STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI TO AIKEN COUNTY
Court of Common Pleas
Jennifer McCoy, Circuit Court Judge

Appellate Case No. 2021-001164

Jerry Lee Shaeffer,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

ZACHARY W. JONES
S.C. Bar No. 104174
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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PETITIONER'S STATEMENT OF THE ISSUE PRESENTED

Did the PCR court err in finding Petitioner erred in failing to prove his mental incapacity prevented him from filing a PCR application in the one year following his guilty plea when the PCR court acknowledged his incompetence based on a subsequent competency evaluation and the expert witness who conducted the evaluation testified there was a reasonable probability Petitioner was incompetent at the time of his plea?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE PRESENTED

The PCR court properly applied the statute of limitations as set forth in the Uniform Post-Conviction Procedure Act and found Petitioner failed to establish he was entitled to equitable tolling of the statute of limitations when he failed to show he was incompetent during the requisite filing period.

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections. Petitioner was indicted at the April 2014 term of the Aiken County Grand Jury for four counts of criminal sexual conduct with a minor, second degree (2014-GS-02-00576, 2014-GS-02-00577, 2014-GS-02-00578, and 2014-GS-02-00579). Assistant Public Defender Michael D. Routzong of the Second Circuit Public Defender's Office represented Petitioner, and Deputy Solicitor Ashley A. Hammack of the Second Circuit Solicitor's Office prosecuted the case.

On May 18, 2015, Petitioner pled guilty as indicted before the Honorable R. Knox McMahon. Judge McMahon sentenced Petitioner to imprisonment for three concurrent terms of twenty years and a consecutive term of twenty years. Petitioner did not file a notice of appeal.

PCR Application

Petitioner filed his application for post-conviction relief (PCR) on February 28, 2019 (2019-CP-02-00516). He alleged the following grounds for relief in his application:

1. Ineffective Assistance of Counsel
    a. "Applicant did not knowingly, intelligently, or voluntarily plead guilty."
    b. "Plea counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible mitigating evidence in preparation of Applicant's defense. Specifically, Plea counsel failed to consult with an expert witness to evaluate whether Applicant was competent to stand trial or had the requisite mental capacity when it was reasonable and necessary in his defense."
    c. "Plea counsel failed to move for a Blair hearing prior to trial to determine Applicant's competency to stand trial."
    d. "Plea counsel failed to present all reasonable and necessary evidence to the judge during the sentencing phase in mitigation of Applicant's potential sentence. Specifically, plea counsel failed to call an expert witness to testify regarding Applicant's mental health background and competency to stand trial when it was reasonable and necessary to present this critical mitigating evidence."

Respondent made its return and motion to dismiss on June 5, 2019, arguing Petitioner's application was untimely because it was made more than one year after his conviction. Petitioner requested a hearing to present evidence in support of his request for equitable tolling. A virtual evidentiary hearing was convened on June 4, 2021, before the Honorable Jennifer B. McCoy, solely on the issue of whether Petitioner was entitled to equitable tolling of the one-year statute of limitations. Petitioner was represented by Dayne C. Phillips, Esq. By written order filed September 7, 2021, Judge McCoy found Petitioner failed to establish he was entitled to equitable tolling and dismissed the application as untimely. On September 17, 2021, Petitioner filed a motion to alter or amend the order pursuant to Rule 59(e), SCRCP, which Judge McCoy denied on October 5, 2021. Petitioner thereafter filed a timely notice of appeal.

STANDARD OF REVIEW

The PCR court's findings of fact receive great deference during appellate review and will be upheld if supported by any evidence of probative value. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

I. The PCR court properly applied the statute of limitations as set forth in the Uniform Post-Conviction Procedure Act and found Petitioner failed to establish he was entitled to equitable tolling of the statute of limitations when he failed to show he was incompetent during the requisite filing period.

The PCR court's decision not to toll the statute of limitations for filing Petitioner's PCR application was proper because the testimony of Petitioner's plea counsel and the transcript of the plea hearing supported the PCR court's finding that Petitioner was competent during the one-year period following his guilty plea, notwithstanding the result of his mental evaluation conducted many years later.

