

PETITION FOR A WRIT OF CERTIORARI  
IN POST-CONVICTION RELIEF ACTIONS

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

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Case No. 2010-CP-10-9745

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Norris Earl White,

Petitioner,

v.

State of South Carolina,

Respondent.

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REPLY TO RESPONDENT'S RETURN

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**RECEIVED**

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**S.C. Supreme Court**

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## **QUESTIONS PRESENTED**

I. Did the lower court properly summarily dismiss Petitioner's application for post-conviction relief for failure to state a claim cognizable under the PCR Act where Petitioner's claim is based upon evidence discovered over a three year period following conviction, where the evidence speaks clearly to Petitioner's innocence, and where the evidence has not been addressed by a lower court, and could not have been addressed on appeal?

II. Are the Petitioner's Constitutional claims preserved for Certiorari where Petitioner's Constitutional claims were properly pled, and Petitioner's claim was summarily dismissed by the PCR court without an evidentiary hearing or merits hearing, so that Petitioner may have one bite at the apple?

## ARGUMENT

Dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief. S.C. Code Ann. § 17-27-70(b) and (c) (2003). When considering the State's motion for dismissal of an application, where no evidentiary hearing has been held, the circuit court must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant. S.C. Code Ann. § 17-27-80 (2003) (PCR actions are governed by usual rules of civil procedure); Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002); Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000).

PCR is appropriate where an applicant mounts a collateral attack challenging the validity of his conviction or sentence. Id. Where PCR is an avenue of relief for claims provided under the Act, an evidentiary hearing is warranted. Fraisier v. State, 351 S.C. 385, 570 S.E.2d 172 (2002).

"A defendant has the procedural right to one fair bite at the apple." Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002). Every defendant has a right to file a direct appeal and one PCR application. Id. (citing In re Anonymous Member of the Bar, 303 S.C. 306, 307, 400 S.E.2d 483 (1991)). In Wilson, the Appellant did not have "one bite of the apple" because he was not afforded a direct appeal from his conviction or a PCR hearing. Id. (citing Poston v. State, 339 S.C. 37, 528 S.E.2d 422 (2000)).

**I. The lower court's dismissal of Petitioner's after-discovered evidence claim is unsupported by the evidence and controlled by an error of law where Petitioner's claim is based upon evidence discovered up to three years following a guilty finding, where Petitioner filed for PCR relief within one year of entry of judgment, and where Petitioner did not know and could not have known of the evidence to support a direct appeal.**

“An application must be filed within one year after the entry of a judgment of conviction or the filing of the final decision upon an appeal, whichever is later.” S.C. Code Ann. § 17-27-45(A). A PCR application alleging newly discovered material facts that require vacation of a conviction or sentence must be filed within one year 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 Ann. § 17-27-45(C) (2012). Petitioner asserts that under either deadline, his PCR application was filed within one year after the entry of a judgment. An unambiguous reading of S.C. Code Ann. § 17-27-45(A) speaks clearly to the fact that a PCR applicant does not have to file an appeal as a prerequisite to PCR, and despite Respondent’s understanding of the facts and argument in support, Petitioner does not assert trial based error that could have been appealed. Petitioner submits that the application sufficiently raises constitutional violations, which clearly entitle Petitioner to “any relief on any theory of the case.” Al-Shabazz, 338 S.C. 254 (2000) (quoting Rule 12(b)(6), S.C. R. Civ. P.).

Respondent’s position is based upon the following arguments contained in Respondent’s Return as follows:

- (1) “Petitioner’s after discovered evidence claim was not proper for post-conviction relief and could have been reviewed on direct appeal, since the issue had already been raised before the lower court and dismissed.”
- (2) “The newly discovered evidenced to be alleged in the post-conviction relief act is new evidence presented to for the first time, not evidence presented to the post-conviction relief court after previously being reviewed by the trial court.”

Respondent’s interpretation of the facts in this case is further illustrated in oral argument at the PCR hearing when Counsel for Respondent was asked to explain why Petitioner’s failure to appeal barred Petitioner’s claim for post-conviction relief.

“The distinction is, for example if somebody decides not to file an appeal, they cannot come into a PCR and argue the trial judge erred in not admitting the evidence – because that would have been an appellate issue. That’s why there is a distinction.” (App. 25).

Applying the Respondent’s arguments to the facts in this case results in a disconnected analysis. The facts here show that Petitioner is not alleging trial based error. The Petitioner asserts Constitutional violations based upon newly discovered evidence, not trial based error with regard to rulings on evidence. Respondent’s position is defective to the extent it infers that Petitioner’s claim is based wholly upon trial based error, and/or upon evidence discovered within the time period necessary to effect a direct appeal.

