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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Marlboro County
Thomas Russo, Circuit Court Judge

ALFONSO STATON,

PETITIONER,

V.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

Appellate Case No. 2015-000460

Explanation of Appeal Pursuant to Rule 243(c), SCACR

Pursuant to Rule 243(c), SCACR, Counsel would provide the following explanation concerning the above captioned Post-Conviction Relief (PCR) appeal:

Summary of Argument

While Petitioner sat in prison waiting for the appeal of his first PCR to be decided, Petitioner learned that at the time of his trial his attorney was also working as a part time assistant solicitor in the Fourth Circuit. In fact, unknown to Petitioner trial counsel had been relieved as counsel based the conflict by Judge Smoak only to be ordered back on the case by Judge Cottingham. Under *Holloway v. Arkansas*, this would require an automatic reversal.¹

Two months after his first PCR appeal was dismissed, Petitioner file a motion for a new trial based on after discovered evidence pursuant to Rule 29(b), SCRCrimP.

¹ In *Holloway*, the U.S. Supreme Court found that when Counsel timely objects to a potential conflict of interest the defendant need not show prejudice to warrant reversal. *Holloway v. Arkansas*, 435 U.S. 475, 490, 98 S.Ct. 1173, 1181-82 (1978).

Petitioner's Court appointed 29(b) counsel then proceeded to: submit a substitute motion that waived one of Petitioner's issues; failed to advise the court of the applicable statute of limitations² on a Rule 29(b) in 2009; failed to argue that *Spann*³ was inapposite; and failed to file a timely appeal. As a result of 29(b) Counsel's performance, Petitioner has been barred from litigating his meritorious conflict of interest claim.

Applicant has filed a second PCR as a remedy to 29(b) Counsel's ineffectiveness, but with only a limited hearing the PCR court summarily⁴ dismissed his PCR.

BACKGROUND

Allegations and Investigation

In November of 1994, the Decedent was found on partially submerged on Burnt Factory Road in Marlboro County. Her face hands and legs were bound with duct tape. According to the autopsy she had either been suffocated with duct tape or drowned. On December 1, 1994, Johnny "Ringo" Pearson (Ringo) gave a statement to Jerry Starnes of the Marlboro County Sheriff's Department and Tommy Frazier of SLED. In that Statement Ringo claimed to have duct taped the Decedent while having "kinky" sex and then accidentally pushed her off a bridge. Ringo was arrested however, was not declare competent to stand trial for over ten years.

Investigators believed that the mentally incompetent Ringo was not acting alone. Although there was no physical evidence linking the killing to any other person, Marlboro

² In 2009, when the 29(b) was filed, the rule provided that the motion must be made in a reasonable amount of time. While his motion was pending this was amended to "within one year."

³ *State v. Spann*, 334 S.C. 618, 513 S.E.2d 98 (1999).

⁴ During the hearing in front of the PCR Court, the argument before the PCR court centered on whether an evidentiary hearing should be granted. In the order the PCR Court found that the Application was time barred and successive, but also reached the merits of Petitioner's argument. Petitioner would assert that the finding on the merits was dicta, but in the event that the Court finds this to be a ruling on the merits, Petitioner would argue that he was denied his right to due process in litigating his claims.

County Law Enforcement with the assistance of Chesterfield County Law Enforcement and SLED began looking at people close to Ringo.

About a week after Ringo was arrested, Petitioner was overheard stating that Ringo had duct taped the decedent but that Ring did not intend on killing the decedent he only planned on raping her. This was fairly consistent with Ringo's story. Although Ringo claimed that the sex was consensual.

More than eight people were charged with the murder and the State intended on seeking the death penalty against several of the codefendants.

Although there were many people were suspected of participating in killing, law enforcement had little evidence of anyone other than Ringo's involvement until March 2, 1995 when Danny Davis gave a statement. On March 2, 1995, Davis claims that while he was at a cook out some time before Thanksgiving of 1994, he saw the Decedent's body bound with duct tape. Danny told investigators the following:

Bobby Ransom told me that they had got her from her house in Bennttsville, and took her riding around, and also took her money and food stamps to buy crack with. Ricky Stuckey said that they put tape over her mouth and she suffocated to death.

The March 2, 1995 statement names Robert Graham, Ricky Stuckey, Joe Stuckey, an unnamed person who was related to Rickey Stuckey, Leroy Staton (Petitioner's Uncle), and Danny's lifelong friend Robert Ransom. However, this statement never mentions Petitioner. Danny Davis was arrested and charged with murder.

