THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Case No.: 2011-CP-43-1192

Michael Boulware, Petitioner,

v.

State of South Carolina, Respondent.

2013-000513

PETITION FOR WRIT OF CERTIORARI

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Attorney for the Petitioner

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Columbia, SC 29211

Dated this 20 day of August, 2013
Greenville, South Carolina

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Dated this 20 day of August, 2013
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QUESTIONS PRESENTED

I. **Counsel was ineffective for failing to advise the petitioner that he could have an alcohol charge and a criminal sexual conduct charge tried separately, thereby prejudicing the petitioner.**

II. **Counsel was ineffective for failing to object to statements from the petitioner's former wife regarding the impact on non-victims, thereby prejudicing the petitioner.**

III. **Counsel was ineffective for advising the petitioner that he would receive a sentence of no more than three years imprisonment, thereby prejudicing the petitioner.**

STATEMENT OF THE CASE

This case arises from the petitioner's guilty plea to two different charges involving two different victims: (1) contributing to the delinquency of a minor by aiding Bailey C. in the possession and/or acquisition and/or consumption of alcohol (the "alcohol charge") and (2) second degree criminal sexual conduct with Minor (the "CSC charge").[1] (Appx. 17, 19, 167, 170). Pursuant to the petitioner's plea to these charges, the State *nolle prossed* a charge of lewd act on a minor. (Appx. 71). On November 8, 2010, the petitioner was sentenced to 3 years imprisonment on the alcohol charge and 12 years imprisonment on the CSC charge, to be served concurrently. (Appx. 64-65). The petitioner did not file a direct appeal. On June 17, 2011, he timely filed an Application for Post Conviction Relief. (Appx. 176).

The petitioner served in Korea and Iraq with the Air Force, and was a sheriff's deputy with the Sumter County Sheriff's Office at the time of his arrest. (Appx. 73).

[1] Pursuant to the Court's August 13, 2007 Order, the name of the minor in the Criminal Sexual Conduct charge has been redacted in this Petition and in the Appendix, and the term "Minor" is used instead. Further, pursuant to the Court's August 13, 2007 Order, the names of the minor victims of the alcohol charge have been redacted so that only the minors' first names and first initial of the last names are used.

Minor, the victim on the CSC indictment, was the petitioner's former wife's niece.[2] (Appx. 74-75). Bailey C., the victim on the alcohol indictment, was Minor's cousin. (Appx. 77). There was no allegation that the petitioner provided alcohol to Minor. (Appx. 78). There was no allegation that the petitioner had sexual conduct with Bailey C. (Appx. 152).

The amount of evidence against the petitioner for the alcohol charge and the CSC charge was vastly different. There was ample evidence that the petitioner committed the alcohol charge. Prior to his arrest, the petitioner approached law enforcement and admitted that he provided alcohol to Bailey C. (Appx. 39). The petitioner said that if questioned about it, he would tell his supervisors at the Sheriff's Department the truth. (Appx. 39). Thereafter, the petitioner waived his Miranda rights and gave a statement admitting that he brought Bailey C. alcohol. (Appx. 40). The Sheriff's Department conducted an interview with Bailey C. (Appx. 40). According to Bailey C., she asked the petitioner to bring her alcohol. (Appx. 40). The petitioner brought Bailey alcohol, knowing that minors Allie B. and Molly D. were present with her. (Appx. 40). The Sheriff's Department also conducted interviews with Allie B. and Molly D., both of whom stated that the petitioner brought Bailey C. alcohol. (Appx. 39-40). In their interviews, all three minors said that the petitioner brought them alcohol while in his police uniform. (Appx. 39-40).

On the other hand, there was little evidence that the petitioner committed the CDC charge. He never gave a statement to police admitting to this crime, and there was no

[2] The term "former wife" is used herein because the petitioner and his wife's marriage was annulled after six months. (Appx. 75-76).

inculpating forensic evidence. (Appx. 80, 91-92, 161). Further, there were no other alleged witnesses besides Minor. (Appx. 80).

Moreover, the two charges were separate in time. The alcohol indictment charged that on or about March 1, 2009, the petitioner provided alcohol to Bailey C. (Appx. 167). The alleged CSC did not occur until three months later - - June 2009. (Appx. 170, 173).

Despite the separate charges, the separate victims, the separate evidence, and the separate time frames, counsel failed to advise the petitioner that he was entitled to two separate trials. (Appx. 87). Instead, counsel told the petitioner that there was no way that counsel could walk into a courtroom and tell the jury that the petitioner committed the alcohol charge, but did not commit the CSC charge. (Appx. 83). The jury would convict him of all the charges. (Appx. 83). Counsel admitted that he failed to advise the petitioner that the petitioner was entitled to two separate trials. (Appx. 146, 160-61). The sentencing judge never advised the petitioner that he was entitled to separate trials. (Appx. 161). The petitioner testified that if he had known that he was entitled to two separate trials, he would have not pled guilty to the CSC charge. (Appx. 87-88).

