

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

ROBERT JAMES #261393)
Appellant,)
V.)
STATE OF SOUTH CAROLINA)
Respondent.)

IN THE SOUTH CAROLINA)
SUPREME COURT)

RECEIVED

Appellate Case No: JUN 07 2017
2017-001174

S.C. SUPREME COURT

MOTION AND
RULE 243(c), SCACR EXPLANATION

This matter comes before the Court by way of Motion to appeal the decision of the PCR Court filed April 24, 2017. Appellant's allegations alleged from first PCR case (2001-CP-40-3299). Now comes the Appellant, Robert James, pursuant to South Carolina Code of Law, Titles, 16-17 subsection [17-27-100];[17-27-90]; [17-27-80], alleging that he is being held in custody unlawfully for the following reason :

1. Ineffective Assistance of PCR Counsel.

PROCEDURAL HISTORY

The Appellant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Appellant was indicted at the August 1999 term of the Richland County Grand Jury for two counts of Armed Robbery, Assault With Intent to Kill, two counts of Possession of a Firearm During Commission of a Violent Crime, two counts of Kidnapping, Criminal Sexual Conduct in the first degree (1999-GS-40-19299;-19300;-19301;-44040;-22843;-22844;-22845;-22846). Appellant was represented on the charges by court appointed attorney, John B. Shupper, Esquire. A jury trial on the charges was held in September 1999 before the Honorable Costa M. Pleicones. The jury convicted the Appellant on all charges as

indicted. On September 24, 1999, Judge Pleicones sentenced Appellant to thirty years for the criminal sexual conduct charge, and a consecutive sentence of ten years confinement for one of the armed robbery counts, for a forty year imprisonment.

Appellant appealed his conviction and sentence. The Appellant was represented on appeal by Appellate Defender Wanda H. Haile of the South Carolina Office of Appellate Defense. On September 13, 2000, counsel filed a Final Anders Brief of Appellate Counsel and Petition to be relieved as counsel. The South Carolina Court of Appeals, granted Appellate Counsel's petition to be relieved as counsel. Appellant then filed a pro se Brief, with the Court of Appeals on October 30, 2000, where he raised the following grounds for relief:

(1) Ineffective assistance of trial counsel for allowing the violation of Appellant's Sixth Amendment right to a speedy trial. The state held Applicant in jail for 993 days before calling his case to trial. Applicant filed a pro se speedy trial motion early 1999. At trial Applicant moved to dismiss the charges because the state failed to provide him a speedy trial. Trial judge made three significant factual findings: (1) Applicant wanted a speedy trial, (2) the delay was "horrendous," and (3) prosecution's justification for the delay was "not terribly well explained." Trial counsel failed to argue prejudice or cite United States Supreme Court precedent requiring dismissal.

(2) Trial counsel was ineffective for failing to object to "sleeping jurors" not being removed or questioned. Trial judge clearly stated on record that he himself had noticed one of the jurors had "dozed off a time or two..." It may have been a classic case of resting his eyes. But I'm here for comment if anybody wants to make a comment on that." Trial counsel failed to object.

(3) Trial counsel was ineffective in failing to object to trial court's error in giving instructions which unconstitutionally diluted the state's burden of proof. Trial judge instructed the jury on the elements of aiding and abetting when Applicant was not indicted for this offense/charge, but was charged as the principal. Instructions impermissibly dilute the presumption of innocence.

(4) Trial counsel was ineffective for failing to object when

the state pushed to try Applicant under new armed robbery statute. Current armed robbery statute adds elements not in effect at the time the incident occurred. Applicant should have been tried under statute that was in effect when the offense occurred, trial counsel ineffective for not objecting. Indictments should've been quashed instead of amended. Trial counsel erred in not objecting to trial judge deleting from the indictments with his own pen.

(5) Trial judge erred in denying defense's motion to quash the indictments and dismiss charges due to state's violation of Rule 3(c). The state's violation of Rule 3(c) SCRCrimP, S.C. Const. Art. 1, Sec. 8, S.C. Const. Art. V, Sec. 4. The state failed to timely act on the arrest warrants-warrants issued 1996, indicted August 1999- The Solicitor failed to also file the indictments with the Clerk of Court. Also, state lacked subject matter jurisdiction by state's failure to comply

(6) Trial counsel was ineffective for failing to impeach state's witness, Dr. Stacey Smithson. The state described the attack on the victim as "vicious." Dr. Smithson corroborated these claims by stating that he found redness, abrasions and lacerations, ect. However, Dr. Smithson's written examination report states that there were no signs of trauma on any part of the victim's body.

(7) Trial judge erred in denying directed verdict.