Eight days later, Investigator's armed with Danny's Statement confronted Danny's lifelong friend Robert "Bobby" Ransom. Ransom had already been implicated as a principal in the kidnapping, rape, and murder of Decedent. However, Ransom told a different story than the

one relayed to investigators by Danny on March 2nd. Ransom mitigated his role as someone merely present for the rape and murder.

Investigator's then took Ransom to confront his lifelong friend Danny at the Chesterfield County Jail. Ransom talked to Danny about what happened. Danny would later admit that he did not remember everything but Ransom told him what happened.

After speaking with Ransom, Danny gave a different statement that was in line with what he had been told by Ransom. Danny's March 10, 1995 statement mentions three other people that were previously not mentioned: Jeffrey Walls, Martin McIntosh and Petitioner.

Based on Ransom's story and the new version of Danny's statement, the State's theory of the case is that one or more of the co-defendants kidnapped the decedent. While being held, the State alleges that she was sexually assaulted.⁵ At some point, she either died from suffocation or from drowning. Several days after being kidnapped, the State alleges that eight of the codefendants piled into a single car along with the decedent and drove her to a bridge on burnt factory road.

Trial

Petitioner was indicted by the Marlboro County Grand Jury for murder, kidnapping, criminal sexual conduct in the first degree and criminal conspiracy. In March 1997, Petitioner was called to trial before the Honorable Edward B. Cottingham and a jury. For his trial Petitioner was represented by William B. Rogers. The State was represented by Ralph Wilson. Petitioner was tried jointly with Leroy Staton, Ricky Stuckey, Jeffery Walls, Robert Graham and Martin McIntosh.⁶ Ringo was not tried with Petitioner⁷.

⁵ Petitioner was acquitted of the sexual assault.

⁶ In 2004 Martin McIntosh's case was reversed. In 2007, he plead guilty to misprisonment of a felony and is currently not incarcerated.

This Court has made the following factual statement concerning the evidence presented at trial:

State's case against [the codefendants] consisted primarily of the testimony from co-defendants, Danny Davis and Bobby Ransom.

Davis and Ransom testified they observed Victim tied up and lying on a couch or bed during a cookout and party at two co-defendants' mobile home. Both accompanied several co-defendants on a trip to move Victim from the mobile home to an abandoned house. Ransom testified he was smoking marijuana and drinking creek liquor (a type of "white lightning" or moonshine) when several co-defendants arrived at his house the next night and asked him to join them on a trip back to the abandoned house. When he saw his visitors approaching, Ransom drank the remaining half of a pint of creek liquor he had been drinking so they would not ask him for any.

Davis and Ransom testified Petitioner and another co-defendant were waiting when they arrived at an abandoned house where Victim had been left the previous night. Several unidentified co-defendants carried Victim, still bound by tape, to the car and put her in the back seat beside Ransom. Ransom testified he began "freaking out" when the "liquor hit [him]" and he begged them to stop Victim from "crying all over [him]," although she really was not. The eight co-defendants - including Davis, Ransom, and [McIntosh]- rode in a single car to a bridge, where unidentified co-defendants placed Victim's body in the pond.

Davis and Ransom were cross-examined at length about their extensive history of alcohol and substance abuse. Davis testified he suffered brain damage from a traumatic head injury 10 years earlier, as well as anxiety, sleeplessness, and depression. He was a victim of child abuse and had extensively abused alcohol and illegal drugs for years. He testified he drank heavily every day during November 1994. His alcohol use caused him to forget events and confuse things. During his two-year incarceration preceding the trial, Davis testified he saw nonexistent shadows, heard "a lot of [nonexistent] voices," and talked with imaginary friends. He was taking anti-psychotic and anti-depressant medications during his incarceration and the trial.

Ransom testified he had been paralyzed from the chest down since 1983. In November 1994, he had been on a drinking binge for some three years and eight or nine months. He often blacked out and suffered from memory loss. He had been hospitalized at psychiatric facilities three times before 1996 for abuse of alcohol and numerous drugs, including Valium, Xanax, sleeping

⁷ The State continued to seek the death penalty against Ringo. Ringo was declared incompetent until approximately 2007 at which time death was taken off the table and Ringo plead to 33 years. He was released in 2013.

pills, amphetamines, powder cocaine, crack cocaine, acid, marijuana, and "huffing" gasoline. He drank two quarts to a gallon of alcohol each week, including creek liquor.

