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AUG 17 2015

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Appeal from Greenwood County
The Honorable Clifton B. Newman, Circuit Court Judge
AUG 17 2015

Case Number: 2010-CP-24-0259

S.C. SUPREME COURT

CHARLES VANDROSS

PETITIONER

v.

STATE OF SOUTH CAROLINA

RESPONDENT.

**PETITION FOR A REMAND OR, IN THE ALTERNATIVE, FOR LEAVE TO
FILE A SUCCESSOR POST-CONVICTION RELIEF APPLICATION**

Petitioner, Charles Vandross, by and through counsel, Elizabeth A. Franklin-Best and E. Charles Grose, Jr. respectfully petitions this Court to remand this case for a hearing regarding PCR counsel's conflict of interest with Petitioner or, in the alternative, to allow Petitioner to file a successive post-conviction relief (PCR) application with new counsel.

I. Relevant Background

The State tried Charles Vandross, three times, for breaking into the home of JoAnn Suber Wilson at night, kidnapping her, and murdering Sanford Best. The first two trials resulted in mistrials because the jurors could not come to a unanimous decision on the verdict. PCR. Tr. 6. At his third trial, and after the Solicitors used all of his peremptory challenges to remove African-Americans from the venire, the jurors convicted Vandross. The Honorable Wyatt T. Saunders, Jr. sentenced him to life

imprisonment for murder, life imprisonment for first-degree burglary, thirty (30) years for kidnapping, and a consecutive five (5) years for possession of a firearm during the commission of a violent crime. Both at trial and during his PCR, Petitioner never had access to funding for experts to use in his defense.

Petitioner timely appealed his convictions and sentences. Joseph L. Savitz, III, of the Office of Appellate Defense, raised the issue that the trial court committed reversible error by allowing into evidence two photographs of a Bible. One photograph depicted a Bible that was laying in close proximity to the victim's right hand at the incident location, and the other, the same Bible from a slightly different angle. Counsel argued the photographs were irrelevant under Rule 401, SCRE and unfairly prejudicial under Rule 403. In its opinion, the South Carolina Court of Appeals found this claim procedurally barred.¹ The Court of Appeals affirmed the convictions and sentences, and this Court denied Vandross' petition for writ of *certiorari*.

Petitioner then filed an application for post-conviction relief, and the court below appointed David Belding as his attorney. Despite the irregularities readily apparent from a review of the case, counsel failed to properly raise the *Batson*² claim, did not raise the photographs issue, and failed to secure any funding to challenge the State's theory of the

¹ The Court of Appeals cited *Holy Loch Distribs., Inc. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000) ("In order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court."); *State v. Benton*, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000) (holding an appellant may not argue one ground for objection at trial and a different ground on appeal).

² *Batson v. Kentucky*, 476 U.S. 79 (1986).

case.³ Petitioner diligently tried to have Belding raise particular issues, but Belding did not do so.

After a break down in the relationship, Petitioner moved for the court to relieve Belding of further representation and appoint new counsel. On October 13, 2013, the Honorable Thomas A. Russo convened a hearing on this motion. A copy of the transcript of this hearing is attached. Neither the State nor Belding provided Petitioner with notice of the hearing, and Petitioner did not have his legal materials at court. Judge Russo did not want to hear Petitioner's motion to relieve counsel based on the speculative possibility that "Judge Newman decides and grants [Petitioner's] PCR application." Tr. (10/29/13) 1, lines 15-24; 13, lines 13-19.

Petitioner informed Judge Russo, "[T]here were a number of [PCR] issues that were not stated completely, because they were not spoken in court." Petitioner stated he "followed counsel's lead" and contended that Belding was ineffective during the PCR hearing, despite the Assistant Attorney General's assurances to the contrary. Judge Russo informed Petitioner that alleging ineffective assistance of post-conviction counsel "is not appropriate at this time until you get a ruling from Judge Newman. Because if Judge Newman grants your application, then this is moot. This doesn't matter." Petitioner informed Judge Russo the issues not presented "might not be preserved for further review if not properly" presented. Judge Russo assured Petitioner that if Judge Newman "does not grant your application, then all these rights that you're concerned

³ The State called Dr. Joel Sexton who testified not only to cause and manner of death, but also to the acoustic properties of firearms. Tr. 426, l. 7- 428, l. 8. The State also called Adrienne Riley, a forensic DNA analyst with SLED; Tracy Thrower, a firearms identification expert employed by SLED, and Jennifer Stoner, a gunshot residue expert from SLED.

about here are still available to you.” Tr. (10/29/13) 10, line 14 – 12, line 14. *See also* 16, lines 5-7 (“[I]f Judge Newman does not grant your application, then you can raise these issues.”).

Petitioner reiterated that he “did not received proper notice of the hearing” and did not have his legal materials with him. Judge Russo ruled, “I’m going to *continue* this matter, give you the opportunity that you need to get the matters that you claim are relevant pursuant to this rule, and we’ll just *reschedule it.*” Judge Russo further suggested that Petitioner “hire [counsel] to assist” when the hearing is rescheduled. Tr. (10/29/13) 16, line 21 – 17, line 12 (emphasis added).

Belding then stated he would not assist Petitioner further, except that he “might send him a written notice” of the hearing. Petitioner informed Judge Russo, “We do not have a[n] amicable relationship.” Belding had called Vandross “stupid” and told Vandross, “I could take my chances with the Supreme Court. This man does not have my best interest at heart.” Petitioner informed the court that Belding “hasn’t availed himself to the materials that I’ve put before him. There’s a lot of things, Your Honor, that he did not do in the PCR hearing.” Tr. (10/29/13) 17, line 13 – 19, line 23. Petitioner contended he should be able to “decline” appointed counsel when “there’s a conflict of interest.” Judge Russo acknowledged he didn’t know if there is a conflict of interest “[b]ecause I haven’t fleshed that out.” Tr. (10/29/13) 22, lines 10-25.

