

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Sumter County  
Court of Common Pleas  
R. Ferrell Cothran, Jr., Circuit Court Judge

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2011-CP-43-1192  
Appellate Case No. 2013-000513

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S.C. SUMMER COUNTY

MICHAEL BOULWARE, #343541,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## ISSUE PRESENTED

- I. **Is there evidence of probative value in the record to support the post-conviction relief court's finding that Petitioner failed to meet his burden of establishing that Counsel was ineffective for not advising Petitioner that he was entitled to two separate trials?**
- II. **Is there evidence of probative value in the record to support the post-conviction relief court's finding that Petitioner failed to meet his burden of establishing that Counsel was ineffective for failing to object to statements from Petitioner's former wife during his guilty plea proceeding?**
- III. **Is there evidence of probative value in the record to support the post-conviction relief court's finding that Petitioner failed to meet his burden of establishing that Counsel was ineffective for advising Petitioner that he would receive a sentence of no more than three years imprisonment if he pled guilty?**

## STATEMENT OF THE CASE

Petitioner, a former Sumter County Sherriff's Deputy, was indicted during the September 2010 term of the Sumter County Grand Jury for Criminal Sexual Conduct with a Minor in the Second Degree, Lewd Act on a Child (2010-GS-43-1137), and Contributing to the Delinquency of a Minor (2010-GS-43-1140), all which were alleged to have occurred while Petitioner was an active Sumer County Sheriff's Deputy<sup>1</sup>. Edgar R. Donnald, Jr., Esquire, (herein "Counsel") represented Petitioner on these charges. On November 8, 2010, Petitioner appeared before the Honorable George C. James, Jr., where he pled guilty to as indicted to Contributing to the Delinquency of a Minor and Criminal Sexual Conduct with a Minor in the Second Degree. Judge James sentenced Petitioner to three years imprisonment for Contributing to the Delinquency of a Minor and twelve years imprisonment for Criminal Sexual Conduct with a Minor in the Second Degree, with both sentences to be served concurrently. The remaining Lewd Act on a Minor charge was dismissed pursuant to plea negotiations with the State. Petitioner did not appeal his guilty plea or sentences.

On June 17, 2011, Petitioner filed an application for post-conviction relief, alleging that he was being held in custody unlawfully based on allegations of:

1. Ineffective Assistance of Counsel
  - a. "Advised would receive a certain sentence"
  - b. "Failure to advise of all constitutional rights"
  - c. "Failure to investigate and inadequate preparation"

The State made its Return on September 19, 2011, requesting that an evidentiary hearing be held. An evidentiary hearing into the matter was convened on December 12, 2012 at the Sumter County Courthouse before the Honorable R. Ferrell Cothran, Jr. Petitioner was present at the

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<sup>1</sup> In regards to the Contributing to the Delinquency of a Minor charge, Petitioner pled guilty to providing alcohol to three minor children while in uniform and while driving his police cruiser (App. p. 39).

hearing and was represented by Joe Watson, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office. At the evidentiary hearing, Petitioner proceeded forward on the following specific allegations of ineffective assistance of counsel:

1. Counsel advised Applicant he would receive a maximum sentence of no more than three years if he pled guilty;
2. Counsel failed to object to comments from Applicant's former wife regarding having her minor daughters evaluated; and
3. Counsel failed to advise Applicant that he was entitled to two separate trials for these charges.

Petitioner testified on his own behalf and presented testimony from his wife, mother, brother, and father. Respondent presented testimony from Counsel. By Order dated February 14, 2013 and file don February 21, 2013, the post-conviction relief court denied and dismissed all of Petitioner's allegations with prejudice, specifically finding that Petitioner failed to meet his burden of proof in regards to each specific allegation.

Petitioner submitted his Wit of Certiorari on August 20, 2013. This Return to the Petition for Writ of Certiorari 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 his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the petitioner must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland; Id. The petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the petitioner must prove that counsel’s performance was deficient. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel’s deficient performance must have prejudiced the petitioner such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Where there has been a guilty plea, the petitioner must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pled guilty and instead would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985); Hyman v. State, 397 S.C. 35, 49, 723 S.E.2d 375, 382 (2012); Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011); Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

## ARGUMENT

- I. There is evidence of probative value in the record to support the post-conviction relief court's findings that Petitioner failed to meet his burden of establishing that Counsel was ineffective for not advising Petitioner that he was entitled to two separate trials.**

Petitioner asserts that Counsel was ineffective for failing to advise him that he was entitled to two separate trials. Petitioner alleges that Counsel was deficient for failing to advise him that he was entitled to two separate trials, one for Contributing to the Delinquency of a Minor and one for Criminal Sexual Conduct with a Minor in the Second Degree, as these charges would likely have been severed. Furthermore, Petitioner asserts that he was prejudiced by Counsel's deficiency, as he would not have pled guilty but would have insisted upon proceeding to trial had he known he was entitled to two separate trials. However, there is evidence of probative value in the record to support the post-conviction relief court's finding that Counsel was not ineffective in regards to this allegation.

