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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.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the PCR Court err in failing to apply the equitable tolling doctrine in the interest of justice to the one-year statute of limitations for filing a PCR application under Section 17-27-45(C) of the South Carolina Code of Laws when the PCR Court found trial counsel and initial PCR counsel provided ineffective assistance of counsel, and has invited a reversal on appeal, where Petitioner's former counsel filed a Petition for Writ of Habeas Corpus in the United States District Court instead of also filing an application requesting post-conviction relief in state court after discovering the existence of an exculpatory witness statement implicating another person as the shooter and other compelling material evidence not previously presented and heard that requires vacation of the conviction and sentence?

STATEMENT OF THE CASE

Factual Background

On September 17, 2007, Michael Ritchey was sitting in the stairwell of his apartment building smoking a cigarette when he heard two men arguing in the parking lot followed by a gunshot. (App. 147 – 149). He ran to the bottom of the stairs to see what happened and was almost hit by a vehicle attempting to leave the scene. (App. 149, lines 11-24). However, the vehicle stopped in the road with the motor running. Mr. Ritchey then approached the vehicle and found Earl Robinson ("decedent") sitting in the driver's seat with a fatal gunshot wound.

Based on the testimony presented at trial, the neighbors in the apartment complex heard arguing in the parking lot just prior to the gunshots but none of those witnesses identified Petitioner as the shooter. The apartment complex was known as a high crime area and gunshots were "fairly common." (App. 151). Christopher Freshman of the Dorchester County Sheriff's Office testified that this was a violent area with "a lot of fights, a lot of drug-related calls." (App. 161 – 165; App. 161, line 4).

During their investigation, the police seized several used cigarette butts, a .40 caliber shell casing, and a Bluetooth headset. (App. 172). The police also seized the decedent's cell phone and extracted latent fingerprints from the vehicle. Notably, the police never analyzed the used cigarette butts for DNA comparison, the .40 caliber shell casing was determined not relevant to the crime scene, and the police never investigated the three individuals who were identified by the latent fingerprints found in the vehicle. (App. 176 – 177; App. 184 – 186; App. 212).

The State subsequently obtained a DNA profile from Petitioner and compared it to the DNA found on the Bluetooth headset located a significant distance from the decedent's body. (App. 189; App. 216). Specifically, Detective Earl Asbell testified at trial that "[the Bluetooth

headset] was not located anywhere around the vehicle" and "was in that area on the road as you came in [to the apartments]." (App. 216, lines 3-9).

Minor Child V.M. (who was 14 years old at the time of the shooting) testified that, on the date the incident, she was supposed to meet with the decedent because he allegedly wanted to give her money in exchange for sex. (App. 249 – 250). Minor Child V.M. also stated she was using her friend, Maggie Reid's telephone that evening and did not want to have sex with the decedent. (App. 250 – 253). Minor Child V.M. claimed that she and the Petitioner subsequently went to Virginia and eventually to New York after the incident. (App. 257). Notably, even though Minor Child V.M.'s testimony was not consistent with her original statement to the police, her charge of murder remained in Family Court based on an agreement for her testimony. (App. 297; App. 376).

During the investigation, the police noticed numerous telephone calls to the decedent's son and to a telephone number registered to Maggie Reid. The police were subsequently able to identify Petitioner's telephone number and obtained search warrants based on those telephone calls. Notably, the phone records did not provide anything of evidentiary value to the investigation. (App. 288 – 289). In addition to the unidentified fingerprints located in the vehicle, the police never located the murder weapon. (App. 286 – 288).

Indictment & Trial

On December 3, 2007, the Dorchester County Grand Jury indicted Petitioner for murder. (App. 714 – 715).

On November 15, 2010, Petitioner proceeded to trial before the Honorable Diane Goodstein and a jury. (App. 1 – 526). Sara Jayne Rogers represented Petitioner, and Assistant Solicitors Russell D. Hilton and Harrison Bell, Jr., prosecuted the case on behalf of the State (Respondent). The jury returned guilty verdicts for all charges on November 19, 2010. The Trial

Court sentenced Petitioner to forty-five (45) years imprisonment.

Direct Appeal

On October 25, 2012, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. *See State v. Gethers*, 2012-UP-576 (S.C. Ct. App. filed October 25, 2012) (App. 571 – 572). Appellate Defender Susan Hackett represented Petitioner, and Assistant Attorney General David Spencer represented the State on Direct Appeal.

