

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

JEREL MARQUIS HERIOT, #356193,
Applicant,

C.A No.: 2022-CP-43-0776

v.

STATE OF SOUTH CAROLINA,
Respondent.

MEMORANDUM SUPPORTING
MOTION FOR RELIEF
OF JUDGMENT
[SCRPC 60(b)]

RECEIVED

SEP 01 2023

S.C. SUPREME COURT

INTRODUCTION

ABOVE-CAPTIONED APPLICANT ('Heriot') submits that the integrity of the November 1, 2022 Evidentiary Hearing in the instant action is clearly questionable due to Heriot not receiving a complete and fair opportunity of the 'fair bite at the apple' of receiving relief from current incarceration under South Carolina's Post-Conviction Relief ('PCR') Act, based on conduct of PCR Counsel, Heriot's inability to ensure accountability of PCR Counsel complying with applicable PCR procedures for purposes of exhaustion of state court remedies, and the PCR Court's manner of conducting Heriot's PCR Hearing.

Heriot Moves for this Court to vacate the prospective operation of the December 9, 2022 Order of Dismissal rendered in this action by the Honorable Circuit Court Judge Edward W. Miller, to allow Heriot to receive his 'fair bite at the apple' as guaranteed by law.

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• Noted documents within conjoined compilation of 'Attachments' are designated in tandem and as issues appear in Claim 1 (a)(i) to (xi) hereunder.

JURISDICTION

• In South Carolina, Circuit Court Judges retain power to relieve parties to Civil Actions of judgments that have become final, upon a Motion of a party outlining "just terms"; the principal reasons within the instant Motion are "...excusable neglect" and "...fraud" (see SCRCP 60(b)(1), (3)).

"Excusable Neglect" is defined as "[a] failure - which the law will excuse - to take some proper step at the proper time (esp. in neglecting to answer a lawsuit) not because of the party's own carelessness, inattention, or willful disregard of the court's process, but because of some unexpected or unavoidable hinderance or accident or because of reliance on the care and vigilance of the party's counsel or on a promise made by the adverse party." (BLACK'S LAW DICTIONARY, (1855) (11th ed. 2019)).

"Fraud" is defined as "[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment." (BLACK'S, (14c)).

Heriot submits the following claims for this Court to vacate the December 9, 2022 Order of Dismissal, and set a date for Heriot to receive his "fair bite at the apple" in full measure.

CLAIMS FOR RELIEF

1 - The December 9, 2022 Order of Dismissal should be vacated based on the 'Excusable Neglect' exhibited by PCR Attorney Timothy L. Griffith, Esq., as regards Heriot's guaranteed 'fair bite at the apple' of presenting all available grounds for consideration of relief from sentence and conviction.

FACTS

(a) - Attorney Griffith was at all relevant times cognizable that the 'PCR Act' demanded all grounds to be submitted to the PCR Court for relief in Heriot's original PCR application (S.C. Code Ann. § 17-27-40), and that Griffith would be given a "reasonable time to confer with the applicant..." (SCRCP 71.1(d)) to so "...insure that all available grounds for relief are included in the application and shall amend the application if necessary." (SCRCP 71.1(d)); this is based on the clear requirement that "[a]ll grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application." (S.C. Code Ann. § 17-27-90).

In the instant action, Attorney Griffith was conferring with Heriot regarding errors of Heriot's resultant Guilty Plea Counsel 'Ray Chandler, Esq.', prior to the November 1, 2022

Evidentiary Hearing, and Griffith was presented with the following facts:

- (i) - On August 26, 2021, Chandler sent "G-Mail" update to "Charmaine Marshall" regarding state's decision to drop offered sentence to "12 years from 15" (Chandler discussed matter with Heriot on August 27, 2021, to which Heriot refused due to Heriot maintaining his innocence).
- (ii) - In a Hand Delivered Response letter, dated September 23, 2021, Chandler urged Heriot towards pleading guilty on the basis of the Judge having "authority to sentence [Heriot] far beyond the offer that [Heriot] have even for a lesser included offense."
- (iii) - In Second Paragraph of same September 23, 2021 letter, Chandler stated the "sentencing judge is very, very, very likely to give [Heriot] a CONSECUTIVE sentence".
- (iv) - In a separate letter dated September 23, 2021, Chandler spoke on the subject of 'self-defense' mentioned by Heriot, by saying, "You again bring up the issue of self-defense."; the position Chandler advanced is that Heriot did not have a viable self-defense against the state's charges, when Heriot in fact was entitled to the Court's consideration of 'Self-defense' applicable to Heriot. This was Heriot moving for an Immunity hearing initially, especially when in same letter Chandler clearly agreed that Heriot was

"not at fault" in the engagement, then turned around to say "[t]here is no circumstance under which any of the defenses you bring up are strong enough individually or collectively to risk this type of exposure, basically doubling the time that you have been offered." Finally here, on another important point Chandler stated that fact of apparent witness being an uncertified security guard "is irrelevant to this case", Heriot submits is a clearly erroneous factual assessment.

(v)- In a Hand Delivered letter dated October 4, 2021, Chandler revealed that he was carelessly breaching the solemn oath of 'attorney-client confidentiality' by openly involving a person(s) who had not entered an appearance in Heriot's case, only to conduct a "mock trial" with a retired judge that is allegedly Chandler's friend. In same letter, Chandler changed up his Heriot 'having no circumstance supporting any defenses brought up' position in the September 23, 2021 letter to say that he and his Judge friend "... discussed that assault and battery first degree was the valid lesser included offense to attempted murder in this case, ...". Finally, in the same letter, Chandler urged Heriot against going to trial based on circumstances of possession of a firearm by a person

convicted of a crime of violence or possession of a firearm on a premises where alcohol was sold, because, based on advice from Judge Friend, that any sentencing judge is going to be 20 to 25 years and that Heriot could face 25 to 30 years; Chandler was clearly begging Heriot to plead guilty and not go to trial.

- (vi) - In a Hand Delivered letter dated October 12, 2021, Chandler conveyed clearly inaccurate sentencing information, going off of what he apparently was told by a member of the Classifications at the South Carolina Department of Corrections (as if his own experience as a criminal defense attorney failed to provide him with the intellectual prowess to construe sentencing parameters within criminal statutes).
- (vii) - On October 12, 2021, Chandler sent a "G-Mail" to Charmaine Marshall stating that the drawn Judge McFadden "...will hammer us.", in reference to convincing Heriot to enter the guilty plea offer of twelve (12) years which expired on October 13, 2021. Chandler emphasized that McFadden will give Heriot consecutive sentences.
- (viii) - On October 14, 2021, Chandler sent a

"G-Mail to Charmaine Marshall stating that he did not have a good meeting with Heriot, and spoke very negatively about Heriot personally (despite obligations under the Professional Rules of Conduct (SCACR 407) that requires attorneys to maintain a decent demeanor when dealing with clients).

(ix) - On October 5, 2021, Chandler sent a "G-Mail" to Charmaine Marshall openly admitting that he hoped Heriot's case would be resolved without a trial.

(x) - On November 3, 2021, Chandler sent a "G-Mail" to Charmaine Marshall concerning a meeting he had with "Bill Gadol" in Charleston, S.C.; Gadol was convinced that there was a camera angle down the subject alley, of which Chandler stated "[w]e do not have that.", and Chandler assured that he would be contacting the owner of the property (the "Melted Whiskey" establishment) on same day regarding camera angles of that property that was not seen or possessed by Chandler.

(xi) - On November 13, 2021, Chandler sent a "G-Mail" to Charmaine Marshall revealing a clear change of his position of Heriot not having a viable self-defense against State's charges

[see 1 (a) (iv), above] by saying, "I am considering bringing a Stand your ground motion. It is not something that I expect to win but I do not see a lesser included offense at this point." Here it appears that Chandler was clearly not in a position to adequately defend Heriot within the scope of the 6th Amendment, even after Chandler's Judge Friend told Chandler about a 'valid lesser included offense' [see 1 (a)(v), above].