Davis and Ransom testified on cross-examination they were good friends who grew up together. Davis often visited the reclusive Ransom at his house in 1994, and they saw one another frequently during a four-month period after the crime until their arrest. Police in March 1995 brought Ransom from another jail to see Davis in jail so Ransom could "confront" Davis about the crimes. The two confessed to police the same afternoon at the same location, and, for the first time, Ransom implicated Petitioner.

At his guilty plea prior to [Ppetitioner's] trial, Davis stated, "a lot of this stuff I can't quite remember, but my co-defendant [Ransom] has - he's told me everything." While insisting he was trying to tell the truth at [Ppetitioner's] trial, Davis testified he had changed his story "a lot of times," although not every time he talked to police during fifteen to twenty interviews. He "told [police] what they wanted to hear." In fact, he testified he no longer had an independent recollection of even being at the bridge that night, but based his trial testimony on some other source.

State v. McIntosh, 358 S.C. 432, 595 S.E.2d 484 (2004).

Ppetitioner was convicted of murder, kidnapping, and conspiracy. Ppetitioner was acquitted of criminal sexual conduct. Ppetitioner was sentenced to life in prison. Ppetitioner appealed. Ppetitioner's codefendants were also convicted of murder.

Danny Davis and Robert Ransom were sentenced to 15 years for voluntary manslaughter. Martin McIntosh would have his conviction reversed and plead to 15 years under *Alford*.

Post-Trial History

For his direct appeal, Ppetitioner was represented by Joey Savitz. The State was represented by Creighton Waters. The South Carolina Court of Appeals affirmed in an unpublished opinion. Ppetitioner filed a Petition for Writ of Certiorari in the Supreme Court of South Carolina. Certiorari was denied on November 21, 2002.

On July 10, 2003, Ppetitioner filed an application for Post-Conviction Relief (PCR). For his PCR, Ppetitioner was represented by Candice Lively and the State was represented by Karen

Ratigan. An evidentiary hearing was convened on January 11, 2005, before the Honorable John Milling. On September 16, 2005, Petitioner's PCR was dismissed.

Petitioner appealed the denial of his PCR application. For the appeal of his PCR Petitioner was represented by Wanda Carter, and the State was represented by Karen Ratigan. The Supreme Court of South Carolina granted certiorari on two issues. While his PCR appeal was pending Petitioner wrote Will Rogers to get several documents in his file. Rogers sent him a memorandum stating that the he had been relieved of counsel by Judge Smoak but then placed back on the case by Judge Cottingham. In this memorandum, is states the following:

[Will Rogers] was informed that Judge Smoak wanted me to inform all of [his] criminal clients that [he] would be unable to represent them because of a conflict of interest. [He] the then notified [his] clients of [that] decision.

To this day, Will Rogers in uncertain whether he ever informed his client of the nature of the conflict.

While his PCR appeal was pending, Ringo had plead. On November 2, 2007, Ringo gave an affidavit stating that Petitioner was not involved in the murder. Although Petitioner had two new strong pieces of evidence, he did not believe he could act on them because Rule 29(b), SCRCrimP specifically prevented him filing an after discovered evidence motion while an appeal was pending. Furthermore, Petitioner believed that waiting untile after his PCR appeal would be considered within a "reasonable time."⁸

On March 6, 2009, the South Carolina Supreme Court dismissed Petitioner's PCR appeal as improvidently granted.

On May 6, 2009, pursuant to Rule 29(b), SCRCrimP, Petitioner filed a Motion for a New Trial Based on After-Discovered Evidence (hereinafter 29(b)). Petitioner alleged both the

⁸ At the time, Rule 29(b), SCRCrimP required filing within a reasonable time. In 2011, this was amended to one year.

conflict of interest and Ringo's statement. For this hearing, Petitioner was represented by the Fourth Circuit Public Defender Office. Without consulting Petitioner, Emily Crayton amended the 29(b) to only allege the conflict of interest.

The 29(b) was heard in October 2011 before the Honorable Howard P. King. Will Grove represented Petitioner at the hearing. The 29(b) was denied by written order dated October 19, 2011. This order was mailed to Petitioner on January 4, 2012. Petitioner filed a motion to reconsider. On January 15, 2012, Judge King denied the motion to reconsider.

