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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

CARMEN T. MULLEN, CIRCUIT COURT JUDGE

2014-CP-0700933

2016-001853

JUDEX DESIR #298745.....APPELLANT,

VS.

STATE OF SOUTH CAROLINA.....RESPONDENT.

EXPLANATION AS REQUIRED BY RULE 243(c)

This matter comes before this Court where, the Honorable Carmen T. Mullen, Administrative Circuit Court Judge for the Fourteenth Judicial Circuit, has authorized and executed a Final Order (dated June 17,2015); a copy of which was served upon Applicant on (June 30,2015); whereas Applicant did within the allotted time frame filed a 59(e) Motion to Alter or Amend Judgment on (July 6,2015 filed with the Clerk of Court on July 10,2015).

On August 29,2016 Applicant received Form 4 from the Clerk of Court advising Appolicant of the decision of the Court in this matter. On September 9,2016 Applicant submitted his appeal to the South Carolina Supreme Court and a notice by this Court (dated September 12,2016) to provide "Written Explanation" as require by Rule 243(c), SCACR, in which to show cause why the

Circuit Court determination that this action is barred as being successive and as being untimely under the statute of limitations, was improper. This Notice was served upon Applicant via Institutional Legal Mail Services on September 15, 2016.

The matters within the following arguments shall substantiate just cause, for this Court to vacate the Circuit Court decision and remand this matter for a new Hearing.

Applicant (Judex Desir) is confined in the South Carolina Department of Corrections. Applicant was indicted at the April 2003 term by the Beaufort County Grand Jury for armed robbery (2003-GS-07-715), conspiracy (2003-GS-07-717), and four counts of kidnapping (2003-GS-07-718-21). Applicant was represented by trial attorney Nicholas Felix.

Applicant proceeded to trial and was found guilty on December 18, 2003. The Honorable Jackson Gregory sentenced Applicant to twenty-two (22) years for each count of kidnapping, twenty-two (22) years for the armed robbery and five (5) years for the conspiracy to be served concurrently.

Applicant appealed his conviction and was represented by Eleanor Duffy Esquire whom subsequently filed an Anders brief. The South Carolina Supreme Court dismissed the appeal on March 9, 2006 see State v. Desir, O.P. No. 2006-UP-139 (S.C. Supp. Ct. filed March 6, 2006). The remittitur was issued on May 25, 2006.

Applicant's initial pcr application 2006-CP-07-1377 was timely filed May 31, 2006 six (6) days after the remittitur was issued from his direct appeal. An evidentiary hearing was convened on April 16, 2008 at the Beaufort County Courthouse whence Applicant was represented by agent pcr counsel Corey Fleming

before the Honorable Michael G. Nettles. During initial pcr proceeding Applicant raised and supported with probative evidence the following two (2) claims:

ISSUE (A) Was Counsel ineffective failing to object to the defective Indictments prior to trial as mandated by S.C. Code Annex. §17-19-90?

ISSUE (B) Was counsel ineffective failing to object to the trial court's instructions to the jury that constructively amended "all" of Petitioner's indictment[s]? See Petitioner's Memorandum of Law in Support of Amended Application for Post Conviction Relief Brought Pursuant to S.C.R.C.P. 15(a); see also pcr Tr. Pg. 12 lines 7-25.

At the conclusion of Applicant's initial pcr hearing Applicant earnestly [e]xpressed his desire to preserve any unaddressed issues and pcr counsel (Corey Fleming) assured Applicant that in the event Honorable Michael G. Nettles does not address all issues raised in the proceeding a SCRCP 59(e) Motion to Alter or Amend judgment would be filed on Applicant's behalf. Applicant believed and relied on agent pcr Corey Fleming to do just that, but was deceived by agent pcr Corey Fleming dishonesty, deceit, and or his disloyalty and his misconduct as agent pcr Corey Fleming in fact did not file a Rule 59 (e) motion.

On April 20,2009 (2009-CP-07-233) Applicant file a second pcr application and raised the following claims:

Ineffective Assistance of Counsel.

PCR Court failed to comply with S.C. Code Ann. §17-27-80.

In his second pcr Applicant complained that his ineffective assistance of counsel claims is not successive because Applicant presented the contested

claim in his initial first pcr. In fact, the second application filed relating to the issues of Ineffective Assistance of counsel (b) failing to object to the trial court's instructions to the jury that constructively amended all of the indictments; was in fact filed due to the Honorable Michael G. Nettles Order of Dismissal failing to make specific finding of facts and state expressly its conclusion of law, as required by S.C. Code Ann. §17-27-80. And the fact that no 59(e) Motion To Alter or amend was file by agent pcr counsel as he had in fact promised Applicant to do in his behalf.

