STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Lower Court Case No. 2016-CP-38-00623
Appellate Case No. 2021-000673

BRUCE JEROME HOUSER, 243356

PETITIONER.

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

Did the lower court err in finding that Petitioner's current Application for Post-Conviction Relief should be denied and denied and dismissed with prejudice pursuant to the doctrine of *laches*?

STATEMENT OF THE CASE

The Petitioner was indicted at the November, 1997, term of the Dorchester County grand jury for the offenses of Murder (97-GS-38-0467) and Possession of a Firearm during the commission of a violent offense (97-GS-38-0874). He proceeded to trial by jury on August 7, 1997, before the Honorable Luke N. Brown, presiding circuit court judge. In the Court of General Sessions, Petitioner was represented by Charles Gross, Esquire. At the conclusion of that trial he was found guilty as charged and was sentenced by the trial court to imprisonment for the remainder of his natural lifetime.

Petitioner subsequently pursued a direct appeal from his judgments and sentences. The appeal was perfected by the South Carolina Office of Appellate Defense. Following briefing by both sides, the Supreme Court of South Carolina affirmed Petitioner's judgment and sentences in an unpublished opinion. ***State v. Bruce Jerome Houser***, 99-MO-005 (Sup. Ct. of S.C. filed January 13, 1999. ***See, App. pp. 105 b – 105 c.*** Undersigned Counsel was able to retrieve a copy of the Record on Appeal, and the final briefs filed by the parties to that direct appeal, through the kind assistance of the Supreme Court Library and those records have been included in the Appendix attached to this Petition for Writ of Certiorari. Petitioner has requested a copy of the trial transcript from the Office of the Attorney General and the Appellate Division of the South Carolina Commission on Indigent defense. Both agencies advise that they have a fifteen (15) year file retention policy and would no longer have their file. The PCR Division of the

Office of the Attorney General has ordered their closed file from archives and has promised to advise Petitioner if the trial transcript is found in their file.

First Post-Conviction Relief Action
2000-CP-38-119

On February 3, 2000, Petitioner filed his first Post-Conviction Relief Application which was docketed as **2000-CP-38-119**. The State made its Return nearly ***eleven months later*** on. November 30, 2000.[1] ***App.pp.*** 112-114. ***Eleven months later*** an evidentiary hearing was convened on Petitioner's first Application for Post-Conviction Relief on October 30, 2001. The Petitioner was present at that hearing and was represented by Carl B. Grant, Esquire. The Respondent was represented at that hearing by Elizabeth McMahon, Assistant Attorney General. At that proceeding, the Honorable Diane S. Goodstein, presiding PCR Judge, had before her, in addition to the testimony heard, the records of the Orangeburg County Clerk of Court regarding the subject convictions; Petitioner's records from the South Carolina Department of Corrections; the Application for Post-Conviction Relief and the State's Return. In addition the lower court had before it a copy of the appellate records in this case and a copy of the trial transcript. ***See, Order of Dismissal, App. pp. 115-119.***

Nearly four months following the evidentiary hearing held on Applicant first PCR Application, an Order of Dismissal was issued by Judge Goodstein, on February 22, 2002. ***App. pp.*** **115-119**. On February 22, 2002. Petitioner subsequently filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP. **App. pp. 119 b - 119 e**. Petitioner's PCR Counsel, Carl B Grant, Esquire, filed a Notice of Appeal from the February 22, 2002 Order of Dismissal signed by of Judge Goodstein, on February 22, 2002, **App. pp. 120 – 121.** Apparently, Judge Goodstein's Order of Dismissal, although signed on February 22, 2002, was not served upon

[1] Pursuant to S.C. Code §17-27-70 (a), respondent was required to make its response to an Application for Post-Conviction Relief thirty (30) days of its filing.

