

STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO AIKEN COUNTY  
Court of Common Pleas

The Honorable Robert E. Hood, Post-Conviction Relief Court Judge  
The Honorable Doyet A. Early, III, Plea Judge

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S.C. SUPREME COURT

Appellate Case No. 2016-002284

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ISAAC STARKE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**BRIEF OF RESPONDENT**

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ALAN WILSON  
Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General  
S.C. Bar No. 100108

Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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## RESPONDENT'S STATEMENT OF ISSUES PRESENTED ON APPEAL

- I. Petitioner's assertions that his guilty plea was unknowing and involuntary based on a purported conflict of interest because plea counsel also represented his wife in a family court action therefore would only represent him if he pled guilty is not preserved for this Court's review, does not warrant a remand for the post-conviction relief court to address, and lacks merit.
  - A. Petitioner's assertions that his guilty plea was unknowing and involuntary based on a purported conflict of interest because plea counsel also represented his wife in a family court action therefore would only represent him if he pled guilty is not preserved for this Court's review where Petitioner did not raise this issue in his application or at any time prior to the hearing, did not raise this issue as an allegation at the hearing, the post-conviction relief court did not rule upon the unrepresented issue, and Petitioner did not file any motions asking the court to rule on this unrepresented issue.
  - B. This Court should reject Petitioner's invitation to ignore longstanding preservation principles and excuse his neglect in failing to present this issue to the post-conviction relief court by remanding the case back to the post-conviction relief court for a ruling on this unrepresented issue.
  - C. Regardless of preservation concerns, Petitioner failed to establish he is entitled to relief where his plea was knowing and voluntary and counsel's performance was not constitutionally ineffective.

## STATEMENT OF THE CASE

Petitioner Isaac Starke is presently confined in the South Carolina Department of Corrections serving a fifteen-year sentence following convictions in Aiken County. During its March 2013 term, the Aiken County Grand Jury indicted Petitioner for one count of second-degree criminal sexual conduct with a minor and four counts of third-degree criminal sexual conduct with a minor based on his sexual assault of his minor daughter. He was represented on these charges by George A. Anderson, Esquire. Assistant Solicitor Ashley Agnew Hammack of the Second Circuit Solicitor's Office prosecuted the case on behalf of the State.

On May 13, 2013, Petitioner appeared in the Aiken County Court of General Sessions before the Honorable Doyet A. Early, III, circuit court judge, to enter guilty pleas to one count of second-degree criminal sexual conduct with a minor and one counts of third-degree criminal sexual conduct with a minor. The only negotiations between Petitioner and the State were for the dismissal of the other three third-degree criminal sexual conduct with a minor charges, but there was no negotiation or recommendation as to sentence. Plea counsel advised the Court that he had explained to Petitioner that he faced up to an aggregate forty-five years imprisonment, as well as mandatory G.P.S. monitoring and sex-offender registration once released as a result of Petitioner's pleas. Counsel informed the court he had reviewed all discovery with Petitioner and had discussed the case in detail with him. The court then confirmed with Petitioner personally that he understood he would be required to submit to mandatory G.P.S. monitoring and sex-offender registration as a result of his pleas and that he understood the potential sentences he could receive. The court then reviewed Petitioner's constitutional rights with him and Petitioner advised the court he understood each right and wanted to waive each right to enter his guilty pleas. Petitioner confirmed to the court he had not been promised anything or threatened to enter

his plea and that he was pleading guilty based on his own free will. Petitioner also affirmed he was fully satisfied with his lawyer's services. (App.-1-12).

When asked if he was guilty of both offenses, Petitioner hesitated and then told the court, "I didn't stick my finger in her vagina, Your Honor." The court allowed Petitioner time to speak with counsel, then the prosecutor gave the following factual recitation:

Your Honor, on October 12 of 2012, the Aiken County Sheriff's office got called out --- . . . They got called out due to a runaway from school. They talked to the girl who is the victim in this case. She said she was scared to go home which is why she ran away. When they asked her why, she disclosed that from the time she was 11 in 6<sup>th</sup> grade that the Defendant, her father, would molest her at their home on \_\_\_\_\_ which is here in Aiken County. She said that involved him fondling her breast underneath her clothes, putting his mouth on her breast, as well as digital penetration. At that time they did -- and she said that he told her that if she told anybody he would kill himself. So at that time, they did talk to the Defendant. They *Mirandized* him. After *Miranda*, he did admit to that behavior.