On May 7, 2014, this Court denied the Petition for Writ of Certiorari to the Court of Appeals. (App. 621).

First PCR Application and Appeal

On July 3, 2014, Petitioner filed an application requesting post-conviction relief (PCR), alleging ineffective assistance of counsel (App. 622 – 646). Respondent filed a Return on February 26, 2015. (App. 647 – 651). Petitioner appeared before the Honorable Frank R. Addy for an evidentiary hearing on October 28, 2015. (App. 652 – 705). Judge Addy issued an order denying and dismissing the application on January 8, 2016. (App. 706 – 713).

On June 9, 2016, Petitioner filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. (App. 716 – 740). The Respondent filed its Return to the Petition on September 7, 2016. (App. 741 – 755). Our Supreme Court transferred the appeal to the South Carolina Court of Appeals on March 2, 2016. The Court of Appeal denied the Petition by Order on April 24, 2018, and issued the Remittitur on May 15, 2018. (App. 768 – 769).

Federal Petition for Writ of Habeas Corpus

On April 15, 2019, Petitioner subsequently filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (1:19:1088-TMC-SVH). (App. 911 – 932). Respondent filed its Return and Motion for Summary Judgment and Motion to Strike Exhibits Attached to Petition for

Writ of Habeas Corpus on July 1, 2019. Petitioner moved for an evidentiary hearing on July 11, 2019. The Honorable Shiva V. Hodges, United States Magistrate Judge, issued a Report and Recommendation on October 17, 2019, recommending that Respondent's motion for summary judgement be granted, Respondent's motion to strike be denied, Petitioner's motion for an evidentiary hearing be denied, and the Petition be dismissed with prejudice. Petitioner timely objected on October 29, 2019.

On June 5, 2020, the Honorable Sherri A. Lydon, United States District Judge, denied Petitioner's Petition, and accepted the Report and Recommendation for summary judgment. Petitioner gave notice of his appeal to the Fourth Circuit Court of Appeals on June 7, 2020, and filed an informal opening brief on July 15, 2020. The Fourth Circuit Court of Appeals dismissed Petitioner's appeal by unpublished *per curiam* opinion on March 22, 2021. *Trevee Gethers v. Bryan Stirling*, No. 20-6850 (4th Cir. March 22, 2021). The Fourth Circuit issued a formal mandate on April 13, 2021.

Second PCR Application

On July 6, 2021, Petitioner filed an application for Post-Conviction Relief (PCR) based on after discovered evidence and a memorandum in support of his PCR application, alleging:

(1) "Counsel Elizabeth A. Franklin-Best prepared [a] legal brief on July 9, 2020, on behalf of the Petitioner, and legal counsel Elizabeth A. Franklin-Best discovered that a witness by [the] name of Dante Hubbart witness[ed] the commission of this crime, and a statement was g[iven] to the police that Dante Hubbart observed the murder and the Petitioner was not the one who committed it" and

(2) "The State Solicitor withheld *Brady* material. [A] statement that was found by legal counsel Elizabeth A. Franklin-Best, and this statement never exist[ed] at the time of trial in the Petitioner['s] motion discovery".

(App. 770 – 785). Respondent filed its Return and a Motion to Summarily Dismiss the application on October 15, 2021. (App. 786 – 798). Petitioner filed an Objection to the Motion and requested

a hearing on October 27, 2021. (App. 799 – 857). The Honorable Edgar W. Dickson issued an Order finding it appropriate to convene an evidentiary hearing on June 29, 2022. (App. 858 – 860).

Evidentiary Hearing

On January 24, 2023, Petitioner appeared before the Honorable Heath Taylor for an evidentiary hearing on this PCR application. (App. 861 – 910). Dayne Phillips represented Petitioner, and Assistant Attorney General Chelsey Marto represented the Respondent. The following witnesses testified at the hearing: Petitioner; Jamal Gethers; Elizabeth Franklin-Best, Esq.; Sara Rogers; and Russell Hilton, Esq.

The following exhibits were admitted into evidence at the hearing: (1) Petitioner's Petition for Writ of Habeas Corpus; (2) Dante Hubbart's statement to the Dorchester County Sheriff's Office on November 28, 2007; (3) Investigator's notes; (4) Affidavit from Dante Hubbart dated December 11, 2018; (5) Affidavit from Veronica M. dated July 5, 2018; and (6) Affidavit of Rodney Davis dated July 10, 2019. At the close of evidence and hearing arguments from counsel, the PCR Court requested that the parties submit proposed orders for his review and consideration.

