

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge S.C. Supreme Court

ORIGINAL

Trial Court Case No. 2010-CP-26-6653

Somjai Fung Fue Starnes

Petitioner,

v.

State of South Carolina

Respondent.

APPENDIX / SUPPLEMENT APPENDIX



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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY) 2010-CP-26-6653

Somjai Fung Fue Starnes-Henderson,)

Plaintiff,)

vs.)

State of South Carolina,)

Defendant.)

Transcript of Record

PCR Hearing

February 1, 2011

B E F O R E :

Honorable Benjamin H. Culbertson
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Rachel Dain, Esquire
Attorney for Plaintiff

Christina J. Catoe, Esquire
Attorney for Defendant

Grace L. Hurley, CVR-CM
Circuit Court Reporter

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1 (There were no exhibits marked during the hearing.)
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1 (On the record, February 1, 2011.)

2 THE COURT: Next is case number 2010-CP-26-6653, and I
3 apologize, you're going to have to pronounce this name for me.

4 MS. DAIN: Somjai Starnes.

5 THE COURT: All right, Somjai Starnes versus State of
6 South Carolina. The matter is before the Court on an
7 application for post-conviction relief. Present at the call
8 of the case, you're Ms. Dain?

9 MS. DAIN: Yes, sir.

10 THE COURT: All right, Rachel A. Dain, as the
11 Applicant's attorney, Christina J. Catoe is present
12 representing the State of South Carolina. All right, hold for
13 one second.

14 All right, so, the status - what is the status of the
15 case and what are we here for today because I understand she's
16 already completed any sentence she'll serve on this charge; is
17 that correct?

18 MS. CATOE: Yes, Your Honor. She completed, I
19 believe, in the early nineties.

20 MS. DAIN: That's correct.

21 THE COURT: Okay, and so, the sole issue is the
22 conviction?

23 MS. DAIN: Well, Your Honor, it's all the things that
24 happened after the plea and the plea was intended to stop
25 everything. It was a contract between the State and Somjai.

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1 THE COURT: The plea to what charge?

2 MS. DAIN: The plea to lewd act on a minor and there
3 are actually two issues here. One is the issue of being able
4 to rely on that contract as it was intended to stop the action
5 that happened in the Appellate Court afterward and then Ms.
6 Starnes has only recently learned that her plea was not
7 voluntary and informed because it was defective due to
8 counsel's failure to tell her that she would be subject to
9 deportation as a result of the plea and had she known that she
10 would have either not pleaded or would have pled to a
11 different charge.

12 THE COURT: All right, so, what are you asking me to
13 do?

14 MS. DAIN: I think the appropriate remedy would be to
15 grant her a new trial.

16 THE COURT: As to what charge?

17 MS. DAIN: As to all of it. The only charge ---

18 THE COURT: Criminal sexual conduct and committing a
19 lewd act on a minor?

20 MS. DAIN: Well, the lewd act on the minor was a plea
21 that the Supreme Court vacated.

22 THE COURT: Okay.

23 MS. DAIN: These are very unusual circumstances and
24 that plea no longer exists. So, we can't go back to it as a
25 remedy, although that's what it was intended to be. It was

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1 intended to be the final step ---

2 THE COURT: All right.

3 MS. DAIN: --- in all of these issues but that plea
4 is also defective for the other reason of ineffective
5 assistance of counsel.

6 THE COURT: All right, let's, for the sake of
7 argument, let's say I rule with you on every issue in this
8 PCR, what do you want my order to say?

9 MS. DAIN: New trial.

10 THE COURT: As to?

11 MS. DAIN: The criminal sexual conduct, which is the
12 only charge she has now.

13 THE COURT: Okay, so, I grant her a new trial as to
14 criminal sexual conduct. It starts from square one.

15 MS. DAIN: That's correct.

16 THE COURT: She's acquitted, that's it. She's found
17 guilty she's subject to re-sentencing by the judge.

18 MS. DAIN: That's correct.

19 THE COURT: So, she could go back to jail?

20 MS. DAIN: Possibly.

21 THE COURT: Okay, is that your understanding, Ms.
22 Catoe?

23 MS. CATOE: Well, Your Honor, the State does have a
24 pending motion to dismiss.

25 THE COURT: I understand that, but is it your

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1 understanding that if Ms. Starnes goes forward with this PCR
2 and prevails then her request for relief ---

3 MS. CATOE: If she proves - I'm sorry.

4 THE COURT: --- her request for relief is that I grant
5 her a new trial on the charge of criminal sexual conduct and
6 if convicted on that retrial then she could go to jail for
7 what is it up to 30 years for that?

8 MS. CATOE: Your Honor, I guess that's why I mentioned
9 the State's motion to dismiss. There's no basis asserted in
10 the petition for vacating the conviction. The only
11 ineffective assistance of counsel is relating to the plea and
12 it's brought about through this new evidence claim. So, the
13 only relief I guess would be to vacate the plea. However, the
14 plea is already a legal nullity and does not exist, and that,
15 of course, is the basis for the State's motion to dismiss.
16 So, I would disagree that the conviction could be vacated and
17 a new trial granted because the jury's verdict has already
18 been affirmed on direct appeal and via the PCR process.

19 THE COURT: Well, that's if you prevail. That's if
20 you prevail in this PCR, but let's just say for the sole, for
21 the sake of argument if the Applicant prevails in this PCR ---

22 MS. CATOE: Okay.

23 THE COURT: --- she wins her PCR, according to ---

24 MS. CATOE: Then yes, Your Honor, I would agree.

25 THE COURT: --- Ms. Dain ---

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1 MS. CATOE: It would go back to trial on the CSC with
2 a minor and she would be subject to the maximum penalty in
3 that offense with credit for any time that she served
4 previously.

5 THE COURT: Okay, and how much time has she served
6 previously?

7 MS. CATOE: I think it was about ten years.

8 THE COURT: Okay, all right.

9 MS. DAIN: Excuse me, Your Honor, I believe she
10 served five years and two months.

11 THE COURT: Okay, all right.

12 All right, Ms. Starnes, if you would please stand, all
13 right, and you're going to have to pronounce your name for me
14 again.

15 MS. STARNES-HENDERSON: Somjai Starnes.

16 THE COURT: All right, Ms. Starnes, now, you have
17 filed this application seeking post conviction relief; is that
18 correct?

19 MS. STARNES-HENDERSON: Yes, sir.

20 THE COURT: All right, now, you understand that if I
21 deny your request for post-conviction relief, in other words
22 if you do not win this hearing then as I understand that's
23 basically it. She's already served her sentence; is that
24 correct?

25 MS. DAIN: Yes, sir.

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1 THE COURT: All right, so, you've served your sentence
2 and that would be the end of it. However, you're kind of in
3 the precarious position that if you win this case then that
4 doesn't mean that the charge against you is thrown out, the
5 one that you have a conviction for, it just means that that
6 conviction will be set aside, you could go back and face that
7 charge again, as well as any other charges that you were
8 indicted for that may have been dismissed or dropped to carry
9 this to trial and then if you're convicted again then you
10 could go to jail what is that for 30 years; that's the
11 maximum?

12 MS. CATOE: I believe so, Your Honor.

13 THE COURT: Okay, you could go to jail for 30 years,
14 less the five years. So, you could wind up going back to jail
15 for about 24 to 25 more years. Do you understand that?

16 MS. STARNES-HENDERSON: Yes, sir.

17 THE COURT: I mean, do you understand it?

18 MS. STARNES-HENDERSON: Yes, sir.

19 THE COURT: Do you understand that if I give you what
20 you're asking even though you might win here today you might
21 wind up at some future date going back to jail, do you
22 understand that?

23 MS. STARNES-HENDERSON: Yes, sir.

24 THE COURT: Okay, and you could go back to jail for a
25 long time; do you understand that?

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1 MS. DAIN: Excuse me, Your Honor, may I speak with my
2 client for a moment?

3 THE COURT: Yes, ma'am.

4 MS. DAIN: Thank you.

5 THE COURT: You might need some time. Let me let you
6 talk to your attorney because I'm not convinced that you
7 understand what might happen as a result of this case and you
8 need to consider that because even - I understand you have a
9 conviction for criminal sexual conduct and I understand that
10 you feel like that you may have been wrongfully convicted and
11 that you may be entitled to having that conviction set aside.
12 However, if you succeed in having that conviction set aside
13 down the road you might wish you had not pursued it because
14 you might be going back to jail depending on how your retrial
15 turns out, okay. So, I want you to talk to your attorney to
16 find out if this is really what you want to do; okay?

17 MS. STARNES-HENDERSON: Yes.

18 THE COURT: All right, let's stand this one down for
19 just a minute; okay?

20 OFF THE RECORD

21 (On the record.)

22 THE COURT: All right, let's go back on the record on
23 2010-CP-26-6653. Ms. Starnes, have you had an ample
24 opportunity to talk to your lawyer? Have you had an ample

25 ---

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1 MS. STARNES-HENDERSON: Yes, sir.

2 THE COURT: Has she answered all of your questions?

3 MS. STARNES-HENDERSON: Yes, sir.

4 THE COURT: All right, now, do you understand your
5 rights in this post-conviction relief hearing?

6 MS. STARNES-HENDERSON: Yes, Your Honor.

7 THE COURT: All right, if I grant the relief you're
8 requesting and I don't know whether I'll grant it or not, I've
9 still got some outstanding motions I still have to hear but
10 let's just say if I went through and I denied your request for
11 post-conviction relief then pursuant to an order already
12 issued down by the Supreme Court you've already served your
13 sentence for this criminal sexual conduct charge and you would
14 have that on your record; do you understand that?

15 MS. STARNES-HENDERSON: Yes, Your Honor.

16 THE COURT: Do you understand, however, that if I do
17 grant your request for post-conviction relief all that will do
18 would be set aside your conviction for criminal sexual conduct
19 and set aside any sentence that you received as a result of
20 that. You would go back to square one and you would be facing
21 that charge again as well as any other charges that the State
22 may have dismissed against you to pursue that charge.

23 MS. STARNES-HENDERSON: Yes.

24 THE COURT: The end result being that if you're found
25 not guilty you're not guilty, if you're found guilty then you

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1 could receive additional sentencing and go back to jail; do
2 you understand that?

3 MS. STARNES-HENDERSON: Yes, Your Honor.

4 THE COURT: All right, knowing that do you still want
5 to pursue your request for post-conviction relief?

6 MS. STARNES-HENDERSON: Yes, Your Honor.

7 THE COURT: All right, all right, Ms. Dain, anything
8 you want to place on the record before we begin?

9 MS. DAIN: Your Honor, I'd just like to add that Ms.
10 Starnes, we did discuss this matter with her, as well as any
11 possible defenses that we think we might have to her serving
12 more time and she does understand what she faces.

13 THE COURT: Okay, all right.

14 All right, Ms. Catoe, anything you want to place on the
15 record before we begin?

16 MS. CATOE: Yes, Your Honor, again, I would want to
17 note the State's motion to dismiss on the grounds that there's
18 a failure to state a claim upon which relief could be granted
19 and these grounds are fully set forth at pages three and four
20 in the written motion and I would submit that no testimony
21 that Your Honor hears today will change the result that must
22 be reached, which is that relief must be denied. The reason
23 is because the claim is entirely centered around a plea that
24 has been vacated by the South Carolina Supreme Court. The
25 plea is a nullity. It does not exist in the eyes of the law.

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1 So, therefore, any claim that's based upon it must fail and no
2 prejudice could possibly result from it because it does not
3 exist in the eyes of the law anymore and that is the State's
4 motion to dismiss essentially, Your Honor.

5 THE COURT: All right, Ms. Dain, let me hear from you,
6 number one, as I - I have to agree with the State. There's no
7 issue on the lewd act because the Supreme Court has already
8 ruled that a nullity and the problem I've got with the
9 criminal sexual conduct charges you've already had a PCR
10 hearing where relief was granted but that decision was
11 reversed by the Supreme Court.

12 MS. DAIN: Well, first off the issues that we bring
13 before the Court today for PCR are not issues that the Supreme
14 Court has ever entertained before, and as far as the plea I
15 think what the State is saying is that there can be
16 ineffective assistance of counsel to such a degree that when
17 it involves jurisdiction no longer being there for what
18 happened that the Applicant is so prejudiced that they're not
19 entitled to redress, and that's ---

20 THE COURT: Well, I mean, what, what kind - that's the
21 problem I'm having is what kind of redress is your client
22 seeking for a charge that she has not been convicted of, that
23 is not - I mean, that has been - she's been totally absolved
24 of.

25 MS. DAIN: That, that plea was a contract.

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1 THE COURT: Right.

2 MS. DAIN: But for ineffective assistance of counsel,
3 what happened in that contract is that it was breached and all
4 the things and all the benefits that were supposed to come to
5 my client as a result of that and all the detriment that was
6 supposed to go away as a result of entering into that contract
7 she lost all the benefits and she received all the detriment
8 and that is all a result of the ineffective assistance of
9 counsel or the State's breach of the contract.

10 THE COURT: All right, and that's another problem,
11 explain to me how the State breached the contract. As I
12 understand the State was willing to go forward and comply with
13 it and the Supreme Court just says, "You don't have the
14 ability to even make a contract. So, we're nullifying the
15 contract because you don't have the authority to negotiate
16 with Ms. Starnes, to let her plead to anything less, this
17 issue is on appeal. So, you don't have the authority."

18 MS. DAIN: Well, one of the things we wanted to bring
19 up, Your Honor, is that under the Rules of Civil Procedure a
20 case can be before the Appellate Court and that does not stop
21 the parties from being able to settle it. The parties to the
22 plea were the exact same parties to the PCR. The plea was a
23 settlement of the PCR and we believe the State, the solicitor
24 at that time, which in this court's order of March 24th they
25 said they looked to the solicitor's intent, what part of it

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1 was clear and not contradicted by the Attorney General's
2 Office to decide what to do. It is our position today that
3 that testimony will show that in fact that plea was supposed
4 to be relied upon, it was a settlement of the PCR and ---

5 THE COURT: Yeah, but ---

6 MS. DAIN: --- and all things that happened
7 thereafter were not meant to happen.

8 THE COURT: And I understand your argument
9 wholeheartedly. The problem I have is that you've got a
10 Supreme Court decision that says, "Solicitor, you had no
11 authority to make that agreement. You could not have entered
12 into it to start with." So, how do you get ineffective
13 assistance of counsel when the attorney basically by getting a
14 contract, even though it was an invalid contract, he got her a
15 contract and a plea negotiation that worked to her benefit,
16 the problem is is that you have the Supreme Court stepping in
17 and saying her attorney and the State and the Defendant
18 couldn't enter into this arrangement.

19 MS. DAIN: And in the argument that was made in the
20 State's motion to vacate in that case did not bring up and did
21 not ask the Court to inquire or look at the conduct of her
22 counsel because this was a case where the remittitur had not
23 come back and under those circumstances counsel should have
24 made sure that jurisdiction, if he's not required to rely on
25 the solicitor under those circumstances then he has to make

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1 sure that Somjai is protected, and the way to do that is to
2 see that jurisdiction exists. Had he gone and checked to see
3 if the remittitur was there this problem would have been
4 answered and it would have been resolved, the plea would have
5 gone forward, the Solicitor ---

6 THE COURT: Wait a minute, if he had waited for the
7 remittitur to be there then you would have had the conviction,
8 I mean, the - her, her, her post-conviction relief decision
9 overturned by the Supreme Court and her - she had prevailed on
10 the first PCR hearing. So, basically if he had waited for the
11 remittitur that would have just reversed, all you would have
12 had was a reversal of the PCR.

13 MS. DAIN: Well, let me restate that. Then I
14 apologize. What he could have done, when the solicitor knew
15 because at the time that this plea was entered into Somjai was
16 winning this case, her, her conviction had been vacated. She
17 was ahead in the game. At that time the solicitor obviously
18 wanted to settle the case because the solicitor sought the
19 plea, agreed to the plea that under those circumstances if
20 counsel, plea counsel had found out that there was a
21 jurisdictional problem that could have been discussed with the
22 solicitor and they could have approached the AG. However, it
23 is still our position and another issue of fairness in all
24 that's transpired is that the State, the solicitor
25 representing the State, the same parties in interest in the

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1 plea were the same parties in interest in the PCR and under
2 the Rules of Civil Procedure they had the right to settle that
3 case without the approval of the Appellate Court. Now, the AG
4 came in later and said, "We don't want them to do that," but
5 the solicitor is the State and had the apparent authority to
6 do what she in fact did and they decided to settle the case.

7 THE COURT: All right, so, tell me specifically what
8 you're saying Ms. Starnes' trial attorney should have done
9 rather than just saying he should have ensured this, what
10 should he have done in this case that he didn't so?

