

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Chester County  
William Jeffrey Young, Circuit Court Judge  
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RECEIVED

APR 28 2015

S.C. Supreme Court

EARL MALCOLM BURR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002072

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PETITION FOR WRIT OF CERTIORARI  
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ATTORNEY FOR PETITIONER

# INDEX

|                       |    |
|-----------------------|----|
| INDEX .....           | 1  |
| ISSUE PRESENTED ..... | 2  |
| STATEMENT .....       | 3  |
| ARGUMENT .....        | 5  |
| Relevant Facts .....  | 5  |
| Discussion .....      | 11 |
| CONCLUSION .....      | 16 |

ISSUE PRESENTED

Whether the PCR court erred in applying Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004), to deny PCR counsel's motion to continue the PCR hearing where the local detention center failed to provide Petitioner with his psychiatric medications during the five days preceding the hearing?

## STATEMENT

On January 23, 2012, Petitioner, Earl Malcolm Burr was indicted by the Chester County Grand Jury for felony driving under the influence causing death and hit and run involving death. Both counts arose from the same incident. App. 113 – 116.

On May 8, 2012, Burr appeared before the Honorable Brooks P. Goldsmith and entered an Alford<sup>1</sup> plea to the above offenses. Burr was represented by Mike Lifsey and the State was represented by assistant solicitor Julie Hall. App. 1. The State recommended a cap of twenty years incarceration and that the sentences run concurrent. App. 5, ll. 9-12. The court accepted Burr's plea but deferred sentencing so that Burr could be examined by a psychiatrist and the deceased victim's family could travel in from out of town. App. 18, l. 21 – 19, l. 1; App. 4, ll. 10-16; App. 19, ll. 3-13.

On May 18, 2012, the parties appeared before Judge Goldsmith for the sentencing hearing. App. 21. Judge Goldsmith sentenced Burr to concurrent sentences of twenty years incarceration on both offenses. App. 61, ll. 12-14.

On May 21, 2013, Burr filed an application for post-conviction relief.<sup>2</sup> App. 65 – 69. The State filed its Return on September 4, 2013. App. 70 – 74. On July 28, 2014, an evidentiary hearing was held before the Honorable W. Jeffrey Young. Burr was represented by Nathan J. Sheldon and the State was represented by Assistant Attorney General Croom Hunter. App. 75. At the outset of the PCR hearing, PCR counsel made a motion to continue, which was opposed by the State and denied by the PCR court. App. 79, ll. 10-23.

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<sup>1</sup> North Carolina v. Alford, 400 U.S. 25 (1970).

<sup>2</sup> Though the allegations listed on the PCR application appear to be incomplete, the State's Return and the Order of Dismissal confirm that the PCR application sent to the State and before the PCR court was the same as that included in the Appendix. Compare App. 65 with App. 71 and 106.

On September 12, 2014, Judge Young issued an Order of Dismissal, denying Burr's application for post-conviction relief and dismissing it with prejudice. App. 105 – 112. The PCR court found that Burr failed to prove his claims of ineffective assistance of counsel and involuntariness of his plea. App. 108 – 111. The court further found that all other allegations were abandoned. App. 111.

This Petition for Writ of Certiorari follows.

## ARGUMENT

The PCR court erred in applying Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004), to deny PCR counsel's motion to continue the PCR hearing where the local detention center failed to provide Petitioner with his psychiatric medications during the five days preceding the hearing.

### Relevant Facts

As will be discussed more fully *infra*, Burr told police, his attorney, and the defense investigator that he was kidnapped in Gastonia after witnessing a murder there. He was then either forced to drive under duress or not driving at all. According to Burr, after the accident, he ran out of gas, the kidnappers disappeared, and he was able to get help. App. 91, ll. 4-24.

### Alford Plea Hearing

At the plea hearing, plea counsel advised the court that Burr had never been properly diagnosed by a mental health professional but that he has some mental health problems. At the time of the plea hearing, he was taking Prozac and had also taken Ibuprofen as a result of an altercation at the jail the night before where he sustained a black eye. Plea counsel did not believe that Burr's mental health problems affected his competency or presented any defense to the alleged crime. However, the parties agreed to delay sentencing to allow completion of a mental health evaluation for purposes of mitigation. App. 4, l. 21 – App. 5, l. 8; App. 7, l. 20 – 8, l. 23.

