STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Dorchester County
Court of Common Pleas
The Honorable Carmen T. Mullen, Circuit Court Judge



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2011-CP-18-0533
Appellate Case No. 2013-000015

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NORMA HALL,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

## INDEX

## ISSUES PRESENTED

I. Did the post-conviction relief court correctly discern that Petitioner was entitled to an appellate review pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), of the denial of her initial post-conviction relief action?

II. Did the post-conviction relief court properly determine that Petitioner failed to meet her burden of establishing ineffective assistance of counsel for Counsel's failure move for the recusal of the plea judge, where no credible evidence was presented to base such a recusal request and Petitioner has failed to show any resulting prejudice?

## STATEMENT OF THE CASE

During its April 2002 term, the Dorchester Grand Jury indicted Petitioner for Homicide by Child Abuse (2001-GS-18-1126) and Murder (2001-GS-18-1128). Tommy Bolus, Esquire (hereafter "Counsel"), represented Petitioner on both charges. On April 10, 2002, Petitioner appeared before the Honorable Diane S. Goodstein for a guilty plea proceeding; however, Judge Goodstein refused to accept Petitioner's guilty plea because Petitioner failed admit culpability. On April 15, 2002, following the selection of a jury, Petitioner pled guilty pursuant to North Carolina v. Alford[1] to Homicide by Child Abuse; the Murder indictment was dismissed pursuant to the plea. On April17-18, 2002, a sentencing hearing was held before Judge Goodstein. At the conclusion, Judge Goodstein sentenced Petitioner to forty years imprisonment for Homicide by Child Abuse.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected by Robert M. Dudek, Esquire. On March 1, 2004, the South Carolina Court of Appeals affirmed Petitioner's guilty plea and sentence. State v. Hall, No. 2004-UP-145 (S.C. Ct. App. March 1, 2004). The Remittitur was issued on March 18, 2004.

On February 15, 2005, Petitioner filed an initial application for post-conviction relief, alleging various allegations of ineffective assistance of counsel and involuntary guilty plea (2005-CP-18-288). Respondent filed its Return on March 22, 2006. An evidentiary hearing into the matter was convened April 23, 2007 at the Dorchester County Courthouse before the Honorable R. Ferrell Cothran, Jr. Petitioner was present at this hearing, alongside counsel Laura S. Knobeloch, Esquire. Respondent was represented by former Assistant Attorney General Lance Boozer. After taking the matter under advisement at the conclusion of the hearing, Judge

[1] 400 U.S. 25 (1970).

Cothran denied and dismissed Petitioner's application with prejudice by written Order dated October 12, 2007, and filed on October 24, 2007. No appeal was taken.

Petitioner subsequently filed a second application for post-conviction relief on March 14, 2011 (2011-CP-18-0533). Respondent filed its Return and Motion to Dismiss on July 27, 2011, requesting that a hearing be held solely on the issue as to whether Petitioner was entitled to an Austin appellate review of the denial of her initial post-conviction relief action. In support of her allegation, Petitioner presented an Affidavit from former counsel Laura Knobeloch, where Knobeloch states that Petitioner's failure to file a Notice of Appeal "was entirely due to my oversight and did not reflect a knowing and voluntary waiver of the client's rights to a Post-Conviction Relief appeal." On November 1, 2012, the Honorable Carmen T. Mullen signed a "Consent Order for Austin Review", granting Petitioner an Austin review of her prior post-conviction relief action that was dismissed by Judge Cothran.

A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari was perfected by Tara Shurling, Esquire. This Return follows.

## STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "'*any* evidence' of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). In a post-conviction relief action, the petitioner bears the burden of proving the allegations in her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

## ARGUMENT

### I. The lower court was correct in ruling that Petitioner was entitled to an appeal of her first post-conviction relief application pursuant to Austin v. State.

Petitioner's first post-conviction relief counsel failed to file an appeal from the denial of Petitioner's first post-conviction relief application through oversight independent to Petitioner's desire to appeal. (App. p. 634). Respondent consented that Applicant did not knowingly and voluntarily waiver her right to an appellate review of her initial post-conviction relief action. Respondent agrees that Petitioner is entitled to petition this Court for an Austin appellate review of her initial post-conviction relief application, as she did not knowingly and voluntarily waive her right to an appeal.

### II. The post-conviction relief court properly found that Petitioner failed to establish ineffective assistance of counsel for Counsel's failure to ask the plea judge to recuse herself, where no evidence existed to base such a recusal request and Petitioner failed to show any resulting prejudice.