The petitioner, the petitioner's current wife, the petitioner's brother, the petitioner's mother, and the petitioner's father all met with counsel. Each testified at the post conviction relief hearing that counsel represented that the petitioner would receive no more than three years imprisonment if he pled guilty to the CSC charge and the alcohol charge. Specifically, the petitioner testified that "[counsel] told me no more than three years . . . possibly probation." (Appx. 83). Counsel told the petitioner that he attended church with the judge, and that "he was personal friends with the judge; that he had helped get him elected, played golf with him on a regular basis and - - and was owed

a favor." (Appx. 84, 93-94). In fact, counsel attended church with the judge. (Appx. 162-63). The only way the petitioner and his family could have known this was through counsel. (Appx. 162-63). Counsel admitted that he told the petitioner and his family that he and the judge attended the same church. (Appx. 163).

Similarly, the petitioner's current wife testified that she overheard counsel speaking with the petitioner. (Appx. 99). Counsel told the petitioner that "at most he would get . . . one to three years. And more than likely he would walk out with probation, because he had just played golf with the judge, and the judge was a friend of his and owed him a favor." (Appx. 99). The petitioner's current wife also spoke directly to counsel, and counsel told her that "at most, it would be one to three years, but more than likely, my husband would be walking out with me with probation." (Appx. 100). Based on counsel's representations, the petitioner and the petitioner's current wife decided to get married prior to the petitioner's sentencing. (Appx. 84, 100-01).

Likewise, the petitioner's brother testified that he had a conversation directly with counsel. (Appx. 105). Counsel told the petitioner's brother that the petitioner "most probability, would walk out with probation; that he would do three years active sentence maximum." (Appx. 106-07).

Counsel also told the petitioner's mother that the petitioner could get one to three years imprisonment, but would probably get probation. (Appx. 113). Counsel told the petitioner's mother that the judge owed counsel a favor. (Appx. 113). Based on counsel's representations that the petitioner would not be imprisoned for more than three years, the petitioner's mother and father agreed to pay the petitioner's household expenses during his imprisonment. (Appx. 113-14).

Similarly, the petitioner's father testified that counsel told him that the petitioner would get one to three years imprisonment. (Appx. 127-28). The petitioner's father also testified that counsel represented that the judge owed him a favor because counsel helped the judge get elected. (Appx. 125).

Despite the testimony from the petitioner, the petitioner's current wife, the petitioner's brother, the petitioner's mother, and the petitioner's father, the post conviction relief court found counsel's testimony credible that "[counsel] informed [the petitioner] that there was no negotiation or recommendation from the State and that he could receive up to the maximum sentence on each charge. Counsel elaborated that he informed [the petitioner] that he would likely receive a more lenient sentence than the maximum if he entered a guilty plea, as courts often reward defendants for admitting their guilt." (Appx. 12).

ARGUMENT

I. Counsel was ineffective for failing to advise the petitioner that he could have an alcohol charge and a criminal sexual conduct charge tried separately, thereby prejudicing the petitioner.

Counsel was ineffective for failing to advise the petitioner that he could have the alcohol charge and the CSC charge tried separately. Instead, counsel told the petitioner that if he were to go to trial and admit guilt to the alcohol charge, the jury would find him guilty of the CSC charge. (Appx. 83). Counsel's "actual words [were] that there was no way he could walk into a courtroom and tell the jury that [the petitioner] did some - - one thing - - and [the petitioner] didn't do the other; that [the petitioner] was going to be charged - - basically convicted of all the charges." (Appx. 83).

The petitioner did not know that he could have the alcohol and CSC tried separately. Despite the separate charges, the separate victims, the separate evidence, and the separate time frames, counsel failed to advise the petitioner that he was entitled to two separate trials. (Appx. 87). Counsel admitted that he never advised the petitioner that he could have the charges tried separately. (Appx. 146). Moreover, the Judge never advised the petitioner that he could have the charges tried separately. (*See* Appx. 22-65).

In fact, the petitioner could have had the charges tried separately. "Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced." State v. Smith, 322 S.C. 107, 109, 470 S.E.2d 364, 365 (1996) (citing State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); State v. Williams, 263 S.C. 290, 210 S.E.2d 298 (1974); McCrary v. State, 249 S.C. 14, 152 S.E.2d 235 (1969)); *see also* State v. Rice, 368 S.C. 610, 615, 629 S.E.2d 393, 395 (Ct. App. 2006) ("Charges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances; (2) are proved by the same evidence; (3) are of the same general nature; **and** (4) no real right of the defendant has been prejudiced") (bold added). Here, the criteria for joining the indictments were not met.