11 MS. DAIN: Well, because the case was reversed ---

12 THE COURT: Right.

13 MS. DAIN: --- he should have made sure that a
14 petition for rehearing was not pending and once he knew that
15 it was ---

16 THE COURT: All right, now, how does he do that? Tell
17 me what he should have done to make sure that there was not a
18 petition for re-hearing.

19 MS. DAIN: Call the Supreme Court.

20 THE COURT: All right, and they say, "No, we've got a
21 petition for rehearing pending," then what should he have
22 done?

23 MS. DAIN: And then the solicitor who normally gets
24 to make the decisions on something like this calls the AG's
25 office to effectuate the plea, to make sure that it's done in

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1 that way. However, Your Honor, under Rule, I think it's
2 261(B) as a settlement the parties don't have to have the
3 approval of the Appellate Court of this settlement. The plea
4 was a settlement of the PCR.

5 THE COURT: But the Supreme Court said, and I
6 understand that argument, but the Supreme Court said that
7 there was no jurisdiction there.

8 MS. DAIN: But that's because the AG was - well, you
9 don't have to have jurisdiction to enter into a settlement if
10 you don't have to have the approval of the Appellate Court.

11 THE COURT: Then why wouldn't your proper recourse be
12 to have appealed the Supreme or to have asked for another
13 rehearing before the Supreme Court to address that issue? I
14 mean, I guess what I'm trying to say aren't you asking me to
15 reverse the Supreme Court?

16 MS. DAIN: Not on the issues that we raise today.
17 The Supreme Court has not heard the issues that we want to
18 raise today and also Somjai only found out that her conviction
19 had been reinstated in July of 2010. There's no way she could
20 have appealed it back then. Because of the fact that she
21 relied on the plea and she was gone and no one knew where she
22 was she's actually never even been served with the order.
23 The only reason she found out about the reinstatement was a
24 result of the deportation consequences which she was also not
25 advised of.

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1 THE COURT: So, how did she find out about it?

2 MS. DAIN: Because a little over a year ago after
3 being here for an additional 20 years immigration contacted
4 her and told her that she needed to come in for an appointment
5 and not knowing that there was anything wrong she went in and
6 they detained her and told her that she was subject to
7 deportation and their notice to appear which is what they call
8 their document shows both the conviction for criminal sexual
9 conduct and lewd act on a minor. Now, that's just a result of
10 all the confusion that's happened in the case but in trying to
11 get a waiver and appeal that and her understanding was that
12 she could not be deported for lewd act on a minor. When they
13 began losing that fight in immigration court her immigration
14 attorney told her that she needed, because she didn't know
15 this stuff subjected her to deportation that she needed to
16 talk about a PCR in South Carolina. That's how I first met
17 her in June of 2010. Her immigration lawyer did not even know
18 that her original conviction had been reinstated because she
19 was relying on what Somjai knew herself. She did not find out
20 until I believe it was July 15th of 2010 when I called her, her
21 husband and earlier that day sent an e-mail to her immigration
22 attorney after I went down to the Supreme Court and pulled
23 that record. The final order reinstating the conviction is
24 not a published order. She didn't know. She couldn't have
25 appealed it.

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1 THE COURT: Okay. Well ---

2 MS. DAIN: It's a mess.

3 THE COURT: It is, it is and I don't know, I guess you
4 can appeal my decision because I'm going to go ahead and, Ms.
5 Catoe, if you would prepare an order because I want it pretty
6 plain what I'm doing so that Ms. Starnes can pursue this, but
7 if you'd prepare my order that grants the State's motion to
8 dismiss. My decision being that since the Supreme Court has
9 vacated the guilty plea for lewd act that there's no post-
10 conviction relief that can be granted as to that guilty plea.
11 As to the charge for CSC she was convicted at trial. That
12 conviction was appealed - I mean, was affirmed on appeal. She
13 then filed her request for post-conviction relief seeking
14 post-conviction relief as to that conviction for CSC. That
15 was granted, reversed by the Supreme Court. So, all issues
16 addressed in that PCR is res judicata, and then anything else
17 if it's any other ineffective assistance of counsel it could
18 have been or should have been raised in that initial PCR which
19 was granted and then reversed by the Supreme Court because I
20 think there's clearly some res judicata issues here. As I see
21 it she's already had a PCR, that even though she won at trial
22 it was reversed by the Supreme Court. The Supreme Court threw
23 out the guilty plea for lewd act. So, that's not even -
24 there's no relief that I can even grant on the lewd act
25 because that's - that's a non-entity anymore and then make

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1 sure Ms. Dain takes a look at that order before you submit it
2 to me.

3 MS. CATOE: Yes, Your Honor.

4 THE COURT: All right.

5 Can you think of anything I have not addressed on this
6 order?

7 MS. CATOE: I cannot, Your Honor.

8 THE COURT: Okay, I don't know of anything.

9 MS. DAIN: No, Your Honor.

10 THE COURT: Okay, all right, thank you very much and
11 you know that's about as clear as I can make it to where if
12 that's - if she is entitled to any post-conviction relief then
13 that pretty adequately states rather than me going through
14 some testimony and hearing it I'd rather say she's already had
15 her PCR, it was granted, reversed on appeal. So, therefore,
16 it's a res judicata issue, and if they say I'm wrong, I'm
17 wrong and we'll deal with it then.

18 MS. DAIN: Thank you.

19 THE COURT: All right, thank you very much.

20 MR. ALEXANDER: Allen Alexander. I'm here only as a
21 witness.

22 THE COURT: Excuse me. I'm sorry. Your name?

23 MR. ALEXANDER: Allen Alexander.

24 THE COURT: All right, I need you to speak with Ms. -
25 you're a witness for who?

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1 MR. ALEXANDER: For Ms. Starnes.

2 THE COURT: All right, let's speak with Ms. Dain first
3 before you address the Court.

4 All right, anything further?

5 MS. CATOE: Nothing from the State, Your Honor.

6 THE COURT: All right, Ms. Dain, anything further from
7 Ms. Starnes?

8 MS. DAIN: No, Your Honor.

9 THE COURT: Okay, thank you very much.

10 (Adjourned.)

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C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Somjai Fung Fue Starnes-Henderson versus the State, held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on February 1, 2011.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

Grace L. Hurley, CVR-CM
Official Reporter

February 23, 2011.

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

CASE #: 2010-CP-26-6653

Somjai Fung Fue Starnes
Plaintiff(s)

vs.

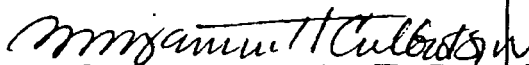
State of South Carolina
Defendant(s)

**ORDER
DISPOSITION OF MOTIONS**

Applicant's Motion Pursuant to Rule 59(e), SCRCP is DENIED.

** This decision is based upon arguments presented in the applicant's motion
and the respondent's return, without oral arguments.*

AND IT IS SO ORDERED.



Benjamin H. Culbertson
Presiding Judge
15th Judicial Circuit

Dated at Conway, SC this 15th day of April, 2011.

Racheal A. Dain
Plaintiff's Attorney

Christina J. Catoe
Defendant's Attorney

CELANIE HUGGINS-WARD
CLERK OF COURT

2011 APR 19 AM 11:28

HORRY
COUNTY

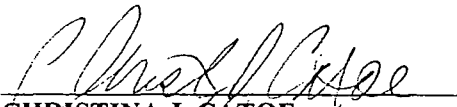
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
Somjai Fung Fue Starnes,	)	2010-CP-26-6653
	)	
Applicant.	)	
	)	
v.	)	STATE'S RESPONSE
	)	TO APPLICANT'S RULE 59(E) MOTION
State of South Carolina,	)	
	)	
Respondent.	)	

The State, making its response to the Applicant's Motion to Alter or Amend the Judgment Pursuant to Rule 59(e), SCRCF, received via electronic mail on April 4, 2011, would respectfully submit the following:

The State believes that the Order Denying Post-Conviction Relief issued by this Court on February 23, 2011 properly addressed all issues necessary to resolution of the case. The contract issues and remedies proposed by the Applicant have no place in this post-conviction relief case under the circumstances. It is the State's position that the Applicant deserves no PCR remedy, where she has been convicted by a jury of criminal sexual conduct with a minor in the first degree, where the conviction has been upheld on direct appeal and on post-conviction relief, and where this conviction subjects the Applicant to deportation under federal law.

Therefore, the State requests that the Motion to Alter or Amend be denied.

Respectfully submitted,


CHRISTINA J. CATOE
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

April 5, 2011

STATE OF SOUTH CAROLINA
HORRY COUNTY

Somjai Fung Fue Starnes,
Applicant,

vs.

State of South Carolina,
Respondent.

COMMON PLEAS COURT
FIFTEENTH JUDICIAL CIRCUIT

Docket No.: 2010-CP-26-6653

FILED
HORRY COUNTY
11 APR 20 PM 12:03
MELANIE HARRIS-CLARK
CLERK OF COURT

NOTICE OF MOTION AND MOTION PURSUANT TO RULES 59(e) & SCRCP

TO: STATE OF SOUTH CAROLINA AND THEIR ATTORNEY:

YOU WILL PLEASE TAKE NOTICE that Applicant will move as follows:

Before: Judge Benjamin H. Culbertson

Location: Horry County Common Pleas

Date / Time: _____

or as soon thereafter as counsel can be heard

Purpose: to request this Court reconsider, alter and amend the order denying and dismissing with prejudice Applicant's request for post-conviction relief.

Pursuant to Rule 59(e), SCRCP, Applicant (Starnes) requests of this Court to reconsider, alter, and amend, its Order signed by Judge Benjamin H. Culbertson on February 23, 2011, and filed with the Horry County Clerk of Court on March 1, 2011, denying and dismissing with prejudice Starnes's request for a post-conviction relief (PCR).

Starnes, through her counsel, Attorney Rachael A. Dain, received via U.S. Mail a copy of the filed Order on Thursday, March 24, 2011, and has timely filed this motion.

Starnes presents this Notice of Motion and Motion without waiving and specifically reserving all rights to appeal any and all findings, conclusions, and results of

the Order referred to herein despite the fact that she may not raise all objections to such findings, conclusions, and results in this Notice of Motion and Motion to Reconsideration, Alter and Amend.

Applicant files this Notice of Motion and Motion for the purpose of giving Judge Benjamin H. Culbertson the opportunity to reconsider, alter, and amend his Order based on the grounds herein or to comment upon issues which should have been ruled upon but were not. See, Talley vs. S. C. Higher Ed. Tuition Grants Comm., 289 SC 483, 347 SE2nd 99 (1986); Bailey vs. Covil Corporation, 291 SC 417, 354 SE 2nd 35 (1987); and Ringer vs Graham, 293 SC 238, 359 SE 2nd 523 (Ct. App. 1987).

Facts Alleged

This case includes a train wreck of facts that obscure the path to providing Starnes with a well-deserved PCR remedy. For this reason, while asserting grounds to reconsider, alter and amend, this motion will walk through both the chronological procedural history of the case and the facts Starnes would prove to this Court should it reconsider and reverse its previous order.

After having been convicted of criminal sexual conduct (CSC), sentenced to 20 years, and having lost her direct appeal, Starnes filed a PCR action wherein she was granted a new trial that was affirmed by the S.C. Supreme Court. Thereafter, the State filed and was granted a Petition for Rehearing.

Assistant Solicitor Julaan Prince, who previously tried Starnes, was aware her conviction had been overturned and affirmed. Having the State's apparent authority and believing she had actual authority, Solicitor Prince, on her own initiative, had Starnes retrieved from the correctional institute and deposited in the Horry County Court of General Sessions for purposes of offering and entering into a plea agreement.

The Horry County Public Defender's office was contacted for her representation. Attorney Jeffrey Bloom, then chief public defender and Starnes' previous trial counsel, came to the courthouse to represent her.

It was at that time the State proposed Starnes plead guilty to lewd act on a minor (LAOM) as a final resolution to all matters relating to her alleged crime. Starnes understood fully if she refused the plea offer she would spend another 15 years in prison, yet Starnes refused. Due to the State's commitment to finalize Starnes' case, the State then offered her a plea of no contest to LAOM which Starnes accepted.

Attorney Bloom, like Starnes, believed he could rely on the State's plea agreement since Solicitor Prince had apparent authority to offer and accept Starnes' plea. Furthermore, the plea was intended to resolve all legal matters between the State and Starnes arising from her alleged crime. This promised finality of the plea agreement assured Starnes that she need no longer fear a CSC conviction for any reason and that she would be free to resume her life.

Starnes was sentenced to ten years suspended on the five-plus years she had already served. After she was released, she moved in with the parents of Sylvester Henderson, a man she met while in prison who was involved with a prison ministry. She later married Mr. Henderson and they have been married for eighteen years.

Unbeknown to Starnes, a few weeks after her release from prison, the S.C. Supreme Court reversed its previous affirmation of a new trial and reinstated Starnes' CSC conviction. When the Attorney General learned the State had already settled Starnes' criminal and PCR matter via the plea and used the same indictment number as the case pending before the S.C. Supreme Court, the State sought to take advantage of this simple yet extremely complicating fact and breach the plea agreement. At this

point, the State could have honored the plea contract by advising the S.C. Supreme Court of the circumstances. Instead the State chose the unfair advantage of hindsight and its attendant opportunity to chose the outcome they liked best. The State decided to breach its plea agreement and undo all promises it made to Starnes that induced her accept and enter into the plea agreement.

Fulfilling the State's request, the S.C. Supreme Court vacated Starnes' LAOM plea and reinstated her CSC conviction and modified her sentence upward to 30 years satisfied upon time already served. The S.C. Supreme Court stated in its order that Starnes' sentence was modified because "the State evidenced its judgment against any further imprisonment."

Starnes had already left South Carolina when these events unfolded so she was never contacted by her counsel and never knew what had transpired.

In June of 2010, Starnes, a legal immigrant who had successfully renewed her visa twice since being released from prison, was detained by Immigration and Customs Enforcement (ICE) and scheduled for deportation. Starnes, who does not read English and has difficulty comprehending the English language in all but the most simple matters, was detained for almost two months while her husband was in Iraq. Starnes did not understand why she was detained and believed it could only be a mistake.

It was not until early August of 2009, after Starnes' husband made arrangements for her to bond out and meet with an immigration attorney, that she learned ICE sought to deport her based on her CSC and LAOM convictions. Starnes advised her immigration attorney this was a mistake and that she only had a conviction for LAOM. Starnes' immigration attorney proceeded in Starnes' immigration matter asserting that

Starnes only had the LAOM charge because the CSC was vacated.

In July of 2010, Starnes hired S.C. counsel to verify the status of her criminal charges and seek PCR relief based on Attorney Bloom's failure to advise her of the deportation consequences of her plea. It was not until then that Starnes and her immigration attorney learned her plea was vacated and the CSC charges reinstated.

At the time of her plea, Attorney Bloom was advising his immigrant clients of any possible deportation consequences of their plea, which several criminal defense attorneys would also show to be the standard of care at that time. Upon information and belief, Attorney Bloom did not inform Starnes she was subject to deportation for LAOM because he mistakenly believed the charge was exempt since it was not a violent felony. For this reason, Starnes' plea was unintelligently made and involuntarily.

Argument to Reconsider, Alter, and Amend

As a first ground for this motion, Starnes respectfully disagrees with this Court's ruling and request that it reconsider and reverse its order of dismissal with prejudice.

Starnes would first ask this court to reconsider her request for relief and to alter and amend the previous order accordingly. Since her plea has been vacated, perhaps a threshold matter is whether or not Starnes has a right to enforce the plea agreement since its jurisdictional defect renders it unavailable. Unfortunately, S.C. Court have construed contract law in criminal cases with a limiting view, but Starnes would assert she is entitled to any defenses and remedies available via South Carolina contract law.

Detrimental Reliance. If Starnes relied to her detriment on her plea despite the jurisdictional issues, that issue alone would entitle her to specific performance of the plea, or in this case a new trial given the circumstances.

South Carolina has already found that if there is no valid plea contract (which is the case here) defendants can enforce their plea agreement if 1) the agent is authorized to do so and 2) the defendant has relied on the agreement to their detriment. Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct.App.1999).

As to the first prong, the jurisdictional posture of the case is not the same issue as whether or not Solicitor Prince had authority to accept Starnes' plea. Under the circumstances that existed at that time, if Solicitor Prince did not have actual authority she had apparent authority and the State should be estopped from denying her authority.

As to the second prong, Starnes has certainly relied to her detriment on her agreement with the State. By accepting the plea agreement, she went forward with the promise she could regain her life. As a result, she did just that. She fell in love with a man, established a home and a marriage of almost eighteen years.

