STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
AUG 11 2017
S.C. SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS
Appeal from Spartanburg
The Honorable J. Derham Cole, Post-Conviction Relief Judge

Opinion No. 27726
Heard December 14, 2016 – Filed July 19, 2017

Appellate Case No. 2016-000610

FARID A. MANGAL, RESPONDENT,

v.

STATE OF SOUTH CAROLINA, PETITIONER.

RETURN TO PETITION FOR REHEARING

ALAN WILSON
Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General
S.C. Bar # 102524

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

On July 19, 2017, this Court issued a published opinion in which it reversed the Court of Appeals and reinstated the Post-Conviction Relief (PCR) court's order denying PCR. *Mangal v. State*, Op. No. 27726 (filed July 19, 2017). Pursuant to Rule 221, SCACR, Respondent petitioned this Court for rehearing. For the following reasons, Respondent's petition for rehearing should be denied.

1. Respondent was represented by J. Faulkner Wilkes, Esquire, at his PCR hearing. Whether Mr. Wilkes was appointed or retained is of no consequence in this matter.

2. Respondent contends that the allegation that trial counsel was ineffective for failing to object to improper bolstering was encompassed by the *general* allegations of "ineffective assistance of counsel" and "failure to preserve direct appeal issues" included in Respondent's PCR application. However, this contention overlooks the fundamental and essential rule, codified in the Uniform Post-Conviction Procedure Act, that applicants must *specifically* set forth the grounds upon which a PCR application is based and facts sufficient to support those grounds. S.C. Code Ann. § 17-27-50; *See also* 17 S.C. Jur. Post-Conviction Relief § 18, Westlaw (updated June 2017). Having failed to set forth the specific grounds or facts in support of those grounds upon which his application was based, the State could not have been on notice. Therefore, this Court properly found that the PCR court acted within its discretion to exclude any claim regarding improper bolstering.

3. Respondent concedes his allegation was "general" and "vague" (Pet. for Reh. p. 2), yet asserts a procedural default on this allegation is the result of mutual fault on the part of the State in not moving for a more definite statement pursuant to Rule 12(e) of the S.C. Rules of Civil Procedure. Respondent argues that because of this mutual fault, the State cannot now complain about the vagueness of the allegation. In making this argument, Respondent

overlooks the other specific allegations of ineffective assistance of counsel pleaded in his PCR application. Placing blame on the State for failing to move for a more definite statement, where specific allegations of ineffective assistance of counsel were in fact alleged, would require the State to have the foresight to assume Respondent had additional, specific allegations. Furthermore, it is not incumbent upon the State to request specificity – something mandated by statute – of an applicant's allegations. Therefore, no fault can be attributed to the State in the procedural default Respondent suffers.

It is well established that "all applicants are entitled to a full and fair opportunity to present claims in one PCR application." *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). Respondent has certainly had his full bite of the apple proceeding through every level of court this state has. The PCR court found the issue of improper bolstering was not alleged or presented to the court. The Court of Appeals considered the issue anyway and reviewed testimony in the record that was not even considered by the PCR court, ultimately reversing the PCR court and granting Respondent a new trial. This Court properly found Dr. Henderson's alleged improper bolstering testimony was insufficient to warrant the "extraordinary action" of excusing the procedural default. In coming to that conclusion, this Court necessarily reviewed and considered the improper bolstering issue and evidence in the record. Ultimately, Respondent was not deprived of a full review of his conviction through the Post-Conviction Relief process in this state.

4. Respondent claims Dr. Henderson's finding that sex abuse occurred was based solely on the history, and not the physical findings, and thus, amounted to improper bolstering. Dr. Henderson testified that she could not make that finding based solely on the physical examination, but she did not testify that she could or was making that finding based solely on

Victim's history either. It was a combination of both Dr. Henderson's physical examination findings and Victim's history that yielded her conclusory opinion. This opinion was proper and admissible. Any further attempt on cross-examination by trial counsel to place more weight on Dr. Henderson's reliance on Victim's history than her physical findings was part of a well-planned trial strategy aimed at strengthening his theory of the case – that Victim fabricated the story.

5. Respondent contends this Court erred in accepting the State's position that the actions of trial counsel were based upon a valid trial strategy. However, this Court did not actually decide the issue of whether trial counsel's trial strategy was valid. Respondent implies because such a valid trial strategy was not elicited through testimony from trial counsel at the PCR hearing, it could not be argued as trial strategy on appeal. Respondent fails to recognize it was because the allegation was never raised to the PCR court, that Counsel never had the opportunity to defend his conduct with respect to his cross-examination of Dr. Henderson. Regardless, it is clear Counsel's trial strategy was to discredit Victim's testimony by any and every means he could. Trial counsel repeatedly sought to attack Victim's credibility through cross-examination and *his theory of the case* was that the abuse allegations were fabricated by Victim and her mother. Therefore, it can be reasonably inferred from the record that Counsel had a valid strategic reason for questioning Dr. Henderson in the manner in which he did.

Additionally, a strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn't have to personally identify his or her thinking. It is enough that the record shows a basis for strategy, not that counsel announce that strategy on the record. *See Wood v. Allen*, 558 U.S. 290, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010). Furthermore,

though such rulings are not binding precedent on this Court, other courts have held that the nature and scope of cross-examination is inherently a matter of trial tactics. *See United States v. Nersesian*, 824 F.2d 1294, 1321 (2nd Cir. 1987); *see also United States v. Bari*, 750 F.2d 1169 (2nd Cir. 1984). Courts have also found that even where testimony may have been otherwise inadmissible, this does not preclude the possibility that Counsel had a strategic reason to elicit the testimony. *See Janosky v. St. Amand*, 594 F.3d 39, 48 (1st Cir. 2010) (finding no ineffective assistance of counsel where decision to elicit otherwise inadmissible hearsay testimony "was part of a calculated trial strategy aimed at poking holes in" the state's case); *Krist v. Foltz*, 804 F.2d 944, 947 (6th Cir. 1986) (finding no ineffective assistance of counsel for eliciting otherwise inadmissible evidence).

WHEREFORE, as this Court properly reversed the Court of Appeals and reinstated the PCR court's decision to deny relief in this case, it is respectfully requested that the petition for rehearing be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General
S.C. Bar No. 102524

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: _____
Attorneys for the State

August 11, 2017

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS
Appeal from Spartanburg
The Honorable J. Derham Cole, Post-Conviction Relief Judge

Circuit Court Case No: 2010-CP-42-0080
Appellate Case No.: 2016-000610

FARRID A. MANGAL, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

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

Clarence Rauch Wise, Esquire
305 Main St.
Greenwood, SC 29646

This 11th day of August, 2017.

Jennifer A. Jennison
Legal Assistant