The State gave its recitation of the facts that it maintained it would have proven at trial. App. 9, l. 22 – 14, l. 15. The solicitor proffered that at approximately 3:20 p.m. on October 6, 2011, Burr left Rock Hill after having an altercation with a tattoo artist at her home. App. 10, ll. 5-13. She would have appeared as a witness and testified that Burr appeared intoxicated and left her house only after taking a canvas that she had painted. App. 10, ll. 14-24. The solicitor alleged that Burr then proceeded down I-77, traveling in the correct lane of travel but heading opposite of his intended destination. App. 10, l. 24 – 11, l. 2; see also App. 60, ll. 3-18. The State would call

witnesses who reported an erratic driver on the interstate to authorities. App. 11, ll. 2-22. The victim was traveling in the left lane when Burr allegedly swerved and clipped the right front of the victim's vehicle, sending it into the trees on the side of the interstate. App. 11, l. 23 – 12, l. 3. The driver was pronounced dead at the scene and the passenger received only minor injuries. App. 12, ll. 3-8. Burr then allegedly left the scene. App. 12, ll. 8-16.

The State maintained that it would have presented a text message recovered from Burr's phone that said "I'm so drunk" and phone records indicating that he called his uncle, who would testify that Burr asked for directions to a gas station. App. 12, l. 17 – 13, l. 7. The State would have also called a witness who alerted authorities when he saw Burr's car abandoned on the side of the road and later found Burr at the Sharp gas station down the road from the vehicle. App. 13, ll. 10-25. Police found both Burr's shoes and the canvas taken from the tattoo artists' home in the vehicle. App. 13, ll. 17-18. The State would have introduced video footage of Burr at the Sharp station and would have called workers from the station to testify that Burr was there for approximately two hours. App. 14, ll. 1-15. Officers administered field sobriety tests approximately four hours after the accident, from which they would have testified they determined Burr was "materially and appreciably impaired." App. 14, ll. 16 -21. Burr was placed under arrest and the State would have sought admission of a subsequent blood sample taken approximately five hours after the accident that revealed a blood alcohol content of .089. App. 14, l. 22 – 15, l. 3. Lastly, the State would have presented testimony that a piece of tail light left at the scene of the accident matched Burr's vehicle. App. 15, ll. 10-15.

### ***Sentencing Hearing***

At the subsequent sentencing hearing, plea counsel stated that as he interacted with Burr it became apparent that, though competent in his opinion, Burr suffered from undiagnosed mental

illness. App. 27, ll. 10-16. Plea counsel presented a report from Burr's psychological evaluation conducted by Dr. Price, which stated that Burr suffers from bipolar disorder.<sup>3</sup> App. 27, ll. 16-20; App. 35, ll. 8-14.

### ***PCR Hearing***

At the beginning of the PCR hearing, Burr testified that he is prescribed Depakote and Demerol for bipolar disorder and paranoid schizophrenia. App. 78, ll. 9-18. He said that the last time he was given the medications was "about five days ago" because he had not received them in the county facility.<sup>4</sup> App. 78, l. 19 – 79, l. 3. Burr testified that being deprived of those medications "affects [his] ability to think and to keep up with what's real and what's not real." App. 79, ll. 4-9. PCR counsel then made a motion to continue the hearing based on Burr's testimony. App. 79, ll. 10-11. Assistant Attorney General Hunter responded that the State was ready to go forward and referred the PCR court to Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004). App. 79, ll. 13-16. Hunter averred that Council "essentially states that Mr. Burr would not need to be competent to go forward on his P.C.R." App. 79, ll. 16-18. In denying the motion to continue, the PCR court ruled: "Well, I'm listening to him right now, and **he seems lucid**. He knows. **He's answering your questions. I'm going to go ahead and proceed**. The record is – I've got the transcript and everything like that. So we'll proceed." App. 79, ll. 19-23 (emphasis added).

PCR counsel proceeded to ask Burr about his allegation of ineffective assistance of counsel. App. 79, l. 25 – 80, l. 3. Burr testified that he was original assigned assistant public defender Ross

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<sup>3</sup> Dr. Price's report was not marked as an exhibit or admitted into evidence.

<sup>4</sup> This Court can take judicial notice of the South Carolina Department of Corrections' Inmate Search Detail Report, which indicates that Burr was moved from Lieber Correctional Institution to Kirkland Correctional Institution on Thursday, July 24, 2014 and then moved from Kirkland Correctional Institution to the Chester County Detention Center on Friday, July 25, 2014. He did not appear for the PCR hearing until Monday, July 28, 2014.

