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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lee County

Honorable Diane Schafer Goodstein, Circuit Court Judge

JOHNNY HAGGINS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000176

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in dismissing Petitioner's duly raised constitutional challenges to the validity of his convictions and sentences where Petitioner was tried *in absentia* and without counsel in violation of numerous federal and state constitutional rights and where the PCR Act plainly allows a collateral attack upon a conviction or sentence obtained in violation of the Constitution of the United States or the Constitution or laws of this State?

STATEMENT OF THE CASE

During the March 2018 term of the Lee County grand jury, Petitioner was indicted for one count of burglary second degree, one count of domestic violence of a high and aggravated nature, one count of assault and battery first degree, and one count of conspiracy. App. 94-95. The charges arose from an alleged assault of Petitioner's wife,[1] Ashleigh Haggins (Haggins), which occurred on August 29, 2017. App. 54, l. 24-App. 25, l. 25.

Haggins alleged that the pair had an initial argument on August 27 and then a disagreement on Facebook on August 29. A few hours after their disagreement on Facebook, Haggins stated that Petitioner and his then girlfriend, Cody Weaver, kicked in the front door of her home. App. 56, l. 25-App. 59, l. 20. According to Haggins, after kicking in the door, Petitioner charged at her while yelling, knocked her cellphone from her hand, and began to hit and kick her. App. 60, l. 1-App. 61, l. 19. At the time of the incident, Haggins' son was home. App. 64, ll. 8-9.

On June 4, 2018, the State, represented by Paul M. Fata, called the case to trial before the Honorable Kristi F. Curtis and a jury. Petitioner was represented by Kevin Etheridge. App. 1. After calling the case, Solicitor Fata informed the court that Petitioner was not present, that the State had noticed him to be present for trial through Counsel Etheridge, and that the State intended to move forward in Petitioner's absence. App. 3, l. 1-App. 4, l. 14. Counsel Etheridge argued that, based on State v. Wrapp, 421 S.C. 531, 808 S.E.2d 821 (Ct. App. 2017), Petitioner had not received notice of the trial date or the fact that he could be tried *in absentia* should he fail to appear because Counsel Etheridge had not had contact with Petitioner despite numerous

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[1] Petitioner and Haggins were married on December 27, 2010. They separated two days after the wedding. Although they lived separately, the pair did not divorce. Petitioner and Haggins also have a seven-year-old daughter in common. App. 55, ll. 2-24.

efforts to find him. Counsel Etheridge stated that Petitioner had been sent two letters that were returned to his office, that Petitioner's phone number had been disconnected, and that he had tried to contact members of Petitioner's family to no avail. Counsel Etheridge requested a continuance of the matter. App. 4, l. 17-App. 6, l. 12.

The State argued that it could only notice Petitioner through his attorney, and because it had served Counsel Etheridge with notice, it had fulfilled its duty. App. 6, ll. 15-18. Counsel Etheridge agreed that the State noticed him, but he confirmed to the court that despite numerous attempts he was unable to notice Petitioner of the trial date and the potential to be tried *in absentia*. App. 6, l. 19-App. 7, l. 22. After confirming that Counsel Etheridge had not had any contact with Petitioner in quite some time, the trial court granted a continuance in the case until the following term of court and issued a bench warrant for Petitioner. App. 10, l. 20-App.14, l. 18.

On July 10, 2018, the State, represented by Paul Fata, called the burglary second degree and domestic violence of a high and aggravated nature charges to trial before the Honorable George M. McFaddin, Jr., and a jury. App. 16. The State asserted that it had placed on the record at the June 4, 2018, hearing that Petitioner would be tried the following term of court and that if he did not appear he would be tried in his absence. The State also emailed Counsel Etheridge after the June 4 hearing to place in writing that Petitioner's case would be first up during the July term of court and that Petitioner would be tried in his absence if he failed to appear. App. 18, l. 11-App. 19, l. 7.

Counsel Etheridge made a motion to be relieved as counsel for Petitioner. Counsel Etheridge stated that Petitioner had failed to maintain any contact with him or his office and that he only met with Petitioner once in September of 2017. Counsel Etheridge further stated that he

had tried to reach Petitioner via telephone, mail, and through family members but had not been successful. He further informed that court that Petitioner had failed to meet his payment obligations. App. 19, ll. 9-21. The court confirmed that Petitioner was a paying client, that the letters sent to Petitioner were "returned to sender" and that no forwarding address had been provided to Counsel Etheridge. When questioned by the court, Counsel Etheridge stated that he had not appeared at any bond or preliminary hearing with or for Petitioner. App. 20, ll. 1-25.