Petitioner filed a notice of appeal on February 13, 2012. Petitioner's claim was appeal was dismissed by order dated March 27, 2012. Petitioner filed a petition to reinstate the appeal on April 3, 2012. This motion was not ruled on for five months. On April 15, 2013, Petitioner asked the Court of Appeal to appoint counsel. The record does not indicate that appellate counsel was ever appointed.

On August 28, 2012, Petitioner filed a federal habeas petition. Pursuant to *Rhines*,⁹ The Honorable Kaymani West has recommended that the habeas be held in abeyance pending the outcome of Petitioner's state claims. In Judge West's recommendation she found the following:

[T]he undersigned is of the opinion that [Petitioner] has satisfied the good-cause prong of *Rhines*. The letter from [Petitioner's] appointed Rule 29(b) counsel regarding the potential appeal of the denial of the Rule 29(b) Motion is not a model of clarity. [Petitioner's] confusion on whether an appeal regarding the Rule 29(b) Motion was timely is "reasonable" and well-indicated by his filings and letters. His "protective" filing of this federal petition in August 2012, while his appeal was pending, was appropriate.

On September 7, 2012, South Carolina Court of Appeal denied Petitioner's Petition to Reinstate the Appeal. Two weeks later, on September 21, 2012, Petitioner filed a Petition for Writ of Certiorari to this Court. In that petition, Petitioner again requests that Counsel be

⁹ *Rhines v. Weber*, 544 U.S. 269 (2005).

appointed. The State filed a return on October 30, 2012. This Court denied Petitioner's Petition for Writ of Certiorari.

On April 26, 2013, Petitioner filed the current PCR action alleging that 29(b) Counsel was ineffective. Petitioner's PCR also alleges that 29(b) Counsel was ineffective in failing to file an appeal of the 29(b) and request a belated 29(b) appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) and *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

On October 22, 2013, the Honorable J. Michael Baxley issued a Conditional Order of Dismissal. Petitioner responded to the Conditional Order of Dismissal and Judge Baxley directed the parties to schedule a hearing on Applicant's motion to amend the pleadings and motion to set aside the conditional order of dismissal.

The hearing on the motion to amend the pleadings and motion to set aside the conditional order of dismissal was held on July 24, 2014 before the Honorable Thomas Russo. At the motion hearing, the Court allowed evidence on the proposed amendments but did not allow Petitioner to present testimony on the merits of his claim.

In an order dated December 18, 2014, Petitioner the Court found the following:

[T]he Court finds [Petitioner] has not shown a sufficient reason why the application was not untimely, successive and failed to state a cognizable claim. Applicant has not established any constitutional violations or deprivations that would require this Court to Grant his application, not has he presented sufficient reasons why Judge Baxley's conditional order should not become final. Therefore, for the reasons set forth above and in the Conditional Order of Dismissal, the Court finds that this application for post-conviction relief must be denied and dismissed with prejudice.

This appeal follows.

DISCUSSION

- I. The second PCR was not successive.

As an initial matter, Petitioner argues that the factual basis for this PCR did not arise until after his first PCR and therefore there is a sufficient reason for why Petitioner has filed this second PCR. *See Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991) (“[S.C. Code § 17-27-90] forbids a successive PCR application unless an applicant can point to a ‘sufficient reason’ why the new grounds for relief he asserts were not raised, or were not raised properly”). S.C. Code § 17-27-90 allows an Petitioner to file a subsequent PCR application when the factual basis for the claim did not exist or was unknown at the time of the application. *See McCoy v. State*, 401 S.C. 363, 370, 737 S.E.2d 623, 627 (2013). Clearly in 2003—when his first PCR was filed – Petitioner would not have been able to raise his 29(b) counsel’s deficient performance that occurred in 2011 and 2012. Therefore this is not a successive application.

Although treated as one allegation by the State, Petitioner argues that the failure to file an appeal should be examined separately from the other ineffective assistance of counsel (IAC) issues.

II. The Second PCR was not untimely filed.

Although not filed within a year of the dismissal of the 29(b), Petitioner’s PCR should be equitably tolled. *See Gary v. State*, 347 S.C. 627, 557 S.E.2d 662 (2001).

