

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT)	FOURTEENTH JUDICIAL CIRCUIT
)	
Nathaniel Johnson Jr.#211574,)	2013-CP-07-1650
Applicant,)	
)	
v.)	Motion For Evidentiary Hearing
)	In Response to Proposed
State of South Carolina,)	Conditional Order of Dismissal
Respondent,)	
<hr/>)	

2015 JAN 14 PM 2:24
 CLERK OF COURT
 BEAUFORT COUNTY S.C.

Comes now the Applicant to appear before this Court by way of an pro-se PCR application filed on June 25th.,2013. Applicant is hereby ordered to provide this Court with specific reasons why the application should not be dismissed in its entirety. In response to the Respondent's Motion to Dismiss. Applicant files this Motion for Evidentiary Hearing to resolve any issues that were not raised or heard in previous application. But, for the PCR counsel's ineffective performance the results would have been different. However, the statute of limitations defense does not apply in this case. See- Whitehead v. State, 352, S.C. 215, 574, S.E. 2d. 200 (2002).

The Applicant hereby responds to the Proposed Conditional Order of Dismissal. In light of my defense the Applicant is ordered to show sufficient reasons why this Court should not summarily dismiss Applicant's current PCR application.

Respondent's alleges that the application is successive and untimely to his previous PCR application. However, the Applicant is claiming ineffective assistance against his PCR counsel Timothy M. Wogan, Esquire. Therefore, it was impossible for these issues or grounds to^{be} heard or raised in the first PCR application. See- Aice v. State, 305, S.C. 448, 450, 409, S.E. 2d. 392, 394, (1991). Which permits an Applicant to file an successive PCR application. According to S.C. Code Ann. §17-27-~~80~~ by this code, the counsel for the Applicant "must" make Motion to alter or amend the Judgment pursuant to Rule 59(e) SCRPC.

Counsel for the Applicant failed to do so, and thereby held liable for an claim of ineffective assistance of counsel. But, for the deficient performance of PCR counsel the results would have been different. See- Dennison v. State, 371, S.C. 221, 639, S.E. 2d. 35, (2006), It is appointed counsel's duty in PCR matters to serve and file the notice of appeal.

Respondent's stated that the Applicant's current PCR application should be summarily dismissed for failure to comply with the Uniform Post Conviction Procedure Act. Applicant denies such allegations to the fact of filing application more than three years after the statutory filing period expired.

The remittur was issued on December 30th., 2008. Applicant filed his first PCR application 2009-CP-07-1050, an evidentiary hearing was convened and the Applicant was represented by Timothy M. Wogan, Esquire. Applicant's appeal process of the one year tolled started after October 17th., 2011. Order by the Honorable D. Craig Brown, denied and dismissed with prejudice. Applicant proceeded with the assistance of Robert M. Pachak an assistant Appellate Defender to Petition for Writ of Certiorari to the S.C. Supreme Court and the appeal was perfected.

Applicant received an final judgment from the S.C. Supreme Court and then proceeded to pursue an Federal Habeas Corpus Petition 1:13-1794, on June 21st., 2013. Applicant met the requirements of filing before the deadline or statute of limitations.

Applicant filed an second PCR application for the purpose of amending the application with the previous application. Based solely on the grounds of ineffective assistance of counsels. This claim is against all representation appointed by the Courts. To include Trial counsel, PCR counsel, and Appellate counsel's.

In Pruet v. State, 1992, After a PCR judgment is filed the PCR counsel has an obligation to review the judgment and if the order does not set forth required findings and reasons for those findings Code 1976 17-27-80 the counsel "must" file an Motion to alter or amend Rule 59(e) to amend judgment. Rules of Civil Procedures 52(a), 59(e), Const. Amend.#6.

Under Martinez v. Ryan, and Aice v. State, the Applicant, may have established sufficient reasons why the Applicant's second PCR application should be amended and to give the State Courts an full opportunity to resolve any probable constitutional violations or issues by invoking the one complete round to fairly be heard and to establish, and to satisfy, the exhaustion doctrine and to present claims to either the Courts of Appeals, or the S.C. Supreme Court.

In Austin v. State, the Courts explained that every PCR Applicant is entitled to a full adjudication on the merits of the PCR application or the one bite of the apple, which is to include the right to appeal the judgment of denials and the right to effective assistance of counsel.

Applicant's first PCR hearing the Honorable D. Craig Brown decided to dismiss the issues of Prosecutorial Misconduct and the Violations of Due Process claim which are valid and have merit. But, Applicant did not file those claim or grounds under the umbrella of the ineffective assistance of counsel, they were denied and dismissed with prejudice. Applicant requested for the PCR counsel to alter or amend the application to preserve issues for review. Counsel stated that at this point his job was done. Applicant was contact~~d~~by Appellate counsel and he stated that PCR counsel did not file the Rule 59(e) Motion. Robert M. Pachak, also stated that he have never seen anyone win their PCR by filing an Rule 59(e) Motion. Applicant has kept an copy of that letter from counsel as proof in writing.