(8) Trial counsel failed to adequately prepare for case..... by failing to obtain the assistance of experts.

(9) Trial Court lacked Subject Matter Jurisdiction due to prohibited practice of prosecutors appearing as sole witness before Grand Jury.

(10) Appellate Counsel Wanda H, Carter was ineffective in filing a frivolous brief on appeal. In her petition to be relieved as counsel, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396(1967), counsel states she has thoroughly reviewed Applicant's lower court record, and in her opinion the record fails to demonstrate either preserved or other legally substantial issues to present to the court. However, transcript of trial proceedings and facts contained therein, will confirm that several arguably issues were preserved for appellate review.

The South Carolina Court of Appeals dismissed the appeal and affirmed the convictions, Unpublished Op. No.2001-UP-082 (filed February 6,2001), withdrawn and refiled March 21,2001.The remittitur was issued on April 4,2001.

STATE PCR PROCEEDING
2001-CP-40-03299

Appellant subsequently filed an application for post-conviction relief on August 8, 2001, where he alleged he was being held unlawfully for the following reasons:

1. Trial counsel fail[ed] to adequately prepare for the case, to do a legal and factual investigation, to exercise due diligence in the preparation of the defense's case and to the circumstances of it, deprived [Applicant] of the right to effective assistance of counsel in violation of Article I §§ 3, 14 of the State Constitution as well as the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution.
2. Appellate counsel was ineffective in failing to raise issues preserved below, which would have entitled [Applicant] to reversal on appeal. A defendant is constitutionally entitled to effective assistance of counsel on direct appeal. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985); see also, Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983) (appellate counsel's duty to raise issues on appeal).

On January 7, 2005, represented by Tara Dawn Shurling, Appellant filed an amended PCR application. In the amended application, Appellant raised eleven issues for review (quoted verbatim):

- 1: Trial judge erred in denying defense's motion to quash indictments and dismiss charges due to State's failure to timely act on arrest warrants, violation of Rule 3(c), SCRCrimP. The Solicitor failed to file the indictments with the Clerk of Court. Also, State lacked Subject Matter Jurisdiction by State's failure to comply.
- 2: Trial Counsel was ineffective for failing to object to "sleeping jurors" not being removed or questioned.
3. Trial counsel was ineffective in failing to object to trial Court's erroneous instructions. The Court instructed the jury on the elements of accomplice liability, referred to as aiding and abetting, (or, the hand of one is the hand of all), when Applicant was charged as the principal. This instruction impermissibly dilutes the presumption of innocence. State v. LaBarge, 275 S.C. 168, 268 S.E.2d 281 (1980).
4. Trial Court lacked Subject Matter Jurisdiction due to prohibited practice of prosecutors appearing as sole witness before Grand Jury.
5. Trial Counsel was ineffective for allowing the violation of Applicant's Due Process Right to a Speedy Trial as Applicant awaited trial for two years and nine months. The delay in bringing the case to trial undoubtedly prejudiced Applicant because of forgotten facts and confused and incomplete recollections. Applicant's alibi witness could not rely on her memory and the Applicant himself could not remember with certainty what had occurred seven months prior to his arrest. Further, the memories and whereabouts of defense witnesses were compromised and lost. There were no continuance orders

that mention exceptional circumstances, and the State has never offered any justification for the significant delay.

6. Trial counsel failed to adequately prepare for case... by failing to obtain the assistance of experts.

7. Appellate Counsel was ineffective in failing to sufficiently raise any arguable issues in brief on Appeal. Ms. Haile filed an Anders Brief. Arguable issues included needed severance and imputed guilt of Applicant because of being tried with his co-defendant. Applicant contends that the transcript amply documents significant preserved errors and [Applicant's] trial counsel provided a six page letter to Ms. Haile that detailed many arguable, preserved issues.

8. Trial counsel failed to call witness that could dispute the State's theory that Applicant lived at [redacted]. If the landlord had been asked to testify he would have said that Applicant did not live there and was not even allowed on the property. Also, Henretta Jordan (former girlfriend) could have been an effective alibi witness if she had been called to testify nearer to the time of the incident-but, because it took so long to get to trial, she could no longer state with certainty how long she and Applicant were together on that day. Trial Counsel was informed about all this and said he would look into it, but never talked about it again. State's witness and victim, Ms. Brown frequently stated that she was "not sure" and "I honestly can't say who did what-it happened so fast". The delay in bringing the case to trial undoubtedly prejudiced Applicant because of forgotten facts and confused and incomplete recollections.