Based on the appeal of his Rule 29(b) it is reasonable that Petitioner was uncertain whether he had a properly filed appeal. The District of South Carolina has already found that Petitioner was “reasonably confused” concerning the whether his appeal was 29(b) appeal was properly filed. This confusion was compounded by 29(b) Counsel’s January 24, 2012 letter which seems to state that Petitioner still had a Rule 29(b) pending. Based on the appellate history described above Petitioner asserts that he is entitled to a hearing on equitable tolling

III. Ineffective assistance of 29(b) Counsel is a cognizable claim for PCR.

Relevant Facts

Judge King ruled on the 29(b) at the hearing however planned on signing a written order. On October 19, 2011, Judge King issued a written order. This order was served on Petitioner's counsel of record, Will Grove. However, Petitioner was not informed of this order when it was signed. On December 14, 2013 Petitioner wrote Judge King concerning the order.

On January 4, 2012, Petitioner received Judge King's order. Upon receiving the order Petitioner filed a motion to reconsider and wrote Will Grove asking about an appeal. On January 15, 2012, Judge King Denied to motion to reconsider in an order.

Petitioner received the order denying the motion to reconsider the denial of for a new trial on after discovered evidence on January 24, 2013. That same day Will Grove, his appointed attorney for this motion, sent him a letter stating the following:

I did not file an appeal of the judge's ruling on your motion to reopen the case because of a conflict. However, the judge did not rule on your issue of new evidence, which was included towards the back of the motion. This is the issue I'd like to present inform of a judge for consideration

Once I have it scheduled, I will let you know if that motion fails then an appeal of that motion can be filed.

Uncertain whether 29(b) Counsel was correct about his appeal, Petitioner filed a notice of appeal on February 13, 2012. Petitioner's claim was appeal was dismissed by order dated March 27, 2012. Petitioner filed a petition to reinstate the appeal on April 3, 2012. This motion was not ruled on for five months. On April 15, 2013, Petitioner asked the Court of Appeal to appoint counsel. The record does not indicate that appellate counsel was ever appointed.

On September 7, 2012, South Carolina Court of Appeal denied Petitioner's Petition to Reinstate the Appeal. Two weeks later, on September 21, 2012, Petitioner filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. In that petition, Petitioner again requests

that Counsel be appointed. The State filed a return on October 30, 2012. As of May 1, 2013, this petition is still pending review at the South Carolina Supreme Court.

Fearing that the Supreme Court would find that his Appeal was not timely filed, Petitioner filed the present action on April 26, 2013.

Petitioner is essentially raising a claim for a belated appeal under *Austin*.

The State has argued that an ineffective assistance of counsel claim cannot be properly brought against 29(b) Counsel because Petitioner had no right to Counsel at a 29(b) hearing. Regardless of whether a defendant has a Sixth Amendment right to Counsel at a Rule 29(b) hearing, Petitioner does have a Due Process right to appellate review of his 29(b); therefore Petitioner's court appointed counsel has a duty to ensure that file an appeal when one is necessary. A similar situation arises with some regularity in post-conviction relief cases where appointed counsel fails to perfect an appeal. *See Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). *Austin* establishes a cognizable PCR claim for ineffective assistance of counsel when counsel fails to seek appellate review when the client had a right to assistance of Appellate Counsel. *See id.* 305 S.C. at 453, 409 S.E.2d at 396 ("Because petitioner is entitled to the assistance of appellate counsel on PCR, and because we must craft a remedy to correct the unfairness which occurred, we find his allegation that counsel failed to seek review in this case sufficiently states a claim of ineffective assistance of counsel."). Petitioner is asserting an *Austin* claim in the context of his 29(b) case.¹⁰

Petitioner would have been entitled to appointed counsel to perfect his 29(b) appeal.

¹⁰ The State has raised the statute of limitations. Petitioner would point out that the statute of limitations is inapplicable to *Austin* claims. *See Odom v. State*, 337 S.C. 256, 263, 523 S.E.2d 753, 757 (1999) ("*Austin* appeals are considered 'belated appeals' and are used to rectify unjust procedural defects such as when an attorney does not file a timely appeal.>").

Similarly to the denial of a PCR, A defendant has the right to appointed counsel for the denial of a 29(b). Petitioner had the right to appeal the denial of his 29(b). *See* S.C. Code § 14-3-330 (2)(b) (recognizing appellate jurisdiction for the denial of a motion for a new trial). Since he had been declared indigent and appointed counsel for his 29(b) hearing, Petitioner would have been appointed counsel for his 29(b) appeal. *See* Rule 602 (e)(3) (noting that when counsel is appointed and files a notice of appeal counsel is immediately relieved and Appellate Defense is appointed), SCACR; *see also*, S.C. Code § 17-3-360 (C) (Noting the duties of appellate defense to represent persons “who files a Notice of Intention to Appeal or Desires to appeal a conviction in a trial court, or decision of a proceeding in civil commitment or other or other involuntary placement in a state, county or municipal facility”). The Fourth Circuit Public Defender was appointed to represent Petitioner for his 29(b). Therefore, had they properly filed a notice of appeal, Petitioner would have been entitled to Counsel to assist with the 29(b) appeal.

