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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

CHARLES GREEN, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001204

Appeal from Beaufort County

Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2023-UP-026

RETURN TO PETITION FOR REHEARING

Relying in part on authority which it never cited in its Brief of Respondent, and speculating—without evidence—about the PCR judge's inner thoughts, the state takes umbrage with this Court's well-reasoned opinion. Despite the fact that the PCR judge limited Green's allegations at the evidentiary hearing under Rule 11, the state would have this Court dilute the efficacy of State v. Hiott, 381 S.C. 622, 674 S.E.2d 491 (2009). In essence, Respondent contends that although the PCR court impermissibly relied on and outright referenced Rule 11, SCRCP, to restrict Green's presentation at the PCR hearing, the court *did not mean what it said.* This position is untenable, and this Court should deny the state's Petition for Rehearing.

In its unpublished opinion, this Court granted limited relief in the form of a new PCR evidentiary hearing, because "the PCR court improperly required Green's counsel to evaluate and effectively discard Green's claims under the limitations of Rule 11 before presenting them to the PCR court." Green v. State, Op. No. 2023-UP-026 (S.C. Ct. App. filed Jan. 25, 2023). Furthermore, this Court noted "PCR counsel was not allowed to fully present Green's PCR claims." Id. These are accurate conclusions, supported by the record. As a result, this Court correctly held "the PCR court erred in using Rule 11 to justify the refusal to consider the merits of and hear testimony on Green's claims." Id.

In Hiott, supra, our Supreme Court discussed a potential chilling effect and noted how "there are already limitations in place that serve to curb the potential abuse of the PCR process." 381 S.C. 622, 629, 674 S.E.2d 491, 494 (2009). Instead of conceding the applicability of Hiott, the state now seeks to relitigate established law.

The state now posits that the PCR judge *could have* relied on an alternative theory to limit Green's allegations. True, the PCR judge could have issued an order for amendment of the application under S.C. Code Ann. § 17-27-70, *but he did not*. Instead, *sua sponte*, the PCR judge limited the claims Green could raise and thereby deprived him of his one bite at the apple. In doing so, the PCR judge stripped himself of his obligation to make findings of fact and conclusions of law in line with the PCR Act.

Additionally, it is practically impossible for a PCR attorney to determine what claims may be frivolous without hearing testimony from witnesses. As is often the case with PCR attorneys who are appointed to represent applicants via the contract system, numerous meetings (if any) do not occur between client and counsel. As a result, many PCR attorneys are unaware of what the testimony of their clients is going to be until the client is called to the stand.

The state maintains that the PCR judge *could have* relied on a handful of authorities when he referred to Rule 11 "and other grounds" at the PCR evidentiary hearing. In doing so, the state acknowledges that there is no evidence in the record that the PCR judge was actually relying on these authorities, only that he might have been.

The state's first potential "other ground" that the PCR judge *could* have been referring to is S.C. Code Ann. § 17-27-50 which sets out: "The application shall identify the proceedings in which the applicant was convicted, give the date of the entry of the judgment and sentence complained of, specifically set forth the grounds upon which the application is based, and clearly state the relief desired." Candidly, that is not a provision the PCR judge was referencing, or even likely considering, where the PCR judge never referenced a problem with specificity, only merit:

PCR counsel: He is alleging that he is prejudiced by the fact - -

PCR judge: No. Pursuant to Rule 11 and by other grounds, what are his grounds? And we're going to go forward with that. I'm not going to let him just throw out anything and see if it sticks. I want to hear what the grounds are and that we're going to pursue, and not just throw everything out there. Okay, sir?

App. 267 l. 21 – App. 268 l. 3.

Notably, despite the state's current assertions that the PCR judge relied on other, unnamed and unlisted authorities, the PCR judge reiterated his reliance on Rule 11, SCRCP, seconds after the above exchange:

PCR judge: Any other basis of this claim of ineffective assistance of counsel?

PCR counsel: If we are speaking in terms of Rule 11, I would have to say no.

PCR judge: Okay, sir. Then, prosecutorial misconduct. Is there a viable claim there?

PCR counsel: Again, **if we're - - under the limitations of Rule 11**, I'd have to say no.

PCR judge: **Well, you are.**

App. 268 ll. 14 – 22 (emphasis added).

The PCR judge noted for the record that counsel raised an objection "to me limiting you to Rule 11 basis." App. 269 ll. 3 – 6. Furthermore, the PCR court made clear how he limited the allegations that could be raised:

> Now, based on your representations to me, Mr. Falk, pursuant **to my requirements that you do so, under Rule 11**, the only … ground that we're proceeding on today is counsel failed to object to prejudicial hearsay, which caused some prejudice in this case Is that correct?

