

Dear Clerk,

Please find enclosed, my Explanation Pursuant to Rule 243(C), S.C.A.C.R. Please consider the Rulings in regards to filing of Court Documents by Indigent Inmates pursuant to Haines v. Kerner and also, Riley v. South Carolina, 82 F. Supp. 2d 474 (D.S.C. 2000). (For purposes of determining timeliness of Court filings, filing date for prisoners is date of delivery of documents to prison officials.

Thank you for your kind services

Respectfully,
Ernest Perry 281290
Ernest Perry, 281290
Kershaw C.I., OB-45
4848 Goldmine Highway
Kershaw, S.C., 29067

The State Of South Carolina
In The Supreme Court
Appeal From Newberry County
Court Of Common Pleas
Frank R. Addy, Jr., Circuit Court Judge
Case No. 2014-CP-36-0091

RECEIVED

MAR - 9 2015

S.C. Supreme Court

Ernest Perry, 281290,

Appellant,

v.

State Of South Carolina,

Respondent.

Explanation

Now comes the Appellant in the above-captioned matter, who provides this Honorable Court with an Explanation pursuant to Rule 243(C), SCACR as to why he believes the circuit court's determination that this action is barred as successive and time for filing is untimely was improper.

Appellant filed his Application For Post Conviction Relief/Alternative Petition For State Habeas Corpus on February 21, 2014. Appellant also filed with the Application an Initial Brief, in support thereof, raising three (3) issues:

Issue A: Did The State's Failure To Prove Key And Essential Elements Of The Substantive Charges Render Petitioner's Convictions And Sentences Constitutionally Invalid?

Issue B: Was Defense Counsel Ineffective For Not Properly Moving The Court To Dismiss All Charges Against Petitioner And Was PCR Counsel Ineffective For Not Amending And Arguing This Issue At The Post-Conviction Hearing?

Issue C: Why Should This Case Be Heard And Ruled Upon?

In this "Issue C" and within a document entitled "Objection To The Conditional Order Of Dismissal" Applicant argues that he is actually and factually innocent of the substantive charges and with all the due diligence he mustered and with the new rules of law and the discovery of the factual basis for these claims surfacing just a few days before the April, 2008 hearing and with the new rule of law involved in State V. Hernandez, 382 S.C. 620, 677 S.E.2d 603 (2009) coming later, Applicant was unable to ascertain his actual innocence claim because he was awaiting a ruling upon his Petition For Writ Of Certiorari during the time of this ruling, and the entire issue would be barred from advancing it to the

next step of "Petition For Habeas Corpus" and therefore, the issue would not have been exhausted. Thus, Petitioner had no choice but to continue his process forward with his collateral review and appeals thereof which persisted until his Petition For Writ Of Certiorari in the U.S. Supreme Court was dismissed on January 6, 2013. There were, consequently, other U.S. Supreme Court rulings made retroactive that Appellant has also relied upon giving leadway to excuse procedural bars in his case. However, and if these cases are not to be applied to collateral review in South Carolina, then surely an issue of actual innocence and "a miscarriage of justice" under Petitioner's circumstance would be sufficient reason for exception to the Circuit Court's determination as this action being time barred and successive. Let's review further.

As stated within our Initial Brief and Objection, as well as, the lower Court's "Final Order Of Dismissal", Appellant's efforts in challenging his convictions has been further impeded by the State's failure to comply with Judge Saunders's Order to provide Applicant with all of the missing portions of "Transcript Of Record". Not only have the State (Respondent) failed to follow this Order, they have and still are leaving out the "Transcript" of the first "PCR hearing" where Judge Saunders discussed with the State's attorney to supply Appellant with all 30 pages instead of the eight (8) that the State inevitably turned over to Appellant. Also, the Appellant has diligently tried to explain to the Supreme Court and Habeas Court that the record was incomplete with numerous pages missing. Under these circumstances, it has been at no fault of the Appellant that the issues presented to PCR Court could not have presented within his first application and he could not have brought them to the Court's attention any sooner than he has. Furthermore, Appellant has been struggling with Hepatitis C treatment and almost died twice with infections during his PCR and Federal Habeas Corpus processes. Now comes this Analysis in regards to why the PCR Court's determination was improper.