Any argument, that Petitioner would not have been entitled to appointed counsel for the purposes of appealing his 29(b) is indefensible. With the exception of one¹¹ municipal court case, all¹² 29(b) appeals in the past 20 years have been handled by counsel. *See e.g.*, *State v. Koon*, (2013-UP-216) (Mr. Koon was represented by Appellate Defender, Robert Pachak); *State v. Harris*, 391 S.C. 539, 706 S.E.2d 526 (2011) (Mr. Harris was represented by Appellate Defender Celia Robinson); *State v. Bennett*, (2011-UP-208) (Mr. Bennett was represented by Appellate Defender Elizabeth Franklin-Best); *State v. Watrus*, (2010-UP-562) (Mr. Watrus was represented by Appellate Defender Celia Robinson); *State v. Kromah*, (2009-UP-322) (Ms.

¹¹ *City of Columbia v. Assa 'ad-Faltas*, (2007-UP-193). However, Petitioner submits that Dr. Faltas's case presents and anomaly. Dr. Faltas is a medical doctor who has a long history of *pro se* representation in both State and Federal Court. It is also important to note that Appellate Defense generally will not accept magistrate and municipal appeals. *See State v. Rau*, 320 S.C. 385, 465 S.E.2d 370 (Ct. App. 1995).

¹² This is based upon Counsel's search of Lexis Advance.

Kromah was represented by Tara Shurling); *State v. Miller*, (2009-UP-236) (Miller was represented by Appellate Defender Elizabeth Franklin-Best); *State v. Jarrell*, (2009-UP-074) (Ms. Jarrell was represented by Appellate Defender Katherine Hudgins); *State v. Rollins*, (2009-UP-264); *State v. Mercer*, 381 S.C. 149, 672 S.E.2d 556 (2009) (Mr. Mercer was represented by Appellate Defender Robert Dudek and other appointed counsel); *State v. Franklin*, 341 S.C. 555, 534 S.E.2d 716 (2000) (Mr. Franklin was represented by Dan Stacey of Appellate Defense); *State v. Needs*, 333 S.C. 134; 508 S.E.2d 857 (1999) (Mr. Needs was represented by Appellate Defender Bob Dudek and Joseph Smith Deal); *State v. Needs*, 334 S.C. 618, 513 S.E.2d 98 (1999) (Mr. Spann was represented by John Blume and Diana Holt); *State v. Taylor*, 333 S.C. 159, 508 S.E.2d 870 (1998) (Mr. Taylor was represented by Appellate Defender Robert Dudek); *State v. Clinkscales*, 318 S.C. 513, 458 S.E.2d 548 (1995) (Mr. Clinkscales is represented by Appellate Defender Anne Pearce)¹³; *State v. Freeman*, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995) (Mr. Freeman was represented by Ed Clement and others); *State v. Prince*, 316 S.C. 57, 447 S.E.2d 177 (1993) (Mr. Prince was represented by Ray Coit Yarborough and others). It is also important to note that nearly all of these attorneys were appointed counsel. Clearly, Petitioner would have been appointed counsel had the notice of appeal been properly filed.

Under *Austin*, Petitioner has raised a cognizable claim for PCR.

“*Austin* appeals are considered “belated appeals and are used to rectify unjust procedural defects, such as when an attorney does not file a timely appeal.” *Odom v. State*, 337 S.C. at 263, 523, S.E.2d at 757. The State’s primary argument is that Petitioner had no right to the effective assistance of 29(b) Counsel. Similarly, there is no Sixth Amendment right to effective assistance of PCR counsel. *See Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990 (1987). However,

¹³ It is important to note that even in the case the State relies heavily on in their motion to dismiss, 29(b) Counsel was appointed for the purposes of appeal.

South Carolina has recognized that appointed PCR counsel has a duty to file an appeal upon an Petitioner's request. *Austin*, 305 S.C. 453, 409 S.E.2d 395.