Judge Russo assured Petitioner, “[Y]ou’re going to have every opportunity that you need to flesh” out the issues with Belding’s representation and instructed the motion to be scheduled with the next PCR roster in February 2014. Judge Russo again reminded Petitioner of the possibility of “hiring another attorney to help you with that” hearing. Tr.

(10/29/13) 18, lines 16-20; 20, line 10 – 21, line 18. After a discussion about the possible timing of Judge Newman’s ruling, Judge Russo stressed, “I just want Mr. Vandross to know that he’s not losing any rights here, because we’ve continued this matter. His rights are – are going to be protected in that fashion.” Tr. (10/29/13) 24, line 11 – 25, line 19.

Upon the issuance of an order denying relief, and in which the PCR judge claimed to have reviewed Petitioner’s Rule 15, SCRCF motion, even though it had not been filed at that time, Belding then failed to file a Rule 59(e) motion.

The PCR court never provided Petitioner an opportunity to present the motion to relieve Belding.

II. Petitioner has not received his One Bite at the Apple.

This Court consistently recognizes that inmates should have one full opportunity to have their claims adjudicated in state court. For instance, in *Odom v. State*, this Court reversed a PCR judge's order of dismissal, finding that the petitioner never received a full “bite at the apple” because both of his PCR applications were summarily dismissed before he was appointed legal counsel. 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999).

In *Austin v. State*, this Court reversed the summary dismissal of a second PCR application and remanded for an evidentiary hearing, where the petitioner alleged in his second application that his first PCR counsel was ineffective for failing to seek appellate review. 305 S.C. 453, 409 S.E.2d 395 (1991). Specifically, the Court stated: “Because petitioner is entitled to the assistance of appellate counsel on PCR, and because we must craft a remedy to correct the unfairness which has occurred, we find his allegation that counsel failed to seek review in this case sufficiently states a claim for ineffective

assistance.” *Austin*, 305 S.C. at 454, 409 S.E.2d at 396. Thus, “[u]nder *Austin*, a defendant can appeal a denial of a PCR application after the statute of limitations has expired if the defendant either requested and was denied an opportunity to seek appellate review, or did not knowingly and intelligently waive the right to appeal.” *Odom v. State*, 337 S.C. 256, 260, 263, 523 S.E.2d 753, 755, 756 (1999) (“The one-year statute of limitations for PCR applications is not applicable to appeals filed pursuant to *Austin v. State*.”); see also *Whitehead v. State*, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002) (“We have held that the PCR statute of limitations found in S.C.Code Ann. § 17-27-45(A) (Supp.2001) does not apply to *Austin* claims.”).

In *Aice v. State*, this Court limited the holding of *Austin* to its particular factual situation, or in other words, to the situation where the petitioner is prevented from seeking appellate review of a denial of his or her PCR application by the action or inaction of his or her attorney. 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991). In *Aice*, the petitioner sought to file a second PCR application raising additional issues not raised in the first PCR under the rubric of ineffective assistance of the first PCR trial counsel. 305 S.C. at 449, 409 S.E.2d at 393. The court pointed out that section 17-27-90 provides:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. 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 in any other proceeding the applicant has taken to secure relief, may not be the basis for 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.

Now, here in this case, Vandross has been unable (to this point) to have potentially meritorious issues presented to the Court of Common Pleas because his PCR

attorney failed to seek any funding to pursue claims that trial counsel thought were worth investigating, and failed to raise two issues that a cursory review of the record would have indicated were worth raising.

A. Petitioner's *Batson* Claim.

At trial, Vandross raised a *Batson* challenge based on the Solicitor's use of 100% of his peremptory strikes to remove African Americans from the jury:⁴

“Basically the State has exercised seven strikes, including the two for the alternates. Those strikes were exclusively African Americans. Race would not be a proper criteria (sic) to base a strike on and we would challenge the State's strikes.”

Tr. 51, ll. 6-11.

Solicitor Peace responded, with regard to Juror 112, Asia Seigler, that he struck her for “being unemployed, single.” He further stated, “while there may be some single individuals on the jury, I don't think that I sat anybody who was also unemployed, so that was the reason for striking number 112, Asia Seigler.” Tr. 52, ll. 6-11. Trial counsel pointed out to the judge that Ms. Seigler is a student and that “[w]hile she may not have paid employment, I don't think being a student would be a proper reason to strike someone from the jury.” Tr. 54, ll. 10-14. The judge asked Peace, “Any Caucasian juror not stricken an unemployed student?” Peace replied, “No, sir, not that I'm aware of. I believe everybody on the jury is employed except I think there may be a housewife.” Tr. 55, ll. 19-23. The trial court overruled the objection.

⁴ The only African-American juror that the Solicitor did not strike had a daughter-in-law employed as a Correctional Officer at McCormick Correctional Institution. PCR Tr. 89.

Trial counsel rendered ineffective assistance of counsel when he did not argue that removing a student was mere pretext for striking a qualified African-American from the jury. Had he done so, the trial court judge would have found a *Batson* error. This issue is patent on the face of the record, and PCR counsel should have raised this obvious issue.

PCR counsel further failed in his duty to Vandross when he did not file a Rule 59(e) motion to contest the PCR court's erroneous interpretation of the claim:

The PCR judge found:

“This Court finds Counsel was effective in his representation of Applicant by filing a *Batson* motion. Applicant alleges counsel was ineffective for not challenging two jurors because one was a student and the other an unemployed housewife. Applicant's understanding of a *Batson* challenge is misguided. A *Batson* challenge is an objection to a preemptory challenge based solely on a juror's race. In this case, Applicant is not claiming race as a factor for the State's strikes but lack of employment. Employment status is not a ground for a *Batson* challenge. Because Applicant has failed to meet his burden of proof under 71.1(e) SCRCF, this allegation is denied.”

