

STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM GREENWOOD COUNTY  
Court of Common Pleas

**RECEIVED**

The Honorable Clifton B. Newman, Circuit Court Judge AUG 25 2015

Appellate Case No. 2014-000650

**S.C. Supreme Court**

Charles N. Vandross, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

**RETURN TO PETITIONER'S "PETITION FOR A REMAND OR, IN THE ALTERNATIVE, FOR LEAVE TO FILE A SUCCESSOR(sic) POST-CONVICTION RELIEF APPLICATION"**

Respondent, the State of South Carolina, respectfully requests this Court to deny Petitioner's petitioner for the following reasons.

**Conflict and Remand**

A.

Petitioner first argues this Court should remand his case to the lower court for a hearing regarding PCR counsel's purported conflict of interest. Respondent submits that Petitioner has failed to show the existence of a conflict of interest with his PCR attorney – if true – would entitle him to the relief he seeks. Specifically, Petitioner's request for this Court to remand his case and allow a

lower court to rule on a motion for new PCR proceeding if a conflict of interest is determined to exist is not supported by the law of this state. Petitioner points to no framework for determining what types of conflicts preclude PCR representation, nor is there a clearly established remedy.

Respondent simply submits that there is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel – including conflict free counsel<sup>1</sup> – does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722 (1991). As a result, even if Petitioner presented evidence to show an actual conflict that would have violated his Sixth Amendment rights if it had occurred at trial, it is unclear such a conflict would entitle him to a remand *or* a new PCR hearing.

#### B.

Moreover, Respondent submits that the transcript provides sufficient information to dispose of the matter. Petitioner's conflict of interest claim consisted of telling Judge Russo that PCR Counsel represented the Department of Corrections in 1986. Tr. (10/19/13) p. 22, l. 4-9. Beyond referencing the transcript, Petitioner has declined to elaborate on his conflict allegation, or cite to any body of law which would support the relief he is requesting. Respondent submits that Judge Russo correctly informed Petitioner that the fact that PCR Counsel may have represented the Department of Corrections at some point in the past, even if true, does not automatically create a conflict of interests. Tr. (10/29/13) p. 23, l. 1-3; see also State v. Childers, 373 S.C. 367, 372, 645 S.E.2d 233, 235 (2007) (trial judge did not abuse his discretion in denying request to relieve counsel where

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<sup>1</sup> See Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708 (1980) (holding that a Sixth Amendment violation can be shown where counsel's performance was adversely affected by an actual conflict of interest).

criminal defendant failed to show his counsel had any divided loyalties or an actual conflict of interest).<sup>2</sup>

### **Leave to File a Successive Application**

Petitioner also requests, as an alternate form of relief, this Court grant him leave to file a successive application to remedy what he alleges to be ineffective assistance of PCR counsel. Specifically, PCR counsel failed to raise issues at the evidentiary hearing that Petitioner believes to be meritorious. Respondent notes Petitioner is *not* attacking the adequacy of his PCR counsel's performance in presenting the claims that *were* raised; nor does it appear that he contests validity of the lower court's adjudication of those claims. Respondent submits that the argument is without merit because it is not properly before this Court, and is adequately refuted by longstanding precedent.

#### **A.**

Petitioner is asking this Court to grant him leave to file a successive application. Respondent points out that the commencement of PCR proceedings are governed by Statute, which provide the appropriate method for filing and do not require leave of the South Carolina Supreme Court. S.C. Code § 17-27-40 (2014) ("A proceeding is commenced by filing an application verified by the applicant with the clerk of the court in which the conviction took place.").

To the extent Petitioner is requesting that this Court go ahead and *rule* on whether his forthcoming application will be successive, Respondent submits this matter is not presently ripe for adjudication and should be dismissed.

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<sup>2</sup> While Respondent maintains that the conflict holdings of Childers do not extend to PCR proceedings, Petitioner has failed to show or even allege facts sufficient to warrant relief *under that harsher standard*.

Before any action can be maintained, a justiciable controversy must be present. Byrd v. Irmo High Sch., 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). A justiciable controversy is a real and substantial controversy appropriate for judicial determination, as opposed to a dispute or difference of a contingent, hypothetical, or abstract character. South Carolina Pub. Interest Found. v. South Carolina Dept. of Transp., 412 S.C. 18, 26, 770 S.E.2d 399, 403 (2015). Appellate courts do not concern themselves with moot or speculative questions. Id.

Petitioner has not yet filed the application he is asking this Court to rule upon. Moreover, when or if Petitioner does eventually file, he must file with the clerk of the court in which the conviction took place – here, in *circuit court*. § 17-27-40. A *final judgment* may be reviewed by a writ of certiorari. § 17-27-100. If Petitioner wants the Supreme Court of South Carolina to decide whether or not he is entitled to a successive application for post-conviction relief, then the proper procedure is to file a new application in circuit court.

### B.

Regardless of this cases procedural posture, it is more than clear that Petitioner is not entitled to a successive application for post-conviction relief. First, as stated above, there is no Sixth Amendment right to the effective assistance of counsel in state post-conviction relief proceedings. Coleman v. Thompson, 501 U.S. 722 (1991).

Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). Specifically, the legislature has provided that

[a]ll 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 a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

S.C. Code Ann. § 17-27-90 (2014). Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a “sufficient reason” why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, “the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' allowing for a successive PCR application under § 17-27-90.” Id. at 452, 409 S.E.2d at 394-95.

There are sound, logical reasons behind the decision to preclude such claims. The PCR rules “contemplate an adjudication on the merits of the original petition, one bite at the apple as it were.” Aice, 305 S.C. at 452, 409 S.E.2d at 395 (citing Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)). “Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice.” Id. at 451, 409 S.E.2d at 395. In reaching this decision, this Court noted that to find otherwise would be to create an exception that “may well swallow [the general rule against successive applications],” and that “the number of successive PCR applications” would be “limited only by the imagination and creativity of skilled attorneys.” Id. Likewise, Petitioner’s current argument rests on the allegation that his PCR counsel was ineffective in failing to raise several additional claims – an allegation that has no *evidentiary support* in the actual record. Underneath Petitioner’s claim is the presumption – which he asks this Court to share – that ineffectiveness occurred solely because his current attorney would have handled the case differently

than his former attorney. This argument is analogous to that in Aice, where the Court concluded that under the petitioner's view, "[a]s long as a given convict's counsel could craft new arguments not raised by prior PCR counsel, a successive application could be heard." Id.

For these reasons, Respondent respectfully requests this petition be denied.

Respectfully submitted,

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By: 

ATTORNEYS FOR RESPONDENT

August 25, 2015

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Greenwood County

The Honorable Clifton B. Newman, Circuit Court Judge

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CHARLES VANDROSS, #3166095

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

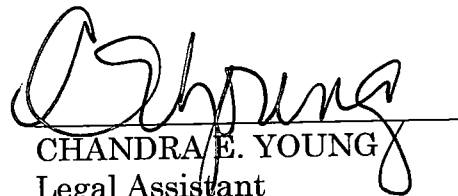
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**PROOF OF SERVICE**  
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I, CHANDRA E. YOUNG, certify that I have served the Return to Petitioner's "Petition For A Remand or, In The Alternative, For Leave to File a Successor (sic) Post-Conviction Relief Application" on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Elizabeth A. Franklin-Best, Esquire  
900 Elmwood Avenue; Suite 101  
Columbia, SC 29201

I further certify that all parties required by Rule to be served have been served.

This 25<sup>th</sup> day of August 2015.

  
CHANDRA E. YOUNG  
Legal Assistant  
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