Law Analysis

There are two exceptions to the general one-year statute of limitations. First, when the South Carolina Supreme Court or a Court whose decisions are binding upon the South Carolina Supreme Court announces a new substantive standard or right that is intended to be applied retroactively. South Carolina Courts are required to follow the United State's Supreme Court's decisions on retroactivity. See e.g., Danforth V. Minnesota, 128 S.Ct. 1029, 1035 (2008); Talley V. State, 371 S.C. 535, 547, 640 S.E.2d 878, 880 (2007). A PCR applicant has one year from the date on which the new standard or right was determined to commence a PCR application. S.C. Code Ann. § 17-27-45(B); See, Talley (determining that

the limitations period set forth in section 17-27-45(B) applied in Talley's post-conviction relief application because the application was filed within one year of Alabama v. Shelton, 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002), which announced a watershed rule of criminal procedure that applies retroactively).

Second, if a PCR applicant has newly discovered evidence, they may benefit from a more lenient statute of limitations. Specifically, "[I]f the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction ~~of~~ sentence, the application must be filed under this chapter within one year after the date of actual discovery of 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). This exception is commonly known as "the discovery rule." The Applicant in this case, has shown both of these exceptions to the lower Court, but has been ruled barred by the statute of limitations none-the-less. The Court also barred Applicant's claims as successive. This was incorrect for the following legal reasons.

The PCR Act provides a narrow exception to allow a successive PCR application where the applicant can provide a "sufficient reason" for why the ground was not asserted or was inadequately raised in the original application. S.C. Code Ann. § 17-27-90. There are some exceptions to the general bar against successive petitions. A successive application may be permitted where the Court's refusal to hear the claim would constitute a "gross miscarriage of justice"; Arce v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); where government interference or the reasonable unavailability of the factual basis of the claim impeded Counsel's ability to raise the claim, See McClesky v. Zant, 499 U.S. 467, 111 S.Ct. 1454 (1991), or, where some other circumstances beyond the applicant's control occurred. Id. Petitioner's ground (claim) of actual innocence as previously explained to the PCR and this Court now; should excuse him of all procedural bars, if not for no other "sufficient reason".

Also, the PCR Court found that the Applicant's grounds were grounds that should of or could have been raised on direct appeal or could have been raised on his first PCR application or otherwise, was not suitable for State Habeas Corpus. The Court was incorrect here for the following reasons,

In a proceeding for PCR, a defendant collaterally attacks his convictions) and may raise any claims of constitutional violations relating to his conviction(s). Williams v. Ortiz, 380 S.C. 473, 671 S.E.2d 600 (S.C. 2008). However, the fact that the

South Carolina Legislature enacted a PCR statute did not suspend the right to habeas corpus by substituting the PCR statutes (procedure) as the only remedy available to a state prisoner, Harvey V. South Carolina, 310 F. Supp. 83 (D.C. S.C.). Habeas Corpus remains available as an "extraordinary" constitutional remedy in certain circumstances. Gibson V. State, 495 S.E. 2d 426, 428 (S.C. 1998), Habeas Corpus is available only when other remedies, such as PCR, are inadequate or unavailable, Id. Any Judge of Court may entertain a habeas corpus, S.C. Code, §§ 17-17-30 and 17-17-40. In fact, an appeal from an order made by two Magistrates in habeas corpus proceedings must be to the circuit court, and not directly to the Supreme Court, State V. Duncan, 22 S.C. 87 (S.C. 1884). The South Carolina Supreme Court has granted the writ in only a handful of cases, see, Tucker V. Catoe, 552 S.E. 2d 712, 718 (S.C. 2001). Petition for State Habeas Corpus is appropriate as long as Petition itself supports requested relief, S.C. Code, § 17-17-10; Hunter V. State, 316 S.E. 105, 447 S.E. 2d 203 (S.C. 1994). The inquiry on habeas corpus is limited to the legality of the prisoner's present detention, and the only remedy which can be granted on habeas corpus is release from custody, whether absolute or conditional, McCall V. State, 247 S.C. 15, 145 S.E. 2d 419 (S.C. 1965).