After filing the Federal Habeas Corpus Applicant claimed constitutional violations of the fifth, sixth, and fourteenth amendment to the U.S. Constitution. All Court appointed counsel's violated the S.C. Appellate Court Rules #407 S.C. Rules of Professional Conduct of Lawyers Responsibilities. For the lack of effective assistance of counsel, Applicant was faced with issues being abandoned, defaulted, and considered waived. Applicant's defense is that his concerns about the issues, *one must* have *e* knowingly, intelligently, or voluntarily waived their rights. The request for an new trial is based upon After-~~ly~~ Discovered Evidence in Hayden v. State, 278 S.C. 610 611-12 299 S.E. 2d. 854, 855, (1983).

But, for the deficient ineffectiveness of counsels, Applicant would not be in default. In *Austin v. State*, 305, S.C. 453, 409, S.E. 2d. 395 (1991). *Austin* recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. In *Aice v. State*, S.C. 409, S.E. 2d. 392, (1991), Applicant should not be barred from filing a second PCR application to include additional grounds or Newly Discovered Evidence for Court review. The S.C. Supreme Court Rules 50(5) and 71.1(d), makes it mandatory that PCR counsels "must" make sure that all grounds or issues in the PCR application be raised during the PCR proceeding.

After filing the PCR application, usually the Courts will appoint counsel to represent the Applicant. Thereafter, the Applicant cannot file any further pleadings or amend their application while represented by counsel. Pleadings, Motions, and etc. "must" be made by counsels. Failure to do so are grounds for an claim of ineffective assistance of counsel. Applicant's are being subjected to issues of abuse of discretion, discrimination, and their constitutional rights being violated, and faced with discredit.

Applicant filed his Habeas Corpus application and the Respondent's alleged that technically, the Applicant has exhausted his State remedies. Later, stated that however, the Applicant did not properly exhausted his State remedies and as a result the Applicant was procedurally barred from an Federal Habeas Corpus Petition for review.

Finally, a successive PCR application may be permitted where the Courts refusal to hear the claims, it would constitute a gross miscarriage of justice, where the government interference or the reasonable unavailability of the factual basis of the claim impeded counsel's ability to raise the issues or where some other circumstances were beyond the Applicant's control occurred. This shows the sufficiency of reasons why the Applicant's second PCR application should not be dismissed. Applicant rights to appeal was not waived knowingly, intelligently nor willingly. In *Anderson v. State*, 354, S.C. 431, 581, S.E. 2d. 834, (2003). When the claim of ineffective assistance of counsel is based upon a failure to raise viable issues, the Court "must" examine the record to determine whether Appellate counsel failed to present significant and obvious issues on appeal.

Newly discovered evidence defined by S.C. Code 17-27-45, and should invariably qualify as a sufficient reason for permitting a successive PCR application. Trial counsel was ineffective for failing to present a defense in challenging the DNA evidence. Ineffective for allowing and not objecting to the prosecutorial misconduct, and failing to preserve or raise issues on direct review. DNA testing of the semen taken from victim was reasonably necessary to support an procedurally barred claim of ineffective assistance of counsel. Based upon Newly discovered evidence, demonstrating factual innocence in proceedings under 28 U.S.C. § 2254, where Applicant had made an claim of ineffective assistance of counsel that was denied and dismissed with prejudice.

DNA testing is necessary in all sexual assault cases because the testing could demonstrate either guilt or innocence, See- Cherri v. Braxton, (2001 ED VA) 131 F. Supp. 2d. 756 App. PCR counsel was ineffective for failing to seek DNA testing in light of Applicant's defense. Counsel also did not challenge the chain of custody issue that was presented in the initial PCR hearing.

Newly discovered evidence defined by "Due Diligence", under Rule 60(b) (2) (3), are rules governing relief from judgment. It also allow the Courts to grant a new trial only if the newly discovered evidence could not have been discovered by due diligence prior to trial. Due Diligence is reasonably expected from and ordinarily excercised by a person who seeks to satisfy a legal requirement or to discharge an obligation. It also seeks not to what the litigant actually discovered, but, what he or she could have discovered. Applicant also asserts that his appointed counsels were ineffective for allowing the Courts to deny the Applicant the right to be heard. Due Process of law requires that a person "shall" have a reasonable opportunity to be heard before a legally appointed and qualified impartial tribunal, before any binding decree, orders, or judgments can be made affecting his or her rights to life, liberty or property,

In S.C. App. 1993, For Good Cause Shown: as practical matters, factors, of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation or other misconduct of adverse party are relevant both under rule providing for relief from judgment and under Rule 55(c), 60(b) (2), (3). Pursuant to which a default may be set aside "For good cause shown". In New Hampshire Inc. Co. v. Bey Corp, 435, S.E. 2d. 377,312, S.C. 47 App. (1993).

In conclusion to the ineffectiveness of all Court appointed counsels, starting from pretrial and throughout all stages of the Applicant's appeals, there was an domino affect that followed Applicant's trial counsel that prejudiced applicant's case from the very start and was past on. This domino affect took a toll ~~on~~ the outcome of the Applicant's case thus far. Therefore, having Due Diligence of After Discovered Evidence, allows the Applicant to excercise and protect his constitutional rights.