Counsel testified that Petitioner never indicated that he wanted to proceed to trial, but rather, insisted from the start of Counsel's representation that Counsel needed to secure a plea agreement because "he was a law enforcement officer" and "could not go to trial." (App. pp. 138 ln. 25 – pp. 140 ln. 5). Counsel also testified that the Contributing to the Delinquency of a Minor case was never called to trial, only the Criminal Sexual Conduct with a Minor in the Second Degree charge had been placed upon the trial docket, and that any possible trial was still three weeks or more away (App. pp 146-147; pp. 155-159). Counsel testified that any such motion for severance would have been made at the time the case was called for trial and that neither case was ever called for trial (App. p. 155 lns. 4-13). Additionally, Counsel testified that the various charges were interrelated, as both involved allegations of providing alcohol to minors

and that the only possible defense that Petitioner could provide was that he was under such a perpetual haze of drunkenness at the time of these offenses that he could not recall what happened. (App. pp 153-154). Based on the foregoing, the post-conviction relief court correctly found that Counsel's performance was reasonable and effective in regards to this allegation and that Petitioner failed to meet his burden in regards to this allegation. There is evidence of probative value to support the post-conviction relief court's ruling.

**II. There is evidence of probative value in the record to support the post-conviction relief court's finding that Petitioner failed to meet his burden of establishing that Counsel was ineffective for failing to object to statements from Petitioner's former wife during his guilty plea proceeding.**

Petitioner alleges that Counsel was ineffective for failing to object to comments made by his former wife during his guilty plea proceeding concerning an "intimate interview" that her two minor daughters received following these charges. (App. pp. 51-52). Counsel testified that he did not object to these comments because in his professional opinion, he did not think it was wise to ask the plea court to ignore an impact statement from a family member affected by the crimes.<sup>2</sup> Counsel testified that shortly after these comments from the Petitioner's former wife and the victims' aunt, he stressed to the plea court that the incident giving rise to the Criminal Sexual Conduct with a Minor in the Second Degree was limited to one victim and there was nothing to indicate any more minors were involved. The record from Applicant's guilty plea shows that immediately following the comments in question, Counsel did emphasize to the plea court that there was only one victim of Criminal Sexual Conduct with a Minor and no evidence to support that any other minors were involved or harmed. (App. pp. 54 lns. 4-15). Based on the

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<sup>2</sup> Petitioner's former wife is the aunt of both minor girls from which the charges stem. The term "former wife" is used because the marriage was annulled after six months. At the time of the incident, the victim of the Criminal Sexual Conduct with a Minor in the Second Degree charge was the niece of Petitioner, albeit through marriage that was ultimately annulled.

foregoing, the post-conviction relief court found that Counsel's performance was not deficient in regards to this allegation. This ruling is supported by probative evidence.

Additionally, Petitioner failed to meet his burden of establishing any resulting prejudice from Counsel's alleged deficiency. Petitioner argues that he received a harsher sentence than a "similar case in which the sentence judge . . . sentenced that defendant to five or seven years," which shows that he "would have received less prison time if counsel had objected to these statements. (Pet. for Writ of Cert. p. xi). However, this assertion is not only not supported by the record, but is directly refuted during Petitioner's guilty plea proceeding. During Petitioner's guilty plea proceeding, the plea court specifically stated that the "primary points" that upon which it was focusing when determining Petitioner's sentence was that Petitioner was "a sheriff's deputy" and that the victim was "[his] niece." (App. pp. 62-64). There is nothing in the record to support Petitioner's assertion that these comments made by the victims' aunt had any impact upon Petitioner's sentence whatsoever.

As there is evidence of probative value in the record to support the post-conviction relief court's findings, this allegation was correctly denied.

**III. There is evidence of probative value in the record to support the post-conviction relief court's finding that Petitioner failed to meet his burden of establishing that Counsel was ineffective for advising Petitioner that he would receive a sentence of no more than three years imprisonment if he pled guilty.**

Petitioner alleges that Counsel was ineffective for advising him that he would receive no more than a three year sentence if he pled guilty. In support of this allegation, Petitioner presented testimony from himself and varying family members who all asserted Counsel promised him sentences ranging from "probation" to "48 months" to "three years" if he pled guilty. See generally App. p. 68- 164. In contrast, Counsel testified that informed Petitioner that

there was no negotiation or recommendation from the State in regards to a specific term of imprisonment and that he could receive up to the maximum sentence on each charge. (App. pp. 140-141). Counsel adamantly denied that he ever informed Petitioner that he would likely receive a probationary sentence or a sentence of less than three years if he pled guilty. (App. p. 141). The post-conviction court found that counsel's testimony was credible in regards to this allegation over the self-interested testimony of Petitioner and his family members. (App. p 12). As there is evidence of probative value to support the post-conviction relief court's determination that Petitioner failed to meet his burden of establishing deficiency, the court properly denied this allegation.

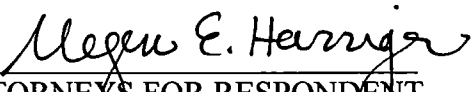
**CONCLUSION**

For the foregoing reasons, the Petition 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,

ALAN WILSON  
Attorney General

MEGAN E. HARRIGAN  
Assistant Attorney General  
SC Bar No. 100108

By:   
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November 25, 2013

STATE OF SOUTH CAROLINA  
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Certiorari to Sumter County  
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MICHAEL BOULWARE, #343541,

PETITIONER,

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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:

Joe Watson, Esquire  
650 E. Washington Street  
Greenville, South Carolina 29601

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

This 25<sup>th</sup> day of November, 2013.

  
MEGAN E. HARRIGAN  
Assistant Attorney General  
S.C. Bar No. 100108

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ALAN WILSON  
ATTORNEY GENERAL

November 25, 2013

NOV 25 2013

P.O. SYSTEMS CENTER

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

**Re: Michael Boulware, #343541 v. State of South Carolina**  
**Appellate Case No. 2013-000513**  
**Lower Court Case No. 2011-CP-43-1192**

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  
Assistant Attorney General  
S.C. Bar No. 100108

MEH  
Enclosures

cc: Joe Watson, Esquire  
Trisha Allen, Victim Services