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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable Robert E. Hood, Circuit Court Judge

ISAAC STARKE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002284

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether petitioner's guilty plea was unknowing and involuntary because plea counsel, who was operating under a conflict of interest, told petitioner he would only represent him if he pled guilty and would not take his case to trial?

STATEMENT

On March 11, 2013, an Aiken County grand jury indicted petitioner for four counts of third degree CSC with a minor and one count of second degree CSC with a minor. App. 3, l. 5 – 4, l. 8. App. 193. On May 13, petitioner pled guilty to one count of second degree CSC with a minor and one count of third degree CSC with a minor before the Honorable Doyet A. Early, III. App. 1. Ashley Agnew Hammack represented the State. App. 1. George A. Anderson represented petitioner. App. 1. Judge Early deferred sentencing until May 15, 2013, and sentenced petitioner to concurrent terms of fifteen years' imprisonment on both charges. App. 30, l. 5 – 31, l. 22. Petitioner did not appeal.

On April 7, 2014, petitioner filed a PCR application. App. 33. On September 20, 2016, a hearing was held before the Honorable Robert E. Hood. App. 61. J. Falkner Wilkes represented petitioner. App. 61. Julie A. Coleman represented the State. App. 61. On November 7, 2016, Judge Hood denied petitioner's application. App. 180. This petition follows.

ARGUMENT

Petitioner's guilty plea was unknowing and involuntary because plea counsel, who was operating under a conflict of interest, told petitioner he would only represent him if he pled guilty and would not take his case to trial.

Factual and Procedural Background

The State charged petitioner with molesting his daughter. App. 3, l. 3 – 4, l. 23. The solicitor claimed that petitioner's wife was never investigated, much less charged, but stated that she "was extremely non-cooperative with law enforcement" and "refused to meet with the solicitor's office or talk with us at any point." App. 138, l. 14 – 140, l. 5. It seems very likely that petitioner's wife knew about the alleged abuse before it was reported to law enforcement. App. 28, ll. 14 – 20. At the guilty plea, plea counsel told Judge Early:

> This is a very religious-oriented family and when these circumstances arose and became known to the family, there were some persons who tried to rectify some things moving this man out of the marital home and into a secondary place to try to sort of keep things together and there are several people here. One would like to speak from the church.

App. 28, ll. 14 – 20. Petitioner was in jail almost two hundred days before his plea. App. 16, ll. 8 – 14. A psychologist who allegedly evaluated petitioner for competency told Judge Early that he and plea counsel "didn't feel like it was appropriate to release him on bail. . . ." App. 20, ll. 19 – 20.

This testimony at the plea hearing corroborates petitioner's testimony at the plea hearing about the family's reaction to the abuse allegations. App. 116, l. 5 -117, l. 16. Appellant testified, "It was completely settled five months earlier with that pastor back there. I moved across town and stayed out of the home five months and she's the one that asked me to move back home." App. 116, ll. 5 – 17. Appellant stated that he bought a travel trailer and lived

across the street from his house. App. 116, ll. 18 – 24. He would only go to his house when his daughter was not home. App. 116, l. 18 – 117, l. 1. Appellant testified that his attorney "wouldn't let me come to court because **they said they'd put my wife in prison for just as long** because my wife told me at the end, 'Why don't you just have sex with her.' I said, 'Are you crazy. I love my daughter.'" App. 116, ll. 5 – 17 (emphasis added).

Plea counsel admitted that he represented both appellant and his wife at the same time. App. 157, ll. 10 – 12. He represented petitioner in the criminal charges and claimed he only represented the wife in the DSS action concerning the children. App. 157, ll. 10 – 24. Plea counsel testified no conflict of interest existed because petitioner and his wife's goals were aligned. App. 157, ll. 10 – 24.

