STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Hampton County

Honorable R. Lawton McIntosh, Circuit Court Judge

JAMES A. GARDNER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000192

PETITION FOR WRIT OF CERTIORARI

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1.

The PCR court erred by limiting petitioner to raising only three issues during his PCR hearing under threat of Rule 11, SCRCP, sanctions, where Rule 11 has been held by this Court not to apply to PCR proceedings and the PCR judge's application of Rule 11 chilled petitioner's legitimate right and his obligation to present all of his cognizable PCR issues at the PCR hearing 12

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ISSUES PRESENTED

1.

Whether the PCR court erred by limiting petitioner to raising only three issues which counsel found "meritorious" during his PCR hearing under threat of Rule 11, SCRCP, sanctions, since this Court has held that Rule 11 does not to apply to PCR proceedings and the PCR judge's application of Rule 11 chilled petitioner's legitimate right and his obligation to present all of his cognizable PCR issues at the PCR hearing?

2.

Whether the PCR court erred by finding defense counsel's "all of nothing" plan on not requesting jury instructions on lesser-included offenses was valid trial strategy given petitioner's advanced age where there was no evidence petitioner was consulted with or consented to waiving jury charges on lesser offenses?

STATEMENT

Petitioner was indicted at the October 30, 2014, term of the Hampton County Grand Jury for three counts of attempted murder and one count of possession of a weapon during the commission of a violent crime. App. 496 – 503. His case was called to trial on February 2, 2015 before the Honorable Perry M. Buckner, and a jury. Cory Fleming represented petitioner. Tameaka Legette was the assistant solicitor. App. 1.

The state alleged that petitioner attempted to murder Mary Etta Montouth, who was his girlfriend, and her sister, Mariam Walden. The state also alleged petitioner attempted to shoot Major Bobby Anderson of the Varnville Police Department upon his arrest. Montouth testified that petitioner came into the house, and he accused her of being unfaithful. He threatened to kill her. App. 157, l. 16 – 158, l. 2. Petitioner went to his truck, got a rifle, came back into the house and shot at her. Fortunately, he missed, and Montouth left the house and walked to Mae Francis Smith's house where she met her sister. App. 158, l. 5 - 159, l. 3.

According to Montouth, petitioner followed her to Smith's house in his truck. App. 159, ll. 18-23). Montouth testified that she returned to her house but when petitioner followed her back to the house she ran to a church to get help. App. 164, l. 6 – 166, l. 16

Montouth's sister, Mariam Walden also testified at trial. According to Walden, petitioner came in the house where she was with two rifles and threatened to kill her. Walden dropped to her knees, heard the gun click but the gun did not fire. App. 199, ll. 16-25. When she opened her eyes petitioner said that he was going to kill himself. "And I just said no, no, no, no, no. So he got – he was agitated. So he ran out the back door. " App. 199, l. 23 – 200, l. 2. Walden called 911 and then ran out of the house to look for her sister. According to Walden, as she ran out of the house, petitioner shot her. App. 200, ll. 12-17. She remembered being in the

ambulance, and "[t]hey looked at my wound and patched it up and took my vitals and then just asked me to lay down and be calm." Walden said she was in pain for a while from having been shot but she fortunately no longer felt the pain. App. 204, l. 20 – 205, l. 11.

Major Bobby Anderson with the Varnville Police Department was one of the officers who arrived at the scene. According to Major Anderson, he and petitioner exchanged gunfire. App. 284, l. 1 – 285, l. 16. Lieutenant Luis Hernandez with the Hampton Police Department arrested petitioner and read him his Miranda rights. App. 256, l. 5 – 258, l. 24.

Petitioner was transported to the Varnville Police Department where he provided a taped statement to Chief Tyrone Smith with the Varnville Police Department. A recording of petitioner's statement was introduced in evidence and played for the jury. App. 306, l. 17 – 308, l. 22.

