

STATE OF SOUTH CAROLINA
SOUTH CAROLINA COURT OF APPEALS

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2016-001819

RECEIVED

AUG 12 2019

SC Court of Appeals

WILLIAM DAVID WOOTEN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

AMENDED PETITION FOR REHEARING

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ATTORNEY FOR PETITIONER.

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NOW COMES PETITIONER, acting by and through his undersigned counsel, asking this Honorable Court for Rehearing *En Banc*, pursuant to Rule 219, SCACR. In support of that prayer, Petitioner would show unto this Court the following.

QUESTIONS PRESENTED

I.

Did the lower court err in denying Petitioner's Application for Post-Conviction Relief where Petitioner met his burden of proof with regard to his claim that Plea Counsel was ineffective for failing to maintain copies of any and all plea agreements accepted and signed by the Petitioner after they were extended by the State?

Second Amended Application, Allegation 4

II.

Did the lower court err in denying Petitioner's Application for Post-Conviction Relief where Petitioner met his burden of proof with regard to his claim that Plea Counsel was ineffective for failing to make adequate arrangements for someone to cover for him during a vacation out of South Carolina where said failure resulted in the Petitioner not receiving a plea offer from the State in a timely manner?

Second Amended Application, Allegation 7

III.

Did the lower court err in denying Petitioner's Application for Post-Conviction Relief where Petitioner met his burden of proof with regard to his claim that Plea Counsel was ineffective for failing to move for specific enforcement of a plea offer from the State where said offer was made during a time period during which Plea Counsel was under an Order of Protection and the State was on notice of said order?

Second Amended Application, Allegation 8

IV.

Did the lower court err in denying Petitioner's Application for Post-Conviction Relief where Petitioner met his burden of proof with regard to his claim that Plea Counsel was ineffective for failing to convey an advantageous plea offer to the Petitioner immediately upon receipt of said offer by Plea Counsel when he

returned to South Carolina after the expiration of his Order of Protection?

Second Amended Application, Allegation 9

STATEMENT OF THE CASE

The Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Pickens County Clerk of Court. The Pickens County Grand Jury indicted the Petitioner for two counts of lewd act upon a child (2011-GS-39-1763,-1765), first-degree criminal sexual conduct (CSC) with a minor (2012-GS-39-0492), and second-degree CSC with a minor (2012-GS-39-0493). He was represented by S. Paul Aaron, Esquire.

On February 27, 2012, the Petitioner pled guilty-pursuant to a negotiated sentence- to one count of lewd act upon a child¹ and one count of first-degree CSC with a minor. The Honorable Brooks P. Goldsmith sentenced the Petitioner to concurrent terms of fifteen years for lewd act upon a child and twenty-five years for first-degree CSC with a minor. The Petitioner did not appeal.

This matter came before the Court by way of an Application for Post-Conviction Relief (hereafter PCR) filed August 17, 2012 and amended applications filed August 28, 2012 and April 17, 2015. The Respondent made its Return on February 12, 2013. In his original Post-Conviction Relief Application, filed on August 17, 2012, Petitioner has alleged generally that he received ineffective assistance of counsel prior to and during his trial in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as, Article I, Section 14, of the South Carolina Constitution. In support of that claim he has raised the following general allegations in that Application:

¹ 2011-GS-39-1765

1. The Petitioner received Ineffective Assistance of Counsel prior and during his plea in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution.

2. The Petitioner's pleas of guilty were not voluntary and intelligently entered. The judgment and sentence against the Petitioner were entered in violation of his rights to due process of law and effective assistance of counsel.

3. Trial Counsel failed to provide the Petitioner effective assistance of counsel in that he failed to convey a plea offer from the State to the Petitioner in a timely manner thereby causing the Petitioner to lose the benefit of that plea negotiation with the prosecution.

4. Counsel failed to provide client effective assistance of counsel prior to and during his guilty pleas proceeding. The Petitioner's pleas of guilt were coerced by counsel's failure to provide adequate representation.

App.pp. 20-26.

Petitioner filed an Amended Application for Post-Conviction Relief on August 28, 2012. The sole amendment reflected in that pleading was the addition of a charge that had not been listed in Petitioner's original Application; Lewd Act on a Minor under 16 years of age, Indictment No. 2011-GS-39-01765. App.pp. 27-33.

