

W Y C H E

Attorneys at Law

By Electronic Mail; Original by U.S. Mail

April 13, 2016

Ms. Janet Johnson
PCR Specialist
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

RE: *Joey Johnson, S.C.D.C. No. 214306 vs. State of South Carolina*
Anderson County Case No.: 2011-CP-04-1849

2016-000741

Dear Ms. Johnson:

This letter is intended to supplement the Notice of Appeal filed in the above-referenced matter with the explanation required pursuant to Rule 243(c), SCACR, as to why the determination of the lower court was improper.¹ We received written notice of order on appeal on March 22, 2016, and filed our Notice of Appeal on March 31, 2016. As you are aware, our Notice of Appeal was initially filed with the Court of Appeals and then transferred to this Court pursuant to Rule 204(a), SCACR.

We are serving a copy of this letter upon the Respondent and enclosing proof of service of the same, and we are also providing a copy of this letter to the Anderson County Clerk of Court.

This appeal follows denial of Appellant's Post-Conviction Relief ("PCR") application. Appellant argued in this PCR application that he had received ineffective assistance of appellate counsel during appellate review of the denial of his first PCR application. The court of common pleas denied relief, holding in part that Appellant's arguments with respect to ineffective assistance of appellate counsel did not "justify a successive filing." Order at p. 4. (Attached as Exhibit A to Notice of Appeal). The court further found that "even if it were to find ineffective assistance of appellate counsel a sufficient reason to warrant a successive application, Applicant has failed to meet his burden to show any actual deficient performance or prejudice." *Id.*

¹ Rule 243(c) requires an explanation accompany the notice of appeal "[i]f the lower court has determined that the post-conviction relief action is barred as successive or being untimely under the statute of limitations." As noted below, the court here held that Appellant's allegations were "insufficient to justify a successive filing." The explanation in this letter is therefore being provided only out of an abundance of caution.

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The decision of the court of common pleas was improper for two reasons. First, Appellant's arguments as to ineffective assistance of appellate counsel were sufficient to justify a successive filing. Second, Appellant has demonstrated that he suffered prejudice.

Appellant filed his first PCR application on May 17, 2006. In that application he brought eight claims: (1) that he only pled guilty because he believed he would receive a seven-year sentence; (2) his counsel was ineffective for failing to file a direct appeal; (3) he only pled guilty because he was coerced and under duress; (4) the guilty plea was involuntary because he was not competent to plead guilty; (5) his counsel was ineffective because they promised him he would be housed in a prison close to his home in Anderson; (6) inadequate conditions of confinement; (7) his counsel was ineffective because they did not investigate possible defenses; and (8) his counsel was ineffective for not communicating with him about his case. An evidentiary hearing was held on his initial PCR Application on July 22, 2008. This Application was denied by an Order issued on September 2, 2008. He appealed this denial of his application, and was assisted in his appeal by the Office of Indigent Defense. Appellant's counsel on this first appeal made the unilateral decision to raise only one issue on appeal: that Appellant pled guilty only because his attorney told him he would get a prison close to his home in Anderson if he pled guilty. While it was not disputed that Appellant was given assurances by SCDC that he would serve his sentence in a facility close to his home in Anderson, the Supreme Court, after granting certiorari, reversed itself and dismissed his appeal without reasoning as improvidently granted on May 13, 2011.

Appellant brought the present PCR action now on appeal on June 10, 2011. Among the claims raised in this second application was that his appellate counsel (in the appeal of the denial of his initial PCR application) was ineffective for only appealing one out of the eight issues he raised in his initial PCR.

As Appellant argued to the court below in opposition to the court's conditional order of dismissal, Appellant plainly could not have raised in his first PCR application his claim for ineffective assistance of appellate counsel on review of denial of that first application. The law makes clear that,

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any grounds 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 (emphasis added). Further, the statute states that an applicant must provide "sufficient reason" for a successive PCR only in regard to grounds which were or could have been raised in an earlier PCR application. Here, however, the gravamen of Appellant's second PCR application is that counsel in his initial PCR proceeding was ineffective. Obviously, this is not

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a claim which could have been brought in his initial PCR application since it is based upon actions and omissions which had not yet occurred when that application was filed.

