STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

The Honorable Walton J. McLeod, IV, Circuit Court Judge

2017-CP-32-04132

Ivis Ahimara Reyes Yedra,

PETITIONER,

v.

State of South Carolina,

RESPONDENT.

Appellate Case No.: 2019-001309

PETITION FOR A WRIT OF CERTIORARI

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5. DID THE PCR COURT ERR IN DENYING THE PETITIONER'S APPLICATION WHEN COUNSEL WAS INEFFECTIVE WHEN HE ERRONEOUSLY ADVISED THE PETITIONER ON THE AMOUNT OF TIME SHE WOULD SERVE?

6. DID THE PCR COURT ERR WHEN IT DENIED THE PETITIONER'S APPLICATION BECAUSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO MOVE TO QUASH THE INDICTMENT?

STATEMENT OF THE CASE

The State Grand Jury indicted Petitioner on October 15, 2013, for two counts of trafficking in marijuana pursuant to a multi-count indictment related to a marijuana growing and distribution operation that was throughout the midlands of South Carolina (2013-GS-47-00019). (App. p. 279). Stephen Paul Gant, Esquire, of the Florida Bar was admitted *pro hac vice* and for representation of the Petitioner. Arthur K. Aiken, Esquire was local counsel. (App. pp. 179-180). However, Steven E. Amster, Esquire of the Florida Bar actually represented Petitioner along with all the other co-defendants.[1]

On October 7, 2014, the Petitioner pled guilty to a negotiated plea before the Honorable Donald B. Hocker to two counts of the lesser-included offense of manufacturing marijuana. (App. pp. 277-278) The transcript from that guilty plea was unavailable and on February 20, 2019, the record of that guilty plea was reconstructed. (App. pp. 1-36.) Petitioner was sentenced to a negotiated five year sentence. Petitioner was released from the SC Department of Corrections on December 28, 2016. Petitioner did not appeal her guilty plea or sentence.

Petitioner filed her application for post-conviction relief (PCR) on November 7, 2017. (2017-CP-32-04132). (App. pp. 37-49). The State filed its Return and Motion to Dismiss on or about May 7, 2017, (App. pp. 50-59) requesting the Petitioner's application be dismissed for failing to file within the one-year

[1] Various individual Florida attorneys were admitted *pro hac vice* to represent the group of defendants. (App. pp. 174-212.) Those attorneys included Stephen P. Gantt representing the Petitioner and Janesky Vasquez; Esther Pino supposedly represented Osniel Garcia and Manuel Suarez; Steven E. Amster supposedly only represented Yaima Perez, Gustavo Del Sol, and Robiel Gonzalez. (Id.) However, as the evidence shows, Mr. Amster actually

limitations period. A hearing was held on November 7, 2018, requesting a continuance to reconstruct the guilty plea transcript. This request was granted on November 9, 2018. (App pp. 60-65). The guilty plea was sufficiently reconstructed on February 20, 2019. (App pp. 66-71, pp 1-36)

The PCR hearing was held on April 1, 2019, before the Honorable Walton J. McLeod, IV, at the Lexington County Courthouse. Petitioner was present and represented by Ashley A. McMahan, Esquire. Senior Assistant Deputy Attorney General Megan H. Jameson represented the Respondent. On June 11, 2019, Judge McLeod denied the State's request to dismiss based on the statute of limitations and dismissed the Petitioner's PCR application. (App pp. 72-169, pp. 213-247) On June 21, 2019, the Petitioner filed a Motion to Alter or Amend. (App. pp. 249-255). The State replied on July 19, 2019. (App. pp. 257-267). The Petitioner's motion was denied on July 26, 2019. (App. pp. 268-276). This petition follows.

represented them all.

STANDARD OF REVIEW

The reviewing court defers to the PCR court's factual findings and will uphold them if supported by any evidence in the record. Smalls v. State, 422 S.C. 174, 179–181, 810 S.E.2d 836, 839 (2018). Furthermore, the reviewing court affords great deference to a PCR court's credibility findings. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). Questions of law are reviewed *de novo*, and this court will reverse the PCR court if its decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

ARGUMENT

The PCR court erred in denying the Petitioner's application, as the Petitioner's counsel had a conflict of interest.