The court found that Petitioner knew there was a charge against him because he had sought out Counsel Etheridge to represent him, that he had a duty to maintain contact with Counsel Etheridge, that there was no "hard core attorney-client" relationship, and that the attorney-client relationship only existed on paper. The court then proceeded to relieve Counsel Etheridge and inform the State that it would proceed with the trial of Petitioner. App. 21, ll. 2-20. After selecting a jury, the State addressed the notice it had provided to Petitioner.

The State summarized the prior court hearing during which Judge Curtis continued the case. The State maintained that Petitioner was noticed on the record that he would be tried during the July term of court and that if he failed to appear the case would proceed in his absence. Counsel Etheridge "acknowledged receiving" the notice, and the State argued therefore that Petitioner had received proper notice. App. 29, l. 11-App. 30, l. 16. The State next called the bailiff for Lee County Court of General Sessions, Roosevelt Stuckey, to testify that he had called Petitioner's name three times "from the crier's porch" and had not received any responses. App. 31, ll. 6-24. The court ruled that the State's notice requirements had been satisfied, and the case proceeded forward. App. 32, ll. 2-4.

The trial of Petitioner began at approximately 1:33 in the afternoon. App. 32, ll. 11-14. The State rested its case at approximately 2:25 p.m., and the case was sent to the jury for

deliberations at 3:05 p.m. The jury returned a verdict of guilty as to both charges at 3:15 p.m. App. 69, ll. 17-25; App.84, l. 1-App. 85, l. 4. Judge McFaddin completed the sentencing sheets on both charges and sealed the sentences. App. 85, ll. 15-20.

On September 4, 2018, Petitioner was brought before the Honorable R. Ferrell Cothran to have the sentences unsealed. App. 88. Petitioner appeared *pro se*, and the court at no point questioned whether Petitioner wanted counsel appointed for the sentencing hearing. App. 88-92. Petitioner was sentenced to concurrent terms of twenty years imprisonment on the domestic violence high and aggravated, and fifteen years imprisonment on the burglary second degree charge. App. 92, ll. 12-19.

Petitioner's convictions and sentences were not appealed. Petitioner filed an application for post-conviction relief dated March 13, 2019, alleging,

1. "Ineffective assistance of trial counsel for failing to file a direct appeal pursuant to White vs. State, 263 S.C. 1 10."

2. "Ineffective assistance of trial counsel for failing to object to and/or challenge defendant being tried and/or sentenced in absentia."

3. "Ineffective assistance of trial counsel for failing to challenge the indictment in relation to count one in the indictment on the grounds of lack of jurisdiction and/or improper change of venue."

4. "Defendant was denied his Sixth Amendment right to be present at trial and/or sentencing and face accuser."

5. "The trial court abused its dicretion[sic] and/or committed reversible error when trying (holding the trial) and/or sentencing defendant in absentia without giving defendant proper notice of hearing date 7-10-18 which was seal sentence."

6. "Ineffective assistance of trial counsel for failing to notice defendant of waiver of preliminary hearing and future preliminary hearings requested by defendant."

7. "Defendant was denied due process to fair opportunity of defense."

8. "Defendant didn't have knowledge of being impeach[sic] by convictions to oppose and having fair opportunity to contest the use of such evidence."

9. "Defendant didn't have knowledge of plea offer by solicitor Paul M. Fata for 5 years non-violent unto[sic] after sentenced in absentia and placed in department of corrections."

10. "Defendant didn't have counsel upon the opening and reading of seal[sic] sentencing on date 9-4-18 to represent him and request appeal or/and reconsideration on sentencing on defendant[sic] behalf as well as disposition sentencing sheet for date 7-10-18 shows no proof of defendant or attorney for defendant was present for this hearing dated 7-10-18 which defendant was sentence[sic] in absentia."

App. 98-109; App. 172-173. The State filed a return and partial motion to dismiss dated July 18, 2019. App. 110-120. No amended PCR application was ever filed. An evidentiary hearing was convened before the Honorable Diane S. Goodstein via WebEx on November 17, 2021. App. 121; App 127, ll. 1-15.

