IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honarable Roger M. Young, Presiding Judge

Appellate Case No. 2024-000601

Terrell McCoy, 256070 .... Petitioner

V.

STATE OF SOUTH CAROLINA .... Respondent

AMENDED
PETITION FOR WRIT OF CERTIORARI

Terrell McCoy 256070
BRCI MOB# 270
4460 Broad river Rd
Columbia SC 29210

Attorney General
Assistant Attorney General
P.O. Box 11549
Columbia SC 29202

TABLE OF CONTENTS

5) Did the Circuit Judge abuse its discretion in ruling Petitioner's Rule 60 (b)(5) was not brought in a reasonable time?

6) Did the Circuit Judge make an error of law and facts under Rule 60 (b)(1) "Mistake" pursuant to Kemp V. United states, 596 U.S. 528, 142 S.Ct. 1856, 213 h.Ed.2d 90 (2022)

Relevant Facts.

Discussion

Conclusion

• Certificate of Petitioner ...

TABLE OF AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

DID THE CIRCUIT JUDGE ABUSED ITS DISCRETION IN RULING PETITIONER'S RULE 60 (B), SCRCP MOTION WAS UNTIMELY?

DID THE CIRCUIT JUDGE ABUSED ITS DISCRETION RULING PETITIONERS RULE 60 (B) IS BARRED BY RES JUDICATA?

DID THE CIRCUIT JUDGE ABUSED ITS DISCRETION RULING PETITIONER HAS NOT MADE PRIMA FACIE SHOWING THE PCR JUDGE'S ORDER IS VOID, WHERE THE PCR COURT DEPRIVED PETITIONER OF HIS PROCEDURAL DUE PROCESS TO AN EVIDENTIARY HEARING ON THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM WHERE TRIAL COUNSEL FAILED TO SUBPEONA FAVORABLE WITNESS AND OBTAIN EVIDENCE, AND DEPRIVED PETITIONER A HEARING REGARDING PROSECUTORIAL MISCONDUCT?

DID THE CIRCUIT JUDGE ABUSED ITS DISCRETION RULING PETITIONER DID NOT MAKE A PRIMA FACIE SHOWING OF NEWLY DISCOVERED EVIDENCE WHERE TRIAL COUNSEL WAS INEFFECTIVE FOR FAILURE TO SUBPEONA WITNESSES?

DID THE CIRCUIT JUDGE ABUSED ITS DISCRETION IN RULING PETITIONER'S RULE 60 (B) (5) WAS NOT BROUGHT IN A REASONABLE TIME?

DID THE CIRCUIT JUDGE ABUSE ITS DISCRETION DENYING PETITIONER'S RULE 60 (B) (1) MOTION PURSUANT TO KEMP V. UNITED STATES 596 U.S. 528 142 S.Ct. 1856, 213 L.Ed. 2d 90 (2022)

STATEMENT OF CASE

On March 27, 2006, Petitioner was arrested for the murder of Antwan Bryant which occurred at 5061 Delta Street, North Charleston, South Carolina. During the arrainment Petitioner asserted not guilty.

On March 30, 2006, the State of South Carolina appointed public defender Norelle Proctor to represent Petitioner. On March 30, 2006, Ms. Proctor filed a Rule 5 and 6 SCRCRIMP Motion pursuant to Brady v. Maryland, 373 U.S. 83 (1963). (App. I page 22) Proof of service on the Solicitor office April 10, 2006.

On July 15, 2008, the case was called to trial. The State was represented by the Ninth Circuit Solicitor Burns Wetmore, and Peter McCoy. On July 17, 2008, the presiding Judge Deadre Jefferson declared a mistrial.

Public Defender Norelle Proctor did not file a notice of appeal; nor did Ms. Proctor order the full first trial transcript. On December, of 2008, Ms. Proctor filed a motion to be relieved as counsel. on January 22, 2009, a waiver hearing was held, Judge Markley Dennis Jr. presided. (App. I page 23)

During the waiver hearing, Judge Dennis granted Ms. Proctor's motion, but ordered Ms. Proctor's last administrative act to Subpoena Petitioner's favorable witnesses. (App. I page 24 line 11-18)

The State did not appeal.

On February 2, 2009, the second trial was held. Judge Roger Young presided, and Norelle Proctor as stand by counsel. On February 6, 2009, the Jury found Petitioner guilty of murder. He was sentence to fifty (50) years imprisonment. Ultimately his sentence was reduce to forty years imprisonment. Petitioner did not signed neither sentence sheet. (App. I page 25)

A timely notice of appeal was filed on March 19, 2009. (App. I pages 26-28). The State appointed Robert M. Dudek to perfect the direct appeal. On October 26, 2011, the South Carolina Court of Appeals affirmed the conviction and sentence. (App. I pages 29-30)

Mr. Dudek filed a petition for rehearing on November 2011. (App I. pages 31) On March 16, 2012, Mr. Dudek filed a Petition for Writ of Certiorari to the Court of Appeals. (App. I pages 32-48)

On March 08, 2013, The Court of Appeals affirmed. (App. I page 49) On April 4, 2013, Petitioner filed an application for post Conviction Relief. (App. I page 50-67) The State filed an Return.

