

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO Horry COUNTY

Larry B. Hyman, Jr., Circuit Court Judge

Jamie Goss, Petitioner,

v.

State of South Carolina, Respondents.

MOTION TO AMEND PETITIONER'S PRO SE
REPLY BRIEF TO JOHNSON PETITION

JAMIE GOSS
Petitioner

Lee Correctional Institution
990 Wisacky Highway
Bishopville, South Carolina 29010

PETITIONER

RECEIVED

NOV 01 2012

S.C. SUPREME COURT

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Questions Presented By Petitioner

I. Was Petitioner denied Fair Process and his One Full and Fair Bite of the Apple in the initial PCR Proceedings when appointed PCR Counsel (refused/failed) to amend two substantial grounds for Relief, which were conclusively supported by the record, that Petitioner had repeatedly demanded PCR Counsel amend prior to actual PCR Hearing...(which can be proven by the Certified U.S. Postal Mail receipts.)

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S.C. SUPREME COURT

II. Was Petitioner constructively denied his Statutory Right to Assistance of PCR Counsel and Fair Process, (1) where appointed PCR Counsel refused Petitioner's request to amend two substantial grounds for Relief, which are, conclusively, supported in the record. (2) Failed to properly file Rule 59(e) and 60(b) Motions in the Circuit Court as were requested timely by Petitioner, resulting in the substantial grounds being waived and not put in the record for the S.C. Supreme Court's review. (3) Then while the 59(e) and 60(b) Motions, which were improperly filed, were still pending in the Circuit Court, the PCR Attorney filed a Notice Of Intent to Appeal the PCR Final Order. Does this all constitute unfair process and a denial of Petitioner's one full and fair bite at the apple entitling Petitioner to a new PCR Hearing?

III. Was Trial Counsel ineffective for failing to make a Motion, prior or during trial, to dismiss the charges based on the fact that the State's only witness, and or Agent destroyed evidence which would conclusively prove Petitioner was not guilty and was not the person driving, or in the car.

IV. Was Petitioner denied Due Process of Law and his Constitutional Right to a Fair Trial when the Trial Judge failed to instruct the Jury, before allowing them to leave Court for the night, not to talk to family, friends, strangers, or anyone about the case; not to look at any newspapers, go online, computer, etc.; not to do any research about the victims or defendant's past, etc.

V. In light of the United States Supreme Court ruling in Martinez Vs. Ryan 566 US. Will South Carolina acknowledge or extend a Constitutional or equitable right of Effective Assistance of Counsel in Initial Post Conviction Proceedings where now Direct Appealable issues such as Ineffective Assistance of Trial Counsel are heard for the first time? If so, will the Applicant be (allowed/directed) to file a successive PCR Application or raise the substantial ground in a State Habeas Corpus Petition, giving the State Courts

an opportunity to review and correct the error, or will the (petitioner/applicant) be directed to file the Federal Habeas Corpus? What is, our South Carolina Supreme Courts position in this matter?

Procedural History Of Case

The Petitioner was indicted in November 2006 for trafficking in Crack Cocaine, 10-28 grams (2006-GS-26-4735). On February 12-13, 2007, the Petitioner was tried and convicted of a Jury before the Honorable Edward B. Cottingham, and Judge Cottingham sentenced the Petitioner, as a third time drug offender, to 28 years.

The Petitioner subsequently filed a Motion for a new trial based upon newly-discovered evidence. A hearing was held on the Motion on March 22, 2007. The Petitioner was represented by William I. Diggs, Esquire at this hearing. Judge Cottingham denied the Motion for a New Trial. Thereafter, a Notice of Appeal was timely filed, and an Answers Brief was submitted on the Applicant's behalf by Katherine H. Hudgins, Esquire. The South Carolina Court of Appeals affirmed the conviction on December 22, 2009 (2009-UP-610). The case was remitted to the Circuit Court on January 7, 2010.

