STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Supreme Court County

Honorable Robert E. Hood, Circuit Court Judge

ISAAC STARKE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-002284

BRIEF OF PETITIONER

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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. On May 2, 2018, this Court granted certiorari and this brief of petitioner follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue before the Court. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). The Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. The Court reviews questions of law without deference to trial courts. Id. See also Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

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.

Introduction

The petition for certiorari in this case was filed approximately one month before this Court decided Mangal v. State, 421 S.C. 85, 805 S.E.2d 568 (2017) (opinion originally filed July 19, 2017). The pre-Mangal petition for certiorari asked this Court to revisit its holding in Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007) which addressed Rule 59(e) motions and the all-too-common failure of PCR orders not addressing all claims presented. Mangal largely reaffirmed this Court's decision in Marlar. After Mangal, petitioner acknowledges that a significant question exists regarding whether this Court can reach the merits of the issue presented. However, unlike Mangal, the issue presented here was the subject of significant testimony at the PCR hearing and exhibits presented by petitioner. Mangal also realized that where a substantial claim is presented, courts must be flexible in excusing procedural default. See Mangal at 99-100, 805 S.E.2d at 575-76. Petitioner Isaac Starke's Sixth Amendment claim—that his lawyer operated under a conflict of interest—is one of these substantial claims that, in the interests of justice, require excusal of any procedural default.

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 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 PCR 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 on the criminal charges and a DSS action concerning the children and claimed he only represented the wife in the DSS action. 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. PCR counsel moved the GAL's letter into evidence at the PCR hearing. App. 90, l. 11 – 91, l. 9.

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.

Issue Preservation and *Mangal*

The conflict of interest issue in petitioner's case is not the subject of a separate, specific heading in the "Findings of Fact and Conclusions of Law" section of the PCR court's Order, but it is discussed within the factual summary. App. 181-191. This Findings and Conclusions section of the Order contains four headings: (1) Ineffective Assistance of Counsel, (2) Involuntary Guilty Plea, (3) Brady Violation, and (4) All Other Allegations. App. 186-191. The first section, "Ineffective Assistance of Counsel," begins, "Applicant alleges Counsel was ineffective in his advice surrounding his guilty plea." App. 186. After setting forth broad statements of law and citations, the PCR court stated that petitioner "failed to meet his burden in proving Plea Counsel was ineffective in any regard." App. 187. The court also found that "Plea Counsel properly relayed the State's plea negotiations and went over the discovery with Applicant, as well as fully explained the possible outcomes in sentencing." App. 187. The second section, "Involuntary Guilty Plea," discusses whether "Plea Counsel misled him as to the sentence he would receive in exchange for his guilty plea." App. 188. The PCR court found "very credible" plea counsel's "testimony that he advised Applicant of all facts and risks of pleading guilty, including the potential length of his sentence. App. 189. The third section discusses an alleged Brady violation related to the guardian ad litem's letter. App. 189-191.

None of these sections make any findings or conclusions regarding plea counsel's conflict of interest. The conflict issue is discussed in the PCR court's "Summary of Relevant Testimony Presented." App. 181-85. In its summary of petitioner's testimony, the court wrote:

> Applicant testified that Plea Counsel was supportive of him at first, but then he told him that he was a child molester and he could not take him to open court because he was guilty. He stated that Plea Counsel told him that his wife would be arrested and his daughter would be taken away from him if he did not pay Plea Counsel money. Applicant testified that Plea Counsel represented him and

> his wife simultaneously on their criminal charges and in their DSS case in the Family Court **and that this was clearly a conflict of interest.**

App. 182 (emphasis added). The court discussed the GAL letter. App. 183. The court noted the solicitor's testimony that petitioner's wife was never charged. App. 184. In its summary of plea counsel's testimony, the PCR court wrote:

> Plea Counsel testified that he represented Applicant and his wife in Family Court, **but it did not create any conflict of interest** because they were both aligned in their goals at that time. He stated that he never represented Applicant's wife on criminal charges.

App. 185 (emphasis added). Petitioner did not file a motion asking the PCR court to make a specific legal ruling pursuant to Rule 59(e), SCRCP.

In Mangal, the PCR court's order did not address an issue related to improper bolstering in a child sexual abuse case. Mangal at 90-91, 805 S.E.2d at 570-71. PCR counsel filed a Rule 59(e) motion asking the court to address it, but the PCR court refused. Id. The PCR court ruled the ground was not presented in the application, an amendment, or through testimony. Id.

