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S.C. SUPREME COURT

IN THE SOUTH CAROLINA SUPREME COURT

Appeal from the Honorable
Roger M. Young, Sr., Court of Common Pleas

Makandi L. Terry, #353344,
Appellant,

V.

State of South Carolina,
Appellee,

Case No.: 2018-CP-08-02440, filed June 23, 2023

PRO-SE APPELLATE BRIEF

By: s/



Makandi L. Terry, #353344
Kershaw Corr. Institution
4848 Goldmine Hwy.
Kershaw, S.C. 29067

QUESTIONS PRESENTED

WHEHTER THE APPLICANT RECEIVED THE TOTALITY OF A COMPLETE PCR CIRCUMSTANCE, DUE TO THE FACT COUNSEL FAILED TO FILE A "REQUESTED 59(e), IN WHICH WOULD HAVE EFFECTVELY LIMITED ANY EFFECTIVE APPELLATE REVIEW"?

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STATEMENTS OF THE CASE

This matter is being respectfully brought to the attention of the South Carolina Supreme Court, by way of a Applicant claiming his right to relief under the Uniform Post Conviction Act, of South Carolina. Based on "newly discovered evidence", S.C. Code Ann. §17-27-45 (C).

Here, the Applicant is presently confined within the South Carolina Department of Corrections, pursuant to orders of commitment from the Berkeley County Clerk's Office. Applicant/Appellant was indicted on September 9, 2009, for the crime of murder (2009-GS-08-1912). Applicant/Appellant was represented by William Thrower, Esquire. Brian Alfaro, prosecuted the case for the State.

On or about November 30, 2012, "based on the advice and information conveyed by counsel", Applicant agreed to forgo trial, for which Applicant maintained "was not an intentional killing", and instead plead guilty to a lesser-included offense of voluntary manslaughter. The Honorable R. Markley Dennis, sentenced Applicant to eighteen years imprisonment. Applicant did not directly appeal this conviction or sentence.

Applicant filed his initial PCR in 2013 (2013-CP-08-2228), raising several instances of ineffective assistance of counsel.

- (a) Induced and coerced guilty plea
- (b) Failed to put forth any defense at sentencing
- (c) Failed to challenge prosecution's evidence
- (d) Failed to develop adequately State's evidence
- (e) Failed to conduct an independent investigation
- (f) Failed to file an appeal
- (g) Failed to call co-defendant as eyewitness

- (h) Counsel operated under a conflict of interest by working with an attorney that was discharged/fired from the case and did not advise the Applicant that they were working with that attorney;
2. Involuntary Guilty Plea.
- (a) Would not have pled guilty if counsel had not misinformed him that the Judge would give less time due to the facts of the case.

An evidentiary hearing was convened on the above matters on July 12, 2015, at the Charleston County Courthouse. Applicant was present and represented by Rodney Davis, Esquire. The State was represented by J. Rutledge, Esquire, of the S.C. Attorney General's Office. On August 28, 2015, by written order, the Court denied and dismissed the application. A timely 59(e) was pursued "by Applicant" to preserve and afford a fair bite at the PCR apple. As PCR counsel refused to file the 59(e).

Benjamin John Tripp, Esquire, with the Appellate Defense, filed a Johnson Petition for writ of certiorari on January 25, 2016. On December 16, 2016, the Supreme Court denied the petition and granted counsel's motion to withdraw.

Applicant's Justifiable Second PCR Application.

On or about November 1, 2016, Applicant/Appellant initiated a "second or subsequent" PCR application. On the basis "he did not receive procedural Due Process", (i.e. the attorney filing of the 59(e)). To have preserved "all issues raised within the first PCR."

