

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Aug 03 2022**

S.C. SUPREME COURT

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Certiorari to Orangeburg County

Honorable Edgar W. Dickson, Circuit Court Judge

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JUSTIN BRADLEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000132

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PETITION FOR WRIT OF CERTIORARI

\_\_\_\_\_  
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## **ISSUE PRESENTED**

Whether the PCR judge erred in signing the order of dismissal that made findings of fact, conclusions of law, and credibility determinations, where the judge was a successor judge who did not preside over the PCR hearing and did not comply with the requirements of Rule 63, SCRPC, prior to signing the order?

## STATEMENT

Petitioner was indicted by an Orangeburg County grand jury on May 18, 2016 for armed robbery. App. 62. He pled guilty as charged on May 24, 2016, before the Honorable D. Craig Brown. App. 1. Minh Wyman represented Petitioner; Josh Edwards appeared on behalf of the state. The plea was entered without a recommendation. App. 3 ll. 2 – 5.

The facts as alleged by the state were that Petitioner robbed a victim at gunpoint after being given a ride. App. 7 l. 17 – App. 8 l. 18. After the factual recitation, plea counsel advised the court Petitioner wished to plead pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). The plea judge found a substantial factual basis existed and that Petitioner pled freely, voluntarily, knowingly, and intelligently. App. 10 ll. 8 – 13.

Judge Brown sentenced Petitioner to eighteen years' incarceration. App. 13 ll. 17 – 20.

Petitioner filed an application for post-conviction relief on or about April 10, 2017. App. 16. It contained allegations regarding counsel's failure to investigate. App. 18. The state made its Return on or about August 14, 2017. App. 24.

An evidentiary hearing was held before the Honorable Kristi Harrington on December 12, 2017. App. 29. Arthur Aiken represented Petitioner; Ruston Neely appeared on behalf of the state. Petitioner and plea counsel testified at the hearing. Judge Harrington took the matter under advisement and requested a proposed order. App. 50 ll. 16 – 18.

Over four years later, an Order of Dismissal was then signed **by the Honorable Edgar W. Dickson on December 23, 2021**. App. 52 – 60. This petition follows.

## ARGUMENT

**The PCR judge erred in signing the order of dismissal that made findings of fact, conclusions of law, and credibility determinations, where the judge was a successor judge who did not preside over the PCR hearing and did not comply with the requirements of Rule 63, SCRCP, prior to signing the order.**

### Relevant facts

At the outset of the Order of Dismissal, Judge Dickson wrote:

As Judge Harrington is no longer on the bench, this Order was sent to the undersigned for signature in the undersigned's capacity as Chief Administrative Judge by agreement of the parties. As noted above, the Court has reviewed the transcript of the evidentiary hearing, at which no exhibits were introduced and only two witnesses testified. The Court has also thoroughly reviewed the record in this case including the application, the State's return, the guilty plea transcript, and Applicant's appellate records. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies relief.

App. 52.

The Order of Dismissal contained credibility findings: "This Court has reviewed the evidence presented at the evidentiary hearing, observed the witnesses, evaluated their credibility, and weighed the testimony and evidence accordingly in its discussion below." App. 55. Upon information and belief, Judge Dickson did not observe the witnesses or evaluate their credibility based upon their appearances, tone, and demeanor.

The Order of Dismissal exceeded the purview of its author:

The Court finds credible Counsel's testimony she engaged a private investigator to track down the one witness identified by Applicant ... but she was unable to locate him. The Court also finds credible Counsel's assertion Applicant never mentioned the witness Fields as a potential defense witness.

App. 57.

## Discussion

Judge Dickson signed the Order of Dismissal in the matter at bar ostensibly based on his position as the Chief Administrative Judge for Orangeburg County. However, that action was beyond the bounds of the “Duties of Circuit Court Chief Judges for Administrative Purposes as prescribed by this Court.”<sup>1</sup> The proper procedure, and what Petitioner is currently requesting, would have been to provide Petitioner with a *de novo* postconviction relief hearing. Because Judge Harrington was no longer on the bench, Rule 63, SCRCF, should have been invoked.