When the State reneges on a plea agreement relied on by a defendant to their detriment, the appropriate remedy is specific performance of the plea agreement. Sprouse v. State, 355 S.C. 335, 585 S.E.2d 278 (2003). In this instance, Starnes' plea has already been vacated so specific performance doesn't appear to be an appropriate remedy especially given the plea was made unintelligently and involuntarily.

Perhaps the most insulting circumstance in Starnes' case is that it was the State that enticed her into a plea and then acted in bad faith and reneged on its plea agreement by requesting and receiving a vacation of Starnes' plea, which this Court has found as reason to dismiss her case and deny her timely judicial review.

Ineffective Assistance of Counsel. Should this Court determine that Starnes was not justified in relying on the State's plea contract and the apparent authority of Solicitor Prince, then Attorney Bloom clearly provided Starnes with ineffective assistance of counsel. He should have verified the jurisdictional status of Starnes' matter before allowing her to plea. He could have taken steps to see that the Solicitor had the blessing of the Attorney General in her plea efforts; however, from where everyone involved stands today it would once again be unfair to hand the State the unfair advantage of looking back in time and choosing to say it would not have done so. All that can be done to ensure fairness is to look at the State's intent at that time, which was that Starnes only have a conviction be for LAOM and never be subjected to a CSC conviction.

Given the State's clear intent, even if its other hand, the Attorney General, would not cooperate, Attorney Bloom could have secured Starnes' plea by having the State use an alternate indictment number, thereby depriving the S.C. Supreme Court of jurisdiction and resolving any jurisdictional deficiencies. Plante v. State, 315 S.C. 562, 446 S.E.2d 437 (S.C. 1994). It is presumed the Attorney General would then have been required to withdraw its Petition for Rehearing due to double jeopardy issues.

As an alternate remedy to Attorney Bloom's counseling, he could have prepared a consent order with Solicitor Prince to settle the PCR matter (a natural consequence of the plea) pursuant to the South Carolina Appellate Court Rules 261 and 232.

But for this first instance of ineffective assistance of counsel, Starnes would now have a plea on which she could file PCR and the CSC conviction would never have been revised and reinstated.

As for the second instances of ineffective assistance of counsel, Starnes did not enter into her plea agreement knowingly or voluntarily because Attorney Bloom failed to advise her, as was the standard of care at the time, of the immigration consequences of her plea. This is grounds for Starnes to prevail in her PCR claim. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998) .

For this reason, even if Starnes plea could be reinstated as a remedy for the first instances of ineffective assistance of counsel, she would be entitled to a new trial because her LAOM plea was equally as defective and prejudicial as the jurisdictional issue.

In its order we are asking this Court to reconsider, this Court stated that to grant Starnes a PCR hearing would require it to "ignore and overlook the South Carolina Supreme Court's Order," Starnes disagrees with this finding of fact and/or conclusion of law and asks instead that this Court follow the example set by the S.C. Supreme Court in its order dated March 24, 1992.

Clearly, the intent of the State and the time of the plea was pivotal to the S.C. Supreme Court in reaching its decision. Were it not so, that court would not have included in its order language asserting that "the State evidenced its judgment against any further imprisonment" of Starnes. It was this clear intent which led that court to the unprecedented move of modifying Starnes sentence.

While the S.C. Supreme Court was not rendering its decision while examining the issues before this Court, certainly the S.C. Supreme Court would not afford one standard of analysis or evidence to the State while denying the same to Starnes. Given

their order, it stands to reason the S.C. Supreme Court would also find the State evidenced its judgment that Starnes never against be subjected to a CSC conviction.

If Starnes' plea were not already vacated, perhaps the remedy for this calamity would be to reinstate her plea would for purposes of allowing a collateral attack. However, the only springboard this Court imagines to rectify this series of mistakes is the plea. This cannot be so especially given that it is the State, while acting in bad faith with intent to breach the plea agreement on which Starnes has already relied, later successfully sought to destroy her only avenue of judicial review. This would be fundamentally unfair and violate all the principles that due process and equal protection require.

Even cases with this tortured history are entitled to judicial review and it is instances such as these why we have courts of both law and equity. When no legal remedy can be found, equity will find a remedy. Given these extraordinary circumstances, the answer is to follow the lead of the S.C. Supreme Court and do exactly what they did when they modified Starnes sentence, which was to make an unprecedented move. Given the severe and irreversible injury facing Starnes at this moment, any remedy to be afforded must be in equity and will include allowing her claim to go forward and thereafter, if ineffective assistance of counsel is found, to grant her a new trial. Should the S.C. Supreme Court takes issue with this equitable remedy, they will make it known at the appeal.

For a second ground, Starnes' PCR application includes defenses of ineffective assistance of counsel for both failing to discover or resolving the jurisdictional issues in her case as well as failing to advise her of the possible deportation consequences of

her plea. She has also asserted that she is relying on principles of contract as well as her right to rely on the plea agreement, both of which were previously brought to this Court's attention during argument (see transcript page 4 line 4 and page 14, line 4). The Court's order is silent on each of these issues, presumably due to the reason for its ruling. However, out of an abundance of caution and to be sure all issues are properly preserved for appeal, Starnes requests this Court alter and amend its order to acknowledge and rule on each of these defenses.

As a third ground, because findings of fact are reviewed differently than conclusions of law, Starnes respectfully requests this Court alter and amend its order to separate the two for appellate purposes.

On a final note, Starnes has now exhausted all immigration appeals and is subject to deportation at any moment. She has been informed by her immigration attorney that if she receives a remedy before she is called to meet her deportation flight, she will be allowed to stay in the United States; however, if she receives her remedy after she is called for her deportation flight, her appeal to return to this country will almost assuredly be denied based on government defenses of standing and mootness. If Starnes is not provided the opportunity to be heard and awarded a timely remedy, no remedy at a later date will undo the irreparable harm of being deported back to a country where she has not lived in for almost 38 years and where she knows no one as her entire family now resides in the United States. Her predicament is a textbook example of how justice delayed is justice denied. For these reasons, we request an immediate response to this motion so Starnes can expedite her appeal.

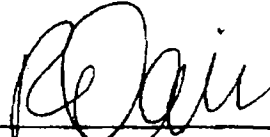
For all the reasons listed herein, we respectfully ask this Court to reconsider,

alter and amend its previous order as requested herein.

Rule 11 Affirmation

Applicant affirms that she believes any attempted good faith attempt with opposing counsel to resolve the matters herein would serve no useful purpose.

Respectfully Submitted,



Rachael A. Dain, J.D.
Attorney Dain, LLC
5000 Thurmond Mall, Suite 220
Columbia, SC 29201
Voice / Facsimile: 803.256.6661
AttorneyDain@gmail.com
ATTORNEY FOR APPLICANT

Columbia, South Carolina
April 4, 2011 (Monday)

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Somjai Fung Fue Starnes,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

2010-CP-26-6653

**ORDER DENYING
POST-CONVICTION RELIEF**

FILED
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CLERK OF COURT

This matter came before the Court pursuant to an Application for post-conviction relief filed July 23, 2010, by Somjai Fung Fue Starnes. Respondent made a Return on August 21, 2010. The Applicant served an Amended PCR Application on January 25, 2011, and the State responded the same day with an Amended Return and Motion to Dismiss. An evidentiary hearing was convened at the Horry County Courthouse on February 1, 2011. The Applicant was present in court and represented by Rachael A. Dain, Esquire. Respondent was represented by Christina J. Catoe, Assistant Attorney General.

PROCEDURAL HISTORY

The Applicant is not presently incarcerated. The Applicant was indicted in June 1986 for criminal sexual conduct with a minor in the first degree (1986-GS-26-838). On August 26, 1986, the Applicant was tried, along with co-defendant Devon Starnes, before the Honorable C. Victor Pyle, Jr. The Applicant was represented by Jeffrey P. Bloom, Esquire. Both defendants were convicted and sentenced to twenty (20) years. A timely notice of appeal was filed, and Joseph L. Savitz, III, Esquire, represented the Applicant in her appeal. The Applicant's conviction was affirmed on December 8, 1987 (1987-MO-416). The matter was remitted to the circuit court on December 21, 1987.

Thereafter, on September 16, 1988, the Applicant filed a PCR application (1988-CP-26-3346). O. Allen Alexander, Esquire, represented the Applicant. An Amended Application was filed on November 6, 1989. The matter came before the Honorable James B. Stephen for an evidentiary hearing. On April 5, 1990, Judge Stephen issued an Order finding that counsel was ineffective and granting a new trial. The State appealed. Desa Ballard, Esquire, represented the Applicant in the PCR appeal. Initially, the South Carolina Supreme Court affirmed the decision of the PCR judge. The State then filed a petition for rehearing. While the petition for rehearing was pending, on October 24, 1991, the Applicant entered a "no contest" plea to the lesser-included offense of lewd act upon a minor. She was sentenced to ten (10) years suspended to time already served.

Thereafter, the South Carolina Supreme Court granted the State's petition for rehearing and reversed the post-conviction relief judge in an opinion filed December 2, 1991. The Court denied the Applicant's petition for rehearing on March 24, 1992. In this same Order, the Court also declared that the plea court did not have jurisdiction to accept the lewd act plea while the matter was still pending on appeal. However, the Court found that because the State allowed the Applicant to enter a "no contest" plea for time served, the State had illustrated its intent that the Applicant not be incarcerated further. Therefore, the Court vacated the plea but modified the Applicant's sentence to thirty (30) years satisfied upon time served.

II. - Allegations and Relief Sought

In her Amended Application, Ms. Starnes raised the following allegations:

- (1) That she received ineffective assistance of counsel such that her plea was not informed or voluntary when:
 - a. Plea counsel failed to advise/protect Applicant from the jurisdictional issue that led to her plea being vacated and therefore ending all future action by the State of South Carolina; and

- b. Plea counsel failed to advise Applicant that the charge to which she pleaded guilty would subject her to deportation.¹

The Applicant stated that she was seeking the following relief: "To eliminate any prejudice suffered by Applicant to include vacating Applicant's conviction/plea or, in the alternative, modifying Applicant's criminal history/conviction such that all prejudice is removed. At the PCR hearing, the Applicant's counsel clarified that the Applicant was seeking a new trial on the underlying charge.

Set forth below are the relevant findings and conclusions of law, as required by S.C. Code Ann. § 17-27-80 (2003):

FINDINGS AND CONCLUSIONS OF LAW

At the PCR hearing, this Court had before it the Applicant's PCR file, including all pleadings filed, the records of the Horry County Clerk of Court regarding the conviction, and the documents from the Applicant's previous PCR and PCR appeal, including the South Carolina Supreme Court Order, dated March 24, 1992, which denied the Applicant's Petition for Rehearing after the Court reversed the grant of PCR. As mentioned previously, this Order also vacated the Applicant's October 24, 1991 plea to lewd act upon a minor (under the CSC with a minor indictment), finding that the plea court had no jurisdiction because the PCR appeal regarding the CSC with a minor charge was still pending when the plea was entered.

At the outset of the PCR hearing, the State renewed its motion to dismiss for failure to state a claim upon which relief could be granted. In response to the motion, the Applicant argued that the case should not be summarily dismissed because the plea was intended to be a contract between the Applicant and the State, and had been intended to settle the matter pursuant

¹ The Applicant asserted that her recent arrest and detention by immigration officials led to "new evidence" such that this PCR Application was timely.

to Rule 261(b), SCACR. The Applicant argued that the State breached this contract and settlement. The Applicant asserted that, since the plea was intended to prevent the possible reinstatement of the CSC with a minor charge, and since ineffective assistance of counsel caused the jurisdictional defect that led to the CSC's reinstatement, the only remedy was to vacate the original CSC conviction and grant the Applicant a new trial. The Applicant contended that the issues she was raising were new and had never been considered or addressed by the South Carolina Supreme Court, because the Applicant did not learn of her immigration status until recently.

This Court rejects the Applicant's arguments and finds that the State's motion to dismiss must be granted. Since the guilty plea has already been vacated and is a legal nullity, the Applicant's claims based upon it must fail. Even if this Court were to conclude that plea counsel rendered ineffective assistance with respect to the plea, there is no relief to be granted because the plea has already been vacated. Any erroneous legal advice, or lack of advice, regarding the effect of the plea could not be prejudicial to the Applicant because the CSC with a minor conviction was reinstated and therefore superceded the lewd act plea. Nothing that any of the Applicant's attorneys did or did not do with respect to the plea could have changed the fact that the South Carolina Supreme Court ultimately reversed the grant of PCR and upheld the Applicant's CSC with a minor conviction. In order for this Court to grant any relief to the Applicant, this Court would have to ignore and overlook the South Carolina Supreme Court's Order. This Court declines to do so and concludes there is no valid basis for doing so.

This Court further finds that the Applicant has not set forth any valid grounds for granting a new trial regarding the CSC with a minor charge. This conviction has been upheld on direct appeal and through the post-conviction relief process. Any PCR claims regarding this

CSC with a minor conviction would be barred as *res judicata*, as impermissibly successive, and as being filed outside of the statute of limitations. See S.C. Code Ann. § 17-27-45 & § 17-27-90. Therefore, for the reasons discussed above, this Court finds that the Application must be dismissed for failure to state a claim upon which relief could be granted.

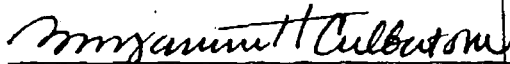
CONCLUSION

Accordingly, this Court concludes that the Application must be DENIED and DISMISSED with prejudice.

Counsel's attention is directed to Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), and Rule 59(e), SCRCP, regarding the filing of a Motion to Alter or Amend should counsel believe this Order fails to adequately address all issues raised as required by S.C. Code Ann. § 17-27-80 (2003). This Court further advises that if Applicant desires to secure appellate review of this Order, a notice of appeal must be filed and served **within thirty (30) days** of the service of this Order. Applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

IT IS THEREFORE ORDERED THAT the Application for post-conviction relief is **DENIED** and **DISMISSED** with prejudice.

AND, IT IS SO ORDERED this 23rd day of Feb., 2011.



Benjamin H. Culbertson
Presiding Judge
Fifteenth Judicial Circuit

Conway, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
Somjai Fung Fue Starnes,	)	2010-CP-26-6653
	)	
Applicant,	)	
	)	
v.	)	AMENDED RETURN
	)	AND MOTION TO DISMISS
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Respondent, making its Amended Return and Motion to Dismiss in response to the Amended Application for post-conviction relief received by Respondent via electronic mail on January 25, 2011, would respectfully show this Court:

I. – Procedural History

The Applicant is not presently incarcerated. The Applicant was indicted in June 1986 for criminal sexual conduct with a minor in the first degree (1986-GS-26-838). On August 26, 1986, the Applicant was tried, along with co-defendant Devone Stroud Starnes, before the Honorable C. Victor Pyle, Jr. The Applicant was represented by Jeffrey P. Bloom, Esquire. Both defendants were convicted and sentenced to twenty (20) years. A timely notice of appeal was filed, and Joseph L. Savitz, III, Esquire, represented the Applicant in her appeal. The Applicant's conviction was affirmed in a *per curiam* opinion on December 8, 1987 (1987-MO-416). The matter was remitted to the circuit court on December 21, 1987.

Thereafter, on September 16, 1988, the Applicant filed a PCR application (1988-CP-26-3346). O. Allen Alexander, Esquire, represented the Applicant. An Amended Application was filed on November 6, 1989. The matter came before the Honorable James B. Stephen for an evidentiary hearing. Judge Stephen took the matter under advisement. On April 5, 1990, he issued an Order finding that counsel was ineffective and granting a new trial. The State appealed. Desa Ballard, Esquire, represented the Applicant in the PCR appeal. Initially, the South Carolina

Supreme Court affirmed the decision of the PCR judge. The State then filed a petition for rehearing. While the petition for rehearing was pending, on October 24, 1991, the Applicant entered a “no contest” plea to the lesser-included offense of lewd act upon a minor. She was sentenced to ten (10) years suspended to time already served.

Thereafter, the South Carolina Supreme Court granted the State’s petition for rehearing and reversed the post-conviction relief judge in an opinion filed December 2, 1991. The Court denied the Applicant’s petition for rehearing on March 24, 1992. In this same Order, the Court also declared that the plea court did not have jurisdiction to accept the Applicant’s plea while the matter was still pending on appeal (i.e., the State’s petition for rehearing was still pending when the plea was entered). However, the Court found that because the State allowed the Applicant to enter a “no contest” plea for time served, the State had illustrated its intent that the Applicant not be incarcerated further. Therefore, the Court vacated the lewd act plea, but modified the Applicant’s sentence to thirty (30) years satisfied upon time served.

II. – Allegations as Set Forth in Amended PCR Application

In her Amended Application, Ms. Starnes raises the following allegations:

- (1) That she received ineffective assistance of counsel such that her plea was not informed or voluntary when:
 - a. Plea counsel failed to advise/protect Applicant from the jurisdictional issue that led to her plea being vacated and therefore ending all future action by the State of South Carolina; and
 - b. Plea counsel failed to advise Applicant that the charge to which she pleaded guilty would subject her to deportation.

