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S.C. SUPREME COURT

DATE: 2-15-24

HON. CHIEF JUSTICE BEATY  
SOUTH CAROLINA SUPREME COURT  
P.O. BOX 11330  
COLUMBIA, S.C. 29221

RE: CHARLES E. RICHEY V. STATE,  
NOTICE OF APPEAL/EXPLANATION  
PUR. TO RULE 243 SCACR

DEAR CHIEF JUSTICE,

THE PETITIONER SUBMIT THIS EXPLANATION AS TO WHY SUMMARY DISMISSAL WAS IMPROPERLY GRANTED. FIRST, HE ASK THE COURT FOR LENIENCY AS CONCERNING ANY CONFUSION WITH RESPECT TO THE FRAMING OF HIS APPLICATION APPROPRIATELY.

ISSUES PRESENTED

- (1) THE SUMMARY DISMISSAL OF HIS APPLICATION AS UNTIMELY IS IMPROPERLY DETERMINED AND UNSUPPORTED BY THE RECORD.
- (2) THE SUMMARY DISMISSAL OF HIS APPLICATION AS SUCCESSIVE IS IMPROPERLY BASED ON FINDING APART FROM THE AMPLE FACTS EVIDENCE PRESENTED IN SUPPORT OF CLAIM AS BEING OR CONSTITUTING SUFFICIENT REASON TO OVERCOME THE BAR SUCCESSIVE PCR APPLICATION.
- (3) WHETHER THE APPLICATION OF THE DOCTRINE OF RES JUDICATA WAS APPROPRIATELY APPLIED IN LIGHT THE RELEVANT ISSUE OF FUNDAMENTAL FAIRNESS.

STATEMENT OF THE CASE

THE PETITIONER IS SERVING LIFE WITHOUT PAROLE PURSUANT TO A CONVICTION FOR ARM ROBBERY AND KIDNAPING IN GREENVILLE COUNTY 2004. AFTER EXHAUSTING STATE AND FEDERAL REMEDIES, HE SOUGHT REVIEW IN THE S.C. SUPREME COURT ORIGINAL JURISDICTION OF A TRIAL COUNSEL INEFFECTIVE ASSISTANCE (I/A) CLAIM BASED ON CONFLICT OF INTEREST HE BELIEVED WAS NOT GIVEN PROPER ATTENTION IN THE FIRST PCR. THE SUPREME COURT DENIED THE PETITION ON AUGUST 29, 2018, FOR LACK OF EXHAUSTION PURSUANT TO GIBSON V. STATE. THIS DECISION WAS UNEXPECTED BECAUSE HE WAS UNDER THE BELIEF THE CLAIM HAD BEEN PROPERLY RAISED BY PCR COUNSEL AND THUS EXHAUSTED BASED ON THE ADVICE HE GOT FROM PCR COUNSEL<sup>1</sup> REGARDING THIS PARTICULAR CLAIM AND THE JUDGE GENERAL

(1)

1) SEE: PCR TR. Pg. 373, L-4-25,  
Pg. 374, L-1-23.

RULING AND DISMISSAL OF THE CLAIM IN HIS ORDER. AS A RESULT OF THIS DECISION, THE PETITIONER REALIZED THAT THE CLAIM HAD NOT BEEN RAISED AND HE HAD BEEN MISLEAD BY PCR COUNSEL. THEREFORE, ON FEBRUARY 18, 2019, HE FILED THIS SECOND APPLICATION ALLEGING THE INEFFECTIVENESS OF PCR COUNSEL BASED ON HER ERRONEOUS ADVICE AND FAILURE TO RAISE THE UNDERLYING TRIAL COUNSEL INEFFECTIVE ASSISTANCE CLAIM IN THE FIRST PCR HEARING. IN HIS APPLICATION HE ASSERTED THAT PCR COUNSEL ERRONEOUS ADVICE DEPRIVED HIM OF THE RIGHT TO RAISE ALL HIS CLAIMS IN THE FIRST PCR AND THUS A FAIR HEARING, AS HER ACTION SERVICED TO PREVENT HIM FROM DOING SO. HE HAS ESTABLISHED THAT THE UNDERLYING CLAIM IS SUBSTANTIAL AND WOULD, IF PROVEN, REQUIRE HIS CONVICTION OR SENTENCE TO BE REVERSED. HE HAS ASSERTED THAT PCR COUNSEL ACTION DEPRIVED HIM A FAIR PROCEDURE UNDER DUE PROCESS AS IT, IN ONE RESPECT, EFFECTIVELY THWARTED HIS CHANCE TO SEEK REVIEW OF THIS TRIAL COUNSEL CLAIM UNDER THE PROVISION OF THE U.S. SUPREME COURT DECION IN MARTINEZ V. RYAN, 132 S.C.T. 1309 (2012), WHICH PROVIDED A REMEDY FOR PCR COUNSEL INEFFECTIVE ASSISTANCE IN FAILING TO RAISE A SUBSTANTIAL CLAIM IN THE FIRST PCR. HE FURTHER ARGUED THAT A FAILURE TO CORRECT THIS KIND OF ERROR WOULD BE FUNDAMENTALLY UNFAIR AND THUS A MISCARRIAGE OF JUSTICE. AFTER THE JUDGE DENIED THIS APPLICATION HE FILED A MOTION TO AMEND THE ORDER WHICH WAS ALSO DENIED. RULE 59(e) SCRPC. THIS APPLICATION FOLLOWS. RATHER AN APPEAL.

