

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

**RECEIVED**  
**JUN 24 2024**  
**S.C. SUPREME COURT**

Case No. 2015-CP-23-05294

Allen Lee Hawkins #290682.....Petitioner,

v.

State of South Carolina.....Respondent,

RULE 203(d)(1)(B)(v) and RULE 243 (c)

WRITTEN EXPLANATION OF BASIS OF APPEAL

Petitioner appeals the Honorable R. Scott Sprouse’s Order of Dismissal dismissing petitioner’s application for post-conviction relief (PCR), and Judge Sprouse’s Order denying petitioner’s Motion for Reconsideration and Motion for Amendment of the Findings, and provides the following explanation of the basis for appeal:

The PCR court erred in finding that the evidence presented at the Petitioner’s second PCR hearing was not after discovered evidence of material facts not previously presented and heard that requires vacation of the sentence filed within one (1) year of the date of actually discovery of the facts by applicant or the date when the facts could have been ascertained by the applicant by the exercise of reasonable due diligence. S.C. Code Ann Sec. 17-25-45(c)

The PCR court erred in finding that this was a procedurally barred successive petition.

The PCR judge incorrectly applied the facts to applicable law in finding 1) that this was not after discovered evidence under S.C. Code Ann Sec. 17-25-45(c), 2) that this was a procedurally barred successive petition, 3) failing to rule on all the grounds presented by Petitioner, 4) dismissing Petitioner’s Rule 59(e), SCRCPP and Rule 52(a)(b) SCRCPP motions, and 5) incorrectly finding that the impeachment witness’ (Ms. Hopper) testimony would have been

inadmissible hearsay. The appeal should be allowed to go forward challenging the court's erroneous ruling.

S.C. Code Ann Sec. 17-25-45(c) allows for filing of subsequent post-conviction relief applications within one year of the Applicant's discovery of the information. S.C. Code Ann Sec. 17-27-90 allows for subsequent applications should the court find grounds for relief "for which sufficient reason was not asserted or was inadequately raised in the original application...". The SC Supreme Court does recognize some right to successive PCR applications and actions against post-conviction relief attorneys. See *Tilly v. State*, 334 SC 24, 511 SE2nd 689 (SC 1999), *Robertson v. State*, 418 SC 505, 795 SE2d 29 (SC 2016). Finally, S.C. Code Ann. Sec 17-27-20(c) allows for Applicant to institute a PCR action whenever "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice".

### **General Procedural History**

On January 17, 2008 Applicant was tried and convicted in the Greenville County Court of General Sessions of Murder and Armed Robbery (2006-GS-23-3511) and Possession of a Weapon During a Violent Crime (2016-GS-23-3512). He was sentenced to 30 years in prison on the murder charge, 10 years on the armed robbery, and 5 years on the POWDVC charge, all to run concurrently. Applicant was represented by Mills Ariail at his trial.

Applicant filed a direct appeal from his convictions and the remittitur was issued on April 22, 2010. Applicant's first post-conviction relief action, filed on May 10, 2011, was dismissed with prejudice on April 22, 2011. Hal Roach represented Applicant at this 2011 PCR. Applicant did file an action in federal court challenging his convictions. The Applicant's writ for habeas corpus was denied on February 10, 2016. Applicant filed this subsequent post-conviction relief petition on August 26, 2015.

The State filed a Return and Motion to Dismiss on or around October 14, 2016. The Honorable Perry H. Gravely issued a Conditional Order of Dismissal on November 28, 2016. Applicant responded to the Conditional Order of Dismissal on or around December 28, 2016. A hearing on Respondent's Motion to Dismiss was heard by The Honorable Letitia H. Verdin on August 27, 2019. Judge Verdin vacated the order of dismissal in her October 19, 2020, Order Denying The State's Motion to Dismiss, finding that this Applicant's petition was not procedurally barred and Petitioner was entitled to a PCR merits hearing.

An evidentiary hearing was held on January 16, 2024, at the Greenville County Courthouse. On May 02, 2024, the court signed an order dismissing Petitioner's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on May 02, 2024. Petitioner filed a Motion for Reconsideration and Motion for Amendment of the Findings on May 10, 2024. Judge Sprouse issued an order denying the relief

sought in Petitioner's Petitioner Motion for Reconsideration and Motion for Amendment of the Findings on May 20, 2024.