At the hearing, Petitioner's sister, Nyeisha Miller, testified that she knew something was not right with Petitioner during the time his charges were pending because he was always wearing the same clothes. Petitioner would stay with her some nights but was always gone in the morning, and she did not know where he went. She testified that she let Petitioner stay with her on occasion and that she did not think he had a place of his own during that time. App. 128, l. 1-App. 129, l. 13.

Petitioner testified that he had been living with his co-defendant but had to move out and subsequently did not have a place to stay. He stayed with various people but did not have a permanent address that he could have mail forwarded to. He also stated that his phone was in his co-defendant's name and was disconnected after he moved out. Petitioner testified that had he known of his court date he would have appeared, just as he had appeared at every roll call date until April. App. 132, l. 4-App. 133, l. 9.

Petitioner testified that he only met with Counsel Etheridge once, when he initially hired him, and that he was never provided with a copy of his discovery while the charges were pending. App. 133, ll. 12-23. Petitioner stated that he understood that "in a bond they do actually say stuff about if you miss court things going to happen" but that he did not know that language was in there at the time his charges were pending. Petitioner also stated he did not understand how someone could waive his rights and that there could be a trial in which he was not represented by anyone at all. App. 135, ll. 5-20.

On cross-examination, Petitioner testified that he never discussed the incident or evidence with Counsel Etheridge. They only ever discussed the basics of the charges and the fee arrangement. App. 136, l. 23-App. 137, l. 4. Petitioner stated he learned that he had been offered a five-year plea deal when he received his case file once he was in prison. He testified that he never received any letters or phone calls from Counsel Etheridge. Petitioner acknowledged that Counsel Etheridge had advised him he that he could move to be relieved if Petitioner failed to keep in contact with him. Petitioner further stated that he could not provide Counsel Etheridge with updated contact information because he was moving from house to house every day. Petitioner stated that nine out of ten times he would plead to a charge. He acknowledged being told in prior cases that he could be tried in his absence if he did not appear in court but maintained that he would always appear when he knew of the court date. App. 137, l. 5-App.139, l. 24.

Former Solicitor Paul Fata testified that the plea offer he sent to Counsel Etheridge for Petitioner was to plead to burglary second non-violent and the domestic violence high and aggravated with a cap of five years. App. 141, l. 12-App. 142, l. 16. Fata testified that Counsel Etheridge had been relieved as counsel and there was no one acting on behalf of Petitioner

during the jury selection process or trial. App. 143, ll. 6-17. Fata testified he did not recall seeing Petitioner at roll calls but could only definitively say that Petitioner failed to appear at the June and July terms of court where his case was called to trial. App. 144, l. 8-App. 145, l. 7. Fata testified that the bond form which Petitioner signed directed him to appear at court on October 11, 2017, and that Petitioner was required to appear and remain through out each subsequent term of court until his case was called. App. 147, ll. 4-14. Fata also testified that that Counsel Etheridge never told the solicitor's office that he had been unable to find Petitioner but only that they were not in contact with each other. App. 150, l. 23-App. 151, l. 8.

Counsel Etheridge testified that he met with Petitioner once in his office, and to his recollection they only had a preliminary discussion about the case. He stated that he received discovery from the State but was never able to share it with Petitioner. Counsel Etheridge did not recall if Petitioner appeared regularly at roll calls but testified that his notes only showed Petitioner being absent three times, two of which he believed were the dates where the case was called to trial. App. 153, l. 21-App. 154, l. 24. Counsel Etheridge confirmed he made numerous calls to two different phone numbers he had for Petitioner, but both numbers were disconnected. He stated his office followed up the phone calls with several letters, but the letters were sent back to his office marked "return to sender." App. 115, ll. 4-12.

Counsel Etheridge assumed that his office had reached out to the co-defendant and to Petitioner's bondsman to locate him, but he did not have anything in his notes showing he took those actions. App. 155, l. 13-App.156, l. 15. Counsel Etheridge confirmed that he had received a plea offer for Petitioner, but that he was neither able to give Petitioner his discovery nor able to convey the plea offer or to notify Petitioner of his trial date. Counsel Etheridge testified that, to his knowledge, Petitioner never received notice of his trial date. App. 157, ll. 1-12.