9. Trial counsel was ineffective for failing to object when the State pushed to try Applicant under the new Armed Robbery statute. The State pushed to try Applicant under the new Armed Robbery Statute because where under the old statute, a main element is that the suspect had to actually be armed and the offense predated the new statute.

10. Indictments should have been quashed instead of amended. Trial Counsel erred in not objecting to the Judge deleting from the indictments with his own pen.

11. Trial counsel was ineffective for failing to impeach State's witness Dr. Stacey Smithson. The State described the attack on the victim as "vicious". Dr. Smithson corroborated these claims stating that he found redness, abrasions, and lacerations, ect. However, Dr. Smithson's written examination report states that there were no signs of trauma on any part of the victim's body.

An evidentiary hearing was convened on January 14, 2005, at the Richland County Courthouse. Appellant was present and represented by counsel Tara D. Shurling, Esquire. Appellant testified on his own behalf. Also testifying was Appellant's former trial counsel, Mr. John B. Shupper. On August 19, 2005, the PCR COURT issued an Order of Dismissal denying relief and finding that the issues raised by Appellant were without merit. (App.P.1493-p.1499) The PCR Order did not address the issue of ineffective assistance of Appellate Counsel and PCR Counsel did not file a motion to

alter/amend judgement under SCRPC Rule 59(e).

Appellant then appealed the decision made by the PCR court and filed a timely notice of appeal. Appellant was represented by Appellate Defender Eleanor Duffy Cleary of the South Carolina Commission on Indigent Defense. Counsel filed a petition for writ of certiorari on Appellant's behalf on February 27, 2008, raising the following issues:

Whether trial counsel was ineffective for failing to argue that petitioner's indictments should be dismissed because the State violated his Sixth Amendment right to a speedy trial and petitioner was prejudiced by this deficiency because the indictments would have been dismissed had the issue been properly raised to the trial judge?

On January 6, 2009, the South Carolina Supreme Court transferred the case to the South Carolina Court of Appeals. The Court of Appeals granted certiorari on December 14, 2009.

On March 15, 2010, the Appellant made a "Brief of Appellant" through Appellate Defender Elizabeth A. Franklin-Best raising the same issue as in the certiorari petition. James v. State, Brief of Appellant (Court of Appeals), March 15, 2010). The Respondent through Mr. Petrano made a Brief of Respondent in the Court of Appeals on May 14, 2010. On August 5, 2010, the South Carolina Public Defender Association made a Brief of Amicus Curie.

On October 19, 2011, the South Carolina Court of Appeals heard oral arguments and issued an unpublished opinion on October 27, 2011, (James v. State, 2011-UP-480, S.C.Ct. App. filed October 27, 2011), affirming Appellant's convictions and sentences. Appellant filed a petition for rehearing, which was denied on December 20, 2011.

Appellant then filed a petition for writ of certiorari to the South Carolina Supreme Court, through Appellate Defender Franklin-Best, which was granted on April 3, 2012. The S.C. Public Defenders Association filed an Amicus Brief, (James v. State, Brief of Amicus Curie S.C. Public Defenders Association, January 31, 2012).

On May 11, 2012, the Appellant made a Brief of Petitioner before the Supreme Court. On November 21, 2012, the South Carolina Supreme Court entered its Order that certiorari was "improvidently granted" and dismissed the appeal. (Robert Anthony James v. State, Appellate Case No. 2012-206346, Memo. Op. 2012-MO-050 [S.C.S. Ct. November 21, 2012] [Dismissed as improvidently granted]). The remittitur was issued on December 7, 2012.

Appellant subsequently filed a petition for a writ of Habeas Corpus in the federal district court on June 21, 2013, (8:13-1738-TMC-JDA) where he raised the following grounds for relief:

Ground One: Ineffective assistance of trial counsel for allowing the violation of Applicant's Sixth Amendment right

to a speedy trial.

Supporting Facts: The State held Applicant in jail for 993 days before calling his case to trial. Applicant filed pro se speedy trial motions 1998 and 1999. At trial Applicant moved to dismiss the charges because the state failed to provide him a speedy trial. Trial judge made three significant factual findings: (1) Applicant wanted a speedy trial, (2) the delay was "horrendous," and (3) prosecution's justification for the delay was "not terribly well explained." Trial counsel failed to argue prejudice or cite United States Supreme Court precedent requiring dismissal.

Ground Two: Trial counsel was ineffective for failing to object to "sleeping jurors" not being removed or questioned.

Supporting Facts; Trial judge clearly stated on record that he himself had noticed one of the jurors had "dozed off a time or two...It may have been a classic case of resting his eyes. But I'm here for comment if anybody wants to make a comment on that." Trial counsel failed to object.

