

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM SALUDA COUNTY

Court of Common Pleas
William P. Keesley, Judge

Appellate Case No. 2014-002565

RECEIVED

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S.C. Supreme Court

James P. Robinson, #250720,-----Petitioner

v.

State of South Carolina-----Respondent

**CERTIORARI TO REVIEW
POST-COVICTION RELIEF ACTIONS
PETITIONER'S EXPLANATION OF WHY
THE LOWER COURT'S DETERMINATION
WAS IMPROPER**

PLAINTIFF IN THIS MATTER COMES before this Court to show that the lower court erred by issuing a Final Order to Dismiss with Prejudice Petitioner's post-conviction relief action due to Petitioner's applications were barred as successive in this matter. Attorney Miles addresses the explanation herein, on behalf of Petitioner, of why the lower court's determination was improper and to comply with the South Carolina Supreme Court Order dated January 20, 2015

Attorney Mary P. Miles requested to be relieved as counsel in the Notice of Intent to Appeal that was filed on November 25, 2014. The Appellate Defense should be substituted as counsel for Petitioner in this matter. Petitioner is an indigent inmate and incapable of paying Attorney Miles' attorney fees and costs. Petitioner contacted Attorney Miles only to respond to Respondent's Motion to Dismiss in Lexington County Court of Common Pleas, Lexington, South Carolina. Attorney Miles was not contacted by Petitioners as an attorney to represent Petitioner on any follow up proceedings. Petitioner has not provided money for Attorney Miles'

legal representation. Attorney Miles filed the Response to the Motion to Dismiss on Petitioner's behalf in the lower court and she filed the Notice of Intent to Appeal due to the timeliness of protecting Petitioner's rights.

STATEMENT OF THE CASE

Petitioner is an indigent inmate at Kirkland Correctional Institution located in Columbia, South Carolina. Petitioner was charged and sentenced with Murder, Pointing a Firearm, and for Possession of a Firearm or Knife during the Commission of or Attempt to Commit a Violent Crime on June 16, 1998. In the lower court, the Petitioner was represented by Thomas D. Broadwater, Esquire, at trial. The Honorable Edward B. Cottingham sentenced Petitioner to thirty (30) years for Murder and five (5) years concurrently on the other above charges. Petitioner did not appeal his sentence due to his November 9, 1998 application for PCR. On February 20, 2001, the Honorable Rodney S. Peeples dismissed Petitioner's PCR. Petitioner appealed the dismissal by a Petition for Writ of Certiorari to the South Carolina Supreme Court. On May 30, 2002, the South Carolina Supreme Court denied Petitioner's Petition for Writ of Certiorari. Petitioner filed a Petition for Rehearing which was denied on July 10, 2002. In addition, the remittitur was issued on July 10, 2002.

Subsequently, Petitioner was denied his Petition for Writ of Habeas Corpus in Richland County Court of Common Pleas, Columbia, South Carolina. Petitioner's petition was denied by the Honorable G. Thomas Cooper, Judge for the Fifth Judicial Circuit. Petitioner filed a *pro se* Notice of Appeal with the South Carolina Court of Appeals but filed a Motion to Stay the appeal. Petitioner filed an amendment to his original PCR that was construed as a second PCR application on March 24, 2005. On April 26, 2005, the Court of Appeals denied Petitioner's amended or second application for PCR. A remittitur was issued on July 27, 2005.

On January 17, 2007, a hearing on Petitioner's amended or second PCR application was held in Lexington County Court of Common Pleas, Lexington, South Carolina. The Honorable R. Knox McMahon dismissed the case with prejudice on March 1, 2007. Petitioner appealed the denial to the Court of Appeals which denied Petitioner's Notice of Appeal on April 24, 2009. The Court of Appeals issued its remittitur on May 14, 2009. On June 30, 2009, Applicant filed a Petition for Writ of Habeas Corpus in the Federal District Court. On December 23, 2009, Respondent filed its Return and Motion for Summary Judgment. The Honorable Shiva V. Hodges, United State Magistrate, issued a Report and Recommendation on July 19, 2010. On August 11, 2010, the United States District Court granted Respondent's Motion for Summary Judgment.

