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S.C. SUPREME COURT

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STATE OF South Carolina
In The Supreme Court

Certiorari To Florence County
Honorable Debra R. McLaughlin, Circuit Court Judge

VANCE ROSS,

Petitioner,

V.S.

STATE OF South Carolina,

Respondent.

Appellate Case No. 2024000024

Pro se Johnson Petition FOR WRIT of Certiorari

STATEMENT of The Case

VANCE ROSS was found guilty of six counts of First Degree Criminal Sexual Conduct with a Minor by a jury trial held during the April, 2017 term of The Florence County Court of General Sessions before Judge D. Craig Brown.

Petitioner was sentenced by a enhanced sentence to life imprisonment. App. 1-386. Thurmond Brooker, E.S.Q., represented petitioner at trial, and assistant solicitor David Richardson appears

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on behalf of the state. Petitioner appealed, but his appeal was dismissed. See *State v. Ross*, op. No. 2020-UP-438 (S.C. Ct. App. Feb. 12, 2020).

On December 29, 2020, petitioner filed a P.C.R. application with the Florence County Court of Common Pleas. App. 388-394. The Respondent filed a return dated April 20, 2021. App. 395-406.

A P.C.R. hearing in the case was convened on June 3, 2023, at the Florence County Courthouse before Judge Debra McClaslin. App. 407-452.

Petitioner was present at the P.C.R. hearing and represented by Attorney Steven W. Fowler, and asst. Attorney General, Russell Barlow on behalf of the state. On November 1, 2023, Judge McClaslin, issued an order of Dismissal, therein denying petitioner's allegations of ineffective assistance of trial counsel. App. 454-481.

This appeal follows: Moreover, P.C.R. Counsel was ineffective for failing to return an answer, or response to the "States Return, and partial motion to Dismiss, and motion for a more definite statement." Being that the applicant did not know how to raise specific allegations of ineffective assistance of trial counsel, applicant was asked to do so by the Respondent. The record reflects that Applicant's Counsel failed to do so, failed to amend his P.C.R., and failed to file a Rule 59(e), S.C.R.C.P.,

Motion to alter and/or Amend the Judgement. Inasmuch, the applicant moves this Court to alter the Final order to reflect the applicability of *Pelquin v. State*, 321 S.C. 468 (S.C. 1996.), to this case because this case is one where the Applicant alleges that because of attorney abandonment, i.e. ineffective assistance of Counsel, on Counsel's failure to provide procedural Due process of law, relief should be granted. Furthermore, the petitioner alleges that Defense Counsel was ineffective for failing to take numerous actions with regard to the victim's testimony, including: (1), failing to hire experts for the defense to interview the victim's prior to the trial.

Argument 1.

Trial Counsel erred in failing to properly advise petitioner regarding the plea offer in the case:

Petitioner was sentenced to six concurrent Life Sentences on each of his six convictions of First degree Criminal Sexual Conduct with a minor.

During the P.C.B. hearing held in the case, petitioner testified that he received a plea offer of twenty-five years in the case, and that his response was "absolutely not..."

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"I'm not taking that." App. 422, l. 14-p. 424, l. 8. trial Counsel testified that his method of operation would include a discussion about a plea offer with a client and allow him/her to reject or accept it. App. 438, l. 14-p. 439, l. 18; App. 448, lines 3-22. Clearly, trial Counsel erred in merely discussing rather than advising petitioner with respect to the twenty-five-year plea offer in light of the lengthier sentencing possibilities on the charges in the case, i.e., life sentences with no suspensions and no probation. S.C. Code Ann. 16-3-655(D)(1)

The P.C.B. Judge ruled that petitioner failed to show any alleged deficiencies with respect to Counsel's representation in the case. App. 454-481. The Court's ruling was without fact finding and conclusion of law on specific issues raised. See, State v. Pruitt, 310 S.C. 284 (1992).