Petitioner subsequently filed a Second Amended Post-Conviction Relief Application on April 17, 2014, in which he raised the following additional allegations:

1. Plea Counsel was ineffective for allowing the State to force the Petitioner to make a decision about the plea offer extended to him on February 27, 2012, the date of his pleas, where the Petitioner was not indicted for two separate charges of First Degree Criminal Sexual Conduct and Second Degree Criminal Sexual Conduct with a minor relating to his daughter until February 21, 2012, and was not made aware of these charges until immediately prior to his plea proceeding.
2. Plea Counsel was ineffective for failing to adequately advise the Petitioner of measures which could be taken to ask the Court to sever the prosecution of his charges which involved two separate victims, neither of whom were witnesses to acts alleged to have been committed with the other.
3. Plea Counsel was ineffective for neglecting to fully advise the Petitioner

concerning what use the defense could make of a recantation made by the Petitioner's daughter if his case had proceeded to trial by jury.

4. Plea Counsel was ineffective for failing to maintain copies of any and all plea agreements accepted and signed by the Petitioner after they were extended by the State.
5. Plea Counsel was ineffective for failing to fully discuss with the Petitioner what use the defense could make of the domestic history between the Petitioner and his daughter's mother, if the Petitioner exercised his right to trial by jury, where allegations of sexual battery were not made against the Petitioner until after he sought child support from his ex-wife sometime after he was awarded custody of their daughter.
6. Plea Counsel was ineffective for failing to consult with Attorney Nick Lavery concerning the fact that the Petitioner's daughter had made a statement in the presence of Attorney Lavery, recanting her allegations of sexual battery.
7. Plea Counsel was ineffective in that he failed to make adequate arrangements for someone to cover for him during a vacation out of South Carolina where said failure resulted in the Petitioner not receiving a plea offer from the State in a timely manner.
8. Plea Counsel was ineffective for failing to move for specific enforcement of a plea offer from the State where said offer was made during a time period when Plea Counsel was under an Order of Protection and the State was on notice of said order.
9. Plea Counsel was ineffective for failing to convey an advantageous plea offer to the Petitioner immediately upon receipt of said offer by Plea Counsel when he returned to South Carolina after the expiration of his Order of Protection.
10. Plea Counsel failed to provide the Petitioner reasonable professional assistance of counsel in that he failed to adequately inform the Petitioner of the elements of the charges against him.
11. Plea Counsel was ineffective for failing to give the Petitioner accurate advise concerning his sentencing exposure if he proceeded to trial by jury.
12. Plea Counsel was ineffective for failing to object to the Petitioner's re-indictment for First Degree Criminal Sexual Conduct with a Minor and Second Degree Criminal Sexual Conduct with a Minor on charges of sexual battery upon his daughter where the second indictments broke the time period covered in a earlier single indictment into two separate offenses.

13. Plea Counsel was ineffective for neglecting to review all the discovery materials produced by the State with the Petitioner before he was required to make a decision regarding exercising his right to a jury trial.
14. Plea Counsel was ineffective for failing to consult with his daughter's guardian *ad litem*, Liz Young, where Ms. Young's testimony would have helped develop a defense to the Petitioner's charges pertaining to his daughter.
15. Plea Counsel was ineffective for failing to advise the Petitioner concerning how the defense could use the testimony of a child interviewer who was the first to interview his daughter after the allegations concerning the daughter came to light.
16. Plea Counsel was ineffective for failing to object to a conflict of interest where the Plea Judge's daughter was close friends with the Prosecutor in the Petitioner's case.

App.pp.40-42.

An evidentiary hearing was held in this matter on August 25, 2014 before the Honorable James R. Barber, III, presiding circuit court judge. At the outset of that proceeding, Petitioner waived all his allegations with the exception of those relevant to ineffective assistance of counsel concerning a plea offer made by the state. Following that hearing, Petitioner's PCR Counsel submitted a Memorandum in Support of PCR Application, which was filed on September 19, 2014. On September 23, 2014, Petitioner filed a Motion to Enlarge Record in which he noted that documentation relevant to his allegations had come to light which had not been provided to PCR Counsel in response to a duly served subpoena which clearly covered the records in question. App.pp. 167-200. Judge Barber subsequently filed a Form 4 Order returning Petitioner's case to Roster for a Trial *de novo*. App.p. 201.

The *de novo* hearing ordered by Judge Barber was held on April 20, 2015 at the Pickens County Courthouse, before the Honorable Edward W. Miller, presiding circuit judge. The Petitioner was present at this proceeding and was represented by undersigned counsel. Karen C. Ratigan, Assistant Attorney General, represented the Respondent. During this hearing, by

agreement of both parties, a partial transcript of the August 25, 2014, evidentiary hearing was introduced into evidence as Plaintiff's Exhibit No. 6. App.p. 273, ll. 11-20. This transcript contained the previous PCR testimony of Plea Counsel, Paul Aaron, and Assistant Solicitor Brandi Batson from the August 25, 2014 hearing.