An Application for Post Conviction Relief was filed October 26, 2010, by Petitioner. Respondent made a Return on December 23, 2010. An evidentiary hearing was held at Horry County Courthouse on November 7, 2011. The Petitioner was represented by Daniel A. Selwa, II, Esquire. The Respondent was represented by Christine J. Catoe, Assistant Attorney General.

On December 6, 2011, PCR Judge Hyman issued an Order denying and dismissing the Application for PCR, which was filed with Clerk of Court on December 16, 2011.

The Applicant timely informed PCR Counsel to file a 59(e) and 60(b) Motion, since Applicant was not allowed to, due to a prohibition of Hybrid representation.

The PCR Attorney filed a Notice of Intent to file 59(e) and 60(b) Motion, but failed to put the basis for the Notice and Motion.

While the 59(e) and 60(b) Motions were pending in Circuit Court, the PCR Counsel filed a Notice Of Intent to Appeal PCR Judge's Order of Dismissal, thereby depriving State Courts Jurisdiction to rule upon 59(e) and 60(b) Motions. Applicant notified PCR Attorney, Attorney General, and Courts of the error.

The S.C. Attorney General's Office requested the matter be remanded back to the lower Courts for a Hearing on the 59(e) and 60(b) Motions. Justice Toal denied the State's Motion. The Office of Appellate Defense appointed Counsel to represent Applicant on his PCR Appeal. The PCR Counsel filed a Johnson Petition. The Applicant was given 45 days to file a response.

The Applicant is confined in the State's most violent and dangerous prison (Lee Correctional Institution). The prison is on constant lockdowns with inmates being confined to their cells, all movement restricted, and in the past three months there have been 2 hostage situations in the prison, 4 major gang fights, numerous near fatal stabbings, all of which were during and around the time the Applicant was given to respond to Johnson Petition...

Initially, Petitioner attempted to file what he could without access to Law Library, and limited and no movement due to Institutions repeated lockdowns.

The Institution is back to normal operations and the Petitioner is able to properly respond to the Johnson Petition with access to the Law Library and mobility.

Therefore, the Petitioner would, respectfully, pray that this Court allow him to file this Amended Pro Se Johnson Petition reply.

Legal Argument To Questions Presented By Petitioner

I. Was Petitioner denied fair process and his 'one full and fair bite at the apple' in the initial PCR Proceedings when appointed PCR Counsel (failed/refused) to amend two substantial grounds for relief, which Petitioner had repeatedly demanded PCR Counsel to amend prior to PCR Hearing? If so, from this Honorable Supreme Court on the two substantial grounds?

Supporting Facts:

The Petitioner sent the written request to amend the two substantial grounds to PCR Counsel prior to the PCR Hearing via Certified Mail. Petitioner has the US Postal Certified Mail receipts as evidence his request to amend was timely sent to PCR Counsel and would have presented these proofs had he been given a hearing on the 59(e) and 60(b) Motions...

In order to establish whether Applicant was prejudiced, it is Applicant's understanding that this Court must look at the substantial grounds and if this Court determines the grounds proven require the conviction being overturned then the Petitioner was prejudiced. Therefore, Petitioner ask this Court to review the two grounds to determine whether Petitioner was prejudiced. The First Ground Petitioner asked his PCR Attorney to Amend was:

(1) Trial Counsel was ineffective for failing to make a Motion to dismiss charges prior to Trial based on the fact that the State's only witness and or Agent of the State destroyed evidence that could have, conclusively, proven Petitioner's innocence and without that evidence it would make it nearly if not impossible for Petitioner to prove his innocence and the destruction of the evidence deprives the (proceeding/trial) of fairness.

The Officer testified that the entire incident was caught on the Police video recorder. see Trial transcript, _____. However, the Police testified he accidentally erased over the video tape...see Trail transcript, pg 34, Line 2. If this was the first time he had erased over a tape which was evidence, it may possibly be considered an accident by the Court, however, as Police testified it happened on other occasions...see Trial transcript pg 33, Line 18. The fact that this type of evidence had been destroyed on numerous occasions should have been advanced notice to take precautionary steps.