Attorney Elizabeth Franklin-Best

Attorney Elizabeth Franklin-Best testified about her extensive background and experience in the following practice areas: Criminal Defense; Appeals; Post-Conviction Relief; and Federal Habeas Corpus. (App. 867 – 879). Attorney Franklin-Best also testified that she represented Petitioner on his federal habeas corpus action. Petitioner moved to admit his Petition for Writ of Habeas Corpus into evidence, and the Court admitted Petitioner's exhibit number one without objection. (App. 911 – 932).

Attorney Franklin-Best testified Don Sorenson of the First Circuit Solicitor's Office gave her a statement that Dante Hubbart provided the police in connection with the murder investigation in this case.[1] It appears that this statement and the detective's notes were found in the Solicitor's file. Petitioner moved to admit Hubbart's statement and the detective's notes into evidence, and the Court admitted Petitioner's exhibits numbers two and three without objection. (App. 911 – 934).

Attorney Franklin-Best also obtained an affidavit from Dante Hubbart affirming that Donsurvi Chisolm shot and killed the victim in this case. Petitioner moved to admit this affidavit into evidence, and the Court admitted Petitioner's exhibits number four without objection. (App. 936 – 937). Attorney Franklin-Best testified that Donsurvi Chisolm is serving two life sentences for murder.[2]

Additionally, Attorney Franklin-Best obtained an affidavit from Petitioner's initial PCR counsel, Rodney Davis, who admitted he did not request a copy of the Solicitor's file, had no strategic reason for failing to do so, and did not contact Trial Counsel prior to the evidentiary hearing. Petitioner moved to admit this affidavit into evidence, and the Court admitted Petitioner's exhibit number six without objection. (App. 939).

Attorney Franklin-Best further testified that the State's witness Minor Child V.M. provided an affidavit recanting her testimony. Petitioner moved to admit this affidavit into evidence, and the Court admitted Petitioner's exhibit number five without objection. (App. 938).

As to the police investigation, Attorney Franklin-Best testified that Petitioner was not identified by any witness, that the three people identified based on the presence of fingerprints in

[1] Solicitor Sorenson was not involved in the prosecution of Petitioner's case.
[2] *See* https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000347831

the decedent's car were never pursued by the police, and that the murder weapon was never found. Notably, although Petitioner's DNA was found on a Bluetooth headset, it was not located close to the decedent's body and that the search warrant for Petitioner's phone records did not contain any inculpatory evidence.

Jamal Gethers

Petitioner's brother, Jamal Gethers, testified that he happened to see Dante Hubbart in public, and Hubbart asked what happened with his brother. (App. 879 – 882). Jamal also testified that, during their discussion, Hubbart told him about making the statement to the police regarding Donsurvi Chisolm being the shooter. Jamal futher testified that he informed Petitioner of this information but could not remember when (potentially 2019 or 2020).

Sara Rogers

Petitioner's trial lawyer, Sara Rogers, was appointed to represent Petitioner after he had five prior lawyers and acknowledged that she was disbarred from the practice of law in 2015.[3] (App. 882 – 888). Rogers testified that she was a new attorney and did not have a lot of time between her initial appointment of representation and the scheduled trial date. Rogers also testified that she felt Petitioner was not guilty of the charges and looked closely through the discovery for exculpatory evidence.

Notably, Rogers reviewed Dante Hubbart's statement to the police and the detective's notes at the hearing and testified that she had not seen those documents prior to Petitioner's trial. Rogers acknowledged on cross-examination that she met with Assistant Solicitor Russell Hilton and reviewed the State's file prior to trial. However, Rogers maintained that she did not see the statement or notes in the State's file during that review.

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[3] *See In re Sara Jayne Rogers*, Op. No. 27550 (Sup. Ct. filed July 23, 2015).

Russell Hilton

Former Prosecutor, Russell Hilton, testified that that he was the lead prosecutor with Blair Jennings being the second chair for this case. (App. 893 – 899). Hilton maintained that his typical practice was to have an open-file policy and that Sara Rogers reviewed the State's file with him prior to trial. Hilton maintained that the statement and detective's notes had always been in the file. Hilton admitted that he could not recall whether he specifically discussed or reviewed Hubbart's statement with Rogers or that the statement was provided directly to Rogers due to Petitioner having five prior lawyers.

