

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Mar 31 2023

APPEAL FROM SPARTANBURG COUNTY  
COURT OF COMMON PLEAS  
R. Keith Kelly, Circuit Court Judge  
Case No. 2018-CP-42-03181

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S.C. SUPREME COURT

Appellate Case No.: \_\_\_\_\_

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John Alexander, #194748, ..... Appellant,

v.

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

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RULE 243(c) EXPLANATION

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Summary dismissal based on a finding that the Applicant's case was out of time and successive was in error based on the following:

Applicant alleged that the jury in his criminal case was given an improper implied consent charges based on the use of a deadly weapon. The jury charge as a whole included the words "implied malice" approximately forty times. Applicant appealed his conviction and during the time that the Applicant's direct appeal was pending State v. Belcher held that "a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina

where evidence is presented that would reduce, mitigate, excuse or justify the homicide. State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803–04 (2009). On direct appeal the Court of Appeals affirmed the conviction in 2010-UP-265. No petition to the supreme court was filed and a remittitur was issued in 2010.

In 2010 the Applicant filed his first post-conviction relief action (PCR). The 2010 PCR included a claim that counsel was ineffective for failing to adequately raise and preserve a Belcher type objection to the trial court's jury charges. A hearing was held in December of 2011 from which an order of dismissal was entered in 2012. Applicant has alleged that at that hearing and in those proceedings he was denied a full and fair opportunity to testify to facts supporting all of his issues, including the issue raised herein. (Affidavit). A *Johnson* petition for writ of certiorari was filed. Appellant filed a *pro se* petition. The case was transferred to the Court of Appeals which denied the petition in May of 2015. A remittitur was issued on October 2015. Applicant submits that the Belcher and related issues were not effectively raised nor clearly ruled on in his first PCR such that he is entitled to raise them herein under the rule that he is entitled to "one full and fair bite at the apple." Applicant filed a federal *habeas corpus* action in 2016. The *habeas* action was ultimately dismissed in 2017. Applicant petitioned the Fourth Circuit Court of Appeals and US Supreme Court which ultimately denied

his petition March 8, 2017.

Applicant filed the present PCR on September 14, 2018 alleging a denial of full and fair opportunity to raise all of his claims in his first PCR. Applicant submits that he has never been afforded a full and fair opportunity to raise and have a ruling on the Belcher and other issues arising out of the facts of his case.

Applicant submits that his Belcher and other claims are viable pursuant to Odom v. State, 337 S.C. 256 (1999), where this Court addressed the failure of the PCR court to procedurally protect the petitioner's right to raise and exhaust claims through the PCR process. Here the Applicant has not had a full and fair opportunity to have his PCR issues fully heard and finally adjudicated. Applicant submits that his claim is further supported by Mack v. State, 433 S.C. 267 (2021), which provides that a PCR applicant's claims are entitled to full review, and that any constitutional deficiencies in the process of fully litigating the claims, including the lack of an effective appeal, may be raised through a subsequent PCR:

Unlike the *Austin* review procedure, the petitioner will not be required to establish prejudice under the standard outlined in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See United States v. Peak, 992 F.2d 39, 42 (4th Cir. 1993) (noting "Strickland is concerned with attorney performance in the course of representation" and "does not apply to deprivations of counsel altogether," which occurs when counsel fails to file a notice

of appeal); see also Roe v. Flores-Ortega, 528 U.S. 470, 486, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) ("[I]t is unfair to require an indigent, perhaps pro se, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal."). Instead, prejudice will be presumed. See Roe, 528 U.S. at 483 (holding prejudice will be presumed where "counsel's deficient performance deprived him of a notice of appeal, and hence, an appeal altogether"); Rodriguez v. United States, 395 U.S. 327, 330, 89 S. Ct. 1715, 23 L. Ed. 2d 340 (1969) ("Those whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings."); *see also* Frasier v. State, 306 S.C. 158, 161, 410 S.E.2d 572, 574 (1991) (reviewing the denial of PCR and holding "counsel was ineffective in failing to perfect petitioner's appeal, and that petitioner was prejudiced thereby because but for counsel's deficient performance, petitioner would have taken a direct appeal").

Mack v. State, 433 S.C. 267, 276-77, 858 S.E.2d 160, 164 (2021).

The applicant's factual submissions when combined with the procedural history of the case entitle him to the appointment of counsel and an evidentiary hearing in this case. In Gary v. State, 347 S.C. 627 (2001) this Court held that when the State moves for dismissal as it has in the present case counsel should be appointed if the applicant raised a material fact regarding the applicability of the one-year statute of limitations. In Gary the Court reasoned:

Rule 71.1(d) provides:

If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent. Counsel shall be given a reasonable time to confer with the applicant. Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.

Under this rule, an indigent applicant who is granted a hearing has a statutory right to be represented by a court-appointed attorney. Al-Shabazz v. State, 338 S.C. 354, 364, 527 [\*\*664] S.E.2d 742, 747 (1999) [\*\*\*5] *citing* Whitehead v. State, 310 S.C. 532, 426 S.E.2d 315 (1992). Petitioner was not appointed counsel to represent him at the hearing and there is no waiver of his right to counsel in the record. Further, in the interest of fairness, we find HN7 counsel should be appointed under Rule 71.1(d) when the State moves for dismissal under § 17-27-45(A) and the PCR applicant raises an issue of material fact regarding the applicability of the one-year limitation.

We remand this case for appointment of counsel and an evidentiary hearing regarding petitioner's claim of equitable tolling of the one-year limitation.

Gary v. State, 347 S.C. 627, 629-30, 557 S.E.2d 662, 663-64 (2001).

Applicant submits that in his prior PCR the trial judge denied him the opportunity to present testimony and thus all of his issues. (Affidavit 10/26/21). Here, the applicant's factual allegations support an evidentiary hearing to determine whether he has had a full and fair opportunity to have his PCR claims effectively presented and fully litigated, and if not, then to have those claims heard and adjudicated herein. The circuit court's ruling that the Applicant's claims are

time-barred and successive are therefore in error.

Respectfully submitted,

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April 2, 2023.