Petitioner alleges that the post-conviction relief court erred in denying Petitioner post-conviction relief, as Counsel was ineffective for failing to move for the recusal of the plea judge and for failing to investigate an alleged conversation between the plea judge and her husband when the plea judge stated she would sentence Petitioner to life imprisonment if convicted by a jury. Petitioner asserts that but for these deficiencies of Counsel, she would not have pled guilty and would have proceeded to a jury trial. However, Petitioner's argument is without merit, as the post-conviction relief court correctly determined that Counsel's actions were reasonable based on professional standards and that Petitioner failed to meet her burden of establishing deficiency and the requisite prejudice required for relief.

To be granted post-conviction relief as a result of ineffective assistance of counsel, an applicant must show both: (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance. Strickland v. Washington, 466 U.S. 668 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, a petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. 668 (1984)).

Further, a petitioner who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that: (1) counsel was ineffective, and (2) there is a reasonable probability that but for counsel's errors, she would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A petitioner alleging that her guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985).

In the instant case, the post-conviction relief court correctly found that Counsel was not deficient in his representation of Petitioner. At the post-conviction relief hearing, Petitioner testified that she decided to plead guilty after she was visited by Mark Hane and Jim Bell and they informed her that her assigned plea judge, Judge Goodstein, told her husband that "if [Petitioner] wasted the taxpayers' money, that [Judge Goodstein] would give [Petitioner] life in

prison." (App. p. 558 lines 1-3). Petitioner also testified that she did not recall if she ever told Counsel that she did not want Judge Goodstein presiding over her case. (App. p. 560 line 5). However, Petitioner also testified that she decided to enter a guilty plea rather than pursue a trial because the threat of a life sentence if convicted "upset [her] mother." (App. p. 560 lines 14-20). She testified that her mother came to her crying and did not want her daughter to risk receiving a life sentence if convicted at trial. (App. p. 560 lines 14-20). Petitioner testified that Counsel advised her that she could receive up to a life sentence if convicted on either count and that she acknowledged to the plea court that she understood that homicide by child abuse carried a "max of life." (App. p. 561 lines 10-15; App. p. 566 lines 17-25).

Counsel testified that he "never . . . heard that Judge Goodstein told [her husband] to tell [Mark Hane and Jim Bell] that [Petitioner is] going to get life." (App. p. 595 lines 1-3). Counsel testified that he was aware of a conversation between Hane and Bell with Petitioner regarding Judge Goodstein and potential sentences, but that "it was definitely the intonation that knowing Judge Goodstein's reputation – she was a young judge then, she still is fairly young. But she was kind of new at the time and she had a reputation known throughout the tri-county area of being very, very rough on certain cases." (App. p. 594 lines 7-12). Counsel testified that "that wouldn't have been a reason" to request that Judge Goodstein recuse herself. (App. p. 596 lines 3-10). With the limited amount of speculative information on this subject that was communicated to Counsel, Counsel was not deficient in his representation of Petitioner for failing to move for the recusal of Judge Goodstein.

Additionally, Counsel also testified that "a number of people," including family members, talked to Petitioner about how she should accept a guilty plea rather than risk a life

sentence if convicted a trial. (App. p. 590 lines 11 -18). Counsel also testified that "[Petitioner's] mother was scared to death about her going to trial on a murder case" and wanted Petitioner to pled guilty. (App. p. 590 lines 19-21).

At the post-conviction relief hearing, Petitioner presented no evidence or witnesses that this alleged conversation really took place and relied only on her own speculative and highly self-interested testimony to support this allegation. The post-conviction relief court found "that every aspect of [Petitioner's] testimony regarding the deficiencies of her plea counsel's representation was not credible." (App. p. 614). Based on the lack of credible evidence presented, the post-conviction relief court was correct in finding that Petitioner "failed to show [that] the plea judge should have been recused." (App. p. 617). In order to warrant a party's moving for recusal of a particular judge from a case, the party "must show some evidence of bias or prejudice;" simply alleging bias is not enough. Christensen v. Mikell, 324 S.C. 70, 74, 476 S.E.2d 692, 694 (1996) (citing Lyvers v. Lyvers, 280 S.C. 361, 312 S.E.2d 590 (Ct. App. 1984)). In this case, Petitioner presented no credible evidence of bias or prejudice and simply relied on mere speculation that Judge Goodstein was biased. As the post-conviction relief court found, Petitioner's "contention is based purely on hearsay statements." (App. p. 617). Without further evidence, Counsel acted reasonably in not seeking Judge Goodstein's recusal from this case.