(App. 13-14). Petitioner then informed the plea court he was pleading guilty because he was guilty. (App. 14-15). The court pressed Petitioner as to whether he was truly guilty:

Do you understand that if you doubt- -- if you deny doing that, all you have to do is tell me. We'll set this case for trial. We'll bring in 12 individuals from your community selected from a jury. They will listen to the testimony -- listen to all the testimony from you, the victim, from whomever that's relevant, and they will determine what the true facts are. Do you wish to go through or -- do you want me to try the case? I'll be glad to accept your plea, but I am not going to accept your pleas unless you tell me you are guilty. Simple as that.

(App. 14-15). Petitioner then affirmed for a second time that he was indeed guilty. (App. 15).

Plea counsel next addressed the court in mitigation and informed the court he had known Petitioner's family "for decades since this man was probably a very young minor." (App. 16). He advised the court that the Department of Social Services (DSS) was already involved in this case when he was retained and that Petitioner had already implicated himself in conduct giving rise to several of the indictments. (App. 16-17). He testified he had Petitioner evaluated and a

psychosexual assessment performed on Petitioner. (App. 16-17). He further stated DSS had previously removed all five of Petitioner's children (four minor sons and the minor daughter who is the victim of these indictments) from the home, but that the four sons had subsequently been returned to the home and were present in support of their father. (App. 16-17). Plea counsel informed the court that he had also discuss the possibly that he could be confined pursuant to the sexually violent predator act once he completed whatever sentence he received. (App. 18-19).

The court then heard from Dr. Joe Holt, the psychologist who had evaluated Petitioner. He informed the court that he has been working with Petition on psychosexual treatment weekly and attributed some of his conduct to bi-polar disorder. He also informed the court:

He's been very cooperative in what we've done. He's acknowledged to me that he did the acts that he's expressed to you; so he has been forthright in that manner. I'm sure just the accountability to the Judge would be somewhat intimidating, but would sit down with me and we would discuss it.

(App. 22). Dr. Holt then informed the court that he had been working with the entire family to create "a safer environment." (App. 22-23).

Petitioner's wife then addressed the court and stated that Petitioner was "a loving husband and a good father" but that he "did go wrong. He made this mistake, but I know he's real sorrowful for it." (App. 24-25).

Petitioner then addressed the court:

Your Honor, I'd like to apologize to the victim, [Daughter 1]. I'd like to apologize to the Court for bringing such a case here. I'd like to apologize to the community, Your Honor, and I'm very sorry for what I done and I also – it's all my fault and it'll never happen again, Your Honor. I am very sorrowful for what going on. I don't know – I don't understand it. I don't really understand why I done it. I am very sorrowful and I cry – I cry daily in my jail cell over my family and over what I done and how it affected my family and how it affected me. I apologize, Your Honor. I am very sorry.

(App. 26-27).

The court then indicated it wanted to recess for the afternoon to allow additional time to review Dr. Holt's report, the guardian ad litem's report, and reflect on the case. (App. 27-28). The court then heard from a member of Petitioner's church before concluding the matter for the day. (App. 30).

On May 15, 2013, all parties reconvened before for sentencing. Judge Early sentenced Petitioner for fifteen years imprisonment for both offenses. (App. 30-31). Petitioner did not appeal his guilty pleas or sentences.

On April 7, 2014, Petitioner, through retained counsel J. Faulkner Wilkes, filed an application for post-conviction relief, alleging the following grounds for relief:

1. Ineffective Assistance of Counsel
  - a. "Counsel failed to properly conduct discovery, obtain experts, have a proper evaluation of the Applicant, have adequate information presented to the court during the plea process, investigate, research, prepare for the case, and advise the Applicant adequately on the facts and law involved."
2. Involuntary guilty plea
  - a. "The Applicant was not adequately advised as to the legal aspects of the plea and his rights to a trial. The Applicant was improperly coached and counseled as to what he was to say at the plea proceedings. The Applicant was misled by Counsel as to the existence of an agreement on the sentence, or what sentence he would receive. The Applicant was misled by counsel or others as to what representations would be made on his behalf and the effect that such representations would have in the case. The Applicant was led to believe that he would receive a specific sentence less than the court imposed. The Applicant was not capable of fully understanding the process or to enter a plea."
3. Brady Violation
  - a. "The State had information that it failed to disclose to the Defendant that it was obligated to disclose. The State further misled the defense as to what position it would take, the sentence that it would recommend or that the Defendant would receive."

On August 6, 2014, Respondent filed its return to the application and requested an evidentiary hearing on the application. Neither Petitioner nor his counsel amended his application at any time or put the State on notice of any allegation pertaining to a conflict of interest.