The PCR judge's ruling wholly misconstrues the nature of the objection raised at trial. And, because PCR counsel failed to properly raise this issue during the PCR hearing, instead simply calling Applicant to the stand to try and argue the appropriate legal basis of the claim, the resulting ruling on the issue is almost incoherent.⁵ PCR counsel failed in his duty to properly represent his client during the hearing, and further failed to correct the mistake by pointing out that the transcript of the trial makes it clear that the basis of the challenge was race.

⁵ Counsel's eliciting any information relating to this claim consisted of his asking Vandross, “All right, Mr. Vandross. Anything else that Mr. Sheek did ineffectively on your behalf?” PCR Tr. 79.

B. The Bible Photographs

This issue was raised in Petitioner's appellate brief, but the Court of Appeals found it procedurally barred.. It was, therefore, ripe to be raised during Petitioner's PCR hearing, couched as an ineffective assistance of counsel claim. Yet, Petitioner's PCR counsel failed to do so. *See State v. Passmore*, 363 S.C. 568, 611 S.E.2d 273 (2005); *Fossick v. State*, 317 S.C. 375, 453 S.E.2d 899 (1995) (PCR granted where attorney failed to object to solicitor's closing argument that defendant showed no remorse). In South Carolina, as elsewhere, evidence must be relevant to be admissible. Rule 401, SCRE. Two photographs of Bibles surrounding the deceased victim were irrelevant to the crime, and their admission suggested an improper basis upon which to render a verdict; specifically, that the victim was a Christian and therefore a "good person." Not only was the admission of this evidence improper because it was irrelevant, but it also interjected improper character evidence in violation of SCRE, Rule 404. See also *State v. Lee*, 399 S.C. 521, 732 S.E.2d 225 (2012) (photographs calculated to arouse sympathy or prejudice of the jury should be excluded if they are not necessary to substantiate material facts or conditions). PCR counsel's failure to even raise this issue further shows that Vandross did not receive his one bite at the apple.

C. Lack of Funding to Date

Vandross has been indigent from the day he was arrested. His first trial attorney was appointed, and his first PCR lawyer was appointed by the state as well.⁶ At his PCR hearing, Vandross alleged his trial counsel was deficient for failing to retain and call

⁶ Family members, not Vandross, retained the final trial counsel, Lance Sheek, PCR Tr. 7, 124, and the undersigned PCR attorneys.

expert witnesses. Specifically, Vandross argued his trial counsel was deficient for failing to retain and call an expert to examine a bloodstained handprint found on JoAnn Suber Wilson's shirt (the State's expert excluded Vandross as a source of the blood), and for failing to retain an expert on ballistics or gunshot residue. PCR Tr. 28-31, 40-41, 59-60, 66, 92-94, 108-10.⁷ *And see Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007) (holding trial counsel ineffective for failing to consult independent gunshot residue expert). Trial counsel testified at the PCR hearing that he wanted to retain experts, but that Vandross did not have any funds with which to hire them.

“Q: Did you hire or retain any experts in this case?”

A: I did not. **Told him that I thought it would be very beneficial to us.** But I was retained. And he did not have the funds to do that.

As a matter of fact, I—I obtained all the transcripts of the state's witnesses' testimony from the second trial at my own expense. It was right at \$1,000. He couldn't pay that either. But he did not have any funds to seek an expert.”

PCR transcript, 132 (emphasis added). *And see* PCR Tr. 108 where Vandross testified he was told he would have to pay for the experts himself and 147-48 where trial counsel acknowledges Vandross' requests for experts was reasonable but said he “would go out of business” if he had to fund experts. PCR counsel failed to attempt to secure any experts either, and the PCR judge denied the claim, as he had to, because no expert witnesses⁸ were presented at the hearing. It is well-settled law that an applicant must produce the testimony of a favorable witness or otherwise offer the testimony in

⁷ The Attorney General, in fact, twice objected to Vandross testimony unless he was an expert. PCR Tr. 41, 60. *See also* PCR Tr. 108-10 where Attorney General pointed out that no ballistics or GSR expert was available to testify at the PCR hearing.

⁸ Only Vandross and trial counsel, Lance Sheek, testified at the PCR hearing. PCR 2.

accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness's failure to testify at trial. *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998). In the order of dismissal, the PCR judge cited the long and established line of cases that hold that an applicant cannot show prejudice unless he produces the testimony of the favorable witnesses. See *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Bassette v. Thompson*, 915 F.2d 932 (4th Cir. 1990, *cert denied*, 499 U.S. 982 (1991); *Bannister, supra*. PCR order, p. 5. To date, Vandross, an indigent defendant, has not been allowed to have experts review the forensic evidence in his case, or an investigator investigate his case, violations of his rights to due process. *Ake v. Oklahoma*, 470 U.S. 68 (1985); *Caldwell v. Mississippi*, 472 U.S. 320 (1985). *And see Griffin v. Illinois*, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."). Trial counsel did not offer any "strategic reason" for failing to retain the experts and, in fact, testified that he believed they needed to hire experts. He simply, it appears, did not realize that he could have petitioned the trial court for the funding upon a showing that the services were reasonably necessary. S.C. Code Ann. §17-3-50 (B).

IV. Why this Court Should Remand for a Hearing on the Conflict Issue or, in the Alternative, Grant Leave to File a Second PCR.

In assessing Vandross's request that his case be remanded for a hearing on Belding's conflict or, in the alternative, for leave to file a second PCR application, this Court can take note that *two* juries refused to convict Vandross of murder. It was only in the third case, and during which the Solicitor used all of his peremptory challenges to remove African-Americans from the venire, that Vandross was convicted. This case was

far from one of overwhelming guilt. Indeed, it may be one where having adequate resources, including experts and an investigator, would tip the scales entirely. Because Vandross has not received an opportunity in the South Carolina courts to fully develop his case and present it to the jury, or fully present his complaints to a district court judge for relief, counsel respectfully ask this Court, in this highly unusual case, to remand the case for a hearing on Belding's conflict of interest with Vandross (and to allow a district court judge to rule on a motion for a new PCR proceeding if a conflict is determined to exist), or simply allow Vandross to file an amended application for post-conviction relief with instructions not to dismiss.