Burton, but Burton would not speak to him during his four months of incarceration. Once they finally met, Burton did not do what he said he would and “went against” their discussions. Burr said that Burton was “not in any way trying to help [him].” App. 80, l. 7 – 81, l. 4. The Sixth Circuit public defender, Michael Lifsey, took over Burr’s case. Burr testified that Lifsey “made an attempt to try to help [him], but he only had about a month to do anything with this case.” App. 81, ll. 5-10. He said that the investigator did not have time to do a thorough investigation either. App. 81, l. 11 – 82, l. 11. Burr also testified that while they discussed some of his discovery, he was not given access to everything. App. 82, ll. 12-24; App. 87, l. 24 – 88, l. 2

On cross-examination, Burr testified that he did not understand exactly what plea counsel was telling him to do regarding the plea. App. 83, ll. 17-18. He further said that he did not recall anything from that day and that he was never provided with the transcript of the plea colloquy in preparation for the PCR hearing, despite requesting it. App. 83, l. 21 – 85, ll. 2-4. Burr did not recall the specifics of the sentencing hearing either, except to say that it was very traumatic listening to people speak on his behalf and on behalf of the victim. App. 87, ll. 4-23. Burr reiterated that the Lifsey took the case “too late for any of it to do any good.” App. 88, ll. 3-6.

Lifsey testified that though he could not remember the specifics, he took over as Burr’s attorney in March 2012 after both Burr and Burton requested that the case be reassigned. App. 89, ll. 9-20; App. 97, ll. 14-23. He said that their first in depth meeting was March 20, 2012. App. 89, ll. 21-23. On March 22, 2012, he obtained authorization for a private investigator, Pete Skidmore, to work on the case and later retained the services of a forensic psychologist. App. 90, ll. 2-8; App. 98, l. 11 – 99, l. 1. Lifsey said that he went over portions of discovery with Burr at the March 20, 2012 meeting and all of the discovery eventually. App. 90, l. 22 – 91, l. 2. Skidmore also met with Burr several times, even without Lifsey present. App. 100, ll. 8-13.

He said that Burr's version of the incident was that he was kidnapped in Gastonia after witnessing a murder there. Lifsey could not remember if Burr said that he was driving under duress or not driving at all. After the accident, he ran out of gas, the kidnappers disappeared, and he was able to get help. App. 91, ll. 4-24. This version of events was consistent with what Burr told the investigators when he was arrested. App. 91, ll. 16-17. Skidmore looked into missing persons and homicides in the Gaston County area during the relevant time period but found none. App. 91, l. 18 – 92, l. 5; App. 100, ll. 14-25. Lifsey said that Skidmore never indicated that he needed more time to investigate and he thought he had sufficient time to complete the necessary investigation. App. 92, ll. 6-22; App. 101, l. 4. Skidmore confirmed Lifsey's belief that Burr needed a psychological evaluation. App. 92, l. 23 – 93, l. 8.

Lifsey testified that he reviewed with Burr the elements of and potential sentences associated with the alleged offenses and his constitutional rights. App. 93, ll. 9-14; App. 94, ll. 14-16. He said that he would have no problem trying "to sell" Burr's "story" to a jury, but he could not find anything to support that version of events. App. 93, ll. 15-22. Additionally, he said that some of Burr's interactions earlier that day contradicted Burr's explanation. App. 93, l. 22 – 94, l. 3. Lifsey testified that he had Burr mentally evaluated prior to the plea and that he was determined to be competent.<sup>5</sup> App. 94, ll. 4-13. He said that Burr appeared to understand what was going on at the plea hearing and it was his decision to enter an Alford plea. App. 94, ll. 17-25. Lifsey said that he reviewed the psychological evaluation report with Burr and explained how his undiagnosed and improperly treated mental health problems would be relevant to mitigation. App. 99, ll. 7-23.

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<sup>5</sup> The plea and sentencing transcripts reflect that the evaluation was conducted after the plea but prior to sentencing. App. 4, ll. 10-16; App. 19, ll. 3-13; App. 27, ll. 16-22.

***Order of Dismissal***

In the Order of Dismissal, the PCR court wrote that “[i]mmediately prior to the post-conviction relief hearing, Applicant moved for a continuance based upon the assertion that Applicant had not taken his medicine in six (6) days.” The court “denied Applicant’s request pursuant to Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782, 783 (2004) (holding a petitioner’s mental incompetency does not impede his ability to assert his meritorious PCR claims).” Additionally, the court observed Burr “during the PCR hearing” and found “no deficiencies” in his “mental competency.” App. 106.

## Discussion

The PCR court ruled that it denied Burr's request for a continuance pursuant to Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004). However, the court's reliance on this case was misplaced. Burr was not seeking a stay of the PCR proceedings to regain competency, but rather a brief continuance due to the failure of the local detention center to administer his prescribed psychotropic medications during the five days preceding his PCR hearing. Further, even if Council was applicable to Burr's case, the PCR court failed to conduct the requisite analysis to make a finding pursuant to Council.

