STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Writ of Certiorari to Sumter County
Court of Common Pleas

The Honorable Kristi F. Curtis, Post-Conviction Relief Judge
The Honorable William H. Seals, Resentencing Judge

Appellate Case No. 2019-001992

Tervin Goodman,

Petitioner,

v.

State of South Carolina,

Respondent,

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

I. Whether the PCR court erred in finding that Petitioner had failed to meet his burden of proving he did not voluntarily and intelligently waive his right to appeal and that counsel was not ineffective where counsel failed to file an appeal of Petitioner's life sentence following a resentencing hearing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), where Counsel for Petitioner did not file an appeal because he mistakenly believed he had to submit a "legal basis" to support an appeal, where Petitioner expressed a desire to appeal, and where Petitioner had meritorious grounds to appeal?

II. Whether the PCR court erred in finding that counsel for Petitioner was not ineffective because he presented proper mitigation at the resentencing hearing where counsel testified that he was advised to prepare for the resentencing hearing as if it were a death penalty sentencing case, then counsel only called one witness to testify on behalf of Petitioner during the hearing, and where that witness was as social worker that primarily relied on a battery of twelve year old psychological, personality, and IQ tests to form his expert opinion, since counsel was not effective under these circumstances?

RESPONDENT'S QUESTIONS PRESENTED

I. Did the PCR court correctly find Petitioner failed to establish he did not knowingly and intelligently waive his right to a direct appeal where Petitioner's argument that Counsel gave erroneous advice as to the standard for an appeal after resentencing is not preserved because it was not argued to the PCR court, and in any event, Counsel testified he never tells clients they cannot file an appeal; he had an independent recollection of telling Petitioner only that he did not see any meritorious basis to appeal, and Petitioner did not ask him to do so?

II. Did the PCR court correctly find Counsel was not constitutionally ineffective in his preparation and performance at Petitioner's resentencing hearing where Counsel properly presented mitigation evidence in support of a lesser sentence for Petitioner under the Aiken v. Byars standard?

STATEMENT OF THE CASE

Petitioner is incarcerated with the South Carolina Department of Corrections. In October 2009, the Sumter County Grand Jury indicted Petitioner for murder, first-degree burglary, and grand larceny (2009-GS-43-1120). Petitioner was seventeen years old at the time the crime was committed. Charles T. Brooks, III, Esquire, represented Petitioner on the charges. Assistant Solicitor John P. Meadors prosecuted the case. On September 19, 2011, Applicant pleaded guilty to murder and first-degree burglary before the Honorable Howard P. King. The State agreed to dismiss the grand larceny charge in exchange for Petitioner's guilty plea. Judge King sentenced Petitioner to life imprisonment for each charge. Petitioner did not appeal his guilty plea or his sentences.

Petitioner filed an application for post-conviction relief on May 16, 2012. Respondent filed its return on August 2, 2012. An evidentiary hearing convened at the Sumter County Courthouse on March 17, 2016, before the Honorable Brooks P. Goldsmith. At the hearing, Petitioner challenged the constitutionality of his life sentence for first-degree burglary and waived all other allegations for relief. He specifically argued that his life sentence for first-degree burglary was unconstitutional pursuant to Graham v. Florida,[1] and he was entitled to a new sentencing proceeding. Respondent consented to the relief sought, and Judge Goldsmith vacated Petitioner's sentence for first-degree burglary and granted him a new sentencing hearing. The order granting relief was filed on April 7, 2016.

On October 5, 2017, Petitioner appeared at the Florence County Courthouse before the Honorable William H. Seals, Jr., for his resentencing hearing. Counsel represented him at the hearing. Solicitor Ernest Finney, III, and Lisa Beharry, of the Third Circuit Solicitor's Office

[1] 560 U.S. 48 (2010) (holding the Eighth Amendment prohibits the imposition of a life without parole sentence on juvenile offenders who did not commit homicide).

represented the State. In the meantime, Counsel had filed a motion requesting resentencing pursuant to Aiken v. Byars[2] for Petitioner's murder charge as well. Resentencing for both charges was addressed at the October 5, 2017, hearing.

At the resentencing hearing, Counsel presented testimony from Jim Manning, a social worker qualified as an expert witness in social history and child development, testified for the defense. The State presented testimony from Detective Irene Culsek, who explained the circumstances of the crime and resulting investigation, as well as her interviews and interactions with Petitioner. The State also offered victim impact testimony from the victim's daughter, Gayle Wenzel, and Joseph and Charles Horger, the victim's brothers.