The Petitioner testified on his own behalf at the second PCR hearing. Also testifying were: Lisa Spangler, Assistant Solicitor Brandi Batson Hinton, Jean Keown, Richard Douglas Wooten, III, and the Petitioner's plea counsel, S. Paul Aaron, Esquire. The lower court has before it a copy of the guilty plea transcript, the Pickens County Clerk of Court records, the South Carolina Department of Corrections record, the PCR application, the Return, and the Petitioner's Exhibits 1-6 from the April 20, 2015 hearing. On May 4, 2015 Petitioner filed his Memorandum in Support of his Application for PCR. App.pp. 297-303. Respondent's Post-Trial Memo was submitted to Judge Miller on May 4, 2015. App.pp. 304-305. Petitioner filed a Reply to Respondent's Memorandum on May 11, 2015. App.pp. 306-310.

An Order of Dismissal was filed by Judge Miller on October 6, 2015. App.pp. 311- 324. Petitioner subsequently filed a Motion to Alter or Amend, pursuant to Rule 59(e), SCRPC, on October 26, 2015 after having been timely served on Respondent on October 22, 2015. App.pp. 325-366. The lower court's Order denying Petitioner's 59(e) Motion was not filed until July 25, 2016. App.p. 367. Petitioner's Notice of Appeal, filed September 6, 2016, expressly gave notice of his appeal from the Order of Dismissal filed October 6, 2015 and the Order Denying Motion to Alter or Amend filed July 25, 2016. App.pp. 368-369. Petitioner filed his Petition for Writ of Certiorari with the Supreme Court on February 13, 2017. Petitioner next sought leave to file an Amended Certiorari Petition. That request was granted by Order dated March 6, 2017 and the Amended Certiorari Petition was filed on that same date. This appeal was subsequently transferred to the jurisdiction of the South Carolina Court of Appeals by Order of the Supreme

Court of South Carolina dated October 30, 2017. By Order dated June 7, 2019, Certiorari was denied. Petitioner filed his Rehearing pursuant to Rule 221, SCACR, on June 24, 2019. Petitioner has recently discovered two typographical errors on page 15 of the Petition for Rehearing in which the date the plea offer at issue in this case was extended and the date it expired are improperly listed as **December 20, 2013** and **January 3, 2014**. Those dates should have been **December 20, 2011** and **January 3, 2012**. This error most likely occurred because the same mistake was made in the original Petition for Writ of Certiorari filed in the Supreme Court of South Carolina. A Petition to Amend that error was granted by the Supreme Court and the error was corrected in an Amended Certiorari Petition. Regrettably, it appears that the original petition was inadvertently referenced in drafting this Petition for Rehearing and consequently the error was repeated. Petitioner's Counsel apologizes to the Court for any confusion this may have caused. The errors in question have been corrected below.

ARGUMENT

Questions I through IV

Plea Counsel was ineffective for failing to maintain copies of any and all plea agreements accepted and signed by the Petitioner after they were extended by the State.

Second Amended Application, Allegation 4

Plea Counsel was ineffective in that he failed to make adequate arrangements for someone to cover for him during a vacation out of South Carolina where said failure resulted in the Petitioner not receiving a plea offer from the State in a timely manner.

Second Amended Application, Allegation 7

Plea Counsel was ineffective for failing to move for specific enforcement of a plea offer from the State where said offer was made during a time period during which Plea Counsel was under an Order of Protection and the State was on notice of said order.

Second Amended Application, Allegation 8

Plea Counsel was ineffective for failing to convey an advantageous plea offer to the Petitioner immediately upon receipt of said offer by Plea Counsel when he returned to South Carolina after the expiration of his Order of Protection.

Second Amended Application, Allegation 9

These questions were presented as a single argument in Petitioner's Petition for Writ of Certiorari due to the fact that the questions were all interrelated and addressed the same factual considerations.