Petitioner filed an Appeal and Motion for Certificate of Appealability with the United States Court of Appeals for the Fourth Circuit on September 15, 2010. Petitioner's Motion for Certificate of Appeal ability was denied and dismissed on March 25, 2011. Petitioner's amended his PCR application that was filed in the Saluda County Court of Common Pleas, Saluda, South Carolina. Petitioner's amended PCR application was dismissed on October 28, 2014 which was received by Petitioner on November 11, 2014. Attorney Mary P. Miles, on Petitioner's behalf, filed a Notice of Intent to Appeal on November 25, 2014 with a copy of the Final Order from the lower court. Currently, an Order was issued by The Supreme Court of South Carolina dismissing Petitioner's appeal due to failure to provide the explanation required by Rule 243(c) of South Carolina Appellate Court Rules (SCACR). Petitioner's herein complies with Rule 243 (c) of the South Carolina Appellate Court Rules (SCACR) to request that Petitioner's appeal not be denied.

Pursuant to The Uniform Post-Conviction Procedure Act (Act), S.C. Code Ann. §§ 17-27-10 to 160 (2003), governs the procedure for PCR proceedings. *Al-Shabazz v. State*, 338 S.C. 354, 363, 527 S.E.2d 742, 746 (2000). Petitioner James P. Robinson opposed the State of South Carolina Motion to Dismissal Petitioner's PCR application in the lower court. Petitioner's

opposition to Respondent's Motion To Dismiss was based on the grounds that Petitioner had evidence to establish the essential elements of his causes of action against his trial attorney for ineffective assistant of counsel. There is no genuine issue of material facts in dispute for Petitioner's amended PCR request to be treated as a second PCR application rather than an amendment to Petitioner's original PCR application. Thus, the lower court's Order of Dismissal with prejudice should be reversed and that Petitioner should be granted a hearing on his original and amended PCR requests as a matter of law.

STANDARD OF REVIEW

"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The defendant must first demonstrate that counsel was deficient and then must also show the deficiency resulted in prejudice. *Id.* To satisfy the first prong, a defendant must show counsel's performance "fell below an objective standard of reasonableness." *Franklin v. Catoe*, 346 S.C. 563, 570–71, 552 S.E.2d 718, 722 (2001). "To prove prejudice, an applicant must show there is a reasonable probability that but for counsel's deficient performance; the result of the proceeding would have been different." *Id.* at 571, 552 S.E.2d at 723. The petitioner in a PCR hearing bears the burden of establishing his entitlement to relief. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law." *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). The PCR court's findings on matters of credibility are given great deference by this Court. *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010).

ARGUMENT

Petitioner argues that the South Carolina Supreme Court has both appellate and original jurisdiction. In its appellate capacity, the Supreme Court has exclusive jurisdiction to hear appeals from the circuit court. The Supreme Court also reviews judgments of the circuit and family court relating to post-conviction relief actions by writ of certiorari. The Respondent moved to dismiss Petitioner's amended PCR application. The lower court's Decision to Dismiss with prejudice was based on five procedural claims made by Respondent: first, that Petitioner's PCR application is successive; second, that Petitioner failed to comply with the statute of limitations to file a PCR pursuant to The Uniform Post-Conviction Procedure Act (Act), S.C. Code Ann. §§ 17-27-10 to 160 (2003); third, Petitioner's PCR application was barred under the doctrine of *res judicata*; fourth, Petitioner's PCR application for defective indictment for Murder was not objected to and was untimely; and fifth, Petitioner's PCR application failed to prove defective subject matter jurisdiction.

Petitioner argues that The South Carolina Rules of Civil Procedure also apply to PCR proceedings, but only to the extent they are not inconsistent with the Act. Rule 71.1, SCRPC. Under the Act, an applicant must "specifically set forth the grounds upon which the application is based" and include in his or her application those facts that are within the applicant's "personal knowledge" and set them out "separately from other allegations of facts." S.C. Code Ann. § 17-27-50 (2003). The Act also requires "[a]ll grounds for relief available to an applicant . . . [to] be raised in his [or her] original, supplemental, or amended application." S.C. Code Ann. § 17-27-90 (2003). The Act permits the PCR judge, "when appropriate," to allow an "amendment of the application" S.C. Code Ann. 17-27-70(a) (2003). By the same token, Rule 15(a), SCRPC, permits "[a] party [to] amend his [or her] pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served" Beyond that, however, whether a party may amend his

or her application, as with any other pleading, rests within the sound discretion of the PCR judge. See *Simpson v. Moore*, 367 S.C. 587, 599, 627 S.E.2d 701, 708 (2006) (noting a PCR judge may allow a petitioner to amend pleadings pursuant to Rule 15(b), SCRPC). The trial court's decision whether to allow an amendment will not be reversed on appeal absent a showing of an abuse of discretion. See *Mylin v. Allen-White Pontiac, Inc.*, 281 S.C. 174, 180, 314 S.E.2d 354, 357 (Ct. App. 1984) ("Courts have wide latitude in amending pleadings and, while this power should not be exercised indiscriminately or to surprise or prejudice an opposing party, the matter of allowing amendments is left to the sound discretion of the trial judge. His decision will not be overturned absent an abuse of discretion or unless manifest injustice has been done.").