(b) - Attorney Griffith failed to draft and amend the following claims into Heriot's PCR application as required by SCRPC 71.1(d), pursuant to S.C. Code Ann. § 17-27-90, upon above-outlined facts:

(i) - Chandler provided Ineffective Assistance in failing to assert a Motion for Immunity under the Protection of Persons & Property Act (S.C. Code Ann. § 16-11-450), where Heriot's factual circumstances met statutory requisites of Heriot being under presumption of reasonable fear of imminent peril while not engaged in unlawful activity when attacked by another in a place of business Heriot had a right to be in (S.C. Code Ann. § 16-11-440(c)), in light of a reasonable probability that, as Circuit Court Judge makes determination of entitlement to

Immunity, the Circuit Court Judge reviewing all relevant facts of Heriot's situation could have granted Immunity in accord with existing precedent State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (S.C. 2019).

Heriot was clearly not intending to harm anyone, and none of the State's facts show Heriot attempting to kill another person at the 'Melted Whiskey' bar. Chandler urged Heriot to enter a guilty plea instead of moving for Immunity — even under terms of precedent revealing that "... the fact a defendant armed himself does not, in and of itself, make him the aggressor in a given confrontation." (Cervantes-Pavon, 426 S.C. at 451, 827 S.E.2d at 568), and that "... just because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity; the court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." (*Id.*).

Had Chandler move for an Immunity Hearing instead of urging Heriot to plead guilty, there is a reasonable probability that Heriot would've been so granted Immunity under § 16-11-450.

(ii) - Chandler provided Ineffective Assistance by failing to move forward with seeking Dismissal of charges due to violation of state's discovery obligations under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) in submitting the video footage of the back patio of the "Melted Whiskey" bar, where exculpatory evidence (in Heriot not bringing on difficulty) would be found, and Chandler's failure to so move prejudiced Heriot's overall defense where no evidence exists revealing the entire incident which police investigated on the night of events leading to Heriot's charges.

The Federal Eighth Circuit Court of Appeals in United States v. Walrath, 324 F.3d 966 (C.A.8 2003) interpreted Brady regarding an allegation that the United States Attorney failed to release a videotape to the defense; in denying relief, the Court found:

"No evidence supports Walrath's conclusory assertion the videotape contains exculpatory or material evidence. By all accounts, the

videotape depicts only the exterior of a residence and two people entering the residence. The videotape neither shows what happened inside the residence nor contributes anything pertinent as to whether or not Walrath possessed the weapon or whether he lacked criminal intent."

- Walrath, 324 F.3d at 969.

In the instant case, even Chandler acknowledged that there were camera angles of the 'Melted Whiskey' bar that even he had not seen, as for why he was seeking camera angles by independent means (see 1(a)(x), above), following the State's non-submission of all inculpatory and exculpatory evidence gleaned from the 'Melted Whiskey'; thus, there is a reasonable probability that if Chandler had moved for a dismissal of charges due to this Brady violation, that the Circuit Court would've so granted the dismissal of charges against Heriot.

(iii) - Heriot reserves the right to seek to Amend and/or Supplement other viable claims of 6th and 14th Amendment violations as should become apparent upon Grant of Requested Relief.

(C) - Heriot had no way of compelling Attorney Griffith to comply with SCRCP 71.1(d) and Amend Heriot's original PCR application as required by S.C. Code ANN. § 17-27-90 because the U.S. Supreme Court have clearly and unequivocally that PCR applicants do not "...have a constitutional right to counsel when mounting collateral attacks upon their convictions." (see Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed. 2d 539 (1987)); Heriot was, therefore, at the unbridled mercy of Attorney Griffith.