Prior to trial, the judge held a hearing to determine if petitioner's statement was voluntarily made. Lieutenant Hernandez and Chief Smith testified at the hearing. Lieutenant Hernandez admitted that he heard petitioner tell Chief Smith that he drank an entire bottle of Crown Vic and more. Lieutenant Hernandez admitted that they found a bottle in the area where the shooting took place but denied smelling alcohol on petitioner. App. 18, ll. 20-25.

Chief Smith testified, "We found a bottle of Crown Vic. They found it on the scene. He stated he had a few drinks, and I told him that we found a bottle, and [petitioner] said, yeah, I drunk that and more." Smith claimed that petitioner had no odor of alcohol on his person, and he testified that petitioner did not appear drunk. App. 27, l. 20 – 28, l. 6. The defense argument was that petitioner was so intoxicated that the police knew he could not intelligently and knowingly give a statement at that time. The judge found that the statement was voluntarily given. App. 39, l. 7 – 40, l. 10.

On February 4, 2015, the jury found petitioner guilty of the attempted murder of Major Bobby Anderson, guilty of the attempted murder of Mariam Walden, and guilty of the attempted murder of Mary Etta Montouth. The jury also found petitioner guilty of possession of a weapon during the commission of a violent crime. App. 384, l. 16 – 385, l. 7.

Judge Buckner sentenced petitioner to twenty-five years imprisonment for each count of attempted murder, and five years imprisonment for possession of a weapon during a violent crime. All sentences were concurrent. App. 401, l. 18 – 402, l. 10.

Petitioner's convictions were affirmed on direct appeal in State v. Gardner, 2016-UP-369 (S.C. Ct. App. filed July 20, 2016).

Petitioner filed an application for post-conviction relief on January 9, 2017. App. 405 – 427. Petitioner alleged ineffective assistance of trial and appellate counsel. App. 407. Petitioner contemporaneously attached to his PCR petition a motion in support of post-conviction relief application. App. 413 – 427.

Petitioner alleged, inter alia, that counsel was ineffective for failing to request jury instructions on lesser included offenses of attempted murder. App. 415. Petitioner also alleged trial counsel was ineffective, and he denied petitioner's right to due process and a fair trial where there was a breakdown in communication from the beginning of representation. App. 414. In addition, petitioner asserted counsel was ineffective for failing to object to juror Alice Scott, who was biologically related to the victim and was still allowed to serve on the jury. App. 414.

Petitioner also alleged counsel was ineffective for failing to investigate and interview witnesses. He also failed to seek funding for his defense. App. 414 – 415. In addition, petitioner alleged the breakdown in communication was ineffective assistance of trial counsel,

especially where he was willing to enter a guilty plea to a lesser included offense for a sentence of under nine years imprisonment. App. 415.

An addition allegation of ineffective assistance of counsel was counsel's failure to utilize an investigator where there was evidence of lesser included offenses available. Petitioner also alleged ineffective assistance of trial counsel for him seemingly not forcing the state to prove its case beyond a reasonable doubt on the charge of attempted murder. App. 416.

The return and partial motion to dismiss dated August 3, 2017, was filed by the state. App. 428 – 435. This return also noted many of petitioner's allegations of ineffective assistance of trial counsel and appellate counsel. App. 429 – 430.

An evidentiary hearing was convened on January 29, 2018, before the Honorable R. Lawton McIntosh. App. 438. Petitioner was represented by James K. Falk. The state was represented by Assistant Attorney General Deshawn H. Mitchell. App. 437.

At the beginning of the hearing, Assistant Attorney General Mitchell, the judge said, understood PCR counsel Falk had matters to bring up with the court. PCR counsel Falk then marked amended PCR application as Court's Exhibit #1. App. 440, l. 25 – 441, l. 11; app. 504.

