STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Case No. 2011-CP-18-533, Judge Carmen T. Mullen
Austin Review Granted on Case No. 2005-CP-18-288, Judge R. Ferrell Cothran, Jr.
Appellate Case No. 2013-000015

NORMA HALL, 283470,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Did the lower court properly grant Austin review on the facts of this case?

II.

Did the lower court err in denying the Petitioner Post-Conviction relief where she met her burden of proof with regard to her allegation that she received ineffective assistance of counsel prior to and during her plea proceeding?

STATEMENT OF THE CASE

Norma Patrick Hall, the Petitioner herein, was indicted in Dorchester County for murder (2001-GS-18-628) and Homicide by Child Abuse (2001-GS-218-1126). . She was represented in the trial court by M. Tommy Bolus, Esquire.

On April 10, 2002, a guilty plea proceeding was held at which the Petitioner's attempt to enter a guilty plea was not accepted by the presiding circuit judge, The Honorable Diane S. Goodstein. On April 15, 2002, the Petitioner proceeded to trial by jury. After the selection of a jury, the Petitioner entered an *Alford* plea[1] to Homicide by Child Abuse. As part of the plea agreement reached in this case, a second charge of Murder was dismissed in exchange for the Applicant's plea to Homicide by Child Abuse pursuant to *Alford.* Following the entry of this plea, the proceeding was recessed until April 17, 2002, at which time the Court reconvened for the purpose of hearing testimony regarding aggravating and mitigating circumstances prior to the sentencing as required by South Carolina law.[2] Following two days of testimony, the Petitioner was sentenced by the Honorable Diane S. Goodstein, presiding circuit judge to forty (40) years incarceration.

A timely Notice of Appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Appellant's conviction and sentence on March 1, 2004. State v. Norma Patrick Hall, Opinion No. 2004-UP-145 (S.C. Ct. App. Filed March 1, 2004).

Petitioner filed an Application for Post-Conviction Relief on February 15, 2005. An evidentiary hearing was convened on April 23, 2007 before the Honorable R. Ferrell Cothran, Jr., presiding judge. In that application the Petitioner alleged that she received ineffective

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1 North Carolina v. Alford, 400 U.S. 25 (1970).

2 S.C. Code Ann. §16-3-85 (D).

assistance of counsel prior to and during her entry of an *Alford* plea in violation of her rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and further that, her plea pursuant to *Alford* was not knowingly and voluntarily entered inasmuch as it was the product of ineffective assistance of counsel. By written Order filed October 24, 2007, the court denied and dismissed the application with prejudice. Through a clerical error, PCR counsel failed to file Notice of Appeal from that decision. Petitioner filed an Application for Post-Conviction Relief on March 14, 2011 seeking to have a belated PCR appeal granted pursuant to *Austin v. State, 305 SC 453, 409 S.E.2d 395 (1991).* The State filed a Return and Motion to Dismiss dated July 27, 2011. A Consent Order for *Austin* Review was filed on November 30, 2012 (2011-CP-18-0533) granting *Austin* review on 2005-CP-18-288. A timely Notice of Appeal was filed on January 2, 2013.

She now asks that the writ be issued and that she be permitted to submit a full briefing on the issues summarized herein.

ARGUMENT

Standard of Review

This Application for Post-Conviction Relief generally raises numerous specific allegations of ineffective assistance of counsel. The standard of review in a Post-Conviction Relief appeal is whether "any evidence of probative value" exists to support the Post-Conviction Relief court's findings. *Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989*). The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. *Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rule 71.1(e), SCRCP.* In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that trial counsel (1) failed to provide him

with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. *Strickland v. Washington, 466 U.S. 668 (1984).* In other words, the Applicant must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; *Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).* A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. *Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).*

On the one hand, where trial counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. *Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).* On the other hand, counsel may not explain away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. In the case of *Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002),* the Supreme Court of South Carolina found that

> Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

(Emphasis in original) (internal citations omitted).