The Court of Appeals ruled that the PCR court erred in not ruling on the improper bolstering issue because it was presented to the PCR court. Id. at 91-92, 805 S.E.2d at 571. This Court reversed and upheld the PCR court's refusal to rule on the issue and applied an abuse of discretion standard of review. Id. at 92-96, 805 S.E.2d at 571-73.

The Mangal Court reviewed the PCR court's decision that the issue had not been properly presented. Id. The issue was whether Mangal had presented the improper bolstering issue to the extent that the PCR judge improperly refused to rule on it. Id. Here, the PCR judge never refused to rule on the issue presented because PCR counsel did not file a Rule 59(e) motion. The PCR judge in Mangal was given the chance to reach the merits, but found it procedurally barred.

This Court looked at several stages of the case to determine whether the PCR judge properly refused to rule on the improper bolstering issue. Id. First, the Court noted that the PCR application did not mention improper bolstering and no amendment was filed. Id. Petitioner here concedes that his PCR application does not mention the conflict of interest issue. App. 35.

The Mangal Court then looked to see whether counsel mentioned the improper bolstering issue at the beginning of the hearing or in argument at the end of the hearing. Mangal at 92-93, 805 S.E.2d at 571-72. The Court found no mention of additional claims at the onset of the hearing and found the argument at the end of the case insufficient for lack of specificity. Id. The Court also found that when Mangal questioned trial counsel about improper bolstering, he failed to inform the PCR court he was making a legal claim of ineffective assistance on this ground. Id. Here, PCR counsel made no opening argument nor any closing argument. App. 65, l. 8 – 66, l. 23. App, 164, ll. 19 – 20.

The Mangal Court finally looked to the presentation of the evidence at the PCR hearing to determine whether the issue had been fairly presented and concluded that it had not. Mangal at 93, 805 S.E.2d at 572. The presentation during the hearing consisted only of three points, one of which PCR counsel conceded was a proper question to the expert. Id.

On this point—the presentation of evidence during the hearing—petitioner's case differs from Mangal. Substantial evidence was presented about the conflict of interest. At the very beginning of the substance of Starke's testimony, he explained that plea counsel could not allow him to go to trial, his wife would go to prison, and his daughter would go to "reformatory" unless he paid $7,500.00; $5,500.00; and $3,500.00 to represent all of them simultaneously. App. 69, l. 16 – 70, l. 10. Starke said plea counsel "represented all three of us at the same time and then he told me I had a deal." App. 70, ll. 11 – 14.

Judge Hood then told Starke to slow down for the benefit of the court reporter. App. 70, l. 15 – 71, l. 15. The court told him to take a deep breath, get a drink of water and then reminded him that he was "talking about Mr. Anderson's representation and that he ended up representing you, and your wife, and your daughter." App. 71, ll. 12 – 19. PCR counsel then marked and introduced his first exhibit that was an unsigned consent order from the DSS action asking the family court to relieve plea counsel as the attorney for both Starke and his wife. App. 72, l. 2 – 74, l. 2. App. 167. PCR counsel asked whether plea counsel was meeting with both Starke and his wife during this period. App. 74, l. 4 – 75, l. 7. Starke again testified that plea counsel represented all of them simultaneously and that the judge asked, "'Don't you think this is a conflict of interest.'" App. 74, l. 24 – 75, l. 7. PCR counsel asked Starke when the simultaneous representation began and Starke's answer indicated it began immediately and plea counsel told him he had to represent his wife or else she would go to prison. App. 75, l. 19 – 76, l. 6. Starke then testified that his attorney told him that "'Child molesters don't get to go to court. You have to just go to prison,'" and told him he needed to tell the judge he was guilty and that he was sorry. App. 77, ll. 2 – 9.

Starke then testified about the involvement of Dr. Holt. App. 77, l. 10 – 80, l. 21. Plea counsel and Dr. Holt told Starke that they had met with the prosecution and negotiated a four-year plea deal.[2] App. 77, l. 10 – 80, l. 21. The testimony then moved into the plea hearing and Starke's mental health. App. 80, l. 22 – 86, l. 13. Starke again got off track, Judge Hood calmed him down, and PCR counsel resumed his examination by introducing "billing statements Mr. Anderson sent you for representing Ms. Starke and yourself." App. 87, l. 1 – 89, l. 4. App. 170-75. The billing statements are addressed to Beverly Starke and petitioner. App. 170-75. The

[2] The solicitor confirmed she met with plea counsel and Dr. Holt. App. 133, ll. 6 – 9.

bills contain entries that demonstrate that Beverly Starke was also plea counsel's client. App 170-75. An entry on August 8, 2013, shows correspondent to the plural "clients." App. 171. An entry on June 3, 2013, shows correspondence "To client (B. Starke)." App. 172. Starke testified again about plea counsel's simultaneous representation. App. 87, l. 18 – 88, l. 22.