### Allegations

Applicant raised the following PCR issues:

1. That trial counsel rendered ineffective assistance of counsel.
2. That there existed evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.
3. That counsel was ineffective for 1) failing to call critical witnesses, 2) failing to inform defendant of the findings of AIS Investigative Services and of material witnesses that were found during such investigations, 3) failing to call material witnesses to testify during trial, and 4) failing to call impeachment witnesses. (Application for Post-Conviction Relief, filed August 26, 2015).
4. That Applicant was denied due process and effective assistance of both trial counsel and PCR counsel.
5. That Applicant alleged that he has newly discovered evidence in his case. Specifically, applicant discovered important and potentially exculpatory witnesses including Barbara Hopper and Connie Atwood after his original PCR was completed. Applicant alleged he could not have raised these issues or presented this information at prior hearings, as he was not aware of the information at the time of his trial or the initial PCR hearing.
6. Applicant further alleged that both trial counsel and PCR counsel had possession of this information, failed to disclose this information to Applicant during either his trial or his first post-conviction relief action, and failed to utilize this information in his defense, particularly as the testimony related to the defenses of self-defense and the lesser included charge of voluntary manslaughter.
7. Applicant was entitled to a lesser included charge from the court of manslaughter when evidence was presented of this lesser included offense. Trial counsel failed to raise this issue, and PCR counsel failed to raise the issue.

Applicant raised the following issues in his Motion for Reconsideration and Motion for Amendment of the Findings:

1. That Applicant alleged and argued, that evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice existed in this case, and requested relief on those ground. That these grounds were not ruled upon in the Dismissal Order, and requested a ruling from the court on this issue.
2. Applicant requested a reconsideration of the court's ruling that "... this Court finds Ms. Hopper's testimony to be improper hearsay that exceeded the limitations set forth in Rule 801(d) SCRE and does not satisfy a hearsay exception under Rule 803, SCRE", and alleged that Ms. Hopper's testimony was not hearsay.

3. Applicant alleged that failure to introduce Ms. Hopper's testimony was ineffective assistance of counsel, that Applicant had established that counsel's performance was unreasonable under prevailing professional norms, and that counsel's deficient performance prejudiced his defense, and requested the court reconsider its ruling.
4. That the AIS reports are newly discovered evidence that met Applicant's burden under Strickland, and the failure to call these impeachment witnesses establishes deficiency and prejudice under Strickland, and requested the court reconsider its ruling on this issue.
5. That Applicant has met the filing requirements by stating this ground for relief within one year after the date of actual discovery of the facts by the applicant. Under these grounds, the failure to call these impeachment witnesses establishes deficiency and prejudice under Strickland, and requires vacation of the conviction or sentence in the interest of justice. Applicant asked the court to reconsider its ruling on these issues.

### **Summary of Facts**

#### *Trial Testimony*

At the trial the witnesses testified that Applicant and the victim, David Gilbert ("Gilbert"), were friends. (Trial Tr. 345-348, Tr. 362-363). Their friendship included selling and buying pills from each other - Methadone, Oxycontin, and Xanax. (Trial Tr. 363-364). A few months before the incident that led to Gilbert's death, Gilbert told Applicant that he had been robbed a few times, showed him a gun that he kept under his pillow, and told Applicant he was not afraid to kill somebody and had nothing to lose. (Trial Tr. 363-365, 366).

Applicant testified that he began carrying a gun when he went to Gilbert's house out of fear that someone would attack or rob him at Gilbert's home. (Trial Tr. 365).

On November 21, 2005, Ross Walton ("Walton") called Applicant and asked if he knew anyone that wanted to buy Methadone pills from him. (Trial Tr. 367). Applicant testified that he said he knew David, and that he would see if he wanted to buy them. (Trial Tr. 367). Gilbert told Applicant to come over the next morning with the pills. (Trial Tr. 367).

On November 22, 2005, Applicant testified that he went to Gilbert's house with Walton with the intent to sell him pills. (Trial Tr. 367). That Walton remained in the passenger seat of the car, and Applicant went into Gilbert's home alone. (Trial Tr. 371, 121).

When Applicant arrived at Gilbert's house, another man, Shawn Banks, was there. (Trial Tr. 371, 121). Applicant gave the pills to Gilbert to examine, and Gilbert pulled out a magnifying glass and commented that they weren't the right milligrams. (Trial Tr. 373).

According to the testimony of both Shawn Banks ("Banks") and Applicant, Mr. Banks was the only other witness to the events that occurred between Applicant and Gilbert. (Trial Tr. 121, 127).

This is where the trial testimony of Banks and Applicant begin to diverge.

Applicant testified that Applicant and Gilbert then got into an argument, and Gilbert reached under his pillow with his left hand. (Trial Tr. 373) That Applicant grabbed Gilbert and threw him across the table, told Gilbert not to move, that Applicant was leaving. (Trial Tr. 373-374)). When questioned about why he threw Gilbert, Applicant explained that he knew Gilbert had a gun under the pillow. (Trial Tr. 374). Applicant testified that Gilbert said “Yeah, I'm going to move”. That Gilbert then jumped across the bed, pulled a gun on Applicant, and Applicant fired a weapon at Gilbert as he swung the gun around toward Applicant. (Trial Tr. 374-375).

Banks testified that there was no argument between Applicant and Gilbert. (Trial Tr. 128). Banks testified that the first thing he heard was Gilbert crashing into the table. (Trial Tr. 128). That immediately after the crash sound Banks turned around and saw Applicant pointing a gun at Gilbert. (Trial Tr. 129) That Gilbert following Applicant's commands to “get on the bed”, and that Applicant then shot Gilbert. (Trial Tr. 131). Banks testified that he never saw Gilbert with a gun. (Trial Tr. 134). Banks also testified that Gilbert did not have a gun when he was knocked on the table, getting off the table, or when he was on the bed. (Trial Tr. 134).