#### ARGUEMENT

(1) THE PCR JUDGE FINDING THAT HIS CLAIM IS UNTIMELY IS UNSUPPORTED BY THE RECORD, AND FACTS PRESENTED.

THE APPLICANT ASSERTS IN HIS APPLICATION THAT PCR COUNSEL ERRONEOUS ADVICE AND FAILURE TO RAISE A TRIAL COUNSEL CONFLICT OF INTEREST CLAIM CONSTITUTE NEWLY DISCOVERY EVIDENCE. THE UNIFORM POST-CONVICTION PROCEDURE ACT PROVIDES: "IF AN APPLICANT CONTENTS THERE IS EVIDENCE OF A MATERIAL FACT NOT PREVIOUSLY PRESENTED OR HEARD THAT REQUIRE THE DISMISSAL OF HIS CONVICTION OR SENTENCE, THE APPLICATION MUST BE FILED WITHIN ONE YEAR AFTER THE ACTUAL DISCOVERY OF THE FACTS BY THE APPLICANT OR AFTER THE DATE WHEN THE FACTS COULD HAVE BEEN ASCERTAINED BY THE EXERCISE OF REASONABLE DILIGENCE. S.C. CODE ANN. SECTION 17-27-45(C). AS ASSERTED, HE DISCOVERED THAT PCR COUNSEL ADVICE WAS IN ERROR WHEN THE SUPREME COURT DISMISS HIS STATE PETITION DUE TO LACK OF EXHAUSTION ON AUGUST 29, 2018. THAT HE THEREAFTER FILED THIS SECOND APPLICATION ON JANUARY 31, 2019, WHICH IS WITHIN ONE YEAR OF THIS DISCOVERY. THE JUDGE IN THIS CASE, HOWEVER, APPARENTLY OVERLOOKED THIS FACT AND INCORRECTLY APPLIED SECTION 17-27-45(A) WHICH IS NOT APPLICABLE TO NEWLY DISCOVERED EVIDENCE CLAIMS. SEE: McCOY V. STATE, 737 S.E.2D 623(2013) WHERE THE JUDGE IN THAT CASE MISCONSTRUED STATUTE IN A SIMILAR MATTER. THE JUDGE ALSO BASED HIS RULING ON THE IMPROPER FINDING THAT THIS CLAIM WAS OR COULD HAVE BEEN RAISED IN THE FIRST PCR WHEREAS, THE APPLICANT WAS UNAWARE OF THIS DISCOVERY BECAUSE HE WAS RELYING ON THE ADVICE OF COUNSEL AS BEING TRUE AT THE TIME. CASE LAW HOLDS THAT RELYING ON COUNSEL ADVICE CONSTITUTE DUE DILIGENCE AND IS COVERD UNDER THE DISCOVERY RULE. COATS V. STATE, 575 S.E.2D 557(2003); DORMAN V. CAMPBELL, 500 S.E.2D 786,789 (1998).