On April 16,2014 2014-CP-07-933 Applicant filed a third pcr application with "attachment" and raised the following claims:

(a) Whether PCR Counsel's (Corey Fleming) professional misconduct deceit disloyalty and/or dishonesty effectively demonstrated that he was not a genuinely representative agent when the Appellant missed the **10 day filing** deadline which resulted in expiration of limitation period to preserve for Appellate review potential meritorious ground: [Trial counsel was ineffective failing to object to the Trial Court's instruction to the jury that constructively amended all of Petitioner's indictments]. Despite Applicant's expressed desire to preserve unaddressed issues and PCR counsel (Corey Fleming) advising him in the event Honorable Michael G. Nettles does not address each issue a SCRCP 59(e) Motion to alter or amend judgment would be filed on his behalf to preserve unaddressed issues? (See Pcr application Pg.3 10.(a) and Applicant's attachment)

(b) Whether PCR Counsel's (Corey Fleming) professional misconduct deciet disloyalty and/or dishonesty effectively severed the lawyer/client relationship rendering the inconsistency of the PCR Act mandates and SCRCP

during initial PCR proceedings external to the Applicant because of the extraordinary circumstances surrounding PCR Counsel's (Corey Fleming) misconduct which prevented a ruling on potential meritorious ground: [Was trial counsel ineffective failing to object to the Trial Court's instruction to the jury that constructively amended all of Petitioner's indictments]. (See PCR application P.g 3 10.(b) and Applicant attachment)

(a) Order denying relief, denial of Article 1 Sec.3, and SCRPC 59(e). (See PCR applilcation Pg. 3 11.(a) and Applicant's attachment)

(b) Violation of U.S.C.A. Sixth and Fourteenth Amendment right, §17-27-80, 17-27-100, SCRPC 52(a), 52(e), and denial of Article 1 Sec.3.

POSITION #1

Did the Court err in finding that this current action should be barred by §17-27-45(a), under the statue of limitation doctrine?

As to the timeless issue statute of limitationsu Applicant asserts that Respondent misconstrued S.C. Code Ann.§17-27-45(a) in finding Applicant was required to file his third application one year after the remittitur was sent from his direct appeal. Applicant asserts, it impossible for him to file this **third application** which encompasses two professional misconduct claims against initial agent pcr counsel **Corey Fleming** soon after his direct appeal remittitur was issued on May 25,2006 because:

- 1) Initial pcr application was file May 31,2006 six (6) days after the rimittitur was issued on May 25,2006 and;
- 2) Agent Corey Fleming was appointed as pcr counsel for Applicant's initial pcr proceeding before Honorable Michael G. Nettles.

3) PCR hearing was held on April 16,2008.

4) The Order of Dismissal was signed by Honorable Michael G. Nettles June 3,2008 and agent pcr counsel Corey Fleming file an Appeal June 4,2008. It was during the initial pcr hearing that Applicant requested from agent pcr counsel Corey Fleming to file a 59(e) Motion to Alter or Amend judgment if "all" issues raised were not addressed in judge Michael G. Nettles Order. To which agent pcr counsel Corey Fleming assured Applicant that in the event that judge Michael G. Nettles did not addressed in his Order "all" of Applicant's issues, he would indeed file a SCRPC Rule 59(e) Motion to Alter or Amend judgment on Applicant's behalf.

Thus the core of Applicant's issue in his third (3rd) pcr application is agent pcr counsel Corey Fleming's professional misconduct, his deceit, disloyalty and his dishonesty, that clearly demonstrated that agent pcr Corey Fleming was not a genuine representative agent of the Applicant when he deceived and purposely without regards for the color of justice or professional conduct deprived and denied Applicant of his one bite of the apple, by promising Applicant that he would file a SCRPC Rule 59(e) Motion if Honorable Michael G. Nettles Order of Dismissal did not address each issues raised at the pcr hearing.

Applicant concludes a genuine issue of fact exist as to whether his professional misconduct claims against initial agent pcr Corey Fleming whom control Applicant was under during initial pcr proceeding is successive under S.C. Code Ann. §17-27-90 which permits an applicant to file a subsequent application [o]nly if the applicant demonstrates sufficient reason why the claims asserted therein were not asserted previously.