The appellate courts of this state have yet to consider the impact of Rule 63, SCRCF, on an order arising from a PCR hearing. However, federal case law interpreting the rule and state case law interpreting the rule as it was written prior to 2004 are instructive. Prior to the 2004 amendment, Rule 63 SCRCF, provided:

If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then the resident judge of the circuit or any other judge having jurisdiction in the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

The South Carolina appellate courts addressed then Rule 63 in Christy v. Christy, 347 S.C. 503, 556 S.E.2d 701 (Ct. App. 2001), *aff’d* as modified, 354 S.C. 203, 580 S.E.2d 444 (2003). In Christy, following the dissolution of the parties’ marriage, former husband filed an action to terminate or reduce spousal support alleging both that former wife had entered a common law marriage and that he had changes in his financial circumstances. Id. at 505-06, 556 S.E.2d at 702. Wife filed a counterclaim to increase support. Id. The family court bifurcated

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<sup>1</sup> Order dated June 29, 2019

<https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2019-06-28-02> (last accessed August 3, 2022).

the issues, and a bench trial was held on the common law marriage claim. The original judge made no oral rulings or findings during the bench trial. Id. Subsequently, the family court judge who heard the common law marriage evidence became incapacitated before signing an order. Id. A successor judge denied husband's motion for a new trial pursuant to Rule 63, SCRCF, and later signed an order, based in part on a draft order submitted to the original judge, finding no common law marriage. Id. at 506-07; 566 S.E.2d at 703.

In analyzing the application of then Rule 63, SCRCF, the Court of Appeals engaged in a thorough analysis of applicable state and federal law. The Court of Appeals noted that federal courts had unanimously read into Rule 63 the negative inference "that if the presiding judge in a civil case dies or becomes disabled before the rendering of a verdict or before the judge issues his findings of fact and conclusions of law, a successor judge must retry the case." Id. at 509, 566 S.E.2d at 704 (citing Townsend v. Gray Line Bus Co., 767 F.2d 11, 17-18 (1st Cir. 1985); Arrow-Hart, Inc. v. Philip Carey Co., 552 F.2d 711, 713 (6th Cir. 1977); Emerson Elec. Co. v. Gen. Elec. Co., 846 F.2d 1324, 1325-26 (11th Cir. 1988)).

In denying husband's motion for a new trial and signing the proposed order, the successor judge relied in part on holdings in Rex Oil, Ltd. v. M/V Jacinth, 873 F.2d 82 (5th Cir.1989) and The Del-Mar-Va, 56 F. Supp. 743 (D.Va.1944). Id. at 510, 566 S.E.2d at 704. In both of those cases the successor judge denied a request for a new trial under Rule 63. Id. at 510-11, 566 S.E.2d at 704-05. On appeal, it was held that although the original judges in Rex Oil and Del-Mar-Va had not filed written orders prior to their deaths, they had made extensive findings of fact and conclusions of law on the record sufficient to support the successor judge's decision to enter a judgment based on the record. Id. at 512, 566 S.E.2d at 705. The Court of Appeals distinguished these cases from the situation it was analyzing in Christy, finding that the

original judge in Christy had not made any findings of fact or conclusions of law on the record that the successor judge could have relied upon. Id.

Additionally, the Court of Appeals acknowledged that two exceptions had developed to the general operation of Rule 63. The Court of Appeals wrote:

First, if all parties consent, a successor judge may make findings of fact and conclusions of law based on the trial transcript. Second, the successor judge may consider the trial transcript as akin to “supporting affidavits” for summary judgment purposes and render judgment *if no credibility determinations are required*. Emerson Elec. Co. v. Gen. Elec. Co., 846 F.2d 1324, 1326 (11th Cir.1988). *Absent consent of the parties, a successor judge cannot make credibility determinations. Id.*; see also Whalen v. Ford Motor Credit Co., 684 F.2d 272, 274 (4th Cir.1982) (finding Rule 63 communicates a positive prohibition on substitution of a judge prior to verdict where all parties have not stipulated their consent).

Christy at 512, 556 S.E.2d at 705 (emphasis added).

