

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Florence County  
William H. Seals, Jr., Circuit Court Judge

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Thomas McCall,

Petitioner,

vs.

State of South Carolina,

Respondent.

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**BRIEF OF RESPONDENT**

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ATTORNEYS FOR RESPONDENT

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## ISSUE PRESENTED

The PCR court did not abuse its discretion in denying Petitioner's motion for continuance where Petitioner failed explain what further investigation was needed to prepare for the PCR hearing.

## STATEMENT OF THE CASE

Petitioner McCall was indicted for assault and battery of a high and aggravated nature (ABHAN), criminal sexual conduct first degree (CSC), and possession of cocaine base. McCall pled guilty as charged on January 29, 2007. McCall was represented by Scott P. Floyd, Esquire. The Honorable Judge Michael G. Nettles sentenced McCall to five years imprisonment for ABHAN; three years concurrent imprisonment for the drug charge, and twenty years consecutive imprisonment for CSC.

McCall appealed his guilty plea conviction. The appeal was dismissed by the Court of Appeals pursuant to Anders v. California, 386 U.S. 738 (1967). State v. McCall, 2009-UP-273 (S.C. Ct. App., filed June 2, 2009).

McCall filed a PCR application on July 16, 2009, and after the State filed its return, a hearing was convened at the Florence County Courthouse before the Honorable Judge William H. Seals, Jr., on July 13, 2010. McCall, through his PCR counsel, moved for a continuance, which was denied. Then following a hearing, Judge Seals denied the application by written order dated September 22, 2010.

McCall appealed and seeks a writ of certiorari from this Court. The State's return to the petition for writ of certiorari follows.

## STATEMENT OF FACTS

At the guilty plea hearing, the prosecution provided Judge Nettles with facts to support the charges, as follows in part:

McCall and his brother brutally assaulted their half-sister while she was about four months pregnant. McCall threw a blanket over her head and beat her. The brother held the victim down and kicked her in the stomach. Police responded to a call, and the two brothers fled when they arrived. App. pp. 8-9.

The following morning, at approximately 4:30 a.m., McCall arrived at his sister's residence with a Black Hawk .38 pistol. At gunpoint, McCall made his sister disrobe in the hall. When she was not undressing quick enough, he tore her clothes, including her brassiere. In his brother's room, he forced his sister to perform oral sex – in his words, to “try to humiliate her.” He then had forcible intercourse with her and ejaculated inside her. He struck her head with the pistol. After he went into another room, she fled the house stark naked and ran across the road to a neighbor's house. They let her in and provided her clothes, and they also called the police. McCall left, went to his mother's house for breakfast, and threw the gun in the woods. App. pp. 8-13.

McCall agreed that the facts related by the prosecution were true and accurate. App. p. 17, lines 7-10.

## ARGUMENT

### **The PCR court did not abuse its discretion in denying Petitioner’s motion for continuance where Petitioner failed explain what further investigation was needed to prepare for the PCR hearing.**

McCall alleges the PCR court should have granted his motion for continuance arguing he did not have funds for the investigator. McCall failed to explain in his motion why an investigator was needed, what allegations were being investigated, or what benefits might possibly accrue from further investigation. McCall argued he did not have funds to serve potential witnesses, but failed to specify who these witnesses were, what they would have testified about, or what efforts were taken to attain their presence in lieu of subpoena.

“The grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record.” Plyer v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007) (citation omitted). “Moreover, the denial of a motion for a continuance on the ground that counsel has not had time to prepare is rarely disturbed on appeal.” Id.

The applicable rule concerning the grant of continuance in a PCR case is Rule 40(i), SCRC<sup>1</sup>, which sets out the rule as follows:

(1) *For Cause*. As actions are called, counsel may request that the action be continued. If good and sufficient cause for continuance is shown, the continuance may be granted by the court. . . .

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<sup>1</sup> See S.C. Code § 17-27-80 (“All rules and statutes applicable in civil proceedings are available to the parties”). See Rule 71.1(a), SCRC (stating that the Rules of Civil Procedure apply to PCR actions “to the extent that they are not inconsistent with the Act.”).