The judge then asked PCR counsel Falk to state his amended grounds for the record. PCR counsel Falk responded, "In addition to other grounds raised in his original application, we would add that trial counsel had a conflict of interest in its representation of the applicant in this case." PCR counsel Falk told the judge that "Trial counsel was a close friend of a gentleman named Adonis Coker, and he [Coker] was the son of the victim in this case. This relationship between trial counsel and the victim's family was not made apparent to my client, was not disclosed to my client prior to the trial. And once the conflict became—or my client became aware of a conflict, he sought to have—" App. 442, l. 24 – 443, l. 13.

The PCR judge interrupted at this point, and he asked: "Which ethical rule are you making under that he should have advised his client, do you know?" PCR counsel Falk responded, "I don't have that at hand." The judge then told PCR counsel, "Well, it's a serious claim, so you need to know." The following then occurred between PCR counsel and the PCR court:

> MR. FALK: It's my understanding that a breach of an ethical rule is not necessary grounds under published South Carolina case law as far as PCR-related, but we're just saying, so that's why I'm not prepared under the rule. I would just say that as far as --
>
> THE COURT: Well, by an order for him, I know that it may raise a duty. Would you agree?
>
> MR. FALK: Yes, your Honor.
>
> THE COURT: And then, if there's an ethical rule that would make a duty attach, and so, I guess what I'm asking, and very in-artfully, Mr. Falk, is that, if, in fact, there is an obligation for him to recuse himself or at least advise his client of the potential there, I want to know what rule that is so I can gage his conduct accordingly in this case. All right, sir?
>
> MR. FALK: Okay, your Honor. All right, your Honor.
>
> THE COURT: Okay, sir? And maybe that's not hitting the mark, but that's the way I look at it. If you have it, just give it to me.
>
> MR. FALK: Okay. We would go forward under violation of the *Sixth Amendment* right to counsel and the corresponding South Carolina constitutional provision.
>
> THE COURT: Very good. Of the allegations out, that's the only other ground in the amended grounds?
>
> MR. FALK: Yes, your Honor.
>
> THE COURT: And then, of the allegations under ineffective assistance.
>
> MR. FALK: Failure to charge a lesser-included offenses and failure to object to the composition of jury.
>
> THE COURT: Okay.

MR. FALK: There was a particular juror. Her name was Neece Scott, and he brought this to an addendum that was attached to his original application. So the fact --

THE COURT: According to the State, I'm just looking at their brief, they have ineffective trial counsel, it's a breach of communication. *And what I want you to do, again, not only like we did in the last case, but all cases under Rule 11, I don't want there to be any claims that are specious or not recognized or non-meritorious. I want claims that are recognized and meritorious to be presented, and you, as an officer of the court, to tell me which ones should not be considered.*

MR. FALK: Yes, your Honor. I think that under his l(b) (i), failure to object to the jury composition, because the juror -- it's unclear if it's Neece or Alice -- Scott is biologically related to one of the alleged victims.

THE COURT: Is Scott related to who?

MR. FALK: One of the victims. The victim. One of the jurors --

THE COURT: Okay. Okay. Juror related to victim. Okay. I'm sorry. I'm -- sometimes I'm hard of hearing. Okay. Go ahead.

MR. FALK: And possibly, this should -- could have been better stated, but failure of trial counsel to seek the charge on the lesser-included offenses in this case. I mean, he set that up as ineffective assistance of appellate counsel in the original claim, but I think that's best stated as ineffective assistance of trial counsel.

THE COURT: Okay.

MR. FALK: And then our concern about Adonis Coker. And then our concern about the conflict of interest.

THE COURT: Right. Right. Okay. *So those are the three grounds that you say are non-specious and meritorious and should Iproceed on*?

MR. FALK: *Yes, your Honor*. Yes, sir, your Honor.

THE COURT: Thank you so much, Mr. Falk. All right. Would you call your first witness.

App. 443, l. 19 – 446, l. 10. (emphasis added).