After considering the testimony and arguments presented, Judge Seals sentenced Petitioner to life imprisonment for murder and a consecutive thirty years' imprisonment for first-degree burglary. Petitioner did not appeal his sentence.

Petitioner then filed an application for post-conviction relief filed on August 6, 2018. Respondent filed a return and partial motion to dismiss on October 24, 2018. An evidentiary hearing into the matter convened on March 27, 2019, at the Sumter County Courthouse before the Honorable Kristi F. Curtis. At the hearing, Petitioner alleged Counsel was constitutionally ineffective for (1) failing to file an appeal on Petitioner's behalf; (2) failing to present proper mitigation evidence; and (3) failing to object to Detective Culsek's testimony during the State's presentation. Judge Curtis denied relief on all counts by written order dated April 15, 2019.

[2] 410 S.C. 534, 765 S.E.2d 572 (2014) (holding life without parole sentences for juveniles without individualized consideration of their youth constituted cruel and unusual punishment).

STATEMENT OF THE FACTS

On June 8, 2008, Petitioner broke into sixty-seven-year-old Mary Hunter's home, murdered her by smashing her head with a ceramic vase, and stole her cell phone, her car, and several thousand dollars from her safe. App. pp. 13-26, 74-75. Four days later, Ms. Hunter's family contacted a realtor whom they knew had a key to the house to go in and check on her, and he found her body in a downstairs bedroom. App. pp.13-14, 74-75. When investigators responded to the scene, they collected swabs of the blood found throughout the house, fingerprints from the ceramic vase and a credit card found on the bed, and immediately issued a "be on the lookout" advisory for Ms. Hunter's 2006 Toyota Camry. App. pp. 14-15, 76.

Shortly thereafter, a patrol officer spotted the car at a nearby apartment complex. App. pp. 15, 76. Petitioner's brothers were using the car at that time, and they informed police Petitioner had suddenly showed up with the car and a significant amount of cash, claiming to have done a "lick," or a robbery. App. pp. 15, 18-20, 77-79. Other friends and family members corroborated the brothers' statements implicating Petitioner as the person who initially had the car, although several people used it in the days after the murder. App. pp. 18, 80. Multiple witnesses also attested Petitioner alluded to having killed someone, but they did not initially take him seriously. App. pp. 20-21, 80-81. When investigators questioned Petitioner, he admitted to the robbery and stated he "pushed" the victim when she came around a corner and surprised him. App. pp. 16, 22. However, he claimed other people were involved in the crime with him, and after he pushed the victim, he ran out of the house and took off in her car. App. pp. 16, 22, 79.

Eventually, Petitioner's fingerprints were found on both the ceramic vase and the credit card recovered from the bedroom. App. pp. 24, 77. Investigators also found a pair of tennis shoes at Petitioner's house with Ms. Hunter's DNA on them. App. p. 81. Investigators did not find any

fingerprints matching the other people Petitioner claimed participated in the robbery with him, and they ultimately concluded Petitioner acted alone. App. pp. 22, 79-80.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Petitioner asserts the post-conviction relief court erred in denying him relief because Counsel was allegedly constitutionally ineffective for failing to adequately investigate what the lead investigator planned to say at Petitioner's plea hearing. However, the PCR court properly considered the record in its entirety, listened to the evidence and arguments presented, and determined Petitioner did not meet his burden of establishing counsel was constitutionally ineffective. These findings are supported by probative evidence and not premised on an error of law, so this Court should deny certiorari.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Petitioner, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging counsel was constitutionally ineffective, he must prove "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Petitioner must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

judgment." Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id.

These standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

I. Petitioner's argument counsel gave erroneous advice as to the standard for an appeal after resentencing is not preserved because it was not argued to the PCR court, and in any event, the PCR court correctly found Petitioner failed to establish he did not knowingly and intelligently waive his right to a direct appeal where Counsel testified he never tells clients they cannot file an appeal; he had an independent recollection of telling Petitioner only that he did not see any meritorious basis to appeal, and Petitioner did not ask him to do so.

