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THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

APPEAL FROM ANDERSON COUNTY
Court of General Sessions
R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2018-000095

Jerome J. Noone, Jr,..... Petitioner,

v.

State of South Carolina, Respondent.

Reply to State's Return to Petition for Writ of *Certiorari*

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ARGUMENTS

The post-conviction relief (“PCR”) judge signed the State’s proposed order.¹ As discussed in more detail below, the State did not defend that order in its Return to the Petition for Writ of *Certiorari* (“State’s Return”). Rather, the State asserts a new theory for the first time on appeal that completely lacks any support in the law.

I. Deficient Performance.

The first issue presented in the petition for a writ of *certiorari* is whether the PCR judge erred as a matter of law by failing to consider *Hinson v. State*, 297 S.C. 456, 377 S.E.2d 338 (1989), *Alexander v. State*, 303 S.C. 539, 402 S.E.2d 484 (1991), and *Ray v. State*, 303 S.C. 374, 401 S.E.2d 151 (1991), regarding counsel’s obligation to provide accurate advice about the collateral consequences of a guilty plea once counsel undertakes to provide that advice. *See* A. 26, 34 (Rule 59(e), SCRC motion and Mr. Noone’s proposed order). The State did not address these cases. Nor could it because these cases squarely establish trial counsel’s deficient performance for affirmatively misadvising Mr. Noone about the collateral consequences of his guilty plea. The State,

¹ The procedure followed by the court below denied Mr. Noone an opportunity to have his PCR application adjudicated by a judicial officer. “S.C. Code Ann. §17-27-80 (1976), requires the PCR court to ‘make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.’” *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991). *See also* *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). The court below did not do that, but rather delegated the responsibility of drafting the order to the Attorney General’s Office. The reasoning in the State’s order is entirely that of an advocate and not an independent judicial officer, which violates the separation of powers. S.C. Const. Art. I, §8. In capital cases, this Court “strongly encourage[s] PCR judges to draft their own findings of fact and conclusions of law.” *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). The admonition in *Hall* is consistent with the court’s responsibility to “safeguard the rights of litigants,” *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012), and should be followed in all PCR cases.

accordingly, has conceded deficient performance pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984).

II. Prejudice.

The second issue presented in the petition for a writ of *certiorari* is whether the PCR court applied the correct standard of review for determining prejudice when it considered the purported strength of the State's evidence rather than Mr. Noone's uncontested testimony that, but for counsel's erroneous advice about the implications of the guilty plea to his driver's license, he would not have pleaded guilty and would have proceeded to trial. The State's Return acknowledges *Frierson v. State*, 423 S.C. 257, 815 S.E.2d 433 (2018) and concedes the PCR judge applied the "inappropriate" standard "post-*Frierson*." Return at 8, fn. 3. *Frierson*, however, is not a new standard. In *Frierson*, this Court applied *Hill v. Lockhart*, 474 U.S. 52 (1985), just as Mr. Noone asked the PCR judge to do when he submitted his proposed order and Rule 59(e), SCRPC motion. A. 25-26, 33-34. See also *Lee v. United States*, ___ U.S. ___, 137 S. Ct. 1958, 1961 (2017). This concession notwithstanding, the State continues to rely on its assessment of the purported "overwhelming evidence." Return at 8. As pointed out in the petition for a writ of *certiorari*, at 3 and 11, when meeting Mr. Thomason about the plea offer, Mr. Noone's "main concern" was the the consequences to his driver's license. Mr. Thomason advised him the resulting conviction would be treated as a first offense "in every respect." Mr. Noone's testimony was not contradicted.

In its proposed order adopted by the PCR judge, the State suggested the letters from the highway department relieved Mr. Thomason of his obligation to provide accurate legal advice about the collateral consequences of conviction, *i.e.* the absence of

deficient performance. Confronted with *Hinson*, *Alexander*, and *Ray*, the State pivoted on appeal and now argues these letters establish lack of prejudice. Once again, the State proposes an inappropriate standard for establishing prejudice rather than following *Hill* and *Frierson*.

III. Constitutional Violation.

The State now contends Mr. Noone “was not entitled to counsel because his conviction did not result in actual imprisonment,” meaning he “cannot establish a constitutional violation regardless of whether” his counsel “rendered ineffective assistance of counsel.” State’s Return at 8-9.² For this proposition, the State relies on *Talley v. State*, 371 S.C. 535, 640 S.E.2d 878 (2007). This Court must reject the State’s position for two reasons.

First, *Talley* does not stand for this proposition. The issue before this Court in *Talley* was, “Did the PCR judge err in applying *Alabama v. Shelton*, 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002), retroactively on collateral review to Respondent’s convictions?” 371 S.C. at 540, 640 S.E.2d at 880. The Supreme Court decided *Shelton* in 2002.³ The underlying charge giving rise to this case occurred in 2015. Retroactivity of *Shelton* is not an issue in this case. The State actually acknowledges “the United States Supreme Court extended the right to state-appointed counsel for indigent defendants who

² By presenting this issue “as an additional sustaining ground,” Return at 8, the State acknowledges it did not raise this issue in the court below. Mr. Noone, however, addressed his standing to bring this PCR action in his proposed order. A. at 29, fn. 1. Let’s not forget that when the General Sessions Court appointed counsel, Mr. Noone was charged with driving under the influence second offense, which requires “imprisonment for not less than five days nor more than one year.” S.C. Code Ann. § 56-5-2930(A)(2).

³ *Shelton*, of course, addressed the right to appointed counsel for minor misdemeanors and not the application of *Strickland*. Even before *Shelton*, a represented person had the right to effective assistance of counsel.

receive a sentence that “may end up in the actual deprivation of a person’s liberty.” Return at 9 (citing *Shelton* 535 U.S. at 658). It is not clear why the State asks this Court to ignore this precedent.

Second, this Court long ago held the Uniform Post-Conviction Relief Act confers “standing to bring the action where the challenged conviction did not result in incarceration and where petitioner alleges he is suffering continuing effects from his conviction.” *Jackson v. State*, 331 S.C. 486, 488, 489 S.E.2d 915, 916 (1997); *see also* A. at 29, fn. 1 (Mr. Noone’s proposed order citing *Jackson*). It is not clear why the State asks this Court to ignore this precedent.

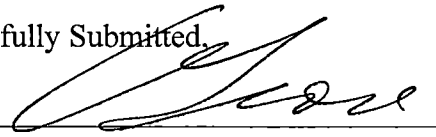
Thus, Mr. Noone presents a claim of ineffective assistance of counsel pursuant to *Strickland* that is proper in post-conviction relief.

CONCLUSION

For the reasons set forth in the petition for writ of *certiorari* and this return, this Court should grant the writ and consider the issues presented. The State no longer contests the deficient performance prong of *Strickland* and concedes the PCR judge applied to wrong standard for determining prejudice. Mr. Noone’s testimony that he would not have plead guilty but for counsel’s deficient performance is not contradicted.

Respectfully Submitted,

By _____


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November 21, 2018.

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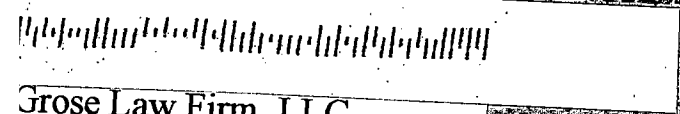
I certify that I have served a copy of the Reply to the State's Return to Petition for Writ of *Certiorari* on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Lindsey McCallister, Esquire
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November 21, 2018



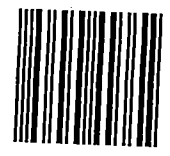
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