Over Petitioner's objection, Hilton testified that the other prosecutor on the case had sent a letter to one of Petitioner's former lawyers about this evidence. Notably, the State failed to call that prosecutor as a witness, and Hilton conceded that he did not know whether the former prosecutor had shared that evidence with Rogers or one of the other former lawyers.

Petitioner Trevee Gethers

Petitioner testified that he had never seen Dante Hubbart's statement prior to trial but acknowledged that he knew Hubbart was a witness. (App. 888 – 892). Petitioner also testified that he had five prior lawyers and had provided a previous lawyer a list of potential witnesses. Petitioner further testified that he never heard anything else about Dante Hubbart or any other investigation done prior to trial from his former lawyers.

Order of Dismissal

On July 3, 2023, the PCR Court signed an Order of Dismissal. (App. 940 – 954). Specifically, although the PCR Court denied the application, the PCR Court invited a reversal of its decision on appeal:

> **From a substantive perspective, [Petitioner] is entitled to the relief he seeks.** However, the application currently before the Court is procedurally barred and for the

reasons set forth below, must be denied. Nonetheless, the Court is compelled to address the merits of the application. The State and [Petitioner] ground their arguments in the doctrine of newly discovered evidence. The two documents at issue in the matter are the statement of Dante Hubbart (Exhibit 2) and the investigative notes from the interview with Dante Hubbart (Exhibit 3). Both are dated November 28, 2007. These documents were not newly discovered. The State was aware of the evidence all along. Either the State wrongfully withheld the documents from [Petitioner's] trial counsel or trial counsel and [Petitioner's] initial post-conviction relief counsel simply missed the documents and their paramount importance of having positively identified a person other than [Petitioner] as committing the murder in this case. There is nothing in the record before this Court to suggest the State engaged in any wrongful conduct. Consequently, the analysis of this case does not revolve around newly discovered evidence but ineffective assistance of counsel.

This action is [Petitioner's] second post-conviction relief application. ... **This Court finds that [Petitioner] has shown a sufficient reason why the current grounds for relief were not raised. [Petitioner] was not afforded effective assistance of counsel at the trial level or during his initial post-conviction relief application.**

. . .

[Petitoner's] trial counsel failed to locate the exculpatory statement of Dante Hubbart. Not only did the statement indicate [Petitioner] did not shoot the victim but the statement also positively identified another individual as the shooter. Failure to locate and present exculpatory evidence of this magnitude is unquestionably deficient under the *Strickland* standard. **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.** [Petitioner's] counsel during his initial post-conviction relief proceeding provided an affidavit indicating he did not request a copy of the State's file during the course of his representation of [Petitioner]. *See* Exhibit 6. He stated he had no strategic reason for failing to request or review the file. Further, he did not interview trial counsel or otherwise discuss the case with her prior to [Petitioner's] evidentiary hearing. Failure to complete these rudimentary steps necessary to investigate [Petitioner's] claims amounts to deficient performance under *Strickland.* Had [Petitioner's] post-conviction relief counsel reviewed the State's file, he likely would have discovered Mr. Hubbart's statement in similar manner as [Petitioner's] federal habeas counsel. **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 finds and concludes that [Petitioner] could not have obtained the statement of Mr. Hubbart on his own but instead was at the mercy of his

> **attorneys to properly investigate and prepare his case at the trial level and post-conviction relief proceeding.** Further, Mr. Hubbart's statement was unquestionably material. While Mr. Hubbart's statement was not entirely consistent with the physical evidence present at trial, the exculpatory value is obvious and material.
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> . . .
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> **Despite the woefully ineffective assistance of counsel, this Court finds [Petitioner's] current application must be dismissed with prejudice.** If [Petitioner] contends there is evidence of a material fact not previously presented, under the discovery rule, the application must be filed within one year after the date of actual discovery of the facts by [Petitioner] or after the date when the facts could have been ascertained by the exercise of reasonable diligence
>
> . . .
>
> [Petitioner's] federal habeas petition was filed on or about April 15, 2019. While [Petitioner] likely knew of the existence of Mr. Hubbart's exculpatory statement and his counsel's ineffective assistance prior to the filing of the habeas petition, he certainly knew or should have known in April of 2019. The current application was filed July 6, 2021. In the memorandum of law accompanying his application, [Petitioner] contends he did not discover the existence of Mr. Hubbart's exculpatory statement until his habeas counsel filed a brief in that matter on July 9, 2020. This Court does not find [Petitioner's] assertion that he did not discover the information with regard to Mr. Hubbart until July 9, 2020 to be credible. Therefore, this PCR application must be denied and dismissed.
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> . . .
>
> **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.**

(App. 940 – 954) (emphasis added).

