

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas
Post-Conviction Relief

S.C. SUPREME COURT

Perry H. Gravely, Circuit Court Judge

Case No.: 2023-000962

Brian McGill, #362046,Appellant,

vs.

State of South Carolina,Respondent.

EXPLANATION PURSUANT TO RULE 243(C)

Appellant, in explanation pursuant to Rule 243 (c) would respectfully respond as follows:

Appellant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Cherokee County. Appellant was indicted at the July 2013 term of the Cherokee County Grand Jury for murder and possession of a weapon during the commission of a violent crime (2013-GS-11-0729). Appellant pleaded guilty to the lesser included offense of voluntary manslaughter and possession of a firearm during the commission of a violent crime on May 5, 2008. Sentencing occurred the next day before the Honorable Roger L. Couch where he sentenced Appellant to twenty-three years for voluntary manslaughter and the mandatory five years for possession of a weapon to be served concurrently. He was represented at trial by Douglas Brannon and Fletcher Smith, Esquires.

Appellant filed a timely notice of appeal on November 20, 2015. It was perfected by the filing of a brief by Robert Dudek, Esquire. The South Carolina Court of Appeals dismissed Appellant's appeal for failure to provide sufficient explanation for appeal. *State v. McGill*, App. Case No. 2014-002437 (S.C. Ct. App., filed December 8, 2015). Remittitur issued January 7, 2016.

Appellant filed two prior applications for post-conviction relief. The first was in 2015 but was dismissed because the direct appeal was still pending (2015-CP-11-00806). The second was filed in 2016 (2016-CP-11-00680) and was withdrawn at the evidentiary hearing on September 21, 2017, at which Appellant was represented by Rodney W. Richey, Esquire.

This application, however, is substantially and materially different in that it deals solely with after-discovered evidence as allowed in S.C. Code Ann. § 17-27-45(c). The statutory language has been interpreted to mean that a defendant requesting a new trial based on after-discovered evidence must prove to the court that:

1. Is such as would probably change the result if a new trial was held;
2. Has been discovered since the trial;
3. Could not, by the exercise of due diligence, have been discovered before the trial;
4. Is material to the issue of guilt or innocence; and
5. Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 611-12, 299 S.E.2d 854, 855 (1983); *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993).

Here, Appellant presented evidence at trial that included two witnesses whose testimony was not presented at trial. This included a woman who was present at the shooting, Bridgette Tessner, who testified that she witnessed an altercation between the victim and Appellant before the shooting. She was not contacted by Appellant's defense attorneys. It also included Ricky Eugene Austin who knew the victim and the fact that he had a firearm on the day of the shooting.

Testimony was presented that the defense attorneys contacted Mr. Austin prior to trial to but refused to provide testimony at the time. He since came forward and spoke with Appellant's current private investigator to get whatever information he had about the shooting off his chest.

Regardless, it satisfies the above-stated elements to warrant a new trial under the Post-Conviction Relief Act and related case law. This evidence has clearly been discovered since the trial, could not have been discovered before trial and is not merely cumulative or impeaching. Further, and despite the State's argument to the contrary, the other two elements – whether the evidence would change the result at trial and whether it is material to guilt or innocence – are also satisfied. These witnesses were available but were either not interviewed or not used, leading Appellant to plead guilty without enough evidence on his side.

The State argued that this was not enough to satisfy the standard in *Jamison v. State*, 410 S.C. 456, 765 S.E.2d 123 (2014), in a motion to dismiss Applicant's case and the PCR court agreed, thus denying relief on the entire application. Despite this, Appellant believes that the interests of justice demand his guilty plea should be vacated. Though the defense attorneys may have searched for all the witnesses possible, they did not discover the testimony presented at this merits hearing. It is important to distinguish that this balancing test does not consider the performance of counsel as in many PCR cases, but only whether the newly-discovered evidence is sufficient. Whether they could have found these witnesses or thought others would have performed well is irrelevant to the consideration of if this evidence is "of such weight and quality that, under the facts and circumstances of [this] particular case, the 'interest of justice' requires the applicant's guilty plea to be vacated." *Jamison*, 410 S.C. at 470, 765 S.E.2d at 130.

Appellant believes that the PCR court's decision not to grant the State's motion to dismiss for a successive application is notable. Instead of dismissing the application out of hand, the

court saw enough merit in Appellant's argument to allow him to present the witnesses at issue. This allowed a full merits hearing to be conducted and, as such, there is ample information for this Court to review and determine that it rises to the level of newly-discovered evidence. As well as whether the Court erred in not granting relief on the issue of ineffective assistance of counsel itself.

As such, Appellant is informed and believes that his appeal should be allowed to proceed in order to consider the weight and quality of this evidence and potential for vacation of his guilty plea under South Carolina Appellate Court Rule 243(c).

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. A. Thomas', written over a horizontal line.

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