STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS
Appeal from Richland County
The Honorable L. Casey Manning, Circuit Court Judge
The Honorable Brooks P. Goldsmith, Post-Conviction Relief Judge

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Unpublished Opinion 2016-UP-171 (S.C. Ct. App. filed April 6, 2016)

Appellate Case No. 2016-001311

Nakia Jones, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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STANDARD OF REVIEW

The Court gives great deference to the post-conviction relief ("PCR") court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). This Court will uphold the findings of the PCR judge "if there is any evidence of probative value sufficient to support them." Dempsey, 363 S.C. at 368, 610 S.E.2d at 814. "If no probative evidence exists to support the findings, the Court will reverse." Id. at 368–69, 610 S.E.2d at 814. Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615-16 (2011).

QUESTIONS PRESENTED

(as phrased by Petitioner, citations reformatted when possible)

1. "Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court where the Court ruled that a decision in this Petition would not terminate the uncertainty or controversy giving rise to the proceeding. Petitioner additionally submits that his 1996 YOA sentence did not contain a designation as a "serious offense" or "most serious offense" as those terms are used in S.C. Code 17-25-45(A). See State v. Small, 613 S.E.2d 754, Epp v. Bazzle, 2008 WL 2563151."

2. "Whether the Petition substantial constitutional right to habeas corpus and due Process of Law were infringe on when the Lower Court and Court of Appeals ruled that this Petition should be treated as a P-C-R action when a constitutional denial of fundament fairness shocking to the universal sense of Justice has accured. See Butler v. State, 302 S.C. 466, 397 S.E.2d 87, cert. denied 498 U.S. 972 111 S.Ct. 442, 112 Led 2d 425 1990."

STATEMENT OF THE CASE

The Petitioner was true bill indicted during the June 1995 term of the Richland County Grand Jury for Assault and Battery with Intent to Kill (1995-GS-40-01328). On February 29, 1996, Petitioner appeared before the Honorable L. Casey Manning, where he pled guilty to the charge as indicted and was sentenced under the Youthful Offender Act to an indeterminate sentence not to exceed six (6) years.

Thereafter, Petitioner was indicted at the May 1998 term of the Richland County Grand Jury for Failure to Stop for a Blue Light, Possession/Making Implements Capable of Being Used in Crime, Unlawful Sale or Delivery of a Pistol, and three counts of Armed Robbery (1998-GS-40-23850, -24551 through -24555). On June 16, 1998, Petitioner proceeded to jury trial before the Honorable H. Dean Hall, where Petitioner was acquitted of Failure to Stop for a Blue Light, but convicted of three counts of Armed Robbery and the weapons charge as indicted. The Possession/Making Implements charge was *nolle prossed* by the State. Judge Hall sentenced Petitioner to life imprisonment without parole for each count of Armed Robbery pursuant to S.C. Code Ann. § 17-25-45; Petitioner was not sentenced for the Weapons charge as a result pursuant to S.C. Code § 16-23-490(a).

A notice of appeal was filed and an appeal was perfected. Senior Appellate Defender Wanda Haile Carter, Esquire of the South Carolina Office of Appellate Defense represented petitioner. After briefing, the South Carolina Supreme Court affirmed the convictions and sentences by Order filed March 12, 2001. State v. Jones, Op. No. 25257 (S.C. filed March 12, 2001). Specifically, regarding the imposition of life without parole under S.C. Code § 17-25-45 due to Petitioner's prior Assault and Battery with Intent to Kill conviction, the Court found:

> "Here, Jones' armed robberies occurred subsequent to passage of 17-25-45, and, as such, there is no *ex post facto* violation. Accord Phillips v. State, 331 S.C. 482,

504 S.E.2d 111 (1998) (no *ex post facto* violation for legislation to enhance punishment for later offenses based on prior conviction, even though enhancement provision was not in effect at time of prior offense).

To the extent Jones contends that the Two-Strikes law changes the consequences of his 1996 plea to ABIK, he is correct. See Gryger v. Burke, 334 U.S. 728 (1948) (holding that sentencing as a habitual criminal is not viewed as new jeopardy or additional penalty for an earlier crime; rather it is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because it is a repetitive one). Accord State v. Oliver, supra.

In sum, we find no constitutional violation in application of the Two-Strikes law to Jones."

State v. Jones, 344 S.C. 48, 59, 543 S.E.2d 541, 546-47 (2001). The Remittitur was issued March 28, 2001.

Petitioner filed an initial application for post-conviction relief on June 27, 2001 challenging his 1998 convictions (C.A. No. 2001-CP-40-2660). Respondent filed its Return on July 12, 2002, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened April 28, 2003, at the Richland County Courthouse before the Honorable James R. Barber, III. Petitioner was present with counsel, Melissa J. Kimbrough, Esquire. By order filed May 23, 2003, Judge Barber denied and dismissed the action with prejudice. The subsequent motion for reconsideration was denied by Judge Barber on June 25, 2003. Petitioner filed a notice of appeal and a Petition for Writ of Certiorari was submitted to the South Carolina Supreme Court on Petitioner's behalf. By Order on or about August 19, 2004, the South Carolina Supreme Court denied the petition. The Remittitur was issued on or about March 11, 2005.