The Court should keep in mind. It is a practice throughout the World for Police to tag and bag all evidence. The video tape was evidence. Why wasn't it put in a evidence bag, with the drugs, cell phones, and all other evidence?

If the Courts or this Honorable Supreme Court would allow Police Officers to be excused by destroying tapes, then it encourages Police Officers to make

pretextual stops (stops under false pretences), assault motorists, etc. All of which are supposed to be recorded; all Officers have to do is say, he or she accidentally recorded over video. Force a Defendant, who might have a long criminal record, to have to go into a Courtroom and weigh his word against a Law Officer, which is totally unfair when there was conclusive evidence that could prove a Defendant's version.

The Petitioner contends that if that tape had not been destroyed that the result of the trial/proceedings would have been different. And had the Trial Attorney moved for dismissal of the charges due to the destruction of the video tape and argued accident or not, then it should not be excused since it was not the first time it was done and that the destruction of such conclusive evidence deprives Petitioner of his Constitutional right to a fair trial and interferes with his right to a meaningful defense...Had this been done the results of the proceeding and trial would have been different.

The Second Ground Petitioner asked PCR Counsel to Amend was:

Petitioner was denied Due Process of Law and his Constitutional right to a Fair Trial when Trial Judge failed to instruct Jurors, before they were allowed to leave for the night, on the first night, not to read any newspaper clippings or anything about the case, not to discuss the case with family, friends, etc. Not to look up anything on the internet, computer, about the case, witnesses, or defendant.

Supporting Facts and Legal Argument

Petitioner contends this error should be considered reversible error and the presumption of prejudice standard should be applied, because its only natural for a person to look into the matter before becoming involved. There's no way at this hour to determine if one or several of the Jurors discussed the case or learned prejudicial facts from a computer source, etc.

We contend that the failure of a Judge to give such important instruction at such a critical point in the Jury process calls into question the entire decision making Jury process and deprives the Jury process of fundamental fairness and deprives a Defendant of Due Process and Fair Trial, and we believe had PCR Attorney amended this ground in PCR proceeding as Petitioner requested, then the results of the PCR proceedings would have been different.

Question Two Presented By Petitioner

II. Was Petitioner constructively denied his Statutory Right to Assistance of PCR Counsel and Fair Process in the PCR Proceedings.

Supporting Facts and Legal Argument

(A) The Petitioner requested PCR Attorney to amend two substantial grounds for relief prior to hearing which PCR Attorney (refused/failed) to...

This can be proven by a copy of the letter sent to PCR Attorney, and because it was sent by US Postal Mail Certified Mail receipt. The Certified Mail receipt will prove it. That's why Petitioner wanted a 59(e), 60(b) Motion hearing to present the proof and preserve the issues on appeal.

(B) Petitioner also requested PCR Attorney file 59(e) and 60(b) Motions timely since the prohibition on Hybrid representation prevented Petitioner. However, once again PCR Attorney botched this by failing to timely and properly file the Motions as Chief Justice Toal stated in her letter. I also have letters which prove I timely requested PCR Counsel file Motions. I have letters I sent to PCR Counsel and letters he sent to me stating he had timely filed Motions. The prejudice is that his failure may result in my issues being waived according to Marlar.

Further evidence of PCR Counsel's incompetence in PCR matters is the fact. PCR Counsel filed a Notice of Intent to Appeal PCR Judges Order of Dismissal while Motions 59(e), 60(b) were still pending in Circuit Court, which then deprived Circuit Court of jurisdiction...

Clearly, if Petitioner had represented himself in PCR proceedings, he couldn't have done worse. We, believe this all constitutes a constructive denial of assistance of PCR Counsel and denial of all Procedural Due Process in PCR process.

And had Petitioner been appointed Effective Assistance of PCR Counsel, the outcome of the PCR proceeding would have been different.