In Lambert v. Blackwell, 387, F. 3d. 210, 247, (3rd. Cir. 2004), only allows an otherwise procedurally barred or an defaulted claim to be considered by this Court, if PCR trial counsel was ineffective in failing to raise that barred claim in the State's PCR action.

In light Applicant's defense pertaining to the PCR's Court action. Applicant was directed to take the witness stand and instructed by PCR counsel Timothy M. Wogan, to only answer the questions that are being asked. Counsel was ineffective for not allowing the Applicant an opportunity to be heard nor raise any issues that needed to be raised at the hearing.

After reviewing the final order and the PCR transcript, Applicant understood where the counsel was ineffective and how prejudice took place that resulted in default. Counsel was ineffective for failing to follow the Courts Order. Applicant was hereby ordered to file notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this order to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedure to follow after notice of intent to appeal has been timely served and filed. Counsel was deficient, and prejudice by abandoning his client. As a result of counsel's failure to file an appeal the Court's decision within thirty (30) days, issues are considered waived and abandoned. Applicant also understands that the Courts made an unreasonable determination of judgment based upon the full adjudication in which the Applicant is entitled too, the right to be heard. Counsel stated that at this point after the Courts judgment, his job is done.

After reviewing the District Court's Order and (R&R), Report and Recommendation, from the Honorable Magistrate Judge Shiva V. Hodges, and the District Judge the Honorable Richard M. Gergel. In their discussion the Court agrees with the Applicant's PCR claim of ineffective assistance^{of} trial counsel. Counsel was ineffective for failing to object to the trial judge's, curative instruction, after the Applicant's character was allegedly, put into issue twice. The Court also agreed that the case of Martinez v. Ryan, was sufficient to have establish grounds for the cause of default. The Applicant's second and third grounds of ineffective assistance of counsel may also be sufficient under Martinez.

The End.

STATE OF SOUTH CAROLINA)

) VERIFICATION

County of Beaufort)

2015 JAN 14 PM 2:24
CLERK OF COURT
BEAUFORT COUNTY, S.C.

I, Nathaniel Johnson Jr, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Nathaniel Johnson Jr. #211574

SWORN to and subscribed before me this 12th
day of Jan, 2015.

Ludrean Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

CONCLUSION

Wherefore, the Applicant moves to respectfully ask this Court not to grant the Respondent's Motion to summarily dismiss this application. The Applicant respectfully asks that this application be amended to prior application. The Applicant did not knowingly, intelligently, or willfully waived his rights to appeal, the PCR Court must make such a finding in the final order. Additionally, other PCR issues Applicant intends to raise on appeal should still be raised in this petition.

Where results of appeal would have been different had counsel not been deficient, the appropriate remedy is to grant a new trial. See- Ezell v. State, 345 S.C. 312, 548 S.E. 2d. 852 (2001).

Respectfully submitted,

BY: Nathaniel Johnson Jr.

Nathaniel Johnson Jr # 211574

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COUNTY OF BEAUFORT)	
)	
Nathaniel Johnson Jr.#211574,)	2013-CP-07-1650
Applicant,)	
)	
v.)	CERTIFICATE OF SERVICE BY
)	U.S. Mail
State of South Carolina,)	
Respondent,)	
_____)	

2015 JAN 14 PM 2:24
 CLERK OF COURT
 COUNTY OF BEAUFORT
 S.C.

1. I am an pro-se Applicant currently at Lieber Correctional Inst. in Ridgeville, S.C..
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by U.S. mail.
3. I have this day served a copy of Motion For Evidentiary Hearing and Response to the Proposed Conditional Order of Dismissal, by deposing same in the U.S. mail postage.

Office of the Clerk of Court
 Jerri Ann Roseneau
 P.O. Box Drawer 1128
 Beaufort, S.C. 29901-1128

Respectfully submitted,

Nathaniel Johnson Jr.

S.C.D.C.#211574

Pro-SE

By: Nathaniel Johnson Jr.

Ridgeville, S.C. 29472

January 12, 2015.

Office of the Clerk of Court

Beaufort County

Post Office Drawer 1128
Beaufort, South Carolina 29901-1128
(843)255-5050

Jerri Ann Roseneau
Clerk of Court

Lynn Geren
Judicial Clerk

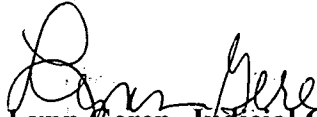
February 24, 2015

CERTIFICATE OF TRANSMITTAL

TO: Nathaniel Johnson, Jr. #211574
LCI Stone - B #50

RE: Nathaniel Johnson Jr. v State of South Carolina
Civil Action No. 2013-CP-07-01650

Attached please find a copy of the Motion for Evidentiary Hearing In Response to Proposed Conditional Order of Dismissal (with exhibits) filed in our office January 14, 2015.



Lynn Geren, Judicial Clerk
Beaufort County Clerk of Court