Ordinarily, a PCR application must be filed within one year after the entry of a judgment of conviction, unless the conviction is challenged on appeal. S.C. Code Ann. § 17-27-45(A). However, this Court has held that the one-year statute of limitations should be tolled when an applicant demonstrates the failure to timely file for PCR was due to mental incompetence. Ferguson v. State, 382 S.C. 615, 619, 677 S.E.2d 600, 602 (2009). When an applicant claims he was unable to file a timely PCR application due to mental incompetence, the PCR court should conduct a hearing to determine whether the applicant's mental incapacity prevented him from

filing his application in the one year following his conviction. Id. at 620, 677 S.E.2d at 602. If so, then PCR should proceed, provided the application was filed within one year of the applicant's regaining competence. Id.

Petitioner pled guilty and was sentenced on May 18, 2015, and he did not pursue a direct appeal. Therefore, pursuant to the one-year statute of limitations, his application for PCR was due on May 19, 2016. Petitioner, however, did not file an application until February 28, 2019, nearly three years after the expiration of the statutory filing deadline. The only explanation offered by Petitioner for this delay is that he was prevented from filing his application on time due to mental incompetence. In accordance with Ferguson, the PCR court ordered an evidentiary hearing to determine whether Petitioner was mentally incompetent during the one-year period following his guilty plea.

At the hearing, Petitioner called Dr. Geoffrey McKee, who was qualified without objection as an expert witness in the field of forensic psychology, criminal responsibility, and competency to stand trial. (App.p.119, lines 7–17). Dr. McKee testified Petitioner had been in special education programs as a child before dropping out of school after the seventh grade, which suggested Petitioner had significantly sub-average intellectual functioning. (App.p.121, lines 6–24). Dr. McKee further testified he performed a series of tests to assess Petitioner's intelligence and reading ability, and Petitioner scored in the lowest one percent of the population. (App.p.122, line 24–p.124, line 9). Dr. McKee stated he did not suspect Petitioner of malingering because Petitioner scored well on a long-term memory test. (App.p.124, line 10–p.125, line 13). Dr. McKee diagnosed Petitioner with mild to moderate intellectual disability and estimated Petitioner's IQ as "[s]omewhere around 60. Maybe as high as 65." (App.p.125, lines 8–15). Based on Petitioner's cognitive deficits at the time he was evaluated, Dr. McKee believed

he lacked the capacity to understand the proceedings against him or to assist his attorney with his defense. (App.p.127, lines 11–17). Dr McKee testified that, because intellectual disability was a chronic and unchanging disorder, it was his opinion that Petitioner was likely incompetent at the time of his plea. (App.p.128, line 6–p.129, line 4). However, Dr. McKee acknowledged he had only examined Petitioner in December of 2018, many years after Petitioner's plea hearing. (App.p.131, lines 11–13; p.132, lines 12–14). He admitted that he never reviewed Petitioner's prior mental health records or high school records. (App.p.135 lines 6–11). He also acknowledged Petitioner understood the charges against him and their factual bases and knew that he had pled guilty to a sentence of 40 years. (App.p.136, line 20–p.137, line 1). Dr. McKee's report was admitted into evidence; the report concludes Petitioner "*does not currently* have a sufficient factual & rational understanding of the proceedings against him and is not now capable of assisting his attorney in his defense." (App.p.177) (emphasis in original).

The State called Petitioner's plea counsel, Michael D. Routzong, who testified he met with Petitioner several times leading up to his guilty plea. (App.p.140, line 11–p.141, line 13). He stated Petitioner was able to discuss the facts of the case and characterized their conversations as normal conversations between a defense attorney and his client. (App.p.141, line23–p.142, line 15). He did not remember having any difficulty communicating with Petitioner about the charges or the possible outcomes. (App.p.144, lines 15–17). He recalled that Petitioner had retired from a job at General Motors and was living on his own. (App.p.145, lines 7–12). He also testified that Petitioner was able to suggest a defense, claiming that certain photographs of the victim were taken by the victim himself rather than by Petitioner. (App.p.145, lines 12–17). Mr. Routzong testified he occasionally had concerns about competency with some of his clients, causing him to order evaluations from the judge, but he did

not have any such concerns with Petitioner. (App.p.146, line 24–p.147, line 24). He stated that many of his clients were "slow," including Petitioner, but were not necessarily incompetent. (App.p.155, line 6–p.156, line 13).