In the context of a guilty plea, the operative question becomes whether a defendant, but for counsel's errors and omissions, would have exercised his right to trial. *Hill v. Lockhart, 474 U.S. 52 (1985).* Further, the applicant must show that there is a reasonable probability that he would have insisted on proceeding to trial on the matter instead of pleading guilty. *Porter v. State, 368 S.C. 378, 629 S.E.2d 353 (2006).* A guilty plea, along with the resulting waiver of

fundamental constitutional rights, is valid only if made voluntarily, knowingly, and intelligently. *Boykin v. Alabama, 395 U.S. 238, 242-43 (1969)* ("For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality.")

RELEVANT FACTS

At the PCR proceeding held in this matter, Defense Counsel acknowledged that the Petitioner always wanted a trial by jury. App. P. 585, ll. 9 – 16. The Petitioner's testimony at this proceeding verifies this fact as well. App. P. 557, ll. 7 – 14. Her testimony indicates that her resolve to go to trial was overcome by the fact that on April 15, 2002, she was visited at the jail by Mark Hane and Jim Bell. These individuals advised her that they had had breakfast with her trial judge's husband and that he had told them that if the Petitioner went to trial and was convicted the judge would sentence the Petitioner to life imprisonment. App. p. 557, l. 20 – p. 558, l. 9. She further indicated that, although her attorney was not present during this conversation, he knew about it. [3] App. p. 558, ll. 10 – 12. The Petitioner also alleged that her trial had a conflict of interest in this case from the beginning because the Petitioner had been the clerk to council and to the county administrator for right and a half years and that during that time the judge had been the county attorney. Although the plea record indicates that the Petitioner waived this conflict of interest on the record in the lower court, her PCR testimony clearly indicates that she did not know she had a choice and that the decision had been made for her. As she stated during her PCR testimony, "I believe that's what they decided, yes." Her testimony indicates that the matter was discussed at the bench. App. p. 559, ll. 7 – 24. The

[3] Although Defense Counsel admits knowing about this conversation in his PCR testimony, and states that one of the individuals who relayed this information to his client was a lawyer, the testimony in the PCR proceeding does not reveal whether he had given his permission for this lawyer to meet with the Petitioner or whether he knew about the visit in advance.

Petitioner firmly asserted that she had not wanted this particular Judge to preside in her case. App. p. 560, ll. 559, l. 25 – p. 560, l. 3. The Petitioner testified that, to her knowledge, her attorney never questioned the Judge about the conversation she had with individuals who claimed the judge's husband had indicted that the judge would give her the maximum sentence of life imprisonment if she went to trial and were convicted. 558, ll. 16 – 25. In his PCR testimony Defense Counsel acknowledged that Jim Bell, whom he described as a very fine lawyer in Dorchester County, and another person whom he thought was the Petitioner's boss or friend, had come to her cell and that there had been was some conversation about them knowing the judge's husband extremely well and conveying the fact that if she was convicted on either charge at a jury trial the judge was going to give her a life sentence. App. p. 15, l. 15 – p. 595, l. 5. Defense Counsel admitted that he could not recall whether these individuals claimed their friend, the judge's husband, had actually indicated that the judge herself had said the information conveyed to his client. He indicated however, "that was enough for me to be worried about • • • if she was convicted by Judge Goodstein in Dorchester County, she would get a serious, serious problem." App. p. 595, ll. 6 – 15.

In his PCR testimony, Defense Counsel admitted that the trial judge had offered to step down from this case due to her prior relationship with the Petitioner. When asked why he didn't take advantage of that opportunity to have the judge step down from this case, he said he didn't know why and admitted that, in retrospect, he should have taken her up on her offer to step down. App. p. 596, ll. 3 – 21. He admitted that he wished he had objected to the judge serving in this case. App. p. 596, l. 20 – p. 597, l. 10. He also admitted that although he was aware of the conversation between his client and Jim Bell and the other fellow, "no one approached [the judge] about it." Not only did he fail to ask her to step down when she raised the question of a

potential conflict due to her prior relationship with the Petitioner, he admittedly failed to question her about the information that had been conveyed to his client by another lawyer. App. p. 597, l. 11 – p. 598, l. 1.