Petitioner argues that the lower court failed to consider Petitioner's application for PCR pursuant to Rule 15 (c) of the South Carolina Rules of Civil Procedure, SCRPC. The lower court's Decision to dismiss with prejudice Petitioner's PCR application as successive is a manifest of injustice against Petitioner. In this case, Petitioner was not given his rights to amend his PCR application and to consider the amendment to his first PCR application. Instead, the court treated Petitioner's amended application as totally a second PCR application. Petitioner's first PCR application and his amended PCR applications were filed to bring a PCR action challenging the constitutionality of ineffective assistant of counsel without adding any new parties, circumstances, and issues in the amended application. Additionally, the lower court's Decision to Dismiss with prejudice was not proper pursuant to Rule 12 (b) of the South Carolina Rules of Civil Procedure, SCRPC, in this action. Pursuant to The Uniform Post-Conviction Procedure Act (Act), S.C. Code Ann. §§ 17-27-10 to 160 (2003), governs the procedure for PCR proceedings. *Al-Shabazz v. State*, 338 S.C. 354, 363, 527 S.E.2d 742, 746 (2000), Applicant has the right to amend his Application for PCR. There is no time limit to amend but is at the discretion of the court to grant an amendment of the pleadings. Courts have wide latitude in amending

pleadings. In this case, Petitioner's second PCR application is an amended application that relates back to the original application pursuant to Rule 15 of the South Carolina Rule of Civil Procedures, SCRPC.

A motion to dismiss a complaint for failure to state a claim tests the legal sufficiency of the complaint; all facts pleaded and all reasonable inferences from those facts are admitted as true, but only for the purpose of testing the legal sufficiency of a claim, not for trial. Rule 12(b) (6) of the South Carolina Rule of Civil Procedures, SCRPC, provides that parties may assert by motion a defense based on "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b) (6). The Rule 12(b) (6) test has been revised in recent years. In *Conley v. Gibson*, 355 U.S. 41 (1957), the Supreme Court stated the interplay between Rule 8 (pleading) and Rule 12(b) (6) as follows: "[T]he accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46. In *Bell Atlantic Corporation v. Twombly*, 55 U.S. 544 (2007), the Court noted questions raised regarding the "no set of facts" test and clarified that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint," *id.* at 563. It continued: "*Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival." *Id.* In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Court further elaborated on the test, including this statement: "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at 1949 (citation omitted). Whereas complaint is inadequate, leave to amend the complaint is common. *See, e.g., Butt v. United Brotherhood of Carpenters & Joiners of America*, No. 09-4285, 2010 WL 2080034 (E.D. Pa., May 19, 2010).

But the lower court asserts no *factual* inadequacy in Petitioner's applications—and seeks dismissal with *prejudice without* consolidation of Petitioner's PCR applications. The lower court issued an Order of Dismissal as a matter of law, rather than to treat Petitioner's application claims as a consolidation under Rule 15 of the South Carolina Rules of Civil Procedure, SCRCPP. Petitioner's original and amended applications relates back to the timely application as a matter of law and not successive. The lower court's Decision to dismiss Petitioner's PCR applications with prejudice was without merits. Petitioner addressed the issues in his original and amended applications at length of his trial lawyer's inefficient assistant of counsel. The lower court's Decision in this matter was decided on an alleged second application that was actually an amended application in which the lower court construed as not timely. Petitioner's amended application for PCR demonstrated the constitutionality of the challenged limits and all establishing the unconstitutionality of the limits as challenged in Petitioner's original application for PCR.

Scott v. Savers Property and Cas. Ins. Co., 663 N.W.2d 715, 262 Wis.2d 127 (2003). “A complaint will be dismissed only if it appears certain that no relief can be granted under any set of facts that the plaintiffs might prove in support of their allegations.” *Id.* “When standing is challenged on the basis of the pleadings, [courts] accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party.” *Town of Eagle v. Christensen*, 191 Wis. 2d 301, 316, 529 N.W.2d 245 (Ct. App. 1995). Thus, Respondent's Motion to Dismiss should be denied.