On September 9, 2015, a Summary Judgment hearing was held. The Honorable Harry B. Hyman presided. The state argued Petitioner could not raise ineffective assistance of trial counsel claims during Post Conviction Relief. Judge Hyman continued the hearing until the December term, and ordered PCR Counsel to file an Amended PCR application. (App. I pages 68-87 line 12-25)

On December 4, 2015 PCR Counsel Rodney Davis filed an amended PCR application as directed by the Court. (App. I pages 89-90)

On December 14, 2015, the PCR hearing was held. Judge Deadre Jefferson presided.

PCR Counsel called Lorelle Proctor as a witness, and the state objected. (App. I pages 94 line 6-24; pages 135 line 13-25)

On May 5, 2016, the PCR Judge issued an order of dismissal. (App. I pages 175-186) On May 12, 2006, the Order of dismissal was served upon Applicant's attorney Melissa W. Gay, Esquire. (App. I pages 187)

On May 27, 2016, after receipt of the PCR Judges order, PCR counsel Melissa Gay filed an timely Rule 59 (e) SCRCP motion. (App. I page 188-192). On February 8, 2017, the state filed a return to Petitioners Rule 59 (e), SCRCP motion. On February 10, 2017, the PCR Judge issued an order denying Petitioner's Rule 59 (e) SCRCP motion. On March 8, 2017, Petitioner through Counsel filed a timely notice of appeal.

On November 20, 2017, Counsel filed a Petition for Writ of Certiorari. (App. I. pages 193-212) On February 1, 2019, The South Carolina Supreme Court vacated the PCR Judge's order of dismissal. (App. I pages 213-215)

On June 14, 2019, the PCR Judge issued an Amended Order of Dismissal. (App. I page 216-236) On July 19, 2019, after receipt of Amended order of dismissal, Petitioner, through Counsel Clarissa Joyner, filed a notice of appeal. (App. I page 237)

On February 5, 2020, Petitioner through Counsel filed a petition for Writ of Certiorari. (App. I pages 238-263) On July 21, 2020, Petitioner through Counsel filed an Reply to Return to Petition for Writ of Certiorari. (App. I. page 264-276)

On May 18, 2022, The South Carolina Court of Appeals denied Petition for Writ of Certiorari. (App. I page 277)

On June 7, 2022, Petitioner filed his first Rule 60 (B) (3), SCRCP motions. (App. I pages 278-279) and additional Rule 60 (B) (3) SCRCP motions. (App. I pages 280-317)

The Respondent filed a response.

On August 3, 2023, The attorney general served a copy of the order denying Applicant's Rule 60 (B) motions. (App. I pages 318-336)

On August 28, 2023, Petitioner filed timely notice of appeal. (App. I page 337) On September 21, 2023 Petitioner filed a Rule 240 SCACR motion for leave to return back to lower court pending Rule 59 (e), SCRCP motion decision. (App. I page 338-346)

On October 24, 2023, the South Carolina Supreme Court granted Petitioners motion for leave. (App. I page 347-348)

On March 19, 2024, the Circuit Judge Roger Young denied Petitioner's Rule 59 (e) motions, (App. I page 349-350) to reconsider the denial of Rule 60 (B) motion. (App. I page 351-360).

Petitioner filed this timely notice of Appeal.

STATEMENT OF FACTS

On December 14, 2015, During the PCR hearing, PCR Counsel Rodney Davis Called Lorelle Proctor as a witness and the State objected. During the hearing, Petitioner was not allowed to examine Mrs. Proctor, nor mention; nor offer any evidence pertaining to the ineffective assistance of Counsel. (App. I pages 94 line 6-25; page 135 line 13-25)

The PCR Judge unreasonably determined that Petitioner did not call Lorelle Proctor as a witness eliminating the Court from determining what advice, if any, Lorelle Proctor gave Petitioner to waive his right to Counsel.[1] (App. I pages 225)

PCR Judge found Lorelle Proctor's performance effective under Strickland V. Washington, 466 U.S. 668 (1994) without an hearing. See Rule 52 (a) SCRCP, Rule 71.1 (e). § 17-27-80. Watson V. State, 370 S.C. 68, 634 S.E. 2d 642 (2006); Bannister V. State 333 S.C. 298, 302, 509 S.E. 2d 807, 809 (1998); Cherry V. State, 300 S.C. 115, 119, 386 S.E. 2d 624, 626 (1989) This violated Petitioner's fourteenth, and Sixth Amendment U.S. Constitutional right and S.C. Constitution Article I section 3 and 14.

Petitioner did appeal this decision, and the Court of appeals, gave deference to the State Court ruling without thoroughly recognizing Petitioner's burden of proof under Rule 71.1 (e). Therefore an defect in the integrity of the PCR proceeding exist.

