner was present and represented by Susannah C. Ross, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Michael G. Nettles granted Petitioner a new trial on all charges in an order dated March 26, 2007. (App.pp.139-46).

Respondent filed a notice of appeal at the South Carolina Supreme Court. (App.pp.163-65). The Supreme Court granted Respondent's petition for writ of certiorari and the parties submitted briefs. (App.p.186; pp.187-200; pp.201-09). Petitioner was represented by Robert M. Pachak, Esquire of the South Carolina Commission on Indigent

Defense, Division of Appellate Defense. In an opinion filed July 13, 2009, the Supreme Court reversed the order granting relief. Terry v. State, 383 S.C. 361, 680 S.E.2d 277 (2009). (App.pp.210-22).

C.

Petitioner filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina. (App.pp.224-491). Respondent submitted a return and memorandum of law in support of motion for summary judgment and a subsequent amended return and memorandum of law in support of motion for summary judgment. (App.pp.492-563; pp.564-620). On June 16, 2011, the Honorable Kevin F. McDonald, United States Magistrate Judge, issued a report and recommendation to grant the motion for summary judgment. (App.pp.621-39). On September 30, 2011, the Honorable Joseph F. Anderson, Jr., United States District Court Judge, issued an order to stay, noting that as Petitioner did not file a notice of appeal after the PCR order was issued, he may have unexhausted State remedies. (App.pp.640-49).

D.

Petitioner filed a second PCR application on February 20, 2012 (2012-CP-23-1297). (App.pp.650-761). Respondent filed a return and partial motion to dismiss. (App.pp.762-68). A hearing was convened at the Greenville County Courthouse on December 17, 2013. (App.pp.769-822). Petitioner was present and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable G. Edward Welmaker issued an order filed February 17, 2014 in which he (1) granted Respondent's partial motion to dismiss

and (2) denied relief on Petitioner's claim that he was entitled to an Austin¹ review.
(App.pp.836-43).

¹ Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

The PCR judge did not err in finding Petitioner failed to meet his burden of proving he was entitled to an Austin review.

A.

At the PCR hearing, Petitioner stated the judge in his first PCR action granted relief on one ground and denied his other grounds. (App.pp.788-89). Petitioner argued he believed the first PCR judge failed to address one of his issues, so he filed a pro se Rule 59(e), SCRCP motion. (App.pp.790-91). Petitioner argued his first PCR attorney sent him a copy of the final order with a letter stating his appeal would be handled by the Office of Appellate Defense. (App.p.794). On cross-examination, Petitioner admitted he never asked his first PCR attorney to file an appeal. (App.p.810).

Petitioner’s first PCR counsel testified Petitioner never made a timely request for either a Rule 59(e) or an appeal. (App.p.811). PCR counsel testified she did not believe there were meritorious grounds for a Rule 59(e) motion. (App.p.811; p.813). PCR counsel testified the PCR judge instructed her how to draft the final order so she did not believe a 59(e) motion would have been successful. (App.p.815). PCR counsel

explained why the issues Petitioner lost at the first PCR hearing would not have been successful on appeal. (App.pp.812-13). PCR counsel reiterated Petitioner never asked her – either orally or in writing – to file an appeal. (App.p.813). PCR counsel stated that, if Petitioner asked her to file an appeal, she would have advised him against it but would have filed an appeal. (App.p.817).

B.

In denying Petitioner’s application for post-conviction relief, the PCR judge found Petitioner did not meet “his burden of proving he is entitled to an Austin review of the issues denied in his first PCR application.” The PCR judge noted Petitioner admitted he never asked PCR counsel to file a notice of appeal. The PCR judge found “PCR counsel’s decision not to file a notice of appeal without [Petitioner]’s request was a legitimate strategic decision for his appeal, and [Petitioner] has failed to demonstrate this decision fell below prevailing professional norms.” (App.pp.841-42).

C.

The PCR judge did not err in finding Petitioner failed to meet his burden of proof. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCPP).

