

State of South Carolina
In The Supreme Court

Appeal From Greenville County
Court of Common Pleas

The Honorable Robin B. Stidwell - Chief Admin. Judge

Case No. 2016 - 001184

Furman E. Thompson

Petitioner,

v.

State of South Carolina

Respondent.

Motion To Show Cause

Furman Elliott Thompson
Petitioner (Pro Se)
Tugue River Cor. Inst.
180-200 Prison Road
Knorrle, S.C. 29335

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SC SUPREME COURT

Statement of the Case

Petitioner is currently incarcerated in the Tiger River Correctional Institution of the South Carolina Department of Corrections, pursuant to orders of commitment from the Clerk of Court for Greenville County. On August 17, 2004, Petitioner was indicted for First degree Burglary and attempted armed robbery. He was represented by Earliest Hamilton at trial. On July 14, 2005, Petitioner was found guilty as indicted and sentenced to twenty years for First degree burglary and ten years for attempted armed robbery, to run concurrent.

Petitioner filed a direct appeal, asserting the trial Court erred "by failing to direct a verdict of acquittal when the state failed to present any direct or circumstantial evidence to show that the appellant was guilty of First degree burglary or attempted armed robbery, either as a principal or as an accomplice." Petitioner was represented by Eleanor Duffy Cleary on appeal. In an opinion filed June 18, 2007, the South Carolina Court of Appeals affirmed Petitioner's conviction. The remittitur was issued on July 11, 2007.

Petitioner filed a pro se application for PER on October 18, 2007, alleging ineffective assistance of trial counsel. As supporting facts, Petitioner ar-

gued that counsel "Failed to make necessary objections to the court / solicitor" errors during the course of the trial" and "Failed to file various motions in a timely manner," including a motion for a preliminary hearing.

The State made a return to the Petitioner's P. CR application on January 16, 2008. At the writ hearing (held on September 22, 2008), the Petitioner was represented by Susannah Ross. The Court heard testimony from the Petitioner, Ms. Wanda Harris - as the state's primary witness, and trial counsel (Hamilton). On November 3, 2008, the PER Court denied and dismissed the Petitioner's application.¹

On July 27, 2009, Robert Pachak filed a Johnson Petition for Writ of Certiorari on the Petitioner's behalf, along with a Motion to Be Relieved as counsel. The Petition raised the following arguable issue: "Whether trial counsel was ineffective in his representation of the Petitioner?" Certiorari was denied on June 25, 2010, and the Court issued the remittitur on July 13, 2010.

1. Petitioner filed a 59(c) Motion to Alter or Amend Judgment on December 1, 2008.

Habeas Corpus

Petitioner Filed this Petition For writ of habeas on August 11, 2010, pursuant to 28 U.S.C. § 22-54. Petitioner raised the following ground for relief, substantially verbatim:

Ground One: 6th Amendment and 14th Amendment violation(s)

Supporting Facts: (A)-Counsel failed to make the necessary objections to the trial court, and solicitor error during the course of the trial. (B)-Failed to file timely motion for preliminary hearing that the Applicant requested - ten (10) days notice for a preliminary hearing. Applicant also filed a 59(c) on 8-28-2009.

Respondent filed a motion for summary judgment on September 30, 2010.

The United States District Court Magistrate Judge issued his Report and Recommendation on July 28, 2011. (ECF No. 20).

The Petitioner challenged the Report through de novo review, and on August 12, 2011, the United
1. up to this point, the statements have been taken from the same Report.

States District Court Judge, issued his Order dismissing the Petition (although, without prejudice). (ECF No. 24).

Fourth Circuit Appeal

Petitioner appealed the District Judge's Order and denial of a certificate of appealability to the United States Court of Appeals - for the Fourth Circuit, and the Court issued its "Dismissed by unpublished per curiam opinion" on February 2, 2012.

Petitioner then requested a rehearing, and on March 26, 2012, the Court issued its Order denying rehearing.

Petitioner submitted an application for writ of Certiorari to the Supreme Court of the United States on July 10, 2012, and was denied.

Second PER Application

On April 20, 2015, Petitioner submitted an APER-
1. Denial of certiorari review did not dictate (necessarily) that Petitioner's case was meritless.

(pursuant to Austin v. State), alleging being held in custody unlawfully for the following reasons:

1. Due process violation (Certiorari/Land).
2. Ineffective (Appellate) counsel.

On September 17, 2015, the State Respondent filed and served a document entitled "Conditional Order of Dismissal" seeking an approved signature from the Chief Administrative Judge of the Thirteenth Judicial Circuit - Hon. Robin B. Stilwell.

On September 28, 2015, the Respondent filed and served a second document entitled "Return And Motion To Dismiss" the APER.

On October 23, 2015, Judge Stilwell issued a "Conditional Order of Dismissal" granting the Petitioner "Twenty (20) days from the date of service upon him to show why the order (summarily dismissing the case) should not become final...."