See (2016-CP-08-2607. The State filed a Return and Motion to Dismiss the second application on August 25, 2017. The Court issued a Conditional Order of dismissal on September 6, 2017. After receiving Applicant's pro-se objections to summary dismissal, and a final order dismissing the action on December 13, 2017. Applicant's appeal of that action was also denied by the South Carolina Supreme Court on February 6, 2018. Thereby creating a reasonable conclusion at this juncture; "that Applicant never received his fair bite at the PCr apple", premised on the failure to file the 59(e), in the original case. (2013-CP-08-2228).

Based on the AEDPA' limitation. Applicant went on to file his Federal Habeas Corpus, pursuant to 28 U.S.C. §2254. Premised on the unconstitutionality of his guilty plea being "not knowingly, voluntarily or intelligently rendered". And that counsel failed to move to withdraw the guilty plea, inter alia. The State filed its return and Motion for Summary Judgment on April 21, 2017. On or about August 18, 2017, the Honorable Thomas E. Rogers, III, issued the Report and Recommendation that Respondent's motion for summary judgment be granted, and that Applicant's petition be denied. (0:14-3870-JMC-PJG)

Applicant filed his objections on August 29, 2017. On September 7, 2017, the Honorable David C. Norton, United States District Judge adopted the Magistrate's report and recommendation, and denied Applicant's petition.

Applicant filed a 28 U.S.C. §2254 (4:18-cv-00889-DCN) on April 2, 2018, raising the following grounds for relief:

1. "Petitioner Terry's case should be reversed and remanded based upon direct evidence of ineffective assistance of counsel in his failure to disclose any discovery to him under Brady";

2. "Petitioner Terry's Fourteenth Amendment rights to due process and equal protection was violated by the failure of defense counsel and solicitor to provided him with pertinent discovery";
3. "The lower court lacked subject-matter-jurisdiction to convict petitioner Terry via plea of guilty when petitioner never had possession of his discovery".

Respondent filed its Return and Motion for Summary Judgment. On April 11, 2018, the Honorable Thomas E. Rogers, III issued the Report and Recommendation that Respondent's motion for summary judgment be granted and Applicant's petition be denied. Applicant filed his objection on April 23, 2018. On April 24, 2018, the Honorable David C. Norton, United States District Judge adopted the report of the Magistrate and denied the petition.

APPLICANT NEVER HAD A FULL AND FAIR BITE AT THE PCR APPLE

In a "THIRD" and current application (2018-CP-08-02440), Applicant maintains he is being held in custody unlawfully for the following reasons:

1. "Newly Discovered Evidence":
 - a. "That the following exhibits show that Applicant never had a full and fair bite of the apple as to his original PCR case. Plea counsel testified as a witness for the state; in which state actually failed to prove he was effective under the United States Constitution and the State of South Carolina Law. This newly discovered or after discovered evidence shows plea counsel violated Applicant's Fifth, Sixth and Fourteenth Amendment rights to the United States Constitution, due to coercion";
 - b. "The showings also prove clearly that plea counsel gave inaccurate information to 'coerce' Applicant into pleading guilty; also counsel testified to the court the same inaccurate information on record which shows perjury (which went uncorrected) that changed the outcome of the original PCR case. Whereas, the perjured testimony violated Federal and State laws"
 - c. "Plea counsel testified on PCR record Applicant's co-defendant would have testified against Applicant if the case proceeded to trial, in which was perjury and is definitively shown under newly or after discovered evidence provided by co-defendant's attorney (Andrew Savage's latter) dated January 17, 2018. Where co-defendant had not met with the State

nor provided the State with any incriminating statements against the Applicant. During the time when Applicant's case was suppose to go to trial.

APPLICANT'S ARGUMENT OPPOSING THE CHARACTERIZATION OF A THIRD APPLICATION.