The Applicant states she is seeking the following relief: “To eliminate any prejudice suffered by Applicant to include vacating Applicant’s conviction/plea or, in the alternative, modifying Applicant’s criminal history/conviction such that all prejudice is removed.

III. – The Relief Sought Cannot Be Granted

Respondent first submits that the relief sought by the Applicant cannot be granted by the PCR court. The Applicant has not set forth any grounds supporting vacation of the underlying conviction from trial (criminal sexual conduct with a minor). See S.C. Code Ann. § 17-27-20(a). The guilty plea (lewd act upon a minor) has already been vacated by the South Carolina Supreme Court. Further, Respondent submits that there is no authority for the PCR court to “modify” the Applicant’s criminal history or conviction. Therefore, since there is no relief that can be granted upon the claims raised, the Application should be summarily denied and dismissed.

IV. – There Can Be No Ineffective Assistance of Counsel with Respect to the Plea Because the Plea Was Vacated by the South Carolina Supreme Court

Second, Respondent submits that the allegation regarding ineffective assistance of plea counsel is without merit as a matter of law because the guilty plea was vacated by the South Carolina Supreme Court. The guilty plea is a nullity because the general sessions court had no jurisdiction to accept a plea while the appeal was still pending. The original conviction from trial has been reinstated. Therefore, anything that occurred with respect to the plea is irrelevant and cannot serve as a ground for relief. Therefore, Respondent submits that the Application should be summarily denied and dismissed.

V. – The Application is Time-Barred Pursuant to S.C. Code Ann. § 17-27-45(C)

S.C. Code Ann. § 17-27-45(C) states as follows:

If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

In this case, the Applicant presents no “material facts” that pertain to the underlying conviction from trial. The Applicant presents only claims relating to a guilty plea that has been vacated and is a nullity.

In addition, Respondent submits that the Applicant has been on notice of a potential deportation issue since the time she was released from prison and submitted her "green card" paperwork. Therefore, because she could have, using "reasonable diligence," ascertained her immigration status at any time since her release from prison in the 1990s, her claim pursuant to S.C. Code Ann. § 17-27-45(C) fails and her Application is time-barred.

VI.

Each and every allegation, claim, or statement contained within the Application not expressly admitted, qualified, or explained is hereby DENIED.

VII.

WHEREFORE, having made its Amended Return, the Respondent requests that the Application be denied and dismissed.

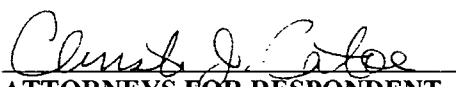
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

CHRISTINA J. CATOE
Assistant Attorney General


ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

January 25, 2011

STATE OF SOUTH CAROLINA
HORRY COUNTY

Somjai Fung Fue Starnes,
Applicant,

vs.

State of South Carolina,
Respondent.

COMMON PLEAS COURT
FIFTEENTH JUDICIAL CIRCUIT

Docket No.: 2010-CP-26-6653

HORRY COUNTY
JAN 27 PM 1:58
CLERK OF COURT

AMENDED PCR APPLICATION

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information establishing the applicant unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention:
2. Name and location of Court which imposed sentence:
Horry County General Sessions Court, in Conway, SC
3. Name(s) of co-defendant(s) (if any):
Devone Stroud Starnes

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed: **86-GS-26-838**
5. The date upon which sentence was imposed and the terms of the sentence:
On April 10, 1992, the SC Supreme Court issued a final order that reversed Petitioner's previous grant of PCR and also vacated her previous plea.
6. Check whether a finding of guilty was made:
 - a. after a plea of guilty - **Yes**
 - b. after a plea of not guilty -
 - c. after a plea of nolo contendere - **Yes**
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes as to the trial, but No as to the plea
8. If you answered "yes" to (7), list:
 - a. the name of each Court to which you appealed: **South Carolina Supreme Court**
 - b. the result in each such Court to which you appealed: **See answer to question #5**
 - c. the date of each such result: **See answer to question #5**
 - d. if known, citations of any written opinion or orders entered pursuant to such results:
9. If you answered "no" to (7), state your reasons for not so appealing: **Applicant only recently discovered the failures of her attorney and the resulting consequences and the circumstances were such that she could not have discovered these things.**
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
Applicant is not currently being detained, but received ineffective assistance of counsel such that her plea was not informed or voluntary when:
 - a. **Plea counsel failed to protect Applicant from the jurisdictional issue that led to her plea being reversed; and**
 - b. **Plea counsel failed to advise her that the charge she pleaded guilty to would subject her to deportation.**
11. State concisely and in the same order facts which support each of the grounds set out in (10):
see answer to 10.

12. Prior to this application have you filed with respect to this conviction:
- any petition in a State Court under South Carolina Law? **Yes**
 - any petition in State or Federal Courts for habeas corpus or post-convictions relief? **Yes**
 - any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? **No**
 - any other petitions, motions or applications in this or any other Court? **No**
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- the specific nature thereof: **PCR based on counsel's failure to object to pre-trial interview of witness outside of Applicant's presence.**
 - the name / location of the Court in which each was filed: **Horry County Common Pleas**
 - the disposition thereof: **PCR granted on April 9, 1990; SC Supreme Court affirming on August 5, 1991; SC Supreme Court reversing on December 2, 1991; and SC Supreme Court vacating Applicants plea (October 24, 1991) on March 24, 1992**
 - the date of each such disposition: **see answers to 13(c)**
 - if known, citations of written opinions or orders entered pursuant to each such disposition: **414.S.E.2d 582; 307 S.C. 247 (December 2, 1991)**
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? **No**
15. If you answered "yes" to (14) identify:
- which grounds have been presented:
 - the proceedings in which each ground was raised:
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
17. Were you represented by an attorney at any time during the course of:
- your arraignment and plea? **Yes**
 - your trial, if any?
 - your sentencing? **Yes**
 - your appeal, if any, from the judgment of conviction or the imposition of sentence? **Yes**
 - Preparation, presentation or consideration of any petitions, motions or applications with

respect to this conviction, which you filed? **Yes**

18. If you answered "yes" to one or more parts of (17), list:

a. the name and address of each attorney who represented you:

Jeffrey Bloom, 1911 Pickens St., Columbia, SC (plea)

O. Alexander, no address (PCR)

Desa Ballard, 226 State Street, West Columbia, SC (PCR Appeal)

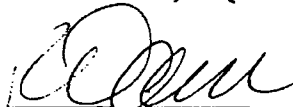
b. the proceedings at which each such attorney represented you: **See answer to #18(a)**

19. State clearly the relief you seek in filing this application:

The prejudice caused at the stage of her proceedings coupled with the resulting injury can only be remedied with dismissal of both her conviction and plea; in the alternative Applicant's resulting conviction, whether by plea or adjudication, should be modified to a non-deportable charge.

20. Are you now under sentence from any other court that you have not challenged? **No**

Columbia, South Carolina



Rachael A. Dain, J.D.
Attorney Dain, LLC
5000 Thurmond Mall, Suite 220
Columbia, SC 29201
Voice / Facsimile: 803.256.6661
AttorneyDain@gmail.com

Attorney for Applicant

VERIFICATION

I, Rachael A. Dain, retained counsel for Applicant, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this Application; and that the matters and allegations therein set forth are true.



Rachael A. Dain

Sworn to and subscribed before me on January 19, 2011

Completed on original
Notary for South Carolina. *filed @ courthouse*
My Commission expires on _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
Somjai Fung Fue Starnes,	)	2010-CP-26-6653
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Respondent, making its Return to the Application for post-conviction relief filed July 23, 2010, by Somjai Fung Fue Starnes, by and through her counsel of record, Rachael A. Dain, Esquire, would respectfully show this Court:

I. – Procedural History

The Applicant is not presently incarcerated. The Applicant was indicted in June 1986 for criminal sexual conduct with a minor in the first degree (1986-GS-26-838). On August 26, 1986, the Applicant was tried, along with co-defendant Devone Stroud Starnes, before the Honorable C. Victor Pyle, Jr. The Applicant was represented by Jeffrey P. Bloom, Esquire. Both defendants were convicted and sentenced to twenty (20) years. A timely notice of appeal was filed, and Joseph L. Savitz, III, Esquire, represented the Applicant in her appeal. The Applicant's conviction was affirmed in a *per curiam* opinion on December 8, 1987 (1987-MO-416). The matter was remitted to the circuit court on December 21, 1987.

Thereafter, on September 16, 1988, the Applicant filed a PCR application (1988-CP-26-3346). O. Allen Alexander, Esquire, represented the Applicant. An Amended Application was filed on November 6, 1989. The matter came before the Honorable James B. Stephen for an evidentiary hearing. Judge Stephen took the matter under advisement. On April 5, 1990, he issued an Order finding that counsel was ineffective and granting a new trial. The State appealed. Desa

Ballard, Esquire, represented the Applicant in the PCR appeal. Initially, the South Carolina Supreme Court affirmed the decision of the PCR judge. The State then filed a petition for rehearing. While the petition for rehearing was pending, on October 24, 1991, the Applicant entered a "no contest" plea to the lesser-included offense of lewd act upon a minor. She was sentenced to ten (10) years suspended to time already served.

Thereafter, the South Carolina Supreme Court granted the State's petition for rehearing and reversed the post-conviction relief judge in an opinion filed December 2, 1991. The Court denied the Applicant's petition for rehearing on March 24, 1992. In this same Order, the Court also declared that the plea court did not have jurisdiction to accept the Applicant's plea while the matter was still pending on appeal (i.e., the State's petition for rehearing was still pending when the plea was entered). However, the Court found that because the State allowed the Applicant to enter a "no contest" plea for time served, the State had illustrated its intent that the Applicant not be incarcerated further. Therefore, the Court vacated the lewd act plea but modified the Applicant's sentence to thirty (30) years satisfied upon time served.

II. – Allegations

In her Application, Ms. Starnes alleges that her conviction is unlawful for the following reason(s):

- (1) Applicant received ineffective assistance of counsel during her plea when she was not advised of the deportation consequences of her plea, nor was the jurisdictional matter that caused her plea to be vacated addressed by counsel, and Applicant was never advised that her plea had been vacated.

The Applicant alleges that she recently discovered the prejudice from the ineffective assistance of counsel when she was arrested for deportation as a result of her conviction. She states that she was arrested/detained by Immigration and Customs Enforcement ("ICE") on June 15, 2009, but was released on bond. She states she is seeking dismissal of the underlying conviction.

III. – Ineffective Assistance of Counsel Claim

Respondent submits that the Applicant will be unable to meet her burden of proof in this matter. See Rule 71.1(e), SCRCF; see also S.C. Code Ann. § 17-27-45(C). However, the Applicant's allegations may raise questions of fact. Therefore, Respondent requests an evidentiary hearing to fully resolve the issues. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Each and every allegation, claim, or statement contained within the Application not expressly admitted, qualified, or explained is hereby DENIED.

V.

WHEREFORE, having made its Return, the Respondent requests that an evidentiary hearing held.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

CHRISTINA J. CATOE
Assistant Attorney General


ATTORNEYS FOR RESPONDENT
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(803) 734-3737

August 21, 2010

STATE OF SOUTH CAROLINA
HORRY COUNTY

Somjai Fung Fue Starnes,

Applicant,

vs.

State of South Carolina,

Respondent.

COMMON PLEAS COURT
FIFTEENTH JUDICIAL CIRCUIT

Docket No.: 2010-CP-26-

6653

PCR APPLICATION

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention:

On June 15, 2009, Applicant was arrested / detained by Immigration and Customs Enforcement (ICE) as a direct and proximate result of Applicant's alleged conviction; however, Applicant is currently released from detention pursuant to her bond.

2. Name and location of Court which imposed sentence:

Horry County General Sessions Court, in Conway, SC

3. Name(s) of co-defendant(s) (if any):
Devone Stroud Starnes
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed: **Unknown**
5. The date upon which sentence was imposed and the terms of the sentence:
The answer to this question is unclear.
- On August 26, 1986, the trial court imposed a twenty (20) year sentence.
- On April 5, 1990, the PCR trial court vacated the conviction.
- On August 15, 1991, the SC Supreme Court affirmed the PCR trial court's decision.
- On October 24, 1991, Applicant pleaded to a lesser charge and was sentenced to 10 years sufficient upon time served.
- On December 2, 1991, the SC Supreme Court reversed their previous order.
- On April 10, 1992, the SC Supreme Court's order vacated the plea, reinstated the original conviction, and modified the original sentence to comport with the Solicitor's intention.
- Given the confusing issues in the record, the trial court's sentence, the reliance on the Solicitor's intent when he accepted Applicant's plea, the plea being vacated, and the modification of Applicant's original sentence, if Applicant does in fact currently have a conviction, what that conviction is and the resulting sentence is unclear.**
6. Check whether a finding of guilty was made:
a. after a plea of guilty - **Yes**
b. after a plea of not guilty -
c. after a plea of nolo contendere
7. Did you appeal from the judgment of conviction or the imposition of sentence? **Yes as to the trial, but No as to the plea**
8. If you answered "yes" to (7), list:
a. the name of each Court to which you appealed: **South Carolina Supreme Court**
b. the result in each such Court to which you appealed: **See answer to question #5**
c. the date of each such result: **See answer to question #5**

- d. if known, citations of any written opinion or orders entered pursuant to such results:
9. If you answered "no" to (7), state your reasons for not so appealing: Applicant only recently discovered the failures of her attorney and the resulting consequences and the circumstances were such that she could not have discovered these things
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: **Applicant received ineffective assistance of counsel during her plea when she was not advise of the deportation consequences of her plea, nor was the jurisdictional matter that caused her plea to be vacated addressed by counsel, and Applicant was never advised that her plea had been vacated.**
11. State concisely and in the same order the facts which support each of the grounds set out in (10): **The prejudice caused to Applicant by the ineffective assistance of counsel was such that it tainted the entirety of the criminal proceedings and the result of that prejudice is that the current conviction is being used to deport Applicant; also see response to question # 10.**
12. Prior to this application have you filed with respect to this conviction:
- a. any petition in a State Court under South Carolina Law? **Yes**
 - b. any petition in State or Federal Courts for habeas corpus or post-convictions relief? **Yes**
 - c. any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? **No**
 - d. any other petitions, motions or applications in this or any other Court? **No**
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- a. the specific nature thereof: **PCR based on counsel's failure to object to pre-trial interview of witness outside of Applicant's presence.**
 - b. the name / location of the Court in which each was filed: **Horry County Common Pleas**
 - c. the disposition thereof: **PCR granted**
 - d. the date of each such disposition: **April 5, 1990**
 - e. if known, citations of written opinions or orders entered pursuant to each such disposition:

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? **No**
15. If you answered "yes" to (14) identify:
- a. which grounds have been presented:
 - b. the proceedings in which each ground was raised:
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented: **Applicant only recently discovered the prejudice caused to her when she was arrested for deportation as a result of her conviction.**
17. Were you represented by an attorney at any time during the course of:
- a. your arraignment and plea? **Yes**
 - b. your trial, if any? **Yes**
 - c. your sentencing? **Yes**
 - d. your appeal, if any, from the judgment of conviction or the imposition of sentence? **Yes**
 - e. preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? **Yes**
18. If you answered "yes" to one or more parts of (17), list:
- a. the name and address of each attorney who represented you:
Jeffrey Bloom, 1911 Pickens St., Columbia, SC (trial)
O. Alexander, no address (during PCR and plea)
Desa Ballard, 226 State Street, West Columbia, SC (PCR)
 - b. the proceedings at which each such attorney represented you: **See answer to #18(a)**
19. State clearly the relief you seek in filing this application:
The prejudice caused at the stage of her proceedings coupled with the resulting injury is so significant that it can only be remedied with a dismissal of any conviction that may be determined to be against Applicant.

20. Are you now under sentence from any other court that you have not challenged? **No**

Columbia, South Carolina

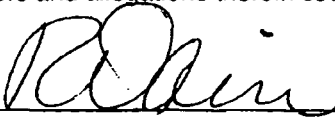


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Attorney for Applicant

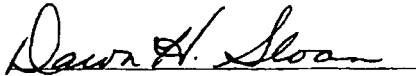
VERIFICATION

I, Rachael A. Dain, retained counsel for Applicant, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this Application; and that the matters and allegations therein set forth are true.



Sworn to and subscribed before me on July 22, 2010.

Rachael A. Dain



Notary for South Carolina.

My Commission expires on February 5, 2020

FILED
JUL 23 PM 4:39
CLERK OF COURT
SOUTH CAROLINA

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF HORRY) 86 GS 26 838

THE STATE OF SOUTH CAROLINA,)
)
) Plaintiff,)
) -VS-)
)
) SOMJAI FUNG FUE STARNES,)
)
)
) Defendant.)