Applicant asserts that he has demonstrated sufficient reasons why his claims filed in third application was not included in his first application filed six (6) days after his direct appeal May 31,2006 due to the fact that agent pcr Corey Fleming professional misconduct, deceit, dishonesty, and or disloyalty was generated at the conclusion of the hearing when he promised to file a 59(2) motion, which Applicant believed and depended on but was dishonest with Applicant.

Applicant contends that he raise and supported with probative evidence the following claim at his pcr hearing held April 16,2008: Was trial counsel ineffective failing to object to trial court's instructions to the jury that constructively amended "all" of Petitioner's indictments (PCR Tr. Pg. 12-14)

Secondly, once pcr counsel was appointed, Applicant was restrained from pursuing any matter within the pcr proceedings, outside of that appointed counsel. Applicant was solely dependant on pcr counsel Corey Fleming to secure his right to have all issues presented before the pcr hearing, both in Applicant memorandum of law and his testimony be preserve by SCRCF Rule 59(e) Motion to Alter or Amend judgment. Had Applicant attempt to file a 59(e) Motion, it would have been barred from adjudication due to the act constituting a hybrid representation. As this Court is well aware of, A hybrid representation has been defined as "Partial by counsel, partial pro se." See Foster v. State, 398 S.C. 306, 379 S.E.2d 907(1989). There exists no constitutional right to hybrid representation either in these types of proceedings; Jones v. State, 348 S.C. 13, 558 S.E.2d 517(2002); no even during a criminal proceeding. See Whelchel v. Bazzel, 489 F.Supp.2d 523, appeal dismissed, 521 Fed.Appx. 166 (2007)(WL 3024457); also State v. Cabrera-Pena, 350 S.C. 517, 567 S.E.2d 472(Ct.App.2002)

Applicant was restrained from protecting his interest within the original pcr proceedings, due to limitations that the hybrid representation places upon individuals such as Applicant that is why agent pcr counsel Corey Fleming professional misconduct, his deceit, disloyalty and/or his dishonesty by not filing a SCRCF Rule 59 (e) Motion to Alter or Amend judgment greatly impeded Applicant's "one bite of the apple."

Agent pcr counsel Corey Fleming professional misconduct, deceit, disloyalty, and/or dishonesty effectively suvered the lawyer client relationship rendering the inconsistency of the pcr act mandates and SCRCF during initial proceeding external to the Applicant because of the extraordinary circumstances surrounding pcr counsel's misconduct which clearly by agent pcr counsel Corey Fleming misleading Applicant into thinking he would file a Rule 59(e) Motion impeded a ruling on a meritorious ground.

All this is in the record before the Lower Court. This is a bold defiance, deceitful and fraudulent action both on Respondent's part as it is on the part of agent pcr counsel Corey Fleming to deprive Applicant of a favorable ruling on his meritorious issue. Respondent sole argument is that Applicant only raised one issue which just happens to be the only issue Honorable Michael G. Nettles ruled on. Respondent has been misleading the Lower Court in depriving Applicant of his fair bite of the apple, when Respondent misrepresented the facts; that Applicant only raised the one issue under Ineffective Assistance of Counsel; and would like to convince this Court that Applicant raise only one (1) issue under ineffective assistance of counsel in Applicant's initial pcr as to insinuate that Applicant never raised issue (B)Was counsel ineffective failing to object to the trial court's instructions to the jury

that constructively amended "all" of Petitioner's indictments?" (See Petitioner's Memorandum of law filed with the Clerk of Court Feb 05, 2007) When in fact Applicant did.

Thus, Applicant contends that two (2) petitions, [Ineffective assistance of trial counsel and pcr counsel misconduct are not based on the same ground despite the fact that third (3) application of necessity incorporates an allegation of the original trial counsel's ineffectiveness. Applicant contend the grave man of his argument is that there never was a proper determination of his allegation concerning the denial of effective assistance by trial counsel failing to object to the trial court's instructions to the jury that constructively amended all of Applicant's indictments; which deprived Applicant of Due Process of law and a fair trial when Applicant was found guilty on elements that were not passed on in the indictment by the Grand Jury. All due to (Corey Fleming) initial agent counsel's professional misconduct, deceit, dishonesty and/or disloyalty. (See Pg. 3-4 of Response to Summary Judgment and Return; see also initial pcr Order of Dismissal)

Applicant never raised ineffective assistance of pcr counsel in third (3rd) application as Respondent deceitfully suggested in its Summary Judgment of Dismissal and as the Lower Court errorniuosly stated in its Final Order page two (2). However, Applicant admits to asserting two professional misconduct issues against initial agent pcr agent (Corey Fleming) that could not have been filed at the time of his initial pcr proceeding due to the fact the misconduct in questioning occurred during and after the proceeding. Applicant does not stipulate to Respondent's contention that he argued initial pcr counsel was ineffective. Although Applicant does stipulate Respondent is

correct that there is no constitutional right to counsel in habeas corpus hearing as well as the Sixth Amendment right to counsel does not extend to state post-conviction actions. Pennsylvania v. Finley, 107 S.Ct. 1990; Coleman v. Thompson, 111 S.Ct. 2546.