STANDARD OF REVIEW

Petitioner is aware that pursuant to Rule 221, SCRAP, a Petition for Rehearing is required to "state with particularity the points supposed to have been overlooked or misapprehended by the Court." Petitioner would most respectfully note however, that where the Court has issued an Order which simply denies certiorari without comment or citation to

authority, Petitioner is denied the opportunity point to what arguments, and or authorities, the Court may have overlooked or misapprehended in reaching the decision to deny certiorari and thereby deny him the opportunity to more fully develop the issues addressed in his Petition for Writ of Certiorari. Nevertheless, Petitioner asks that this Honorable Court reconsider its decision in this matter. Petitioner is equally aware that by issuing an Order simply denying certiorari without citation to authorities or discussion as to the analysis which led the Court to its decision, this Court arguably had shut the door to Petitioner seeking review of this Court's decision in the Supreme Court of South Carolina. *Haggins v. State* 377 S.C. 1385, 659 S.E.2d 170 (2008). It is for that reason, Petitioner most respectfully asks this honorable Court to reconsider its decision in this matter.

DISCUSSION

Petitioner respectfully submits that he has met his burden of proof with regard to his allegations concerning the manner in which his Sixth Amendment right to effective assistance of counsel was violated in the lower court. . Records of the email communications between Plea Counsel and the State confirm that his Order of Protection only protected him through Monday, January 2, 2012. Had he conveyed this offer to Petitioner on January 3, 2012, Petitioner would have pleaded under the terms of a vastly more favorable deal. As result of Plea Counsel's failure to ensure that his staff had a way to communicate urgent matters to him while on vacation, he did not become aware of this offer until he returned to the office. Even then, he did not immediately seize upon the urgency of the situation and bring this offer to Petitioner on January 3, 2012, in time to accept it before it expired. In *Davie v. State*, 381 S.C. 601, 675 S.E.2d 416 (2008) our Supreme Court adopted the rule that failure to convey a plea offer constitutes deficient performance. In so ruling, the Court expressly found that even if they concluded the failure of Defense Counsel constituted excusable neglect, such neglect would not negate the deficient

performance. *Id.*, 381 S.C. at 610, 675 S.E.2d at 421.

Petitioner has demonstrated prejudice by proving that when he finally became aware of the offer on January 17, 2012, he not only agreed to accept it, but actually committed to the deal by signing sentencing sheets for the plea. Furthermore, testimony from the prosecutor in this case, as well as the documents introduced in evidence, establish that the victims only withdrew their agreement to this plea offer after they learned Petitioner had not taken the deal before it expired January 3, 2012. In *Davie*, *supra*, our Supreme Court found the appropriate remedy was a resentencing proceeding. Indeed, on the facts of that case, *Davie* could in theory be made whole by that remedy. Here, Petitioner can not.

As this Court has consistently recognized, the remedy for ineffective assistance of counsel, ***“should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.”*** *Davie*, 381 S.C. at 614, 675 S.E.2d at 423. (citations to authorities omitted). Likewise, the Court recognized in *Davie* that a Petitioner may not be subjected to a greater punishment for exercising the right upon which he prevailed in a collateral attack. *Id.*, 381 S.C. 601, 615, 675 S.E.2d at 424. It was for that reason that Petitioner argued that the appropriate remedy in this case would be a remand for specific enforcement of the plea offer not timely conveyed to Petitioner. This, Petitioner argues, is particularly true where the State did not have entirely clean hands in this matter. It is apparent the offer in dispute was conveyed when the prosecutor either knew, or according to her own testimony should have known, Plea Counsel was under protection. When Plea Counsel made the prosecutor aware of why he had not conveyed this offer to Petitioner before the offer expired, she did not explain the situation to the victims, but rather allowed them to believe that Petitioner had simply failed to accept this offer, which they no doubt viewed as generous, in a timely manner. Further, the prosecutor, once reminded that Plea Counsel had been under an Order of Protection, did not

request approval from her supervisor to extend the deadline for the offer.

Mindful that under the terms of this plea agreement he was to receive a negotiated sentence of fifteen years, Petitioner submitted that the appropriate remedy is remand for specific enforcement of the plea offer. On remand, if the Court accepts the deal as negotiated, it would sentence Petitioner to an aggregate term of fifteen (15) years on two counts of Lewd Act. Petitioner asked for this Court's Order providing that if the lower court declined to follow the *negotiated sentence* of fifteen (15) years, the Court could impose an aggregate sentence of no more than Petitioner's original sentence of twenty-five (25) years for the two counts of Lewd Act the State agreed to accept pleas to in lieu of the original charges.