On cross-examination. Counsel Etheridge confirmed that he attempted to relay the plea offer to Petitioner, but the letters were returned, and Petitioner's phone was disconnected. App. 159, l. 3-9. He testified he believed they tried to contact Petitioner through his family but were not able to get in touch with them either. App. 160, ll. 18-24. Counsel Etheridge stated he moved to be relieved because he had not had any conversations with Petitioner about the case and did not feel he could effectively represent him at trial. He confirmed he was not present during Petitioner's trial. App. 161, ll. 7-19.

At the conclusion of the hearing, the court requested proposed orders from both parties. The court informed the parties that one of its concerns was that a PCR was a collateral attack, and it felt that many of the issues raised were direct appeal issues. App. 163, l. 15-App. 164, l. 8. Additionally, during the testimony of Fata, the court stated that the question before the court was "what is it that Mr. Etheridge did that was ineffective representation of counsel" and that many of the issues raised were appropriate for direct appeal rather than post-conviction relief. App. 146, ll. 10-22.

An order of dismissal was filed on February 10, 2022. App. 166-184. The PCR court found that claims four, five, seven, eight, and nine were direct appeal issues that were not cognizable under the PCR Act and denied those claims. App. 173-174. As to claims one and ten, the court found them to be without merit because Counsel Etheridge had been relieved and did not represent Petitioner at the time his sentence was unsealed. Therefore, Counsel Etheridge was not responsible for filing an appeal or motion to reconsider the sentences. App. 179-180. On claim two, the court found that Counsel Etheridge was not ineffective for failing to object or challenge Petitioner being tried *in absentia* because Counsel had been relieved based on Petitioner's behavior in failing to communicate with him. App. 180-181. Claim three was

denied because no testimony was elicited at the hearing regarding the validity of the indictments, and the court found the indictments to be facially valid. App. 181. Finally, claim six was denied because there is no constitutional right to a preliminary hearing, and even if Counsel Etheridge was deficient in failing to notice Petitioner of the hearing, there could be no prejudice, as the charges were ultimately indicted by the grand jury. App. 182.

ARGUMENT

The PCR court erred in dismissing Petitioner's duly raised constitutional challenges to the validity of his convictions and sentences where Petitioner was tried *in absentia* and without counsel in violation of numerous federal and state constitutional rights and where the PCR Act plainly allows a collateral attack upon a conviction or sentence obtained in violation of the Constitution of the United States or the Constitution or laws of this State.

The PCR court found that Petitioner's claims that he was denied due process and that his constitutionally protected rights to be present at trial, to face his accuser, and to present a defense were violated, were not cognizable claims under the PCR Act. Respectfully, the PCR Act allows for claims that a conviction or sentence was obtained in violation of the Constitution of the United States or the Constitutions and laws of our State. Petitioner was improperly tried *in absentia* and without counsel resulting in his convictions being obtained in violation of both the United States and the South Carolina constitutions. The claims were properly brought under the PCR Act and should have been considered on the merits by the PCR court.

South Carolina adopted the Uniform Post-Conviction Procedure Act (the Act) in 1969. S.C. Code Ann. §§ 17-27-10 to -160. Pursuant to the Act, any person who has been convicted of, or sentenced for, a crime and who claims:

> (1) *That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;*
>
> (2) That the court was without jurisdiction to impose sentence;
>
> (3) That the sentence exceeds the maximum authorized by law;
>
> (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

> (5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
>
> (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; *may institute, without paying a filing fee, a proceeding under this chapter to secure relief.* Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

S.C. Code Ann. § 17-27-20 (emphasis added). As this Court noted in Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 746 (2000), the "[p]ost-conviction relief processes created by the states are the result of the United States Supreme Court's determination that the Fourteenth Amendment may require the states to afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees."

In Brown v. State, 423 S.C. 56, 58, 814 S.E.2d 146, 146–47 (2018), this Court considered whether a Petitioner could raise a PCR claim after he had finished serving his sentence. This Court wrote,

> Post-conviction relief is a statutory remedy in South Carolina. Therefore, we begin our analysis with the text of the Act, which provides,
>
> Any person who has been convicted of, or sentenced for, a crime and who claims:
> (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
> ....
> may institute ... a proceeding under this chapter to secure relief.
>
> *Under the plain language of this subsection, Brown may prosecute his action seeking PCR. He has been convicted of a crime, and he claims his conviction is invalid due to violations of his constitutional rights to effective counsel under the Sixth Amendment and due process under the Fourteenth Amendment.* Under subsection 17-27-20(A)(1), it is not necessary that the PCR applicant demonstrate any collateral consequences to his conviction, even if he has completed serving his sentence.