While Appellant cannot, and does not, dispute that successive PCR applications are “disfavored” under South Carolina law, *Land v. State*, 274 S.C. 243 (1980), Appellant notes that South Carolina courts have been willing to allow successive PCR applications to go forward in a number of different circumstances. See, e.g., *Washington v. State*, 324 S.C. 232, 236 (1996) (successive PCR application was not barred where “so many procedural irregularities occurred during the course of [applicant]’s judicial process that he has not received due process.”); *Carter v. State*, 293 S.C. 528, 530 (1987) (holding that successive PCR application, alleging ineffective assistance of PCR counsel, was not barred when defendant was represented by trial counsel during his first PCR application, defendant not having been “specifically advised of the hazards of being represented by trial counsel at the post-conviction hearing and . . . consent[ing] to such an arrangement.”); *Case v. State*, 277 S.C. 474 (1982) (holding that successive PCR application was permitted where first PCR application was filed without assistance of counsel).

As Appellant argued to the court below, the most factually analogous case to this one is *Austin v. State*, 305 S.C. 453 (1991). The applicant in that case, like Appellant in the present case, requested that counsel appeal certain claims which had been denied at his initial PCR hearing. When counsel failed to bring an appeal on these claims, applicant brought a successive PCR application alleging that his appellate PCR counsel had been ineffective in not appealing his denied claims. The court there found that this did constitute “sufficient reason” for a successive PCR, as the applicant was entitled to a substantive appeal of the initial denial of his PCR claims. The court noted that “we have recognized a prisoner’s right to the assistance of appellate counsel in seeking review of the denial of a PCR. Supreme Court Rule 50(6) expressly provides for the appointment of counsel to seek appellate review on PCR.” *Id.* at 454.

South Carolina law does recognize the right to assistance of counsel in bringing an appeal of an adverse finding at the initial PCR hearing. This Court should recognize that Appellant was denied this right when his PCR appellate counsel did not argue all of Appellant’s claims on his first appeal, as Appellant requested.² Appellant further demonstrated that he was prejudiced by this decision, as the issues not argued were therefore not preserved for a potential federal appeal. *Cf. Austin*, 305 S.C. at 454, 409 S.E.2d at 396 (recognizing that *Anders [v. California]*, 386 U.S. 738 (1967)] requires appellate counsel to brief arguable issues, despite counsel’s belief the appeal is frivolous, as a safeguard of the right to appeal.”)

² It is also worth noting that there seems to be a clear trend in jurisprudence towards recognizing a broader right to the effective assistance of counsel in state post-conviction relief proceedings. The Supreme Court held, in *Martinez v. Ryan*, 132 S.Ct. 1309 (Oct. 4, 2012), that an applicant for habeas relief could not be held to have procedurally defaulted his or her habeas claims at the state court level where the claims had not been exhausted in a PCR proceeding because of the ineffective assistance of PCR counsel. In doing so, the Court “acknowledge[d], as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim.” *Id.* at 1318.

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Yours sincerely,


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Enclosure

Cc: Walt Whitmire, Esq.
John W. McIntosh, Esq.
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Anderson County Clerk of Court

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Frank Addy, Jr., Circuit Court Judge

Case No. 2011-CP-04-1849

Joey Johnson,
S.C.D.C. No. 214306, Appellant,

vs.

State of South Carolina, Respondent.

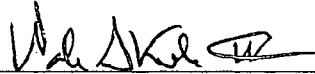
PROOF OF SERVICE

This is to certify that I have this date caused to be served a true and correct copy of Appellant's letter to Ms. Janet Johnson, PCR Specialist, South Carolina Supreme Court to supplement the Notice of Appeal filed in the above-referenced matter with the explanation required pursuant to Rule 243(c), SCACR, on the Office of the Attorney General, counsel for Respondent and Anderson County Clerk of Court, by U.S. Mail, postage prepaid, as follows:

Walt Whitmire, Esq.
John W. McIntosh, Esq.
Salley Elliott, Esq.
John W. Whitmire, Esq.
Office of the Attorney General
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Columbia, SC 29211

Honorable Richard A. Shirley
Clerk of Court
Anderson County Courthouse
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Anderson, SC 29622-8002

Respectfully submitted,



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