Applying the law to the facts of the case in Christy, the Court of Appeals held that the successor judge erred in denying husband’s motion for a new trial following the incapacity of the original judge. Id. at 512, 566 S.E.2d at 705-06. The Court of Appeals held that where the successor judge did not review the transcript, where there was nothing in the record containing finds of fact and conclusions of law made by the original judge, and where the order relied on credibility determinations, the successor judge could not enter an order on the record unless the parties stipulated to the record and consented to the successor judge making such determinations. Id. The order was vacated, and the case remanded for a new trial on the common law marriage issue.

When the South Carolina Supreme Court reviewed the case, it stated:

Rule 63, SCRCP, by its terms governs those situations where the trial judge becomes incapacitated or dies after the filing of his findings of fact and conclusions of law, but prior to the completion of post-trial acts authorized by the SCRCP. *As the Court of Appeals found, other jurisdictions having our version of Rule 63 have derived a 'negative inference' from the language of the rule, and concluded that a new trial is mandated where, as here, the incapacity or death precedes the filing of an order. While we find no error in the Court of Appeals' analysis of the rule, nor in its suggestion that two exceptions adopted by other jurisdictions would be applicable under the appropriate circumstances, we hold that this case is governed not by any negative inference derived from Rule 63, but rather by another principle of state law.*

Christy v. Christy, 354 S.C. 203, 205–06, 580 S.E.2d 444, 446 (2003) (emphasis added).

This Court held that a new trial was required under the common law principal that “[u]ntil the paper has been delivered by the judge to the clerk of court, to be filed by him as an order in the case, it is subject to the control of the judge, and may be withdrawn at any time before such delivery.” Id. (citing Archer v. Long, 46 S.C. 292, 24 S.E. 83 (1896); see also e.g., Bowman v. Richland Mem. Hosp., 335 S.C. 88, 515 S.E.2d 259 (Ct.App.1999) (citing Archer v. Long); compare Rule 58(a), SCRCP (“A judgment is effective only when ... entered on the record”); see also Ford v. State Ethics Comm'n, 344 S.C. 642, 545 S.E.2d 821 (2001) (“Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling”)).

Since the holding in Christy, Rule 63, SCRCP, has been amended to conform to the requirements set out in Rule 63 of the Federal Rules of Civil Procedure. Currently the rule provides:

If at any time after a trial or hearing has been commenced, but before the final order or judgment has been issued, the judge is unable to proceed, a successor judge shall be assigned. *The successor judge may proceed upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. In a hearing or a trial without a jury, the successor judge shall, at the request of a party, recall any witness whose*

*testimony is material and disputed and who is available to testify without undue burden.* A successor judge may also provide for the recall of any witnesses.”

Rule 63, SCRCP (emphasis added).

While the appellate courts of this state have not considered the current version of Rule 63, SCRCP, in a published<sup>2</sup> opinion, numerous federal courts have interpreted the rule. As stated in Mergentime Corp. v. Washington Metropolitan Area Transit Authority, 166 F.3d 1257, 1262 (D.C. Cir. 1999), “balancing efficiency and fairness, the new rule thus allows successor judges to avoid retrial, but only to the extent they ensure that they can stand in the shoes of the predecessor by determining that “the case may be completed without prejudice to the parties.”” Importantly, the exceptions noted by the South Carolina Court of Appeals to the old Rule 63, have been held to apply to the current version of the rule.

In Henry A. Knott, Co. v. Chesapeake & Potomac Telephone Co. of West Virginia, 772 F.2d. 78 (4th Cir. 1985) the United States Court of Appeals for the Fourth Circuit held that “a successor judge simply cannot make credibility determinations based upon the record. A hearing de novo before a new successor master or before the district court *must be conducted if the case requires the trier of fact to make credibility determinations concerning the testimony of witnesses*; otherwise the parties right to a full due process hearing would be severely undercut.” Id. at 85 (emphasis added).