Brown at 58, 814 S.E.2d 146-147 (internal citations removed) (emphasis added). This Court also noted in a footnote that

> The South Carolina Code contains a scrivener's error in the publication of subsection 17-27-20(A). In the text of Section 1 of the original 1969 Uniform Post-Conviction Relief Procedure Act—which became section 17-27-20 in the 1976 Code—subsection (A)(6) ends with the language "... available under any common law, statutory or other writ, motion, petition, proceeding or remedy;" followed by a line break, with the language "may institute ... a proceeding under this chapter to secure relief" on the next line, in the body of subsection (A). See Act No. 164, 1969 S.C. Acts 158-59. The Code Commissioner made the error in the 1970 Code supplement, in which the Act was first published as part of our Code. See S.C. Code Ann. § 17-601 (Supp. 1970). *Thus, the language "may institute ... a proceeding" applies to all six subsections of subsection 17-27-20(A).*

Id. at 60, 814 S.E.2d 146-147, n. 2 (emphasis added).

While PCR actions are often framed as ineffective assistance of counsel claims, a Petitioner can allege the denial of any federal constitutional right in a PCR action, except to challenge the sufficiency of the evidence. See Finklea v. State,[2] 273 S.C. 157, 158, 255 S.E.2d 447, 447-48 (1979). ("Our Post-Conviction Procedure Act is designed to incorporate all rights available under federal habeas corpus" citing Harvey v. South Carolina,[3] 310 F.Supp. 83 (D.S.C.1970)). The Act also "recognizes almost any abridgment of a state created right." John H. Blume & Emily C. Paavola (FNaaa1), A Reintroduction: Survival Skills for Post-Conviction Practice in South Carolina, 4 Charleston L. Rev. 223, 236 (2010).

Petitioner raised valid, constitutionally based challenges to his convictions and sentences. He argued he was denied due process, the opportunity to confront his accuser, the right to be

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2 Implied overruling on other grounds recognized by Brown v. State, 423 S.C. 56, 814 S.E.2d 146 (2018).

3 Holding "the South Carolina Act affords all the protections contemplated by our founding fathers. It is designed to afford post-conviction relief of a scope sufficiently broad to comply with the mandates and holdings of the United States Supreme Court relating to federal review of state convictions" (internal citations omitted).

present at trial, and the right to present a defense. These claims fell squarely under S.C. Code Ann. § 17-27-20(A)(1). Tellingly, the PCR court twice informed the parties that the question at issue was solely the alleged ineffective assistance of Counsel Etheridge and that the matters raised by Petitioner were matters for direct appeal[4] and not PCR. That, however, was not a proper statement of the law. Again, while most PCR actions are framed as claims of ineffective assistance of counsel, the Act specifically allows a collateral attack challenging the validity of the conviction obtained in violation of federal constitutional law and State constitutional and statutory law. Much like the applicant in Brown, *supra*, Petitioner's claims were properly pursued under the PCR Act as he, like Brown, was convicted of crimes and claimed that the convictions were invalid due to violations of his constitutional rights and due process.

In Al-Shabazz, *surpa,* this Court "re-emphasized the core purpose of the PCR Act" and held that "PCR is proper avenue of relief *only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence* as authorized by Section 17-27-20(a)." Al-Shabazz at 367, 527 S.E.2d at 749. Petitioner mounted a constitutionally based attack that challenged the validity of his convictions. Accordingly, the PCR court was required to rule on each claim raised and dismissing the claims as not cognizable under the Act was improper.

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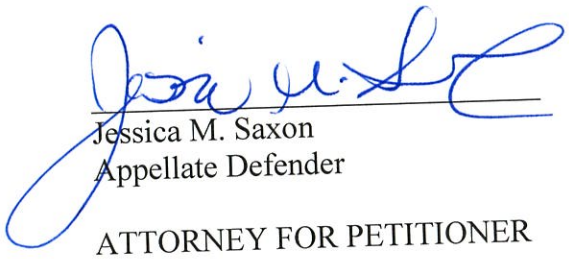
[4] Additionally, PCR Counsel Griffith seemingly conceded this point in agreeing with the PCR court that the claims Petitioner raised were better suited for a direct appeal than a PCR action. App. 164, ll. 1-8.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the writ of certiorari to allow full briefing on this issue.



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This 31st day of October, 2022.