

S.C. Supreme Court
P.O. box 11330
Columbia, S.C. 29211

PLH

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MAY 22 2013

S.C. SUPREME COURT

May 9, 2013

RE: ALFONZO RICHARDSON V. STATE, 2012-CP-23-0185

DEAR HONORABLE CLERK OF COURT,

Enclosed for filing in your court please find appellant "Notice of Appeal" and Petition for writ of certiorari. In the above-captioned case also attached is a copy of the final order and the disposition of appellants (s) motion regarding same.

Thank you

Alfonzo Richardson
McCormick C.I.
386 Redemption way
McCormick, S.C. 29899

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

Case No. 2012-CP-23-0185

ALFONSO BERNARD RICHARDSON

Appellant

vs.

THE STATE OF SOUTH CAROLINA


Respondent

NOTICE OF APPEAL

ALFONSO BERNARD RICHARDSON appeals the order of the Honorable G. Edward Welmaker Filed on October 29, 2012.

Other Counsel of Record:

Karen C. Ratigan
S.C. Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211-1549
(803) 734-3737
Attorney for Respondent

 271264
Alfonso Bernard Richardson #271264
McCormick Correctional Institution
386 Redemption Way
McCormick, S.C. 29899

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

Case No. 2012-CP-23-0185

ALFONSO BERNARD RICHARDSON

Appellant

vs.

THE STATE OF SOUTH CAROLINA

Respondent

CERTIFICATE OF SERVICE

I, Alfonso Bernard Richardson, in the above-captioned action. Regular communication by mail exists throughout the state of South Carolina and that this is a proper circumstance of service by mail. I have this day served a copy of the "Notice of Appeal and Petition for Writ of Certiorari" in the above-captioned matter on the following Person(s) by depositing same in the United States mail, postage prepaid:

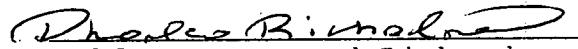
Paul B. Wickensimer
Greenville County Clerk of Court
305 E. North Street
Greenville, S.C. 29601

Karen C. Ratigan
Assistant Deputy Attorney General
Post Office Box 11549
Columbia, S.C. 29211

S.C. Commission of Indigent Defense
Post Office Box 11433
Columbia, S.C. 29211

South Carolina Supreme Court
Post Office Box 11330
Columbia, S.C. 29211

Dated: May 9, 2013


Alfonso Bernard Richardson

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

Case No. 2012-CP-23-0185

ALFONSO BERNARD RICHARDSON

Appellant

vs.

THE STATE OF SOUTH CAROLINA

Respondent

PETITION FOR WRIT OF CERTIORARI
PURSUANT TO RULE 243(c) SCACR

Dated:

May 9, 2013

Alfonso Bernard Richardson
SCDC No 271264
McCormick Correctional Institution
386 Redemption Way
McCormick, S.C. 29899

ISSUE ON APPEAL:

WHETHER INEFFECTIVE ASSISTANCE IN AN "INITIAL-REVIEW COLLATERAL PROCEEDING" ON A CLAIM OF INEFFECTIVE ASSISTANCE AT TRIAL MAY PROVIDE "SUFFICIENT REASON" TO EXCUSE A PROCEDURAL DEFAULT IN A PCR PROCEEDING?

STATEMENT OF THE CASE:

This matter comes before this Court by way of an application for Post-Conviction Relief (PCR) filed January 12, 2012. Respondent made its return on July 13, 2012, requesting the application be summarily dismissed based upon the expiration of the statute of limitations and the presumption against successive PCR applications. The Court of Common Pleas issued a Conditional Order of Dismissal signed July 19, 2012 and filed July 25, 2012, provisionally denying and dismissing this action, while giving applicant twenty (20) days from the date of service of said order in which to show why the dismissal should not become final. Applicant received said order on August 10, 2012 in a document captioned "Applicant's Reply to Respondents Motion to Dismiss and Conditional Order of Dismissal" filed on August 28, 2012. Applicant argued that his attorney that represented him at his Initial Review Collateral Proceeding failed to safeguard his right to appeal. Applicant argued that PCR attorney at his Initial Review Collateral Proceeding failed to object to portions of the Respondent's proposed Order of Dismissal and then failed to file a Motion to Alter or Amend Judgment Pursuant to Rule 59(e) S.C.R.C.P.

The Court of Common Pleas, after reviewing the Applicant's response to the Conditional Order of Dismissal, found that a sufficient reason was not shown why the Conditional Order of Dismissal should not become final. The Court held in its final order the contention that prior PCR counsel was ineffective is not per se a "Sufficient Reason" warranting a successive PCR application under §17-27-90. The Court denied and dismissed the application with prejudice. Applicant then filed a Motion to Alter and Amend Judgment arguing that the Court of Common Pleas reasoning conflicts with that of the United States Supreme Court in Martinez v. Ryan U.S. - (2012). This Motion was denied and now Applicant seeks Writ of Certiorari on the aforementioned issue.

