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December 2, 2016

RECEIVED
DEC -2 2016
S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Robert Louis Garrett, Jr., v. The State of South Carolina
Appellate Case No. 2016-001448 -- Lower court 2012-CP-43-402007

Rule 243 (c), SCACR response

Dear Mr. Shearouse:

In its order dated November 7, 2016, this Court relieved PCR counsel Fulton Casey Cornwell, and ordered the Division of Appellate Defense to provide this Court with the explanation required by Rule 243(c), SCACR, within twenty (20) days of the order. This Court then granted an extension for undersigned counsel to file this Rule 243(c), SCACR response until today.

What follows is a procedural history as ascertained by the documents on C-Track, various pleadings, orders, and a lengthy telephone conversation with the Applicant Garrett's former retained PCR and Rule 29 (b), SCRCrimP attorney, Jeremy Thompson. Undersigned counsel then will suggest a possible remedy for this unusual case on appeal, and, as an officer of the Court, will then explain how and why the ruling below summarily dismissing the after-discovered evidence claim -- as successive and barred by the statute of limitations without an evidentiary hearing -- was improper as required by Rule 243 (c), SCACR.

Mr. Garrett was granted a new trial by the trial court after his 2000 convictions for carjacking, two counts of kidnapping, two counts of ABHAN, possession of a weapon during a violent crime, and criminal conspiracy. However, the granting of a new trial was reversed by the Court of Appeals in 2002, and this Court then denied certiorari in an order dated January 24, 2003.

Mr. Garrett was later sentenced on February 26, 2003 after his convictions were reinstated. His direct appeal to the Court of Appeals, where he was represented by Assistant Appellate Defender Robert Pachak, was unsuccessful. The remittitur was issued on October 1, 2004.

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Mr. Garrett filed his first PCR on September 12, 2005. After an evidentiary hearing on March 20, 2007, the Honorable Clifton Newman denied the application in his written order dated February 20, 2008. There apparently was not any allegation of after-discovered evidence in this first PCR action. A Johnson petition was then filed on appeal by Assistant Appellate Defender Kathrine Hudgins to the Court of Appeals, and certiorari was denied by the Court of Appeals after Mr. Garrett filed a pro-se response to the Johnson petition.

Mr. Garrett then filed his second application for PCR on December 21, 2009. In addition to allegations of ineffective assistance of counsel, and due process violations, Mr. Garrett asserted "Co-defendants were willing to recant their statements or their testimony." See, Exhibit A, (Conditional Order of Dismissal by the Honorable W. Jeffrey Young, filed April 9, 2014 in the present action). The Attorney General responded with a return and motion to dismiss on or about June 10, 2010. In a conditional order of dismissal filed June 30, 2010, the Honorable George C. James found that the application should be dismissed based on the statute of limitations and successiveness. Mr. Garrett was given 20 days in which to respond. In his response to the conditional order of dismissal Mr. Garrett alleged, inter alia, that "he had affidavits from all three of his co-defendants admitting that they had signed statements back in January, 1999 recanting their original statements, because investigators had coerced them to do [so]." See, exhibit A at 3.

Thus, in his second action for PCR applicant Garrett raised these assertions of newly or after-discovered evidence. Judge Young then filed a final order of dismissal on October 3, 2011. Mr. Garrett filed a *pro se* "motion for reconsideration pursuant to Rule 59 (e), SCRCPP on October 17, 2011. Apparently, and allegedly, in an order filed July 3, 2012 Judge Young denied the motion for reconsideration. See Exhibit A at 4.

The action appears to get rather unusual at this point. Mr. Garrett filed a notice of intent to appeal on November 3, 2011. However, Mr. Garrett subsequently filed a motion to withdraw his appeal to pursue his Rule 59(e), SCRCPP motion on October 17, 2011. (This is obviously difficult to understand if the motion was already denied by the PCR court) This Court issued an order dated May 2, 2012 granting Mr. Garrett's motion to withdraw his appeal and pursue his Rule 59 (e) action. However, the remittitur was then issued on May 31, 2012, obviously ending the appeal. See, Exhibit A at 4.

Undersigned counsel has spoken with Jeremy Thompson who initially represented Mr. Garrett in his current PCR application alleging after-discovered evidence,(2012-CP-43-2007), and in his Rule 29(b), SCRCrimP action alleging after-discovered evidence in the Sumter County Court of General Sessions. Ultimately, Mr. Thompson was relieved in both actions.

Mr. Thompson had apparently just opened his own law firm at the time he was retained, and it was unclear whether PCR or a Rule 29(b), SCRCrimP action was the "best" or proper

manner to assert a claim of after or newly discovered evidence. (A miscellaneous, undersigned counsel would respectfully assert that some of that confusion remains. Where an allegation of after-discovered evidence being discovered within the last year is made in a PCR action, counsel's experience has shown that a contract PCR counsel is usually appointed, and the action proceeds in a uniform manner. However, in a Rule 29(b), SCRCrimP action, conversely, it is difficult to ascertain when or why Circuit Court Judges sometimes choose to appoint counsel, or grant or refuse to hold evidentiary hearings. It is certainly understandable that Rule 29(b), SCRCrimP actions not be allowed to be the modern day replacement for successive PCR's of old, which alleged feckless "subject matter jurisdiction" grounds, and at times received a hearing).