Plea counsel had known petitioner's family "for decades." App. 16, ll. 2 – 7. Petitioner's mother, who plea counsel described as "a very well-known lady" in Aiken County contacted him to represent her son and he was ultimately retained. App. 151, l. 14 – 152, l. 24. Plea counsel had petitioner evaluated by a psychologist, Dr. Joe Holt ("Holt"). App. 154, ll. 4 – 8. App. 18, l. 16 – 23, l. 17. The daughter's guardian ad litem sent a letter to the court indicating that Dr. Holt was treating petitioner's daughter and wife in "joint therapy sessions" **before** petitioner's guilty plea. App. 176-77.

Amazingly, plea counsel testified at the PCR hearing that he told petitioner he would only represent him if he pled guilty. App. 152, ll. 9 – 24. Plea counsel said:

> And of course he was accused of sexually molesting the girl over a period of a couple of years. And, the essence of those discussions were that once the Defendant had admitted that—the circumstances and the facts. **I said, "Well, fine. We're headed to let the Court know that. In other words, offer a plea to the Court that I'll represent you. If you want me to try this case before a jury based upon the information you've already given me, I will not participate in that. I don't handle those kinds of cases on a trial basis."**

Q. Did you discuss any defenses with the Applicant?

A. No.

App. 152, l. 13 – 153, l. 2 (emphasis added).

At the plea hearing, petitioner hesitated when Judge Early asked him if he was guilty. App. 13, ll. 8 – 16. He told the court, "I didn't stick my finger in her vagina, Your Honor."[1] App. 13, ll. 15 – 16. Digital penetration was the basis of the second degree CSC charge. App. 12, l. 23 – 13, l. 6. After conferring with plea counsel, petitioner then said he was guilty. App. 13, l. 17 – 15, l. 12.

Plea counsel had no independent recollection of what he said to petitioner during this discussion. App. 159, ll. 6 – 22. He guessed he told petitioner that "If you're offering a plea and you're guilty of the charges, then you need to indicate that to the judge." App. 159, ll. 20 – 22. Petitioner testified that he was led to believe he would receive a four-year sentence and plea counsel urged him during this discussion, "Get your deal. Get your deal. Get your four-year deal. Remember your deal." App. 163, l. 10 – 164, l. 2. Plea counsel denied leading petitioner to believe he would receive a four-year sentence. App. 158, ll. 5 – 22.

Petitioner is severely mentally ill. App. 19, l. 21 – 22, l. 17. He has bipolar disorder and the psychologist told the plea judge he had been in a psychotic state. App. 19, l. 21 – 22, l. 17. Petitioner's testimony at the PCR hearing is rambling and chaotic and Judge Hood repeatedly had to calm him down so that the court reporter could take his testimony. App. 10, l. 11 – 71, l. 23. Even the solicitor noted petitioner's strange behavior at the PCR hearing, telling the court,

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[1] Petitioner also testified at the PCR hearing that police officers refused his multiple requests for counsel before they took his recorded statement, telling them that if he had money he could call a lawyer and that if he was a man of faith, he would confess. App. 64, l. 2 – 97, l. 22. Petitioner told plea counsel about the refusal to honor his request for counsel and plea counsel told him "That don't mean nothing. Only thing they're going to do is go back and re-arrest you. That don't mean nothing. You're a child molester." App. 98, ll. 1 – 9.

"[Petitioner] acted extremely different from his demeanor today, both in the—from his tone of voice in the recording with his interview with law enforcement but also at the plea." App. 137, ll. 14 – 19. Jail records indicate petitioner was taking Risperdal and Zoloft at the time of his plea. App. 169. Despite petitioner's limitations, he testified at the PCR hearing that he did not want to plead guilty because he did not digitally penetrate his daughter and wanted a new trial. App. 100, l. 7 – 105, l. 16. When told he could face greater punishment, petitioner said "That's just a risk I got to take." App. 105, ll. 11 – 12.

Discussion

The PCR court erred in denying relief because plea counsel's conflict of interest and coercion rendered petitioner's guilty plea unknowing and involuntary. Boykin v. Alabama, 395 U.S. 238 (1969). Plea counsel's acceptance of a fee only if petitioner agreed to plead guilty amounts to a fee contingent on a particular outcome, which is not allowed in criminal cases in South Carolina. S.C. R. Prof. Conduct 1.5(d)(2). Plea counsel unequivocally testified at the PCR hearing that he would only represent petitioner if he pled guilty. App. 152, ll. 9 – 24. Not only was this a denial of petitioner's right to the effective assistance of counsel, it effectively denied petitioner his right to a jury trial. U.S. Const. amend. VI.