An evidentiary hearing into the application and amendment was convened September 20 & 23, 2016, in the Aiken County Court of Common Pleas before the Honorable Robert E. Hood, circuit court judge. Petitioner was present alongside counsel Wilkes. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office. At the start of the hearing, Petitioner did not amend his allegations or otherwise give any indication that he would be proceeding forward on any allegations other than the three specific allegations enumerated in his application. Petitioner testified on his own behalf and presented testimony from his pastor, David Belton, Jr. Respondent presented testimony from the prosecutor, Assistant Solicitor Ashley Agnew Hammack, another prosecutor who assisted with the case, Assistant Solicitor Nicholas McCarley, and plea counsel George A. Anderson. At the conclusion of the hearing, Petitioner did not present any argument on an allegation pertaining to conflict of interest (or any argument at all) and did not move to conform his allegations to the testimony presented or otherwise indicate he was amending his application to include any allegations that his plea was unknowing and involuntary or counsel was ineffective based on an alleged conflict of interest. The post-conviction relief took the matter under advisement.

On November 1, 2016, the post-conviction relief court denied and dismissed the application in full by written order. In its order, the court listed and addressed the three specific allegations Petitioner had enumerated in his application. The court did not make any findings as to the unrepresented issue of plea counsel's purported conflict of interest. This order was filed on November 11, 2016. Petitioner did not file a motion to reconsider, alter, or amend pursuant to

Rule 59(e), SCRCP, or otherwise ask the court to rule on the unrepresented issue of plea counsel's asserted conflict of interest.

On November 8, 2016, Petitioner filed a notice of appeal. On June 16, 2017, Appellate Defender David Alexander of the South Carolina Commission on Indigent Defense filed the petition for a writ of certiorari and appendix on Petitioner's behalf. On November 1, 2017, Respondent, through Assistant Attorney General Coleman, filed its return to the petition. On May 2, 2018, this Court granted certiorari and instructed parties to file briefs as provide by Rule 243(i), SCRCP.

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). When reviewing a post-conviction relief court's resolution of procedural questions arising under the Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure, appellate courts apply an abuse of discretion standard. Mangal v. State, 421 S.C. 85, 92, 805 S.E.2d 568, 571 (2017) (citing Winkler v. State, 418 S.C. 643, 663, 795 S.E.2d 686, 697 (2016) (applying an abuse of discretion standard to the trial court's decision on a motion for a continuance); Sweet v. State, 255 S.C. 293, 296, 178 S.E.2d 657, 658 (1971) (same)).

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that

“counsel’s conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced Petitioner such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel’s alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

“A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate’s right to contest the validity of such a plea is usually, but not invariably, foreclosed.” Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)). “Indeed, where a thorough colloquy is

conducted, courts must exercise caution in setting aside the guilty plea.” Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 712 (2018); see Jamison v. State, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that “guilty plea[s] must be treated as final in the vast majority of cases” and instructing that caution must be exercised so as not to “undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea”).

## ARGUMENT

- I. **Petitioner's assertions that his guilty plea was unknowing and involuntary based on a purported conflict of interest because plea counsel also represented his wife in a family court action and therefore would not represent him unless he pled guilty is not preserved for this Court's review, does not warrant a remand for the post-conviction relief court to address, and lacks merit.**

For the first time on appeal, Petitioner argues his guilty plea was unknowing and involuntary based on a purported conflict of interest because plea counsel also represented his wife in a family court action and therefore would only represent him if he pled guilty. However, Petitioner never raised this issue in his post-conviction relief application, which was filed with the assistance of retained counsel. Petitioner never amended his application to include this allegation. Petitioner never asked the post-conviction relief court to consider or otherwise rule on this issue before, during, or after the hearing, and accordingly, the post-conviction relief court did not rule on this unrepresented issue. Moreover, after the court's order of dismissal was entered, Petitioner never filed any motions asking the court to rule on this unrepresented issue. Based on Petitioner's complete failure to ever raise this issue to the court below, this issue is patently unrepresented for this Court's review.

Petitioner readily admits the glaring preservation concerns, noting "petitioner acknowledges that a significant question exists regarding whether this Court can reach the merits of the issue presented." (BOP 4). Despite this acknowledgment, Petitioner begs this Court to excuse his procedural default in the interest of justice and remand this matter back to the post-conviction relief court for a ruling on this unrepresented issue because some testimony centered on this issue. Petitioner readily admits he is not forever foreclosed from relief on this issue should this Court find this issue unrepresented, as he will still be able to have a federal court consider the claim if he chooses to pursue the claim in a subsequent federal habeas corpus action. This Court

should reject Petitioner's invitation to ignore longstanding preservation principles and excuse his neglect in failing to present this issue to the post-conviction relief court by remanding the case back to the post-conviction relief court for a ruling on this unrepresented issue because this is not a rare case requiring such action.