TRANSCRIPT OF RECORD

October 24, 1991
Conway, South Carolina

B E F O R E:

HONORABLE EDWARD B. COTTINGHAM, Judge.

A P P E A R A N C E S:

JULAAN PRINCE, Esquire
Office of the Solicitor
P. O. Box 1276
Conway, South Carolina 29526
Attorney for the State

JEFFREY BLOOM, Esquire
Office of the Public Defender
P. O. Box 1666
Conway, South Carolina 29526
Attorney for the Defendant

BETTYE S. GUM
Official Reporter

1 MS. PRINCE: May it please the Court. This is
2 86-GS-26-838, the State versus Somjai Fung Fue Starnes.
3 On the '86 indictment, Your Honor, she was charged with
4 criminal sexual conduct with a minor, first degree. She
5 was tried and convicted back in '86 to that offense.
6 This case has been since reversed on a post-conviction
7 relief and sent back to this Court for a re-trial.

8 THE COURT: What was the basis for reversal? Was
9 that reversal affirmed by the Supreme Court?

10 MR. BLOOM: Yes, sir, Your Honor.

11 MS. PRINCE: It was affirmed by the Supreme Court,
12 but the Supreme Court had ruled prior to that. They
13 reversed it because of the part of the testimony
14 concerning the child's competency when the Judge was
15 asking questions was not video taped or was not done with
16 her present either in the video tape procedure ---

17 THE COURT: That's the one where they said she had
18 to be present?

19 MS. PRINCE: Present for that portion of the ---

20 MR. BLOOM: She was present during the video tape
21 testimony that was introduced in Court, ---

22 THE COURT: But not at the initial -- I understand.

23 MR. BLOOM: But not during the competency
24 qualification of the child witness.

25 THE COURT: What do you propose to do?

1 MS. PRINCE: Your Honor, she has been incarcerated
2 since that time, and her attorney, of course, has
3 requested a bond for Ms. Starnes. I told her based on
4 the item that has lapsed, some five years, and based on
5 the fact that she has been incarcerated since that time,
6 that I was, at this time, in a situation to offer her
7 some type of plea with a recommendation for time served,
8 because it's quite apparent that she's close to having
9 maxed out this initial sentence to start off with, so we
10 have ---

11 THE COURT: How much was the initial sentence?

12 MS. PRINCE: It was twenty-five.

13 MR. BLOOM: It was twenty years as to her.

14 MS. PRINCE: Twenty years, and twenty-five as to
15 him. Excuse me.

16 THE COURT: So your recommendation here is that
17 based on that, she's going to plead nolo contendere?

18 MS. PRINCE: And she's going to waive presentment
19 and plead to a lewd act upon a minor child and plead
20 nolo contendere to time served, with the State agreeing
21 to that. I will also state for the record that the
22 child here was five at the time. He, I guess, would be
23 ten or eleven at this time. He has since been adopted
24 by his foster parents and would be quite difficult for
25 us to locate, so I have not had the input from the victim

1 in this situation, but I feel like at this point that
2 we're doing what is in the best interest for that child
3 by taking this plea.

4 THE COURT: What was the relationship between this
5 Defendant and that child?

6 MS. PRINCE: This is his mother.

7 MR. BLOOM: His natural mother.

8 MS. PRINCE: Since then, she's lost total custody of
9 him to the foster parents.

10 THE COURT: Is this the only child she has?

11 MS. PRINCE: No. There was two of them.

12 MR. BLOOM: There was two children.

13 THE COURT: Where is the other one?

14 MS. PRINCE: He's with his brother; they're
15 together, with the foster parents adopting them.

16 THE COURT: Are we going to have any difficulty with
17 her trying to get these children?

18 MR. BLOOM: She has no knowledge of where the
19 children are, Your Honor, and the Family Court Order as
20 to the adoption was never appealed, to my knowledge, so
21 that matter has ended, and I have advised her repeatedly
22 of that.

23 THE COURT: You've talked to her; does she accept
24 it?

25 MR. BLOOM: Yes, sir. She wants to get on with her

1 own life.

2 THE COURT: Is she going to continue to live here?

3 MR. BLOOM: Your Honor, her sister-in-law lives in
4 Rock Hill area, and if she had made bond, that's where
5 she would have gone. I imagine that's where she will go
6 to after sentence is imposed.

7 THE COURT: She has signed a waiver of presentment
8 of indictment?

9 MR. BLOOM: Yes, she has, Your Honor.

10 THE COURT: And she pleads nolo contendere now to
11 this charge?

12 MR. BLOOM: Yes, she does, Your Honor.

13 THE COURT: Have you explained to her that we'll go
14 right back through the same process and give her a jury
15 trial?

16 MR. BLOOM: Yes, sir, Your Honor, and, of course,
17 I've discussed with her the impact of that jury trial.
18 She, unlike many other defendants, in this situation,
19 had an opportunity to see all the evidence and hear all
20 the evidence, and the issue that her case was reversed
21 on was a pre-trial matter. It had nothing to do with
22 the evidence the jury heard or the testimony presented.

23 THE COURT: The jury obviously had sufficient
24 evidence to find her guilty?

25 MR. BLOOM: So she is aware of the nature of the

1 evidence the State has and understands the -- that.

2 THE COURT: Your attorney tells me you wish to plead
3 no contest to this charge by entering a plea of lewd act
4 on a minor, which the sentence will be suspended on time
5 served; do you understand that?

6 MS. STARNES: Yes, Your Honor.

7 THE COURT: There still is a penalty attached, and
8 that is the time that you've been in jail and the fact
9 that this will be on your record, you understand that?

10 MS. STARNES: Yes, Your Honor.

11 THE COURT: If you ever try and get those children
12 back, the fact that you entered this plea will impact
13 against you, you understand that?

14 MS. STARNES: Yes, Your Honor.

15 THE COURT: Let there be no question about it, now.
16 This is going to be a part of your record, and if you
17 ever attempt to try and get those children back, that
18 Judge will know that in this Court on this day, you
19 entered the plea of no contest to criminal sexual conduct
20 on a minor.

21 MR. BLOOM: I'm sorry, Your Honor, no contest to
22 lewd act on a minor.

23 THE COURT: Lewd act on a minor, you understand
24 that?

25 MS. STARNES: Yes, Your Honor.

1 THE COURT: And you understand that you're entitled
2 to a jury trial on this charge, too, if you want one?

3 MS. STARNES: That's right.

4 THE COURT: And you're telling me you don't want
5 one?

6 MS. STARNES: No.

7 THE COURT: Has anybody promised you anything else
8 in connection with this?

9 MS. STARNES: No, sir.

10 THE COURT: Nobody has made to you any
11 representation about these children now, have they?

12 MS. STARNES: No.

13 THE COURT: Those children are somewhere else
14 apparently enjoying a comfortable and happy life, and
15 that's where they're gonna stay, you know that?

16 MS. STARNES: Right.

17 THE COURT: All right, I'm going to accept the plea.
18 I just wanted to make sure there's been no understanding
19 with her because we'll hear about that on a PCR, that
20 somebody promised her she could get her children back,
21 and this, that and the other, and I want this record to
22 be abundantly clear in that connection, you understand
23 that?

24 MS. STARNES: Yes, Your Honor.

25 THE COURT: All right. I'm going to sentence her to

1 ten years. I'm going to suspend it upon time served.

2 MR. BLOOM: Let the record reflect, Your Honor, she
3 has been incarcerated since August 26th of 1986, as well
4 as having a month and a half prior to ---

5 THE COURT: Okay. She would have maxed out on a ten
6 year sentence. That's appropriate, and the record will
7 reflect it.

8 MR. BLOOM: Thank you, Your Honor.

9 MS. PRINCE: Thank you, Your Honor.

10 CONCLUSION OF REQUESTED TRANSCRIPT.

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1 STATE OF SOUTH CAROLINA) CERTIFICATE OF REPORTER
2 COUNTY OF HORRY)
3

4 I, the undersigned Bettye S. Gum, Official Court
5 Reporter for the Fifteenth Judicial Circuit of the State
6 of South Carolina, do hereby certify that the foregoing
7 is a true, accurate and complete Transcript of Record of
8 all the proceedings had and evidence introduced in the
9 trial of the captioned case, in the Court of General
10 Sessions for Horry County, South Carolina.

11 I do further certify that I am neither of kin,
12 counsel nor interest to any party hereto.
13
14

15 January 27, 1992

16
17 Bettye S. Gum 12-8-2016
18 BETTYE S. GUM, CVR-CM

19 Official Reporter
20
21
22
23
24
25

The Supreme Court of South Carolina

CERTIFIED A TRUE
AND CORRECT COPY.

Melanie Higgins
HORRY COUNTY CLERK OF COURT
BY *Melanie Higgins*

Somjai Fung Fue Starnes,

Respondent,

v.

State of South Carolina.

Petitioner.

ORDER

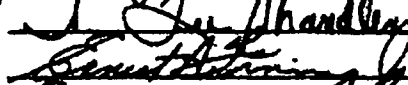
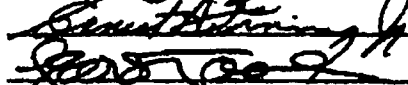
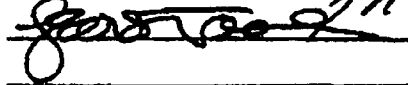
While the petition for rehearing was pending in this matter, respondent was returned to Horry County and, pursuant to a plea agreement with the solicitor, enter a plea of nolo contendere to the "lesser included offense" of committing a lewd act on a minor. She was sentenced to ten years imprisonment, satisfied upon time served. No direct appeal was taken.

Respondent asks the Court to again grant rehearing and withdraw its opinion. We deny the petition for rehearing.

The State has filed a motion asking the Court to vacate the conviction for lewd act on a minor and to reinstate the conviction for CSC. Because respondent's plea to the charge of lewd act on a minor was under the indictment for criminal sexual conduct which was the subject of the case on appeal to this Court, the lower court did not have jurisdiction to accept her plea and it is therefore vacated. By accepting the plea and allowing respondent released on time served, however, the State evidenced its judgment against any further imprisonment of

respondent. In light of that decision by the State and the fact that respondent has been released, we modify her sentence to thirty years, satisfied upon time served.

IT IS SO ORDERED.


C.J.

A.J.

A.J.

A.J.

A.J.

Columbia, South Carolina

March 24, 1992

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY

JAMES B. STEPHEN, CIRCUIT COURT JUDGE

Somjai Fung Fue Starnes,

Respondent,

vs.

State of South Carolina,

Petitioner.

RETURN TO MOTION TO VACATE

The State seeks an order of this Court vacating Somjai Starnes' conviction for committing a lewd act on a minor and reinstating her conviction for a greater offense. The motion must be denied.

This Court issued a decision affirming the granting of a new trial absolute to Somjai on August 5, 1991. The State filed a petition for rehearing. This Court did not request a return from Somjai, and Somjai did not file a return. Rule 224(e), SCACR.

Pending rehearing in this case, sometime in October, 1991, Somjai was transferred by the Department of Corrections to Horry County, from which her conviction for criminal sexual conduct with

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S. C. SUPREME COURT

has timely petitioned for rehearing. [Letter from Supreme Court dated December 17, 1991, copy attached].

The State seeks an order of this Court vacating Somjai's plea to committing a lewd act on a minor, asserting that jurisdiction rested exclusively in this Court at the time of Somjai's plea. The State asserts that the plea agreement into which it entered with Somjai, and her release from custody by the trial court, is a "nullity." [State's Motion, para. IV]. Assuming Somjai can even be located, the legal and constitutional implications of the State's motion are mind-boggling.

JURISDICTION WAS VESTED IN THE TRIAL COURT

Assuming this Court retained jurisdiction over Somjai's conviction for criminal sexual conduct during the pendency of the petition for rehearing, it did not retain jurisdiction over any different charge that could have been brought against her.

The court of general sessions acquires jurisdiction over an offense when a charge is brought, and over a person when the person is arrested or voluntarily appears. State v. Langford, 223 S.C. 20, 73 S.E.2d 854 (1953).

At the time of her plea, Somjai was not charged with and did not plead to criminal sexual conduct with a minor, the offense which was the subject of the proceedings in this Court. On the contrary, she pleaded to a different offense of committing a lewd act on a minor. The offense of committing a lewd act on a minor is not a lesser included offense of first degree criminal sexual conduct with a minor. State v. Norton, 286 S.C. 95, 332 S.E.2d

531 (1985).

The only offenses which could have been within the jurisdiction of this Court are the offense which was the subject of the indictment identified in the PCR proceeding, and any lesser-included offense. Phillips v. State, 281 S.C. 41, 314 S.E.2d 313 (1984); State v. Suttles, 279 S.C. 87, 302 S.E.2d 338 (1983). See also State v. Johnson, 287 S.C. 171, 337 S.E.2d 204 (1985) [solicitor could not agree to plea to lesser included offense during pendency of appeal of greater offense].

The court of general sessions acquired jurisdiction to accept the plea to committing a lewd act on a minor when (1) the solicitor's office charged Somjai with that crime, and (2) she voluntarily appeared and pleaded to that offense. S.C.Code Ann. Section 17-23-140 (1985); See also State v. Martin, 278 S.C. 256, 294 S.E.2d 345 (1982) [criminal defendant can enter plea to an offense which is not a lesser included offense of the indicted offense only by waiving presentment to the grant jury].

The pendency of proceedings in this Court on PCR did not deprive the court of general sessions of jurisdiction to proceed with matters related to a different offense. Rule 204, SCACR [trial court retains jurisdiction over proceedings "not affected by the appeal"]. The solicitor had the authority to bring the new charge, the circuit court had jurisdiction over the new charge, and Somjai voluntarily appeared, thus conferring full jurisdiction in the circuit court to proceed with the plea.

If the State wished to dispute the entry of the plea

a minor originated.¹ On information and belief, counsel was appointed for her, and the solicitor's office entered into an agreement with Somjai to permit her to plead nolo contendere to a different offense, committing a lewd act on a minor, in lieu of a new trial on the criminal sexual conduct offense.²

On October 24, 1991, Somjai waived presentment to the grand jury on the new charge, and entered a plea of nolo contendere to committing a lewd act upon a minor. The waiver of presentment appears on the face of the indictment (attached). Judge Edward Cottingham sentenced Somjai to ten (10) years imprisonment, and ordered her released on the basis of time served. Somjai had been in custody for more than five (5) years. She was released from custody at that time. No appeal has been filed in any court relative to the plea, and that matter is therefore final.

On information and belief, these events were known to the State, and specifically to the Attorney General's office, prior to this Court's issuance of its amended opinion on December 9, 1991. However, the State failed to notify the Court of the events that had transpired, and this Court subsequently issued its amended opinion reversing the trial court's grant of a new trial. Somjai

¹ Somjai's appellate counsel learned of this transfer when she tried to call Somjai at the Women's Correctional Center. Appellate counsel was never notified of any proceedings involving Somjai's transfer or her subsequent plea. Counsel learned of the plea to the lesser offense after this Court's amended opinion was issued.

² The specific terms of the plea agreement are not known to Somjai's appellate counsel. The transcript from the plea proceeding held on October 24, 1991 has been requested, and it will be forwarded to the Court upon receipt.

agreement, the proper avenue for doing so would have been an appeal from that proceeding. Having permitted the time for appealing to expire, the only possible avenue by which the State can seek the relief it seeks by this petition is by collateral petition to the circuit court. The State's petition is blissfully silent as to how and why this Court may have jurisdiction over the conviction for committing a lewd act on a minor.

This Court has no basis, nor any jurisdiction, upon which to vacate Somjai's conviction or sentence for committing a lewd act on a minor.

THE CONTRACTUAL NATURE OF THE AGREEMENT

A plea agreement is in the nature of a contract between the State and the defendant; the State is bound by the terms of its agreement with Somjai as stated to the Court of General Sessions on October 24, 1991. State v. Gates, 299 S.C. 92, 382 S.E.2d 886 (1989). A criminal defendant is entitled to "specific performance" by the solicitor of whatever agreement the solicitor made during plea negotiations. State v. Thompson, 278 S.C.1, 292 S.E.2d 581 (1982) cert. denied 102 S.Ct. 1996.

The fact that the trial judge is not obligated to accept the recommendation of the solicitor does not lessen the solicitor's obligation to comply with the terms of his agreement to recommend something to the trial judge. State v. Riddle, 278 S.C. 148, 292 S.E.2d 795 (1982).