Despite the difficult procedural posture Petitioner finds himself in, he is asking for Rehearing, at least in part, because the issues which created such problems in this case, no doubt came about because there are no clear rules in place governing the time ordered practice of allowing lawyers to obtain, for good cause shown, an Order of Protection for a period of time from their duties as an attorney. Petitioner would note that this case presented a prime opportunity for this Court to clarify exactly what duties and responsibilities a lawyer is "*protected*" from while under an order of protection. Further, this case presents an opportunity to clarify for the prosecutors of this state what their obligations are with regard to dealings with a lawyer under an Order of Protection. For example, in this case, the prosecutor alternately admitted knowing Petitioner's lawyer was under Order of Protection and then denied that knowledge. Interestingly, however, she clearly expressed the view that an Order of Protection would not prohibit her from communicating with an attorney "*while they're out of town or on protection. I cannot rule them into court, but I'm not aware of my inability to communicate with them.*" App.p. 250, ll. 8-11. The manner in which the parties handled this case, clearly punctuated the need for more definitive guidelines on this crucial issue. Petitioner understands

that this Honorable Court may feel the responsibility for formulating clearer guidelines and rules applicable to Orders of Protection, falls to the highest court in the state and as such these issues should be decided by the Supreme Court of South Carolina. While Petitioner can not argue with the logic of such a conclusion, he would respectfully point out that this case presents the perfect opportunity for further clarification of these important issues by our Supreme Court. That being said, based solely on the manner in which this Court decided this PCR appeal, Petitioner will likely be denied the opportunity to have this Court's ruling in this matter reviewed by the Supreme Court. *Haggins, supra.*


For all the reasons set forth in his Petition for Writ of Certiorari, Petitioner prays for this Court's reconsideration of its decision to deny certiorari in this matter. Because this case requires consideration of questions of exceptional importance, not just to Petitioner, but to the entire Bench and Bar, Petitioner respectfully asks for Rehearing En Banc pursuant to Rule 219, SCACR. Petitioner respectfully asserts that Rehearing *En Banc* is necessary and appropriate inasmuch as this case not only involves consideration of exceptionally important questions implicating the right to effective assistance of counsel, and the impact of Orders of Protection on that fundamental right, but brings to light the need for uniformity in the manner in which our court system in South Carolina handles Orders of Protection, how a lawyer's duties to his clients are impacted by the grant of such an order and what the good faith obligations of the State are in their handling of a case while a lawyer is under the "protection" afforded by such an order.

CONCLUSION

For the reasons stated herein, and in his Petition for Writ of Certiorari, Petitioner asks that this Honorable Court grant rehearing *en banc*, reconsider its previous decision and remand his case for specific enforcement of the plea offer. On remand, if the Court accepts the deal as negotiated, it would sentence Petitioner to an aggregate term of fifteen years on two counts of

Lewd Act as provided in the terms of the plea offer extended on December 20, 2011 and repeated, January 3, 2012. Petitioner prays that this Court provide, however, that if the Circuit Court declines to follow the *negotiated sentence* of fifteen (15) years, the Circuit Court be instructed that it could not impose an aggregate sentence of more than Petitioner's original sentence of twenty-five (25) years for the two counts of Lewd Act the State agreed to accept pleas to in lieu of the original charges. Petitioner once again asks that the writ be granted and that he be allowed full briefing of the issues summarized herein. Alternatively, Petitioner most respectfully asks that this Honorable Court issue its Order certifying the questions presented herein pursuant to Rule 244, SCACR, inasmuch as a fair determination of the Sixth Amendment claims present in this case requires action on questions of law not answered by existing precedent in South Carolina.

Respectfully submitted,


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ATTORNEY FOR PETITIONER

This 8th day of August, 2019

STATE OF SOUTH CAROLINA
In The South Carolina Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2016-001819

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AUG 12 2019

SC Court of Appeals

WILLIAM DAVID WOOTEN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Amended Petition for Rehearing in the above-entitled case has been served upon opposing counsel this the 8th day of August, 2019 by depositing in the mail one (1) copy properly addressed to:

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
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August 8, 2019

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11549
Columbia, SC 29211

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AUG 12 2019

SC Court of Appeals

RE: William David Wooten, v. State of South Carolina
Appellate Case No. **2016-001819**

Dear Jenny:

Enclosed for filing please find the original and six copies of the Amended Petition for Rehearing and Certificate of Service in the above-captioned case.

I have enclosed an extra copy of that Amended Petition for Rehearing and Certificate of Service and would appreciate it being clocked and returned for my file in the enclosed self-addressed envelope. Thank you for your assistance in this matter. I remain,

Sincerely yours,

A handwritten signature in black ink that reads "Tara Dawn Shurling". The signature is written in a cursive, flowing style.

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/jj

Enclosures

cc: Megan Harrison Jameson, Esquire (w/enclosure)
David Wooten, 349872 (w/enclosure)



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