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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2017-CP-10-3273
Appellate Case No. 2023-001952

Herbert Palmer, Jr. #260691 Appellant,

v.

The State of South Carolina, Respondent.

PETITION FOR REHEARING

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Petitioner hereby files this Petition for Rehearing as to the Order of Dismissal which was entered on February 7, 2024. As the court was non-specific as to which aspects of the required Explanation were not compelling, Petitioner hereby submits points which appear to have been overlooked and/or misapprehended by the Court.

Recanting Testimony

Petitioner's after-discovered evidence includes recanting statements by

Tara Spann and Carl Judge, both of whom testified at the trial in which Petitioner was found guilty. On June 13, 2022 Tara Spann submitted a sworn affidavit in which she states that her testimony at that trial was false. Tara Spann states, *inter alia*:

> "At trial, I testified that Herbert Palmer was the person who shot Marlo because of pressure from law enforcement and my friends to testify that way. I feel guilty about that because I do not know who shot Marlo."
>
> Affidavit of Tara Spann – Attached as Exhibit.

Ms. Spann further asserts that she came forward after all these years to clear her conscience. Had she been truthful at trial, her testimony would have almost certainly affected the outcome of that trial. Her honest testimony would have disclosed her own observations and experiences at the time of the incident in question and would have revealed the pressure and influence that was being applied to her and potentially other witnesses in the case. The jury absolutely needed to hear her genuine testimony in order to render a just verdict in the matter. Further, her lack of truthfulness at trial directly deprived the Petitioner of his right to appropriate and effective cross examination granted him under the Confrontation Clause (U.S Const. amend.VI).

Similarly, Carl Judge asserts in his affidavit, "…I testified that I witnessed Defendant shoot the victim, Marlo Perry. This testimony was not true". Affidavit of Carl Judge – Attached as Exhibit. Further, Carl Judge was not included in the list of witnesses provided to Petitioner prior to trial - in violation of Petitioner's rights afforded under the Confrontation Clause as well as those afforded under *Brady v. Maryland*. Carl Judge testified that he had received no deals or offers from

the State prior to his testimony. However, Carl Judge asserts in his affidavit that he met with a prosecutor and two police officers a week before the trial, and he specifically states in his affidavit: "I was told that if I did not testify that I saw the Defendant shoot Marlo, I would be taken to prison for drug charges that were pending at the time". "Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment irrespective of the good faith or bad faith of the prosecution, *Brady v. Maryland*, 373 U.S. 83, 87. "If a Brady violation is found to have occurred, PCR must be granted," *Riddle v Ozmint*, 631 S.E. 2d, 70, 73 (2006). The present scenario is decidedly analogous to that in *State v Dean,* in which the Court stated that a defendant "has a constitutional right to cross-examine (a witness) about his motive and bias and whether he had any deal with the State regarding his cooperation, State v. Dean, 427 S.C. 92, 106 (S.C. App. 2019) (parenthetical added). This right is infringed upon when neither the prosecutor nor the witness is truthful in their assertions to the triers of law and fact. The United States Supreme Court has held similarly in such cases as *Napue v Illinois,* 360 U.S. 264 (1959) and *Giglio v United States,* 405 U.S. 150 (1972). That the prosecutor at trial did not seek to correct or amend Carl Judge's trial testimony is also of concern, as "a prosecutor has special responsibilities to do justice", *State v. Quattlebaum*, 338 S.C. 441, 449 (2000).

This stated deal and prior communication with agents of the State were not discoverable at the time of trial for the obvious reason that – as with Ms. Spann's testimony – Petitioner could not reasonably know that the testimony would not be

truthful. For the lower court to require Petitioner to prevent false testimony at trial and to "suss out" backroom deals is to place an entirely new and frankly unconstitutional burden upon a Defendant at trial who is of course not required to prove his innocence. In fact, had the lower court denied the motion for summary dismissal in this matter, an evidentiary hearing would have revealed the extraordinary manner by which Petitioner eventually discovered Carl Judge's deal with the State and subsequent false testimony at trial. In a strange twist of fate, Petitioner was incarcerated with Carl Judge's older brother, Ernest Judge, at Lieber Correctional Institution in 2014. Ernest Judge told Petitioner of the deal between the State and his brother, Carl, and Petitioner subsequently obtained the affidavit attached hereto. Absent this chance meeting, Petitioner would likely still be unaware of the communications and deal between the State and Carl Judge.

Statute of Limitations/Equitable Tolling

The basis and explanation for equitable tolling in this matter is remarkably straightforward. The present issue provides an ideal scenario for the application of the "Prison Mailbox Rule", as applied in *Houston v. Lack*, 487 U.S. 286 (1988), *et al*. This matter is also directly analogous to the specific application of the Prison Mailbox Rule in *Mose v. State*, 420 S.C. 500, 509 (2017).

Arguably more compelling is the fact that the Prison Mailbox Rule need not even be applied when considering the application filed regarding after-discovered evidence of Tara Spann. Ms. Spann came forward with her previously unknown recantation and submitted a sworn affidavit on June 13, 2022. The related PCR

application was then filed on June 29, 2022. This application was filed in a timely manner, and at no point has that timeliness been challenged. That application was merged with the 2017 application number for the purposes of judicial economy, but it can and must be viewed separately for the purpose of demonstrating the timely filing of the subsequent action. Therefore, even if the application filed in 2017 were deemed to not be timely filed, a hearing on that application could be denied while granting a hearing on the application filed in 2022. As the lower court appeared confused on this particular issue, a transcript of the hearing has been attached to this Petition. The colloquy in question can be viewed on Page 20 of the transcript.

Conclusion

"Where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant" Leamon v State. 611 S.E.2d 494, 495 (2005). Petitioner in the present case has asserted that any perceived failure on his part to comply was with the statute of limitations was based on error which would have been easily remedied through the assistance of learned counsel or simply having the freedom to submit them in person. As such, the statute of limitations should be equitably tolled in this matter, and an evidentiary hearing should be granted. Further, as the application regarding the recanting statements of Tara Spann was filed in a timely manner, equitable tolling is not required, and an evidentiary hearing should be granted. Finally, Petitioner's application should not be barred as successive, as Petitioner has adequately and effectively demonstrated that the

grounds for the present application were not available or known prior to the filing of the same.

The lower court erred in summarily dismissing this matter and in not granting an evidentiary hearing to determine the credibility of the witnesses discussed above as well as other relevant witnesses. The lower court erred in failing to appropriately apply the Prison Mailbox Rule to this matter, and the lower court erred in failing to recognize the timely filing of the PCR application related to the testimony of Tara Spann.

s/Brian M. Byrd
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