IT IS SO MOVED.

Respectfully submitted,

By 

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August 13, 2015

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenwood County
The Honorable Clifton B. Newman, Circuit Court Judge

Case Number: 2010-CP-24-0259

CHARLES VANDROSS

PETITIONER

v.

STATE OF SOUTH CAROLINA

RESPONDENT.

Certificate of Service

I certify that I have served the Brief of Petitioner on the State of South Carolina, by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

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August 13, 2015
Greenwood, South Carolina

State of South Carolina)
County of Greenwood)

In the Court of Common Pleas
Eighth Judicial Circuit
2010-CP-24-0259

Charles Vandross,)
Applicant,)
vs.)
State of South Carolina,)
Respondent.)
_____)

Transcript of Record

October 29, 2013
Greenwood, South Carolina

B E F O R E :

The Honorable Thomas A. Russo, Judge

A P P E A R A N C E S :

David E. Belding, Esquire
Attorney for Applicant

J. Rutledge Johnson, Esquire
Attorneys for Respondent

Maryann S. Nevers, CVR-M-CM
Circuit Court Reporter

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<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVID.</u>
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No exhibits introduced during proceeding.

TRANSCRIPT OF RECORD

1
2 (Whereupon, the proceeding was commenced at 10:40 a.m.)

3 THE COURT: We -- we can go ahead and start.

4 MR. JOHNSON: Okay.

5 THE COURT: So ---

6 MR. JOHNSON: May it please the Court, Your Honor?

7 THE COURT: Yes, sir.

8 MR. JOHNSON: The case of *Charles Vandross v. State of*
9 *South Carolina*, it's Case No. 2010-CP-24-0259. Mr.
10 Vandross was indicted at the December 2004 term of the
11 Greenwood County Grand Jury for burglary first-degree,
12 murder, kidnapping, and possession of a firearm during the
13 commission of a violent crime.

14 He actually had three trials. The first two ended in
15 hung juries. The third one, he was represented by Lance
16 Sheek, proceeded to trial, and was convicted by a jury of
17 all charges on June the 21st, 2006. The Honorable Wyatt T.
18 Saunders sentenced him to confinement for the balance of
19 his natural life for both murder and burglary first-degree,
20 30 years for kidnapping, and 5 years for the possession
21 charge, all to run concurrent.

22 It was a timely notice of appeal file and an appeal
23 perfected on his behalf. The South Carolina Court of
24 Appeals affirmed that conviction. The remittitur was
25 issued on May 22nd, 2009.

1 He filed a timely PCR application February 26th, 2010.
2 The state filed its return July 29th, 2010. There was an
3 evidentiary hearing held in this -- actually, in the
4 Greenwood County courtroom across the hall from us on March
5 13th of this year. He was represented by Mr. Dave Belding.

6 We had a fully evidentiary hearing before Judge
7 Newman. Currently, that case is under advisement. Judge
8 Newman has not ruled on that case.

9 But he is here today on a motion to relieve Mr.
10 Belding as his PCR counsel. And I turn it over to Mr.
11 Vandross.

12 THE COURT: Well, now, the -- this -- this was heard
13 in March, correct?

14 MR. BELDING: Yes, Your Honor.

15 THE COURT: And -- and Judge Newman is -- has it under
16 advisement; is that ---

17 MR. BELDING: He does, Your Honor.

18 THE COURT: Well, I -- I -- I don't -- I'm ---

19 MR. BELDING: And he did not ask for proposed orders,
20 so none have been submitted for either side.

21 THE COURT: Right. But I think my understanding was
22 he was contacted recently about when you could expect that
23 decision.

24 MR. JOHNSON: Yes, Your ---

25 THE COURT: Somebody ---

1 MR. JOHNSON: --- Honor. I -- I sent an e-mail to him
2 about a month ago ---

3 THE COURT: And that ---

4 MR. JOHNSON: --- and he ---

5 THE COURT: --- he said ---

6 MR. JOHNSON: --- said that ---

7 THE COURT: --- it ---

8 MR. JOHNSON: --- he's still under advisement.

9 THE COURT: --- still has it -- well, then, I -- I'm
10 not -- not necessarily understanding the purpose of this
11 morning, then.

12 THE APPLICANT: Your Honor, if I may address the
13 Court?

14 THE COURT: Yes, sir.

15 THE APPLICANT: I received no notice as to what this
16 hearing was to be about. I don't know who was supposed to
17 advise me of why we were going be here today. But I do
18 have a motion in to relieve counsel. I'm going to need to
19 go through these ---

20 THE COURT: Whoa -- we're -- no. We're not going go
21 through anything. And with all due respect, Mr. Vandross,
22 what -- what -- why would we go through that here today and
23 what if next week or whatever, Judge Newman decides and
24 grants your -- your PCR application?

25 THE APPLICANT: Because what we are -- what we are

1 doing, Your Honor -- and your name is?

2 THE COURT: Russo.

3 THE APPLICANT: Okay. Judge Russo, there is a motion
4 -- a -- a Rule 15(b) motion that I asked counsel to prepare
5 after the PCR hearing. We've been working on getting that
6 motion together to amend the pleadings to conform with the
7 evidence and testimony. That motion needs to -- need to go
8 in. I -- I want it in before Judge Newman rules. It is a
9 matter for Judge Newman to determine -- to analyze and
10 decide upon.