Moreover, regardless of any preservation concerns, Petitioner has failed to establish that there is any merit to this unrepresented claim, as no conflict of interest existed and certainly did not induce Petitioner's guilty plea. Petitioner's guilty plea was knowingly and voluntarily entered with the advice of competent counsel. Petitioner has not established any constitutional deprivations that warrant this Court vacating his guilty plea and remanding the matter back to the court of general sessions.

- A. Petitioner's assertions that his guilty plea was unknowing and involuntary based on a purported conflict of interest because plea counsel also represented his wife in a family court action and therefore would only represent him if he pled guilty is not preserved for this Court's review where Petitioner did not raise this issue in his application or at any time prior to the hearing, did not raise this issue as an allegation at the hearing, the post-conviction relief court did not rule upon the unrepresented issue, and Petitioner did not file any motions asking the court to rule on this unrepresented issue.**

As an initial matter, Petitioner's assertions that his guilty plea was unknowing and involuntary based on a conflict of interest with counsel was never raised to the post-conviction relief court and is only being raised not for the first time on appeal. Accordingly, it is not preserved for this Court's review.

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). Significantly, the application of issue preservation requirements ensures the trial court has an opportunity "to rule properly after it considered all relevant facts, law, and arguments." I'On,

L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). In order for an issue to properly be preserved for appellate review, the issue must be: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see JEAN HOËFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review).

The same preservation requirements apply in post-conviction relief actions. Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007); Pruitt v. State, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992). The failure of the post-conviction relief court to specifically rule on an issue ordinarily precludes appellate review of the issue. Id. Although our courts have recognized the somewhat relaxed procedures in post-conviction relief cases and will excuse procedural defaults in extraordinary cases, “[i]n most PCR cases, however, [appellate courts] have refused to excuse the pleading and issue-preservation requirements that apply in all civil cases.” Mangal, 421 S.C. at 97, 805 S.E.2d at 574.

In Mangal, this Court recently addressed procedural defaults in the post-conviction relief context. In Mangal, this Court reversed the decision of the South Carolina Court of Appeals and reinstated the post-conviction relief court’s order denying post-conviction relief where there was some testimony presented at the evidentiary hearing on a specific issue, but the issue was never raised to the court. In reaching this decision, this Court relied on the fact that Mangal never mentioned the issue in his post-conviction relief application, made no amendment to his application raising the issue, his post-conviction relief counsel did not make an oral amendment at the evidentiary hearing to add the issue as a claim for relief, and he did not specifically make

the claim at the hearing even when testimony on the issue arose. Unlike the present case, Mangal's attorney made a brief mention of the issue in his closing argument at the evidentiary hearing, and later filed a Rule 59(e), SCRCP, motion to reconsider, alter or amend, asking the court to address the issue. This Court ruled the post-conviction relief court properly refused to rule on the issue, as it was never raised and no testimonial evidence was presented in support of the allegation. This Court held the post-conviction relief court could not be expected to recognize the claim based only on brief and broad mentions of it in closing argument. *Id.* at 92–93, 805 S.E.2d at 572. (“To the extent PCR counsel’s brief statement constitutes a claim for ineffective assistance of counsel, we find a PCR judge would have difficulty recognizing it.”) This Court noted:

[T]here are situations where the interests of justice require PCR courts to be flexible with procedural requirements before PCR applicants suffer procedural default on substantial claims. Such flexibility is consistent with the purpose and spirit of our Rules of Civil Procedure. These considerations should guide PCR courts when struggling to balance procedural requirements against the importance of the issues at stake in PCR proceedings. We encourage trial courts in PCR cases to use the discretion we grant them on procedural matters to find reasonable ways—within the flexibility of our Rules—to reach the merits of substantial issues.

Mangal, 421 S.C. at 99–100, 805 S.E.2d at 575–76.