The colloquy with the Court during which the judge in this case raised the question of her potential conflict of interest in this case occurred at the outset of the Petitioner's April 10, 2002 court appearance. App. p. 3, l. 22 – p. 5, l. 3. According to the Petitioner and her Defense Counsel, the jail cell visit to the Petitioner by individuals interested in her case, including another attorney from the area, took place on April 15, 2002. The record before the lower court confirms that the question of whether Judge Goodstein should step down was never again raised in the Petitioner's case after the April 10, 2002 discussion on the record. .

DISCUSION

Question I

Austin review in this matter was granted by way of consent order. Inasmuch as all parties acknowledge that the Order of Dismissal in the Petitioner's original PCR was not appealed due to clerical error, the lower court correctly ruled that she was entitled to a belated PCR appeal.

Question II

In the case before the Court, the Petitioner waived her right to trial by jury due to a conversation with parties claiming to know, *from conversations with the judge's husband,* that the judge in her case would definitely give her the maximum sentence allowed for her conviction if she went to trial and was convicted by a jury. Defense Counsel expressed his belief at the time that this revelation meant that the Petitioner would get a life sentence if she were convicted by jury of either charge; Murder of Homicide by Child Abuse. He acknowledged that this information was conveyed to his client by another respected lawyer from the community.

Defense Counsel also admitted that the Petitioner had been resolute in her determination to have a jury trial until that conversation. An earlier attempt at a plea had fallen apart because the Petitioner would not admit her guilt in connection with the death of her son.

The Petitioner has asserted that she never wanted the trial judge in this case to preside over her case. While the initial opportunity to have this judge step down came before this information was conveyed to the Petitioner, it is clear from the record that Defense Counsel neither asked the judge about this information or discussed with his client the possibility of raising the conflict issue again and asking that the judge allow the Petitioner, upon further reflection, to ask for another judge to preside in her case. Even if Defense Counsel did not wish to broach the subject of Attorney Bell's conversation with the Petitioner with the judge, he had a tailor made opportunity to ask this judge to step aside without embarrassing or compromising anyone connected with the alleged conversation with her husband. The fact that he failed to do so, on the facts of this case, constituted ineffective assistance of counsel. The right to effective assistance of counsel clearly extends to representation during sentencing. *Dervin v. State, 386 S.C. 164, 687 S.E.2d 712 (2009).* In the case before the Court, the Petitioner wanted a jury trial and yet was forced to give up that constitutional right due to the report that the trial judge had predetermined that if she were convicted the Petitioner would receive the maximum penalty of life imprisonment.

The sentencing record before the Court indicates that the Petitioner had no prior criminal record, had a long positive employment record with the County and had many supporters in the community. In his PCR testimony, Defense Counsel testified that even the investigating officer in this case, Tom Marshal, liked the Petitioner, despite the situation she was in. Defense Counsel stated that his investigation indicated that although this baby had some health issues, the

Petitioner had been a good mother before the tragic events that lead to his death. App. p. 579, l. 12 – 580, l. 9. James Bell, a former county attorney, testified during the Petitioner's sentencing proceeding that she was not the kind of person to allow something like this to happen to her child but acknowledged that he understood that drugs were involved. App. p. 180, l. 9 – p. 181, l. 25. Dr. Donna Swartz-Watts testified that the Petitioner suffered from a major mental illness in the form of amphetamine dependence. She opined that at the time her child died she was suffering from symptoms of psychosis including hallucinations and delusions. App. p. 320, l. 11 – p. 341, l. 20. The Petitioner has consistently denied intentionally harming her son.