App. 269 ll. 18 – 23.

Following the direct examination of trial counsel Trasi Campbell, the PCR judge made a record of a bench conference:

> For the record, we had a bench conference, and counsel is concerned - - counsel for applicant is concerned that the applicant has brought here to these proceedings. I, of my own volition, sua sponte, have excluded the grounds that I'll articulate on the record earlier as not being relevant or acknowledged, grounds that we can - - what's the term I'm looking for, I'm drawing a blank. They are - - they're not meritorious grounds, and therefore, I'm excluding them from the testimony.
>
> And I'm going to tell you, Mr. Green, that your attorney is fighting for you, and he is concerned that you're not going to be allowed to testify as to these other grounds that you're claiming. But I'm not going to let you testify as to that. You're protected on the record that if I make a mistake in saying that they're not meritorious or recognizable grounds, then somebody will correct me. But I'm not going to let you testify to them, and your attorney is fighting for you on that behalf.

App. 281 l. 22 – App. 282 l. 16.

At the conclusion of the hearing, the PCR judge 1) amended the PCR application to include a failure to call a witness and 2) denied all of Green's other allegations as specious. App. 310 l. 11 – 18. The above detailed breakdown of what actually transpired at the PCR evidentiary hearing illustrates why the state's position is inaccurate and unpersuasive.

Based on the remarks by the PCR judge, and the overall sentiment expressed at the hearing, it is obvious the PCR judge was not relying on S.C. Code Ann. § 17-27-50 to limit Green's based on lack of specificity.

The second authority the state contends the PCR judge could have been relying on is S.C. Code Ann. § 17-27-70, "Court procedure on receipt of application."[1] Pet. for Rehearing p. 3. Under that statutory section, the PCR court "may, when appropriate, issue orders for amendment of the application or any pleading or motion, for pleading over, for filing further pleadings or motions, or for extending the time of the filing of any pleading." S.C. Code Ann. § 17-27-70(a). The Appendix before this Court does not contain any "orders for amendment," nor does the PCR judge ever indicate he intended to have Petitioner or PCR counsel modify the application to *exclude* allegations.[2] As such, it is readily apparent that the PCR judge never intended to rely on this "other ground" to limit Green's presentation at the PCR evidentiary hearing.

Third in the state's litany of potential (yet unarticulated) "other grounds" is Rule 71.1, SCRCP. Under Rule 71.1(d), the circuit court "shall promptly appoint counsel to assist the applicant if he is indigent" and "[c]ounsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary." Curiously, the state suggests this language that requires counsel to "insure that all available grounds for relief are included the application and shall amend the application if necessary" was the basis for the PCR judge—not counsel—to restrict Green's PCR allegations, despite the numerous outright references to Rule 11 at the evidentiary hearing. It is axiomatic that the rule requires counsel to

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1 This section also provides a thirty-day timeframe for the state to file its Return to a PCR application. That deadline was not complied with in this case. It is routinely overlooked in PCR cases.

2 The PCR judge did amend the application to include the failure to call a witness. App. 310 ll. 11 – 15.

include "all available grounds" and shall therefore amend the application if necessary to accomplish that purpose. The state's strained reading of this rule is illogical and was not the basis for the PCR judge's decision to limit Green's case under Rule 11, SCRCP.

Similar to the preceding three "other grounds," the state's fourth potential reasoning that the PCR judge could have relied on is Rule 12, SCRCP. Pet. for Rehearing p. 4. The state posits that Rule 12 "permits a post-conviction relief judge to require a more definite statement when the claims raised are too vague or ambiguous to be reasonably understood or addressed." Id. As previously noted, the PCR judge made his ruling based on Rule 11 and perceived frivolity, not ambiguity. Furthermore, Rule 12(e) squarely places the burden on the state to "move for a more definite statement before interposing [its] responsive pleading." Rule 12(e), SCRCP. The Appendix before this Court does not include a motion to make more definite or certain, as can be seen in other cases.

Either before or during the PCR evidentiary hearing, the state could have made a motion to make more definite or certain, *but it did not.* The state could have made a motion to dismiss under Rule 12, SCRCP, *but it did not.* The state could have filed for summary judgment under Rule 56, SCRCP, *but it did not.*

The state neglected to use the tools at its disposal in order to follow the correct process. Presumably, based on the lack of a motion to make more definite or certain, the state was satisfied with the clarity in Petitioner's application. Had there been confusion, a motion would have been filed. Regardless, this rule was not on the PCR judge's radar when improperly employing Rule 11 at the hearing.