In the present case, like Mangal, this Court should similarly determine Petitioner failed to properly preserve this issue for appellate review. Petitioner, who was represented by retained counsel<sup>1</sup> through the entirety of this action before the circuit court (including when his

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<sup>1</sup> Respondent notes that Petitioner’s application was drafted and filed by retained counsel to highlight to this Court that Petitioner, unlike the vast majority of post-conviction relief applicants, did not draft his application as a *pro se* litigant without any legal training, but rather, with the assistance of competent and trained legal counsel who presumably reviewed the record and selected the issues he deemed to be the most meritorious. In Mangal, this Court made specific mention that “Mangal filed his PCR application **without** the assistance of counsel. Mangal, 421 S.C. at 89, 805 S.E.2d at 570 (emphasis added).”

application was filed), never raised this issue to the post-conviction relief court either in his application or in any amendments. Petitioner never moved to amend his application to conform to the evidence presented pursuant to Rule 15(b), SCRCP, or otherwise indicated he wished for the court to rule on this unrepresented issue. Petitioner never presented argument on this unrepresented issue. Accordingly, the post-conviction relief court properly did not rule on the issue because it was never presented to the court as an allegation upon which Petitioner was seeking relief. Moreover, Petitioner did not file any motions seeking the court to rule on this unrepresented issue after the order was signed and filed. Accordingly, this issue is patently not preserved for this Court's review.

**B. This Court should reject Petitioner's invitation to ignore longstanding preservation principles and excuse his neglect in failing to present this issue to the post-conviction relief court by remanding the case back to the post-conviction relief court for a ruling on this unrepresented issue.**

Petitioner acknowledges that he did not raise this issue to the post-conviction relief court, that the court accordingly did not rule on this unrepresented issue, and that he did not file any motions or otherwise request to the court to rule on this unrepresented issue. He nevertheless argues he is entitled to a remand back to the circuit court for a ruling on this unrepresented issue "in the interest of justice" merely because some portion of the testimony over the hearing that spanned two days covered this issue. However, this is not one of the "rare cases" discussed in Mangal that requires this Court to excuse the apparent procedural default and this Court should reject Petitioner's invitation to ignore a procedural default of his own making.

In Petitioner's case, as is often the case in the vast majority of post-conviction relief proceedings, testimony was taken on a wide range of topics beyond those allegations specifically enumerated in the application. Petitioner, like most applicants, used his time on the witness stand to air his grievances on a wide variety of subjects, ranging from counsel's performance, to the

solicitor's conduct, to the qualifications of the mental health expert his attorney had retained. In response to this testimony, counsel for both Petitioner and the State questioned witnesses on many of these unrepresented and ancillary topics as the testimony developed throughout the hearing to create a full record. However, at the conclusion of all testimony, Petitioner did not move to conform his testimony to the evidence presented pursuant to Rule 15, SCRCP, present an argument regarding this unrepresented issue, or otherwise indicate in any manner to Respondent or to the court that he wished to proceed forward on this unrepresented issue. Accordingly, the post-conviction relief court did not rule on this unrepresented issue.

Despite failing to raise this issue at any point before, during, or after the evidentiary hearing, and despite failing asking the court to rule on this issue, Petitioner now asserts he is entitled to a remand and ruling on this issue "in the interest of justice." However, Petitioner fails to explain how this case is one of those "rare" few that requires this Court to excuse procedural default other than noting that some testimony taken on the issue. As discussed previously, it is quite common that testimony is taken on a wide-range of topics and issues that are not enumerated in an application for post-conviction relief. Simply put, the circumstances of Petitioner's case are routine, not rare. If Petitioner wanted to raise this issue to the post-conviction relief court, he merely needed to put the court, and Respondent, on notice so that the issue could properly and fully be developed for a ruling.

By advocating for a remand for the court to rule on the merits of an issue that he recognizes he never raised to the post-conviction relief court, Petitioner is advocating for this Court to adopt an approach where post-conviction relief applicants are relieved from their duty to raise their claims to the circuit court and leaves Respondent and the post-conviction relief court to wade through the testimony presented at any evidentiary hearing, shift through what potential

unpresented issues might have any scintilla of arguable merit, and then construct an order to address all of these unpresented issues properly. This is quite simply unreasonable and relieves Petitioner of his duty to present his claims to the court.