Petitioner James A. Gardner was then called as a witness. Petitioner testified he became concerned with trial counsel Fleming's representation when he learned Fleming was "a friend of my stepson." App. 448, l. 24 – 449, l. 8. Petitioner said he was "cleaning my stepson's room out, and I ran upon Mr. Fleming's picture. I know they was friends, you know, and I ask him about it. And he [Fleming] told me he didn't know Adonis [the stepson]." The stepson's mother, Mary Etta Montouth, was one of the victims in this case. App. 449, l. 3 – 450, l. 15.

Petitioner said he wrote Fleming a letter, "and I told him I don't know what you and Mr. Alex Murdaugh [the solicitor], is trying to pull on me, but I don't want you as my lawyer, you know, I want my money back." App. 450, ll. 9 -20. Petitioner related that the judge refused to relieve Fleming on this basis, which was about two or three months before trial, and that he was forced to go to trial with Fleming as his lawyer. App. 450, l. 23 – 453, l. 2.

Petitioner also complained that defense counsel Fleming did not exercise a preemptory challenge to remove Alice Scott, who was related to the victim's family. Petitioner said at one point he thought he told Fleming about Alice's relationships to the victims, but that Fleming nonetheless did not strike Scott. App. 453, l. 3 – 454 l. 25.

On cross-examination, petitioner acknowledged he remembered the judge asking potential jurors if anyone was related to the victim. Petitioner did not remember if Alice stood when that question was asked. Nonetheless, Assistant Attorney General Mitchell noted that on page 58 of the trial record that the question was asked and "Ms. Scott does not stand. Note that for the record. That's all the questions I have for the applicant." App. 459, l. 24 – 460, l. 16.

Defense counsel Fleming then testified if he had known Scott was related to the victim, "I am certain I would have written it down next to her name here, because that would have been a reason for the strike." App. 462, l. 14 – 463, l. 5. Fleming explained that his trial strategy was

to try to convince the jurors that petitioner did not have the specific intent necessary to commit the crime since "James had drunk a lot of Crown Royal in the process of whatever happened." Fleming noted that petitioner was so intoxicated that he wanted the police to kill him that day when he shot at the victims and the police. App. 463, l. 8 – 464, l. 21; app. 470, l. 15 – 475, l. 5. Fleming said his strategy on petitioner not having the intent necessary to commit the crimes of attempted murder was very much harmed by petitioner telling the police in his videotaped confession that "I wanted the bleep dead, etc. And that's a mountain to climb at that point." App. 474, l. 21 – 475, l. 5.

Defense counsel noted that the entire incident started because petitioner thought his girlfriend or common-law wife was having an affair at the time. Petitioner "grabbed a rifle, either intentionally or unintentionally shot her in the leg." Petitioner was then involved in a shootout with the Varnville Police Department, and he later confessed, which unfortunately included his statements that he wanted to kill the victims. App. 473, l. 7 – 475, l. 5.

Fleming opined there was overwhelming evidence of petitioner's guilt given the "thorough confession." App. 471, l. 25 – 472, l. 3. Fleming explained he did not ask for instruction on any lesser-included offenses because he had an "all-or-nothing kind of strategy." App. 476, ll. 14 – 24. Fleming explained that petitioner was sixty years old at the time and petitioner turned down a nine-year plea offer as being "too much time." Therefore, a "compromise verdict," as Fleming saw it, on ABHAN or assault and battery in the first degree carrying a ten or twenty year potential prison sentence still meant as a practical matter that petitioner would not leave prison alive. App. 476, l. 14 – 478, l. 1.

Without hearing arguments, the judge then ruled that "You've alleged three what I consider recognizable, potentially meritorious claims." App. 478, ll. 12 – 17. The judge opined

that petitioner "presented zero credible evidence" about there being an improper relationship between trial counsel Fleming and petitioner's stepson, whose mother was a victim in this case. The judge also observed that juror Scott did not stand when the judge asked if anyone was related to the victims so the judge concluded "So you failed to meet your burden there."