In his closing argument, Petitioner urged the PCR court to toll the statute of limitations based on Dr. McKee's opinion that, according to his evaluation of Petitioner in 2018, Petitioner likely would have been incompetent at the time of his plea in 2015. (App.p.165, line 13–p.167, line 13; p.170, lines 7–13).

In a written order filed September 7, 2021, the PCR court denied Petitioner's request for equitable tolling, finding Petitioner had failed to establish he was incompetent during the one-year period following his guilty plea. (App.p.218). The court found the testimony of Michael D. Routzong persuasive because he interacted with Petitioner at the time of Petitioner's guilty plea and noticed no indication of incompetence during his representation. In particular, the court noted Mr. Routzong's testimony that Petitioner was able to discuss the facts of the case with him and to suggest a possible defense, understood that his conduct was wrong, and knew what he was doing when he entered the guilty plea. (App.p.218–19). The PCR court also noted the transcript of the plea hearing reflected that Petitioner affirmed he understood the plea process, coherently answered the plea court's questions without prompting or help from Mr. Routzong and told the plea court he understood the questions. (App.p.219). The PCR court further found Dr. McKee did not evaluate Petitioner until 2018, could not provide a date on which Petitioner's incompetency began, and did not review Petitioner's mental health information or school records; however, Dr. McKee conceded Petitioner understood the charges against him and was aware he had pled guilty and been sentenced to 40 years' imprisonment. (App.p.219). The PCR court did not dispute Dr. McKee's conclusion that Petitioner was incompetent at the time of his

evaluation in December 2018; however, it found Petitioner's current condition was not relevant to whether he was prevented from filing his PCR application during the statutory filing period. (App.p.220). Accordingly, the PCR court granted the State's motion to dismiss Petitioner's application as untimely.

In his petition for a writ of certiorari, Petitioner argues that Dr. McKee's testimony and report established a reasonable probability that Petitioner was incompetent at the time of his plea and, therefore, likely incompetent during the statutory filing period as well. Petitioner argues the PCR court erred by relying on Mr. Routzong's recollection of Petitioner's competency rather than Dr. McKee's expert opinion.

In effect, Petitioner invites this Court to reject the factual findings of the PCR court and to take its own view of the evidence. This argument completely ignores the deferential standard of review for factual findings in PCR proceedings. See Buckson v. State, 423, S.C. 313, 320, 815 S.E.2d 436, 440 (2018) (holding an appellate court is not free to make its own factual findings; it is limited to deferential review of the PCR court's findings). The question is not whether this Court believes the balance of evidence supported the PCR court's decision; the question is whether *any* evidence of probative value supported the findings of the PCR court. See id., see also Sellner, 416 S.C. at 610, 787 S.E.2d at 527. If so, then those findings must be upheld on appeal. Id. In this case, the PCR court expressly based its factual findings on the testimony of Mr. Routzong, the transcript of the plea hearing, and Dr. McKee's acknowledgement that Petitioner understood the charges to which he had pled guilty and their sentences. (App.pp.218–20). The evidence relied on by the PCR court was probative of Petitioner's mental capacity because it tended to show Petitioner was able to consult with his attorney and had a rational and factual understanding of the proceedings against him. See Garren

v. State, 423 S.C. 1, 14, 813 S.E.2d 704, 711 (2018) (setting forth the test for competency). This probative evidence of Petitioner's competency during his plea proceedings also supports a finding of competency during the statutory filing period, since the statute of limitations in this case began to run immediately after Petitioner's guilty plea. Dr. McKee's evaluation, by contrast, was not conducted until years after the statute of limitations had already run, making it relatively less probative. All of these facts, which the PCR court deemed significant, supported its finding that Petitioner had not proven any mental incompetence prevented him from filing a timely application.