During the time period of March 8, 2017 through May 18, 2022, Petitioner's PCR application was pending on appeal. On June 7, 2022, Petitioner filed his first Rule 60 (B) (3), SCRCP motion, and additional motions. (App. I page 278-317)

ARGUMENT

I. Did the Circuit Judge abused its discretion in ruling Petitioner's Rule 60(b), SCRCP motion was untimely?

Rule 60(B), SCRCP provides: Mistake; Inadvertence; Excusable Neglect; Newly discovered evidence; Fraud; etc. On motion and upon such terms as are Just, the court may relieve a party or legal representative from a final Judgment order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, a excusable neglect (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud, misrepresentation

1. There were three ineffective assistance of trial Counsel claims raised in the Amended PCR application. (See App. I. pages 89-90)

or other misconduct of an adverse party (4) the Judgment is void (5) the Judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. The motion shall be made within a reasonable time, as for reason (1) (2) and (3) taken. A motion under this subdivision (b) does not affect the finality of a Judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a Judgment order, or proceeding, or to set aside a Judgment for fraud upon the Court. During the pendency of an appeal, leave to make the motion must be obtained from appellate Court.

Here, the circuit court abused its discretion by incorrectly calculating the time limit Petitioner had to file his Rule 60 (B) (1)(2)(3)(4)(5), SCRCP motions. See: Otten v. Otten, 287 S.C. 166, 337 S.E.2d 207 (1985); Coleman v. Dunlap, 306 S.C. 491, 49, 413 S.E.2d 15, 99 (1992); Evans v. Gurter, 294 S.C. 525, 529, 366 S.E. 2d 44, 46 Ct. App. 1988) (As to whether, the circuit court erred in finding that the Rule 60(B), SCRCP. Requiring a motion for relief from a Judgment be made within a reasonable time) Gonzalez v. Crosby 545 U.S. 524, 125 S.Ct 2641, 162 L.Ed. 2d 480 (2005)

From March 8 2017 through May 18, 2022, Petitioner's PCR application was pending on direct appeal. See Bradley v. Hallander, 266 S.C. 188, 222 S.E.2d 283 (1976) (Service of notice of intent to appeal divest the lower courts of Jurisdiction over the appeal. Rule 18, Section 3A Rules of practice in the Supreme Court of South Carolina. Andrick Development Corp v. Macaro 280 S.C. 103, 311 S.E. 2d 95 (Ct. App. 1984)

See: State v. Cooper, 342 S.C. 389, 536 S.E. 2d 870 (2000); Wicker v. Anderson County, 347 S.E. 2d 96 (S.C. 1986) Otten v. Otten 287 S.C. 166 237 S.E.2d 209, 203 (a) (1) SCACR, Rule 241 (a) SCACR. (A general rule, the service of a notice of appeal in a civil matters act to automatically stay the relief ordered in the appealed order, Judgment or decree or decision. This automatic stay continues in effect for the duration of appeal unless lifted by Order of the lower Court, the administrative tribunal, appellate Court, or Judge, or Justice of the appellate Court. The lower court or administrative tribunal retain Jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal. See: Kearney v. Alley, 287 S.C. 324, 388 S.E.2d 335 (1985)

This Court has held in Kearney v. Alley, "when a dispute as to whether an automatic stay exist under our Rule, authority to resolve such dispute is invested in the Supreme Court. See: Holland v. Florida, 560 U.S. 631, 649 (2010) under clearly established law in the State of South Carolina and the United States, Petitioner's Rule 60 (B) motion is timely.

II Did the Circuit Judge abuse its discretion ruling Petitioner's Rule 60, SCRCP motion is barred by Res Judicata?

Pursuant to Plum Creek Dev. Co v. City of Conway, 334 S.C. 30, 34 512 S.E.2d 106, 109 (1999) If res judicata applies, a litigant is barred from raising any issues were or might have been adjud-

icated in the former suit. Id.

See: Also Raby Constru., L.L.P. v. Orr, 388 S.C. 10, 21 n. 5, 594 S.E.2d 478, 483 n. 5 (2004) (The doctrine of res judicata, however, does not bar collateral attack of a judgment based on extrinsic fraud) Aaron, 381 S.C. at 592-93, 674 S.E. 2d at 486)

The claims that the Solicitor Burns Wetmore committed misrepresentations; and adverse misconduct were not previously raised in PCR. The claims Peter McCoy suborn perjury through Angela Bunker and Cerenda Snowden were not raised in PCR. The claim public defender Iorelle Proctor committed misrepresentation all during the Criminal proceeding were not raised in PCR, and constitutes extrinsic fraud. Petitioner sought to raise similar claims of ineffective assistance of trial Counsel and prosecutor misconduct, and the State objected.