Motion to Alter or Amend Judgment

On July 17, 2023, Petitioner filed a Motion to Alter or Amend Judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure (SCRCP). (App. 955 – 960). In support of the motion, Petitioner submitted the following arguments:

> (1) Applicant incorporates by reference the issues and arguments raised in Applicant's Proposed Order Granting Applicant Post-Conviction Relief as if fully set forth verbatim into this motion. *See* (Attachment

A).

(2) The Order of Dismissal fails to properly address the Court's finding that Applicant's PCR application is procedurally barred by the one-year statute of limitations set forth in Section 17-27-45(C) of the South Carolina Code of Laws.

(3) Specifically, this Court should apply the equitable tolling doctrine to the statute of limitations based on attorney Elizabeth Franklin-Best's decision to file a Petition for a Writ of Habeas Corpus in the United States District Court for the District of South Carolina. *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).

a. This unique and compelling situation is akin to the Court's finding that Applicant was "at the mercy of his attorneys to properly investigate and prepare his case at the trial level and post-conviction relief proceeding", Applicant 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.

b. In sum, it is not Applicant'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).

(4) The denial of Applicant'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.").

(5) Although it is rare, 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).

(6) The Order of Dismissal fails to properly address what specific evidence supports the Court's finding that [Petitioner's] testimony regarding when he learned about this issue being raised in the federal action was not credible.

(7) 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.

(8) [Petitioner] has shown a sufficient reason why the current allegations for relief were not raised in his original PCR action.

(9) 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*, 466 U.S. at 687-88. Trial Counsel's and original PCR Counsel's deficient performance also prejudiced Applicant because it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692).

(10) Accordingly, Trial Counsel and original PCR Counsel provided [in]effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *See* U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14

Order Denying Motion for Reconsideration

On August 1, 2023, the PCR Court signed an Order denying Petitioner's motion to alter or amend judgment. (App. 961 – 963). Specifically, the PCR Court ruled, "[Petitioner] urges this Court to apply the doctrine of equitable tolling and find that his application is not time barred based upon his pursuit of a Writ of Habeas Corpus in U.S. District Court. [Petitioner's] motion is denied. *See Green v. State*, 353 S.C. 29, 576 S.E.2d 182 (2003) (Statute of limitation for filing application held not to be tolled by applicant's action seeking federal habeas corpus relief)."

Petitioner now seeks a writ of certiorari for this Court to review the denial of his PCR action.

STANDARD OF REVIEW

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *See Hill v. Lockhart*, 474 U.S. 52 (1985) (applying the *Strickland v. Washington*, 466 U.S. 668 (1984) standard to guilty plea challenges of ineffective assistance of counsel and finding ineffective assistance of counsel from a guilty plea where: (1) counsel's advice was not within the range of competence demanded of attorneys in criminal cases; and (2) "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial")); *see also Missouri v. Frye*, 566 U.S. ____, 132 S.Ct. 1399 (2012) (finding the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected, and reaffirming *Hill v. Lockhart*); *see generally Jamison v. State*, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014) (finding "we must reject the State's claim that the waiver of trial and admission of guilt encompassed in a guilty plea necessarily preclude post-conviction relief in *all* cases", and holding "a PCR Petitioner may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.") (emphasis in original).

To establish ineffective assistance of counsel, a Petitioner must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims). "First, a [Petitioner] must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). "The second prong of the *Strickland* test requires a

showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, a Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result" when seeking relief based on ineffective assistance of counsel. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

In a PCR action, "[t]he burden of proof is on the Petitioner to prove his allegations by a preponderance of the evidence." *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Strategic "[d]ecisions made [by counsel] in ignorance of relevant, available information cannot be characterized as strategic." *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014). "Ordinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Smalls v. State*, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018). Notably, "for the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability . . . the factfinder would have had a reasonable doubt' cannot possibly be met." *Id.* 422 S.C. at 191, 810 S.E.2d at 845.

As to appellate review, "this Court will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them." *Thompson v. State*, 423 S.C. 235, 239, 814 S.E.2d 487, 489 (2018), reh'g denied, (June 12, 2018). This Court also reviews questions of law de novo and will reverse if the PCR court's decision is controlled by an error of law. *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018), reh'g denied, (March 29, 2018).