Ground Three: Trial counsel was ineffective in failing to object to trial court's error in giving instructions which unconstitutionally diluted the state's burden of proof.

Supporting Facts: Trial court instructed the jury on the elements of aiding and abetting when Applicant was not indicted for this offense/charge, but was charged as the principal. Instructions impermissibly dilute the presumption of innocence.

Ground Four: Trial counsel was ineffective for failing to object when the state pushed to try Applicant under new armed robbery statute.

Supporting Facts: Current armed robbery statute adds elements not in effect at the time the incident occurred. Applicant should've been tried under statute that was in effect when the offense occurred, trial counsel ineffective for not objecting. Indictments should've been quashed instead of amended. Trial counsel erred in not objecting to trial judge deleting from the indictments with his own pen.

Ground Five: Trial judge erred in denying defense's motion to quash the indictments and dismiss charges due to state's violation of Rule 3 (3).

Supporting Facts: The State's violation of Rule 3c SCRCrimP, S.C. Const. Art. 1, Sec.8, S.C. Const. Art. V, Sec.4. The State failed to timely act on the arrest warrants- warrants issued 1996, indicted August 1999- The Solicitor failed to also file the indictments with the Clerk of Court. Also, state lacked subject matter jurisdiction by state's failure to comply.

Ground Six: Trial counsel was ineffective for failing to impeach state's witness, Dr. Stacey Smithson.

Supporting Facts: The state described the attack on the victim as "vicious." Dr. Smithson corroborated these claims by stating that he found redness, abrasions and lacerations, ect. However, Dr. Smithson's written examination report states that there were no signs of trauma on any part of the victim's body.

Ground Seven: Trial judge erred in denying directed verdict.
Supporting Facts: At the close of the state's case, Applicant's counsel moved for a directed verdict, setting forth the state's inability to present "enough evidence that even giving it as much light as the Court wanted to," however, considering all the evidence, there was no sufficient evidence to convict (sustain a conviction) or even send the case to the jury against Applicant.

Ground Eight: Appellate counsel Wanda H. Carter was ineffective in filing a frivolous brief on appeal.
Supporting Facts: In her petition to be relieved as counsel, pursuant to *Anders v. California*, 386 U.S.738,87 S.Ct.1396 (1967), counsel states she has thoroughly reviewed Applicant's lower court record, and in her opinion the record fails to demonstrate either preserved or other legally substantial issues to present to the court. However, transcript of trial proceedings and facts contained therein, will confirm that several arguably issues were preserved for appellate review.

The State made it's Return and Motion to Dismiss on November 22,2013. On October 14,2014, the court filed an Order granting the motion for summary judgment and denying the petition.

SECOND PCR APPLICATION
2015-CP-40-05187

In his second application for Post-conviction Relief, the Appellant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of PCR Counsel.
The PCR judge failed to address Appellant's Ineffective assistance of Appellate Counsel and PCR Counsel failed to file a Rule 59(e), SCRPC Motion to alter or amend the judgement as required by S.C. Code Ann. §§ 17-27-80 and Rule 52(A) SCRPC. PCR Counsel failed to protect Appellant's rights pursuant to Rule 71.1(g), S.C. Code Ann.§ 17-27-100; the right to seek Appellate review of the denial of Applicant's PCR application and violation of Applicant's 14th. Amendment Procedural Due Process Rights.

Appellant filed his second PCR application August 25,2015. Respondent, represented by J.Clayton Mitchell, Assistant Attorney General, of the South Carolina Attorney General's Office, made it's Return on May 18,2016, requesting that the Application be summarily dismissed based upon the expiration of the statute of limitations, the presumption against successive PCR application and raises an issue not cognizable in PCR.

The matter was before the Honorable Alison Renee Lee, who issued a Conditional Order of Dismissal signed May 27,2016 and filed June 1,2016, provisionally denying and dismissing the action, while giving the Applicant twenty (20) days from the date of ser-

vice of said Order in which to show why the dismissal should not become final. The Appellant then filed a document titled "Response to Return and Motion to Dismiss," on June 24, 2016, in which Appellant argues his allegations in his second PCR application were not raised or were not properly raised in the previous application because of PCR court errors, PCR counsel's errors and statute violations that arose at and after the Appellant's first PCR hearing

After reviewing all pleadings, the Honorable Deandrea G. Benjamin, issued a Final Order of Dismissal, finding that "for the reasons set forth in the Court's Conditional Order of Dismissal, the application for PCR is hereby denied and dismissed with prejudice. This Court hereby advises the Appellant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review," signed April 21, 2017 and filed April 24, 2017.

