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Aug 15 2023

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Heath P. Taylor, Circuit Court Judge

Case No. 2021-CP-18-1217

Trevee Gethers,

Petitioner,

v.

State of South Carolina,

Respondent.

WRITTEN EXPLANATION PURSUANT TO RULE 243(C), SCACR

Petitioner Trevee Gethers appeals the Honorable Heath P. Taylor's Order Denying his Application for Post-Conviction Relief filed on **July 6, 2023**, and the Order Denying Applicant's Motion to Alter or Amend Judgment (Rule 59(e), SCRCR) filed on **August 1, 2023**. Notably, the PCR Court invited a reversal of its decision on appeal in the Order of Dismissal:

After reviewing all records and evidence, **this Court finds [Petitioner] is entitled to post-conviction relief** but denied and dismisses this application with prejudice as barred by the statute of limitations.

...

Either the State wrongfully withheld the documents from [Petitioner's] trial counsel or trial counsel and [Petitioner's] initial postconviction relief counsel simply missed the documents and their paramount importance of having **positively identified another person other than [Petitioner] as committing the murder in this case.**

...

Additionally, this Court finds and concludes that there is a reasonable probability that but for Ms. Rogers' error, the result of

[Petitioner's] trial would have been different. In addition to receiving ineffective assistance of counsel at the trial level, [Petitioner] also was not provided effective assistance of counsel during his initial post-conviction relief application.

...

This Court finds and concludes that there is a reasonable probability that but for Mr. Davis' failure to minimally investigate [Petitioner's] case, the result of **[Petitioner's] initial post-conviction relief proceeding would have been different.**

...

This Court is of the opinion that the interests of justice suggest that Applicant should receive a new trial. However, this Court has neither the constitutional nor statutory authority to ignore the one-year statute of limitations set forth in S.C. Code Â§ 17-27-45(C) (2014). Jurists in lower courts generally loathe a reversal by a higher court. **In this instance, however, this Court invites a reversal that provides [Petitioner] the fair trial with competent counsel afforded to him by the United States and South Carolina Constitutions.**

(Order of Dismissal, pp. 1, 10 – 13) (emphasis added).

The PCR Court erred in failing to properly apply the equitable tolling doctrine to the statute of limitations in this case based on attorney Elizabeth Franklin-Best's decision to file Petitioner's Petition for a Writ of Habeas Corpus in the United States District Court for the District of South Carolina instead of also filing an application requesting Post-Conviction Relief in state court. *See generally Pelzer v. State*, 378 S.C. 516, 521, 662 S.E.2d 618, 620-621 (Ct. App. 2008) (summarizing the doctrine of equitable tolling: "The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, *in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant*

application of the doctrine.”) (emphasis added).

Specifically, this unique and compelling situation is akin to the Court’s finding that Petitioner was “at the mercy of his attorneys to properly investigate and prepare his case at the trial level and post-conviction relief proceeding”, Petitioner was also at the mercy of attorney Franklin-Best who failed to file a successive PCR action in state court; but instead, filed a habeas corpus action in federal court. In sum, it is not Petitioner’s fault that his Counsel chose to file a habeas corpus action instead of filing a successive PCR action. *See generally Moses v. State*, 420 S.C. 500, 803 S.E.2d 718 (finding “tolling the statute of limitations in circumstances in which an applicant demonstrates the failure to timely file for PCR was due to no fault of his own does not create an exception by which incarcerated litigants may avoid time restrictions. . . . Instead, it provides PCR applicants with functionally equivalent time bars and seeks to ensure equal access to the courts for all.” (internal quotations and citations omitted) (emphasis added).

The denial of Petitioner’s PCR action based on the statute of limitations is fundamentally unfair because equitable tolling is justified under the circumstances and is in the interest of justice. *See Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) (“Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental practicality and fairness.” (internal quotation marks and citations omitted)); *see also Hooper*, 386 S.C. at 117, 687 S.E.2d at 33 (“Equitable tolling may be applied where it is justified under all the circumstances. We agree, however, that equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use.”).

Although it is a rare occurrence, our appellate courts have permitted successive PCR applications. *See generally Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996) (permitting successive PCR application where multiple procedural irregularities, including the denial of a direct appeal, prohibited applicant the benefit of due process); *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987) (authorizing a successive PCR application where the applicant did not have PCR counsel that differed from his trial counsel); *Case v. State*, 277 S.C. 474, 289 S.E.2d 413 (1982) (allowing a successive PCR application where applicant's first PCR application was dismissed without assistance of legal counsel and without a hearing).

Furthermore, the Order of Dismissal failed to properly address what specific evidence supports the Court's finding that Applicant's testimony regarding when he learned about this issue being raised in the federal action was not credible. More specifically, there was no evidence presented during the hearing that directly contradicted Petitioner's testimony, and any circumstantial evidence regarding when Petitioner knew of this issue being raised in his habeas corpus petition is merely speculative.

Petitioner has shown a sufficient reason why the current allegations for relief were not raised in his original PCR action. Based on the testimony and evidence presented at the evidentiary hearing, Petitioner has established constitutional violations and deprivations that would require post-conviction relief. Specifically, Trial Counsel's and original PCR Counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14.

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August 15, 2023