IN THEIR RESPONSE TO HIS RULE 59(e) MOTION, THE ARGUED THAT THIS CLAIM WAS NOT DECIDED BECAUSE IT IS NOT COGNIZABLE UNDER THE PCR ACT BECAUSE THERE IS NO RIGHT TO COUNSEL. THE JUDGE FOUND THAT THE ONLY EXCEPTION WHERE PCR COUNSEL PERFORMANCE CAN BE CHALLENGE IS IN AN AUSTIN V. STATE, 409 S.E.2D 395 (1991), CASE WHERE PCR COUNSEL FAIL TO FILE AN APPEAL. AGAIN, THE JUDGE OVERLOOK OTHER PROVISION SUCH AS S.C. CODE 17-27-90, WHICH PROVIDE AN EXCEPTION BASED "SUFFICIENT REASON" ALSO, AICE V. STATE, 409 S.E.2D 392,394(1991), WHICH HELD THAT "PCR COUNSEL PERFORMANCE COULD BE CHALLENGED IN A SUCCESSIVE PCR APPLICATION." FUNDAMENTAL FAIRNESS IS AT THE HEART OF SUCH DECISION. THUS THE QUESTION IS WHETHER THE CIRCUMSTANCES RAISED BY THE APPLICANT MEET THE CRITERION. THE SUPREME COURT HAS YET TO ELABORATE ON SUCH MATTER. THE APPLICANT AS WELL AS THE COURT'S FEEL THEY HAVE A CASE DUE TO THE GRAY AREA, THEREFORE THE COURT SHOULD FURTHER EXPLAIN SO SUCH A CASE AS THIS ONE CAN BE PROPERLY EVALUATED THE CIRCUMSTANCES. THE STATE FURTHER ARGUED THAT IN RESPONSE THE 59(e) MOTION THAT THE CLAIM IS NOT COGNIZABLE UNDER SECTION 17-27-20(A)(1) BECAUSE IT DOES NOT REST ON AN ALLEGATION THAT THE CONVICTION OR SENTENCE WAS IN VIOLATION OF THE CONSTITUTION OR LAWS OF THIS STATE". THE PETITIONER CONTENDS HIS PCR COUNSEL CLAIM IS NOT RAISED IN ISOLATION BUT IN CONNECTION WITH THE UNDERLYING TRIAL COUNSEL INEFFECTIVE ASSISTANCE CLAIM THAT DOES REST ON A VIOLATION OF THE SIXTH AMENDMENT UNDER THE CONSTITUTION. THIS UNDERLYING CLAIM ALSO CONNECTS WITH HIM DEPRIVED OF HIS RIGHT TO THE BENEFITS PROVIDED UNDER MARTINEZ V. RYAN. THIS U.S. SUPREME COURT PROVISION HAS BEEN PROVIDED DUE TO THE STATE PROCEDURE SCHEMES AS BEING INADEQUATE. NOW THIS INADEQUACY IS POSE TO INTERFERE WITH OR ALLOW SUCH CLAIM TO GO UNCONTESTED. THIS IS FUNDAMENTALLY UNFAIR AND A MANIFEST INJUSTICE.

- (2) THE RECORD FAIL TO SUPPORT SUMMARY DISMISSAL OF HIS APPLICATION AS SUCCESSIVE.

THE JUDGE FOUND THE FAIL TO PROVIDE REASON, FACTUAL OR LEGAL WHY THE ORDER, BASED ON THE APPLICATION AS BEING IMPERMISSIBLE SUCCESSIVE, SHOULD NOT BECOME FINAL. THE APPLICANT CONTENDS THE JUDGE'S FINDING FAIL TO TAKE INTO ACCOUNT THE REASON PRESENTED BY THE APPLICANT AS TO THE UNIQUE CIRCUMSTANCES RAISED IN THE APPLICATION AND AS DISCUSSED BELOW. WHEREAS, UNDER THE LAW, SUCCESSIVE APPLICATION IS NOT ALLOW BUT NOT PROHIBITED EITHER. SEE: WILLIAMS V. OZMINT, 671 S.E.2D 600,602 (2008). TO BE ENTITLE TO A SUCCESSIVE PCR APPLICATION, HE MUST ESTABLISH THAT THE GROUNDS IN THE SUBSEQUENT APPLICATION COULD NOT HAVE BEEN RAISED IN THE FIRST ONE. ODOM V. STATE, 337 S.C. 256 ( ). SUCCESSIVE APPLICANT IS NOT ALLOWED ON THE GROUNDS OF INEFFECTIVE ASSISTANCE OF PCR COUNSEL. HOWEVER, AS WITH MOST BROAD RULES, THERE HAVE BEEN EXCEPTION. IN AICE V. STATE, 409 S.E. 2D 392,394 (1991), THE COURT INTERPRETED SECTION 17-27-90 AS FORBIDDING SUCH UNLESS FOR "SUFFICIENT REASON" WHY A GROUND WERE NOT RAISED OR NOT PROPERLY RAISED. THE PHRASE "NOT RAISED PROPERLY" IMPLYS A PREVIOUSLY RAISED CLAIM. NEVERTHELESS, THE LATEST EXAMPLE OF SUCH EXCEPTION IN FOUND IN ROBERTSON V. STATE, 795 S.E.2D 29 - (2016), THE FOUND PCR COUNSEL INEFFECTIVE DUE TO A LACK OF PROPER QUALIFICATION WHICH GAVE RISE TO UNIQUE CIRCUMSTANCES. THE PETIT-