To which, the Petitioner complied, by the submission of his "Pro Se Motion To Show Cause." The Court issued its "Final Order of Dismissal" denying the APER citing "successiveness and untimeliness." The Petitioner then filed a timely Notice of Appeal.

Austin Appeal

On June 4, 2016, the Petitioner was served with a letter from the Court appointing the case an appellate number, and requiring the Petitioner to "provide a written explanation as to why the PCR Court's decision (determination) was improper. The Petitioner was given twenty (20) days to respond, from the date of the letter's preparation - which was June 6, 2016.

The letter's envelope postmarks denote that:

- (A.) It was received in the institutional mailroom on June 9, 2016 - three (3) days later.
- (B.) It was U.S. postmarked June 7, 2016.
- (C.) It was (eight (8) days before the Petitioner took possession of the document - at a possible loss of almost half of the allotted response time.
- (D.) It was in possession of the institution five (5) days of the eight in total. Though, withheld for unknown reasons.

In recognition of the SOACR 243(c) mandate set forth by the Court, and in, all-out effort to

perfect and submit some semblance of an accurate document, the Petitioner is hard-pressed to be able to rely on the Full Twenty (20) day allotment. Or at least, the better portion, of it, and prays the Court's acknowledgment of the postal circumstances. And concurrence thereto.

Issue Presented

Was the order of the Circuit Court improper in determining the Petitioner's, second PER submission, successive and untimely?

Argument(s) (Phase One)

The Petitioner contends that perhaps the origin of his arguments are best placed at the habeas level, where, in the Report of the Magistrate Judge it is stated:

"Discussion"

"Respondent acknowledges that the Petitioner has exhausted his available state court remedies. Respondent argues, however, that the Petitioner's

"claims are procedurally barred because the Petitioner did not properly exhaust his state remedies. The Court agrees."¹

Further,

"Although the Petitioner raises the issues in this Petition - almost verbatim from his PER application in state court, the PER court failed to address these specific claims of ineffective assistance of counsel in its order of dismissal. Because of this failure by the court, the Petitioner was required to file a timely Rule 59(c) motion requesting that the PER court make specific findings on all of his claims raised in his PER application. *Marlar*, 653 S.E. 2d at 267." (Pg. 13 of 16).

Further still,

"Petitioner filed a Rule 59(c) motion following the denial of his PER application, however, the Petitioner's Rule 59(c) motion likewise failed to address his ineffective assistance of counsel claims for failure to object, and failure to file a motion for a preliminary hearing."² (Pg. 14 of 16).

1. (ECF No. 20 - pgs 12 and 13 of 16)

And Lastly...

"The Petitioner Fails to articulate cause for procedurally defaulting on these specific ineffective assistance claims, instead making the conclusory statement, "The records for the 'PER' case does not show that the defendant waive[d] or abandoned his issue on record before the PER court." And, "The Petitioner cannot establish cause and actual prejudice because he abandoned the opportunity to preserve these specific issues." (Pg. 14 of 16).

Footnote 4. on (pg. 14 of 16) denotes:

"Petitioner's motion to alter or amend specifically addresses the ineffective counsel issues of: Failure to interview and effectively cross-examine Harris; Failure to explain to the Petitioner legal terminology key to the Petitioner's trial; and Failure to request a charge for abandonment."

To all of which, the Petitioner makes three notable contentions. First, as established, a 39(w) motion was submitted, however, not by the

Petitioner, himself. But rather, by appointed PER
defense counsel. And while the PER action was
pro se initiated, during the course of the "post-
trial submissions," the Petitioner was not under
pro se status. Nor, was there any indication, or
way to preceive the necessity to do so. And
it is well known (established) that South Carolina
courts do not entertain "hybrid circumstances."

Jones v. State.

Next, with these circumstances of post-trial liti-
gation being brought to the habeas arena by the
Petitioner (as a pro se litigant), construal of
his issues were to be given, broader latitude of
assessment by the habeas court. And this was
done - as attested to herein. However, the Petitioner
asserts that, a very few more degrees of latitude
would have necessarily encapsulated the, viable
issue, of ineffective PER counsel.

Or, as an alternative assessment, due process viola-
tion - procedural documentational deficiency (ies)
with the preparation of the 59(w) motion.

Haines v. Kerner, 404 U.S. 519, 30 L. Ed. 2d 652, 92
S. Ct. 594 (1972). ("If the court can reasonably read
pleadings to state a valid claim on which the liti-

gant could prevail, it should do so, despite confusion of legal theories....). And even (.... Failure to cite proper legal authorities, or poor syntax or sentence construction).

Next, while both the Magistrate's Report and the Petitioner's 59(c) motion shed due light on his habeas grounds, the Petitioner brought, yet another understanding to this agenda. That being - as introduced in the AUSTIN PER application - "ineffective assistance of appellate counsel" / due process violation(s).