The PCR Judge sustain the objection. (App. I page 94 line 6-24; page 126 line 14-25; page 127 line 1-25; page 128 line 1-12; page 135 line 13-25) Therefore a defect in the integrity of the PCR proceeding exist. See Chewning v. Ford Motor, 354 S.C. 72, 579 S.E. 2d 605 (2003); Standard v. Oil Co. V. United States, 429 U.S. 17, 99 S.Ct. 31, 50 L.Ed. 2d 21 (1976); Plaut V. Spend Thrift Farm Inc, 514 U.S. 211, 233-34, 115 S.Ct. 1447, 131 L.Ed. 2d 328 (1995) Bowman v. Bowman, 357 S.C 146, 152, 591 S.E.2d 654, 657 (Ct. App. 2004) ("South Carolina strong policy towards Finality of judgment trumps a partys ability to set aside a judgment") ("Relief is granted for extrinsic fraud but not instrinsic fraud on the theory that the latter deception should be discovered during the litigation itself, and to permit such relief undermines the stability of all judgment)

In Chewning, the Court held, the subornation of perjury by an attorney and of the concealment of documents by an attorney are actions which constitute extrinsic fraud.

During the Criminal trial proceeding, Solicitor Burns wetmore misrepresentation that all evidence were disclosed to the defense and no evidence were suppress are shown here. (App. I pages 361-387)

Mr. Wetmore is an officer of the Court. See Chewning V. Ford Motor, Id During the trial proceeding, Mr. Wetmore stated he had not subpoena material evidence from his clients, North Charleston Police Department, despite the facts of receiving specific request from public Defender Iorelle Proctor. (App. I page 383 line 6-25)

The conceal evidence was the March 25, 2006 911 tape recording and the identity of the 911 caller. (App. I page 387, and pages 382 line 20-25, page 384 line 13-17)

The Conceal evidence was material to the defense, because the evidence contradict the testimony given by Cerenda Snowden. In this case, Cerenda Snowden's testimony is unreliable pursuant to Franks V. Delaware 438 U.S. 154 (1978) Navarette V. California 572 U.S. 393 2014) where Ms. Williams gave false statements to police.

Ms. Proctor's misrepresentation can be shown here. MS. Proctor lied to the Judge that she did not subpoena Jenie Fowler, the 911 dispatcher, and that she subpoenaed the Wrong Person, and there were two Jenie Fowler that work at North Charleston police Department. (App. I page 381 line 2-25; 382 line 1-9)

This perjury deprived Petitioner from calling reliable witness, 911 dispatcher, as guaranteed by the Sixth Amendment to the United States Constitution to Compulsory process and confronting witness against him.

After Petitioner was convicted, he exercised due diligence under the Freedom of Information Act, and discovered there were only one person name Jenie Fowler employed at the North Charleston Police Department in 2009 during the time of his Criminal trial proceeding. (App. I page 386) The letter of Beth Woodall was filed attached to Petitioners amended PCR application.

During the September 9, 2015 Summary Judgment hearing held with the presiding Judge, The Honorable Larry B. Hyman, PCR Counsel Rodney Davis explained these facts to the Judge. (App. I page 68-88). At the conclusion of the hearing, Judge Hyman ordered PCR Counsel to amend the PCR application pursuant to Rule 15(a) SCRCP.

As shown above, PCR Counsel amended the PCR application. (App. I 89-90) On December 11, 2015, PCR Counsel obtained affidavit of Kristan D. Neely, legal department for the City of North Charleston. (App. I page 387) The affidavit was introduced during the PCR hearing along with the CAD Dispatchers report. (App. I pages 129 line 8-25, and pages 141 line 13-25. The affidavit of Kriston D. Neely states that the North Charleston police destroyed a March 25, 2006 911 tape recording on June 25, 2006.

Facts in the record shows the PCR Judge abused its discretion by not allowing PCR Counsel to call Noelle Proctor as a witness for direct examination to prove by preponderance of evidence that trial Counsel was ineffective for failure to obtain evidence and subpoena witnesses pursuant to Rule 7(b.1(e) SCRCP.

The identity of the 911 caller was material and reliable under Navarette v. California, Id. The Solicitor attempt to conceal evidence can be shown here, (App. I page 382 line 20-25 and page 384 line 2-17) where the concealment of the 911 caller identity was not Petitioner fault but rather the police.

In Chewning, Concealing assets through an unknown third party, not subject to discovery is extrinsic fraud, also the Subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute

extrinsic Fraud. See Kupferman V. Consol. Research & MfG. Corp 459 F.2d 1072 (2d Cir. 1972) Great Coastal Express, Inc, V. Int'l Brotherhood of Teamster, 675 F.2d 1349, 1357 (4th cir. 1982) Rozier V. Ford Motor Co.; 573 F.2d 1332 (5th cir. 1978); H.K. Porter Co. V. Goodyear Tire & Rubber, 536 F.2d 1115, 1119 (6th cir. 1976); Dixon V. Comm'n of Internal Revenue, 2003 WL 1216296 (9th cir. 2003) Synanon Found Inc V. Bernstein, 503 A.2d 1254 (D.C. 1986); Porcelli V. Joseph Schlitz Brewing Co., 78 F.R.D. 499 (E.D. Wis 1978)

This court has held, attorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice. Accordingly, where an attorney embarks on a scheme to either suborn perjury or intentionally conceal documents extrinsic fraud constituting a fraud upon the Court occurs. Hazel Atlas Glass Co. V. Hartford, 322 U.S. 238, 64 S.Ct. 997 88 L.Ed. 1250 (1944)

Under Rule 60 (b) SCACP, the rules clearly state: Upon such term as are just, the court may relieve a party or his legal representative from a final judgment; order, or proceeding for the following reason (3) fraud, misrepresentation, or other misconduct of an adverse party.