The PCR court found that the Petitioner's attorney did not have a conflict of interest in representing all of the co-defendants. The court erred in this ruling. To establish a claim of ineffective assistance of counsel arising from multiple representations, an applicant must show that counsel actively represented conflicting interests. *See* Langford v. State, 310 SC 357, 426 SE2d 793 (1993). An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's. *See* Fuller v. State, 347 SC 630, 557 SE2d 664 (2001).

While the co-defendants were *technically* represented by three different attorneys in this matter, Mr. Amster testified he essentially represented all of the co-defendants. (App. p. 116, lines 3-8.) He also stated he always met with them as a group. (App. p. 48, lines 23-24.) Petitioner noted that it was she and her co-defendant that met with him together. (App. p. 90, lines 13-17.) Furthermore, Mr. Amster testified at the PCR hearing "there were conflicts and everybody was getting the same deal. So I didn't seem- I didn't see any problems with it." (App. p. 116, lines 6-8.) He also did not recall if he ever asked counseled the Petitioner about a potential conflict of interest or if the judge advised only at the time of the guilty plea and that "[i]t was always kind of meeting as a group. (App. p. 116, line 15 – p. 117, line 8; p. 119, lines 23-24.) Mr. Wedekind, the prosecutor, also testified that he only dealt with Mr. Amster and when he expressed concern about a possible conflict

Mr. Amster brushed it off since they were "all getting the same deal." (App. p. 158, lines 20-22; p. 158, lines 17-18; p. 159, lines 18-20; p. 156, lines 23-25.)

He owed duties to the other co-defendants that were adverse to the Petitioner's, as their defenses would be different from hers and her defenses would be adverse to Osniel Garcia's. The Petitioner was only in the US for ten days (and not at the house in South Carolina the entire ten days as she had to travel from Laredo, TX). (App. p. 172 – date of entry into the United States is August 22, 2013.) Mr. Garcia testified she didn't know anything about the plants nor would she have been able to smell them due to his ventilation system. (App. p. 137, lines 8-9.) He is clearly the culpable party based on his own testimony. Mr. Garcia also testified that Mr. Amster did not explain to him that there was a conflict of interest and also stated that he and the Applicant only met with Mr. Amster together, never separately. (App. p. 138, lines 16 – 24.) Mr. Amster also admitted he never met with the Petitioner by herself. (App. p. 128, lines 3-5.).

To be valid, a defendant's waiver of a conflict of interest in his counsel must not only be voluntary, it must be done knowingly and intelligently. *See* Thomas v. State, 346 SC 140, 551 SE2d 254 (2001). Applicant testified she was told she had to waive the conflict by Mr. Amster. (App. p. 99, lines 5-18; p. 107, lines 5-8.) Clearly there was an issue regarding the conflict as Mr. Wedekind testified that there was some pausing of the proceedings by the judge to ask more questions about the conflict and to see if the defendants understood what was going on. (App. p. p. 20, line 3 – p. 21, line 12; p. 25, line 11 – p. 26, line 11.) Furthermore, Mr. Amster was

not the Applicant's attorney. (App. p. 175.) He was never admitted *pro hac vice* to represent her, Stephan Gant was. Mr. Amster was not licensed or permitted in anyway by the South Carolina Supreme Court to represent the Applicant

Petitioner did what she testified she was told to do, to waive the conflict and agree with the questioning by the judge. A waiver is not knowing, intelligent, and voluntary unless defendant knows of precise form of conflict of interest that eventually results. *See* United States v. Swartz, 975 F.2d 1042, 1048–49 (4 th Cir.1992). (*See also* Lomax v. State, 379 SC 93, 665 SE2d 164 (2008), An actual conflict of interested existed where counsel simultaneously represented petitioner and her husband during guilty pleas which arose out of related offenses.) Once an actual conflict of interest is shown, applicant does not have to demonstrate prejudice. *See* Thomas, *supra.* Based on the foregoing, the PCR court should be reversed and the PCR granted.

The PCR court erred in denying the Petitioner's application as counsel was ineffective when he incorrectly advised the Applicant of the plea offer.