In support of his argument for excusal of procedural default and remand, Petitioner cites to cases where the orders issued by the post-conviction relief court failed to address properly raised issues and this Court remanded for a ruling on those issues. (BOP 17-18, citing Pruitt v. State, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992); Marlar, 375 S.C. 407, 653 S.E.2d 266, Mangal, 421 S.C. 85, 805 S.E.2d 568). Respondent notes this is an issue of renewed importance to this Court in light of the recent order in Robin Reese v. State, Appellate Case No. 2017-001110 (S.C. filed Oct. 18, 2018) (Shearouse Adv. Sh. No. 42 at 9). Respondent recognizes and agrees that it is absolutely vital for all orders to fully and accurately cover all issues raised to the post-conviction relief court when entrusted by the court to draft proposed orders. However, these scenarios are quite different than the one presently before this Court—here, Petitioner **never** raised or otherwise put the court or Respondent on notice that this issue was being raised as a ground for relief. Therefore, this is not the case of Respondent drafting and the post-conviction relief court adopting a defunct order as Petitioner tries to assert, but rather, a situation where the unaddressed issue is one of Respondent's making by failing to ever present this issue to the court.

While Petitioner insists his failure to raise this issue to the lower court should entitle him to a remand for further evidentiary hearings, he presents no valid reason why his case is extraordinary enough to excuse his procedural mistakes. Petitioner was given the opportunity to raise and fully argue every issue he deemed meritorious at the evidentiary hearing. There is no reason to allow him a second bite at the apple to bring up a new issue that would have been

addressed at the hearing if it were truly meritorious. Here, as in Mangal, there is simply no extraordinary reason to excuse this procedural default, and the issue clearly is not preserved for appeal.

**C. Regardless of preservation concerns, Petitioner failed to establish he is entitled to relief where his plea was knowing and voluntary and counsel's performance was not constitutionally ineffective.**

Even assuming this issue were preserved for appeal, it clearly is not meritorious. Petitioner asserts his guilty plea was unknowing and involuntary because plea counsel was operating under a conflict of interest based on his joint representation of Petitioner's wife in a family court action, which led counsel to inform Petitioner that he would only represent Petitioner if he pled guilty. However, the post-conviction court properly found Petitioner's plea was entered knowingly and intelligently and that Petitioner failed to establish any constitutionally ineffectiveness of counsel.

Initially, it is important to note the post-conviction relief court found counsel's testimony to be credible and Petitioner's testimony to be not credible. App. 186. The post-conviction relief court was in the best position to determine credibility and, as such, its findings must be given great deference. See Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 435 (2018) (“[W]e afford great deference to a PCR court's credibility findings.”); Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012) (noting the heightened emphasis reviewing court's place the upon post-conviction relief court's credibility findings) (citing Solomon v. State, 313 S.C. 526, 443 S.E.2d 540 (1994) (appellate court deference to post-conviction relief court's credibility findings is so great that it required the Court to uphold post-conviction relief court's determination even where testimony at post-conviction relief hearing was unequivocally contradicted by the trial record)); Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is

given to the post-conviction relief judge's findings on the credibility of witnesses).

Petitioner's behavior and testimony at the evidentiary hearing was unusual and incredible. Petitioner has repeatedly asserted through his post-conviction relief proceedings that he is severely mentally ill. The prosecuting solicitor testified about the difference in Petitioner's behavior from the guilty plea, stating at the evidentiary hearing that 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, line 14-19). All the testimony presented supported the notion that Petitioner was competent and credible at the guilty plea, and no evidence was presented to show Petitioner was not competent to plead guilty. However, Petitioner's behavior took an extreme turn for the evidentiary hearing, in sharp contrast to his competent demeanor at the plea. For some reason, be it lack of medication or overmedication, or simply malingering, Petitioner became sporadic and exaggerating at the evidentiary hearing, and the post-conviction relief court made a finding in its Order of Dismissal that he was not credible. (App. 186).

At the guilty plea, counsel informed the plea court that he felt Petitioner understood the offenses, the potential sentences, and the "most serious" strike and mandatory sex offender registry and G.P.S. monitoring. (App. 7). Counsel explained to the plea court he had advised Petitioner of his right to a trial by jury and he still wished to plead guilty. (App. 7). Petitioner testified he understood the effects and implications of his guilty plea and he wished to plead guilty. (App. 9-10). Petitioner had no questions for the plea judge. (App. 10). The plea court advised Petitioner of his right to remain silent, his right to a jury trial, and his right to present witnesses on his behalf. (App. 10-11). Petitioner testified he had not been threatened or promised anything in order to plead guilty. (App. 11). He testified he was satisfied with his lawyer, there

was nothing else he wanted him to do on his behalf, and he was totally and completely satisfied with his representation. (App. 11-12). He stated he was not under the influence of drugs or alcohol and he was pleading guilty of his own free will. (App. 12).