The Appellant then filed and served a Notice of Appeal, signed May 17, 2017. Daniel E. Shearouse, Clerk of Court for the Supreme Court of South Carolina, issued a letter/Notice to the Appellant, signed and dated, May 19, 2017, notifying Appellant that his case has been assigned the appellate case number 2017-001174. Additionally, the notice advised the Appellant, that since the order of the circuit court determined that this action is barred as being successive and as being untimely under the statute of limitations, Appellant must provide the written explanation required by Rule 243 (c), SCACR, within twenty (20) days of the date of this letter.

This Motion, Appellant's explanation as required by Rule 243 (c)/Motion For Austin Review, timely follows.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In response to the PCR Court's Final Order of Dismissal, dated April 21, 2017, the Appellant would show this Court:

Appellant asserts that he received ineffective assistance of PCR Counsel in that after the PCR judge's Order failed to address Appellant's claim of ineffective assistance of Appellate Counsel where Appellate Counsel failed (among several things) to raise arguable issues on direct appeal, specifically, Appellant's ineffective-assistance-of-trial-counsel, where trial counsels failed to:

(1) object to sleeping jurors not being removed or questioned and failing to object when the trial judge addressed the issue. (See App.p.1328 line 20- p.1329 line 7). (See also, Attachment A., of this motion, which provides legal citations and sufficient detailed factual argument that shows the merit of this specific claim). And (2) failed to adequately challenge the quashment of the indictment instead of amended. Amendment changed the nature of the offense charged. Therefore, trial counsel erred in not objecting to the judge deleting from the indictments with his own pen. (See, App. p.104 line 16 -p.111 line 18; p.1426 line 24-p.1427 line 16)

However, by allowing the trial judge to delete them in his own pen, somehow resulted in a serious "non-deleted" error, because the indictments still read out completely. The erroneous "or while alleging" language remains. (See Original Transcript-Record On Appeal, p.1362-63 and p.1380-81. Additionally, the Appellant contends that it's highly likely that the jury viewed the defective indictments during their deliberations.)(See, also

Attachment B., of this motion, which provides legal citations and sufficient detailed factual argument that shows the merit of this specific claim).

The PCR judge failed to address the claim of ineffective assistance of appellate counsel and PCR counsel failed to file a Rule 59(e), SCRCP Motion to alter or amend the judgement as required by S.Code Ann. § 17-27-80 and Rule 52 (A) SCRCP.

PCR Counsel failed to protect Appellant's rights pursuant to Rule 71.1(g), S.C.Code Ann. § 17-27-100; the right to seek appellate review of the denial of Applicant's PCR application and violation Appellant's 14th. Amendment Procedural Due Process Rights.

In Garner v. State, 636 S.E.2d 860, the Supreme Court held that Order granting Post-Conviction Relief that did not address all claims was not final Order subject to certiorari review: Appellate Court Rule 227(A)(17-27-80) Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127.

An Order in a post-conviction matter, which does not include specific findings of facts and conclusions of laws relating to each issue presented, but instead dismisses some of the issues without prejudice to them being raised in a future PCR proceeding does not constitute a final order or judgement and therefore, is not reviewable by Writ of Certiorari. Rule on all of the issues raised in the application in a final order without leaving some issues to be determined at a later date; see, McCray v. State, 408 S E.2d 241 (remand was required on appeal from denial of post-conviction court dismissed movant's ineffective assistance of counsel allegations without making findings of facts on specific

allegations raised, violating statute and precluding Appellate Review. Code 1976, § 17-27-80; U.S.C.A. Const. Amend. 6.

The Appellant contends the same court findings would apply here.

EXPLANATION AS REQUIRED BY RULE 243(c) SCACR.

Now the Final Order of Dismissal states three reasons for dismissing the Appellant's application: First (1) that it is successive in two ways, the first way being that, the Appellant failed to establish sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief. Therefore, he failed to meet the burden imposed upon him by Land v. State, 274 S.C.243, 262 S.E.2d 735 (1980) S.C. Code Ann. § 17-27-90 (1985) which states:

All grounds for relief available to an applicant under this chapter must be raised in his original supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the Applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive Post-Conviction Relief applications are forbidden unless an Applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C.448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised... in the previous application." [Emphasis in original]. Id., 305 S.C. at 450. 409 S.E.2d at 394. If the Applicant could have raised these allegations in a previous applica-

tion, the the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, 274 S.C. 243 262 S.E.2d 735 (1980).