"An applicant may attack the voluntary and intelligent character of a guilty plea entered on the advice of counsel only by demonstrating that counsel's representation was below an objective standard of reasonableness." Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). An applicant proves prejudice by showing that counsel's constitutionally deficient performance affected the outcome of the plea. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Plea counsel here performed deficiently by coercing petitioner to plead guilty from the outset of his representation. He candidly admitted telling petitioner he would only represent him

at a guilty plea. He also brazenly admitted that he never discussed any possible defenses with Petitioner. Petitioner's initial denial of a key element of the crime at the plea hearing shows the effect of the coercion.

Petitioner was entitled under the Sixth Amendment to advice from conflict-free counsel. Cuyler v. Sullivan, 466 U.S. 335 (1980); Gonzales v. State, 419 S.C. 2, 9, 795 S.E.2d 835, 839 (2017). It is clear from sources in the record (other than petitioner) that it is highly likely the wife knew about the abuse allegations before it was reported to law enforcement. She could have been charged as an accessory, with aiding or abetting, or with unlawful conduct toward a child. It is undisputed that she was a defendant in a DSS action, so the notion that she was not being investigated or no conflict existed because she was not formally charged with a crime is manifestly incorrect. The solicitor's assertion at PCR that plea counsel had "no capacity" to represent the wife because she had no charges is absurd. Targets and potential targets of investigations routinely hire attorneys. At the very least, the wife was a witness. Furthermore, the guardian ad litem's letter shows that the psychologist hired by plea counsel for petitioner was **treating the wife and the alleged victim** in the months before petitioner's plea.

Under Gonzales, it does not matter whether plea counsel recognized the conflict of interest. Gonzales at 11-12, 795 S.E.2d at 840. The attorney in Gonzales had a conflict of interest when he simultaneously represented the defendant and his mother's boyfriend on drug charges. Id. The failure to pursue cooperation for the defendant in Gonzales to the benefit of the boyfriend led this Court to reverse. Id. Here, plea counsel had an incentive to protect the wife at the expense of petitioner. Had petitioner gone to trial, it ran the risk of implicating the wife and would certainly have caused her to become a witness. The conflict caused an unacceptable burden on the representation and led to petitioner being coerced to plead guilty. In Gonzales, the

defendant was prejudiced because of the attorney's "failure to advise petitioner as to favorable options he may have otherwise exercised." Id. at 12, 795 S.E.2d at 840. Here, plea counsel admitted at the PCR hearing that he never advised petitioner about any possible defenses and foreclosed all possibility of a trial from the beginning of the representation. Petitioner "need not demonstrate prejudice if there is an actual conflict of interest." Lomax v. State, 379 S.C. 93, 102, 665 S.E.2d 164, 168 (2008) (holding plea counsel ineffective for simultaneously representing a husband and wife). See also Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001) (finding an actual conflict of interest arising from simultaneous representation of husband and wife).

The State may argue that the issue presented is not preserved for appeal. The issue is preserved because the coercion and the conflict of interest were squarely placed before the PCR judge at the hearing. Even suffering from a severe mental illness, petitioner himself was able to express the issue in a succinct and compelling fashion:

> I believe it harmed the defense of my case because the interest of me going to court in an open court of law and testifying would have incriminated my then wife. And that is precisely the reason he told me he could not take it to open court. **And he also said that up here on the stand.** He said if they was going to take it the court I didn't want the case at all but if it was a plea I'd take the case.

App. 163, ll. 1 – 9 (emphasis added).