Argument(s) (Phase Two)

In bringing these two grounds to the PER court it was the Petitioner's intention to establish:

A.) By his (Pet.)'s assessments, after the post-trial motions, and upon review of the Final Order, his appellate counsel should have recognized the deficiencies - as brought forth by the Report and Recommendation - and made the necessary corrections. Rather than, submitting a Johnson Petition To Be Relieved.

"Appellate counsel may also be ineffective for failing to make a record sufficient for review"
Exell v. State, 345 S.C. 312, 548 S.E. 2d 852 (2001).

B.) Nonetheless however, as a procedural precedent with the South Carolina Appellate Courts, when an individual is presented with either an Andrus- (direct appeal) or Johnson- (per appeal) brief, the courts (Appellate and Supreme) issue a documentational letter giving a Petitioner "within forty-five days of the date of this letter, file with this court a pro se response to the petition filed by your counsel. In this response, you may raise and argue any issues you believe the court should consider in this appeal."

"Upon receipt of your pro se response or the expiration of forty-five (45) days, the matter will be submitted to the court for its consideration."

"Very truly yours,
Daniel E. Shearouse
CLERK

"A state procedural ground is adequate unless it

is strictly regularly followed."
Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982)

And as such, this endeavor (or rather, lack of it) set the Petitioner's goal(s) as recognizing and pursuing Austin measures, under the assessment of an mixed habeas petition, containing both exhausted and unexhausted claims. With the understanding(s) that:

"The Supreme Court ruled in Odum v. State, 337 S.C. 256, 523 S.E. 2d 753 (1999), that the one year statute of limitations required by S.C. Code Ann. § 17-27-45 (A) does not apply to Austin appeals, because they are "BELATED APPEALS" intended to correct unjust procedural defects."
Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (1991).

Which, (in reiteration), in the Petitioner's case is directly related to the Johnson Petition circumstances. Additionally, in current Respondent counsel's Return it is stated:

"This application was filed on April 20, 2015, which
1. Emphasis, mine.

was over 6 years beyond the time the statutory Filing period had expired."

The Respondent's implications seem to aver that this is an "initial PER Filing." Under time constraints, Austin appeals carry no time constraints. Secondly, while Austin appeals initiate in the Court of Common Pleas, ultimately they are finally adjudicated in the S.C. Supreme Court.

Next, the grounds brought forth by the Petitioner could not have been a part of the initially filed PER action. Ineffective Appellate Counsel (State Certiorari) cannot possibly be brought into existence, except where counsel has been appointed in a PER appeal. Neither, can the ground of due process violation-with the South Carolina Supreme Court-come about, without a PER occurrence. Unless PER was bypassed, after a direct appeal, which, was not the case, here.

Next, it is clearly established that only "two tolling clocks" can run simultaneously in a collateral attack of a conviction and sentence. Those being post-conviction (initial) and habeas corpus. In fact, they are the only two existing tolling clocks, available in a collateral attack. Aside from the dead-

lines set within the various appellate processes of these same said collateral proceedings.

Being denied the initial pro se (Johnson) opportunity, could not have come about (or for that matter) raised in the South Carolina Court of Common Pleas. under Post-conviction (initial) circumstances. As, it is a certiorari matter. And, moreover, than the ground be ruled successive.

Conclusion

It is the Petitioner's hope to have provided cause for this Honorable Court to acknowledge and accept his plea for certiorari review.

Having shown why the PER court erred in denying a full hearing on both the APER and the Memorandum Response attached thereto.

Moreover, the Petitioner stands ready to prepare and submit the requisite Petition for Writ of Certiorari, based upon the allegations that would have been addressed, given the opportunity. Both initially, and presently.

This 28 day of June, 2016.

Respectfully Submitted,
Furman E. Thompson
Petitioner (Pro Se)

State of South Carolina
In The Supreme Court

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Appeal From Granville County
Court of Common Pleas

SC SUPREME COURT

The Honorable Robin B. Stilwell - Chief Admin. Judge

Case No. 2016-001184

Furman E. Thompson

Petitioner,

v.

State of South Carolina

Respondent.

Certificate of Service

I certify that a true copy of the Motion to Show Cause, and a Certificate of Service have been served on the Hon. Daniel E. Shearouse - clerk of the South Carolina Supreme Court, by U.S. Mail, postage prepaid, at P.O. Box 11330, Columbia, S.C. 29211.

Sworn To And Before Me,
this 28th day of July, 2016.
Paul Dean Canty, S.

Notary Public of S. C.

My commission expires: Dec. 10, 2017

S/ Furman E. Thompson
Furman E. Thompson
Petitioner (Pro Se)

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ENOPE, S.C. 29335

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Clerk - South Carolina Supreme Court
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Legal Document - (Please Do Not Fold)
Houston v. Lock