Therefore, regardless of whether the plea to committing a lewd act on a minor was jurisdictionally defective, the State is still

obligated to allow Somjai to plead to committing a lewd act on a minor. Even if the Court should reinstate the conviction for criminal sexual conduct, Somjai would be entitled to bring a new PCR action on the basis of the State's agreement to permit her to plead to committing a lewd act on a minor. The State should be estopped from seeking to vacate the plea to which it has already agreed. Having already taken one position, and having Somjai rely on it, the State cannot now take an inconsistent position and seek to prejudice her in the process.

A majority of states recognize the contractual nature of pleas, and the defendant's right to "specific performance" of the agreement. Annot., Right of Prosecutor to Withdraw from Plea Bargain, 16 A.L.R.4th 1089 (1982). See also Annot., Right to Withdraw Guilty Plea, 66 A.L.R.3d 902 (1975). The federal courts also recognize that one federal prosecutor within a judicial circuit is bound to fulfil the promises made by another prosecutor during plea negotiations. Annot., Plea Bargains by Federal Agent, 55 A.L.R.Fed. 402 (1981).

Conceivably, even if the offense to which the solicitor permitted Somjai to plead was a lesser-included offense of the offense which was the subject of the PCR proceeding, the State's express agreement to the subsequent charge may still require specific enforcement of the plea.

In light of its agreement to permit Somjai to plead to committing a lewd act on a minor, the State cannot now seek to refute that agreement and have her recommitted on the basis of the

prior conviction.

PUBLIC POLICY

Whether by promissory estoppel, equity, contract law, double jeopardy, or issues related to jurisdiction, this Court cannot permit the State to do what it is trying to do. The State, through its agents, clearly and specifically entered into and consummated plea negotiations with Somjai regarding her alleged wrongful conduct, with full knowledge that rehearing was pending in this Court.³ It did so after this Court had issued an opinion granting Somjai a new trial absolute. The State sought to take advantage of Somjai by seeking her agreement to plead to a less serious offense. It obtained her agreement to do so, and now it wants to go back on its word now that this Court has ruled in its favor.

Somjai has filed a separate petition for rehearing regarding this Court's opinion issued on December 2, 1991. She respectfully urges that the best way to resolve the many issues implicated by the State's mishandling of this matter is by vacating the opinion of December 2, 1991 and permitting Somjai's plea and sentence to committing a lewd act on a minor to remain in effect. Somjai has been released from jail. To the best of her counsel's knowledge, no one knows where she is.

To reinstate Somjai's conviction at this late date, and authorize the State to hunt her down and recommit her to prison,

³ The State will no doubt assert that the solicitor did not know what the Attorney General was doing and vice-versa, but both are agents of the State, and the knowledge of one must be imputed to the other.

shocks the conscience of her counsel, and should shock the conscience of this Court. As set forth above, this Court has ample precedent to deny the relief being requested by the State. This Court, in fact, has no jurisdiction over the conviction for committing a lewd act on a minor, and may simply dismiss the petition outright, and vacate its opinion of December 2, 1991 on the grounds set forth in Somjai's pending petition for rehearing.

For the reasons set forth above, and set forth in Somjai's petition for rehearing, this Court is urged to:

- (1) vacate its opinion dated December 2, 1991; and,
- (2) deny or dismiss the State's petition to vacate.


Desa A. Ballard
Ness, Motley, Loadholt, Richardson
& Poole, P.A.
Post Office Box 365
Barnwell, South Carolina 29812

ATTORNEY FOR RESPONDENT
SOMJAI FUNG FUE STARNES

January 4, 1992
Barnwell, South Carolina

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

FEB 06 1992

Appeal from Horry County
Honorable James B. Stephen, Judge

S. C. SUPREME COURT

SOMJAI FUNG FUE STARNES,

RESPONDENT,

VS.

THE STATE,

PETITIONER.

RETURN TO PETITION FOR REHEARING

COMES NOW, the Petitioner, above-named, by and through the undersigned counsel making its Return to Petition for Rehearing would show unto this Court the following:

I.

Respondent was arrested on December 13, 1985, for criminal sexual conduct with a minor. She was charged with sexually abusing her then three (3) year old son Devin Starnes. Subsequently, she was indicted at the June, 1986, term of the Court of General Sessions for Horry County for first degree criminal sexual conduct with a minor pursuant to indictment 86-GS-26-838. A jury trial on the charge was held on August 26, 1986, before the Honorable C. Victor Pyle. She was represented by Jeffrey Bloom, Esquire, Public Defender for Horry County. Respondent was found guilty of the charge and was sentenced to confinement for a period of twenty (20)

years.

The Respondent filed a timely Notice of Intent to Appeal, and an appeal was perfected by Joseph L. Savitz of the South Carolina Office of Appellate Defense. Following the submittal of briefs by both sides, this Court affirmed the conviction pursuant to Rule 23 of the Rules of Practice of this Court. State v. Somjai Fung Fue Starnes, Memo. Op. No. 87-MO-416 (filed December 8, 1987).

II.

This matter came before the post-conviction relief court by way of an Application for Post-Conviction Relief dated September 14, 1988. Petitioner made its Return on November 18, 1988. Respondent then filed Applicant's Motion to Deny State's Motion to Dismiss dated December 13, 1988, to which Petitioner made its Supplemental Return on March 21, 1989. An evidentiary hearing into the matter was convened on January 30, 1990, at the Horry County Courthouse. Respondent was present at the hearing and was represented by Allen Alexander, Esquire, of the Horry County Bar. Petitioner was represented by Delbert H. Singleton, Jr., Assistant Attorney General.

Respondent alleged in her application that she was being held in custody unlawfully because she received ineffective assistance of trial and appellate counsel.

By way of an Order dated April 5, 1990, the Honorable James B. Stephen granted the Respondent's Application for Post-Conviction Relief. Judge Stephen found that Respondent received ineffective assistance of trial counsel because counsel failed to protect

Respondent's right to face-to-face confrontation. Judge Stephen also found that Respondent received ineffective assistance of appellate counsel because her attorney did not brief the issue of the alleged denial of her right to a face-to-face confrontation with the victim. The judge ordered that Respondent be given a new trial on the charge.

Petitioner filed a timely Notice of Intent to Appeal. On July 9, 1990, Petitioner filed its Petition for Writ of Certiorari. Respondent made her Return to the Petition on August 7, 1990. Thereafter, by Order of this Court Petitioner submitted its Brief of Petitioner on January 28, 1991. Respondent submitted her Brief on March 15, 1991. By way of its initial decision in this case this Court affirmed the post-conviction relief court's findings. See Starnes v. State, Op. No. 23444 (S.C. Sup. Ct. filed August 5, 1991). Petitioner then filed its Petition for Rehearing on August 20, 1991. On December 2, 1991, this Court issued an opinion reversing the post-conviction relief court's findings. See Starnes v. State, Op. No. 23444, (S.C. Sup. Ct. refiled December 2, 1991). The Respondent has now filed a Petition for Rehearing in this matter.

III.

Prior to this Court's December 2, 1991, opinion in this case, the Respondent appeared in the Court of General Sessions for Horry County on October 24, 1991.¹ She appeared before the Honorable

¹The Office of the Attorney General had no knowledge that these proceedings were occurring and was not contacted concerning the proceedings by anyone involved. Apparently, none of the

Edward B. Cottingham and entered a plea of nolo contendere to lewd act upon a minor pursuant to indictment 86-GS-26-838. She was represented by Jeffrey Bloom, Esquire, Public Defender for Horry County. Judge Cottingham sentenced her to ten (10) years imprisonment and released her on the time she had already served since August 25, 1986. A copy of the indictment and the November 4, 1991, sentencing form is attached and incorporated herein by reference.

IV.

The Respondent submits that her Petition for Rehearing should be granted because she has already been resentenced and released from confinement. She also asserts that the Petition should be granted to allow her the opportunity to respond to the Petition for Rehearing filed by Petitioner. South Carolina Appellate Court Rule 221 mandates that a Petition for Rehearing must "state with particularity the points supposed to have been overlooked or misapprehended by the [C]ourt" in rendering its decision. The present Petition for Rehearing does not set forth any points that this Court may have overlooked or misapprehended in rendering its Amended decision in this matter. Thus, the Petition should be dismissed.

Nevertheless, the Petitioner submits that the grounds for relief as set forth by the Respondent are without merit. First, the Petitioner submits that the Respondent's plea and sentence for

parties involved in the proceeding had knowledge that this matter was still pending before the Court and that this Court had sole jurisdiction to entertain any action in this matter.

lewd act upon a minor should be vacated and her prior conviction for first degree criminal sexual conduct with a minor should be reinstated because Judge Cottingham was without jurisdiction on October 24, 1991, to act on Respondent's indictment in this case. At the time Judge Cottingham accepted Respondent's plea, jurisdiction rested solely with this Court. Therefore, only this Court had jurisdiction to act upon Respondent's conviction and sentence pursuant to indictment 86-GS-26-838. Thus, the Respondent's plea and sentence on October 24, 1991, to lewd act on a minor is a nullity and should be vacated by this Court and Respondent's original conviction and sentence for first degree criminal sexual conduct with a minor should be reinstated. Further, since this Court affirmed Respondent's original conviction and sentence, justice demands that she is reincarcerated because she has to satisfy the service of her lawful sentence of twenty (20) years for first degree criminal sexual conduct with a minor. Respondent's detrimental reliance argument should not be allowed, nor should she be allowed to reap any benefit from Judge Cottingham not knowing that only this Court had jurisdiction to take any action in this matter.

Respondent's second ground for relief is equally without merit. In this case, this Court did not require the Respondent to file a return to Petitioner's Petition for Rehearing as it could have pursuant to Rule 224 (e), SCACR. Obviously, this Court did not deem such a return to be necessary. Nonetheless, the Petitioner's Petition for Rehearing did not raise any issues that

had not already been discussed in its Brief of Petitioner in this matter. The Respondent had the opportunity to fully respond to those issues in her Brief of Respondent. Thus, allowing her to respond to Petitioner's Petition for Rehearing then or now would not be appropriate under the circumstances.

WHEREFORE, having made its Return in this matter the Petitioner respectfully prays that this Court deny the Petition, vacate the Respondents October 4, 1991, plea and sentence for lewd act upon a minor and reinstate her August 26, 1986, conviction for criminal sexual conduct with a minor and all other relief that is just and proper.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

DELBERT H. SINGLETON, JR.
Assistant Attorney General

BY: Delbert H. Singleton
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
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Telephone: (803) 734-3737

Columbia, South Carolina

February 6, 1992.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY

JAMES B. STEPHEN, CIRCUIT COURT JUDGE

Somjai Fung Fue Starnes,
Respondent,

vs.

State of South Carolina,
Petitioner.

RECEIVED
DEC 16 1991
S. C. SUP. COURT

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Respondent Somjai Starnes respectfully petitions for rehearing and reconsideration of this Court's opinion Number 23444 issued December 2, 1991. In support of her motion, Somjai would show:

FOR A FIRST GROUND OF RELIEF

1. The trial court granted Somjai's application for post conviction relief on the basis of ineffective assistance of counsel at both the trial and appellate levels.

2. By opinion number 23444 dated August 5, 1991, this Court published its opinion affirming the grant of post conviction relief. The petitioner State of South Carolina timely petitioned

for rehearing before the remittitur in this case was transmitted to the trial court.

3. Sometime after that date, upon the instance of and with the knowledge of the petitioner State of South Carolina, Somjai was transferred from the State facilities of the Department of Corrections to the custody of the Horry County Detention Center. On information and belief, counsel was appointed to represent her at the trial level.

4. Subsequently, without the knowledge of Somjai's appellate counsel, but with the express knowledge and participation of the respondent State of South Carolina, Somjai (through her counsel) entered into a plea agreement with the solicitor's office in Horry County which permitted her to plead guilty to a lesser offense, i.e., committing a lewd act on a minor.¹

5. On information and belief, on October 24, 1991, Somjai, her trial counsel, and agents of the solicitor's office in Horry County appeared before the Honorable Edward B. Cottingham and presented the plea agreement to him. The plea agreement was accepted, and Somjai was sentenced to the time she had served since her arrest in 1986. [Indictment and Sentence attached as Exhibit A]. Somjai was released from custody by the State at that time, and her present whereabouts are unknown to her appellate counsel.

¹ Somjai's appellate counsel had no knowledge that these proceedings were occurring, and was never contacted by appointed trial counsel or any representative of the State of South Carolina during these proceedings. Counsel learned of these occurrences on Thursday, December 12, 1991, after this Court issued its amended opinion.

On information and belief, no appeal was taken from that plea, and jurisdiction over that matter is not now in this Court, nor is it in the circuit court.

6. The State of South Carolina failed to notify this Court that it had entered into an agreement with Somjai, prior to issuance of its opinion of December 5, 1991. In addition, without notifying her of the potential jurisdictional defects in her entry of a plea before the circuit court, the State has obtained her detrimental reliance on its representations to her regarding its authority to enter into the plea agreement. Had this Court been notified of the State's agreement with Somjai, the entry of the plea to a lesser offense, and Somjai's release from custody prior to issuance of its opinion, the appellate proceedings should have ceased.

7. The State has filed a Motion in this Court to Vacate Somjai's plea to the lesser offense, to which Somjai's appellate counsel has not yet responded. Apparently, the State seeks to have Somjai re-arrested and re-incarcerated on the basis of this Court's amended opinion, after having entered into the plea agreement and representing to Somjai that she was being fully released on the basis of the time she has already served in prison.

8. Having just learned of the circumstances regarding Somjai's release from custody, and with the Petition for Rehearing due on or before December 17, 1991, appellate counsel has not fully researched the legal implications of the State's entry into a plea agreement pending rehearing, but is informed and believes that the

State's attempts to re-incarcerate Somjai after agreeing to her release from custody are improper and should be rejected. Appellate counsel will fully respond to the legal issues implicated by the State's Motion to Vacate in her response to that motion.

FOR A SECOND GROUND OF RELIEF

9. As further grounds for her motion, Somjai would show that this Court granted rehearing and summarily amended its opinion without permitting her an opportunity to respond to the arguments authorities cited by the State.² Should rehearing be deemed appropriate, Somjai respectfully requests that rehearing be granted, and the parties be given an opportunity to fully address the issues raised by the State's petition for rehearing. In support of this position, Somjai respectfully asserts the due process clauses of the State and Federal constitutions as controlling authorities on this point.

WHEREFORE, having fully set forth the grounds for her petition for rehearing, Somjai respectfully moves for an order:

(1) Withdrawing this Court's opinion number 23444 dated December 5, 1991 in full, or pending Somjai's response to the Motion to Vacate and this Court's decision on that motion; or, in the alternative;

(2) Granting rehearing and permitting Somjai an opportunity to respond to the issues raised by the State's petition for

² Somjai was not permitted to file a response to the State's petition unless requested to do so by the Court. Rule 224(e), SCACR.

rehearing and addressed by this Court in its amended opinion.

Desa A. Ballard
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& Poole, P.A.
Post Office Box 365
Barnwell, South Carolina 29812

ATTORNEY FOR RESPONDENT
SOMJAI FUNG FUE STARNES

December 14, 1991

Barnwell, South Carolina

CONFIDENTIAL
In accordance with the terms of the firm of Ness,
Loadholt, Richardson & Poole, P.A., hereby
certify by our signature below that a copy of the
Petition for Rehearing
which was entered in 1991, was served upon
all the parties to this case in this
jurisdiction by the firm of Ness, Loadholt, Richardson & Poole, P.A., and in Barn-
well, South Carolina, with sufficient
proof attached on this 14 day of Dec.
19 91
Desa A. Ballard
Signature of Employee

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Appeal from Horry County
DEC 13 1991 Honorable James B. Stephen, Judge

S. C. SUPREME COURT
SOMJAI FUNG FUE STARNES,

RESPONDENT,

VS.

THE STATE,

PETITIONER.

MOTION TO VACATE RESPONDENT'S CONVICTION
AND SENTENCE FOR LEWD ACT UPON A MINOR
AND MOTION TO REINSTATE RESPONDENT'S CONVICTION FOR
FIRST DEGREE CRIMINAL SEXUAL CONDUCT

COMES NOW, the Petitioner, above-named, by and through the undersigned counsel making its Motion to Vacate Respondent's Conviction and Sentence for Lewd Act upon a minor would show unto this Court the following:

I.

Respondent was arrested on December 13, 1985, for criminal sexual conduct with a minor. She was charged with sexually abusing her then three (3) year old son Devin Starnes. Subsequently, she was indicted at the June, 1986, term of the Court of General Sessions for Horry County for first degree criminal sexual conduct with a minor pursuant to indictment 86-GS-26-838. (A copy of the indictment is attached and incorporated herein by reference). A jury trial on the charge was held on August 26, 1986, before the

Honorable C. Victor Pyle. She was represented by Jeffrey Bloom, Esquire, Public Defender for Horry County. Respondent was found guilty of the charge and was sentenced to confinement for a period of twenty (20) years.