The fifth "other ground" the state cites in its Petition for Rehearing entails two Rules of Evidence: Rule 401 and 402. A reference to Rule 401, SCRE, never appeared in the Brief of

Respondent; the state nonetheless contends this Court erred in failing to consider these authorities as possible grounds for the PCR court to have relied upon. For the sake of argument, however, these rules and their references to relevance contain no applicability to the case at bar. The PCR court was not concerned with relevance; it was purely seeking to limit the allegations to those perceived by counsel, without having heard testimony, as having merit. This fifth ground is simply another alternative that the state seeks to use as post-hoc rationalization grounds to affirm, despite the PCR judge's repeated references to Rule 11, in violation of Hiott,

The state's final "other ground" revolves around the Rules of Professional Conduct and is accompanied by a fundamentally flawed argument. Pet. for Rehearing p. 5. The state asserts that because Rule 3.1 of the South Carolina Rules of Professional Conduct suggests that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous," the PCR judge was just assisting PCR counsel with abiding by his ethical duties.

Simply put, an alleged violation of the Rules of Professional Conduct is properly handled by contacting the Office of Disciplinary Counsel, not by limiting the allegations that are leveled at a PCR evidentiary hearing. A violation of the Rules of Professional Conduct should be reported to the Office of Disciplinary Counsel. Under Rule 8.3:

> A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

Rule 8.3(c), SCRPC, Rule 407, SCACR.

Although it is unclear whether opposing counsel, the PCR judge, or the attorney representing the state at the PCR hearing filed a disciplinary complaint against PCR counsel for his representation of Petitioner, the Appendix before this Court contains no complaints or

dispositions from the Office of Disciplinary Counsel. Further, if the PCR judge or opposing counsel believes there has been an ethical violation, they have a duty to report that under Rule 8.3, of our Rules of Professional Conduct. The remedy is not to curtail Green's claims under Rule 11, SCRCP.

The PCR judge's unarticulated "other grounds" are never defined or listed; the state instead substitutes its own belief as to what the judge meant, *without support from the record.* In other words, the state is attempting to read Judge McIntosh's mind and convince this Court that its interpretation is aligned with his. There is no proof that the state has now correctly deduced the PCR judge's true intentions, only an argument that the judge *might* have relied on other, unnamed authorities. There is no indication what those authorities were, and the fact remains that the PCR judge repeatedly referenced Rule 11, SCRCP. Respondent is asking this Court to reject the evidence of your eyes and ears.

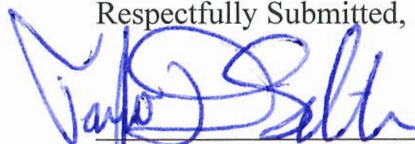
Because the words uttered by the PCR judge—"[p]ursuant to Rule 11"—are clear and unequivocal, a violation of our Supreme Court's precedent under Hiott, supra, occurred. Charles Green is entitled to a new PCR hearing.

In a footnote, the state alternatively requests that if this Court is going to grant a new PCR hearing and allow Green to call witnesses to the stand, that he be limited in his claims because certain claims "have already been fully litigated and ruled upon." Pet. for Rehearing n. 1. A review of the record rebuts this assertion.

PCR counsel did not have the opportunity to question trial counsel on the speedy trial issue, despite Green having included that issue in his PCR application. App. 252. There was no development of the speedy trial factors, and trial counsel was not asked whether she intended to move for dismissal under the 6th Amendment. Stated differently, this issue was not allowed to be

developed based upon the limitations imposed by the PCR judge. This Court's current opinion granting Green a new PCR hearing without limitations should remain in place. The undersigned respectfully requests that this Court deny the state's petition for rehearing.

Respectfully Submitted,



TAYLOR D GILLIAM
Appellate Defender

This 8th day of March, 2023.

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001204

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Return to Petition for Rehearing in the above-entitled case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); on and Charles Green, #320693, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 8th day of March, 2023.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

From:	Leverett, Scott
To:	SC - FARTHING MARK
Cc:	Leigh Ann Stone; Gilliam, Taylor
Subject:	Charles Green Jr. - Return to Petition for Rehearing - Appellate Case No. 2018-001204
Date:	Wednesday, March 8, 2023 4:06:00 PM
Attachments:	AG Coverletter.pdf Charles Green Jr. - Return to Petition for Rehearing - Appellate Case No. 2018-001204.pdf

Dear Mr. Farthing,

Attached please find a copy of the Return to Petition for Rehearing that is being filed with the Court of Appeals today, March 8, 2023, with the Court of Appeals.

-Scott Leverett
Admin. Asst. for Taylor Gilliam
Appellate Defense