Petitioner argues Counsel told Petitioner he could not file an appeal of the resentencing and failed to file a notice of appeal on Petitioner's behalf. PWC p. 12. Petitioner and Counsel offered conflicting testimony on this issue. Petitioner testified he asked Counsel if he could appeal the resentencing decision, and Counsel told him no. App. pp. 136-37. Counsel denied he ever told Petitioner he could not appeal and testified he always talks to his clients about their right to appeal. App. pp. 146-47. He also testified he had a specific recollection of informing Petitioner after the hearing that he did not see any meritorious grounds for appeal. App. pp. 146-47. Counsel also testified he would have filed an appeal anyway, had Petitioner asked him to do so, but Petitioner did not. App. pp. 148-49. The PCR court found Counsel's testimony on this issue

credible, while also finding Petitioner's testimony was not credible. App. p. 160. Accordingly, this Court should deny certiorari as to this issue.

"[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036, 145 L. Ed. 2d 985 (2000). "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Wilson v. State, 348 S.C. 215, 217, 559 S.E.2d 581, 582 (2002) (citations omitted).

Here, Counsel testified he is highly conscious of his duty to inform defendants of their right to appeal because he was found constitutionally ineffective in a PCR proceeding at the beginning of his career when he failed to advise his client of the client's appellate rights. App. p. 147. Additionally, Counsel stated he does not tell clients they "can't" appeal, but he will inform them if he does not see any meritorious issues to raise. App. p. 147. In this instance, Counsel testified he discussed Petitioner's right to appeal with him prior to the hearing, and he had an independent recollection, after the hearing, of informing Petitioner he did not see any meritorious grounds for an appeal. App. pp. 144-45. Counsel testified he initiated the conversation about the appeal, not Petitioner, and if Petitioner had asked for an appeal, Counsel would have filed one, but Petitioner did not. App. pp. 144-45, 149. The PCR court specifically found this testimony to be "very credible," while also finding Petitioner's testimony not credible. App. p. 160.

Petitioner now argues Counsel's statement he saw no meritorious issues to appeal was deficient because this Court has not articulated a standard for reviewing an Aiken v. Byars resentencing hearing. PWC p. 11. However, this is not the argument Petitioner raised below, and

this Court should not consider it. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."); State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974) ("It is well settled that an issue that has not been presented to or passed upon by trial judge will not be considered on appeal."). Rather, Petitioner contended below that Counsel erroneously informed him he *could not* appeal. App. pp. 119, 136-37. The PCR court found this testimony not to be credible, and that finding should be granted deference by this Court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018) ("We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them."). Because there is probative evidence in the record in the form of Counsel's credible testimony that he informed Petitioner of his right to appeal but Petitioner did not ask him to file a notice of appeal, this Court should affirm the PCR court's decision denying relief and deny certiorari on this issue.

II. The PCR court correctly found Counsel was not constitutionally ineffective in his preparation and performance at Petitioner's resentencing hearing where Counsel properly presented mitigation evidence in support of a lesser sentence for Petitioner under the Aiken v. Byars standard.

Petitioner alleges Counsel failed to properly prepare and present mitigation evidence during Petitioner's resentencing hearing. PWC p. 17. Specifically, Petitioner contends Counsel's presentation was insufficient because he only presented testimony from one witness who relied on "twelve year old... tests to form his expert opinion." PWC p. 17. On the contrary, Counsel hired both a mitigation expert and a social worker to interview Petitioner and his family and review Petitioner's psychological and educational records in order to "build a biography of the client... and try[] to find things in there that are mitigating." App. p. 143. The social worker then testified as an expert in social work and child development at the resentencing hearing and informed the court of multiple mitigating factors in Petitioner's background including Petitioner's immaturity,

issues with learning and a low-average IQ, alcohol and drug use, and symptoms consistent with a conduct disorder. App. pp. 49-57. Crucially, however, although Petitioner contends Counsel's investigation and presentation of mitigating evidence was deficient, Petitioner did not present any additional mitigation evidence or witnesses at the evidentiary hearing. App. p. 131. This failure is dispositive of this issue, as without such evidence or witnesses Petitioner cannot meet his burden of proving he was prejudiced. Accordingly, because Counsel was neither deficient nor has Petitioner met his burden as to prejudice, the PCR court correctly found Counsel was not constitutionally ineffective. This Court should deny certiorari.