Plaintiff argues that his amended application for PCR was not successive, was within the statute of limitation, and was not pursuant to *Res Judicata*. Specifically, Petitioner's original and amended filed applications for post-conviction relief (PCR) alleged that his trial counsel was ineffective in several occasions such as failing to object to the sufficiency of the indictments, in failing to file a direct appeal, and in failing to object to the inconsistency of the murder weapon to

the bullet recovered from the deceased at the time of trial and sentencing. Petitioner addressed in his original and amended applications for PCR the same issues but the amended application expanded the reasons for Post Conviction Relief (PCR) in his case. The lower court Decision to dismiss Petitioner's applications as barred by the statute of limitations was an injustice against the legal process and against Petitioner. In this matter, Petitioner argues that the statute of limitations should not apply to his PCR application since Petitioner has the right to amend his original PCR application. Petitioner's amended PCR application should relate back to Petitioner's original application due to Petitioner PCR amendment addressed the same circumstances, parties, law, and issues as in the original PCR. However, the amended PCR application does explain Petitioner's issues more fully with examples of his trial lawyer's inefficiency of counsel than in Petitioner's original PCR application.

Petitioner argues that he did not knowingly and intelligently waive his right to direct appeal and was entitled to a belated review of his direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). The lower courts assessed Petitioner's appeals as the same as Petitioner's PCR original and amended application as successive. The lower court failed to treat each of Petitioner's attempts for relief separate from Petitioner's PCR application. The lower court assumed that Petitioner's filing for various reliefs as successive PCR applications. The lower court erred by Dismissing with prejudice Petitioner's PCR application and to find that the statute of limitations did apply to Petitioner's PCR application without considering Petitioner's amended applications should relate back to the original application. Petitioner argues that the lower court prohibited his amended applications based on the Statute of Limitations have run is in error. Dycippa L. Garner vs. State of South Carolina, 2006-10-18-02.

Moreover, the this court should reverse the lower court's decision to Dismiss Petitioner's PCR application due to the lower court's failure to establish that Petitioner's amended PCR application is successive, failure to comply under the Statute of Limitations, prohibited under the doctrine of *res judicata*, untimely defective indictment claim, and lack of Subject Matter Jurisdiction. It is well established in the South Carolina Code Ann. § 17-27-80 (2003) states that a PCR court "shall make specific findings of fact, and state expressly its conclusions of law *relating to each issue presented. This order is the final order.*" (Emphasis added).

Petitioner argues that his original PCR application was inadequate. Petitioner's intent with filing additional applications for PCR was to amend his original PCR. The amended applications were filed as amended applications to explain fully the reasons that his trial lawyer was ineffective as counsel. Petitioner argues that all grounds for relief available to Petitioner were not adequately raised as he would like in his original PCR application and that he had the right to a supplemental or amended application pursuant to. S.C. Code Ann. § 17-27-90 (2003). "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 an 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." *Id.* A final judgment entered under the Uniform Post-Conviction Relief Act may be reviewed by writ of certiorari. S.C. Code Ann. § 17-27-100 (2003); Rule 227(a), SCACR.

A review of the orders in this PCR matter does not include specific findings of fact and conclusions of law relating to each issue presented in the original and amended applications. Instead, the prior court of common pleas dismissed Petitioner's applications on the issues of successiveness, finding that counsel was not ineffective without considering the facts of the

amended application. Petitioner argues that in a PCR proceeding, a decision that is not making specific findings of fact does not constitute a final order or judgment under the Uniform Post-Conviction Relief Act and therefore is not reviewable by writ of certiorari. Similar to the situation in Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992), failure to finally resolve each of the issues presented in the PCR application when it is initially considered ultimately increases the work load of all involved when a new hearing is required to secure the rulings which should have been made initially.

Petitioner argues that the lower court Decision to grant Respondent the Motion to Dismiss with prejudice when Petitioner had the right to file an amended application on his original PCR application was a clear injustice. Furthermore, Petitioner requests that this court reverse and remand this case to the PCR judge to conduct a hearing on Petitioner's PCR application, if necessary, and to issue a final order which rules on all of the issues raised in Petitioner's PCR original and amended applications. Petitioner argues that the lower court's Final Order to Dismiss with prejudice Petitioner's PCR application should be reversed.