In Council, the petitioner filed a PCR application, a *pro se* motion to waive further PCR proceedings and be executed, and an amended PCR application and motion to indefinitely stay PCR proceedings through counsel. 359 S.C. at 123, 597 S.E.2d at 783-84. The PCR court ordered a competency evaluation based on Council's "clear" mental instability.<sup>6</sup> Id. Council was diagnosed with undifferentiated schizophrenia, after which "[t]he PCR judge found respondent to be incompetent and granted respondent's motion to indefinitely stay the PCR proceedings until respondent regained his competency." Id.

This Court granted certiorari in Council to determine whether a prisoner must be competent to collaterally challenge his conviction. Id. at 124, 597 S.E.2d at 784. Because a PCR action is civil, this Court found that the constitutional protections that forbid a criminal trial of a mentally incompetent defendant do not apply. Id. at 124, 597 S.E.2d at 784-85. Additionally, there was no state precedent requiring that PCR proceedings for a mentally

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<sup>6</sup> At a hearing on the request to waive PCR, Council testified "that he believed the murder victim was still alive and that he was part of a cult responsible for keeping the earth spinning on its axis." 359 S.C. 120, 123 n.1, 597 S.E.2d 782, 784 n.1.

incompetent petitioner must be stayed. Id. at 125-27, 597 S.E.2d at 785. Recognizing that South Carolina law did not provide an approach for determining whether an incompetent petitioner's PCR hearing should proceed, this Court looked to other jurisdictions for guidance. Id. at 128-29, 597 S.E.2d at 786-87 (citing State v. Debra A.E., 523 N.W.2d 727, 735-736 (Wis. 1994) and Commonwealth v. Haag, 809 A.2d 271 (Pa. 2002)). This Court adopted the Wisconsin approach, under which the default rule is that PCR hearings must proceed even though a petitioner is incompetent. Id. at 130, 597 S.E.2d at 787. However, "[f]or issues requiring the petitioner's competence to assist his PCR counsel, such as a fact-based challenge to his defense counsel's conduct at trial, the PCR judge may grant a continuance, staying the review of those issues until petitioner regains his competence." Id.

Council's PCR application included the following allegations: (a) Denial of effective assistance of counsel because counsel requested mitochondrial DNA testing prior to trial but failed to retain their own expert to assist counsel, resulting in admission of this type of evidence without sufficient guarantee that the underlying science was reliable; (b) Denial of effective assistance of counsel during voir dire and jury selection; (c) Denial of effective assistance of counsel during the sentencing phase of his trial; and (d) Unconstitutionality of execution of applicant because he is incompetent. Council, 359 S.C. at 127 n.4, 597 S.E.2d at 785 n.4. This Court found that the collateral attack on the admission of the mitochondrial DNA evidence and any problems with voir dire would be based exclusively on the law of evidence and the trial record. Id. at 127-28, 597 S.E.2d at 786. Further, the incompetency issue requires reliance on expert testimony, not that of the applicant. Id. at 128, 597 S.E.2d at 786. While the allegation related to the quality and type of mitigation evidence might theoretically require an applicant's assistance, "this form of testimony generally comes from family and social history records, from

mental health records, and from experts qualified to opine that respondent is mentally ill - the very type of expert testimony that *was* presented at the hearing below.” Id. (emphasis in original). Therefore, this Court found that “the trial judge erred in finding that the issues respondent presented in his PCR application were ‘all extraordinarily fact intensive that required respondent’s assistance, which he was unable to provide given his incompetent state.’” Id. at 127, 597 S.E.2d at 785-86.

In Ferguson v. State, this Court noted that its decision in Council addressed “whether PCR proceedings of a mentally incompetent applicant should be indefinitely **stayed** until such time as the applicant regained competency.” 382 S.C. 615, 617, 677 S.E.2d 600, 601 (2009) (emphasis in original). Ferguson explained that while the holding in Council was that “trial proceedings should not be delayed due to the applicant’s incompetency,” the basis for that holding “was that the issues on PCR were not ‘extraordinarily fact intensive’ and did not require Council’s assistance.” Id. Ferguson also reemphasized the important point that “if, at a future date, the petitioner regains his competency and discovers that at his original PCR hearing, his incompetency prevented his ability to assist his counsel *on a fact-based claim of ineffective assistance of counsel*, he may then raise that claim in a subsequent proceeding.” Id. (quoting Council, 359 S.C. at 129, 597 S.E.2d at 787) (emphasis added).