Finally, the judge said defense counsel did not request instructions on a lesser-included offense because it would have subjected petitioner to twenty years imprisonment, "which you do not want, you know, certainly and understandably did not want to do." App. 478, l. 12 – 479, l. 22. The judge said to the extent petitioner's "testimony is otherwise, I just don't find it to be convincing or credible. Also, there's just overwhelming evidence of your guilt in this case. So your application is denied." App. 479, l. 23 – 480, l. 4.

An order of dismissal was filed on April 24, 2018. The order stated that petitioner had failed to prove that juror Alice Scott was related to the victim and therefore he had failed to prove the first prong of Strickland v. Washington, 466 U.S. 668 (1984). App. 490 – 491.

The order also found that defense counsel's "all-or-nothing" strategy on a verdict of attempted murder with no request for lesser-included offenses was a legitimate trial strategy. The order noted petitioner's age and that not "requesting a lesser-included charge as to avoid a compromised (sic) verdict [was legitimate]." App. 491 – 492.

In addition, the order stated that petitioner's allegation that trial counsel Fleming had a conflict of interest because he was a friend of petitioner's stepson, Adonis Coker, was not credible. The order concluded petitioner presented no witnesses to substantiate this allegation. App. 492 – 493.

Finally, citing Harris v. State, 377 S.C. 66, 79, 658 S.E.2d 140, 147 (2008), the order stated petitioner could not prove prejudice in any of his claims because of "overwhelming evidence of guilt." App. 493 – 494.

From this order, petitioner is seeking a writ of certiorari pursuant to Rule 243 of the SCACR.

ARGUMENT

1.

The PCR court erred by limiting petitioner to raising only three issues during his PCR hearing under threat of Rule 11, SCRCP, sanctions, where Rule 11 has been held by this Court not to apply to PCR proceedings and the PCR judge's application of Rule 11 chilled petitioner's legitimate right and his obligation to present all of his cognizable PCR issues at the PCR hearing.

As seen, at the beginning of the PCR hearing, the PCR judge cited Rule 11, SCRCP, in admonishing or threatening PCR counsel that he could only the raise three recognizable meritorious PCR claims -- after they initially talked about them -- during the PCR hearing. The judge cited Charles Green Jr. v. State, which was a PCR hearing held immediately before the one in this case. A petition for writ of certiorari in Charles Green Jr. v. State, appellate case number 2018-001204, was filed on January 28, 2019, with this Court.

In Hiott v. State, 381 S.C. 622, 674 S.E.2d 491 (2009), this Court reversed the Court of Appeals and held, as a matter of public policy, "that Rule 11 of the South Carolina Rules of Civil Procedure does not apply to PCR proceedings." Hiott v. State, 381 S.C. 622, 630, 647 S.E.2d 491, 495 (2009). In Hiott, this Court explained that several factors led this Court to hold that Rule 11 does not apply to PCR cases.

First, this Court noted that a petitioner must raise all available grounds for relief in his first PCR application since successive actions are usually barred. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); S.C. Code § 17-27-90 (2003). Next, the PCR applicant must file for PCR within one year of the final resolution of the criminal conviction or within one year of newly discovered evidence or asserting a newly created standard or right. Wade v. State, 348 S.C. 255, 264, 559 S.E.2d 843, 847 (2002).

Thus, "these provisions effectively grant an individual 'one chance to argue for relief' within a year of the final appeal; consequently, '[T]hese limitations adequately prevent inmates from abusing the PCR process.' Wade, 248 S.C. at 264, 559 S.E.2d at 847." Hiott v. State, 381 S.C. 622, 629, 674 S.E.2d 491, 494 (2009). The Court therefore held that Rule 11 of the South Carolina Rules of Civil Procedure did not apply in PCR proceedings, and it further found that it could discern no practical benefit being served by imposing Rule 11 sanctions on PCR petitioners who are often indigent.