The PCR court found that Mr. Amster was not ineffective in his representation in his advising of the Petitioner about the plea offer. Mr. Amster testified that the plea offer from Mr. Wedekind was all or nothing. According to Mr. Amster's understating, all the co-defendants that it was offered to had to take it or no one got the benefit of the plea bargain. (App. p. 118, lines 9-11.) Mr. Wedekind testified that this was incorrect. The plea offer was to each of the individual women who were residing or staying at the homes that were growing the marijuana and that is was not all or nothing. (App. p. 151, lines 19-22.) Rather, each individual

defendant it was offered to decide to take the offer or reject it.

Applicant relied on this all-or-nothing assertion from Mr. Amster that the plea offer would fail for all the other co-defendants if she did not take it. Applicant testified she felt she had to take for everyone else. (App. p. 91, lines 3 – 9.) Mr. Amster was ineffective in his conveying of the plea offer to the Applicant because it wasn't the correct plea offer.

A defendant is entitled to effective assistance of counsel during plea negotiations. *See* Judge v. State, 321 SC 554, 471 SE2d 146 (1996). To support a claim that defense counsel's deficient performance in failing to communicate a plea offer to a defendant resulted in actual prejudice, as required to establish ineffective assistance, it is not always necessary for a defendant to offer objective evidence; instead, depending on the facts of the case, a defendant's self-serving statement may be sufficient to establish actual prejudice. *See* Davie v. State, 381 SC 601, 675 SE2d 416 (2009), *overruled on other grounds by* Smalls v. State, 422 SC 174, 810 SE2d 836 (2018). Based on the foregoing, the PCR court should be reversed and the PCR granted.

The PCR court erred in denying the Petitioner's application as counsel was ineffective when he failed to adequately notify the Petitioner that she would face mandatory deportation and could not become a Legal Permanent Resident.

The PCR court found that Mr. Amster adequately advised the Petitioner regarding her immigration consequences. The PCR court was incorrect in its ruling. An attorney for an alien charges with a crime has a Constitutional obligation to inform their client that the conviction carries a risk that the person will be

deported. *See* Padilla v. Kentucky, 559 US 356 (2010).

Mr. Amster testified that most of his clients are not US citizens and are Cuban nationals. (App. p. 120, lines 6 – 8.) Additionally, Mr. Amster testified he just started practicing immigration law, a month before the PCR hearing. (App. p. 114, lines 8-9). He further noted that he would generally tell his Cuban clients that "although Cubans are still not being deported, we never know... what's going to happen next" and that the deportation order would be "hanging over your head" and would prevent the person from leaving the US. (App. p. 120, lines 17-19; p. 120, lines 22-25; p. 120, line 25 – p. 121, line 1.) He also could not recall if he ever told the Petitioner any of this. (App. p. 121, lines 4 – 9.)

Petitioner stated that Mr. Amster never told her she would face immigration consequences and never explained that the conviction would bar her from becoming a permanent resident. (App. p. 96, line 19 – p. 97, line 1; p. 106, lines 6 – 14.)

In State v. Tejeiro, 345 P.3d 1074 (NM Ct. App. 2014), defense counsel was found to be deficient when counsel failed to advise their Cuban client on immigration consequences of a guilty plea. Whether counsel advised her of her lack of ability to be deported because the US does not have an agreement to return Cuban nationals *at this time*, he never advised her that this conviction would result in mandatory deportation and that she would never be able to adjust to a legal permanent US resident (green card holder). Also, he never advised her that at the time the US resumes an agreement with Cuba she would still be mandatorily deported because she would still have an order of deportation.