The claims encompassed in third (3rd) application against agent pcr counsel Corey Fleming circumvents precedent Coleman v. Thompson, 111 S.Ct. 2546 because Coleman supra **indicated error committed by counsel as cause** and in present application Applicant is emphasizing that his defaulted ineffective assistance of trial counsel's claim did not receive a proper determination on the merits during pcr proceedings and on appeal due to agent pcr counsel Corey Fleming professional misconduct. The Supreme Court of the United States decide in Maples v. Thomas, 132 S.Ct. 912(2012) that cause existed for procedural default of habeas claim **due to lawyer misconduct abandonment**; Holland v. Florida, 130 S.Ct.2549(2010) The United States Supreme Court decided a habeas corpus had to be remanded to the Court of Appeal **to determine whether misconduct abandonment on part of State prisoner's attorney in not filing federal habeas petition in timely fashion despite prisoner's many admonition on importance of doing so**; Spitsyn v. Moore, 345 F.3d 796(2003) tolling state habeas petitioner's statute of limitation **due to the extraordinary circumstances of egregious misconduct on the part of Petitioner's attorney** United States v. Wym, 292 F.3d 226; holding that **petitioner was deceived by his attorney into believing the §2255 motion had been filed on his behalf presents a rare extraordinary circumstances beyond petitioner's control that could warrant equitable tolling of the statute of limitation if petitioner reasonably relied on the attorney's misrepresentation.** As Applicant contend he

did in this instant case

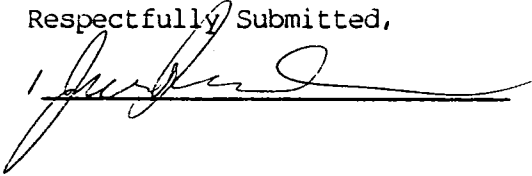
Applicant conclude agency doctrine limits agency consequences specifying when an agency relationships ends. in Applicant's case, for example the fiduciary relationship ended by deceit, disloyalty and dishonesty when Corey Fleming did not fulfill Applicant's expressed desire to preserve unaddressed issues despite advising Applicant that in the event Honorable Michael G. Nettles does not address each issue raised a SCRC 59(e) Motion to Amend and Alter judgment would be file to preserve any unaddressed issues. Subsequently, Applicant's ineffectiveness of trial counsel claim submitted in current application third (3rd) was abandoned because of pcr counsel's underlying conduct.

Additionally, the deceit, dishonesty, and disloyalty by Applicant's agent pcr counsel terminated the agency relationship. By definition, agency is a fiduciary relationship long understood to disallow the pursuit of self interest as a motivating force in actions the agent determines to take on the principals behalf. It has been long understood that an agent breaches this duty by taking a stance antagonistic to the principal because the principal has the right to assume unless informed otherwise that the agent is able to give the principal that undivided allegiance and loyalty which the proper performance of agency requires. An agent's serious breach of loyalty thus terminates the agency relationship with consequences among others that notice of facts to agent **Corey Fleming** is not imputed to the principal Judex Desir.

Whereas, Applicant prays for the requested relief that this Court remand Applicant's third (3rd) application to the Lower Court for a hearing on the issues presented.

Dated: 27 day of September, 2016

Respectfully Submitted,

A handwritten signature in cursive script, written in black ink, positioned above a horizontal line. The signature is partially obscured by the line.

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COURT OF COMMON PLEAS

CARMEN T. MULLEN, CIRCUIT COURT JUDGE

2014-CP-0700933

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VS.

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CERTIFICATE OF SERVICE

I have this day served a copy of **Explanation** as required by Rule 243(c) in the above captioned matter on the following person(s) by depositing same in the United States Mail postage prepaid:

Daniel E. Shearouse
Clerk of Court
P.O. Box. 11330
Columbia South Carolina, 29211

South Carolina Attorney General's Office
Attorney For Respondent
P.O. Box. 11549
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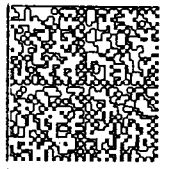
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SEP 27 2016

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