11 But that motion can't get in because counsel refuses
12 to meet with me ---

13 THE COURT: It -- it -- it ---

14 THE APPLICANT: --- and finalize ---

15 THE COURT: --- wouldn't be ---

16 THE APPLICANT: --- the ---

17 THE COURT: It wouldn't ---

18 THE APPLICANT: --- motion.

19 THE COURT: --- be appropriate until the judge makes
20 his ruling.

21 THE APPLICANT: Not the Rule 15(b) and (c) motions,
22 sir. It can be submitted at any time. And again, it
23 amends the -- amends the evidence and testimony -- it
24 amends the pleadings to conform with the evidence and
25 testimony, before the ruling is preferable.

1 THE COURT: Mr. Johnson?

2 MR. JOHNSON: Sir ---

3 THE APPLICANT: I have not -- there's actually a lot
4 that I need to present. So I -- I would like to go -- go
5 through all of what I have to present.

6 THE COURT: Just a minute.

7 MR. JOHNSON: Just -- just respectfully -- and this is
8 just without even arguing Rule 15(b) -- Mr. Vandross, on
9 direct examination, testified for 2 1/2 hours at the
10 evidentiary hearing. He was then subject to cross-
11 examination. It -- the -- the hearing lasted approximately
12 4 1/2 hours. I think he was able to get out what he needed
13 to.

14 It was actually -- Mr. Belding prepared a list of
15 exhibits that Mr. Vandross wanted in. Some of these were
16 admitted; some of them were not. Most of them are
17 handwritten notes, which I would say have no basis or have
18 no foundation.

19 Clearly, counsel has been very diligent in his
20 representation of Mr. Vandross. And I believe that Mr.
21 Belding has sent me supplemental allegations and that all
22 issues were raised at that hearing. And therefore, I don't
23 find that 15(b) would be applicable in this case.

24 Furthermore, as you said, Judge Newman still has this
25 under advisement and we have not heard a ruling from --

1 from -- from Judge Newman. And I just don't think this
2 motion is proper at this time.

3 And just for the Court's record, Judge Griffith was
4 sent, as the chief admin of the 8th circuit, PCR was sent
5 -- the motion to relieve appointed counsel. And Judge
6 Griffith was the one who asked me to put this on the roster
7 for this week.

8 THE COURT: All right. Well, just give me a moment.
9 My clerk's gone to get something for me real quick.

10 THE APPLICANT: And, sir, will I be able to present my
11 case?

12 THE COURT: No, sir. You'll have a seat, and I'll
13 hear from you in a minute. I asked you to have a seat.

14 THE APPLICANT: I didn't hear you.

15 THE COURT: All right. And my law clerk has gone to
16 get something for me, and I'll -- I'll get with you in just
17 a minute.

18 (Off the record briefly.)

19 THE COURT: What matters were tried before the Court
20 that were not addressed by the pleadings?

21 THE APPLICANT: None that I know of, Your Honor. I'd
22 have to ask Mr. Vandross to ---

23 THE COURT: Mr. Vandross ---

24 MR. BELDING: --- address that.

25 THE COURT: --- what matters -- I -- I'm not going

1 take four hours today. I am going to hear from you. But
2 I'm going to focus your attention on my questions.

3 Rule 15 provides for an amendment to conform to the
4 evidence. And it says: ". . . when issues not raised by
5 the pleadings are tried by express or implied consent of
6 the parties."

7 What matters were tried during that proceeding that
8 were not raised in the pleadings?

9 THE APPLICANT: The substance of the Rule 15(b) motion
10 -- 15(b) and (c) motion -- is a matter for Judge Newman to
11 decide upon. But there were a number of issues that were
12 not stated completely, because they were not spoken in
13 court. They were not -- they were not fully stated.

14 THE COURT: You had that opportunity at that hearing
15 before Judge Newman.

16 THE APPLICANT: I followed counsel's lead. It was the
17 first time I've ever been to a PCR hearing. As I said, I
18 was -- I went there -- there was a number of -- excuse me.
19 Mr. Johnson's -- says that counsel was not ineffective. I
20 claim that he is. I'd like to present my case to show the
21 jury ---

22 THE COURT: No.

23 THE APPLICANT: --- show you ---

24 THE COURT: That ---

25 THE APPLICANT: --- that he was.

1 THE COURT: That -- that -- that's been heard. That's
2 been heard, and it is currently under advisement by Judge
3 Newman.

4 THE APPLICANT: That's trial counsel. I'm talking
5 about PCR counsel now. I'm talking about the reasons ---

6 THE COURT: That's a ---

7 THE APPLICANT: --- the reasons why ---

8 THE COURT: --- whole different matter.

9 THE APPLICANT: --- we have ---

10 THE COURT: That's a whole different matter, which is
11 not appropriate at this time until you get a ruling from
12 Judge Newman. Because if Judge Newman grants your
13 application, then this is moot. This doesn't matter.

14 THE APPLICANT: Sir, it does not change what happened.

15 THE COURT: It changes it in this respect: You're
16 claiming PCR counsel was ineffective. But if Judge Newman
17 rules in your favor, then apparently you're wrong. He
18 wasn't ineffective. Because your application got granted.

19 THE APPLICANT: Sir ---

20 THE COURT: So what else could -- what else could be
21 done? If -- if you're -- if Judge Newman grants your
22 application, what more could be done?

23 THE APPLICANT: Sir, there are issues that wouldn't --
24 might not be preserved for further review if not properly
25 ---

1 THE COURT: There's no ---

2 THE APPLICANT: --- stated and ---

3 THE COURT: --- further review ---

4 THE APPLICANT: --- established ---

5 THE COURT: --- if he grants your application. What
6 further review is there?

7 THE APPLICANT: (No audible response.)

8 THE COURT: I -- I -- I -- I -- I don't -- I'm
9 concerned that maybe we're not communicating here. If
10 Judge Newman grants your application, what needs to be
11 preserved? If he does not -- and -- and --and I'll take
12 the other side -- if he does not grant your application,
13 then all these rights that you're concerned about here are
14 still available to you. And they're still preserved.