While counsel informed defendant that she could face deportation, he failed to advise applicant that the deportation was presumptively mandatory even without an agreement with Cuba, and counsel has duty to correctly advise defendant of law regarding deportation. *See* Taylor v. State, 422 SC 222, 810 SE2d 862 (2018). "Pursuant to Padilla, counsel must do more than 'discuss immigration' or advise Petitioner he might face adverse immigration consequences." Id. Padilla imposes a duty on legal counsel to understand Petitioner's legal status and correctly advise her of the law[2] concerning deportation. Id. Where the deportation consequence is clear, the duty to give correct advice is equally clear. Padilla at 369. "[D]eportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." Lee v. United States, 137 S. Ct. 1958, 1966, 198 L. Ed. 2d 476 (2017) (quoting Padilla, 559 U.S. at 364 (footnote omitted)). (*See also* United States v. Carrillo Murillo, 927 F.3d 808 (2019) at 817 "The mere utterance and existence of such statements and language -- without context -- cannot conclusively determine that a defendant would have pled guilty regardless of the immigration consequences of doing so.") Based on the foregoing, the PCR court should be reversed and the PCR granted.

The PCR court erred when it denied the Petitioner's PCR application when counsel

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[2] The Cuban Adjustment Act of 1966 (CAA) allows Cuban natives or citizens living in the United States who meet certain eligibility requirements to apply to become lawful permanent residents (get a Green Card). *See* https://www.uscis.gov/greencard/caa. However, pursuant to federal law, an alien admitted to the United States who is convicted of a violation of "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance ... other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." 8 U.S.C.A. § 1227(a)(2)(B)(i). A controlled substance conviction makes the Applicant unable to adjust to a green card holder and inadmissible to ever adjust status in the US.

was ineffective when he failed to raise and discuss any possible defenses with the Petitioner.

The PCR court erred in denying relief to Petitioner when Mr. Amster failed to discuss with her the defense of mere presence. "The mere knowledge that another person is going to commit a crime, even if the defendant is present when the crime is committed is not sufficient to convict the defendant as a principal." *See* State v. Zeigler, 364 S.C. 94, 610 S.E.2d 859 (2005).

Petitioner was only in the US for ten days at the time of the search warrant. (App. p. 87, lines 11 – 13.) Mr. Garcia testified that the plants were about six months old and that the Petitioner knew nothing about his operation as he had told her not to enter the rooms where the plants were and because he had a very good ventilation system in place so that the home did not smell. (App. p. 137, lines 16-20; p. 137, lines 8-9.) Petitioner testified that she wasn't even at the home most of the time because she was out exploring. (App. p. 94, line 24 – p. 95, line 16.) Petitioner had a valid defense that was never raised or discussed with her. She state she would not have pled guilty had she known about the defense. (App. p. 110, lines 14 – 24.) Even the prosecutor acknowledged this is his testimony. "From the best of my recollection, she was present, although briefly." (App. p. 117, lines 22-23.)

She was never an accomplice or co-conspirator. She merely associated with one who committed the crime with no knowledge of it and was merely present at the scene. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998). Furthermore, mere presence at the scene of a crime is not enough to indict one as a principal, unless there is a legal duty to act. State v. Johnson, 291 S.C. 127, 352 S.E.2d 480 (1987).

Since she had no knowledge of the crime, she had no duty to act. Counsel was ineffective for failing to raise this defense and discuss it with the Petitioner as an option. Had he done so she would not have pleaded guilty. Therefore, the Court was incorrect to deny her PCR based on this issue and this Court should reverse the PCR court's decision.

The PCR court erred in denying the Petitioner's application when counsel was ineffective when he erroneously advised the Petitioner on the amount of time she would serve.

The PCR court denied Petitioner relief ruling that counsel rendered effective assistance of counsel in his advice to her regarding the amount of time she would serve. Counsel testified that he advised the Petitioner she would serve about 18 months with parole and good time credits. (App. p. 122, lines 23-25; p. 123, lines 1-5.) In fact, the Applicant served over two years. She testified she didn't find out that she would have to serve that much time until she went to SCDC and relied on that advice when she decided to accept the plea offer. (App. p. 97, lines 5 – 11.)

If a defendant is actively misinformed about parole eligibility, she must prove she relied on this information in order to receive post-conviction relief. Griffin v. Martin, 278 SC 620, 300 SE2d 482 (1983). *See also* Coats v. State, 352 SC 500, 575 SE2d 557 (2003), ruling that counsel was ineffective for improperly advising defendant that he would be parole eligible. The Petitioner requests this court reverse the denial of the PCR court on this issue.

The PCR court erred when it denied the Petitioner's application because counsel was ineffective when he failed to move to quash the indictment.