At the resentencing hearing, Counsel presented testimony from Jim Manning, a forensic social worker and expert witness in social history and child development, who testified about Petitioner's developmental levels, family history, maturity level, and his potential for improvement over time. App. pp. 49-57, 72. Manning interviewed Petitioner twice and spoke with multiple family members, including Petitioner's mother and stepfather, his siblings, two uncles, a grandmother, and a cousin. App. p. 51. Manning also reviewed records from Sumter County Public Schools, Sumter-Lee Detention Center, SCDC, and Petitioner's records from the Department of Youth Services, which a battery of psychological tests and other records from DJJ. App. pp. 51-52. The DJJ records encompassed three years, from when Petitioner was age fourteen to seventeen.[3] App. pp. 53, 67. Manning testified, based on his review of these records and the interviews he conducted, Petitioner met the diagnostic criteria for a conduct disorder, had a low-average IQ and developmental adjustment, academic delays, and had a history of drug and alcohol

[3] Petitioner committed this murder shortly after his release from DJJ onto probation, when he was seventeen. App. pp. 67, 87. Counsel testified the expert thought those tests were important to help "explain [Petitioner's] state of mind" and "paint a picture of an individual who, at the time of this incident, was immature." App. pp. 143-44.

use. App. pp. 54-57. Manning also testified Petitioner's home life was not always stable, as he attended a new school almost every year of elementary school and frequently moved back and forth between family members in Florida and South Carolina. App. pp. 58-59. Additionally, Manning testified Petitioner showed an ability to reform and curb his anti-social behaviors when given a structured environment. App. pp. 57-59, 61-62. For example, he enrolled in the JROTC program at DJJ and maintained his behavior sufficiently to stay in the program until he was released; he completed his GED while at DJJ; and after release from DJJ, he worked a steady job in Florida until a traffic citation sent him back to his mother's house in South Carolina, where he began to get in more serious trouble again. App. pp. 57-59. Finally, Manning testified to his opinion that based on the records and his interviews with Petitioner's family, Petitioner, at the time of the murder, was "seen as a follower type" who "thinks in the moment" and "doesn't think about the long-term consequences of his conduct."[4] App. p. 60.

To establish counsel failed to adequately prepare for trial, Petitioner must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (holding trial counsel's failure to conduct an independent investigation

[4] The State, on the other hand, presented evidence this crime was an escalation of Petitioner's previous criminal behavior, as he committed the murder while on probation through DJJ, where he had been sent after pleading guilty to ten previous burglaries and an armed robbey. App. pp. 65-67, 81-82. Many of the previous burglaries occurred in the same neighborhood where Ms. Hunter lived, and during the last robbery to Petitioner entering DJJ, he pulled a knife on the victim who was also an elder woman who lived alone. App. pp. 81-82. Additionally, Petitioner committed numerous disciplinary infractions while in SCDC, and Counsel testified at the evidentiary hearing Petitioner's SCDC record was "awful." App. pp. 70-71, 144.

does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997) (finding applicant was not entitled to relief where no evidence was presented at the PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

Petitioner relies primarily on Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008), in support of his argument that Counsel did not properly investigate and prepare a mitigation case. However, Council's case is easily distinguishable from Petitioner's because Council presented three expert witnesses at his PCR hearing who testified to various issues with his mental health and social history which could have been discovered at the time of trial. Id. at 165-66, 670 S.E.2d at 359-60. As discussed above, without this evidence and testimony, Petitioner cannot establish prejudice in his case. Ironically, one of the experts Council presented was a "forensic social worker who compiled a 'social family history'," which is exactly the same kind of expert Petitioner's attorney presented in this case. Id. at 166, 670 S.E.2d 359. Moreover, Petitioner argues his attorney's investigation was incomplete because "he did little to no investigation himself" and instead relied on a "mitigation expert and social worker to speak to Petitioner and Petitioner's family." PWC p. 18. Yet, this do-it-yourself approach is exactly what the Council court faulted Council's attorney for undertaking, stating, "even though the funding was available, trial counsel chose not to hire a social history investigator. Instead, he relied on his law partner and private investigator to collect potentially relevant information. However, neither of these individuals was

qualified, in terms of social work experience, to evaluate the information to assess [Council's] background." Id. at 174, 670 S.E.2d at 363.

Here, Petitioner's attorney hired multiple experts who engaged in a year-long investigation of Petitioner's background, and the testifying expert presented significant testimony in mitigation at the resentencing hearing including issues with Petitioner's mental health and development, academic ability, drug and alcohol use, and unstable home life. App. pp. 49-73, 142-43. Although Petitioner now contends this presentation was insufficient, Petitioner presented no further mitigation evidence or witnesses at the PCR evidentiary hearing. App. p. 131. Accordingly, the PCR court correctly found Counsel was neither deficient nor was Petitioner prejudiced by Counsel's performance and denied relief. App. p. 158. This Court should likewise deny certiorari.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR court's finding Counsel was not constitutionally ineffective. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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