When the plea court asked if Petitioner was guilty of the crimes he was accused of, he hesitated, and told the plea court he did not “stick [his] finger in her vagina.” (App. 13). However, after the Assistant Solicitor informed the plea court of the factual basis of the charge, he told the plea court that he was guilty and he did commit the acts as alleged in the indictment. (App. 14). The plea court informed Petitioner that if he denied doing what he was accused of, all he had to do was tell him, and they would have a trial. (App. 14-15). The plea court explained to Petitioner the process of having a trial and that he would not accept his guilty plea unless he was actually guilty of the crime as accused. (App. 15). Petitioner repeated to the plea court that he was guilty. (App. 15). At the end of the plea, Petitioner apologized to the victim, to the court, and to the community for committing this crime. (App. 26). He stated that it was all his fault, he did not understand why he did it, and it would never happen again. (App. 27).

At the evidentiary hearing, Petitioner testified his guilty plea was involuntary because he was misled by counsel and he was promised that he would get a four-year deal in exchange for his plea. However, counsel testified at the evidentiary hearing that there was never any mention of a four-year deal and he never promised Petitioner he would receive a four-year sentence. He testified he believed Petitioner fully understood what he was doing when he pled guilty. (App. 153-54). He further stated Petitioner had been evaluated and was found competent to plead guilty. (App. 154). He stated Petitioner well understood the potential sentencing range and that he was pleading with no recommendation by the State. (App. 155). Counsel testified Petitioner admitted committing the crimes to him, but would occasionally change his story and deny the

offense. (App. 160). He stated in these instances, he would follow up in another letter with a different personality and different penmanship and apologize, admitting everything. (App. 160-61). Counsel testified he likely would have told Petitioner at the guilty plea that “if you’re guilty of the charges that’s what you need to tell the judge. Then if not, then there will be a trial.” (App. 160).

The post-conviction relief court relied on this testimony in making its ruling, and it found Counsel’s testimony on the subject was credible. (App. 186). The post-conviction relief court cited to Counsel’s testimony that he advised Petitioner of all facts and risks of pleading guilty, including the potential length of his sentence. (App. 189). The post-conviction relief court relied on this testimony as well as the record of the guilty plea and further found Petitioner was fully advised of the rights he was waiving by pleading guilty. (App. 189). The post-conviction relief court held Petitioner was never offered or promised a four-year deal in exchange for his guilty plea, and there was no evidence in the record to support any reliance on this idea or his claim that he was not mentally competent to plead guilty. (App. 188-89).

Petitioner’s assertion he was coerced into pleading guilty because Counsel advised him he would only represent him if he pled guilty is patently meritless and misconstrues the testimony presented below. There is nothing in the record to support this assertion, and Petitioner never alleged that he would have gone to trial rather than plead guilty if Counsel would have represented him at trial.

Additionally, there is no merit to Petitioner’s claim that counsel had a conflict of interest that prevented him from adequately and appropriately representing him. Counsel did not have a conflict of interest which affected his representation of Petitioner. “An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant’s.”

Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). This Court has further stated that a conflict of interest occurs when “a defense attorney places himself in a situation inherently conducive to divided loyalties.” Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). “If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.” Gonzales v. State, 419 S.C. 2, 10, 795 S.E.2d 835, 839 (2017) (citations omitted).

Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) (citing Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); see also Burger v. Kemp, 483 U.S. 776, 783 (1987)). “The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction.” State v. Gregory, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005).

Counsel credibly testified at the evidentiary hearing that he never represented Petitioner’s wife on criminal charges; he represented Petitioner and his wife jointly in family court, in which both of their interests and goals aligned—to regain custody of their five children. (App. 156-57). Prosecuting Assistant Solicitor Ashley Hammack testified Petitioner’s wife was never investigated or criminally charged as part of this case. (App. 138). She testified Petitioner’s wife was extremely non-cooperative with law enforcement and would not testify at trial. (App. 138). It is clear from the record and testimony presented that no conflict of interest existed at any point in Counsel’s representation.

The factual scenario surrounding this case differs from other cases where this Court has held there was an actual conflict of interest. For example, in Gonzales v. State, 419 S.C. 2, 10, 795 S.E.2d 835, 839 (2017), this Court held there was an actual conflict of interest where trial counsel represented the petitioner as well as petitioner's mother's boyfriend on unrelated drug charges because there were indicators and allegations of a conspiracy between the two to traffic illegal drugs. Gonzales held that, because these factors indicated an actual conflict of interest, and because the conflict adversely affected counsel's representation, the petitioner was entitled to relief. Gonzales, at 13, 795 S.E.2d at 841. In contrast, in the present case, though Counsel represented Petitioner and his wife at the same time, counsel's representation of Petitioner's wife was limited to his joint representation of Petitioner and his wife in a separate family court action and Petitioner's wife never faced criminal charges or any real risk of criminal prosecution. She was not going to be used as a witness at trial to testify against Petitioner. At the time Counsel represented both clients, their goals and interests were aligned—to regain custody of their five minor children.