The charges did not arise out of a single chain of circumstances, were not proved by the same evidence, and were not of the same general nature. The evidence in the alcohol charge and the CSC charge were from completely separate sources. Further, the petitioner admitted his guilt to the alcohol charge, (Appx. 39), while he did not admit his guilt to the CSC charge. (Appx. 80, 91-92, 161). The named victim of the alcohol

charge was Bailey C. (Appx. 167), while the victim of the CSC charge was Minor. (Appx. 170). Although the State claimed that Allie B. and Molly D. were also victims of the alcohol indictment, (Appx. 39), there was no evidence that the petitioner provided alcohol to Minor. (Appx. 78). There was no evidence that the petitioner committed sexual assault against Bailey C., Allie B., or Molly D. (Appx. 152). The alcohol violation occurred on March 1, 2009. (Appx. 167). The CSC allegedly occurred three months later. (Appx. 170, 173).

Although counsel maintained that alcohol was a common factor in the alcohol charge and CSC charge (Appx. 153-88), this alleged common factor clearly fails to meet the requirements for consolidation. *See* State v. Middleton, 288 S.C. 21, 23, 339 S.E.2d 692 (1986). The Court has held that consolidation is not justified even where the same weapon is used in all the crimes, the crimes are temporally and spatially similar, and where all the crimes are part of the same crime spree. Middleton, 288 S.C. at 23, 339 S.E.2d at 692.

Moreover here, consolidation of the charges would have prejudiced the defendant. "Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilty for another crime or to infer a general criminal disposition . . . The joinder of charges can be particularly prejudicial when the alleged crimes are sexual in nature." Washington v. Sutherby, 204 P.3d 916, 922 (Wash. Sup. Ct. 2009) (citations omitted); *see also* Wiest v. Delaware, 542 A.2d 1193, 1195 (Del. Sup. Ct. 1988) ("[t]he prejudice which a defendant may suffer from a joinder of offenses has been described in the following terms: 1) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it

would not so find; 2) the jury may use the evidence of one of the crimes to infer a general criminal disposition of the defendant in order to find guilt of the other crimes or crimes; and 3) the defendant may be subject to embarrassment or confusion in presenting different and separate defenses to different charges") (citations omitted); Roark v. State, 620 So.2d 237, 239 (Fla. Ct. App. 1993) ("in child sexual molestation cases, motions to sever should be granted where offenses occurred at different times and places, involving different victims").

Prejudice is apparent here. The "victims" of the charges were all 14 year old girls. The CSC charge was sexual in nature. Counsel even told the petitioner that there was no way that counsel could walk into a courtroom and tell the jury that the petitioner committed the alcohol charge, but not the CSC charge. (Appx. 83). Even further, here counsel admitted that he probably could have gotten the petitioner separate trials. (Appx. 155). Yet, counsel admitted that he failed to advise the petitioner that he could have separate trials. (Appx. 146). If the petitioner knew that the charges could have been tried separately, he would have not pled guilty and would have instead proceeded to trial. (Appx. 87-88). This is precisely the type prejudice envisioned by the United States Supreme Court in Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985) (stating that "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"). It is clear that the petitioner was prejudiced by counsel's ineffective assistance.

II. Counsel was ineffective for failing to object to statements from the petitioner's former wife regarding the impact on non-victims, thereby prejudicing the petitioner.

It is undisputed that counsel failed to object to the petitioner's former wife's statements at sentencing regarding the impact on non-victims. (Appx. 51-52). Specifically, the petitioner's former wife presented victim impact statements for non-victims:

> Ms. Papania [the petitioner's former wife]: I am here today that aside from what I didn't allege. [The petitioner] also caused my little girls to be in this situation. I had to get my 5-year-daughter at the time, and my 2-year-old daughter at the time, examined by Kathy Bass for an intimate interview. To get a 5-year-old and 3-year-old checked to make sure that they were in tact.
>
> Court: You were married to [the petitioner]?
>
> Ms. Papania: I was married to [the petitioner]. And for that reason I had to get my children checked. And the two little girls at such young, innocent ages to go through something like that.
>
> Court: They are not [the petitioner's] children?
>
> Ms. Papania: They are not [the petitioner's] children. But, that's all I have to say is that put my children through that because of him. Thank you.

(Appx. 51-52). Counsel admitted that these statements were not relevant to the sentence at issue in the petitioner's case. (Appx. 150). Yet, he did not object.

The post conviction relief court found that counsel's failure to object was not ineffective because counsel "[emphasized] to the plea court that there was only one victim of Criminal Sexual Conduct and no evidence to support that any other minors were involved or harmed." (Appx. 13). Nevertheless, by failing to object, counsel improperly permitted non-victim impact considerations to be part of the judge's

sentencing decision. This failure was not cured by counsel's later comments that there was only one victim in the CSC charge.