ARGUMENT

1. **THE PCR COURT ERRED IN FAILING TO APPLY THE EQUITABLE TOLLING DOCTRINE IN THE INTEREST OF JUSTICE TO THE ONE-YEAR STATUTE OF LIMITATIONS FOR FILING A PCR APPLICATION UNDER SECTION 17-27-45(C) OF THE SOUTH CAROLINA CODE OF LAWS WHEN THE PCR COURT FOUND TRIAL COUNSEL AND INITIAL PCR COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL, AND HAS INVITED A REVERSAL ON APPEAL, WHERE PETITIONER'S FORMER COUNSEL FILED A PETITION FOR WRIT OF HABEAS CORPUS IN THE UNITED STATES DISTRICT COURT INSTEAD OF ALSO FILING AN APPLICATION REQUESTING POST-CONVICTION RELIEF IN STATE COURT AFTER DISCOVERING THE EXISTENCE OF AN EXCULPATORY WITNESS STATEMENT IMPLICATING ANOTHER PERSON AS THE SHOOTER AND OTHER COMPELLING MATERIAL EVIDENCE NOT PREVIOUSLY PRESENTED AND HEARD THAT REQUIRES VACATION OF THE CONVICTION AND SENTENCE.**

Section 17-27-45(C) of the South Carolina Code of Laws provides, "If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of 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 § 17-27-45(C).

In *Pelzer v. State*, 378 S.C. 516, 521, 662 S.E.2d 618, 620-621 (Ct. App. 2008), the Court of Appeals addressed the doctrine of equitable tolling:

> Equitable tolling is a doctrine rarely applied in South Carolina to stop the running of statutes of limitations. Equitable tolling is reserved for extraordinary circumstances.
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> . . .
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> 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.**

Id. (emphasis added) (internal quotation marks and citations omitted).

Additionally, 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).

Discussion

In this case, the PCR Court erred in failing to apply the equitable tolling doctrine in the interest of justice to the one-year statute of limitations for filing a PCR application under Section 17-27-45(C) of the South Carolina Code of Laws when the PCR Court found trial counsel and initial PCR counsel provided ineffective assistance of counsel, and has invited a reversal on appeal. Petitioner's former counsel filed a Petition for Writ of Habeas Corpus in the United States District Court and did not simultaneously file an application requesting post-conviction relief in state court based on discovering the existence of an exculpatory witness statement by Dante Hubbart (implicating another person as the shooter) and an affidavit from the State's key witness, Minor V.M., recanting her trial testimony. (App. 933 – 938).

Specifically, this unique and compelling situation is akin to the PCR 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 his federal habeas attorney who did not simultaneously file a successive PCR action in state court. The PCR Court

even held that "[t]his Court is of the opinion that the interests of justice suggest that Applicant should receive a new trial" but erroneously believed he did not have the authority to toll the statute of limitations. (App. 953). *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).

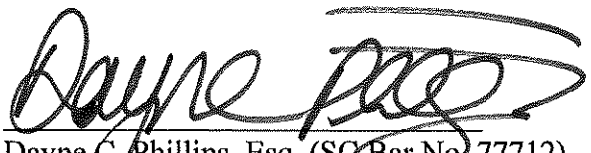
Notably, the rare and exceptional circumstances presented here are distinguishable from the facts in *Green v. State*, 353 S.C. 29, 576 S.E.2d 182 (2003). In *Green*, this Court held that Section 17-27-45(a) does not provide any exception for tolling the statute of limitations where an applicant seeks federal habeas relief ***prior*** to exhausting his state remedies. *Id.* Unlike the facts in this case, the applicant in *Green* pled guilty and knowingly waited to file his PCR application "because he had been pursuing a federal habeas corpus relief prior to filing his application." Therefore, the denial of Petitioner's PCR action based on the statute of limitations is fundamentally unfair because equitable tolling is justified under these exceptional 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.").

The PCR Court properly held that "[Petitioner] has shown a sufficient reason why the current grounds for relief were not raised", and that "[Petitioner] was not afforded effective assistance of counsel at the trial level or during his initial post-conviction relief application." (App. 951). Therefore, Petitioner respectfully requests that this Court accept the PCR Court's invitation to reverse the denial of this application to ensure Petitioner receives a fair trial with effective assistance of counsel. (App. 954).

CONCLUSION

Based on the foregoing reasons, Petitioner Trevee Gethers respectfully requests this Court grant the Petition for Writ of Certiorari. *See* U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6).

Respectfully submitted,



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March 18, 2024