Counsel for Petitioner until ***nearly a month later*** on March 20, 2002. ***See, NOA, App.pp.*** **120 – 121.** The Notice of Appeal was served and filed on his behalf by Attorney Grant on April 19, 2002. ***Six months later***, on October 22, 2002, Robert M. Pachak, Assistant Appellate Defender, notified this Honorable Court that there was a pending Rule 59(e) Motion pending that had not been ruled upon by the lower court. He requested that Applicant's PCR Appeal be dismissed without prejudice pending a ruling on that motion and noted that a new appeal would have to be filed following the ruling on the outstanding motion by the PCR Judge. **App.p.124.** The day before that correspondence, Appellate Defense had ordered a transcript of the evidentiary hearing held in connection with Petitioner's first PCR hearing. Counsel for Petitioner has not been able to determine whether that order was cancelled, however, there is nothing to that effect available in this Honorable Court's records concerning this appeal. This Court's Order dismissing this PCR Appeal without Prejudice was entered the day after the letter from Attorney Pachak; October 23, 2002. **App.p. 125**. The Remittitur was returned to the lower Court on November 8, 2002. **App.p. 126**.

Four days short of two years later, or 28 months, an evidentiary hearing was convened on Petitioner's Motion to Alter or Amend on November 4, 2004 at the Calhoun County Courthouse. The Petitioner was present at that proceeding and was once again represented by Carl B. Grant. Respondent was represented by Paula S. Magargle, Assistant Attorney General. Approximately ***seven months later***, Judge Goodstein signed an Order denying Petitioner's Motion to Alter or Amend on ***June 6, 2005***. When undersigned Counsel attempted to obtain a clocked copy of the Order denying Applicant's Motion to Alter or Amend she discovered that the only copies available appeared to have been signed by Judge Goodstein, but had not filed with the Orangeburg County Clerk of Court's Office. No such order appeared on the Public Index for the Orangeburg County Clerk of Court. At Counsel's request, the Orangeburg County

Clerk of Court's Office pulled their physical file to determine whether it contained Judge Goodstein's June 6, 2005 Order. On Thursday, October 7, 2021, Counsel was advised by Orangeburg County Clerk of Court's Office, by telephone, that they had located the clocked stamped copy of Judge Goodstein's June 6, 2005, Order in their physical file. That Order shows a clock stamp indicating that the Order was filed on June 14, 2005. That Order did not include the date Petitioner's Rule 59 (e) motion was filed. Counsel requested a copy of the filed Motion to Alter or Amend filed by Petitioner and to date has not been provided a clocked copy of that pleading. There is no record of a subsequent Notice of Appeal having been filed on Petitioner's behalf by either Attorney Carl Grant, or, Assistant Appellate Defender, Robert Pachak. The copy of Judge Goodstein's Order denying the Rile 59(e) motion, SCRCP, filed in this matter, did not include any documentation concerning whether the Order had been served upon the parties once it was filed on June 14, 2005. In this Honorable Court's records there is found correspondence from Attorney Carl B. Grant acknowledging that he received a copy of judge Goodstein's Order denying Petitioner's Rule 59 (e) on June 7, 2005, the day after it was signed by her Honor. This correspondence was prompted by direct inquiry from this Court concerning if and when he had been served with the Order denying the 59(e) motion signed by Judge Goodstein on June 6, 2005. App.pp. 128, m – 128 o. Petitioner's PCR appeal attempted by his pro see Notice of Appeal was dismissed on February 22, 2006. The inquiry itself was apparently prompted by a pro se Notice of Appeal filed by Petitioner on December 14, 2005. App. pp. App. pp. 128 e - 128 l. Inasmuch as that Order was not filed until June 14, 2005, the copy received by Attorney Grant could not have been a clocked copy from the Office of the Orangeburg County Clerk of Court.

As noted above, the Remittitur for that PCR action was returned to the lower court on November 8, 2002, following the Order of this Honorable Court dismissing Petitioner's PCR

