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Oct 13 2025

SC Court of Appeals

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

Appellate Case No. 2023-001231

Treveen J. Gethers,

Petitioner,

v.

State of South Carolina,

Respondent.

BRIEF OF PETITIONER

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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). Mr. Ritchey ran to the bottom of the stairs to see what happened and was almost hit by a car that eventually stopped in the road with the motor running. (App. 149, lines 11-24). He then approached the car and found Earl Robinson (“Decedent”) sitting in the driver’s seat with a fatal gunshot wound.

Based on the testimony presented at trial, the other neighbors in the apartment complex also heard an argument in the parking lot just prior to the gunshots (*none* of those witnesses identified Petitioner as the shooter). The State presented evidence that this apartment complex was in a high crime area where 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 law enforcement’s 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 cigarettes 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 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) (emphasis added).

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 Petitioner subsequently went to Virginia and 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 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 or any other items of evidentiary value. (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, this Court 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, our Supreme 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 the 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. This Court 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. *Treveen 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 PCR based on after discovered evidence and a memorandum in support, 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 the 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 Trevee Gether; his brother, Jamal Gethers; Federal Habeas Counsel Elizabeth Franklin-Best; Trial Counsel Sara Rogers; and former Assistant Solicitor Russell Hilton.

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

Habeas Counsel 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). Habeas Counsel 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).

Habeas Counsel Franklin-Best testified that Don Sorenson of the First Circuit Solicitor's Office gave her a statement that Dante Hubbard provided to the police during the investigation in this case.¹ It appears that Solicitor Sorenson found Hubbard's statement and the detective's notes in the Solicitor's file. Petitioner then moved to admit Hubbard'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).

Habeas Counsel Franklin-Best testified that she subsequently obtained an affidavit from Dante Hubbard affirming that Donsurvi Chisolm shot and killed the Decedent in this case. Petitioner also moved to admit Hubbard's affidavit into evidence, and the Court admitted Petitioner's exhibit number four without objection. (App. 936 – 937). Habeas Counsel Franklin-Best noted that Donsurvi Chisolm is serving two life sentences for murder.²

Habeas Counsel Franklin-Best also 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 that Mr. Davis's affidavit into evidence, and the Court admitted Petitioner's exhibit number six without objection. (App. 939).

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

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>

As to the police investigation and strength of the State's case, Habeas Counsel Franklin-Best testified that *no* witnesses identified Petitioner as the shooter, the police *never* investigated the three people identified by the latent fingerprints obtained from Decedent's car, and the police *never* recovered the murder weapon. Notably, Habeas Counsel Franklin-Best also testified that, although Petitioner's DNA was found on a Bluetooth headset, the headset was *not* located close to 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 randomly saw Dante Hubbard in public, and Hubbard asked what happened with his brother. (App. 879 – 882). Jamal also testified that, during their conversation, Mr. Hubbard told him about making the statement to the police regarding Donsurvi Chisolm being the shooter. Jamal further testified that he informed Petitioner of this information but could not remember when that occurred (potentially 2019 or 2020).

Sara Rogers

Petitioner's trial lawyer, Sara Rogers, was appointed to represent Petitioner after he had five prior lawyers. Ms. Rogers acknowledged that she was disbarred from the practice of law in 2015.³ (App. 882 – 888). Ms. Rogers testified that she was a new attorney and did not have a lot of time between the initial appointment of representation and the scheduled trial date. Ms. Rogers also testified that she felt Petitioner was not guilty of the charges and looked closely through the discovery for exculpatory evidence.

At the hearing, Ms. Rogers reviewed Dante Hubbard's statement to the police and the detective's notes and testified that she had *not* seen those documents prior to Petitioner's trial. Ms.

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

Rogers acknowledged on cross-examination that she met with Assistant Solicitor Russell Hilton prior to trial and reviewed the State's file. However, Ms. Rogers testified that she did *not* see Hubbard's statement or notes in the State's file during that review.

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 prior to trial. Mr. Hilton maintained that the statement and detective's notes had always been in the file. Mr. Hilton admitted that he could not recall whether he specifically discussed or reviewed Hubbard's statement with Ms. Rogers, or whether the statement was provided directly to Ms. Rogers due to Petitioner having five prior lawyers.

Over Petitioner's objection, Mr. 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 Mr. Hilton conceded that he did not know whether the former prosecutor had shared that evidence with Rogers.

Petitioner Trevee Gethers

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

...

[Petitioner'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.

...

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.

...

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's appeal follows.

STANDARD OF REVIEW

In PCR actions, the burden of proof is on the applicant. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). “This Court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them.” *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). “Questions of law are reviewed de novo, and we will reverse the PCR court's decision when it is controlled by an error of law.” *Id.*

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.

...

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 because the relevant facts present sufficiently rare and exceptional circumstances that warrant application of that doctrine. *See generally Pelzer*, 378 S.C. at 521, 662 S.E.2d at 620-621. Specifically, in a rare and extraordinary occurrence, the PCR Court invited a reversal on appeal and found that Trial Counsel and PCR Counsel provided ineffective assistance of counsel:

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. 953 – 954) (emphasis added). *See Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims). However, the PCR Court

erroneously believed that he did not have the authority to apply the equitable tolling doctrine to this case. (App. 940 – 954).