ARGUMENT ON APPEAL:

INEFFECTIVE ASSISTANCE IN AN "INITIAL-REVIEW COLLATERAL PROCEEDING" ON A CLAIM OF INEFFECTIVE ASSISTANCE AT TRIAL MAY PROVE "SUFFICIENT REASON" TO EXCUSE A PROCEDURAL DEFAULT IN A PCR PROCEEDING.

During the evidentiary hearing on Applicant's PCR Application which convened on March 20, 2008, the Appellant testified that approximately one (1) month before he pled guilty the Solicitor's office added Jeremiah Hicks to their witness list on the day of the plea hearing. The Appellant testified that he had not seen Hicks' statement and Plea Counsel said they could not get a copy of it. The Appellant stated he pled guilty because the State had not provided a copy of Hicks' statement. The Appellant testified that he asked Plea Counsel the day of the plea hearing for a continuance in order to further investigate Hicks' statement and Plea Counsel said nothing. The Appellant stated he pled guilty after Counsel led him to believe that he would not receive a fair trial.

In the PCR Court's Order of Dismissal, the PCR Court addressed this issue as follows:

"This Court finds the Applicant has failed to meet his burden of proving Plea Counsel in any way mishandled the situation concerning Jeremiah Hicks. Plea Counsel testified he was aware well in advance of the plea hearing that there was no written statement from Hicks, but that he had seen the notes from the police officer's interview with him. This Court notes these "notes" were admitted at the evidentiary hearing as Applicant's Exhibit 1. The Court finds Plea Counsel discussed the contents of the officer's notes with the Applicant, and knowing this information, the Applicant chose to make a free and voluntary guilty plea." See page 7 of PCR Order of Dismissal.

Appellant argues that the testimony heard at the PCR hearing from Plea Counsel contradicts the PCR Court's findings of fact. The factual findings above are not only inaccurate but very misleading and prejudicial to Appellant because a reviewing Court could be misled by them, and PCR Counsel had an obligation to file a Rule 59(e). The true and accurate version of the facts concerning this Jeremiah Hicks incident is clearly reflected in the record transcribed at the PCR hearing which is as follows:

Q: Now, Mr. Richardson has testified about this alleged statement from a Jeremiah Hicks. Can you fill us in on what you recall about that?

A: As I recall, we didn't know about Jeremiah Hicks until late in the game, until December of 04. Apparently he was another inmate who had overheard Alfonso making certain admissions or confessions that Alfonso had made about committing the crime. That was a big problem we had in the case. And so we asked for a copy of Mr. Hicks' statement. We received a letter back from Mr. Moyer that he had not given a written statement, but they did give us copies of the officer's notes from his interview with Mr. Hicks.

Q: Did you share that with Mr. Richardson when you found out there was no statement?

A: I don't know if I did. I think I probably got that right before the trial. I don't remember. So I'm not sure if we discussed that statement or not because I got it right at the end. And then instead of going to trial the next morning, we entered into these plea negotiations.

Q: Mr. Richardson testified that up and including the day of the plea you were actively telling him, we are trying to get the statement and we can't get the statement. Does that sound accurate to you?

A: No, I don't think it was exactly like that. I think I probably told him that I have asked for it and have not received it yet.

(Andrew Mackenzie - Direct by Ms. Ratigan. PCR Transcript p. 46 lines 20-48 line 1)

It is very clear from the sworn testimony of Plea Counsel, that contrary to what the PCR court found, the facts are that: (1) Plea Counsel was not well aware in advance of the plea hearing that there was no written statement. (2) Plea Counsel was uncertain whether or not he discussed the contents of the officer's notes with the Appellant as a matter of fact. On page 68, lines 20-25, Plea Counsel was pretty candid in stating that he did not discuss these notes with him:

A: But you know, on the morning—I had gotten some new evidence in at the last second. On the morning of the plea we didn't discuss the evidence so much as we were ironing out the plea agreement, which was totally unexpected. So I may not have discussed that with him."

(Andrew Mackenzie - Cross by Mr. Gibson. PCR Transcript p. 68 lines 20-25)

In light of the foregoing testimony that was given at the PCR hearing by PCR Counsel, there is no probative evidence to support the PCR Court's findings of fact. The record clearly contradicts the PCR Court's findings and PCR Counsel was ineffective under the standard of Strickland v. Washington 466 U.S. 668 (1984) for failing in his obligation to bring these erroneous findings to the attention of the PCR Court and by PCR Counsel's deficient performance inasmuch as the issue of ineffective assistance of counsel at trial had some merits, and Appellant was deprived of a fair adjudication and process due to him by law.