Gilbert died from the gunshot wound.

The judge charged the jury on self-defense in this case. The jury came back with questions, including regarding self-defense, over six (6) times.

#### 2024 PCR Hearing Testimony

At the 2024 PCR merits hearing, Applicant's witness, Ms. Hopper, testified that she and her husband, Jim Hopper, resided at 18 Fourth Street at the time of the incident, across the street from Gilbert, who lived at 17 Fourth Street, at the time of the incident. Ms. Hopper's father, Ralph Turner, owned the home Gilbert was renting. Ms. Hopper admitted that she knew Gilbert as a tenant and neighbor. The Hopper's were not home at the time of the incident, however, Ms. Hopper testified that a young man named Shawn Banks (“Banks”) came by their home after the shooting and spoke to them about the incident. The Hopper's knew Banks. They had seen him at Gilbert's house, and spoken to him before. During this conversation Banks told the Hoppers that he was in the room when the shooting occurred. That a man came to Gilbert's home, and that the conversation between the two men turned into an argument. Ms. Hopper further testified that Banks told the Hopper's that Gilbert had a gun, and that Applicant only shot Gilbert as Gilbert reached for his gun.

Trial attorney, Mills Ariail, testified that he could not locate a copy of his file. He further testified that he remembered being worried about hearsay issues regarding Jim and Barbara Hopper's testimonies, and decided their testimony was unnecessary and probably inadmissible.

PCR counsel, Hal Roach, testified that he was unaware the AIS reports prior to Applicant's hearing, as he did not still have Applicant's original file. He testified he would have

mailed Applicant a copy of his file at the conclusion of the hearing for Applicant's records. Counsel testified if he had had the AIS he would have added the issue to Petitioner's PCR claims as the AIS reports offered evidence of an impeachment witness to a material facts in the case.

### **Court Findings**

The PCR court found that, 1) Applicant is procedurally barred from relief under S.C. Code § 17-27-90, and 2) that even if he had properly raised his claims, he failed to carry his burden of proof for the following reasons:

In the court's Order of Dismissal, the PCR court found that:

1. Applicant did not raise claims that were newly-discovered evidence under the statute, and the claims could have been discovered through the exercise of due diligence prior to the first PCR hearing.
2. Applicant's witness, Ms. Hopper's, testimony was improper hearsay that exceeded the limitations set forth in Rule 801(d) SCRE and did not satisfy a hearsay exception under Rule 803, SCRE.
3. That trial counsel testified credibly when he stated that he chose not to use the Hoppers as witnesses due to potential hearsay issues and did not feel their testimony presented any evidence that had not already been asserted at trial.
4. Applicant failed to establish deficiency under the first prong of *Strickland*, and even if he had, he has not established prejudice

In the court's Order denying petitioner's Motion for Reconsideration and Motion for Amendment of the Findings the PCR court found no material fact or principle of law that either has been overlooked or disregarded and no error of law or fact not appropriately considered.

### **Conclusion**

The PCR court erred in finding that this was a procedurally barred successive petition.

The PCR court erred in finding that the evidence presented at the Petitioner's second PCR hearing was not after discovered evidence of material facts not previously presented and heard that requires vacation of the sentence filed within one (1) year of the date of actual discovery of the facts by Petitioner or the date when the facts could have been ascertained by the Petitioner by the exercise of reasonable due diligence. S.C. Code Ann Sec. 17-25-45(c)

The court erred in failing to rule on Petitioner's allegation that there existed evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.

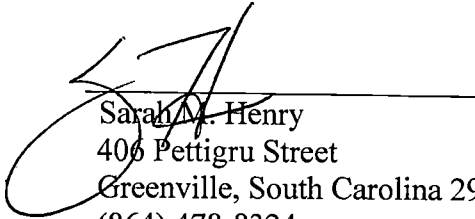
The court erred in denying Petitioner's Rule 59(e), SCRCP and Rule 52(a)(b) SCRCP motions.

The PCR court incorrectly ruled that Ms. Hopper's testimony would have been improper hearsay, and that trial counsel's testimony regarding this issue was credible.

The PCR judge incorrectly applied the facts to applicable law in finding 1) that this was not after discovered evidence under S.C. Code Ann Sec. 17-25-45(c), 2) that this was a procedurally barred successive petition, 3) failing to rule on all the grounds presented by Petitioner, 4) dismissing Petitioner's Rule 59(e), SCRPC and Rule 52(a)(b) SCRPC motions, and 5) incorrectly finding that the impeachment witness' (Ms. Hopper) testimony would have been inadmissible hearsay.

The appeal should be allowed to go forward challenging the court's erroneous ruling.

June 19, 2024



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