Also during the criminal trial proceeding, Peter MCCoy suborn perjury through officer Angela Bunker. Solicitor Peter MCCoy showed Angela Bunker states exhibit 18; 19; and 20, which were identified "as DNA located on the walls, bedroom door jamb, and curtain at 5061 Delta, Street, where the victim was shot and killed. (App. I page 367 line 22-25)

After describing the "DNA" and its location of the "DNA", Solicitor Peter MCCoy asked "were the "DNA" (Blood) related to the homicide in the living room, and Ms. Bunker testified "No". App. I pages 367; pages 368; and 369 line 1-17)

According to Ms. Bunker the DNA was not collected, so she committed perjury by testifying the DNA was not related to the homicide. (App. I pages 371; and 372)

The Solicitor concealed the "DNA", the "911 tape" and the "identity of the 911 Caller."

Resjudicata does not apply here, as all the above Const-

itute extrinsic fraud under Chewning v. Ford Motor, Id. Therefore Judgment should be set aside pursuant to Rule 60 (B)(3) where there Ps evidence of a defect in the integrity of the post Conviction Relief proceeding, and criminal trial proceeding.

See S.C. Code 17-27-20 Person who may institute proceeding; exclusives of remedy (A)(1) that the Conviction or the sentence was in violation of the Constitution of the United States or law of this State.

The PCR Judge abused its discretion by ruling Petitioner had not proved prosecutorial misconduct, when the PCR record shows the state objected to Burns wetmore testifying. The trial proceeding is evidence that fraud occurred. See. Evans v. Gunter, 294 S.C. 525, 366 S.E.2d 414 (1988) (The doctrine of res judicata and collateral estoppel do not bar collateral attack of a judgment on fraud) Arnold v. Arnold, 285 S.C. 296, 328 S.E.2d 924 (Ct. App. 1985)

Petitioner attempted to raise Constitutional violation claims during the Criminal trial proceeding and the trial Judge abused its discretion ruling that no evidence was destroyed. (App. I page 385 line 1-6)

(The decision to grant or deny a motion made pursuant to Rule 60 (B) is within the Sound discretion of the [PCR court]" Rouvet v. Rouvet, 388 S.C. 308, 696 S.E.2d 2004, 2009 (Ct. App. 2010) Mangal v. State, 421 S.C. 85, 92, 805 S.E.2d 568, 571 (2017) (on review of a pcr court resolution of procedural questions arising under .... the South Carolina Rules of Civil Procedure, we apply an abuse of discretion standard") ("an abuse of discretion occurs when the order of the [PLR] court is controlled by an error of law or where the order is based on factual findings that are without evidentiary support.") ; Id at 309, 696 S.E.2d at 208 (In determining whether to grant relief under Rule 60 (b) the court must consider the following facters

: (1) the promptness with relief sought ; (2) the reasons for failure to act promptly (3) the existence of a meritorious defense ; and (4) the prejudice to the other party. " (quoting Mictronic Inc v. S.C. Dept of Revenue 345 S.C. 506, 510-11, 548 S.E.2d 223 226 (Ct. App. 2001))) ;

Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018) (Explaining this court defers to the PCR court's credibility findings as to witnesses who testified before the PCR court")

Jackson v. State 342 S.C. 95, 97-98, 535 S.E.2d 926, 927 (2000) (Reversing the PCR court's denial of relief when counsel failed to properly advise the Petitioner about whether the crime was a misdemeanor or felony ; the petitioner testified he would not have pled guilty had he known the crime was a felony, and there was no evidence contradicting or conflicting with Petitioner's testimony that would support the PCR [Courts] finding that the Petitioner would not have pled "); Bell v. State 410 S.C. 436, 440-44 765 S.E.2d 4, 6-8 (Ct. App. 2014)

Here, during the PCR proceeding, there was no credibility finding as to witnesses who testified before the Court regarding ineffective assistance of trial counsel nor prosecutorial misconduct. See : December 14, 2015 PCR hearing transcript App. I pages : 91 through page 174.

Next, Petitioner acted with promptness with relief sought. During July 30, 2019 through May 18, 2022. Petitioner case was pending on Appeal ; and Rule 60 (b) is not a substitute for appeal. [redacted]

The 911 tape was never heard by the Jury. If the 911 tape recording had not been concealed, the Jury would had learned that someone other than Ms. Snowden dialed 911 and reported the crime happened totally different. According to clearly established federal law under Navarette v. California 572 U.S. 393 (2014), The 911 caller's testimony would have been reliable under the

the four factors of reliability. Jenie Fowler's testimony would have also supported the 911 Caller's reliability. Had the police collected the "DNA" on the walls; bedroom door; and curtain; Petitioner could have sent the evidence to South Carolina Law Enforcement Division for forensic analysis to determine whether the "DNA" was related to the homicide in the living room at 5061 Delta street [2]

This is evidence of the existence of a meritorious defense. The State will not be prejudice, as Petitioner has been deprived of his life, limb, and property without due process of law under the S.C. Constitution Article I section 3 and Article 1 & 14; and the Sixth and fourteenth Amendment of the United States Constitution.