(2) *For Absence of Witness.* No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel or agent, to the following effect, to wit: That the testimony of the witness is material to the support of the action or defense of the party moving; that the motion is not intended for delay; but is made solely because the party cannot go safely to trial without such testimony; that there has been due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that the motion was not intended for delay. . . . A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the foregoing matters what fact or facts she believes the witness if present would testify to, and the grounds for such belief.

In the instant case, no effort was made in the motion to suggest which witnesses would have been called or what their expected testimony would be. McCall failed to offer anything to satisfy the PCR court that the motion was not intended for delay. Further, even assuming McCall was unable to subpoena these witnesses, McCall failed to provide any indication that these witnesses were contacted and asked to voluntarily appear without subpoena. If this Court was to assume that the witnesses would have been McCall's brother and McCall's three friends<sup>2</sup>, it is quite logical to expect they would be willing to help their friend or relative without the coercion of a subpoena. However, his testimony should not be considered, since McCall did not raise his motion again once the hearing began.

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<sup>2</sup> He could only remember the name of two of his friends. App. p.61. Counsel testified that McCall never provided him the names or addresses of any alibi witnesses. App. p. 76. Counsel testified he was ready for trial, and McCall thought his sister would not testify against him, but McCall backed out of trial when he saw his sister in the courtroom. App. pp. 73-74; p. 76.

McCall, during his PCR testimony, was vague on how the witnesses would have helped him at trial. On direct examination, he testified they were present during “the so-called” event. App. p. 60, lines 19-24. On cross-examination, McCall changed his mind and said they were alibi witnesses. App. pp. 63-64. It is not clear what testimony his brother and friends supposedly would be able to provide.

Further, McCall had his opportunity to complain about his counsel not attaining these witnesses when he pled guilty. However, according to McCall’s self-serving PCR testimony, he chose to lie to Judge Nettles instead. App. pp. 66-69. McCall told Judge Nettles he was happy with his attorney and his attorney did everything he asked him to do. App. pp. 22-23. Even if McCall was sincere in his belief about those witnesses assisting his defense, McCall waived his allegations concerning his counsel’s failure to subpoena the witnesses when he chose to not bring the matter to Judge Nettles’ attention.

Finally, as noted in the order, PCR counsel testified that McCall did not provide him with the names of any potential alibi witnesses. The PCR court found PCR counsel’s testimony credible. App. pp. 82-83. Specifically, counsel testified: “Mr. McCall never gave me the names or addresses of any alibi witnesses. . . . He never, never mentioned an alibi witness.” App. p. 76, lines 1-6. Accordingly, since McCall failed to prove counsel’s performance fell below professional norms, attempting to find any supposed witnesses after the fact is unnecessary. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

McCall failed to meet his burden of showing a continuance was necessary and consequently, the PCR court did not err.

CONCLUSION

For the above stated reasons, the PCR court's denial of the continuance motion and subsequent denial of the PCR application should be affirmed.

Respectfully submitted,

ALAN WILSON  
Attorney General

DAVID SPENCER  
Assistant Deputy Attorney General

BY: 

ATTORNEYS FOR RESPONDENT

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Columbia, South Carolina  
June 5, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal From Florence County

Honorable William H. Seals, Jr., Circuit Court Judge

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THOMAS MCCALL,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

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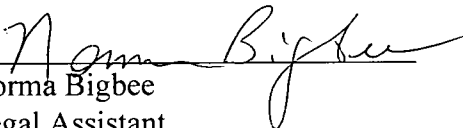
**PROOF OF SERVICE**

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I, Norma Bigbee, certify that I have served the within Brief of Respondent on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Kathrine H. Hudgins, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, PO Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 5<sup>th</sup> day of June, 2013.

  
Norma Bigbee  
Legal Assistant

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RECEIVED

JUN 05 2013

S.C. Supreme Court

ALAN WILSON  
ATTORNEY GENERAL

June 5, 2013

Kathrine H. Hudgins, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211

Re: **Thomas McCall v. State of South Carolina**  
**Appellate Case No: 2010-173546**

Dear Ms. Hudgins:

Enclosed please find two (2) copies of the Brief of Respondent along with proof of service in the above-referenced case.

Sincerely,

David Spencer  
Assistant Deputy Attorney General

DS/nb  
Enclosures

cc: The Honorable Daniel E. Shearouse  
(original & 14 enclosed)  
Ms. Trisha Allen - with enclosure