The Respondent filed a timely Notice of Intent to Appeal, and an appeal was perfected by Joseph L. Savitz of the South Carolina Office of Appellate Defense. Following the submittal of briefs by both sides, this Court affirmed the conviction pursuant to Rule 23 of the Rules of Practice of this Court. State v. Somjai Fung Fue Starnes, Memo. Op. No. 87-MO-416 (filed December 8, 1987).

II.

This matter came before the post-conviction relief court by way of an Application for Post-Conviction Relief dated September 14, 1988. Petitioner made its Return on November 18, 1988. Respondent then filed Applicant's Motion to Deny State's Motion to Dismiss dated December 13, 1988, to which Petitioner made its Supplemental Return on March 21, 1989. An evidentiary hearing into the matter was convened on January 30, 1990, at the Horry County Courthouse. Respondent was present at the hearing and was represented by Allen Alexander, Esquire, of the Horry County Bar. Petitioner was represented by Delbert H. Singleton, Jr., Assistant Attorney General.

Respondent alleged in her application that she was being held in custody unlawfully because she received ineffective assistance of trial and appellate counsel.

By way of an Order dated April 5, 1990, the Honorable James B. Stephen granted the Respondent's Application for Post-Conviction

Relief. Judge Stephen found that Respondent received ineffective assistance of trial counsel because counsel failed to protect Respondent's right to face-to-face confrontation. Judge Stephen also found that Respondent received ineffective assistance of appellate counsel because her attorney did not brief the issue of the alleged denial of her right to a face-to-face confrontation with the victim. The judge ordered that Respondent be given a new trial on the charge.

Petitioner filed a timely Notice of Intent to Appeal. On July 9, 1990, Petitioner filed its Petition for Writ of Certiorari. Respondent made her Return to the Petition on August 7, 1990. Thereafter, by Order of this Court Petitioner submitted its Brief of Petitioner on January 28, 1991. Respondent submitted her Brief on March 15, 1991. By way of its initial decision in this case this Court affirmed the post-conviction relief court's findings. See Starnes v. State, Op. No. 23444 (S.C. Sup. Ct. filed August 5, 1991). Petitioner then filed its Petition for Rehearing on August 20, 1991. On December 2, 1991, this Court issued an opinion reversing the post-conviction relief court's findings. See Starnes v. State, Op. No. 23444, (S.C. Sup. Ct. refiled December 2, 1991).

III.

Prior to this Court's December 2, 1991, opinion in this case, the Respondent appeared in the Court of General Sessions for Horry County on October 24, 1991. She appeared before the Honorable Edward B. Cottingham and entered a plea of nolo contendere to lewd act upon a minor pursuant to indictment 86-GS-26-838. Judge Cottingham sentenced her to ten (10) years imprisonment and

released her on the time she had already served since August 25, 1986. A copy of the November 4, 1991, sentencing form is attached and incorporated herein by reference.

IV.

The Petitioner submits that the Respondent's plea and sentence for lewd act upon a minor should be vacated and her prior conviction for first degree criminal sexual conduct with a minor should be reinstated because Judge Cottingham was without jurisdiction on October 24, 1991, to act on Respondent's indictment in this case. At the time Judge Cottingham accepted Respondent's plea, jurisdiction rested with this Court. Therefore, this court solely had jurisdiction to act upon Respondent's conviction and sentence pursuant to indictment 86-GS-26-838. Thus, the Respondent's plea and sentence on October 24, 1991, to lewd act on a minor is a nullity and should be vacated by this Court and Respondent original conviction and sentence for first degree criminal sexual conduct with a minor should be reinstated.

WHEREFORE, having made its Motion in this matter, the Petitioner respectfully prays that this Court vacate the Respondents October 24, 1991, plea and sentence for lewd act upon a minor and reinstate her August 26, 1986, conviction for criminal sexual conduct with a minor and all other relief that is just and proper.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

DELBERT H. SINGLETON, JR.
Assistant Attorney General

BY: Delbert H. Singleton, Jr.
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

Columbia, South Carolina

December 10, 1991.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Somjai Fung Fue Starnes,

Respondent,

vs.

State of South Carolina,

Petitioner.

Appeal from Horry County
James B. Stephen, Judge

ON WRIT OF CERTIORARI

Opinion No. 23444
Submitted May 21, 1991 - Refiled December 2, 1991

AS Amended On Rehearing

REVERSED

Attorney General T. Travis Medlock, Chief Deputy
Attorney General Donald J. Zelenka, and Assistant
Attorney General Delbert H. Singleton, Jr., all of
Columbia, for Petitioner.

Desa A. Ballard, of Barnwell, for Respondent.

TOAL, A.J.: This is an appeal by the State from a post-conviction relief (PCR) order finding the respondent received ineffective assistance of counsel and was entitled to a new trial. We affirmed in an earlier opinion, however, on rehearing, we have reconsidered the issues presented and now reverse.

The respondent was convicted of first degree criminal sexual conduct with a minor and sentenced to twenty (20) years imprisonment in August 1986. Prior to trial, a hearing was conducted to determine the necessity of allowing the child victim to testify by videotape. At this hearing, the child testified and was examined by both attorneys and the trial judge on issues relating to his competency and his fear of his parents. Dr. Cummings, a specialist in child psychiatry, testified the child was afraid of his parents and, in his opinion, the child would be

STARNES v. STATE

unable to testify in their presence. The trial judge held the use of videotape testimony was necessary based on a factual finding that the child was fearful of his parents and would be intimidated if his testimony was taken in the presence of his parents. The defendant was not present at this hearing.

The child's testimony was taken by videotape out of respondent's presence. Respondent's trial attorney was present. Respondent was able to view the proceeding by way of a closed one-way circuit television monitor and the defendant was in constant contact with her attorney through the use of headphones.

At the outset of the videotape proceeding, respondent's counsel objected to the use of videotape, but did not object to respondent's exclusion from the courtroom. On direct appeal, the defendant abandoned the issue after this Court upheld the use of videotape testimony in State v. Cooper, 291 S.C. 351, 353 S.E.2d 451 (1987).

On post-conviction relief, the judge found counsel was ineffective for failing to object to respondent's exclusion from the pretrial hearing. The PCR judge also found counsel ineffective for failing to object to the use of the videotape testimony and failing to pursue the issue on appeal. We reverse both findings.

The first issue presented is whether the respondent's exclusion from the hearing to determine the necessity of using videotape testimony violated her right to confrontation. The primary interest secured by the confrontation clause is the right of cross-examination. Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). The right to confrontation has been referred to as a "trial right." Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968). See also Pennsylvania v. Richie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). In Kentucky v. Stincer, 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987), the United States Supreme Court held a defendant's right to confrontation was not violated by his exclusion from the hearing held to determine the competency of children witnesses. The Kentucky Supreme Court had held the defendant's rights were violated because the hearing was a "crucial phase" of the trial. The United States Supreme Court held although it was crucial in the sense that if the children were found incompetent, the defendant may not have been convicted, however, the appropriate question under the confrontation clause is whether there has been any interference with the defendant's opportunity for effective cross-examination at trial. Id. at 745 n. 17, 107 S.Ct. at 2667 n. 17, 96 L.Ed.2d at 647 n. 17.

Respondent's exclusion from the hearing to determine the necessity of using videotape testimony did not hinder her effective cross-examination at trial. We therefore conclude her right to confrontation was not violated by her exclusion from this hearing.

STARNES v. STATE

Further, respondent argues she had a due process right to be present. A defendant has the right to be present at any stage of the criminal proceeding that is critical to its outcome if his or her presence would contribute to the fairness of the procedure. Stincer, 482 U.S. at 745, 107 S.Ct. at 2667, 966 L.E.2d at 647. The hearing to determine the necessity of using videotape testimony is not critical to the outcome of the action. Unlike a competency hearing, the decision to be made is not whether a witness will testify, but the circumstances under which the testimony will be taken. Thus, respondent had no due process right to be present.

The PCR judge also found respondent's right to confrontation was violated at the trial itself when the videotape testimony was used. The PCR judge unfortunately did not have the benefit of Maryland v. Craig, ___ U.S. ___, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), at the time. In Craig, the United States Supreme Court upheld the use of testimony via a one-way closed circuit television provided the procedure is necessary to further an important state interest. The Craig court held in some cases the state's interest in protecting a minor child from further trauma and embarrassment is sufficiently important to outweigh a defendant's right to face his or her accusers in court. Id. A case specific finding of necessity is required. Id.; see also State v. Rogers, 293 S.C. 505, 362 S.E.2d 7 (1987) (the fact that children generally feel uncomfortable testifying in open court found to be inadequate). In the instant case, the trial judge made a case specific factual finding that the child was fearful of testifying in front of respondent and would be traumatized and intimidated if required to testify in her presence. This factual finding was supported by the child's testimony and that of the psychiatrist. We hold this finding adequately meets the requirements of Craig and this Court's precedents. See State v. Murrell 302 S.C. 77, 393 S.E.2d 919 (1990).

In Murrell, this Court set down the proper procedure for the use of videotaped testimony. We held the defendant should have counsel present in both the courtroom with the witness and with the defendant. Murrell, 302 S.C. at 81, 393 S.E.2d at 921. In the instant case, respondent maintained contact with her attorney in the courtroom by the use of headphones. We hold this procedure meets the requirements of Murrell. Thus, respondent's right to confrontation was not violated by the use of the videotaped testimony.

Since we find no violation of the respondent's rights, counsel's performance was not deficient in failing to object or pursue objections that were made on appeal. Thus, Starnes has failed to meet the first prong of the test for determining ineffective assistance of counsel. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

STARNES v. STATE

Because there is no evidence to support the findings of ineffective assistance, the order of the PCR judge is **REVERSED**.

GREGORY. C.J., HARWELL, FINNEY and CHANDLER, JJ., concur.

S E N T E N C E

Reversal of PCP
(also. Contendie)

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

CASE NO. ⁸⁶ ~~87~~-GS-26- 838

heard act upon minor

The defendant Sonjai Jung Sue Harnes is committed to
the State Department of Corrections for a term of 10 months/years
and/or to pay a fine of _____ provided upon the service of
time served months/years and/or payment of \$ _____
plus pay/waive costs and assessments as applicable, * ~~the balance is suspended with~~
probation for _____ months/years.

Restitution
Yes/No

For Physical Injury \$ _____
Property Damage \$ _____

to be paid _____

to Clerk of _____

Other Conditions Incarcerated since 8/26/86.

DATED 10-24, 1991

Paul B. Gentry
PRESIDING JUDGE

Court Reported:

Bettye Gurn

*Costs and Assessments

Fine	\$ _____
Court Costs	\$ _____
Assessment	\$ <u>02.00</u>
25% Assessment	\$ _____
Chemical Assessment	\$ _____
Defendant's Fee	\$ <u>02.00</u>
TOTAL	\$ _____

CERTIFIED COPY
2003 JUN 30 AM 9:28
Melanie Higgins
CLERK OF COURT
HORRY COUNTY

Bennie B. Richardson
CLERK OF COURT

86-65-26-838

The State of South Carolina

County of HORRY

COURT OF GENERAL SESSIONS

June Term, 1986
 AW#: A: B459652/DA: 12-13-85
 B: B459653/DA:

THE STATE

VS.

A. Somjai Fung Starnes
 701 11th Ave. South
 Myrtle Beach, S. C. 29577

SS#: /DOB:

B. Devon Stroud Starnes
 1017 Barrow Ct.
 Rock Hill, S. C.

SS#: 251-78-5113/DOB: 9-15-49

CR#: 25770/CDR#: 159 16-3-655

INDICTMENT FOR

CRIMINAL SEXUAL CONDUCT W/MINOR
 FIRST DEGREE

JIM DUNN, SOLICITOR

Larry A. McDaniel
 Foreman of Grand Jury

NOTARY PUBLIC

A. PD/OR-\$10,000.00
 B. IRBY WALKER/Arella Black
 \$10,000.00

STATE OF SOUTH CAROLINA
 COUNTY OF HORRY

AND NOW COMES THE DEFENDANT

Somjai Fung

IN OPEN COURT, AFTER WAIVING PRESENTMENT TO THE GRAND JURY AND PLEADS NOT GUILTY (INOLD)

hand Act upon a Min

AND CONSENTS FOR SAID PLEA TO BE ENTERED ON RECORD

ATTEST:

B. Oliver H. Richardson
 BILLIE C. RICHARDSON
 C.C.C.P. & C. S. FOR HORRY COUNTY

DATE: 10-24-87

Verdict

Somjai Starnes:

to Devon Starnes:

Guilty

Foreman

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
Honorable James B. Stephen, Judge

SOMJAI FUNG FU STARNES,

RESPONDENT,

VS.

STATE OF SOUTH CAROLINA,

PETITIONER.

PETITION FOR REHEARING

Petitioner, above-named, would show unto this Court as follows:

Judgment of the lower court was affirmed by this Court on August 5, 1991, in Opinion Number 23444. Respondent submits pursuant to Rule 221, SCACR, that there are certain points of law and facts with this Court may have overlooked or misapprehended.

In its Opinion, this Court holds

[s]pecially regarding a hearing on the necessity of videotaped testimony we stated in State v. Rogers, 293 S.C. 505, 362 S.E.2d 7 (1987) that the judgment conduct such a hearing to make 'specific factual findings...as to the necessity of using the procedure for this particular witness.' The absence of the defendant from this hearing would deprive the judge of an opportunity to observe the witness' reaction to the defendant and could certainly affect the judge's decision. We now rule that the defendant had a right to be present at that hearing and that counsel's failure to object to the defendant's absence from such a hearing allowed a violation of defendant's rights. Hence, counsel's performance was deficient and that deficiency prejudiced the defendant's rights.

The Court may have overlooked or misapprehended the fact that the August 6, 1986, hearing before the trial judge was equivalent to a competency hearing to determine whether the child witness, Devone Starnes, was competent to testify and the manner in which he would give his testimony. Petitioner respectfully submits that the Court may have overlooked or misapprehended the fact that its ruling would mean that a child witness would have to be preliminarily questioned in a defendant's presence in order for the utilization of videotaped testimony to be consistent with the Sixth Amendment's confrontation clause. This Court may have overlooked or misapprehended the fact that its ruling could possibly cause a tainting of future trial proceedings in which a determination has to be made as to the necessity for the use of videotaped testimony involving child witnesses.

Petitioner also submits that this Court may have overlooked or misapprehended that its opinion is contrary to the United States Supreme Court's decision in Kentucky v. Stincer, 482 U.S. 730, 107 S.Ct. 658 (1987). The United States Supreme Court in Stincer held that the exclusion of a criminal defendant from a hearing on the competency of child witnesses to testify did not violate the defendant's confrontation right. Id. at 744. This Court may have overlooked or misapprehended the fact that the Stincer decision illustrates that there are no discernable distinctions between a hearing to determine whether a child is

competent to testify and a hearing to determine whether a child should be allowed to testify by way of closed circuit television. Further, Petitioner submits that this Court may have overlooked or misapprehended the fact that the hearing in this case concerning the use of a closed circuit television procedure, like the competency hearing at issue in Stincer, does not involve questioning regarding the substance of the child witness' testimony or whether the child will testify, but involves the collateral issue of under what procedure will the child witness testify. See Id. at 740-741.

This Court may have also overlooked or misapprehended the fact that the decision whether to allow the use of a closed circuit procedure is the responsibility of the trial judge and such a decision does not deprive an accused the opportunity for effective cross-examination at trial. See Id. at 742 and 744. Thus, this Court may have overlooked and misapprehended the fact that under Stincer an accused has no right to confront a child witness on the issue of whether closed circuit television procedure should be allowed. Therefore, this Court may have overlooked or misapprehended the fact that the Respondent was not prejudiced by counsel's failure to object to her absence from the August 6, 1986, hearing.

Additionally, in holding that counsel's performance was deficient in failing to object to the Respondent's exclusion from the August 6, 1986, hearing during the trial judge's questioning of the victim, this Court may have overlooked or

misapprehended that no prejudice resulted since the proceeding was held to determine if the videotaped procedure would be used. This Court may have overlooked or misapprehended the fact that under Kentucky v. Stincer it was not error for the trial judge to allow the August 6, 1986, hearing to take place in the defendant's absence. Therefore, the Court may have overlooked or misapprehended the fact that counsel's representation was well within the range of competence demanded of attorneys in criminal matters. Strickland v. Washington, 466 U.S. 668 (1984); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977).

WHEREFORE, Petitioner prays that this Court grant its Petition for Rehearing and rehear this matter on all the grounds asserted herein and for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

DELBERT H. SINGLETON, JR.
Assistant Attorney General

By: Delbert H. Singleton
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Columbia, South Carolina

August 20, 1991.