The Petitioner would respectfully assert that the lower court erred in denying her Post-Conviction Relief where the record illustrates that her decision to waive her right to trial by jury was the product of ineffective assistance of counsel. Defense Counsel allowed his client to make a decision about entering a plea based on a discussion with persons purporting to know that the presiding judge had predetermined to give her the maximum sentence allowed for either Murder of Homicide by Child Abuse without either investigating those claims by reporting them to and discussing them with the judge. Alternatively, Defense Counsel had the opportunity to ask the judge in question to step down based on her previous working relationship with the judge if he had been disinclined to engage the judge in conversation concerning revelations concerning her sentencing intent supposedly made by her husband. While the record indicates that the Petitioner waived the right to ask this judge to step down before the revelations about this conversation were disclosed to her, it also supports her claim that counsel never revisited that issue before her jury selection began on April 15, 2002, later in the morning after the conversation with these two visitors took place in her jail cell.

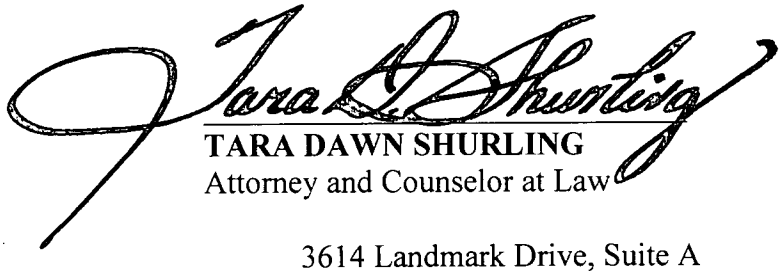
Defense Counsel has now admitted that he should have taken advantage of the judge's

willingness to step down from this case. The Petitioner most respectfully submits that his failure to do so constituted ineffective assistance of counsel. The Petitioner seeks the vacation of her judgment and sentence and the remand of her case for a new trial.

CONCLUSION

For the reasons stated, the Petitioner asks this Honorable Court to grant the writ and allow full briefing of the issue summarized herein. Alternatively, she respectfully asks that the Court dispense with further briefing and grant her a new trial.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

This 14th day of June, 2013.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Case No. 2011-CP-18-533, Judge Carmen T. Mullen
Austin Review Granted on Case No. 2005-CP-18-288, Judge R. Ferrell Cothran, Jr.
Appellate Case No. 2013-000015

NORMA HALL, 283470,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Writ of Certiorari in the above-entitled case has been served upon opposing counsel, Megan E. Harrigan, Assistant Attorney General, Office of the Attorney General, via U.S. Mail, postage prepaid, this 14th day of June, 2013.

Tara Dawn Shurling

TARA DAWN SHURLING
Attorney and Counselor at Law

ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 14th day of June, 2013.

Sharon H. McCollister (L.S.)
Notary Public for South Carolina
My Commission Expires: Jan 16, 2017

LAW OFFICE OF

TARA DAWN SHURLING, PA

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June 14, 2013

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Norma Patrick Hall, 283470, v. State of South Carolina;
Case No. 2011-CP-18-533, Judge Carmen T. Mullen
Austin Review Granted on Case No. 2005-CP-18-288, Judge R. Ferrell Cothran, Jr.
Appellate Case No. 2013-000015

Dear Mr. Shearouse:

Enclosed for filing please find the original and six copies of the Petition for Writ of Certiorari and Certificate of Service in the above-captioned case. I would appreciate you returning two (2) clocked copies of the Petition and Certificate of Service in the envelope provided. The Appendix was filed and served yesterday. Thank you for your assistance in this matter. I remain,

Sincerely yours,

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sm
Enclosures
cc: Megan E. Harrigan, Assistant Attorney General (w/enclosures)
Norma Patrick Hall, 283470 (w/enclosures)