The final judgment should be set aside.

III. Did the Circuit Judge abused its discretion ruling Petitioner has not made prima facie showing the PCR Judge's order is void, where the PCR court deprived Petitioner of his procedural due process to an evidentiary hearing on the ineffective assistance of trial Counsel claims where trial counsel failed to subpoena favorable witnesses and obtain the evidence, and deprived Petitioner a hearing regarding Prosecutorial misconduct?

Rule 60 (B) (4), SCRCP allows relief from judgment to be granted on the grounds that the order is void. A void order is one rendered in the absence of proper due process, or judgment from Courts which lacked jurisdiction or personal jurisdiction.

In this case, the order should be rendered void in the absence of proper due process. A procedural due process claim consist of two elements: (1) deprivation by state action of protected interest in life, liberty, or property and (2) inadequate state process.

See: Zinerman V. Burch 484 U.S. 113, 125, 110 S.Ct. 975, 108 L.Ed 2d 100 (1990) See also 17-27-20 S.C. Code of law.

"Congress legislative intent" requires a state court to provide an post conviction proceeding under 17-27-20 (a) Any person who has been convicted of, or sentenced for a crime, and who claims:

---

2. Petitioner has filed a Application for forensic DNA Testing on December 14, 2023. The State has not responded. The Application is pending.

(1) That the conviction or the sentence was inviolation of the Constitution of the United States or the Constitution or laws of this state; (1) that there exist evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice. "Liberty interest"
See: 17-27-80 - which affords, those convicted of a crime, the right to an evidentiary hearing, and the Court shall make specific findings of facts. Rule 52 (a), SCRCP. "Liberty interest."
17-27-90 .... Grounds for relief provides: Any ground finally adjudicated or not so raised, or Knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the Court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

As shown above, on December 4, 2015, (10) ten days before the evidentiary hearing, PCR Counsel Rodney Davis filed an amended PCR application under Rule 15 (a) SCRCP and included additional ineffective assistance of trial Counsel claims, and prosecutorial misconduct.

The PCR record lacks any articulated strategic reason by trial counsel regarding the failure to subpoena favorable witness and failure to obtain evidence. See McCray v. State, 305 S.C. 329 408 S.E. 2d 241 (1991) Pruitt v. State 316 S.C. 254, 423 S.E. 2d 127 (1992) S.C. code of law 17-27-80; and Rule 71.1 (e) SCRCP

In this Case, Petitioner filed a Rule 15 (b) SCRCP motion on October 10, 2023, along with a Rule 29 SCRcrimP, and Rule 60 (B) (1) (2) motions. See App. I pages 356; 357; 358; 359 and 360. Also affidavit of Terence Prizzie was filed on 4-27-2023. (App. I page 388) Crawford v. Washington 541 U.S. 36 (2004)

Here, the PCR Judge and attorney general disregarded their duty to ensure that Proper procedures were followed. The petitioner's confinement in South Carolina Department of Correction and also delegated to them the Concomitant duty to initiate the procedural safeguards set up by State law to guard against, unlawful confinement. Zinerman v. Burch Id. (The deprivation here is 'unauthorized" only in the Sense that it was not an act sactioned by state law, but instead, was a deprivation of Constitutional rights...

The requirement of due process not include notice, but also include an opportunity to be heard in a meaningful way and Judicial review. Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779 58 L.Ed. 1363 (1914) ("The fundamental requisite of the due process of law is the opportunity to be heard.) S.C. Dept of Soc. Serv. Holden, 319 S.C. 72, 78, 459 S.E. 2d 846, 847 (1995) Carey V. Piphus 435 U.S. 247, 259, 98 S.Ct. 1042, 1050, 55 L.Ed. 2d 252 (1978) (Procedural due process rules are meant to protect persons not from the deprivation, but from mistaken or unjustified deprivation of life, liberty or property.

The PCR Judge abused its discretion by not allowing Petitioner the opportunity to be heard on the ineffective assistance of trial counsel claim, where during the criminal trial proceeding, Judge Markley Dennis ordered Ms. Proctor's last administrative act was to subpoena

all Petitioners witnesses for trial. (App. I page 24 line 8-18)

The State did not appeal Judge Marklay Dennis ruling. The PCR judge also abused its discretion to be heard on the ineffective assistance of trial Counsel Claim Concerning the state concealing evidence and failure to have forensic analysis regarding the unpreserved DNA and three years she represented Petitioner.