Petitioner thereafter filed a second application for post-conviction relief on August 14, 2003 (C.A. No. 2003-CP-40-03963). In this second application, Petitioner raised a claim of ineffective assistance of counsel regarding his 1995 conviction for Assault and Battery with Intent to Kill. Respondent filed a Return and Motion to Dismiss on June 21, 2004, requesting the

court summarily dismiss the application with prejudice. After receiving Petitioner's objections to the summary dismissal, the Honorable G. Thomas Cooper, Jr. summarily dismissed the application with prejudice by order filed February 22, 2006. A notice of appeal was filed, but later dismissed by the South Carolina Supreme Court by order on or about May 2, 2006. The remittitur was received May 22, 2006.

Petitioner filed a Petition for Writ of Habeas Corpus on May 25, 2012, which was received by respondent on August 10, 2012, and also requested a declaratory judgment. Respondent filed a return and motion to dismiss, seeking to summarily dismiss the filing, but the Honorable Robert E. Hood requested that an evidentiary hearing be held. This was convened on November 19, 2013 before Judge Hood at the Richland County Courthouse. Petitioner was represented by David E. Belding, Esquire, and Respondent was represented by Megan E. Harrigan, Esquire. This action was dismissed by order of Judge Hood filed March 20, 2014.

A timely notice of appeal was filed by Attorney Belding with the South Carolina Court of Appeals on March 20, 2014. It was administratively dismissed on July 9, 2014 for failure to file a transcript; however, upon petition of Attorney Belding and explanation of a misunderstanding as to who represented Petitioner, the case was reinstated on September 30, 2014, and Attorney Belding was relieved as counsel December 2, 2014. Petitioner filed his Final Brief on September 24, 2015, and the Respondent did not file a responsive pleading. The Court affirmed the ruling of the circuit court in an unpublished opinion filed April 6, 2016 (Jones v. State, filed 2016-UP-171). Petitioner filed a motion for rehearing on April 20, 2016, which was denied on May 20, 2016.

Petitioner filed his Petitioner for Writ of Certiorari with this Court on or about June 13, 2016. He received an extension to file his appendix, and the same was submitted on or about June 28, 2016. This return to petition for writ of certiorari follows.

ARGUMENT[1]

I. This action is not appropriate for declaratory judgment, and was properly viewed by the lower court and Court of Appeals as a successive post-conviction relief application.

Both prior courts appropriately determined this action to be one for a writ of habeas corpus more so than a petition for declaratory judgment, and both have properly dismissed it as being a successive claim for post-conviction relief action. Because Petitioner raises issued that cannot be resolved by a declaratory judgment, it was actually to his benefit for these courts to delve into the merits of his petition. For Petitioner to have prevailed on the merits of his habeas corpus petition, he must have made a prima facie case showing that he was entitled to the requested relief. ." Gibson v. State, 329 S.C. 37, 40, 495 S.E.2d 426, 427-8 (1998).

Furthermore, a Petitioner must show that he has exhausted all available post-conviction relief remedies. Simpson v. State, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998); Gibson, 329 S.C. at 42, 495 S.E.2d at 428. "Exhaustion includes filing of an application, the rendering of an order adjudicating the issues, and petitioning for, or knowingly waiving, appellate review." Gibson, 329 S.C. at 42, 495 S.E.2d at 428. He must further allege sufficient facts to show why other remedies, such as post-conviction relief, are unavailable or inadequate. Id. Post-conviction relief is not rendered "unavailable or inadequate" merely because the petitioner's application might be dismissed as procedurally barred. In fact, any matter that is cognizable under the Uniform Post Conviction Procedure Act, S.C. Code Ann. §§ 17-27-10 to -120 (2003), "must be raised in post-conviction relief application, and may not be raised by a petition for a writ of habeas corpus before the circuit or other lower courts." Al-Shabazz v. State, 338 S.C. 354, 365, 527 S.E.2d 742, 748 (2000); Simpson v. State, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998). The

[1] Respondent believes that Petitioner's questions presented can be succinctly argued together and, therefore, combines them into this sole argument section.

Uniform Post Conviction Procedure Act is "broadly inclusive and will rarely be inadequate or unavailable to test the legality of the detention." Gibson, 329 S.C. at 41, 495 S.E.2d at 428. A petitioner may even allege constitutional violations in post-conviction relief proceedings, unless the issue could have been raised by the petitioner on direct appeal. Id.

Thus, "[a] person is procedurally barred from petitioning the circuit court for a writ of habeas corpus where the matter alleged is one which could have been raised in a post-conviction relief application." Keeler v. Mauney, 330 S.C. 568, 571, 500 S.E.2d 123, 124 (Ct. App. 1998). "Furthermore, if a person is procedurally barred, his only means of obtaining state habeas corpus relief is to file a petition in the original jurisdiction of the Supreme Court." Id. Here, Petitioner improperly filed the petition with the Richland County Clerk of Court, not in the South Carolina Supreme Court.

In the current action, Petitioner set forth numerous, extensive allegations that could have, and in some cases even were, raised on direct appeal and/or in his prior post-conviction relief actions. He failed to set forth any reason he could not have raised the allegations in his previous post-conviction relief actions or why other remedies, such as post-conviction relief, were unavailable or inadequate. In fact, Petitioner alleges that some of these claims that were raised early have been dismissed with prejudice, therefore leaving him with no other option but to file a writ of habeas corpus. PWC, p. 8. Respondent disagrees, as this is a clear violation of the doctrine of *res judicata* because these issues have been fully litigated and decided. Therefore, the current claims cannot be raised in a Petition for Writ of Habeas Corpus in the Circuit Courts of South Carolina. This Court must uphold the rulings of the circuit court and the Court of Appeals and deny this petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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July 29, 2016