15 THE APPLICANT: We're here today, Your Honor, because
16 there is a Rule 15(b) and (c) motion that needs to get into
17 the Court ---

18 THE COURT: You're incorrect.

19 THE APPLICANT: Sir?

20 THE COURT: You're incorrect. You're not correct.

21 THE APPLICANT: Well -- well, why are we here, then?
22 I mean, are we here on my motion?

23 THE COURT: We're here on your motion to relieve PCR
24 counsel?

25 THE APPLICANT: Yes, sir. And I'm trying --

1 THE COURT: And ---

2 THE APPLICANT: And I'm trying to tell you ---

3 THE COURT: And -- and -- and that's not appropriate
4 at this time.

5 THE APPLICANT: Sir, PCR counsel is not helping me to
6 get the Rule 15(b) and (c) motion into the court.

7 THE COURT: Your PCR has been fully adjudicated and
8 heard. It has not been decided yet; the court is still
9 deciding. My simple question you was -- early was: What
10 issues were not raised -- what -- what issues that were not
11 raised in the pleadings were argued in -- before that
12 Court?

13 THE APPLICANT: As I said, I was not notified of
14 purpose of this hearing before I left. My Rule 15(b) and
15 (c) motion has had to be -- I had to send it to my family
16 to finish preparing it and copying it and getting it ready
17 for submission to the Court. If that's what we -- if
18 that's what you want to discuss, then I'm going have to get
19 that motion back in my hands.

20 THE COURT: Well, here -- this is what my
21 understanding of today's proceeding is, is a motion to
22 relieve Mr. Belding as counsel.

23 THE APPLICANT: Yes, sir. Have you seen my motion?

24 THE COURT: I haven't seen anything, because my
25 understanding is as -- when I got here and the -- the file

1 was available -- my understanding is that this matter was
2 adjudicated before Judge Newman and has not been ruled on
3 yet; that Judge Newman has taken it under advisement; and
4 that the posture of the case is currently awaiting Judge
5 Newman's ruling.

6 Now, whatever ruling that is -- obviously, none of us
7 have any idea of what that may be -- but whatever ruling it
8 is, if he grants your application, then -- you -- you have
9 -- you have prevailed. You have prevailed in your
10 application. And you -- your case will be sent back, and
11 you -- you'll get the relief that you seek. And you're
12 shaking your head, no.

13 THE APPLICANT: Your Honor --

14 THE COURT: Why'd you file a PCR application?

15 THE APPLICANT: (No audible response.)

16 THE COURT: You filed a PCR application. And -- and
17 -- and in filing a postconviction-relief application, you
18 are asking the Court to basically put you back where you
19 were prior to any conviction. That's -- that's what a PCR
20 application basically is. If Judge Newman agrees with you
21 and grants that, then what relief are you seeking here
22 today?

23 THE APPLICANT: Even if Judge Newman granted the
24 application ---

25 THE COURT: Okay.

1 THE APPLICANT: --- that is an appealable decision.

2 And if the --

3 THE COURT: Who would appeal it?

4 THE APPLICANT: Attorney General's office.

5 MR. JOHNSON: The state, Your Honor.

6 THE COURT: All right. And let's say they do.

7 THE APPLICANT: Okay. So if the issues are not
8 properly stated and properly founded and established, then
9 it could be reversed ---

10 THE COURT: Well, apparently ---

11 THE APPLICANT: --- based on technicality.

12 THE COURT: Apparently they were ---

13 THE APPLICANT: Or insufficient.

14 THE COURT: Apparently, they were properly -- if -- if
15 the judge rules in your favor, they apparently were
16 properly presented.

17 MR. JOHNSON: And, Your Honor, just for clarification,
18 is that if he does get his application granted, it's my
19 burden to prove that Judge Newman was wrong. I'm the one
20 who has to deal with the preservation of -- of issues.

21 THE COURT: Correct.

22 MR. JOHNSON: So ---

23 THE COURT: Mr. -- Mr. Vandross, I -- I -- I'm not --
24 please understand, I'm not saying that these issues that
25 you have here are not going to be heard; that they're not

1 relevant. I'm not saying those things.

2 I guess what I'm trying to say is that, it -- in the
3 current state of the case, it's not timely. That -- that's
4 what I'm trying to say. Until Judge Newman makes his
5 decision -- this -- this is the timing -- if Judge Newman
6 does not grant your application, then you can raise these
7 issues. All of these issues can be raised.

8 THE APPLICANT: Sir, this is -- is -- we desire that
9 this motion be considered prior to Judge Newman's ruling.

10 THE COURT: Okay. As ---

11 THE APPLICANT: And that ---

12 THE COURT: And ---

13 THE APPLICANT: --- is totally ---

14 THE COURT: And ---

15 THE APPLICANT: --- permissible by the rule.

16 THE COURT: No. Not until you state to me what are
17 the issues that were not raised -- it -- Rule 15(b) -- when
18 issues not raised by the pleadings are tried by express or
19 implied consent by the parties, they shall be treated in
20 all respects as if they had been raised in the pleadings.

21 THE APPLICANT: Okay. Well, again, since I did not
22 receive proper notice of this hearing and -- and the
23 purposes for this hearing -- and I do not have the motion
24 in hand because someone else has had to prepare it since
25 counsel would not -- I ask that this hearing be continued

1 until such time I can get the motion in my hand and I will
2 probably also retain counsel to come and help me answer
3 your questions.

4 THE COURT: All right. All right. I -- I'm going to
5 continue this matter, give you the opportunity that you
6 need to get the matters that you claim are relevant
7 pursuant to this rule, and we'll just reschedule it.

8 And now, if -- if you -- obviously, you can hire
9 anyone you want to hire to assist you with that. And I --
10 I -- I just think that's going to be the appropriate --
11 appropriate way to handle it. I don't think there's
12 anything else we can do.