Petitioner filed an timely Rule 60 (B) (1)(2)(3)(4)(5) motion to set aside the final judgment. This Court has held, "whether to grant or deny a motion under Rule 60 (B) is within the Sound discretion of the Judge. Coleman v. Dunlap 306 S.C. 491, 494, 413 S.E. 2d 15, 17 (1992); Id 495, 413 S.C. 2d at 17. BB&T v. Taylor 369 S.C. 548, 552, 633 S.E. 2d 501, 503 (2006) ("The movant in a Rule 60 (b) motion has the buiden of presenting evidence prove the facts essential to entitled her to relief"; Rule 60 (B) (4) (explaining a court may relieve a party from a final judgment if the judgment is void) (an abuse of discretion arises where the trial Judge decision was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support.) Tri County Ice, and fuel Co., Palmetto Ice Co, 303 S.C. 237, 399 S.E. 2d 779, 782 (1990)

For these reasons discuss, the judgment is void. Lastly the Circuit Court should have granted the Rule 15 (b) SCRCP motion, where the ineffective assistance of trial Counsel Claims were raised December 4, 2015, as Implied Consent.[3]

II. Did the Circuit Judge abuse its discretion ruling Petitioner did not make a prima facie Showing of newly discovered evidence where trial Counsel was ineffective for failure to Subpoena witnesses.

A motion for a new trial based on after-discovered evidence must be made within one (1) year after the date when the evidence could have been ascertained by the exercise of reasonable diligence.

Petitioner Submitted affidavit of Terence Prizzie to the Court on April 27, 2023; and filed a Rule 29 SCRCrimP. motion, and Rule 59 (b) SCRCP, and Rule 60 (B) (2) motion on October 10, 2023.

---

3. SCRCP Rule 15(b) states when issues not raised by pleading are tried by express or implied consent of the parties, they shall be treated in all respect as if they had been raised in the pleadings. Such amendment of the pleading as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend does not affect the result of the trial of these issues. If the evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the Court may

The information provided by Terence Prizzie were known by trial counsel. Trial counsel failed to subpoena Terence Prizzie, who lived in Georgia in 2009 during the Petitioner's tria. See: Sixth Amendment U.S. Constitution.

As shown above, Honorable Markley Dennis ordered trial counsel to subpoena all Petitioner's witnesses, and the record shows Petitioner requested the Court's aid to subpoena witnesses. (App. I page 24 line 8-18) Nor did trial counsel advised the Solicitor's office of Petitioner's alibi defense.

During the summary judgment hearing held on September 9, 2015, PCR counsel argued trial counsel failed to subpoena witnesses as directed by the Court. (App. I page 77 line 1-25 through pages 83)

Judge Hyman advise PCR counsel to file the amended PCR application; to submit arguments during the december term. (App. I page 27 line 15-22) As shown above, the amended PCR application were filed on December 4, 2015. (App. I page 84 through 90)

On December 14, 2015, during the PCR hearing, PCR counsel called Norelle Proctor as a witness, and the state objected. (App. I page 94 line 7-25) PCR Judge abused its discretion by not allowing Petitioner to mention nor comment on any evidence supporting his ineffective assistance of trial counsel claims. (App. I page 135 line 13-25; page 136 line 12-25)

The PCR judge issued an order on June 14, 2019 and found trial counsel was not ineffective without an evidentiary hearing. The order is based on factual conclusions that are without evidentiary support. BB&T v. Taylor Id. This is an abuse of discretion, and violation of Rule 52 (a) and Rule 71.1 (e) SCRCP, and state laws under McCray v. State 305 S.C. 329, 408 S.E. 2d 241 (1991); Howe v. State 834 S.E. 2d 196, 201 S.C. 2019 (All applicants are entitled to a full and fair opportunity to present claims in one post conviction relief application. Crawford v. Washington 541 U.S. 36 (2004)

The affidavit of Terence Prizzie would probably change the result if a new trial was had; (2) has been discovered since trial; (3) could not by exercise of due diligence have been discovered because

---

allow the pleadings to be amended and shall do so freely when the presentation of the merits of the actions will be subserved thereby and the objecting party fails to satisfy the Court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.....

Counsel failure to investigate alibi witness and subpoena them to the first nor second trial. (4) Is the material to the issue of guilt or innocence; and is not merely cumulative or impeaching".

The affedavit of Terence Prizzie states that Petitioner was in Blakely, Georgia during March 25, 2006, the Morning the victim was killed, and not in Charleston, South Carolina.

The information provided, is material to the issue of innocence. The State relied on an unreliable witness who gave false information to police on multiple occasions in violations of Franks v. Delaware 438 U.S. 154 (1978).

The concealed evidence, the "911 recording" and the identity of the 911 caller" was material. Had the evidence been presentd, along with the 911 dispatcher Jenie Fowler would have weaken the State case, and Petitioner would have been acquited. The concealed DNA would have proven the "blood" was related to the homicide. The motion is timely, and the Circuit Court abuse its dicretion by denying Petitioner a new trial, where Petitioner is being held in violation of the South Carolina Constitution Article I section 3 and section 14; and violation of the Sixth and Fourteenth Amendment to the United States Constitution.