Because a guilty plea is a waiver of trial and, unless applicable law otherwise provides a waiver of right to contest admissibility of any evidence state might have offered against Defendant, guilty plea must be an intelligent act done with sufficient awareness of relevant circumstances and likely consequences. McMann v. Richardson, 90 S.C. 744 (1970). An appellate court can review issues of ineffective assistance of counsel in

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Cases where Counsel offers advice regarding what action to take on plea offers. *Hyman v. State*, 397 S.C. 35 (S.C. 2012). In *Hyman*, the Court held that Counsel was not ineffective in advising the defendant to accept a plea offer despite the fact that the defendant rejected the plea offer in light of Counsel's advice. In *Kolle v. State*, 386 S.C. 578 (S.C. 2010), The Court found that trial Counsel was ineffective in advising the defendant to reject the state's initial plea offer of a 10-year sentence suspended upon five-years and three years probation where the defendant faced 7 to 25 years. In the case at bar, Counsel offered no advice to the plea offer, but only discussed the matter with the defendant, and failed to investigate the plea offer. See, *Strickland v. Washington*, 466 U.S. 668 (1984), also *LaFler v. Cooper*, 132 S.Ct. 1376 (2012). Counsel's errors violated petitioner's Sixth Amendment Right to effective assistance of Counsel.

Argument 2

Failure To Call Certain Witnesses

Applicant alleges Trial Counsel was constitutionally ineffective for failing to call certain witnesses, specifically, Applicant alleges trial Counsel failed to call a school staff member and a urologist who would have allegedly testified in the Applicant's favor. Trial Counsel had a duty to

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provide experts, and witnesses to prepare the defense prior to trial, and during trial. here, trial counsel failed investigate, and failed to provide experts to prepare the defense for trial, in violation of applicant's Sixth Amendment Right to effective assistance of counsel. See, Strickland v. Washington, 466 U.S. 668 (1984), and U.S. v. Cronin, 466 U.S. 648. At a minimum, counsel must interview potential witnesses and make independent investigations regarding the facts and circumstances of the case. Ard v. Latoe, 372 S.C. 318 (S.C. 2007); To show counsel was ineffective for failing to call a witness, the witness(es) must be produced at the P.C.R. evidentiary hearing or their testimony must be otherwise presented, consistent with the rules of evidence.

"In most P.C.R. cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the P.C.R. court's analysis, and the analysis by the appellate court, is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." Buckson v. State, 421 S.C. 313 (2018).

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Argument 3

Conflict of Interest (Attorney);

Applicant alleges Trial Counsel's representation was constitutionally ineffective because trial Counsel had a conflict of interest from representing Applicant's brother in the past. This Court finds these allegations is without merit. The applicant, and his brother is twins; applicant's brother, and defense attorney had a conflict between them in regards to attorney fees, therefore the dispute between applicant's brother and defense attorney was so intense that defense attorney was always calling the applicant by his brother's name, which support that Counsel's performance was never fully on the case at hand.

Ineffective assistance of Counsel may result from an attorney's conflict of interest.

Strickland v. Washington, 466 U.S. 668 (1984);

In Cuyler v. Sullivan, 446 U.S. 335 (1980), The U.S. Supreme Court ruled that a defendant can demonstrate a Sixth Amendment

violation by showing that (1) Counsel was actively representing conflicting interests 446 U.S. 335, 348, 50 (1980), and (2) The conflict had an adverse effect on specific aspects of Counsel's performance. See, U.S. v. Schwarz,

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283 F.3d 76,94 (2d Cir. 2002) (Conflict of interest affected performance because Counsel failed to pursue plausible alternative strategy that would have exculpated defendant but inculcated member of organization that Counsel represented in related civil case.

The Court's Ruling on this issue was without Fact Finding and Conclusion of Law on Specific issues raised pursuant to 17-27-80, and Rule 52(a), see State v. Pruitt, 310 S.C. 284 (S.C. 1992).

Argument 4

Conflict of Interest (Judicial)

If The Court would take Judicial Notice of Applicant's P.C.R. attorney - Steven W. Fowler; if The would Note, it was Requested by the state in their motion to Dismiss that the Applicant make a more Definite Statement. Since The petitioner could prepare the motion, it was left up to Counsel to prepare the motion he did not do so, it being the same error, Counsel failed correctly raise The above issue, and now do so:

it was a Judicial error, and a Conflict of interest for Judge L. Brown to adversely preside over his Bond hearing, and at trial where he was convicted. The Petitioner had two Bond hearings where Trial Judge Brown presided over Both Bond

hearings where Judge Brown adversely denied both Bonds which did prejudiced the petitioner. Defense attorney Thurmond Brooker Failed to object to the Conflict of interest. See *Floyd v. State*, 303 S.C. 298 (S.C. 1991); *In State v. Floyd, Supra*, The Supreme Court held: that, Judge who presided at petitioner's trial may not preside over subsequent post-conviction Relief proceeding. (Vacate and Remand.). See, Rule 501.