In the present case, Burr testified that he was prescribed Depakote and Demerol for bipolar disorder and paranoid schizophrenia. App. 78, ll. 9-18. However, the last time he received his medications was approximately five days before the PCR hearing, as he had not received either of his medications in the county facility. App. 78, l. 19 – 79, l. 3. Burr testified that being deprived of his medications interfered with his ability to discern what is real and what is not. App. 79, ll. 4-9. Further, it is clear from the sentencing transcript that at the time of the plea, Burr was suffering from

undiagnosed and untreated mental illness. App. 27, ll. 10-22; App. 35, ll. 8-14. It is not clear when Burr began receiving medications for his illnesses. However, not taking his medication lends credence to Burr's repeated testimony that he did not recall portions of the guilty plea and sentencing hearings. App. 83, l. 21 – 85, l. 4; App. 86, l. 16-21; App. 87, l. 8-23. Burr's lack of independent recollection and the failure to provide him with the transcripts prior to the hearing were compounded by the deprivation of his psychotropic medications.

The PCR court misinterpreted Council as proscribing any continuance of a PCR proceeding for any mental health condition of the applicant. Council dealt with the very specific issue of competency and whether the applicant's testimony was necessary to the presentation of his PCR allegations, i.e. whether the allegations were fact-intensive. Here, PCR counsel merely requested a brief continuance so that Burr could receive his medications. Instead, the PCR court passively thought Burr "seem[ed] lucid" and ordered him to proceed with the PCR hearing that day. Had the PCR court's denial been merely an exercise of discretion, perhaps this Court would be constrained to defer to its decision. But, this Court, respectfully, should not disregard the PCR court's misapplication of Council in support of its denial of the motion for continuance.

Assuming *arguendo* that Council does apply to Burr's case, the PCR court did not conduct the requisite analysis to make a finding pursuant to Council. The PCR court erred in failing to consider the nature of the allegations contained in the PCR application in making its decision regarding the requested continuance. The pivotal factor in Council was the nature of the allegations raised in Council's PCR application, all which could be supported by either a review of the transcript or testimony and records provided by witnesses other than Council himself. 359 S.C. at 127-28, 597 S.E.2d at 786. In the present case, the PCR judge merely said that Burr "seems lucid" and noted that the court had a copy of the transcript. App. 79, ll. 19-23. However, unlike Council,

the allegations of ineffective assistance of counsel and involuntariness of Burr's plea were both extremely fact-intensive such that the court could not rely on the record alone. Ineffective assistance of counsel was even the example used in Council as an exception to the general rule of requiring a PCR hearing to proceed despite the petitioner's incompetence. Id. at 129, 597 S.E.2d at 787. Thus, Burr's testimony was essential to prove his allegations.<sup>7</sup>

Burr is accordingly entitled to have his case remanded for a new PCR hearing, with instructions that the same psychotropic medications prescribed and provided to him at the Department of Corrections be provided to him at the local detention center while he awaits the new hearing.

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<sup>7</sup> The State may argue that Burr's testimony at the PCR hearing itself reflects that he was competent. However, the fact that he provided some testimony at the hearing does not indicate that he was fully competent to assist his PCR counsel with the fact-based challenges raised in his application. Burr repeatedly stated that he could not remember the majority of the plea and sentencing hearings. Moreover, he was prescribed medications that he testified were necessary for him to function at the most rational level that his mental conditions allow. Thus, regardless of whether the PCR Court erred in applying Council in its decision on the motion to continue or erred in failing to consider the nature of the allegations in its application of Council, Burr should not have been required to testify without the benefit of his prescribed psychotropic medications. Burr's ability to speak and ramble without his medications does not affect this analysis.

CONCLUSION

For the reasons set forth herein, Petitioner Earl Malcolm Burr respectfully requests that this Court grant certiorari to allow full briefing on this issue.

Respectfully submitted,

A handwritten signature in cursive script that reads "Laura R. Baer". The signature is written in black ink and is positioned above a horizontal line.

Laura R. Baer  
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of April, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Chester County

William Jeffrey Young, Circuit Court Judge

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EARL MALCOLM BURR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

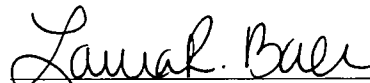
APPELLATE CASE NO. 2014-002072

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on J. Croom Hunter, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Earl Malcolm, II Burr, #350912, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 28th day of April, 2015.



Laura R. Baer  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day  
of April, 2015.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 24, 2021.