However, the Appellant contends ~~he~~ he did and can demonstrate "sufficient reason" why his allegations were not raised or were not properly raised in his first application. The Appellant's ineffective assistance of Appellate Counsel allegation **was raised** in the Appellant's original PCR application, (see, Original PCR application, question 9.b. and App.p.1376-p.1380) but it was not raised adequately by his PCR Counsel at the hearing, and the PCR Judge failed to address this allegation, (see, App.p.1493-1499).

Additionally, the Appellant's allegations of PCR court errors, PCR Counsel's errors, and the statute violations arose **AT AND AFTER** THE Appellant's first PCR hearing. Therefore, there was no possible for the Appellant to raise those allegations IN the previous application. There was no way to raise a claim before it actually occurred. Accordingly, Appellant's second application cannot be dismissed as successive.

The Appellant contends that the same court findings of reverse and remand/ new hearing found in Pruitt, Garner, and McCray, are completely applicable to his case, since his PCR counsel's incompetency, along with the PCR court errors and statute violations are identical to those cases. As demonstrated above, the PCR judge in the Appellant's first PCR hearing failed to address all of the Appellant's allegations as required, and PCR Counsel was ineffective assistance in failing to file a Rule 59(e) Motion to alter or amend the court's Order. Therefore, these

errors by PCR Counsel and the PCR judge prejudiced the Appellant because all of his allegations were not addressed, thus, under Garner, the Appellant never received a Final Order or judgement subject to Certiorari Review; Appellate Court Rule 227 (A)(17-27-80), Pruitt, supra. And PCR Counsel's failure prevented the Appellant from his right to obtain review of a meritorious ineffective-assistance-of-trial-counsel claim. Furthermore, since the Appellant did not knowingly and intelligently waive his right to Appellate Review, PCR Counsel failed to protect Appellant's rights pursuant to S.C.Code Ann.§ 17-27-100; right to seek Appellate Review of the denial of his first PCR application and violation of his 14th. Amendment Procedural Due Process Rights.

Additionally, see, Odom v. State, 523 S.E.2d 753 (S.C.1999) and Austin v. State, 305 S.C.453, 409 S.E.2d 395(1991). Under Austin, a Post-Conviction Relief applicant is entitled to an appeal if the Post-Conviction Relief judge affirmately finds either: (1) the Applicant requested and was denied an opportunity to seek Appellate Review; or (2) the right to Appellate Review of a previous Post-Conviction Relief Order was not knowingly and intelligently waived. Code 1976, § 17-27-90; Rules Civ. Proc., Rule 71.1(g); King v. State, 308 S.C.348, 417 S.E.2d 868 (1992).

INEFFECTIVE ASSISTANCE OF PCR COUNSEL

Now, (2), the second reason the Final Order of Dismissal states that the application is successive, is that; "...the Applicant's current application for Post-Conviction Relief should be

dismissed because it raises a claim that is not proper for Post-Conviction Relief. The Respondent submits that the Applicant's contention that he received ineffective assistance of counsel on his prior Post-Conviction Relief application is not a ground for relief and is not a sufficient claim to warrant a successive application. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S.551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state Post-Conviction Relief actions. Coleman v. Thompson, 501 U.S.722 (1991).

However, Appellant's Austin Appeal (his 2nd. PCR application) is attacking the PCR procedure used in his case, not the merits of his sentence. So, as a method of effectuating the purpose of Rule 71.1(g) SCRCF and enforcing Austin's entitlement to a PCR proceeding the Court held Austin could attack his PCR Counsel as ineffective by petition for a Writ of Certiorari. *Id.* The same findings would also apply to the Appellant's case here.

Furthermore, in Turner v. State, 682 S.E.2d 792 (2009) the court found, (our holding today does not alter our PCR jurisprudence regarding claims of ineffective assistance of PCR Counsel, nor should it be interpreted as creating additional rights to PCR applicants. Indeed, this court has granted relief based on "ineffective assistance of PCR counsel" despite the fact that "[R]ight" to PCR counsel arises from Rule 71.1 SCRCF, and not from the Constitution. See, Washington v. State, 478 S.E.2d 833 (1996) (Granting PCR where the defendant alleged ineffective assistance of PCR Counsel do to so many procedural irregularities)

Also, the Appellant contends that the "...unless the court

finds..." section under S.C. Code Ann. § 17-27-90, is extremely vital to the understanding of Appellant's merit to his ineffective assistance of PCR Counsel allegation. PCR Counsel inadequately raised the ineffective assistance of Appellate Counsel allegation, in that, she incorrectly argued the specific merits of the allegation, despite discussing the allegation with the Appellant, who stated that he believed that; Appellate Counsel Carter, filed a frivolous brief on appeal, [because] there were several arguable issues preserved on record (including Appellant's "Sleeping Jurors" and "Quashment of Armed Robbery Indictments", allegations) that Appellate Counsel could and should have raised on direct appeal. Moreso, counsel Carter was counsel on direct appeal for both Appellant and his brother/co-defendant (Kenneth James #261378, Appellate Case No. 2017-000807). And Kenneth's trial counsel Robert Sneed sent Appellate Counsel a six page letter, detailing 20 to 30 significant issues that Appellate Counsel could and should have raised on direct appeal for the Appellant. (See, p. 15-21 of Attachment B., for copies of App. pages from Appellant's co-defendant's PCR hearing, (2001-CP-40-3298) which provides trial counsel's Robert Sneed's testimony that he sent appellate counsel Carter several potential issues to raise on appeal.)