Petitioner seems to suggest the PCR court, by qualifying Dr. McKee as an expert and acknowledging his opinion that Petitioner was intellectually disabled, was obligated to give greater weight to his testimony than the testimony of Mr. Routzong and the transcript of the plea hearing. However, courts are not bound by the views of experts in assessing competency. State v. Bell, 293 S.C. 391, 396, 360 S.E.2d 706, 709 (1987); see also United States v. Makris, 535 F.3d 899, 905 (5th Cir. 1976) ("While the experts can provide guidance [as to competency], the judge is not bound to agree with their conclusions if other probative evidence points to a different result."). In addition, the PCR court's acknowledgement of Petitioner's intellectual disability is not inconsistent with its finding of competency. See, e.g., State v. Davis, 309 S.C. 326, 337–38, 422 S.E.2d 133, 141 (1992) (holding the lower court did not err in finding a criminal defendant competent, despite the defendant having an IQ of 66, because there was evidence showing the defendant was able to consult with his lawyer and understand the proceedings against him), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999).

Nevertheless, Petitioner insists that "equitable tolling of the statute of limitations was necessary based on the reasonable probability of Petitioner's mental incompetency." (Pet.p.19). The "reasonable probability" language comes from this Court's line of cases establishing the standard for proving ineffective assistance of counsel in cases involving competency to enter a guilty plea. See Ramirez v. State, 419 S.C. 14, 21, 795 S.E.2d 841, 845 (2017) (holding that, to establish ineffective assistance of counsel for failure to request a mental competency evaluation, an applicant need only show a "reasonable probability" that he was incompetent at the time of the plea) (citing Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992); Matthews v. State, 358 S.C. 456, 458–60, 596 S.E.2d 49, 50–51 (2004)). Petitioner's application, however, was not denied on the *merits* of his ineffective assistance of counsel claim; rather, it was dismissed for his procedural failure to file it within the statutory filing period. To challenge that dismissal, Petitioner must make the showing required by Ferguson: that "mental incompetence prevented his filing a PCR application" in the one year following his guilty plea. 382 S.C. at 620, 677 S.E.2d at 602. Nowhere in Ferguson does this Court suggest that an applicant may satisfy this requirement merely by showing a "reasonable probability" of incompetence, as would be sufficient to trigger an attorney's duty to request a mental examination. See Jeter, 308 S.C. at 232–34, 417 S.E.2d at 595–96 (contrasting a PCR applicant's ineffective assistance claim, which merely required showing a "reasonable probability" of incompetence, with his due process claim, which required him to prove "incompetence in fact" by a preponderance of the evidence). Because the present appeal does not concern the merits of Petitioner's ineffective assistance claims, the "reasonable probability" standard is not the appropriate standard by which to resolve this issue. Even if it were, Petitioner has not explained why that standard warrants departing from this Court's ordinary deference to the factual findings of the PCR court.

Petitioner concludes his petition for a writ of certiorari by arguing Mr. Routzong's performance as Petitioner's plea counsel was deficient because he failed to request competency and criminal responsibility evaluations or a Blair[1] hearing prior to the plea hearing. (Pet.pp.19–21). This argument goes to the merits of Petitioner's ineffective assistance of counsel claims, not to the propriety of the PCR court's denial of his equitable tolling request. The PCR court did not rule on the merits of Petitioner's ineffective assistance allegations, and those allegations are not properly before this Court. See, e.g., Plyler v. State, 309 S.C. 408, 409, 424 S.E.2d 477, 478 (1992) (holding an issue that was not ruled on by the PCR court is procedurally barred on certiorari to the Supreme Court), overruled on other grounds by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). If this Court decides to reverse the PCR court's decision to dismiss Petitioner's application, the proper course of action would be to remand Petitioner's ineffective assistance claims to the PCR court for a ruling on the merits.

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[1] State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

CONCLUSION

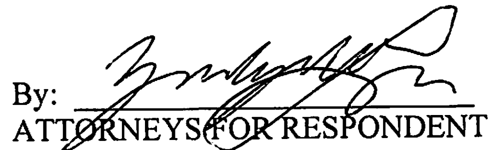
For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

ZACHARY W. JONES
S.C. Bar No. 104174
Assistant Attorney General



By: ______________________
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

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