STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Trial Judge
The Honorable Paul M. Burch, Post-Conviction Relief Judge

Appellate Case No. 2017-000242

RECEIVED
AUG 03 2017
S.C. SUPREME COURT

Timothy Young, ... Respondent,

v.

State of South Carolina, ... Petitioner.

STATE'S REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

I. Requirement to File a Motion for Reconsideration

In his return to petition for writ of certiorari, Respondent argues that the State failed to file a motion for reconsideration pursuant to SCRCP 59(e) and, therefore, failed to preserve its arguments for appeal. To support this proposition, Respondent cites to Marlar v. State, 375 S.C. 401, 653 S.E. 2d 266 (2007), and construes it to say that a motion for reconsideration must be filed before an appeal can be filed. Petitioner avers that this reading is incorrect. Rather, Marlar is understood to hold that a party whom takes issue with a final order for failure to contain specific findings of fact and conclusions of law has a duty to file such a motion. In the instant case, Petitioner made no allegation of lack of specificity of the final order; rather, Petitioner's argument is that the record lacks probative evidence to support the PCR court's finding. This is not in contravention to the holding in Marlar. Respondent also cites to Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992) without reference to a specific page. Petitioner argues that Pruitt stands for the proposition that orders must be drafted carefully and include all allegations raised in the application and argued at the hearing. This supports the proposition in Marlar that orders should be specific, but does not impose a burden to file a motion for reconsideration before proceeding to appeal.

In the same vein, Respondent argues that all case law submitted in the petition for writ of certiorari should have been presented at the PCR hearing, thus giving the PCR court a chance to review all of it. There is no case law cited to support this proposition. Petitioner argues that this assertion is inaccurate. An appeal is an entirely separate proceeding from a PCR evidentiary hearing and, as such, has a different standard of review. This Court recently stated its standard of review with a clear distinction between the types of cases that it may hear:

Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We do not defer to a PCR court's rulings on questions of law.[4]

"Questions of law are reviewed de novo, and we will reverse the PCR court's decision when it is controlled by an error of law." Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). On review of a PCR court's resolution of procedural questions arising under the Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure, we apply an abuse of discretion standard. See Winkler v. State, 418 S.C. 643, 663, 795 S.E.2d 686, 697 (2016) (applying an abuse of discretion standard to the trial court's decision on a motion for a continuance); Sweet v. State, 255 S.C. 293, 296, 178 S.E.2d 657, 658 (1971) (same).

[4] The court of appeals incorrectly stated "an appellate court 'gives great deference to the PCR court's . . . conclusions of law,'" quoting our own incorrect statement in Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). Mangal, 415 S.C. at 316, 781 S.E.2d at 734. We clarify that appellate courts review questions of law de novo, with no deference to trial courts.

Mangal v. State, Opinion No. 27726, Filed July 19, 2017. Based on this statement, Petitioner understands that this court will review this issue de novo, thus reviewing the entire record, as well as any argument or law presented in this appeal. Petitioner argued the same fundamental points at the evidentiary hearing and in the proposed order that were presented in this appeal, namely that reliability is difficult to establish in these tapes of cases and that trial counsel made valid strategic decisions. App. p. 827-830.

II. The post-conviction relief court's decision to grant relief in this matter was controlled by an error of law.

Petitioner presented State v. Chavis, 412 S.C, 101, 771 S.E.2d 336 (2015) in the petition for writ of certiorari because it was discussed at the evidentiary hearing and mentioned in the order granting relief. The test for reliability in Chavis is the same as in State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), which was relied on in the order granting post-conviction relief. Petitioner included argument regarding the experts in Chavis because they were of a similar type

as those in the case at bar – trained in matters of child abuse.

Petitioner stands by its argument as outlined in the petition for writ of certiorari, which is ultimately that, because neither of these witnesses provided expert opinions during their testimony, their reliability under either the White or Chavis test is irrelevant. Because of this, any alleged failure on the part of trial counsel regarding an objection is also irrelevant and cannot be viewed as deficient performance, or as causing prejudice to the Applicant. See Strickland v. Washington, 466 U.S. 668 (1984). As a sidenote, Petitioner asks the Court to note that Respondent's statement of the holding in State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012), is the exact opposite of the actual holding, which is that, generally, a witness's expert status will be determined prior to determining the reliability of the testimony." Id. at 388. In continuing his argument, Respondent notes that one of the experts was able to testify to a diagnosis by another doctor because of her qualification. Petitioner argues that this is not the case, as anyone with knowledge of the diagnosis, such as a parent, could have testified to the diagnosis. Additionally, trial counsel strenuously objected to any attempts by the expert to go outside the scope of her qualification, and these objections were sustained. App. p.266-68. Lastly, Respondent argues a hypothetical alternate diagnosis of the child that reads as fact in an attempt to dramatize the effect that his theory of the allegations may have had on the outcome of the case. RPWC p.12 ("Such a cross examination could have uncovered that CT's PTSD could have been caused by the abuse she suffered at the hands of her mother, as opposed to any alleged actions by Respondent.").

Petitioner maintains the arguments presented in the petition for writ of certiorari regarding trial counsel's objections or lack of thereof. As he testified at the evidentiary hearing, trial counsel believed that he had conducted a thorough *voir dire* of the experts and made all

appropriate objections. Furthermore, he testified that he did not "want to do anything to make that jury think that she's some great kind of witness, you know, that she's got all this expertise that if she thinks the symptoms are consistent, then yeah, the child did it." App. p. 791;10-13. This Court has held that this exact reasoning is a valid strategy: in Caprood v. State, Counsel gave reasonable strategic reasons for not requesting a curative instruction where counsel felt it would only bring into focus the very item intended to be kept out by counsel. Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000), citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). This is yet another reason why trial counsel's performance cannot be held to be deficient or prejudicial, as all of his actions can be viewed as appropriate, within the bounds of case law and practice norms, as well as strategically sound.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the lower court's ruling.

Respectfully submitted,

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By:
ATTORNEYS FOR PETITIONER

August 3, 2017

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County
Court of Common Pleas
The Honorable Benjamin H. Culbertson, Circuit Court Judge

2014-CP-26-7509
Appellate Case No. 2017-000242

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S.C. SUPREME COURT

TIMOTHY YOUNG, Petitioner,

v.

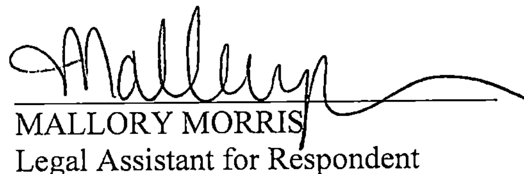
STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Reply to Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

David B. Tarr, Esquire
Law Office of David B. Tarr, LLC
1313 Elmwood Dr., Suite B
Columbia, SC 29201

This 3rd day of August, 2017



MALLORY MORRIS
Legal Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL

August 3, 2017

RECEIVED
AUG 03 2017
S.C. SUPREME COURT

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

RE: **Timothy Young, #345620 v. State of South Carolina**
Appellate Case No. 2017-000240
Lower Court Case No. 2014-CP-26-7509

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Reply to the Return to Petition for Writ Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Jessica E. Kinard
Assistant Attorney General
S.C. Bar No. 77889

JEK/mm
Enclosures

cc: David B. Tarr, Esquire