After a short break, PCR counsel introduced the GAL letter. App. 90, l. 3 – 91, l. 6. PCR counsel's questions are directed toward whether Starke ever saw the GAL letter and whether he would have pled guilty had he seen it. App. 91, l. 3 – 93, l. 6. After discussing the circumstances surrounding petitioner's statement to the police and plea counsel telling him that its admissibility did not matter because "all they would do is re-arrest" him, PCR counsel asked a question attempting to sum up the examination. App. 93, l. 19 – 98, l. 25. The final part of PCR counsel's question was, "and you talked about the conflict between Mr. Anderson's representation of you, your wife, and maybe your children in the DSS matter and criminal matters. Is there any issue that I have missed or overlooked?" App. 98, ll. 20 – 25. Near the end of the direct-examination, PCR counsel described the billing statements from plea counsel as "the documents that I introduced and I actually introduced some of the receipts to show that he represented both of you." App. 110, l. 25 – 111, l. 3. Starke replied, "Absolutely. Conflict of interest." App. 111, l. 4.

The State called the solicitor to testify about whether a four-year plea deal was offered and she denied any such deal existed. App. 131, l. 19 – 138, l. 5. At the end of the solicitor's direct-examination, the State asked two questions related to the conflict of interest issue. App. 139, l. 19 – 140, l. 5. The State first confirmed that petitioner's wife was not investigated. App. 139, ll. 19 – 24. The State then asked, "So do you know if trial counsel, George Anderson, was representing both the Defendant and his wife in any cases involved with this charge?" App. 139,

l. 25 – 140, l. 3. The solicitor replied, "There was no capacity for him to represent the Defendant's wife because she had no charges." App. 140, ll. 4 – 5. The State then ended its examination of the solicitor. App. 140, l. 6. PCR counsel then asked whether the solicitor was aware of plea counsel representing Starke and his wife in family court and she answered no. App. 140, ll. 11 – 14.

The next day, the State called plea counsel. App. 147, l. 1 – 150, l. 24. The State's last question on direct-examination was whether plea counsel represented petitioner's wife "on criminal charges related to this matter." App. 156, ll. 16 – 17. Plea counsel responded that he represented both petitioner and his wife "in the family court." App. 156, l. 18 – 157, l. 4. PCR counsel began his cross-examination by asking, "Mr. Anderson, you say you were representing the wife and Mr. Starke at the same time, correct?" App. 157, ll. 10 – 12. Plea counsel responded, "Yes." App. 157, l. 12. PCR counsel asked several more questions concerning the conflict and ultimately asked whether petitioner and his wife's goals were aligned. App. 157, ll. 13 – 24.

Petitioner then testified in reply and PCR counsel's first question was, "Tell me why you believe that created a conflict of harm in the defense of your case." App. 162, ll. 23 – 25. 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).

Unlike Mangal, where this Court stated that "a PCR judge would have difficulty recognizing" the issue ultimately found unpreserved, here the questioning and testimony repeatedly discussed the conflict of interest. Mangal at 92-93, 805 S.E.2d at 572. In Mangal, the Court of Appeals erred in finding the issue was presented by relying on evidence that was "not revealed to the PCR court at any point during the PCR hearing." Id. at 93. 805 S.E.2d at 572. Here, all of the testimony about the conflict of interest was put before the PCR judge at the evidentiary hearing. The conflict issue was the subject of extensive testimony at the hearing and this testimony was cited in the PCR court's Order. Unlike the improper bolstering issue in Mangal, the presentation of the conflict issue at the hearing was a significant focus and warrants a remand from this Court.

Even if this Court finds the issue procedurally defaulted, the Mangal Court recognized that a procedural default can be excused in "rare cases" and "situations where the interest of justice require PCR courts to be flexible with procedural requirements *before* PCR applicants suffer procedural default on substantial claims." Id. at 96, 99-100, 805 S.E.2d at 573, 575-76. Citing Martinez v. Ryan, 566 U.S. 1 (2012), this Court recognized "the tension between the rights at stake in PCR proceedings and the application of traditional procedural requirements for the presentation and preservation of issues." Id. at 97, 805 S.E.2d at 574. While this Court was discussing the excusal of procedural default before the PCR courts, the same reasoning applies to whether this Court should remand Starke's substantial conflict of interest claim and give the PCR court the chance to cure any procedural default.