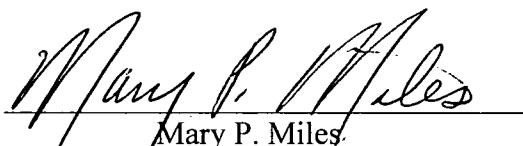
Petitioner argues that a convicted person has a right to a Post Conviction Relief hearing. The purpose of post-conviction relief in South Carolina is to provide convicted persons with a comprehensive mechanism to raise any unresolved and previously unmentioned questions of fact or law relevant to their convictions or sentences. S.C. CODE ANN. § 17-27-20(a) (2003); *see also* YACKLE, *supra* note 6, at 3 (discussing the purpose of state habeas).

According to the South Carolina Supreme Court, the PCR Act was "designed to incorporate all rights available under federal habeas corpus." Finklea v. State, 255 S.E.2d 447, 447-48 (S.C. 1979); *see also* Harvey v. South Carolina, 310 F. Supp. 83, 85 (D.S.C. 1970) ("The [PCR] Act affords all the protections contemplated by our founding fathers. It is designed to afford post-conviction relief of a scope sufficiently broad to comply with the mandates and holdings of

to successiveness. Petitioner request that Attorney Mary P. Miles be relieved as counsel and the Appellate Defense be substituted as Petitioner's legal representative.

Respectfully Submitted,

LAW OFFICE OF MARY P. MILES

A handwritten signature in cursive script, reading "Mary P. Miles", is written over a horizontal line.

Mary P. Miles
810 Dutch Square Boulevard, Suite 206
Columbia, South Carolina 29210
803-939-1177 Office
803-939-1001 Facsimile

February 4, 2015

the United States Supreme Court relating to federal review of state convictions."). It was intended to be an exclusive remedy displacing "all other common law, statutory or other remedies." 40. S.C. CODE ANN. § 17-27-20(b) (2003). For the most part, PCR has replaced the various forms of common law collateral relief, but some exceptions remain.

Petitioner argues that any applicant can begin a PCR proceeding by submitting a claim on a standard PCR application. The state attorney general's *See* S.C. CODE ANN. § 17-27-100 (2003) ("[A] final judgment entered under this chapter may be reviewed by a writ of certiorari as provided by the South Carolina Appellate Court Rules."). The 1999 Act No. 55, § 24 added the court of appeals to the prior language of the rule that stated "[a] final judgment entered under this chapter may be reviewed by the Supreme Court of this State on appeal brought either by the applicant or the State in accordance with laws governing appeals from the circuit court in civil cases." S.C. CODE ANN. § 17-27-100 (1997). The South Carolina Appellate Court Rules provide that final PCR decisions shall be reviewed by the Supreme Court upon petition of either party for a writ of certiorari, but the Supreme Court has discretion to transfer any such case to the court of appeals. S.C. APP. CT. R. 243. (S.C. APP. CT. R. 227 was renumbered to S.C. APP. CT. R. 243, effective April 29, 2009).

Petitioner argues that the lower court denied his PCR application on October 28, 2014 as successive in error. Petitioner filed his notice of appeal to this court. Petitioner now seeks a writ of certiorari to review this denial.

CONCLUSION

For the reasons stated, Petitioner asks this court to grant the Petitioner a writ of certiorari and reverse the lower court's decision to Dismiss Petitioner's PCR applications with prejudice due

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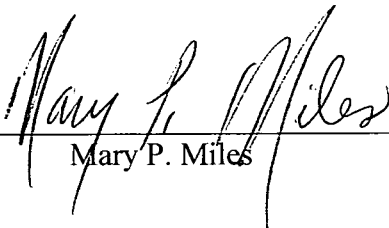
State of South Carolina-----Respondent

PROOF OF SERVICE

This is to certify that the undersigned has this date served the foregoing Petitioner's Certiorari To Review Post-Conviction Relief Actions, Petitioner's Explanation of Why The Lower Court's Determination was Improper by causing a copy on February 6, 2015 to be placed in the U.S. Mail, first class postage prepaid, addressed as shown below:

**J. Clayton Mitchell, Esquire
OFFICE OF THE ATTORNEY GENERAL
PCR Division – 11th Circuit
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Columbia, South Carolina 29211
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**The Division of Appellate Defense
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Mary P. Miles

The Supreme Court of South Carolina

James P. Robinson, Petitioner,

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State of South Carolina, Respondent.

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ORDER

Petitioner has failed to provide the explanation required by Rule 243(c) of South Carolina Appellate Court Rules (SCACR), and requested by this Court's letter dated December 11, 2014. Accordingly, this matter is dismissed. The remittitur will be sent as provided by Rule 221(b), SCACR.

FOR THE COURT

BY


CLERK

Columbia, South Carolina

January 20, 2015

cc: Mary P. Miles, Esquire
James Clayton Mitchell, III, Esquire