And the Appellant respectfully contends that although these facts and testimony from trial counsel Robert Sneed, are from another individual's PCR hearing, they are extremely relevant to the case here [because], Appellate Counsel Carter was counsel for [both] Appellant and his co-defendant at the same time, on the same direct appeal. (See, p. 29 of this Motion, for copy of; The State v. Kenneth James and Robert James; Unpublished Opinion No. 2001-UP-082, submitted Dec. 6, 2000-Filed Feb. 6, 2001, withdrawn and

refiled March 21, 2001).

Also, Appellant and his co-defendant joined in, and raised all the same motions and objections during their joint trial. Therefore, the testimony of, and the fact that counsel Robert Sneed provided Appellate Counsel Carter, 20 to 30 potential issues to raise on appeal, is highly relevant to the [demonstration of and proving] the ineffectiveness of Appellate Counsel Carter. Counsel Carter claimed that the Appellant's case lacked merit, and erroneously chose to file an Anders Brief, despite the fact that she was personally provided with 20 to 30 highly potential issues to raise on appeal. The material information provided to counsel Carter, by trial counsel Sneed, was vitally beneficial and relevant to both of her indigent clients, since they were both jointly represented by her on direct appeal.

Therefore, the Appellant contends, instead of boring out and explaining to the court what Appellate Counsel was ineffective for, PCR Counsel repeatedly focused on explaining "what an Anders Brief" was, the requirement that counsels must meet to file an Anders Brief, what's required of each party after the filing of an Anders Brief, ect. Just any and everything about an Anders Brief. (See, App.p.1393 line 12-p. 1398 line 21).

But, the Appellant contends, there were several issues and errors that the Appellant shared in detail with PCR Counsel concerning Appellate Counsel's ineffectiveness. And the Appellant even provided the PCR court a handwritten "memorandum" (see, App. p.1459 line 23-p.1461 line 25; also, p.1442 line 4-p.1443 line 20) that explain not only, what exactly the issues and errors were against Appellate Counsel, but also specific details for each one of the Appellant's allegations raised.

Nevertheless, PCR Counsel failed to truly focus on and address what Appellate Counsel did or did not do, that resulted in or constituted the Appellant's ineffective assistance of appellate counsel allegation. PCR Counsel failed to adequately argue, raise, and correctly couch and frame the Appellant's ineffective assistance of appellate counsel allegation.

The Appellant argues that his PCR Counsel inadequately raised his ineffective assistance of appellate counsel claim, because PCR Counsel personally believed that this allegation **was** frivolous, and basically stated as much to the court. PCR Counsel stated: "I explained to him...[Appellant], a collateral review of an allegation of ineffective assistance of Appellate Counsel is very seldom worth the paper it's written on if an Anders Brief has been filed..." (See, App.p.1395 line 18-p.1396 line 1). However, even Mr. Bax, Respondent for the State, believed that the Appellant's allegations were issues that should have been raised on direct appeal. Mr. Bax stated; "I believe these are direct appeal issues..." (see, App. p.1458 lines 7-13).

Furthermore, in addition to - yet, still related to how PCR Counsel inadequately raised the ineffective assistance of Appellate Counsel allegation - the Appellant asserts that his ineffective assistance of trial counsel allegation on the Constitutional violation that a juror was sleeping during trial, was ignored by PCR Counsel, despite the fact that this claim was "obvious on the record" (see, App.p.1328-29), and despite the fact that claim was listed among the Appellant's amended PCR application allegations.

Now, although PCR Counsel did inform the court [of] Appellant's "sleeping juror" allegation in her opening statement, as she listed all of his eleven allegations (see, App.p.1400 lines 13-21)

PCR Counsel failed to return to the allegation and actually argue it/explain it's merits to the court. This fact is especially egregious in light of the fact that, this is the very same claim that was not objected to by trial counsel, ignored by appellate counsel Carter, and ignored yet again, by PCR Counsel who knew for certain that the Appellant sought to have it raised, (it was even ignored again by appellate counsel Eleanor Duffy Cleary on PCR appeal). Thus, each counsel either failed to ensure that all grounds were raised and/or failed to safeguard the Appellant's right to appeal. Violation of Appellant's 14th. Amendment Procedural Due Process Rights, and Rule 71.1(g).