Petitioner has not established Counsel owed a duty to either client to take some action which could be detrimental to the interests of the other client. Because of this, he cannot show an actual conflict of interest. Because there is no actual conflict of interest, Counsel's representation was not adversely affected in this manner.

Additionally, Petitioner's repeated assertions that this conflict led counsel to declare he would only represent Petitioner if Petitioner pled guilty is a mischaracterization of the record. Counsel clearly and unequivocally testified at the evidentiary hearing he told Petitioner that he would only represent Petitioner if he pled guilty after Petitioner informed him he was guilty of the indicted offenses—not based on any purported conflict of interest. (App. 152). Petitioner

admitted his guilt, and counsel responded that he would not participate in a trial based on the information Petitioner had given him. It is reasonable for a privately retained attorney to elect not to take a case based on his belief of the case's likelihood of success, especially once the client has admitted his guilt.

Furthermore, Petitioner's assertion that this practice is unethical because it violates South Carolina's rule of professional conduct against accepting a contingent fee for representing a defendant in a criminal case, is incorrect. South Carolina Rule of Professional Conduct 1.5(d)(2) is in place to prevent attorneys from setting a fee contingent on the outcome of the jury's verdict. Nowhere in the rule or commentary does it prohibit attorneys from representing a client and charging a fee only if they choose to plead guilty, particularly after the client has admitted to his guilt. The record of the guilty plea hearing and the testimony presented clearly shows Petitioner was fully advised of his right to a jury trial. If he had chosen to pursue a trial rather than plead guilty, he could have retained new counsel or asked to be appointed a public defender to represent him at trial. His assertion that he was coerced to plead guilty because of Counsel is not supported by any credible evidence before the Court.

In conclusion, all the relevant testimony from the post-conviction relief hearing is probative evidence that the post-conviction relief court relied on in holding Petitioner's guilty plea was knowing and voluntary. Petitioner presented no credible evidence of a valid reason to allow him to depart from his statements at the guilty plea hearing. Because the post-conviction relief court's findings were supported by the probative evidence and are not controlled by an error of law, this Court should affirm the post-conviction relief its denial of the application.

## CONCLUSION

Because Petitioner never raise the issue presented to this Court on appeal to the post-conviction relief court, this issue is not preserved for this Court's review and this case does not warrant a remand for a ruling on this unpresented issue. Additionally, as this claim has no merit, this Court should affirm the post-conviction relief court's denial of his application for relief.

Respectfully submitted,

ALAN WILSON  
Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General  
S.C. Bar No. 100108

By:   
ATTORNEYS FOR RESPONDENT

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

November 30, 2018

STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO AIKEN COUNTY  
Court of Common Pleas

The Honorable Robert E. Hood, Post-Conviction Relief Court Judge  
The Honorable Doyet A. Early, III, Plea Judge

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Appellate Case No. 2016-002284

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ISAAC STARKE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**PROOF OF SERVICE**


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I, Megan Harrigan Jameson, certify that I have served the within **Brief of Respondent** on Petitioner by depositing two copies of the same in the interagency mail to be delivered to Petitioner at the address below:

Appellate Defender David Alexander  
South Carolina Commission on Indigent Defense—Division of Appellate Defense  
P.O. Box 11589  
Columbia, South Carolina 29211-1589

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

This 30<sup>th</sup> day of November, 2018.

  
MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General  
S.C. Bar No. 101260  
Office of Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737



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S.C. SUPREME COURT

ALAN WILSON  
ATTORNEY GENERAL

November 30, 2018

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

**Re: Isaac Starke v. State of South Carolina**  
**Appellate Case No. 2016-002284**

Dear Mr. Shearouse:

Enclosed please find the original and fifteen copies of the Brief of Respondent in the above-referenced post-conviction relief appeal for filing with the Court. Petitioner is simultaneously being served with a copy of this brief.

Please let me know if I can provide anything additional to the Court on this matter.

Sincerely,

Megan Harrigan Jameson  
Senior Assistant Deputy Attorney General  
S.C. Bar No.100108

MHJ/ks

cc: David Alexander, Esquire  
Victim Advocacy Division (without enclosure)