The PCR court's order cites petitioner and plea counsel's testimony about conflicts of interest. App. 182, 185. It cites the solicitor's testimony that petitioner's wife was never charged. App. 184. The PCR court ruled that petitioner "failed to meet his burden in proving Plea Counsel was ineffective **in any regard**." App. 187. The PCR court's Order addresses ineffective assistance of counsel, involuntary guilty plea and finds petitioner did not show prejudice. As part of its holding on involuntary guilty plea, the PCR court stated it found "very

credible" plea counsel's testimony that "he advised Applicant of all facts and risks of pleading guilty" despite plea counsel's glaring admission that he never discussed any defenses with petitioner.

If the State argues this issue is not preserved and this Court accepts the State's argument, then this Court should remand this case to the PCR court for further proceedings. In Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), this Court held that the following general denial does not constitute a sufficient ruling on any issues and "**should not be included in a PCR order unless there are allegations contained in the application and/or mentioned at the PCR hearing about which absolutely no evidence is presented**:"

> As to any allegations raised in the application or at the hearing not specifically addressed by this Order, this Court finds that the applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds that the applicant failed to meet his burden of proof regarding them. Therefore, any and all allegations not specifically addressed in this Order are hereby denied and dismissed.

Id. at 409, 653 S.E.2d at 266. The PCR court's Order in this case contained the following:

> As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

App. 191. For all intents and purposes, these two paragraphs are identical and its inclusion violated Marlar because petitioner presented substantial evidence about the conflict of interest.

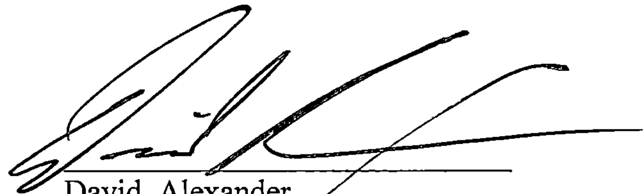
The Marlar Court expressed its frustration with PCR counsel on both sides for not preparing adequate proposed orders that addressed all issues. Id. The Court noted that in the past it had remanded cases, but this practice did not "accomplish[] the Court's goal." Id. The Court then expressed its hope that after Marlar, PCR counsel would file Rule 59(e) motions when proposed orders were inadequate. Id.

Ten years after Marlar, important, obvious issues are still not being fully addressed in proposed orders. By limiting remands, Marlar has had the opposite effect than what the Court intended. Without the possibility of a remand and the increased workload a remand would entail, Marlar has unfortunately created less incentive to ensure proposed orders are correct. Without the possibility of remands, the prevailing party asked by the PCR judge to draft the order has no incentive to specifically address potentially winning arguments by the other side. A flexible approach that allows for remands where the issues are clearly raised by the evidence would remedy Marlar's current overly strict interpretation as urged by the State.

While the PCR court in this case did address the conflict of interest of issue, to the extent the State invokes Marlar to claim it is not preserved, then this Court should revisit Marlar and its overly harsh rule. Here, it would be inequitable to allow the State to benefit from an order that it drafted which mentions the conflict of interest issue and likely led PCR counsel to conclude no Rule 59 motion was required and then invoke Rule 59 on appeal to deny petitioner his "bite at the apple." The legal issue raised was presented by the evidence at the hearing, the PCR court discussed the evidence in the Order, and finding it unpreserved without a remand would unjustly benefit the State and deprive petitioner of his right to a fair adjudication of his claims.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari, order further briefing, and reverse petitioner's convictions. Alternatively, this Court should remand the case to the PCR court to address petitioner's claims.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of June, 2017.

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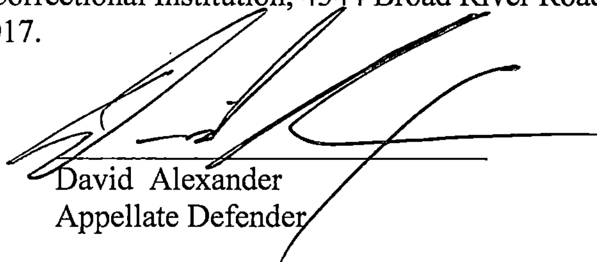
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Isaac Starke, #355498, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 16th day of June, 2017.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 16th day of June, 2017.

_______________ (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023