Question Three Presented BY Petitioner

III. Was Trial Counsel Ineffective for failing to make a Motion, prior and during Trial, to dismiss the charges based on the fact that the State's only witness, and or Agent, destroyed evidence which would conclusively have proved Petitioner's innocence.

Supporting Facts and Argument:

The Police Officer testified at Trial that all the events were captured

and recorded on video tape, but he accidentally erased the evidence...see Trial transcript pg 34 Line 02. Even if the Court believes it to be an accident, the Court would not likely have excused the behavior because it wasn't the first time it happened. see Trial transcript pg 33 Line 18.

Therefore, we believe the Motion would likely have been granted and the results of the proceedings would have been different.

Clearly, Petitioner was denied his Constitutional Right to a Fair Trial where evidence is destroyed that would have proven Petitioner's innocence.

The Petitioner was entitled to a dismissal of the charges with prejudice. (Why wasn't the tape put in an evidence bag like all the other evidence?)

Question Four Presented By Petitioner

IV. Petitioner was denied Due Process of Law and his Constitutional Right to a Fair Trial and impartial Jury when Trial Judge fail to instruct Jury on the first night before letting them leave for the night, not to discuss the case with family, friends, etc. Not to read any newspaper articles about case, nor go online, internet, computer, or do any type of research about case.

Supporting Facts and Argument:

We believe the presumption of Prejudice Standard should be applied to this issue because there is no way to determine if one or more of the Jurors spoke to others, went on a computer, and learned or obtained prejudicial information. This was a very critical period of the Jury process and the instructions are designed to protect the Jury process from (taint) and ensure the Jurors remain impartial, which without those instructions, it calls into question the fairness of the proceedings.

We believe had PCR Counsel raised this issue at PCR Hearing, there is a likely-hood the results of the PCR Proceedings would have been different.

Question Five Presented By Petitioner

V. In light of the United States Supreme Court ruling in Martinez Vs. Ryan 566 U.S.. Will South Carolina Courts acknowledge or extend a Constitutional of Equitable Right of Effective Assistance of Counsel in initial Post Conviction proceedings where non-appealable issues such as Ineffective Assistance of Counsel are required to be heard for the first time? If so, will the Applicant be (allowed/directed) to file a successive PCR

Application or raise the substantial grounds in a State Writ of Habeas Corpus
Petition under Martinez v. Ryan 566 US

Legal Argument

South Carolina prisoners are confused as to whether prisoners in this State who believe their PCR Attorney failed to raise substantial grounds in initial PCR proceedings. Will they be required to give the State Courts an opportunity to correct and hear the claims, or will they be allowed, or/and expected to file a Federal Writ of Habeas Corpus in the Federal Court and allege the Ineffective Assistance of PCR Counsel in the initial proceedings as cause?

Or will prisoners be allowed to file a State Writ of Habeas Corpus and use Ineffective Assistance of Initial PCR Counsel as cause. I would ask that this Honorable SC Supreme Court issue an Opinion on the matter, so prisoners will have the Ruling (Published opinion) as a guide.

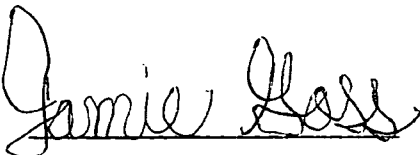
It is a question of first impression and a Ruling on the question will benefit our Court system and relieve our heavily burdened Courts from having to address a lot of possibly inappropriately filed pleadings due to a lack of information or Judicial precedent from our States High Court.

We would respectfully ask that this Court issue an Opinion on this subject of Martinez Vs. Ryan, and whether our State will acknowledge an Equitable or Constitutional Right to Effective Assistance of Counsel in Initial PCR proceedings...

Conclusion

The Petitioner would respectfully ask this Court to accept this Amended Pro Se Petition to Johnson Petition and consider it when this Court makes its decision on the Johnson Petition.

Respectfully submitted,

 294885

Jamie Goss #294885

Lee Correctional Inst.

990 Wisacky Highway

Bishopville, SC 29010