The State responds to this current filing with gatekeeping provisions which directly deals with "second or subsequent PCR applications", and barries based on statute of limitations. To which does not and cannot be applied in this case. In Peloquin v. State, 321 S.C. 468 (1996). This case speaks to applications filed beyond the one-year statute of limitations. Carefully noted; "Applicant's original PCR was timely filed". To which "all issued raised were never fully resolved". And when Applicant attempted to file the 59(e) pro-se. He was met with the notorious "hybrid restrictions". That although he had a attorney on board, "that attorney failed to preseve Applicant's due process concerns for appeal", or in the alternative, "point out to the PCR court what issues were overlooked in the order".

here, even where the "newly discovered evidence presents substantial grounds for relief". Where the State introduced "knowing false testimony during the PCR hearing by plea attorney". Which went uncorrected, to the sheer advantage of the state. Applicant/Appellant here does not have to rely solely on that ground alone, in order to pass muster.

Under §17-27-80, S.C. Code Ann., in relevant part; "under the cardinal rule of statutory interpretation". That eliminates judicial discretion, explains "A Court shall make specific findings of fact, and expressly its conclusions of law, relating to 'each issue' presented". Furthermore, in Reese v. State, 425 S.C. 108, 111, 820 S.E.2d 376 (2018), This Court declared that "[I]t had dealt with the

issue of §17-27-80, and Rule 52 (a) twenty-six years ago". Of Courts signing inadequate PCR orders drafter by solicitors.

In South Carolina, to preserve an issue for appellate review, parties are required to make sure that the lower court's final ruling reflects a ruling on each issue raised. And if such issue is not ruled on, "in order for the appeal court to review such issue, parties must file a motion to alter or amend judgment pursuant to Rule 59(e)". See Harrison v. Pearson, 9 Fed. Appx. 85 2001 WL 427933 (C.A. 4 (S.C.)).

And when a case involved "the failure to file the 59(e)". For example, see State v. Simmons, 416 S.C. 584, 788 S.E.2d 220 (S.C. 2016); this Court routinely finds this to be "an extraordinary circumstance", to which "extraordinary action is required" remanding defendant's application for post-conviction relief based on the court's failure to make specific findings and conclusions of law.

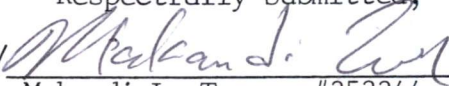
Here, Applicant excluded "strict proof" enclosed as exhibits, which contains (1)his pro-se filed 59(e) to which initial PCR counsel failed to file. And the resulting denial by the appeals court of not all issues which were raised and ruled on fro the original PCR hearing. That effectively deprived this Applicant/ Appellant of "a full and fair bite at the original PCR apple".

In fact, in Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (S.C. 2007), the _____ South Carolina Supreme Court held; "that issues raised but not ruled upon by a PCR Court were not preserved for appellate review where respondent did not submit a 59(e) motion to correct the insufficiency". Thus, "the original appellate review from the original PCR court's ruling". Could not have received Due Process under the Federal Constitution, which is a procedural error, as opposed to arguing the merit of the claims presented. That deprived this Applicant/Appellant "a full and fair bite at the PCR apple".

Wherefore, it would be a fundamental miscarriage of justice to allow the State continuing success based on procedural locks and latches (i.e. statute of limitations, and second and successive); where as the record is absolutely clear Applicant/Appellant has also suffered procedural deficiencies during his initial PCR. An error this Court held "requires extraordinary action", to correct these exact and identical kinds and type of Constitutional deprivations.

For these reasons, inter alia, the Applicant/Appellant moves for the relief that this Court held his designed for persons in this situation. "To remand the case to afford a proper 59(e) to be filed, and a effective appellate review to run its full course pertaining to "findings of fact and conclusions of law", relating to Applicant's initial PCR application. In which makes the second or subsequent argument pertaining to "how many attempts Applicant has sought relief absolutely moot". And thus, Applicant respectfully moves this Court for that relief and any further relief this Honorable Court deems just and Proper.

Respectfully Submitted,

s/ 

Makandi L. Terry, #353344
Kershaw Correctional Institution
4848 Goldmine Hwy.
Kershaw, S.C. 29067

cc: S. Ct. S.C.
S.C. AG's Office
filed
8/4/2023