The facts, however, show that substantive evidence of innocence in this matter was discovered over a three year period following Petitioner’s trial. While the surveillance video evidence was finally made available to Petitioner sometime in June of 2010 (within one year following Petitioner’s trial), Petitioner did not know of and could not have discovered additional evidence by the exercise of due diligence before the trial or within the time to effect an appeal, because the evidence did not exist. The evidence which dispositively speaks to Petitioner’s innocence was only discovered after filing a Motion to Compel in Petitioner’s civil case against the North Charleston Police Department on March 1, 2012, and the filing of a Freedom of Information request with the City of North Charleston, on March 21, 2012.

Petitioner concedes Counsel for Petitioner filed a Motion for a New Trial within one year of Petitioner’s conviction on October 22, 2010, to safeguard Petitioner’s right to file the motion within the confines of S.C. Rules of Criminal Procedure, Rule 29(b). This motion was summarily dismissed, and the dismissal was not appealed. However, Petitioner submits that that a plain reading of the statute does not limit PCR to applicant’s who have previously appealed the original trial. See S.C. Code Ann. § 17-27-45(A) (“An application must be filed within one year

after the entry of a judgment of conviction or the filing of the final decision upon an appeal, whichever is later.”)

To the extent the Court finds the former position unpersuasive, Petitioner asserts that the Motion for a New Trial was supported only by the known existence of a surveillance video, which captured the wrongful arrest of Petitioner. The remaining newly discovered evidence, including the audio trial transcript<sup>1</sup>, was gained pursuant to a Motion to Compel, filed on March 1, 2012 in Petitioner’s civil claim against the North Charleston Police Department, and after a Freedom of Information Act request was filed with the North Charleston Police Department on March 21, 2012. Petitioner has not had the opportunity to proffer this evidence, and Petitioner submits that he is entitled to an evidentiary hearing, an appeal or PCR.

Secondly, Respondent’s Return relies upon Simmons v. State, 264 S.C. 417 (1975), Al-Shabazz v. State, 338 S.C. 354 (2000), and Drayton v. Evatt, 312 S.C. 520 (1993) to support the argument that a Motion for a New Trial was the “proper way to present the Petitioner’s alleged after discovered evidence to the trial court,” and that the PCR “was not proper forum to review the municipal court’s decision or to reassert the after discovered evidence claim.” (Respt. Return 6).

The above cases are distinguishable and incompatible to the present matter. To the contrary, both Simmons and Drayton involve pure trial based error; errors occurring during trial regarding rulings on motions and objections, and which could have been reviewed on appeal. Here, however, the facts show that Petitioner does not seek to “review an issue of after

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<sup>1</sup> Counsel for Petitioner had attempted to obtain the trial transcript from the Clerk of Court for the North Charleston Magistrates Court on June 23, 2010. The court informed Counsel that there was no trial transcript. The trial transcript was not obtained until after a Motion to Compel was filed on March 1, 2012 in Petitioner’s civil action against the North Charleston Police Department. Thus, the trial transcript could not have formed the basis of Petitioner’s Constitutional claim until well after the time for an appeal had lapsed.

discovered evidence that had already been raised and dismissed in the municipal court,” as the Respondent has argued. (Respt. Return 5-6).

Al-Shabazz involved a PCR claim regarding the loss of good time sentence-related credits. The court in Al-Shabazz held that the petitioner’s claim was a non-collateral matter or administrative matter, not falling within one of two exceptions for non-collateral matters under the PCR Act. Id. The court echoed that the PCR Act was designed to redress collateral attacks challenging the validity of a conviction or sentence. Id. Based on the above, Petitioner asserts that even though the facts in Al-Shabazz are distinguishable, this ruling supports Petitioner’s PCR claim, because Petitioner’s after-discovered claim is clearly a collateral attack challenging the validity of his conviction.

## **II. Respondent waived the right to assert the doctrine of *res judicata*.**

Respondent asserts the doctrine of *res judicata* precludes Petitioner from asserting this after-discovered evidence claim to the PCR court. *Res judicata* is an affirmative defense, and must be pleaded. RIM Assocs. v. Blackwell, 359 S.C. 170, 597 S.E.2d 152 (Ct. App. 2004). A party cannot raise the affirmative defense of *res judicata* for the first time on appeal. Id. Petitioner asserts the defense of *res judicata* is being pled for the first time in Respondent’s Return. Therefore, Petitioner submits Respondent may not pursue this defense on appeal.

## **III. Petitioner’s due process claim based upon newly discovered evidence is properly before this Court insofar as Petitioner’s due process claim was properly pled, and Petitioner’s claim was summarily dismissed without a merits hearing and without a full evidentiary hearing.**

“A defendant has the procedural right to one fair bite at the apple.” Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002). Every defendant has a right to file a direct appeal and one PCR application. Id. (citing In re Anonymous Member of the Bar, 303 S.C. 306, 307, 400 S.E.2d 483 (1991)). In Wilson, the application for PCR alleged ineffective assistance of counsel on trial

error grounds, involuntary waiver of appeal, insufficiency of evidence, and judicial impartiality. The PCR application was summarily dismissed, and Appellant appealed. Even though applicant failed to file within one year, the court held that the defendant has the procedural right to “one fair bite at the apple, that is, every defendant has a right to file a direct appeal.” Id. Here, as in Wilson, Petitioner did not have "one bite of the apple," because he was not afforded a direct appeal from his conviction or a PCR hearing. Id. Petitioner avers the facts here show that Petitioner has not been afforded a direct appeal, and that Petitioner has not been given the opportunity to present evidence in a full evidentiary hearing.