Successive PCR applications are disfavored and the burden is on the Appellant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Aice v. State 305 S.C. 448 (S.C. 1991) Foxworth v. State 275 S.C. 615 (S.C. 1984) In the past, our Supreme Court held the contention that prior PCR Counsel was ineffective is not per se a "sufficient reason" allowing for a successive PCR application under §17-27-90. Land v. State 274 S.C. 243 (S.C. 1980) Also, in the past the United States Supreme Court held that attorney errors in a post-conviction proceeding do not qualify as sufficient "cause" for a default. Coleman v. Thompson 501 U.S. 722, 753-754 (1991).

However, the United States Supreme Court, after being faced with the question of whether inadequate performance of PCR Counsel during an Initial Review Collateral Proceeding constituted sufficient cause to excuse a procedural default. The High Court agreed that it was and consequently made modifications to its previous decision in Coleman. Appellant argues that the Court's reasoning is readily applicable here.

In Martinez v. Ryan 566 U.S. ____, 132 S.Ct. 1309 (2012) the United States Supreme Court modified Coleman by recognizing a narrow exception: "Inadequate assistance of counsel at Initial-Review Collateral Proceedings may establish "sufficient reason" for a prisoner's procedural default of a claim of ineffective assistance at trial. The U.S. Supreme Court focused its reasoning on the first occasion to wit a claim of ineffective assistance of counsel at trial can be raised by the Applicant. The Court identified these proceedings as "Initial Review Collateral Proceedings", a prisoner's one and only appeal. In these cases...state collateral review is the first place a prisoner can present a challenge to his conviction. This makes the Initial Review Collateral Proceeding a prisoner's one and only appeal as to an ineffective assistance claim, and this may justify an exception to the constitutional rule that there is no right to counsel in collateral proceedings. Douglas v. California 372 U.S. 353, 357 (1963) (holding states must appoint counsel on a prisoner's first appeal.)

Thus the High Court held that when a state requires a prisoner to raise an ineffective assistance of trial counsel claim in a collateral proceeding, a prisoner may establish sufficient reason for a default of an ineffective assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial review collateral proceeding for a claim of ineffective assistance of counsel at trial. The second is where appointed Counsel in the initial review collateral proceeding, where the claim should have been raised was ineffective under the standards of Strickland v. Washington 466 U.S. 668 (1984). To overcome the default a prisoner must also demonstrate that the underlying ineffective assistance of counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merits.

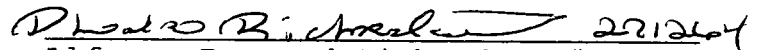
In light of the standard established in Martinez, Appellant argues that he can show that the PRC Counsel's performance was deficient under Strickland v. Washington 466 U.S. 668 (1984). PCR Counsel has an obligation to review the PCR Court Order and file a Rule 59(e) SCRCP motion to alter or amend if the Order fails to set forth the findings and reasoning for those findings. See Pruitt v. State 423 S.E. 2d 241 (S.C. 1991) In addition to the situation, when a Court fails to address on or more PCR issues, a Rule 59(e) motion may also be used when the PCR Court Order contains an erroneous finding of fact. See Charleston Law Review vol. 4 page 240. Appellant contends that he can also show prejudice from PCR Counsel's failure to fulfill his obligations. The Supreme Court here has clearly said that a Rule 59(e) motion must be filed if issues are not adequately addressed in order to preserve the issues for appellate review. Marlar v. State 653 S.E. 2d at 267 (S.C. 2007) In other words, PCR Counsel's failure to file a Rule 59(e) motion not only deprives the Appellant of a full adjudication on the merits of his ineffective assistance at trial claim, but it also bars the Appellant from receiving appellate review on the issue.

Now the only question left to be answered is whether or not the underlying ineffective assistance of Plea Counsel issue had some merits. Appellant argues that his Plea Counsel was ineffective for failing to go over the notes and statements made by a key state witness with him prior to trial. Appellant testified at the PCR hearing that this was the "only" reason why he pled guilty, because without the notes or statements of this key witness being made available to him prior to the trial, his trial would be unfair as he would be unable to prepare a defense. It is well settled that a defendant who pleads guilty upon the advice of Counsel can only attack the voluntary or intelligent character of his plea by showing ineffective assistance of counsel. Richardson v. State 310 S.C. 360 (1993). Appellant has shown that his underlying claim of ineffective assistance of Plea Counsel had some merits.