Bias and Prejudice

Judge's Key, Presiding at Former trial Relating to same or similar Matter: U.S. District Court, D. South Carolina See, *McBeth v. Nissan Motor Corp* U.S.A. 91 F. Supp. 1473 (1996); 28 U.S.A. 455(a). also see, *Alexander v. People VI*, (Dec. 2016), S.Ct. Civ. No. 2015-0018, and Rule 501.

Argument 5

Failure to Utilize Exculpatory Evidence

Applicant alleges trial counsel was constitutionally ineffective for failing to investigate and utilize the alleged letter written by the victim. the Court finds this allegation is without merit. on Direct examination, The Applicant, testified that he and his Fiance gave trial counsel a letter written by the victim that stated she would drop the Charges

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If Applicant ended his relationship with his fiancée. (P.C.R. Tr. p. 18) Applicant testified that this letter could have proved his innocence that the victim's mother was going after him because of his relationship with his fiancée. (P.C.R. Tr. p. 19). In a colloquy with the court, Applicant testified that the letter was because of a vendetta and that his lawyer should have presented it to the trial court.

On cross-examination, Trial Counsel credibly testified that there was no letter provided to him, and if they were he would have given the letter to the solicitor. In Brady v. Maryland, 373 U.S. 83 (1963); The Supreme Court held that due process requires the prosecution to disclose, upon request, United States v. Bagley, 473 U.S. 667 (1985); In Arizona v. Youngblood, *Supra*. The Court held that in cases involving evidence that is only potentially exculpatory, unless a criminal defendant can show bad faith on part of the state or police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

Argument 6

Failure to Investigate and Prepare
Defense Counsel's Failure to take Adequate Measures
prior to, and during his trial.
Applicant alleges that defense counsel was ineffective

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For Failing to take numerous actions with regards to Counsel's deficient performance. In the instant case Defense Counsel was deficient for failing to interview potential witnesses that had evidence to prepare the defense prior to trial. Moreover, on P.C.R., applicant was represented by attorney Steven W. Fowler,;

as the facts show, Applicant was requested by the state to make a more definite statement to the P.C.R. application in which Counsel failed to do so; therefore, no issues was raised prior to the filing of applicant's application, moreover, P.C.R. attorney failed to amend the P.C.R. application, and failed to file a Rule 59(c), S.C.R.C.P.

This Application for Post-Conviction Relief Generally raises numerous specific allegations of ineffective assistance of counsel. 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. *Bell v. State*, 321 S.C. 238 (S.C. 1996); Rule 71.1.(e), S.C.R.C.P., In evaluating an Application for Post-Conviction Relief, The Moving party must demonstrate that trial Counsel (i); failed to provide him reasonable professional assistance of counsel under the prevailing standards

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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.*; *Judge v. State*, 321 S.C. 554 (S.C. 1996); *Johnson v. State*, 325 S.C. 182 (S.C. 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. Catae*, 372 S.C. 318 (S.C. 2007).

Argument 7

Applicant was denied his sixth Amendment Right to a Jury hearing all the factors to his enhanced Life Sentence:

See, *Alleyne v. U.S.*, 133 S.Ct. 2151 (2013), any fact that increases the penalty for a crime beyond the mandatory minimum is an element of the crime and must be submitted to a Jury.

Exceptions to the Apprendi rule may include

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Cases which (1) The Jury must have found the fact beyond a reasonable doubt in order to convict, see, U.S. v. Booker, 543 U.S. 2005 (2005), evidence of the fact is "overwhelming" and "essentially uncontroverted," U.S. v. Patton, 535 U.S. 625, (2002):

A Defendant may also waive his Apprendi rights, see, Blakely, 542 U.S. at 310 (2004), see e.g., U.S. v. Morgan, 386 F.3d 376, 382 (2d Cir. 2004).

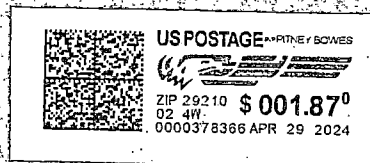
CONCLUSION

The Applicant's Application For Post-Conviction Relief is hereby Granted. The Applicant's Convictions and Sentences are Vacated.

Date: 4/26/2024

x *Jance Ross*

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