The post conviction relief court applied the wrong standard in concluding that the petitioner was not prejudiced by counsel's error. Citing Hill, the post conviction relief court held that "[w]ith respect to guilty plea counsel, the [petitioner] must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial." (Appx. 11-12, 13). The United States Supreme Court has recently held that Hill does not provide the sole means for demonstrating prejudice. Missouri v. Frye, -- U.S. --, --, 132 S.Ct. 1399, 1409-10, 182 L.Ed.2d 397 (2012). To establish prejudice, the petitioner may "show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." Frye, -- U.S. at --, 132 S.Ct. at 1409 (citing Glover v. U.S., 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001)); *see also* U.S. v. Moya, 676 F.3d 1211, 1214 (10th Cir. 2012) ("The more general test set forth in Frye is whether the defendant can show a reasonable probability that the end result of the criminal process would have been more favorable to the defendant in the absence of counsel's deficiencies") (internal quotations omitted). A "'reasonable probability' is, of course, less than a certainty, or even a likelihood." U.S. v. Tapia, 655 F.3d 1059, 1061 (9th Cir. 2011) (citing U.S. v. Dominguez Benitez, 542 U.S. 74, 86, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004) (Scalia J., concurring in the judgment) (observing that the "reasonably probability" standard is more "defendant-friendly" than the "more likely than not" standard).

Here, there is a reasonable probability that the petitioner would have received less prison time. Counsel researched a similar case in which the sentencing judge took a guilty plea. (Appx. 142-43). The judge sentenced that defendant to five or seven years. (Appx. 143). Here, however, the judge heard how the petitioner's crimes affected a 2-year-old and 5-year-old and how they had to be checked to make sure they were "in tact." (Appx. 51-52). The judge sentenced the petitioner 12 years imprisonment on the CSC charge, rather than five or seven years. (Appx. 64-65). There is a reasonably probability that the petitioner would have received less prison time if counsel had objected to these statements.

III. Counsel was ineffective for advising the petitioner that he would receive a sentence of no more than three years imprisonment, thereby prejudicing the petitioner.

Counsel advised the petitioner that he would receive a sentence of one to three years imprisonment, and would possibly receive probation. (Appx. 83). This was confirmed through the testimony of the petitioner, and the petitioner's wife, brother, mother, and father. (Appx. 99-100, 106-07, 113, 127-28). Yet, the post conviction relief court held counsel's testimony credible that "[counsel] informed [the petitioner] that there was no negotiation or recommendation from the State and that he could receive up to the maximum sentence on each charge. Counsel elaborated that he informed [the petitioner] that he would likely receive a more lenient sentence than the maximum if he entered a guilty plea, as courts often reward defendants for admitting their guilt." (Appx. 12).

As an initial matter, counsel's testimony could not be more credible than the other witnesses because counsel never testified that the petitioner would likely receive a more

lenient sentence if he entered a guilty plea. (Appx. 136-164). There is no evidence of probative value in the record to support this finding of the post conviction relief court. Moreover, when determining a sentence, it is improper for a judge to consider the fact that a defendant exercised his right to a jury trial rather than pleading guilty. Davis v. State, 336 S.C. 329, 333, 520 S.E.2d 801, 803 (1999). Counsel would have been ineffective if he would have advised the petitioner that the judge could take this into consideration at sentencing. *See* Id.

Moreover, the petitioner has been prejudiced. Counsel advised the petitioner that he would receive one to three years imprisonment, and could possibly get probation. (Appx. 83). The petitioner was sentenced to 12 years imprisonment on the CSC charge and three years imprisonment concurrent on the alcohol charge. (Appx. 17, 19). The petitioner's sentence is well above the promised three-year cap.

CONCLUSION

For the reasons demonstrated above, the petitioner respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari and permit full briefing on the issues presented.

Respectfully submitted,

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Attorney for the Petitioner

Dated this 30 day of August, 2013
Greenville, South Carolina

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R. Ferrell Cothran, Jr., Circuit Court Judge

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v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I have served the Petitioner's Petition for Writ of Certiorari and Appendix on the following:

The Honorable Daniel E. Shearouse
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August 20, 2013

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

Re: Michael Boulware, Petitioner v. State of South Carolina, Respondent
2011-CP-43-1192

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of Petitioner's Writ of Certiorari along with the original, unbound Appendix and two (2) bound copies of the Appendix in the above referenced matter.

Thank you for your assistance. If you have any questions, please do not hesitate to call.

Very truly yours,

Joe Watson

JJW/da
Enclosures
Cc: James C. Campbell, Clerk of Court, Sumter, South Carolina
Megan E. Harrigan, S.C. Attorney General's Office

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