A significant amount of federal jurisprudence supports the proposition that a successor judge must grant a new hearing where the trier of fact is required to make credibility determinations. See Patelco Credit Union v. Sahni, 262 F.3d 897 (9th Cir. 2001) (stating that the successor judge may examine the trial transcript as if it were ‘supporting affidavits’ for summary

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<sup>2</sup> The only South Carolina case addressing current Rule 63, SCRCP, is Hammer v. Hammer, 2008 WL 9881724.

judgment purposes and enter summary judgment if no credibility determinations are required); see also Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 95 F.3d 593, 601 (7th Cir.1996) (suggesting that on remand successor judge could decide the case on the existing record if credibility determinations were unnecessary); Emerson Elec. Co. v. Gen. Elec. Co., 846 F.2d 1324, 1326 (11th Cir.1988) (holding when a judge has yet to make findings of fact and conclusions of law, a successor judge must retry the case unless all parties consent to resolution based on the trial transcript or summary judgment would be appropriate (i.e., the trial transcript is treated as "supporting affidavits" and no credibility determinations are required for decision)); In re Schoenfield, 608 F.2d 930, 935 (2d Cir.1979) (stating the principle that the factfinder who is given the opportunity to observe witnesses as they testify is in a better position to make factual findings based on that evidence than is the factfinder who is restricted to a written record of the same testimony and affirming grant of new trial because credibility was at issue).

In the present case, Judge Harrington presided over Petitioner's PCR hearing. At no point during the hearing did Judge Harrington make any oral rulings regarding credibility findings, factual findings, or conclusions of law that a successor judge could potentially rely upon. The hearing ended rather abruptly, with no closing remarks from either attorney. App. 50. Judge Harrington simply concluded that she would take the matter under advisement and requested a proposed order. App. 50 ll. 16 – 18.

Additionally, Judge Harrington failed to issue a written order containing the required findings of fact and conclusions of law required by S.C. Code §17-27-80 prior to her retirement. Therefore, as the case had commenced, but no final order or judgment had been issued, Rule 63, SCRCF, required that a successor judge be appointed. The successor judge was then required to comport with the requirements of the rule to certify familiarity with the record, determine

possible prejudice to the parties, and recall witnesses as necessary. This did not happen in Petitioner's case.

While Judge Dickson received the PCR transcript prior to signing the order of dismissal, there is no evidence that he *certified familiarity with all the transcripts and filings* in Petitioner's case as required by Rule 63, SCRCF. To begin to comport with Rule 63, SCRCF, the successor judge needed to certify familiarity with all of these documents, in a manner that made clear he had indeed reviewed the record in full, prior to issuing a ruling.

The failure to follow the strictures of Rule 63, SCRCF, was especially troublesome in Petitioner's case, as the PCR hearing hinged on witness credibility. However, there was no way for the successor judge to have made these crucial credibility determinations based upon the written record.

Credibility findings are extremely important in the PCR setting, especially considering that the appellate courts give great deference to a PCR court's credibility findings, because *appellate courts lack the opportunity to directly observe the witnesses*. See Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). It is essential that the judge who signs an order in a PCR action be the judge who observed the witnesses during the hearing because absent consent of the parties, a successor judge cannot make credibility determinations. Emerson Elec. Co. v. Gen. Elec. Co., 846 F.2d 1324, 1326 (11th Cir. 1988). If the original judge is no longer available, then the requirements of Rule 63, SCRCF, must be met. If those requirements are not met, or cannot be met, then a new hearing is required.

Notably, the two exceptions to Rule 63, SCRCF, recognized by the appellate courts of this state in Christy, *supra*, do not apply in Petitioner's case. Had the successor judge certified familiarity with the record and determined that the proceedings could be completed without

prejudice to the parties then with the consent of the parties the successor judge could have made findings of fact and conclusions of law based on the plea and PCR transcripts. However, there is no evidence in the record that the successor judge took those necessary steps nor that the parties consented to the successor judge making such findings. Additionally, there is nothing in the record showing the parties consented to the successor judge making the credibility determinations that are in the order of dismissal.

A fair reading of the records shows that Rule 63, SCRPC, was not complied with in this case. The successor judge did not certify familiarity with the record and did not determine if the proceedings could be completed without prejudice to the parties. Furthermore, the successor judge improperly made credibility findings without the consent of the parties and without having the ability to observe the witnesses live testimony. These errors cannot be cured. Petitioner is entitled to a new PCR hearing.

**CONCLUSION**

Based upon the foregoing, Petitioner respectfully requests this Court grant certiorari to allow further briefing for the issues raised herein.



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Taylor D. Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of August, 2022.