When determining whether to excuse Mangal's procedural default, this Court examined the merits of his claim and found them lacking. Id. at 100-01, 805 S.E.2d at 576. The Mangal Court noted that the substance of the claim was not presented at the PCR hearing and that it was

likely that trial counsel had a valid strategy for eliciting the doctor's testimony that supposedly constituted improper bolstering. Id. In Starke's case, the substance of the claim was presented to the PCR court. Furthermore, the record below demonstrates a conflict of interest and significant failings in plea counsel's representation that coerced petitioner's guilty plea. If petitioner's conflict of interest claim is found procedurally defaulted, Martinez will excuse the default and allow a federal court to consider it. It is far more economical and efficient to remand the case to Judge Hood for a ruling on this important issue on which he heard the evidence necessary to make a ruling.

Starke's claim is similar to the cases cited in Mangal as examples of the excusal of procedural default because of the merits of his claim. In Simmons v. State, 416 S.C. 584, 788 S.E.2d 220 (2016), the Court agreed with the State that the issue raised was not preserved, but remanded because of the substantial nature of the claim. The claim in Simmons concerned misleading DNA evidence presented by the prosecution. Simmons at 589-91, 788 S.E.2d at 223-24. The PCR court heard ample evidence about the DNA evidence at the hearing, but only ruled on the issue in a summary denial. Id. Simmons' attorneys did not file a Rule 59(e) motion raising the DNA issue. Id. This Court held that a remand was required even though the issue was unpreserved because "dismissing the writ of certiorari would be fundamentally contrary to the interest of justice." Id. Simmons shows that a meritorious claim on which substantial evidence was presented at the PCR hearing can warrant the extraordinary action of a remand by this Court. See also Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999) (reversing summary dismissal of a successive PCR application because defendant "never received a complete 'bite at the apple'").

Plyer v. State shows that the converse is true. Plyer v. State, 309 S.C. 408, 424 S.E.2d 477 (1992). The Court first held the issue of a burden-shifting malice instruction "was neither raised at the PCR hearing nor ruled upon by the PCR court" and therefore was "procedurally barred." Id. at 409, 424 S.E.2d at 478. The Court did not end its analysis with this ruling. Id. The Court first found the jury charge violated Sandstrom v. Montana, 442 U.S. 510 (1979) and that trial counsel should have objected. Id. at 410-11, 424 S.E.2d at 478. But the Court then conducted a prejudice analysis and determined that Plyler's "guilt was established beyond a reasonable doubt and the error in the malice charge was harmless beyond a reasonable doubt." Id. at 411-13, 424 S.E.2d at 479-80. The Court concluded by noting that "Plyler's conviction and sentence is also affirmed on procedural grounds." Id. The lesson from Plyer is that the weaker the merits of the issue, the less reason this Court has to excuse procedural default. The issue is Plyler met one of the prongs of Strickland—deficient performance—and therefore this Court deemed it worthy of a merits analysis, but failed on the prejudice prong and the procedural default was not excused. Here, as will be shown below, petitioner can show a strong likelihood of prevailing on the merits.

Nor does the rule of Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013) operate as a complete bar to a remand in petitioner's case. The petitioner in Kelly sought to use Martinez to file a **third** PCR application. Kelly at 365, 745 S.E.2d at 377. Here, petitioner seeks a remand for full consideration of his first PCR application.

In 1992, this Court recognized the problems facing PCR judges, Assistant Attorneys General, and lawyers appointed to represent PCR applicants. Pruitt v. State, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992). The Court remanded the case in Pruitt to the PCR court because the issue raised was not addressed in the PCR court's order and expressed confidence that all parties

"will do everything in their power to ensure that remand such as the one we order today will no longer be necessary." Id.

Fifteen years later, this Court recognized that such problems still existed in Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), and again expressed its frustration with proposed orders that failed to address all issues. 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 later, this Court decided Mangal, which again addressed this problem. As shown above, Mangal still leaves open the possibility of remands when the interests of justice and the merits of the case require.

The Merits of Petitioner's Issue Warrant a Remand

Plea counsel's conflict of interest and coercion rendered petitioner's guilty plea unknowing and involuntary. See Boykin v. Alabama, 395 U.S. 238 (1969) ("Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality."); Hill v. Lockhart, 474 U.S. 52, 59 (1985) (holding that an applicant proves prejudice by showing that counsel's constitutionally deficient performance affected the outcome of the plea). The Sixth Amendment guarantees the right to conflict-free counsel where the conflict affects the attorney's performance. See Glasser v. United States, 315 U.S. 60, 70 (1942) ("[S]o are we clear that the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests."). "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348 (1980).