• LAW

• Courts as far back as 1883 have relieved parties of judgments obtained by the negligent failures of attorneys representing the parties (see, e.g., F.C. Geer v. H.A. Reams, et al, 88 N.C. 197, 1883 WL 2338 (N.C. 1883) (default judgment relieved due to counsel's inadvertence in failing to put in an answer for client); Emdur Metal Products, Inc. v. Super Dollar Stores, Inc., 55 N.C. App. 668,

286 S.E. 2d 642 (N.C. App. 1982) (Granting 60(b)(1) Motion based on showing of 'excusable neglect' and a 'meritorious defense' to the underlying controversy).

Thus, SCRCP 60(b)(1) "excusable neglect" is alleged to facilitate this Court's granting of Requested Relief.

2. - Attorney Griffith committed 'Extrinsic Fraud' in acting to deprive Heriot from being completely heard in the PCR action on substantial claims for relief.

FACTS

(a) - On January 17, 2023, Heriot received "Attorney Communication" containing numerous enclosures from Attorney Griffith revealing that Heriot's PCR action was denied on December 9, 2022, and allegedly received by Attorney Griffith on January 9, 2023. Attorney Griffith intentionally declined filing a Motion to Alter or Amend the December 9, 2022 PCR Order within the ten (10) days after receipt of written notice of entry of the order, as required by SCRCP 59(e), because he didn't want to allow Heriot to be fully heard on

Heriot's 'fair bite at the apple', following Attorney Griffith clearly failing to Amend Heriot's PCR action as required by law. (see 1(a), above). Attorney Griffith rushed the Appellate process to deny Heriot an opportunity to fairly exhaust all of the available state claims through the PCR process, instead of simply filing a SCRPC 59(e) Motion, to help Heriot preserve his claims for relief.

LAW

• SCRPC 60(b)(3) allows a judgment to be relieved for "... fraud, ...". The South Carolina Supreme Court was clear when it said "Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard." (see Chewning v. Ford Motor Company, 354 S.C. 72, 81, 579 S.E.2d 605, 610 (S.C. 2003)).

CONCLUSION

• Heriot was clearly not at fault in the failure of the material issues to be duly amended into Heriot's PCR action; Attorney Griffith acted in a manner consistent with 'Extrinsic Fraud' by deciding to appeal Heriot's

PCR Order, despite being fully aware that all available grounds for consideration of PCR relief were not so amended into Heriot's PCR as required by law, and Heriot had no legal standing to compel Attorney Griffith to comply with legal requirements for amending Heriot's PCR application, thereby being adequate grounds to support a showing of 'excusable neglect' in regards to sufficient claims not being brought before the PCR Court in an amended application.

Heriot thus moves for the Relief Requested below.

RELIEF REQUESTED

As a Motion under Rule 60(b) is proper to question the integrity of a civil proceeding (see, e.g., Gonzalez v. Crosby, 545 U.S. 524, 532, 125 S.Ct. 2641, 2648, 162 L.Ed. 2d 480 (2005) (a Rule 60(b) motion is allowed when it attacks "... some defect in the integrity of the ... proceedings." (Quoted in relevant part))), and the 'integrity' of Heriot's PCR process was not fair from its inception; this Court should

therefore 'Vacate' the December 9, 2022 Order of Dismissal, and allow another PCR Hearing to be scheduled, so that Heriot may be able to have his 'Fair bite at the apple' in Full, allowing Heriot to fully develop his initial PCR claims, and so exhaust all available claims for later proceedings if Heriot have to so invoke those processes (see, e.g., Granberry v. Greer, 481 U.S. 129, 131, 107 S.Ct. 1671, 1674, 95 L.Ed.2d 119 (1987) ("... there is a strong presumption in favor of requiring the prisoner to pursue his available state remedies,..."); 28 U.S.C.A. § 2254 (c) ("An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.")).

Respectfully Submitted,

1/31 Jerel Marquis Heriot #356193

Jerel Marquis Heriot, #356193

E.C.I. F.I - 170-A

610 Highway 9 West

Bennettsville, SC 29512

~~25~~ 25 day of August 2023

Sarah A. Ouellet

~~2117/24~~ 2117/24

8-25-23

DATE