Additionally, although Judge Goodstein informed all parties at the beginning of Petitioner's initial, albeit failed, attempt at a guilty plea that she knew Petitioner from previous professional encounters and asked all parties whether they wished to proceed before her Honor, Petitioner presented no credible evidence establishing Judge Goodstein was biased or that her ability to be impartial was in question. Counsel testified that in retrospect it probably would have

been a good idea ask Judge Goodstein to remove herself from the case based on her prior professional relationship with Petitioner. (App. p. 597 line 10). However, "[t]he United States Supreme Court has cautioned that every effort be made to eliminate the distorting effects of hindsight and evaluate counsel's decisions at the time they were made." Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) (citing Strickland, 466 U.S. 668 at 689). "Accordingly, [courts] must be wary of second-guessing [plea] counsel's tactics." Edwards, 392 S.C. at 457, 710 S.E.2d at 64. Counsel acted in accordance with prevailing professional norms in not seeking Judge Goodstein's recusal based on the limited professional relationship between Petitioner and Judge Goodstein. Counsel testified that in retrospect it might have been a good idea to take Judge Goodstein's offer to get off the case, but emphasis remains on the words *in retrospect*. At the time Judge Goodstein questioned Counsel and Petitioner, Counsel had no reason to believe that Judge Goodstein was biased or would not act impartially. Counsel only had knowledge that Judge Goodstein knew Petitioner from her previous job as a county attorney and that the contact they shared was minimal (the record reflects that Judge Goodstein would call the county administrator and that Petitioner would answer the phone at times. (App. p. 4.)). It is far easier to look at the situation in retrospect and think that Counsel should have accepted Judge Goodstein's offer to recuse herself from Petitioner's case; however, when evaluating ineffective assistance of counsel claims, looking in hindsight is not the proper way to evaluate Counsel's actions. Nothing in the record indicates that Counsel should have acted upon Judge Goodstein's offer besides his own statement at the evidentiary hearing that in retrospect it probably would have been a good idea. Petitioner has failed to prove the first prong of the Strickland test that Counsel failed to render reasonably effective assistance under professional norms.

Furthermore, Petitioner failed to establish any resulting prejudice from Counsel's alleged deficiency. Petitioner testified that she wanted a trial and only changed her mind because of what Hane and Bell communicated to her. (App. p. 557). However, Petitioner testified that her mother and other members of her family wanted her to pled guilty to avoid risking a possible life sentence if convicted at trial. Although Petitioner claims that she wanted a trial and changed her mind due to the information she had regarding Judge Goodstein, Petitioner has not shown that she still would have proceeded to trial if there were another judge. Petitioner was facing a murder charge and homicide by child abuse charge. The benefit of the plea was that the murder charge was being dismissed, which carries a high punishment than homicide by child abuse. With the benefit of this plea in effect, Petitioner has not shown how she would have insisted on going to trial even if there was another judge. The decision to plea is ultimately left in the defendant's hands. Also even if Counsel had questioned the plea judge about the alleged conversation, the possibility remains that the plea judge would have denied making those statements and would have continued to oversee this case. Further, even if Petitioner went to trial the likelihood of her being convicted of homicide by child abuse was extremely high and the sentence very well could have the same or even harsher. The post-conviction relief was correct in finding that Petitioner failed to carry her burden of proof in showing that she would not have pled guilty but for Counsel's error and instead would have insisted on going to trial.

Accordingly, probative evidence in the record exists to support the post-conviction relief court's findings. Petitioner has failed to carry her burden in proving that she received ineffective assistance of counsel. No witnesses were presented to the alleged conversation that indicated the plea judge was biased towards Petitioner and Petitioner has not established why Counsel erred in

refusing the plea judge's offer of recusal at the outset, therefore, Counsel cannot be found to be deficient for failing to seek recusal of the plea judge or for failing to accept the plea judge's offer to step-down. Furthermore, Petitioner has not shown how any resulting prejudice occurred.

## CONCLUSION

For the foregoing reasons, the State submits that the Petition for Writ of Certiorari should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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By: Megan E. Harrigan
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September 16, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Dorchester County
The Honorable Carmen T. Mullen, Circuit Court Judge
Case No. 2011-CP-18-533
Appellate Case No. 2013-000015

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NORMA P. HALL, #283470, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

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**PROOF OF SERVICE**

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I, Megan E. Harrigan, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tara D. Shurling, Esquire
3614 Landmark Drive, Suite A
Columbia, South Carolina 29204

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

This 16th day of September, 2013.

Megan E. Harrigan

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ALAN WILSON
ATTORNEY GENERAL

September 16, 2013



The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

***Re:*** **Norma Patrick Hall, #283470 v. State of South Carolina**
**Appellate Case No. 2013-000015**
**Lower Court Case No. 2011-CP-18-00533**

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above case.

Sincerely,

Megan E. Harrigan

Megan E. Harrigan
Assistant Attorney General
S.C. Bar No. 100108

MEH
Enclosures

cc: Tara D. Shurling, Esquire
Trisha Allen, Victim Services