Somjai Fung Fue Starnes, Respondent, v. State of South Carolina, Petitioner

No. 23444

Supreme Court of South Carolina

1991 S.C. LEXIS 152

May 21, 1991, Submitted
August 5, 1991, Filed

SUBSEQUENT HISTORY: As Amended on Rehearing December 2, 1991, Reported at 1991 S.C. LEXIS 231. Rehearing Granted December 7, 1991. Certiorari Denied March 24, 1992.

PRIOR HISTORY: Appeal from Horry County; James B. Stephen, Judge; on Writ of Certiorari.

DISPOSITION: *AFFIRMED*

COUNSEL: Attorney General T. Travis Medlock, Chief Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Delbert H. Singleton, Jr., all of Columbia, for Petitioner.

Desa A. Ballard, of Barnwell, for Respondent.

JUDGES: Toal, A.J. Gregory, C.J., Harwell, Chandler and Finney, JJ., concur.

OPINION BY: TOAL

OPINION

This is an appeal by the State from a post-conviction relief hearing in which the PCR judge found that the defendant had received ineffective assistance of counsel and was entitled to a new trial. We affirm.

The defendant was tried on a charge of criminal sexual abuse of her three year old son. The child was five years old at the time of the trial. In prosecuting the case, the State sought to take the child's testimony by videotape, out of the presence of the defendant and in a smaller, less overwhelming setting than a full-blown courtroom.

A pretrial hearing was conducted by the judge to make a determination on the State's motion to take the child's testimony by videotape. The child was present at this hearing [*2] so that the judge could question him and better determine if it was necessary to take his testimony by videotape. The defendant was not present at the hearing. Defendant's counsel did not discuss with defendant any option of being present at the hearing, he did not request that she be allowed to be present at the hearing and he did not object to the fact that she was not allowed to be present.

At the hearing, the judge determined that the child could testify as a competent witness and would be better able to testify via videotape. He asked the child several questions in making his decision. The defendant was not present during any part of the hearing or of that questioning.

LAW/ANALYSIS

This Court has held that the appropriate standard of review in an appeal from a PCR hearing is whether there is any evidence to support the findings of the PCR judge. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a finding of ineffective assistance of counsel must be supported by evidence that counsel's performance was deficient and that the deficiency prejudiced the defendant's case. *Id.*

This Court has also held that a defendant has the [*3] right to be present at every stage of the criminal proceeding against him. *State v. Rivers*, 294 S.C. 123, 363 S.E.2d 105 (1987). In *Re. Dwayne M.*, 287 S.C. 413, 339 S.E.2d 130 (1986). Here, the defendant was not afforded that right, and counsel failed to object to that deprivation.

Specifically, regarding a hearing on the necessity of videotape testimony, we stated in *State v. Rogers*, 293 S.C. 505, 362 S.E.2d 7 (1987) that the judge must conduct such a hearing to make "specific factual findings . . . as to the necessity of using the procedure for this particular witness." The absence of the defendant from this hearing would deprive the judge of an opportunity to observe the witness' reaction to the defendant and could certainly affect the judge's decision. We now rule that the defendant had a right to be present at that hearing and that counsel's failure to object to the defendant's absence from such a hearing allowed a violation of defendant's

rights. Hence, counsel's performance was deficient and that deficiency prejudiced the defendant's rights.

Since trial counsel was ineffective, we [*4] need not consider the defendant's contentions regarding the ineffectiveness of appellate counsel. Also, the State's argument that a new trial is an improper remedy for ineffective appellate counsel need not be considered because we find that a new trial is proper considering solely the ineffectiveness of trial counsel. For the reasons stated above, the decision of the PCR judge is hereby *AFFIRMED*.

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

SOMJAI FUNG FUE STARNES)
NO. 137003,)

PETITIONER,)

VS.)

STATE OF SOUTH CAROLINA,)

RESPONDENT.)

ORDER

88-CP-26-3346

88

FILED
HARRIS COUNTY
CLERK OF COURT

JUN 29 1988 - 9 PM 12:25

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This matter is before the Court upon the Amended Petition for Post-Conviction Relief by the Petitioner. This matter was heard during the Horry County Non-Jury term of Court. The Petitioner was represented by Allen Alexander, Conway, South Carolina. The State represented by Mr. Delbert Singleton, of the South Carolina Attorney General's Office.

The Petitioner was tried on or about August 26, 1986 in the Court of General Sessions for Horry County before the Honorable Victor Pyle. The Petitioner was represented at trial by Mr. Jeffrey Blum of the Horry County Public Defender's Office. She was convicted of First Degree Sexual Misconduct with a Minor and sentenced to twenty (20) years imprisonment.

Prior to the commencement of the trial, upon motion of the State, a hearing was held before Judge Pyle, outside the presence of the Defendant, at which he ordered the testimony of the alleged victim, a minor child, be taken by video tape, and that, during the taping session, the Defendant be excluded from the room

in which the witness testified. The alleged victim, Devon Starnes, is the child of the Petitioner.

The Petitioner seeks a new trial upon the grounds that she was denied effective assistance of counsel either at the trial, at the appellate level, or both. She asserts that Counsel failed to protect her right to a face to face confrontation with the witness against her as guaranteed under the Sixth Amendment of the United States Constitution.

AUTHORITIES:

The right of a criminal defendant to be confronted with the witnesses against him is a basic right substantiated in constitutional and statutory law.

U. S. Constitution Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations: to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

South Carolina Constitution Article 1, Section 14

provides:

"The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both."

§16-3-1530, (G), Code of Laws of South Carolina of 1976 as amended Provides:

"Victims and witnesses who are very young, elderly, who are handicapped or who have special needs, have a right to special recognition and attention by all criminal justice, medical, and social service agencies. The Court shall treat "special witnesses sensitively, using closed or taped sessions when appropriate. The solicitor or defense shall notify the court when a victim or witness deserves special consideration."

§17-23-60, Code of Laws of South Carolina of 1976 as amended provides:

"Every person accused shall, at his trial, be allowed to be heard by counsel, may defend himself and shall have a right to produce witnesses and proofs in his favor and to meet the witnesses produced against him face to face."

The principle United States Supreme Court case in point on confrontation of witnesses is Coy v. Iowa 108 S. Ct. 2798 (1988), which held that under an Iowa procedure whereby the victim/witness was separated from the defendant by a screen violated defendant's constitutional right of confrontation with the witnesses against him. The Court held that the confrontation clause clearly and unequivocally meant a face to face confrontation. The Court gave an extended history of the right of confrontation stating that it meant exactly what its plain meaning implied, that is, a face to face and eye to eye confrontation. The Court distinguished between the right of confrontation and the right of cross-examination holding that the fact that the defendant's

counsel was permitted to cross-examine, does not satisfy the confrontation requirement. The Court acknowledged that under prior cases, the right of confrontation could be satisfied by procedures other than confrontation in the courtroom during the trial, such as by deposition, but that the right to confrontation as face to face contact is a fundamental right guaranteed under the Constitution of the United States.

In addressing the issue of whether the strict interpretation of the Sixth Amendment right would be relaxed, Justice Scalia stated, "We leave for another day, however, whether any exceptions exist, whatever they may be, they would surely be allowed only when necessary to further an important public policy."

As set out in Coy, the right to face to face confrontation is a right which has long been recognized. Kirby v. U.S., 174 U.S. 47 (1899); Dowdell v. U.S., 221 U.S. 325 (1911); Jay v. Boyd, 351 U.S. 345 (1956), and more recently referred to in Lee v. Illinois, 476 U.S. 530 (1986).

The United States Supreme Court has applied Coy to cases then pending before it in three memorandum opinions: Chisholm v. Kansas 109 S. Ct. 486 (1988); Tafoya v. New Mexico 108 S. Ct. 2890 (1988); Conley v. Wisconsin 108 S. Ct. 2892 (1988). In each of these the

Court vacated judgment and remanded with instructions for the applicable State Court to reconsider its decision in light of Coy.

The United States Supreme Court granted certiorari in January of 1990 in the case of Maryland v. Craig, No. 89-478. Certiorari was granted to consider the Maryland Court of Appeals decision to overturn the child abuse and other convictions of Craig, a day care operator. The Maryland Court of Appeals overturned Craig's convictions due to the failure of the trial court to make adequate inquiry concerning the risk of trauma to child witnesses between the ages of four and six years old prior to the child testifying against the defendant by closed circuit television as required under Wilder-muth v. St., 310 Md. 496, 530 A 2d 275 (1987). The trial court was overturned also due to its failure to explore any alternatives to the use of one-way closed circuit television.

The Court of Appeals overturned Craig's conviction but saved the statute, Courts and Judicial Procedure 9-102, that permits child abuse victims to testify from remote locations by closed circuit television when a court concludes that it would be unduly distressing for them to have to come face to face with the accused. The court saved the statute by reading into it several procedural requirements not evident in the statute's

language. The primary requirements are: (1) that the child's fear of testifying is a specific fear of confrontation with the accused, as opposed to a general fear of testifying in public, (2) that the trial judge personally interview the prospective child witness in the presence of the defendant to ascertain whether or not the child would suffer serious emotional distress during confrontation; (3) that the two-way closed circuit television procedure is to be preferred to the one-way procedure authorized by the statute.

In the alternative, the South Carolina Supreme Court's case in point concerning the criminal defendant's right of confrontation is State v. Cooper, 291 S. C. 351, 353 S.E. 2d 45 (1987). The Cooper decision stated:

the "face to face" provision does not require, in all cases, a direct physical confrontation between defendant and witness. When a balancing of competing interests demands it, the "face to face" requirement may be served by the appearance of the witness before counsel for cross-examination outside the defendant's presence.

FACTS:

The facts of the case at hand pursuant to record are as follows:

On August 6, 1986, the parties involved in the trial appeared before Judge Pyle for a hearing to determine whether the videotaping of the victim would be allowed and

whether the videotaping would be done outside the presence of the Petitioner and her co-defendant. During the hearing, which was held outside the Petitioner's presence, Judge Pyle and the Petitioner's trial attorney had the opportunity to question the victim concerning the trauma that he might experience by testifying in an open courtroom setting and before the defendants. See transcript of August 6, 1986, pp. 2-7.

The trial court also had the opportunity to consider testimony from a psychiatrist who indicated that it would be traumatic and harmful to the victim if he had to testify in an open courtroom setting and in the presence of the Petitioner and her co-defendant. See transcript of August 6, 1986, pp. 10-12. Further, Judge Pyle had the opportunity to listen to arguments from both the Solicitor and trial counsel concerning the appropriateness of the Solicitor's motion. At the conclusion of the hearing, Judge Pyle found that there was a potential of injury to the victim, that he would be traumatized and that he would be intimidated if his testimony was taken in the presence of the Petitioner and her co-defendant and in a normal courtroom setting. See Transcript of August 6, 1986, p. 27, l. 13 p. 28, l. 15). The videotape testimony of the victim was taken on August 7, 1986, outside the physical presence of the Petitioner. The Petitioner's trial attorney was present and the Petitioner was able to view the proceedings by way of a closed one-way circuit

television monitor. She was also afforded contact with counsel through the use of headphones. At the outset of the videotape proceeding, trial counsel objected to the use of the videotape, but did not object to the Petitioner's exclusion from the courtroom.

CONCLUSIONS:

It should be noted that the United States Supreme Court decision of Coy was issued after the South Carolina Supreme Court decision of Cooper. In Cooper, the Court followed the reasoning and doctrine expressed in numerous other jurisdictions that a Defendant's right to confrontation with the witnesses against him was protected and preserved by the right of cross-examination. This concept was expressly rejected in Coy.

In Coy, the United States Supreme Court invalidated an Iowa statute permitting the placement of a physical shield between the accuser and the accused in child abuse cases. The actual procedure of the trial court in Coy allowed the use of a large screen to be placed between accused and the witness stand during the girl's testimony. The screen enabled the accused to dimly perceive the witnesses, but the witnesses could not see him at all.

In this case, Judge Pyle and defense counsel examined the child witness to ascertain the risk of trauma to the witness upon confrontation.

The Trial Judge stated his findings on the record as follows:

"He's, in my opinion, and from talking with him, he's obviously afraid of his parents. And I certainly think and I make it a factual finding, that there certainly is a potential injury to him that he would be traumatized, and certainly intimidated if his testimony were attempted to be taken in the presence of his parents." (emphasis added) (Transcript August 6, 1989, pp. 27-28.)

Pursuant to the Court's determination of potential traumatization, the witness was examined by videotape in the Family Courtroom. Petitioner's attorney, the solicitor, the witness' foster parent, and the Judge were present. The Petitioner was able to view the proceedings by way of a one-way closed circuit television monitor and could communicate with counsel through the use of headphones, but the child witness could not view Petitioner's televised picture as would occur on two-way closed circuit.

*205
#9*
A comparison of the examination procedures in Coy and this case reveal that the Petitioner in this case had no greater opportunity to confront her accusers than was given the accused in Coy.

The Craig decision, which is presently on appeal to the United States Supreme Court, is to be argued in April of 1990. Should the Supreme Court in Craig relax its rigid requirement of face to face, eye to eye confrontation of Coy and allow the possible exceptions mentioned in Justice O'Connor's concurring opinion in Coy, the

outcome of this action still would be the same as under Coy, that Petitioner had been denied of her right to confrontation, as the findings of necessity required by Craig, under proceedings imposed by Craig, are not on record.

In the case at hand, Judge Pyle, without the wisdom of Coy and Craig, interviewed the child victim to determine traumatization outside of the Petitioner's presence, and further, did not explore alternative methods of examination other than one-way closed circuit television examination. Unfortunately, neither did Petitioner's attorneys, either at the trial or appellate level, have the benefit of those cases. But, nonetheless, Petitioner's right to face to face confrontation should have been argued, protected and pursued; and Petitioner should not be denied important constitutional safeguards simply because she was tried in 1986 rather than in 1988 or 1989.

This failure to pursue those issues cannot be characterized as a professional tactical judgment as in Strickland v. Washington, 466 U.S. 668 (1984) and thereby excused.

I find that Petitioner was denied effective assistance of trial counsel in that the trial counsel consented to and did not object to the pretrial interview

outside Petitioner's presence. Petitioner, while facing serious charges, was left standing in another room while the Judge, the witness, the solicitor, defense lawyers and the witness' foster parents went into a hearing room to make a record that could profoundly affect the outcome of the trial. Petitioner had no input; she could not suggest questions to her lawyer. Her presence at the interview could have given Judge Pyle more insight as to how the child witness would actually perform on the witness stand, face to face, on the day of trial. Petitioner's exclusion from the interview was not harmless. See In the Interest of Dwayne M., a minor, S.C. 413, 339 S.E. 130 (1986); State v. Rivers, 294 S.C. 123, 287, 363 S.E. 2d 105 (1987).

I find that the Petitioner was denied effective assistance of Appellate Counsel as follows:

1. In that he failed to state as an exception and brief the issue of the denial of Petitioner's right to a face to face confrontation with the witness against her;

2. In that he failed to raise on appeal the failure of the trial court to observe procedural safeguards and make the necessary preliminary findings that would permit the child witness to testify by one-way closed circuit videotape rather than face to face or two way closed circuit.

3. In that he failed to take any other action, such as petitioning for a writ of certiorari, to preserve this issue for further review by the United States Supreme Court;

4. In that he, accepting State v. Cooper as authoritative, abandoned a viable issue of the right to confrontation, without investigating United States Supreme Court decisions on point.

The South Carolina Supreme Court, under Rule 23, affirmed Petitioner's conviction and sentence on December 8, 1987. The Coy decision was argued before the United States Supreme Court on January 13, 1988, and decided on June 29, 1988. The briefs supporting and opposing the grant of certiorari would have been filed with the U. S. Supreme Court long before the argument date. Subsequent to the S. C. Supreme Court's denial of Petitioner's appeal, appellate counsel, Mr. Joseph L. Savitz, employed by S. C. Appellate Defense, should have been aware that certiorari had been granted in Coy and that a U. S. Supreme Court decision on this identical constitutional question was imminent. Counsel's failure to seek U. S. Supreme Court review of Petitioner's case cannot be justified, and his omission, in this regard undoubtedly prejudiced the outcome of her case. Appellant counsel's role as an advocate did not end upon the rendition of the State Supreme Court decision in Cooper.

IT IS, THEREFORE, ORDERED that the verdict of guilty and the sentence imposed on the Defendant on August 26, 1986 in the Court of General Sessions for Horry County be vacated and a new trial is granted.

IT IS FURTHER ORDERED that the South Carolina Department of Corrections shall return the Petitioner to the Horry County Detention Authorities, and that the

Court of General Sessiions for Horry County shall have jurisdiction over further proceedings in this matter, including the setting of appropriate bail.

IT IS SO ORDERED.

GIVEN under my hand and seal this 5 day of April, 1990.


JAMES B. STEPHEN
PRESIDING JUDGE