13 MR. BELDING: Your Honor, if I may, I think it's
14 appropriate too. And I -- I -- long experience with PCR
15 cases -- they never tell the applicants why you're being
16 woken up at five o'clock in the morning and taken to court.

17 The next time that Mr. Vandross appears, he should
18 know that that's what this will be for so there won't be
19 any problem with his notice. I -- he's -- he's asked me
20 not to communicate with him in any way or do anything else
21 on this case, and that's fine. I might send him a written
22 notice.

23 But the next time we're here, that's what this would
24 be for, is to -- to try to determine whether a motion under
25 Rule 15 is appropriate or whether he should go forward on

1 his motion to have me relieved as his PCR counsel. He
2 should be ready for both of these.

3 THE APPLICANT: We do not have a amicable
4 relationship. He has been ---

5 THE COURT: This is not the first time that clients
6 and lawyers don't agree or ---

7 THE APPLICANT: Well, he's ---

8 THE COURT: --- get along.

9 THE APPLICANT: --- called me stupid. He's told me
10 that he could -- I could take my chances with the Supreme
11 Court. This man does not have my best interests ---

12 THE COURT: Well ---

13 THE APPLICANT: --- at heart. He -- he's not with me.
14 This is not the kind of person that I should have
15 representing me. This is my life, Your Honor.

16 THE COURT: I -- I -- I understand. And -- and you're
17 going to have ---

18 THE APPLICANT: He has not ---

19 THE COURT: --- every opportunity that you need to --
20 to flesh that out.

21 THE APPLICANT: Not to be ---

22 THE COURT: That's why ---

23 THE APPLICANT: --- disrespecting ---

24 THE COURT: --- I'm continuing it to give you that
25 opportunity.

1 THE APPLICANT: He doesn't answer my letters. Again,
2 he hasn't helped with this motion in six months. And he
3 doesn't know enough about my case to do the motion.

4 THE COURT: All right.

5 THE APPLICANT: Because he hasn't availed himself to
6 the materials that I've put before him. There's a lot of
7 things, Your Honor, that he did not do in the PCR hearing.
8 I -- I ---

9 THE COURT: Okay.

10 THE APPLICANT: You're ---

11 THE COURT: But that ---

12 THE APPLICANT: --- you're saying -- again, you're --
13 you're asking me to -- to say that he's done a good job ---

14 THE COURT: I did not.

15 THE APPLICANT: --- or to -- or to ---

16 THE COURT: I never ---

17 THE APPLICANT: --- or to ---

18 THE COURT: --- said that.

19 THE APPLICANT: --- wait and see if what he did was
20 okay.

21 THE COURT: No, sir.

22 THE APPLICANT: But he didn't present what I asked him
23 to present.

24 THE COURT: I tell you what you need to stop doing:
25 You need to stop painting a picture that isn't accurate.

1 THE APPLICANT: No, sir. This is -- this is ---

2 THE COURT: No one's -- no one sat here and told you
3 that you have ---

4 THE APPLICANT: Well, I'm ---

5 THE COURT: --- to be happy with him ---

6 THE APPLICANT: Well ---

7 THE COURT: --- or that you have to be happy with the
8 work he did. I'm -- I never said that. That -- that's --
9 that's just not -- that's just not the case.

10 What I had -- did say is that this isn't timely. Your
11 -- your position is different. You've asked for a
12 continuance to give ---

13 THE APPLICANT: Uh-huh.

14 THE COURT: --- yourself the opportunity to gather
15 your information and -- and what you need to present this.
16 I'm giving you that.

17 THE APPLICANT: I ask for -- that you would please
18 make it within, say -- say, 30 days from now?

19 THE COURT: No, sir. It'll go with the PCR schedule,
20 when -- whenever our -- we ---

21 MR. JOHNSON: That'd be February.

22 THE COURT: --- whenever they're scheduled. We -- we
23 can't do a special term of court for one case.

24 THE APPLICANT: Sir ---

25 THE COURT: So ---

1 THE APPLICANT: --- I apologize. I didn't ---

2 THE COURT: So ---

3 THE APPLICANT: --- wasn't asking for ---

4 THE COURT: --- we're -- we're ---

5 THE APPLICANT: --- a special ---

6 THE COURT: --- I'm going to continue the case and
7 give you the opportunity to present -- and -- and as Mr.
8 Belding said -- well, I -- I -- I -- I mean, I'm saying it
9 because you mentioned it. You -- you mentioned about
10 hiring another attorney to help you with that. And you're
11 certainly welcome to do that. You do whatever you feel
12 that you need to do.

13 I just want you to know -- and -- and -- and -- and to
14 go ahead and so that you are on notice -- that -- and I
15 don't know how they do it. But when they bring you the
16 next time, it -- I -- my suggestion to you is to be -- be
17 prepared to argue this. Okay?

18 THE APPLICANT: Your Honor, just so that I can, you
19 know -- can -- can let you know this also: Though I may
20 have had a -- a hearing scheduled for October the 29th,
21 that does not tell me what day I will be shipped. So -- so
22 there is no security issue. I still should be notified.
23 You know, this -- that doesn't stop the notice. It -- he
24 does -- it's not his job to -- to -- to handle security for
25 SCDC.

1 THE COURT: Well ---

2 THE APPLICANT: Also ---

3 THE COURT: --- I mean ---

4 THE APPLICANT: --- Your -- Your Honor, if I -- since
5 we're here, I -- I think that had I known that Mr. Belding
6 -- if -- if I'm correct, in 1986 he represented the
7 Department of Corrections as legal counsel on the *Plyer*
8 case. If I had know that, I would not have accepted him as
9 counsel. That's a conflict of interest.