The PCR judge in this case erred by threatening to impose Rule 11 sanctions on petitioner, which the record shows had a chilling effect and limited PCR counsel to raising only three "recognizable or recognized PCR issues" in this case. This Court can take judicial notice from the SCDC website that, as of the filing of this certiorari petition, petitioner is 72 years old. He legally had one opportunity to raise to raise all PCR grounds he thought entitled him to relief. Petitioner raised grounds of failure to investigate and failure to seek funding for his defense that PCR counsel apparently did not pursue given the threat of Rule 11 sanctions. On their face these appear to be cognizable PCR grounds. Admittedly, that cannot be determined since they were not raised or developed during the hearing. Petitioner should be granted a new PCR hearing where he can have a full and fair hearing – his "one bite at the apple" in post-conviction relief. See Graham v. State, 378 S.C. 1, 3, 661 S.E.2d 337 (2008).

2.

The PCR court erred by finding defense counsel's "all of nothing" plan on not requesting jury instructions on lesser-included offenses was valid trial strategy given petitioner's advanced age where there was no evidence petitioner was consulted with or consented to waiving jury charges on lesser offenses

A defendant is entitled to a jury instruction on a lesser-included offense or a defense if there is any evidence of that offense. State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (2005). Here, petitioner was charged with three counts of attempted murder. Petitioner, as seen, argued at trial that his confession should have been suppressed because the police should have known he was grossly intoxicated from drinking an entire bottle of "Crown Vic" or more that day. There was evidence others knew petitioner was "out of his mind drunk" that day, including Mariam Walden, pleading with petitioner not to kill himself before petitioner shot her. She was not badly wounded, and attempted murder requires proof of a specific intent to kill. See State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017).

Defense counsel admitted he could not remember if he ever discussed his "all or nothing" strategy of waiving jury instructions on lesser-included offenses in this case with petitioner. App. 465, l. 22 – 467, l. 17. Petitioner had tried to fire defense counsel, but the judge would not relieve him. Petitioner and trial counsel obviously did not get along even given the truncated regimented record in this case shows.

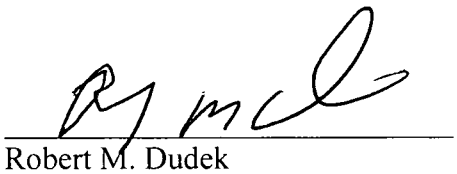
Nonetheless, especially since the state had to prove a specific intent to kill there was evidence in this record which would have supported a jury instruction on ABHAN. "ABHAN requires proof of an unlawful act of violent injury to the person of another, accompanied by circumstances of aggravation. Circumstances of aggravation include the use of

a deadly weapon, the infliction of serious bodily injury, the intent to commit a felony, a great disparity between the ages and physical conditions of the parties, a difference in the sexes, indecent liberties or familiarities with a female, the purposeful infliction of shame and disgrace, resistance of lawful authority, and others." Stevenson v. State, 335 S.C. 193, 200-201 n. 6, 516 S.E.2d 434, 439 n. 6 (1999).

Here, petitioner used a deadly weapon, and one victim was seriously wounded. ABHAN was a proper lesser-included offense. There was no evidence petitioner waived jury consideration of that verdict option were there was evidence of it, and evidence from which the jury could have found petitioner did not have the specific intent to kill any or all of the three victims. See State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017). Petitioner should be granted a new trial.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on these issues. In the alternative, petitioner respectfully submits this case should be remanded to the Hampton County Court of Common Pleas for a new PCR hearing.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of October, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Hampton County

Honorable R. Lawton McIntosh, Circuit Court Judge

JAMES A. GARDNER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Benjamin Limbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on James A. Gardner, #177263, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 28th day of October, 2019.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 28th day of October, 2019.

Mary Allgire (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.