The PCR court ruled counsel was not ineffective when he did not move to

quash the indictment. But counsel was ineffective for failing to quash the indictment issued by the State Grand Jury. The State Grand Jury process differs from the normal county grand jury process in that testimony is taken and recorded by a court reporter. (The process is mirrored after the federal grand jury process.) The testimony presented establishes whether or not there is probable cause that the person was involved with the crime. That is, more likely than not that a crime was committed and the Petitioner was somehow involved with the conspiracy to manufacture marijuana. *See i.e.* In re Snyder, 308 S.C. 192, 417 S.E.2d 572 (1992). The State wholly failed to present any probable cause that the Petitioner had any knowledge or was involved with this conspiracy.

The only time her name is mentioned is when the indictment is being presented. Once in Court's Exhibit 1[3], State Grand Jury transcript October 15, 2013, 10am to 10:38am, on page 5, line 20, and again on page 11, line 12. The only offered evidence regarding the Applicant's involvement was "signs of being inside the residence." Id at page 12, lines 10-11.

At one point a grand juror asked "[i]f a person who lives at these residences where y'all found the marijuana...is it possible for them not to know that there is marijuana growing in that location?" *See* Court's Exhibit 1, State Grand Jury transcript October 15, 2013, 10am to 10:38am, page 10, lines16-19.

The response from the State was no, because the trailers had been completely converted to grow marijuana, the bathrooms were gone, and all the rooms were

[3]This exhibit was sealed by the PCR court due to State Grand Jury secrecy and as such, is not included in the Appendix. The Petitioner requests this court review the sealed exhibit along with the

encase in mylar. Id at lines 19-24. Based on the testimony given at the PCR hearing, this was an incorrect statement of fact related to the house on Catalina Boulevard. Mr. Garcia and the Petitioner both testified there were only two rooms closed off and those were the rooms the Petitioner was told not to go into. (App. p. 136, lines 6 – 14; p. 105, lines 6-20.) Otherwise the trailer was indeed in a livable condition.

Counsel should have moved to quash the indictment as no evidence of probable cause of the Petitioner's involvement was presented to the State Grand Jury. Counsel's testimony that if he "filed motions" would make the negotiations "go south" don't represent dutiful representation of the Petitioner and was prejudicial. (App. p. 123, line 24 – p. 124, line 2.) The outcome of the plea would have been different had Counsel challenged the evidence against the Petitioner and moved to quash the indictment based on the false testimony presented to the grand jury and the lack of evidence that the Petitioner was involved in any time of scheme with the other co-defendants.

Appendix.

CONCLUSION

For the foregoing reasons, Petitioner submits this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

Dec. 10th, 2019

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable J. Walton McLeod, IV, Circuit Court Judge

Case No. 2017-CP-32-04132

Ivis Ahimara Reyes Yedra, ... Petitioner,

v.

State of South Carolina,.....Respondent.

PROOF OF SERVICE

I, Ashley A. McMahan, certify that I have served the within Petition for a Writ of Certiorari and accompanying Appendix on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Megan H. Jameson
Sr. Asst. Deputy Attorney General
S.C. Attorney General's Office
PO Box 1154
Columbia, SC 29211-1549

Ivis Ahimara Reyes Yedra
1150 Wildwood Lakes Blvd
Apt. 108
Naples, FL 34104

I further certify that all parties required by Rule to be served have been served. This 10th day of December, 2019.

ASHLEY A. MCMAHAN, ESQUIRE
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McMAHAN & TAYLOR
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December 10, 2019

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

Re: Ivis Ahimara Reyes Yedra
2017-CP-32-04132
Appellate Case No.: 2019-001309

Dear Mr. Shearouse:

Please find enclosed an original plus six (6) copies of the Petition for a Writ of Certiorari, two (2) copies of the Appendix, and the Certificate of Service.

Should you have any questions, I can be reached at the number and address listed below.

Best regards,

ASHLEY A. MCMAHAN
ATTORNEY AT LAW

AAM
Enclosures

cc: Ivis Ahimara Reyes Yedra
Sr. Asst. Deputy Attorney General Megan H. Jameson

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