Petitioner failed to prove PCR counsel was deficient. Contrary to Petitioner’s assertion, PCR counsel did not testify that she failed to discuss an appeal with Petitioner. Rather, she merely stated she had no record of such one way or the other. (App.pp.816-17). Further, Petitioner clearly knew the PCR order could be appealed because – by his

own admission – PCR counsel advised him the State would likely file an appeal. Petitioner and PCR counsel both testified Petitioner never asked PCR counsel to file an appeal. It is clear Petitioner was aware of the appeal process and simply chose not to exercise his appellate rights.²

Regardless, Petitioner cannot demonstrate he was prejudiced by the lack of a cross-appeal in this case. The issues raised in the “Statement of Austin Questions” in the Petition for Writ of Certiorari would not have been deemed meritorious on appeal. (Petition, pp.14-15). These issues were properly denied by the PCR judge because Petitioner failed to provide either evidence or testimony to support his allegations. As to his first issue, Petitioner failed to provide any medical evidence to support his claim of that he should have received a competency evaluation. See Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992) (holding that, to sustain a claim that plea counsel was ineffective for failing to request competency hearing, the petitioner must show reasonable probability that he would have been found incompetent). As to his second issue, Petitioner’s claim that additional mitigation evidence would have offset his admission to having sexually abused his daughters is pure speculation. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). As to his third issue, Petitioner’s claim that plea

² In addition, PCR counsel testified she did not think an appeal would be meritorious and not “a good way to set the record” and the PCR judge found “PCR counsel’s decision not to file a notice of appeal without [Petitioner]’s request was a legitimate strategic decision.” (App.p.842). See Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) (citation omitted) (“Counsel’s strategy will be reviewed under an objective standard of reasonableness.”).

counsel was deficient for not securing a favorable plea offer is meritless because the solicitor's office has the authority to make plea offers. See, e.g., State v. Needs, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998) ("Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they may simply decide not to prosecute the offense in its entirety. The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion."). As to his fourth issue, Petitioner did not prove his burden of demonstrating prosecutorial misconduct or a Brady³ violation because he did not demonstrate the SLED report was suppressed by the solicitor's office or material to his guilt or punishment. See Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999) (setting forth the four-part test to prevail upon a Brady claim). As the issues Petitioner did not prevail upon at his first PCR hearing would not have merited reversal on appeal, he cannot demonstrate he was prejudiced by the lack of a cross-appeal from his first PCR case.

D.

As Petitioner failed to meet his burden of proving he was entitled to a cross-appeal from the order issued from his first PCR application, the PCR judge in this case did not err in denying the PCR application. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

³ Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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Attorney General

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By: 
ATTORNEYS FOR RESPONDENT

March 9, 2015

COUNTER-STATEMENT OF AUSTIN ISSUES

1. Petitioner cannot prevail upon his claim that plea counsel should have requested a competency evaluation where Petitioner did not provide either an evaluation or expert testimony at the PCR hearing in order to support this claim.
2. Petitioner cannot prevail upon his claim that PCR counsel should have presented additional mitigation evidence at his guilty plea hearing because of the speculative nature of the impact of this alleged evidence may have had upon the plea judge.
3. Petitioner cannot prevail upon his claim that PCR counsel should have negotiated a plea recommendation as the authority to offer a plea recommendation lies with the solicitor's office.
4. Petitioner cannot prevail upon his claim of prosecutorial misconduct (in the form of a Brady violation) where he failed to present any evidence the SLED report was favorable to him, suppressed by the solicitor, and material to his guilt or innocence.

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In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
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The Honorable G. Edward Welmaker, Circuit Court Judge

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Terrence D. Terry,..... Petitioner,

v.

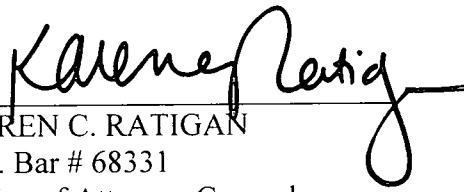
State of South Carolina,..... Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Lara M. Caudy, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 9th day of March, 2015.


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ATTORNEY FOR RESPONDENT



ALAN WILSON
ATTORNEY GENERAL

March 9, 2015

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

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S.C. Supreme Court

Re: Terrence D. Terry v. State of South Carolina
Appellate Case No: 2014-000956
Lower Court Case No: 2012-CP-23-1297

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General
SC Bar #68331

KCR/jacc
Enclosures

cc: Lara M. Caudy, Esquire
Trisha Allen, Victim Services Counselor