10 THE COURT: Well, can I ask: Was Mr. Belding retained
11 or appointed?

12 THE APPLICANT: He was appointed.

13 THE COURT: Okay. You don't get to pick and choose
14 your appointed attorney.

15 THE APPLICANT: Well, if there's a conflict of
16 interest, sir, I would've had opportunity to decline him
17 for that ---

18 THE COURT: Well, and ---

19 THE APPLICANT: --- reason.

20 THE COURT: --- I don't know that there would've been
21 one. Because I ---

22 THE APPLICANT: I think ---

23 THE COURT: --- we haven't ---

24 THE APPLICANT: --- there has ---

25 THE COURT: --- fleshed that out. You -- you think,

1 just because he represented the Department of Corrections
2 at some time in his past, that automatically creates a
3 conflict. It does not.

4 THE APPLICANT: Well, with what I've seen, sir, I
5 think it's related.

6 THE COURT: All right.

7 THE APPLICANT: It could ---

8 THE COURT: Well, again ---

9 THE APPLICANT: --- be related.

10 THE COURT: --- that -- that can be fleshed out at --
11 at -- at another time that's appropriate. And that -- that
12 -- now is not the time for that, so ---

13 MR. JOHNSON: Your Honor, just one quick question that
14 will -- first of all, Mr. Vandross, this case will be
15 called in February. I don't know exactly which week. But
16 it is available online, on our Web site.

17 Second, Your Honor, say Judge Newman does come out
18 with the result of the case. How does that change things?
19 Will he still be brought up on this motion in February, or
20 we go ahead with the appellate process?

21 THE COURT: Well, I -- I mean -- I don't know what's
22 going to happen. That -- because -- because no one knows
23 what that ruling's going to be. And I know Mr. Vandross
24 does -- does -- does not agree with me, but that if his
25 motion is granted, then -- then he's prevailed. And I

1 don't know that there's any need -- because as you stated
2 earlier, he's prevailed. If -- if the state appeals, you
3 have the burden to show. And so any issue on preservation
4 of evidence would be your problem, not Mr Vandross's.

5 MR. JOHNSON: Correct.

6 THE COURT: So what -- what -- I -- you know, again, I
7 -- I just -- this case is under judicial advisement. I
8 think that needs to be done -- and -- and then from there,
9 depending on that decision, a decision's going to have to
10 be made how -- how to proceed.

11 MR. JOHNSON: Okay. I just -- if -- if,
12 hypothetically speaking, Judge Newman comes out and denies
13 the application, you know, he has 30 days from notice of
14 that -- of the written order in we should file his appeal.

15 THE COURT: Right.

16 MR. JOHNSON: I just want to make sure that his rights
17 are preserved, as far as this motion is concerned, so his
18 appellate rights don't -- or appellate time -- does not
19 run, before ---

20 THE COURT: Well, I think ---

21 MR. JOHNSON: --- we hear that motion.

22 THE COURT: I -- I -- I think, if Judge Newman grants
23 his application, then y'all to make a decision what you're
24 going to do. If Judge Newman denies his application, then
25 Mr. Vandross is going to have to make a decision with

1 regards to filing an appeal. I mean, that ---

2 MR. BELDING: And I have not -- don't mean to
3 interrupt , Your Honor. But I have not been relieved as
4 counsel in this case, and I would do what I have to do to
5 protect his rights: either by filing a notice of appeal,
6 or perhaps a Rule 59 motion, to get it back for
7 reconsideration. Because I wouldn't leave him ---

8 THE COURT: Right.

9 MR. BELDING: --- hanging, where we'd get into one of
10 those *Austin v. State* kind ---

11 THE COURT: Right.

12 MR. BELDING: --- of situations.

13 THE COURT: Right. In other words, I think this issue
14 will be heard. And -- and it may be heard under -- under a
15 Rule 59 motion. I just want Mr. Vandross to know that he's
16 not losing any right here, because we've continued this
17 matter. His rights are -- are going to be protected in
18 that fashion. And so we'll just have to wait and see what
19 that ruling is. All right?

20 MR. JOHNSON: I'll prepare an order, Your Honor.

21 THE COURT: All right.

22 THE APPLICANT: Your Honor, please, I -- I would like
23 to know how to obtain a transcript of this hearing, and
24 also how to obtain a transcript of the PCR hearing. I'd
25 like to have that information, please.

1 MR. JOHNSON: You have to contact the court reporter.
2 And I -- I think Ms. Nevers was ---

3 THE COURT: Ms. Nevers is the court reporter for
4 today's hearing. We -- we can -- do you have a card Ms.
5 Nevers? Do you have one -- if not, we'll get -- we'll get
6 that information.

7 THE COURT REPORTER: Yes, sir.

8 THE COURT: Get -- give this to Mr. Vandross. You can
9 order a transcript from Ms. Nevers. Okay?

10 THE APPLICANT: All right.

11 MR. BELDING: Thank you, Your Honor.

12 MR. JOHNSON: Thank you ---

13 THE COURT: Now ---

14 MR. JOHNSON: --- Your Honor.

15 THE COURT: Now, the PCR transcript, I don't know who
16 -- who was the court reporter on that. I don't know. So
17 Ms. Nevers would be the one to contact for both of those.
18 All right?

19 MR. JOHNSON: Thank you, Your Honor.

20 MR. BELDING: Thank you, Your Honor.

21 THE COURT: All right. Thank y'all.

22 (Whereupon, the proceeding was concluded at 11:08 a.m.)

23 --- END OF TRANSCRIPT OF RECORD ---

24

25

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SC Court of Appeals

CERTIFICATE

I, THE UNDERSIGNED MARYANN S. NEVERS, CERTIFIED
VERBATIM REPORTER - MASTER, CERTIFICATE OF MERIT,
OFFICIAL COURT REPORTER FOR THE EIGHTH JUDICIAL
CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY
CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND
COMPLETE TRANSCRIPT OF RECORD IN THE HEARING OF THE
CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT
COURT FOR GREENWOOD COUNTY, SOUTH CAROLINA, ON THE
29TH DAY OF OCTOBER, 2013.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.



MARYANN S. NEVERS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

JUNE 25, 2015