Plea counsel testified at the PCR hearing that he was initially approached by petitioner's family. App. 152, ll. 2 – 8. He unequivocally testified that he represented petitioner and his wife at the same time. App. 157, ll. 8 – 18. While the solicitor testified that the wife did not face criminal charges, she was a party to a DSS action. App. 157, ll. 8 – 18. App. 140, ll. 4 – 5. The solicitor testified that the wife "was extremely non-cooperative with law enforcement and with the solicitor's office in trying to resolve this case." App. 138, ll. 14 – 17. The solicitor said she was never investigated. App. 138, ll. 17 – 20. However, plea counsel's testimony corroborated petitioner's testimony that the "situation goes back a couple of years . . . as far as the daughter is concerned. And the Defendant had moved out of the marital home so that there

wouldn't be any further contact between he and his daughter." App. 156, l. 14 – 157, l. 4. App. 116, l. 5 – 117, l. 13. Petitioner testified that the matter was "completely settled" with a pastor and that he had moved out of the marital home. App. 116, l. 5 – 117, l. 13. Petitioner was incarcerated before his plea. App. 16, ll. 8 – 14. This delay (and the DSS action) indicates a strong likelihood the wife knew about the allegations well before they were reported to the authorities. See S.C. Code Ann. § 63-5-70(A)(1) ("It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child . . . to . . . place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety" and providing for a maximum sentence of ten years' imprisonment). At the least, petitioner's wife was a material witness in the case. As petitioner said at the PCR hearing, had he gone to trial and testified, he could have incriminated plea counsel's other client—petitioner's wife.

Plea counsel's testimony indicated that he coerced petitioner into pleading guilty. 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. 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.

Petitioner was entitled under the Sixth Amendment to advice from conflict-free counsel. 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,

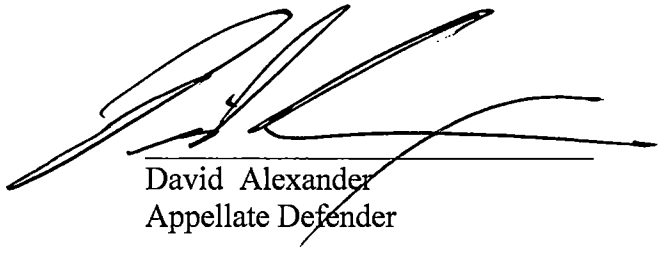
102, 665 S.E.2d 164, 168 (2008) (holding plea counsel ineffective for simultaneously representing a husband and wife). See also Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001) (finding an actual conflict of interest arising from simultaneous representation of husband and wife).

In Thomas, a husband and wife waived any conflict of interest, but a plea offer by the solicitor later created a conflict. Thomas at 144, 551 S.E.2d at 256. Counsel did not obtain a new waiver and this Court held, "To be valid, a waiver of a conflict of interest must not only be voluntary, it must not only be voluntary, it must be done knowingly and intelligently." Id. Plea counsel's glaring admissions that he never discussed any defenses with petitioner and that he would only represent him petitioner if he pled guilty demonstrate that petitioner could not have made any knowing or intelligent decision regarding the conflict and that his guilty plea was coerced.

Petitioner's conflict of interest and coercion claim is established not only by his own testimony, but by plea counsel's testimony and the evidence produced at the PCR hearing. Plea counsel even had petitioner evaluated by the same doctor who was treating the wife and the victim. App. 176. The GAL letter says the victim "felt her mother suspected what was happening." App. 176. Petitioner has demonstrated a substantial claim that his plea was induced by coercion from conflicted counsel and this Court should remand this case to the PCR court for a ruling.

CONCLUSION

For the foregoing reasons, this Court should remand this case to the PCR court to rule on the issue presented.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of August, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Aiken County

Honorable Robert E. Hood, Circuit Court Judge

ISAAC STARKE,

PETITIONER

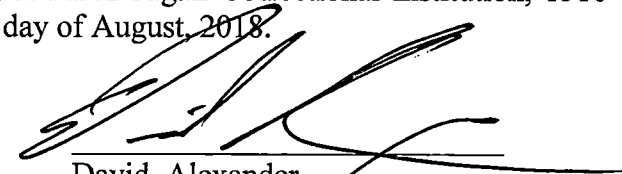
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner 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 Brief of Petitioner have been served on Isaac Starke, #355498, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 1st day of August, 2018.



David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 1st day of August, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: May 2, 2027.