Regardless, in this case, Mr. Garrett had retained counsel initially, and, as seen below, he received an evidentiary hearing on his after or newly discovered evidence in his Rule 29(b), SCRCrimP action, but was refused an evidentiary hearing on what appears to be the same after or newly discovered evidence grounds in this PCR action.

Judge Young, in his attached conditional order of dismissal, exhibit A, in this PCR action, noted Mr. Garrett was alleging he was entitled to a new trial based on after-discovered evidence. Judge Young determined that Mr. Garrett did not meet any of the five requirements for after discovered evidence as stated in this Court's opinion in Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983). *See*, Exhibit A at 4. Judge Young also ruled that Mr. Garrett's PCR action was successive because "the current allegations were or could have been raised in proceedings based on applicant's prior application for post-conviction relief and thus the current application is successive and barred by the South Carolina §17-29-90." Exhibit A at 5. The conditional order of dismissal also found the action was barred by the statute of limitations. Exhibit A at 6.

PCR counsel Jeremy Thompson filed the attached Response to Conditional order of dismissal on May 14, 2014. *See* Exhibit B. Counsel Thompson asserted "The new affidavits which have been introduced in this action are recantations by [co-defendants] Cunningham and Davis." Thompson wrote that the affidavits appeared to exculpate Mr. Garrett in this case. Thompson also stated the newly discovered evidence could not have been discovered before trial. Response of Thompson, Exhibit B, at 3. Therefore, Thompson argued Mr. Garret was entitled to an evidentiary hearing. Response of Thompson, Exhibit B at 8. The final order of dismissal of Judge James in the present PCR appeal dated May 23, 2016 is attached as Exhibit C.

The order of Judge James denying the motion for a new trial based on the same after-discovered evidence pursuant to Rule 29 (b), SCRCrimP dated July 23, 2014, is attached as Exhibit D. In the order of Dismissal of Judge James -- in the Rule 29 (b), SCRCrimP action -- he noted that it was apparent that trial counsel knew before trial that two state's witnesses, Cunningham and China, had already recanted their original statements. *See* Exhibit D at 10-11.

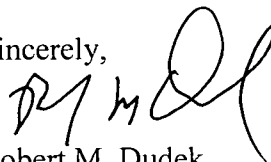
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Judge James therefore concluded that since trial counsel knew of the recantations prior to trial that those recantations could not be asserted to be “after-discovered evidence.” Judge James ruled that not only could the co-defendant recantations have been discovered with due diligence prior to trial, but they *were actually discovered*. Judge James therefore implicitly concluded that any complaint about how trial counsel chose to handle these recantations were garden variety ineffective assistance of counsel PCR issues, and not after-discovered evidence. *See* Exhibit D at 10-11. The reasoning would seem compelling but there is no way to probe behind it in the absence of the transcripts.

Mr. Garrett apparently dismissed Counsel Thompson during the lower court action. Mr. Garrett’s subsequent pro-se appeal in the Rule 29 (b), SCRCrimP action was dismissed by the Court of Appeals for failure to order the transcripts. As seen, Mr. Garrett’s present PCR action was dismissed without a hearing, on the same allegations of after-discovered evidence presented in the Rule 29 (b), SCRCrimP action, where evidentiary hearings were held by Judge James. *See* Exhibit D at 1.

Consequently, undersigned counsel, in conjunction with this Court’s order dated November 7, 2016, would assert that this Court has the discretion to craft a remedy to allow the present PCR action to proceed. This would mean that the present PCR action could be ordered to proceed with a writ of certiorari on the after-discovered evidence issue. The transcripts of the July 23, 2013 and May 29, 2014 evidentiary hearings from the Rule 29 (b), SCRCrimP action that were held *before the same Circuit Court Judge, Judge James, that also ruled on the present PCR action, could be used in the present PCR appeal*. That would ensure fairness to the Circuit Court Judge who ruled on the after-discovered evidence issue below, and prevent duplicity by preventing a remand to the PCR court on the same after-discovered evidence issue. *See* Exhibit D, Order Denying Motion for a new trial at 1 on the July 23, 2013 and May 29, 2014 evidentiary hearing dates. Of course, a normal PCR petition for writ of certiorari could be ordered if this Court determined the “appeal should be allowed to proceed,” and that Mr. Garrett timely raised the after-discovered evidence in a subsequent PCR upon its discovery. *See* Tilley v. State, 334 S.C. 24, 511 S.E.2d 689 (1999) Please contact me if additional information is required or desired to advocate for Mr. Garrett’s position, and assist this Court.

Sincerely,



Robert M. Dudek
Chief Appellate Defender

RMD/blw

cc: Robert Garrett
Julie Coleman, Esquire