On the other hand, Respondent avers that Petitioner failed to sufficiently raise allegations of constitutional violations to preserve them for appeal. Petitioner submits that this argument is unpersuasive to the extent Petitioner adequately provided fair notice of all potential claims to the Respondent and the Court.

In general, post-conviction relief is considered a civil proceeding. The PCR Act and Form 5 are consistent insofar as they require the applicant to state the grounds upon which the claim is based, and to give a concise statement of the facts to support each ground. S.C. Code Ann. § 17-27-50 (2003); S.C. R. Civ. P. Form 5. The South Carolina Rules of Civil Procedure require notice pleading. Pleadings must “give notice of the claim being made against the adversary and of the grounds upon which it rests, rather than allege in detail the specific facts upon which the claim is based.” 61A AM. JUR. 2d Pleading § 5 (1999) (internal citations omitted). The purpose of the pleading is to give fair notice to the opposing party and the court of the legal claims. Overcash v. S.C. Elec. & Gas Co., 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005).

All pleadings shall be so construed as to do substantial justice to all parties." Rule 12(c), SCRPC. "When a fact is well pleaded, any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment." Falk v. Sadler, 341 S.C. 281, 286-87, 533 S.E.2d 350, 353 (Ct. App. 2000) (quoting Russell v. City of Columbia, 305 S.C. 86 at 89, (1991). "A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment." Id.

Petitioner submits that his application for PCR, which is required to be completed on a template, form document, and limited in space, adequately provides notice to the parties and the court of the legal claims entitling Petitioner to relief. The application request of the Petitioner to state the reasons for not appealing the trial court, and Petitioner responds as follows:

"I was not fully aware of my right to appeal... I told the trial judge I would like to appeal the ruling. I also asked the judge how to effect an appeal. The magistrate judge related that I could not appeal the decision without paying the fine." (App. 2)

Petitioner asserts this more than adequately raises an allegation of involuntary waiver of the Petitioner's right to an appeal.

In addition, Respondent claims that Petitioner's allegation of involuntary waiver of his right to direct appeal was not referenced in Petitioner's post-hearing Memorandum of Law, and not mentioned during post-conviction relief hearing. As to the former, Petitioner submits that the lower court PCR hearing was a hearing to rule on summary dismissal. Petitioner was not given the opportunity to introduce evidence, nor was Petitioner given the opportunity to state the grounds for relief. It was not an evidentiary hearing, nor was it a merits hearing. Concomitantly, Petitioner's Memorandum in Support of Post-Conviction Relief was drafted in response to the

lower court's request to provide precedence supporting the justiciability of Petitioner's PCR claim, not to state all of the grounds for relief.

Respondent also claims that Petitioner failed to preserve an involuntary waiver of counsel claim. Petitioner would respectfully show that the issue was raised to the lower court in oral argument when the court questioned Petitioner on the issue of involuntary waiver of counsel<sup>2</sup>.

The Court: He was not allowed counsel?

Milton Stratos: "Well, he wasn't advised that he had a right to counsel, and when he indicated to the court that he couldn't afford counsel, they didn't go into any further discussion. I have a copy of the transcript of record – which it took us two years to get that transcript."

Milton Stratos: "I'm not arguing that the trial judge wouldn't allow evidence that –

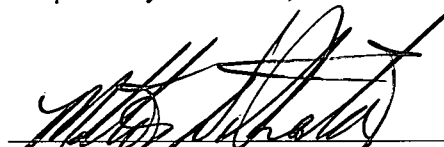
The Court: "Then what are you arguing here?"

Milton Stratos: "I'm arguing – I am going to argue here, one, that he had the right to counsel; two, that after his revocation or after the issuance of a bench warrant that he right a right to counsel; and, three that the after-discovered evidence should be – that it is so material to the facts of that case that he should be allowed a new trial."

### CONCLUSION

For all of the foregoing reasons, Petitioner respectfully submits that the petitioner for writ of certiorari should be granted.

Respectfully submitted,



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<sup>2</sup> The facts supporting this claim were not known to Counsel for Petitioner until 2012 when Counsel received an audio recording of the trial court.

**CERTIFICATE OF SERVICE**

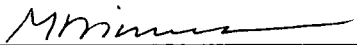
The undersigned hereby certifies that a true copy of the foregoing **Reply to Respondent's Return** has been served upon the following parties by delivery or by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 17<sup>th</sup> day of January 2014.

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