V. Did the Circuit Judge abuse its discretion in ruling Petitioner's Rule 60 (b) (5) SCRCP motion was not brought in a reasonable time?

Under Rule 60 (b) (5), SCRCP the Court may relieve a party of his legal representative from a final judgment, order, or proceeding for the following reasons: the judgment has been satisfied released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated.

In this case, this Court (South Carolina Supreme Court), has previously vacated the PCR Judges May 6, 2016 order of dismissal (App. I pages 213; 214; and 215)

The Supreme Court mandated that the PCR Judge issue an sufficient "legal order" and rule on all claims presented,

pursuant to Rule 52 (a), SCRCP.

As shown above the PCR Judge issued an amended order of dismissal. The Amended order does not remedy the mandate by the S.C. Supreme Court, February 1, 2019 order.

For instance, there is still no record the opposing party could submit to show that there was an evidentiary hearing held on the ineffective assistance of trial counsel claims and prosecutorial misconduct.

As shown above, the Judge's order conflict with the ruling of clearly established federal law, and South Carolina laws under Strickland v. Washington, 466 U.S. 668 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) McCray v. State, 305 S.C. 329 408 S.E. 2d 241 (1991)

See: Werno v. Carbo, 731 f. 2d 204, 38 Fed. R. Serv. 2d 1591 (1984) Perry v. Heirs at L of Gadsen, 359 S.C. 42, 48, 590 S.E. 2d 502, 505 (Ct. App. 2003) Mrs. G v. Mrs. G, 320 S.C. 305, 465 S.E. 2d 101 (1995) Evans v. Gunter, 294 S.C. 525, 529, 366 S.E. 2d 44, 46 (Ct App. 1988) also Johnson v. Johnson, 310 S.C. 44, 425 S.E. 2d 46 (Ct. App. 1992); Smith Companies of Greenville, Inc v. Hayes, 311 S.C. 358 428, S.E. 2d 900 (Ct. App. 1993)

Butler v. Eaton, 141 U.S. 240, 11 S.Ct. 985, 35 L.Ed. 713 1891; Pierce oil Corp v. U.S. 9 f. R. D 619 (1949) Reed v. Allen, 286 U.S. 191, 52 S.Ct. 532 76 L.Ed. 1054 (1932) (Rules on previous vacated Judgments) (motions under 60(B)(5) are not subject to the requirement that they be filed within one year of the Judgment, they still must be filed within a reasonable time)

For these reasons shown, there exist a defect in the integrity of the post conviction relief proceeding which requires the Judgment to be set aside. U.S. McRae, 793 F. 3d 392 (4th Cir. 2015) Rule 60(B) in federal proceedings] Gonzalez v. Crosby 545 U.S. 254 125 S.Ct. 2641, 162 L.Ed. 2d 480 (2005)

VI. Did the Circuit Court abused its discretion denying Petitioner's Rule 60(B)(1) motion?

On January 26, 2023, Petitioner filed a Supplement Rule

60 (b) (1) (2) (3) (4) (5) motion. See. (App. I pages 293; 294; 295; 296; 297; 298; 299.

See: Kemp V. United States 596 U.S. 528 142 S.Ct. 1856 213 L.Ed. 2d. 90 (2022) (A Judges error of law is a "mistake" within meaning of federal Civil procedure allowing relief from final Judgment on grounds of mistake.

The United States Supreme Court held in Kemp, "The ordinary meaning of the term "mistake" in Rule 60 (B) (1) includes a Judges legal error. Likewise, in its legal usage, "mistake" included errors of law or fact" Blacks law Dictionary 1195 (3d. Ed. 1933)

The June 14, 2019 order of dismissal is a "mistake" described in Rule 60 (B) (1) and is an error of law and fact. This Court recently vacated the PCR Judges order of dismissal based on err or of law or fact. Therefore the Judgment should be set aside for all these reasons shown above. The motion is timely, as the S.C. Court of appeals affirmed the PCR Judges order May of 2022.

The South Carolina Court of Appeals decision was founded on fraud upon the Court by the opposing party; and there is no record trial Counsel articulated a strategic reason for failure to obtain evidence, and subpoena favorable witnesses guaranteed by the S.C. Constitution Article I section 3 and section 14, and the Sixth and fourteenth Amendment of the United States Constitution. Strickland V. Washington; Crawford V. Washington Id. Brady V. Maryland

This Is a clear error of law described in Kemp V. United States, Id. Rule 60 (B) (1) SCRCP and Rule 60 (B) (1) FRCP, where there is also evidence the opposing party Committed fraud upon the Court to obtain an Conviction.

Relief

The Circuit Court order denying Rule 60 (B) motions should be vacated, and the final judgment set aside where there exist a defect ~~in the~~ Integrity of the Post Conviction Proceeding, and Criminal trial proceeding, and the Petitioner release from Custody of South Carolina Department of Correction based on Fraud upon the Court.

LEGAL MAIL

11/28/25

x Jerell McCoy 256640
BRCI MOB 270
4460 Broad River Rd
Columbia SC 29210