CONCLUSION:

This Court should grant Writ of Certiorari and allow further briefing of the issue or in the alternative, this Court should grant Writ of Certiorari and remand this case back to the lower Court for further findings.

Respectfully Submitted,


Alfonso Bernard Richardson #271264
McCormick Correctional Institution
386 Redemption Way
McCormick, S.C. 29899

STATE OF SOUTH CAROLINA
 COUNTY OF GREENVILLE
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-23-0185

Alfonzo Bernard Richardson

State of South Carolina

SCDC No. 271264

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

2013 APR 11 A 8:36

Attorney for : Plaintiff Defendant
 or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Before the Court in this PCR action is Applicant's Motion to Alter or Amend Judgment Pursuant to Rule 59(e) SCRPC. This Court entered a Final Order of Dismissal in this PCR action on October 29, 2012, which was filed November 21, 2012. I have carefully reviewed the Applicant's Motion, the Respondent's Return to the Motion, and the relevant court rules and case law. The Applicant's Motion is respectfully DENIED.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2012CP2300185

FILED-CLERK OF COURT
GREENVILLE CO., S.C.
PAUL B. WICKENSIMER
2012 NOV 21 AM 11:06

Alfonzo Richardson 271264 vs. South Carolina State Of

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
SCRCP (Vol. Nonsuit); Rule 12(b), SCRCP; Rule 41(a),
 Rule 43(k), SCRCP (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):**
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Rule 40(j) SCRCP; Bankruptcy;
 Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this 21st day of November, 2012.

Court Reporter:

PRESIDING JUDGE - G Edward Welmaker

This judgment was entered on the 21st day of November, 2012, and a copy mailed first class this 21st day of November, 2012, to attorneys of record or to parties (when appearing pro se) as follows:

Alfonzo Richardson 271264 McCormick Corr
Insti/SMU A 39 386 Redemption Way McCormick,
SC 29899

Karen Ratigan Attorney General Office

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Alfonzo Bernard Richardson,)
 S.C.D.C. No. 271264,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 2012-CP-23-0185

FINAL ORDER OF DISMISSAL

FILED-CLERK OF COURT
 GREENVILLE, S.C.
 PAUL B. WILSON

2012 NOV 21 AM 11:26

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 12, 2012. The Respondent made its return on July 13, 2012, requesting the application be summarily dismissed based upon the expiration of the statute of limitations and the presumption against successive PCR applications.

Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal signed July 19, 2012 and filed July 25, 2012, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service dated August 10, 2012, serving the above-mentioned Conditional Order of Dismissal on the Applicant.

In a document captioned "Applicants Reply to Respondents Motion to Dismiss and Conditional Order of Dismissal" and filed August 28, 2012, the Applicant argues his attorney from his first PCR hearing failed "to safeguard [his] right to appeal." The Applicant argues his

PCR attorney failed to object to portions of the State's proposed order of dismissal and then failed to file a post-trial motion after that order had been signed and filed.

This Court has reviewed the Applicant's response to the Conditional Order of Dismissal in its entirety, in conjunction with the original pleadings, and finds a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

This Court notes the Applicant pled guilty and was sentenced on January 4, 2005 and the South Carolina Court of Appeals dismissed the appeal on May 22, 2007. As this action was filed on January 12, 2012, it was clearly filed outside the expiration of the statute of limitations. See S.C. Code Ann. § 17-27-45(a) (Supp. 2003). This is the Applicant's second application for post-conviction relief. This Court notes successive PCR applications are disfavored. See Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). This Court finds the Applicant had the opportunity to litigate all issues related to his case at the evidentiary hearing for his first PCR application on March 20, 2008. See Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) (“[A]n applicant is entitled to a full adjudication on the merits of the original petition, or ‘one bite at the apple.’”).

This Court notes the Applicant's contention that he received ineffective assistance of counsel on his prior post-conviction relief application is not a ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546 (1991). Therefore, “the contention that prior PCR counsel was ineffective is not per se a ‘sufficient reason’ warranting a successive PCR



Alfonzo Richardson 271264
McCormick C.I. / 7-4119B
384 Redemption way.
McCormick, S.C. 29899

RECEIVED
MAY 15 2000
MAIL ROOM

RECEIVED THIS ITEM. THEREFORE THE
DEPARTMENT DOES NOT ASSUME RESPONSIBILITY FOR ITS CONTENTS.
WARDEN
McCORMICK CORRECTIONAL INSTITUTION
S.C. DEPARTMENT OF CORRECTIONS

South Carolina Supreme Court
Post Office Box 11330
Columbia, S.C. 29211

LEGAL MAIL
SALUDA UNIT