Appeal ***without prejudice***. The correspondence returning the Remittitur to the lower court was copied to the South Carolina Office of Appellate Defense and to then Assistant Attorney General, Elizabeth McMahon. **App.p. 126**. There is no indication that the order dismissing Petitioner's PCR appeal, or the documents returning the Remittitur to the lower court, were served upon circuit court PCR Counsel, Carl B. Grant, of the Orangeburg County Clerk of Court's Office. Counsel has requested clarification from the Orangeburg County Clerk of Court's Office regarding whether the parties, including Attorney Grant, were served with a clocked copy of Judge Goodstein's June 6, 2005 Order denying Petitioner's Motion to Alter or Amend. As previous noted, Attorney Grant, the PCR Counsel in Petitioner's first PCR, was not copied on the correspondence returning the Remittitur to the lower court at the PCR appeal was dismissed without prejudice. We do, however, know from Judge Goodstein's June 6, 2005 Order that Attorney Grant represented Applicant at the hearing held on the Motion to Alter of Amend filed in this matter. We also know that until Thursday, October 7, 2021, these was nothing in the public index indicating that Judge Goodstein had ruled against Petitioner on the outstanding Rule 59(e) motion filed in the action docketed at **2000-CP-38-119.**

Second Post-Conviction Relief Action
2006-CP-38-0413

Petitioner next filed his ***second*** Application for PCR in which he sought a belated PCR Appeal pursuant to ***Austin v. State, 305 S.C. 453, 409 S.E.2d, 395 (1997).*** **(2006-CP-38-0413).** That Application was filed on April 6, 2006. **App.pp. 130 – 134.** The Order issued in that PCR action was filed on November 18, 2008 and granted Petitioner a belated PCR appeal. **App.pp. 143 - 146.** Although Counsel for Respondent had filed a Return requesting dismissal in that matter, and had indicated a hearing was likely necessary in that matter, the language of the Order granting the belated PCR Appeal, indicates that relief was granted by agreement of the

parties inasmuch as Respondent conceded it was appropriate. For reasons to be addressed *infra*, it is apparent that Respondent did not order a transcript of the evidentiary hearing held on Applicant's first PCR after receiving his second Application seeking a belated PCR appeal and therefore did not provide Petitioner with a copy thereof with their Return filed on October 26, 2007.[2] Regrettably, the PCR lawyer in that action apparently did not realize that, although Petitioner won the requested relief in that action, and was granted a belated PCR Appeal from the Order denying him the relief sought in his first PCR Application, it was necessary for a Notice of Appeal be filed on behalf of Petitioner on the PCR Order as the avenue to return jurisdiction over that matter to this Honorable Court.

The current and *third* PCR action **(2016-CP-38-0623)** was filed when the Petitioner subsequently sought to get a belated appeal on the PCR Order in which he was granted ***Austin*** review of the denial of his first PCR action and thereby, a belated PCR appeal of the Order of Dismissal in the first PCR. Petitioner would note that his belated PCR Appeal in that matter should have included an appeal of the Order denying his Rule 59(e) Motion, SCRCP, in Civil Action No. **2000-CP-38-0119**. In his current PCR appeal from the Order of Dismissal in this matter, Petitioner intends to argument the reasons why the Order of Dismissal in that action was wrongfully decided based upon the doctrine of *laches*.

The appeal currently before this Honorable Court was filed by leave of court on June 25, 2021. App.pp. 174 - 175.

DISCUSSION

STANDARD OF REVIEW

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S.

[2] Respondent attempted to Order a transcript of Petitioner's first PCR hearing on January, 6, 2021, but was informed by the Court Reporter that it was no longer available because it had been more than five years since the proceeding they sought to obtain a transcript from. App.p. 123 b.

668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 669).

Strickland does not guarantee perfect representation, only a "'reasonably competent attorney.'" 466 U.S. at 687 (quoting McMann v. Richardson, 397 U.S. 759, 770 (1970)). Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. Strickland, 466 U.S. at 686. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id. at 689.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, an applicant must prove that counsel's performance was deficient. Cherry, 300 S.C. at 117, 386 S.E.2d at 625. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (quoting Strickland, 466 U.S. at 668). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (quoting Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118,

386 S.E.2d at 625. Where trial counsel articulates a valid reason for employing certain trial strategy, counsel will not be deemed ineffective. McKnight v. State, 378 S.C. 33, 43, 661 S.E.2d 354, 359 (2008) (citing Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995)). Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness based thereon. Where counsel articulates a strategy, it is measured, on a claim of ineffective assistance, under an objective standard of reasonableness. Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002). When evaluating the reasonableness of counsel's conduct, for purposes of claim of ineffectiveness assistance, the "court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in a particular case." Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (quoting Strickland, 466 U.S. at 690).

Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. "It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Harrington v. Richter, 562 U.S. 86, 104 (2011) (quoting Strickland, 466 U.S. at 687).

In assessing prejudice under Strickland, the question is whether it is "**reasonably likely** the result would have been different absent the errors." Strickland, 466 U.S at 696 (emphasis added). The likelihood of a different result must be substantial, not just conceivable. Harrington, 562 U.S. at 112 (citing Strickland, 644 U.S. at 693).

Courts may not indulge "post hoc rationalization" for counsel's decision making that

contradicts the available evidence of counsel's actions. See Wiggins v. Smith, 539 U.S. 510, 526–528 (2003). However, there is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Harrington, 562 U.S. at 109. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Id. at 110 (citing Strickland, 466 U.S. at 688).

Petitioner Respondent has corrected stated that on appellate review, the standard of review in Post-Conviction Relief matters depends on the nature of the individual issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, our appellate courts give great deference 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. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (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); *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). Challenges based on questions of law will be reviewed *de novo* without deference to the lower court. *Id.* Such challenges will be reviewed without deference to the lower court's decision. Our appellate courts will reverse a decision based solely on an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

In the Final Order of Dismissal, the lower court found that Petitioner was barred from proceeding with his third PCR action under the doctrine of ***laches.*** Petitioner asserts that on the facts of this case, the PCR Court found that Applicant had waited too long to file his third

Application for PCR and that Respondent had been prejudiced by that delay inasmuch a transcript of Petitioner's first PCR was no loner available. Petitioner concedes that the Order of the lower court has generally set forth accurately the law applying to the doctrine of laches, however, he most respectfully asserts it grossly misapplied that law on the facts of this case.

S.C. Code §17-27-70 (A) requires the State to Respond within thirty days to a PCR Application. In this case they clearly did not. However, that same code section also requires the State to provide the Applicant with a copy of the record of the proceedings challenged if that record is not attached to the Application as filed. As noted above, Respondent waited eleven (11) months to make its Return to Petitioner's second PCR Application and did not provide Petitioner a transcript of his initial PCR hearing. Although the Return originally argued that a hearing would be necessary to determine the merits of Petitioner's request for a belated PCR Appeal, it ultimately waited eleven months to submit its Return. A move that resulted in the time for the Court Reporter to have a retained a transcript of the evidentiary hearing in his PCR to have completely run out. Thus, Respondent conceded that a belated PCR appeal was appropriate on the facts of this case, but waited well beyond the five year anniversary of that hearing to file its Return, a move which rendered moot the grant of a belated PCR appeal, inasmuch the actions of the State deprived him of the opportunity to have a meaningful belated PCR appeal, not the other way around as the most recent Order of Dismissal claims. Had the State ordered the transcript of Petitioner's first PCR hearing when they received his Application docketed at **2006-CP-38-0413** with their Return, Petitioner would have been able to eventual have a meaningful belated PCR Appeal. Ironically, the operative delay in this matter comes from the State's failure to comply with §17-27-70 (A) in responding to Petitioner's second Application for PCR, not in his delay in filing his ***third*** Application. Petitioner beseeches this Honorable Court to closely review the history of this case as set forth above. It paints a picture of a man who has desperately sought,

and never received his one full bite of the PCR apple. He most respectfully asserts that his rights to appellate review have been violated time and time again by the mistakes of others, but that he, a lay person, has made every effort to do things correctly consistent with his faith in the judicial system. He now prays that this Honorable Court will rectify the wrong done to him at the hand of others and grant him the right to have a *de novo* Post-Conviction action.

CONCLUSION

Petitioner has been denied his right to an appeal from the denial of his first PCR action. The actions of two of his attorneys resulted in him not getting his belated PCR Appeal properly before this Honorable Court, but it was the actions of Respondent that resulted in the transcript of his first PCR hearing not being available to him. For all these reasons, he asks that he now be granted the right to proceed with a *de novo* PCR action. It is in fact, the only way to make Petitioner whole.

Respectfully submitted,

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This 11th day of October, 2021