If the doctrine of equitable tolling does not apply where there is evidence of innocence, recantation from the key witness who was a juvenile at the time of the incident, ineffective assistance of Trial and PCR Counsel, and Petitioner’s reliance on Habeas Counsel to preserve all of his potential remedies; *when does it apply?*

Notably, the rare and extraordinary circumstances presented here are distinguishable from the facts in *Green v. State*, 353 S.C. 29, 576 S.E.2d 182 (2003). In *Green*, our Supreme 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 PCR applicant in *Green* had *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.” *Id.*

The federal habeas cases relied upon by Respondent from the Fourth Circuit Court of Appeals are *not* controlling and are distinguishable from this case. In *Rouse v. Lee*, the defendant was convicted of murder, rape, and armed robbery based on overwhelming evidence of guilt:

[Responding to a call,] several officers soon arrived at The Pantry [in Asheboro, North Carolina.] [Officer Hinshaw] heard a muffled sound coming from a storage room. He and Sergeant York, who had arrived at the scene, entered the room where they found defendant [Rouse] against a wall. Hinshaw aimed his gun at defendant, and defendant said, ‘I ain’t got nothing, man.’

Defendant had blood on him, especially on the front of his shirt, his pants, his hands, his waist, his legs and his underwear. There were abrasions on his knees. His pants were unzipped but fastened at the top. His belt was hanging off.

. . . Lieutenant Charles Bulla searched defendant in the store and found in defendant's pocket three rolls of pennies in a plastic

container. . . .

. . . Broadway was covered in blood. There were handprints on her body. She was wearing a blouse, and her pants had been pulled down to her feet. . . . [She had] a knife in [her] neck. . . .

. . . The cash register was turned sideways. Two empty rolls for pennies were on the floor. There was some other debris on the floor beside a trash can and some other penny rolls which seemed to have been knocked out of the safe. The bar stool behind the cash register had some blood on it. There were also spots of blood near the cash register. . . .

. . . Blood on defendant's hands, shirt and underwear was consistent with samples of blood taken from the victim. . . .

. . . [The medical examiner] concluded that the victim died as a result of blood loss caused by a stab wound to the left neck, severing the carotid artery and jugular vein.

Rouse v. Lee, 339 F.3d 238, 241-242 (4th Cir. 2003) (citing *State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543, 548 (N.C. 1994)). The *Rouse* Court held, “Because he has not shown any extraordinary circumstances beyond his control that prevented him from complying with the AEDPA statute of limitations, he is not entitled to equitable tolling.” *Id.*, 339 F.3d at 257. However, the Fourth Circuit did acknowledge that, “[a]s a discretionary doctrine that turns on the facts and circumstances of a particular case, equitable tolling does not lend itself to bright-line rules.” *Harris v. Hutchinson*, 209 F.3d 325, 330 (quoting *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999)).

At the PCR hearing, Habeas Counsel Franklin-Best testified that *no* witnesses identified Petitioner as the shooter, the police *never* investigated the three people identified by the latent fingerprints obtained from Decedent’s car, and the police *never* recovered the murder weapon. Notably, Habeas Counsel Franklin-Best testified that, although Petitioner’s DNA was found on a Bluetooth headset, the headset was *not* located close to Decedent’s body, and the search warrant

for Petitioner's phone records did *not* contain any inculpatory evidence. Same as 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 Habeas Counsel who did not simultaneously file a successive PCR action in state court. *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).

The denial of Petitioner's PCR application based on the rare and extraordinary circumstances is fundamentally unfair because equitable tolling is justified 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."). Therefore, Petitioner respectfully requests that this Court accept the PCR Court's invitation to reverse the denial of this PCR application to ensure Petitioner receives a fair trial with effective assistance of counsel. (App. 954).

If this Court does reverse the PCR Court's erroneous ruling that he lacked the authority to apply the equitable tolling doctrine, Petitioner argues 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). *See Strickland*, 466 U.S. 668

CONCLUSION

Based on the foregoing reasons, Petitioner Trevee Gethers respectfully requests this Court reverse the PCR Court and remand this case for a new trial. *See* U.S. Const. amends. V, VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6); *Strickland*, 466 U.S. 668

Respectfully submitted,



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ATTORNEY FOR PETITIONER

October 13, 2025

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Oct 13 2025

SC Court of Appeals

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

Appellate Case No. 2023-001231

Trevee J. Gethers,

Petitioner,


v.

State of South Carolina,

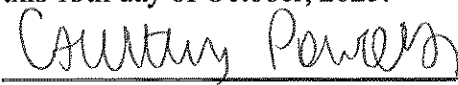
Respondent.

CERTIFICATE OF SERVICE

The undersigned Counsel certifies that a true copy of the Brief of Petitioner has been served upon Assistant Attorney General Benjamin Aplin by emailing and depositing a true and correct copy of the same via first-class mail, postage prepaid, at PO Box 11549, Columbia, SC 29211, on October 13, 2025.


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SUBSCRIBED AND SWORN TO before me
this 13th day of October, 2025.


Courtney Powers (L.S.)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.

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October 13, 2025

The Honorable Jenny Kitchings
Clerk of Court, SC Court of Appeal
P.O. Box 11629
Columbia, SC 29211


Re: Treveen Gethers v. State
BRIEF OF PETITIONER
Appellate Case No.: 2023-001231

Dear Ms. Kitchings:

I have emailed the original Brief of Petitioner along with a Certificate of Service for filing today in the above-referenced case. Thank you for your assistance with filing these documents.

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,


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Enclosures (noted)
cc: Treveen Gethers
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