In *Austin*, the Supreme Court held, “[b]ecause petitioner is entitled to the assistance of appellate counsel on PCR, and because we must craft a remedy to correct the unfairness which occurred, we find his allegation that (PCR Counsel) failed to seek review in this case sufficiently states a claim of ineffective assistance of counsel.” *Id.* 305 S.C. at 453, 409 S.E.2d at 396. The holding in *Austin* hinges not upon a Sixth Amendment right to Counsel, but rather on the right to assistance of appellate counsel. *See Finlay supra*. Although *Clinkscales* held that 29(b) does not implicate a Sixth Amendment right to counsel; under *Austin*, Petitioner can alleged that he was denied the assistance of counsel for the appellate review of his 29(b), based upon his appointed 29(b) Counsel's deficient performance.

In sum, Petitioner lost his right to appeal the denial of his 29(b) claim based on his appointed counsel's grossly deficient performance. As a result, Petitioner has lost his ability to proceed with a meritorious claim. Therefore, this Court should grant his *Austin* appeal to “rectify [this] unjust procedural defect.” *See Odom, supra*.

IV. Petitioner's other claim for ineffective assistance of 29(b) Counsel are cognizable claims for PCR.

Relevant Facts

While awaiting his 29(b) hearing, the court appointed the Fourth Circuit Public Defender's Office to represent him. Emily Crayton was assigned to the case. For an unknown reason, Crayton filed an amended 29(b) that waived Petitioner's actual innocence issue. This was done without consulting Petitioner.

Petitioner's hearing took place in October 2011. For the hearing he was represented by Will Grove. By that time Rule 29(b) was amended to require filing within one year of actual

discovery. Petitioner has stated¹⁴ that Will did not reference the change in the rule at the hearing. Therefore, it is possible that Judge King applied the incorrect statute of limitation in ruling on that his 29(b) was not timely filed.

Moreover, Judge King found that the conflict was “placed on the record and [Petitioner] was charged with the knowledge of these events.” Petitioner has stated that Will Grove did not challenge Judge King’s ruling.

Argument

The State relies heavily on *Clinkscales*, which held that a defendant is not entitled to court appointed counsel for filing a 29(b). *Clinkscales* noted that a post-trial motion for a new trial based on after discovered evidence is not considered a critical stage in the criminal prosecution, and therefore the Sixth Amendment right to counsel is not triggered. However, once counsel is appointed, counsel must diligently and competently present the case.

Petitioner’s case is distinguishable from *Clinkscales*. In *Clinkscales* the circuit court refused to appoint counsel to a 29(b). Petitioner was appointed counsel by the circuit court. Unfortunately, the counsel rendered grossly deficient performance. Not only did 29(b) counsel waive his actual innocence issue, 29(b) counsel diminished¹⁵ any chance of federal habeas review in his case.

South Carolina have crafted remedies in PCR to allow an Petitioner “a complete ‘bite at the apple.’” *See Odum*, 337 S.C. at 262, 523 S.E.2d at 753. Through no fault of his own, Petitioner never received a “complete” bite at the apple. He was unaware of his Counsel’s severe conflict of interest prior to his first PCR. Additionally, Ringo’s exculpatory statement was unavailable prior to his PCR. 29(b) Counsel’s deficient performance is responsible for the deny

¹⁴ A transcript of this hearing has not yet been ordered.

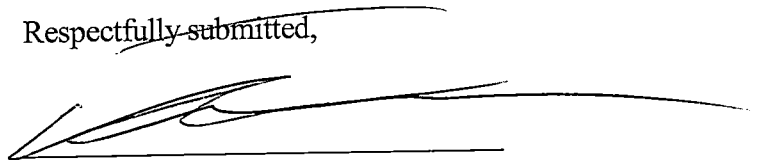
¹⁵ Based on 29(b) court’s finding that it was untimely, the State is arguing that the statute of limitations in his Federal Habeas case is untimely, as a result it is the State’s contention that Petitioner is barred from federal review.

Petitioner a “complete bite” at the apple. Fundamental fairness requires that there be some remedy to this in justice.

CONCLUSION

Based on the foregoing arguments Petitioner respectfully requests that this case should be addressed by this Court.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA,

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Appellate Case No. 2015-000460

CERTIFICATE OF SERVICE

I certify that on this date I served the Explanation of Appeal, on opposing counsel at the following address:

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Tristan M. Shaffer

May 27, 2015