THE APPLICANT ASSERTS THAT THE UNIQUENESS OF HIS CASE SHOULD ENTITLE HIM TO AN EVALUATION BASE ON THOSE CIRCUMSTANCES AS OPPOSE TO BEING DISMISSED WITHOUT SUCH CONSIDERATION. HE HAS SHOWN THAT PCR COUNSEL ACTED IN A MANNER THAT IS NOT TYPICAL BUT UNUSUAL WHERE, IT IS REASONABLE TO ASSUME THAT COUNSEL MADE A DELIBERATE DECISION NOT TO ABIDE BY THE APPLICANT WISH TO RAISE THE TRIAL COUNSEL I/A CLAIM BUT TO MISLEAD HIM IN THE PROCESS. THE APPLICANT ASSERTS THAT THERE WERE NO JUST REASON FOR HER TO DO THIS EXCEPT FOR THE PURPOSE OF COVERING FOR TRIAL COUNSEL WHO, DURING CROSS-EXAMINATION, APPEAL TO HER FOR RESTRAINT. SEE: PCR TR.Pg.331,L.18. IT IS HIGHLY UNUSAL FOR PCR COUNSEL WHO IS REQUIRE TO ASSURE THAT ALL AVAILABLE CLAIMS ARE RAISED, SEE: RULE 71.1 SCRPC, NOT ONLY REFRAIN FROM RAISING A SUBSTANTIAL CLAIM BUT, MISLEAD THE FROM RAISING IT. THIS CONDUCT FALL WAY BELOW THE REASONABLE STANDARD UNDER STRICKLAND V. WASHINGTON, 104 S.CT. 2052 (1984). SOME COURT'S HAS INDEED, CONSIDERED SUCH ACT "RARE AND EXTRAORDINARY CIRCUMSTANCES BEYOND AN INMATE CONTROL". SEE: U.S. V. WYNN, 292 F.2D 226,230 (2002), ALSO, HOLLAND V. FLORIDE, 132 S.CT. 912,924-27 ( ), HOLDING THAT GROSSLY INEFFECTIVE PERFORMANCE BY STATE PCR COUNSEL COULD BE BASES OF A FINDING OF EXTRAORDINARY CIRCUMSTANCES". ADDITIONALLY, PCR COUNSEL ACT IS UNIQUE IN THAT, UN-ANY OTHER CASE, IT INFRINGED ON THE APPLICANT'S DUE PROCESS RIGHT TO A FAIR PROCEDURE. WHEREAS, IT CIRCUMVENT AND DEPRIVES HIM OF THE BENEFITS OF THE U.S. SUPREME COURT PROVISION IN MARTINEZ V. RYAN, 132 S.CT. 1309 (2012), TO SEEK REVIEW OF THE TRIAL COUNSEL I/A CLAIM BASED ON PCR COUNSEL I/A. IN OTHER WORDS, BECAUSE OF PCR COUNSEL MISLEADING ADVICE, HE MISSED OUT ON THAT CHANCE. PROCEDURE DUE PROCESS CONSISTS OF "DEPRIVATION BY STATE ACTION OF A PROTECTED INTEREST , AND, INADEQUATE STATE PROCESS. REED V. GOERTZ, 143 S.CT. 955 (2023). FOR THESE REASON SUMMARY DISMISSAL OF HIS APPLICATION WAS IMPROPER AS THERE EXIST FACTUAL AND LEGAL REASON WHY HIS CLAIM WERE NOT RAISED IN THE FIRST PCR.