Therefore, Appellant asserts, that PCR Counsel was further ineffective in her assistance, for not only failing to adequately raise the Appellant's ineffective assistance of Appellate Counsel allegation, and failing to file a Rule 59(e) motion, but also for failing to adequately raise the exact same "sleeping jurors" allegation that the Appellant alleges Appellate Counsel Carter ignored. An allegation the Appellant adds, that is clearly stronger and carries more weight than all his other allegations.

See, Matire v. Wainwright, 811 F.2d 1430, 1438-39 (11th. Cir. 1987). For example, the eleventh circuit found ineffective assistance of counsel when Appellate Counsel **ignored** "a substantial, meritorious Fifth Amendment issue that was "obvious on the record" and on which trial counsel had expressly objected. Id. at 1438. Similarly Bell's appellate counsel **omitted** to brief a significant meritorious issue that was obvious on the record and instead pursued issues that the appellate court found lacked merit. cf. Gray, 800 F.2d at 646; Bell v. Jarvis, U.S. Court of Appeal, Fourth Circuit. December 2, 1999 198 F.2d 432.

Here, Appellate Counsel Carter omitted to brief a significant meritorious issue that was obvious on the record (App.p.1328-29;"sleeping jurors") and instead pursued issue much weaker (App. p.1363;severance) that the appellate court found lacked merit.(cf. Gray,800 F.2d at 646) And PCR Counsel ignored the same issue, which prejudiced the Appellant because the error resulted in a violation of Appellant's U.S. Const. Right Art. 3§ 2, Amend. 6... A "defendant has a constitutional right to be tried by [competent] jurors," which implies a tribunal both impartial and [mentally competent] to afford a hearing. Tanner v. United States, 483 U.S. 107 S.Ct. 2739, 2755, 97 L.Ed.2d 90 (1987)(Marshal, J. dissenting) (citing Jordan v. Massachusetts,225 U.S. 167, 32 S.Ct. 651, 56 L.Ed. 1038 (1912)).

Appellant contends that these errors by PCR COUNSEL are compounded by the fact that the PCR judge failed to directly address Appellant's ineffective assistance of Appellate Counsel allegation.

Here, Appellant asserts that PCR Counsel failed to adequately raise and argue before the court that Appellate Counsel was ineffective for filing a frivolous Anders Brief --effectively conceding that Appellant's case lacked merit-- and for failing to raise, at the very least, the Appellant's two most vital ineffective-assistance-of-trial-counsel claims; (1)trial counsel was ineffective for failing to object to sleeping jurors not being removed or questioned, and (2) trial counsel failed to adequately challenge the quashment of the armed robbery indictments instead of amended. These two claims were ignored and should have been raised on Direct Appeal by Appellate Counsel, and also adequately by PCR Counsel.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Loni

The State,

Respondent,

v.

Kenneth James and Robert Anthony James,

Appellants.

Appeal From Richland County
Costa M. Pleicones, Circuit Court Judge

Unpublished Opinion No. 2001-UP-082
Submitted December 6, 2000 - Filed February 6, 2001
Withdrawn and Refiled March 21, 2001

APPEAL DISMISSED

Senior Assistant Appellate Defender Wanda H. Haile,
of SC Office of Appellate Defense, of Columbia, for
appellant.

Attorney General Charles M. Condon, Chief Deputy
Attorney General John W. McIntosh, Assistant Deputy
Attorney General Robert E. Bogan, Senior Assistant
Attorney General Charles H. Richardson, and Solicitor

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STATE v. JAMES

Warren B. Giese, all of Columbia, for respondent.

PER CURIAM: Kenneth and Robert James appeal their convictions for criminal sexual conduct in the first degree, assault with intent to kill, two counts of kidnapping, two counts of armed robbery, and two counts of possession of a firearm during the commission of a violent crime. On appeal, counsel for Kenneth and Robert James has filed final briefs along with a petition to be relieved as counsel. Kenneth and Robert James have filed pro se briefs.

After a thorough review of the record pursuant to Anders v. California, 386 U.S. 738 (1967), and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), we dismiss the appeal and grant counsel's petition to be relieved.¹

APPEAL DISMISSED.

HUFF, HOWARD, and SHULER, JJ., concur.

¹ We decide this case without oral argument pursuant to Rules 215 and 220(b)(2), SCACR.