Petitioner has raised two cognizable State Habeas Corpus claims which would require release from custody. Moreover, the two grounds of actual innocence and Ineffective Assistance of Counsel could be addressed together as a ground for relief because: (1) Where government prosecutor failed to produce any evidence of an essential element and key fact that must be proven ^{beyond} a reasonable doubt, then it is not merely insufficient evidence, but it is a miscarriage of justice, U.S. V. Pena-Lora, 225 F.3d 17 (1st Cir. 2000); U.S. V. Spinner, 152 F.3d 950 (D.C. Cir. 1998); Jackson V. Virginia, 443 U.S. 307 (1979); and (2) in rare instances ineffective assistance of Counsel can be a ground for issuance of the habeas writ. A lack of effective of Counsel must be of such nature as to shock the conscience of the Court and make the trial proceedings a farce and mockery of justice in order to suffice as grounds for the issuance of writ of habeas corpus, Welch V. Mag Dougall, 246 S.C. 258, 143 S.E. 2d 455 (S.C. 1965). Mere allegations of mistake of counsel, standing alone, are not grounds for the issuance of a writ of Habeas Corpus. S.C. Code § 17-17-10; Crosby V. State, 241 S.C. 40, 126 S.E. 2d 843 (S.C. 1962). Thus, it is Petitioner's position that "In the Interest of Justice, No American Citizen can be legally convicted unless proven guilty of every essential element of a crime beyond a reasonable doubt, Jackson V. Virginia, 443 U.S. 307 (1979); and Counsel's willingness to stand by and allow the prosecution to convict Petitioner without the prosecution held to prove an essential element they admittedly could not prove at the pre-trial of this case ^{which} created a situation where Petitioner could not raise these issues on direct appeal or in his prior PCR and this

unlawful conviction persist there of are sufficient reasons for Habeas Relief. Petitioner has set forth constitutional claims that meets the standard delineated in Butler v. State, 302 S.C. 466, 397 S.E.2d 87, cert. denied, 498 U.S. 972, 111 S.Ct. 442 (1990). Our grounds do constitute a denial of fundamental fairness shocking to the universal sense of justice, as any American Citizen could find themselves in a similar situation. Gibson, supra; Hunter, supra; Butler, supra.

Consequently, Petitioner has a statutory right to appeal from a decision on a State Habeas Corpus, S.C. Code Ann. (2014), ^{§ 17-17-140} See also, Rule 74, S.C.R.P. and S.C. Code, §§ 14-3-320, 14-3-330. However, Petitioner's appeal from PCR is discretionary with the Supreme Court pursuant to Rule 11.1, S.C.R.P. and Rule 243, S.C.A.C.R. When a PCR application is summarily dismissed as in this case, and a hearing hasn't been held, an appellate court must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant. Pelzer v. State, 378 S.C. 516, 662 S.E.2d 618 (2008); McCoy v. State, 401 S.E.363, 737 S.E.2d 623 (2013). S.C. Code Ann. § 17-27-45; 90

In McCoy, the Supreme Court held where a petitioner alleges facts that establish an exception to either the Statute of Limitations or prohibitions against successive PCR applications and those facts are not conclusively refuted by the record before the PCR Court, a question of fact is raised which can only be resolved by a hearing. Cf. DeLaney v. State, 269 S.C. 555, 556, 238 S.E.2d 679, 679 (1977). Also, In Koon v. State, 372 S.C. 531, 643 S.E.2d 680 (S.C. 2007); the Court held where transcript is missing, a Court may remand to have the record reconstructed, and petitioner is entitled to a reconstruction hearing to establish the existence of issues warranting relief that otherwise be unavailable without full development of the record of proceedings of his original PCR.

With this explanation given, Petitioner has presented facts that the PCR Court's determination was not proper. The PCR Court should have given Petitioner a hearing before dismissing his grounds because of the many unrefuted exceptions and to have reconstruction of the record in order to see just how much the trial Counsel has and still prejudice Petitioner by his intentional avoidance of challenging the State's lack of evidence to the predicate facts necessary to prove Petitioner guilty of the substantive crimes beyond a reasonable doubt. Wherefore, this explanation has been given.

Respectfully Submitted,
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In The Supreme Court
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Certificate Of Service

I, Ernest Perry, #281290, do hereby certify that I have served copies of an "Explanation" pursuant to Rule 243(C), SCACR with a Certificate Of Service in the above-captioned matter upon the below listed parties on the same date.

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THE DEPARTMENT OF CORRECTIONS HAS NEITHER
CELEBRATED NOR REJECTED THIS IDEA. THEREFORE
THE LIAISON OFFICE IS NOT ASSUMING RESPONSIBILITY
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& C. DEPARTMENT OF CORRECTIONS