MOREOVER, WITH RESPECT TO THE TRIAL COUNSEL CONFLICT OF INTEREST CLAIM RAISED AS AN UNDERLYING AND AN INDPENDANT CLAIM TO THE PCR CLAIM RAISED ABOVE, AND ONE THAT WAS NOT RAISED BY COUNSEL IN THE FIRST PCR. THE JUDGE FOUND THAT THE CLAIM WAS RAISED IN THE INITIAL AND AMENDED APPLICATION, THAT HE CANNOT USE PCR COUNSEL ACTION TO COVER A CLAIM ALREADY RAISED. THE CONTENTS THIS CLAIM WERE RAISED IN THE APPLICATION BUT, A CLAIM IS NOT CONSIDERED RAISED FOR THE PURPOSE OF PCR UNLESS PROPERLY PURSED DURING THE HEARING. MANGAL V. STATE, 800 S.E.2D 568 (2017). THUS, ANY FINDING THAT THE CLAIM WAS RAISED AND RULED ON IS IMPROPER AND UNSUPPORTED BY THE RECORD.

AS SUCH, THE CLAIM WAS RAISED UNDER THE PROVISION OF SECTION 17-27-90, WHICH STATES IN PART: ANY GROUNDS NOT SO RAISED... MAY NOT BE THE BASIS FOR A SUBSEQUENT APPLICATION UNLESS THE COURT FINES A GROUND ASSERTED WHICH FOR "SUFFICIENT REASON" WAS NOT ASSERTED OR WAS INADEQUATELY RAISED. THIS STATUTE FORBID A SUCCESSIVE PCR APPLICATION BUT MAKE AN EXCEPTION AND THAT EXCEPTION CAN BE BASED ON UNIQUE CIRCUMSTANCES AS PROVIDED UNDER THE STANDARD ARTICULATED IN AICE.V. STAE, 409 S.E.2D 392,394 (1991) WHICH ACKNOWLEDGED THAT THERE MAY BE UNIQUE CIRCUMSTANCES WHERE A PCR COUNSEL PERFORMANCE


COULD BE CHALLENGED IN A SUCCESSIVE APPLICATION. THE PETITIONER IN THIS CASE CONTENDS PRC COUNSEL PERFORMANCE WAS NOT ONLY DEFICIENT BUT EGREGIOUS AS SUCH VIOLATED HIS RIGHT TO FUNDAMENTAL FAIRNESS AND DUE PROCESS. FURTHER. THE JUDGE'S ASSESSMENT OF THIS CLAIM IS IMPROPER WHERE THE FINDING IS BASED ON THE STANDARD ARTICULATED IN STRICKLAND V. WASHINGTON. THE U.S. SUPREME COURT HAS HELD THAT A INEFFECTIVE ASSISTANCE CLAIM ARISING FROM TRIAL COUNSEL CONFLICT OF INTEREST PRESENTS A SPECIAL CASE SUBJECT TO THE STANDARD ARTICULATED CUYLER V. SULLIVAN, 446 U.S. 335 ( ). AS ARGUED ABOVE, SUCH BY PCR COUNSEL IS BEYOND HIS CONTROL AND IS NOT YOUR TYPICAL I/A CLAIM PER SE. AICE V. STATE, 409 S.E. 2d AT 394.

(3) WHETHER THE JUDGE ABUSED HIS DISCRETION IN APPLYING THE BAR OF RES JUDICATA.

UNDER THIS DOCTRINE, A LITIGANT IS BARRED FROM ANY ISSUE THAT WERE ADJUDICATED IN THE FORMER SUIT AND ANY THAT MIGHT HAVE BEEN" HOWEVER, THIS DOCTRINE HAS BEEN SUBJECTED TO EXCEPTION", "THIS DOCTRINE ARE NOT TO BE RIGIDLY OR MECHANICALLY APPLIED AND MUST, ON OCCASION YEALD TO MORE FUNDAMENTAL CONCERNS" RES JUDICATA "MAY BE PRECLUDED WHEN UNFAIRNESS OR INJUSTICE RESULT". ASHBURN V. ROGERS, 803 S.E.2D 469 (2017). THE APPLICANT CONTENDS A FINDING IN THIS CASE SHOULD PRECLUDE THE APPLICATION OF THIS DOCTRINE AS IT IS AN INJUSTICE THAT HAS BEEN PERPETRATED IN THIS CASE BY PCR COUNSEL AND THE INABILITY OF THE SYSTEM TO PREVENT IT.

IN CONCLUSION HE PRAY THE COURT WILL ALLOW HIS APPEAL TO PROCEED BASED ON THE LOWER FAILURE TO PROPERLY EVALUATE HIS APPLICATION AND FOR IMPROPERLY DISMISSING HIS APPLICATION WITHOUT SUPPORT IN THE RECORD.

RESPECTFULLY SUBMITTED,

  
CHARLES E. RICHEY #301029  
TYGER RIVER CORR. INST.  
200 PRISON RD.  
ENOREE, S.C. 29335