STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
FEB 05 2018
S.C. SUPREME COURT

Appeal from Lexington County
The Honorable Perry H. Gravely, Circuit Court Judge
(Common Pleas, PCR Appeal)

BRANTLEY W. CLARKE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2017-000841

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

ANTHONY MARBURY
Assistant Attorney General

W. JOSEPH MAYE
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER'S QUESTIONS PRESENTED

I. Should Petitioner's PCR action have been dismissed on the ground that his Application for Post-Conviction Relief was not timely filed pursuant to S.C. Code Ann. § 17-27-45(C)?

II. Did the lower court err in concluding that Petitioner's claims lacked merit because Jesse's Law, S.C. Code Ann. § 23-3-540(A), went into effect well before his guilty plea?

III. Did the lower court err in concluding that Petitioner's claims lacked merit because mandatory electronic monitoring is a collateral consequence which did not rise to the level of an *ex post facto* violation?

IV. Did the lower court err in finding, simultaneously, that Petitioner's claim did not constitute an *ex post facto* violation and that his claim was not appropriate for PCR review because it was an *ex post facto* claim?

RESPONDENT'S COUNTER PRESENTATION OF QUESTIONS PRESENTED

I. Was the PCR Court correct to dismiss the "newly discovered evidence" claim as untimely under § 17-27-45(C), when the record shows that statute in question was in effect for more than a year before the guilty plea, and when Petitioner's own correspondence shows that he was aware of the potential issue more than a year before filing his PCR claim?

II. Was there any evidence in the record to support the PCR Court's ruling that Petitioner failed to meet his burden of showing ineffective assistance of counsel for failure to have the indictment date range narrowed?

RESPONDENT'S STATEMENT OF THE CASE

This matter addresses post-conviction relief claims regarding the mandatory GPS monitoring bracelet requirements set forth by S.C. Code of Laws § 23-3-540(A) and whether Petitioner should be subject to those requirements. The Petitioner is not presently confined but was previously confined in the South Carolina Department of Corrections pursuant to an order of commitment of the Lexington County Clerk of Court. (App., pp. 120). The Applicant was indicted at the April 2007 term of the Lexington County Grand Jury for Committing or Attempting to Commit a Lewd Act Upon a Child Under Sixteen (2007-GS-32-1210). (App., pp. 120). David Culbertson, Esquire represented the Applicant, and on April 5, 2007, the Applicant pled guilty as charged. (App., pp. 120). The Honorable James W. Johnson, Jr. sentenced the Applicant to confinement for a period of ten (10) years, provided that upon the service of seven (7) years, the balance would be suspended with five (5) years probation. (App., pp. 120). The Applicant did not appeal his conviction or sentence.

On October 9, 2009, Petitioner filed his first PCR Application claiming "after discovered evidence", citing "electronic monitoring" as the factual basis for relief. (App., pp. 30). The State served its Return on January 5, 2010. (App., pp. 35). A Conditional Order of Dismissal was drafted and signed by the Honorable Judge McMahon on January 30, 2012, *conditionally* dismissing the Application for failure to file within the time mandated by the Post Conviction Procedure Act and on the basis that electronic monitoring is a collateral consequence, not a basis for Post Conviction Relief. (App., pp. 40-43). Applicant was given twenty days to respond as to why the Order should not be made final.

Applicant filed a Motion to amend his Application on February 16, 2012, along with accompanying documents, and then filed his Reply to the Conditional Order of Dismissal on February 21, 2012. (App., pp. 45-56; 57-63). In his Reply, Applicant contested the grounds for dismissal and asserted that Petitioner's sentencing did not include electronic monitoring, that the newly discovered evidence would place his Application within the § 17-27-45(C) statute of limitations based on date of discovery, and that Applicant was seeking leave to file an Amended Application. (App., p. 61). Petitioner's Amended Application set forth greater detail to the action under § 17-27-45(C), and asserted ineffective assistance of counsel for failure to correct the date range on the indictment for the crime in question. (App., pp. 45-56). An identical Conditional Order of Dismissal was again filed by Judge McMahon on July 3, 2012. (App., p. 64). A letter dated July 19, 2012 reaffirmed the previously filed reply to the Conditional Order of Dismissal and was mailed on July 19, 2012 to the Lexington County Clerk of Court. (App., p. 64).

A status conference was held before the Honorable William P. Keesley on October 8, 2015, wherein a hearing was scheduled to determine whether further review of this PCR matter was necessary. (App., p. 64). That hearing was conducted before Judge Mark Hayes, II. (App., p. 64). Judge Hayes found that genuine issue of material fact existed sufficient to warrant further investigation and filed a Form 4 Order on January 15, 2016, instructing that further review of this PCR matter be conducted. (App., pp 147-148). Pursuant to the instructions of the Form 4 Order, the conclusions of the Court were more specifically memorialized in Judge Hayes' January 26, 2016 Order (filed February 3, 2016), wherein Judge Hayes directed that an evidentiary hearing be conducted to address material issues of fact. (App., pp. 64-65). Prior to the PCR evidentiary hearing, Applicant filed his Second Amended Application for Post Conviction Relief on March

26, 2016, no new grounds for relief were asserted, and the same "Request to Staff Member" documentation and dates were referenced as Applicant's basis for establishing timeliness. (App., pp. 67-73). An Amended Return was filed by the State on April 13, 2016. (App., pp 75-81).

The PCR evidentiary hearing was held before the Honorable Perry H. Gravely on April 20, 2016, wherein Applicant's claims were heard. (App., pp. 90-117). Judge Gravely ruled from the bench, finding that he did not find that Petitioner had met his burden to receive the relief requested, and noted that he did not believe a PCR evidentiary hearing was the proper forum for asserting an *ex post facto* violation of rights. (App., p. 116, lines 2-16). On October 18, 2016, Judge Gravely filed an Order of Dismissal providing his legal and factual findings, and denying Petitioner's Application. (App., pp. 119-127). Petitioner filed a Rule 59 Motion to Reconsider, and on December 9, 2016, the State served a Return to the Motion to Alter. (App., pp. 128-176; 177-187). By dual Orders dated February 15, 2017, and March 15, 20[17], the PCR Court denied amending or altering the Order of Dismissal. (App., pp. 188-189). This Appeal follows.

RESPONDENT'S STATEMENT OF FACTS

During the years of 2004 and 2006, Petitioner was between 25 and 27 year old, and was serving as a youth pastor with his church in Lexington, South Carolina. (App., p. 6). As was common at the time, youth would often visit Petitioner at his home. Two instances occurred relative to this matter, Petitioner had two male youth members at his family's home, 13 year old Minor 2 and 12 year old Minor 1. (App., pp. 6-7). On one occasion, Petitioner provided Minor 2 with a male masturbatory aid and pornographic video to watch while at his home. Charges of disseminating obscene material to a minor under the age 12 were brought for this, but were dismissed in advancement of Petitioner's voluntary guilty plea for Lewd Acts Upon a Child

under the age of 16. (App., p. 7, lines 3-16). This charge was brought against Petitioner for an incident where Petitioner, while sharing a bed with Minor 1, fondled Minor 1's genitals during the night. (App., p. 7, lines 15-25).

Petitioner pled guilty as charged to Lewd Acts upon a Child under the age of 16 on April 5, 2007, with the State agreeing to recommend a sentencing cap of 10 years. Statutory history shows that this criminal offense was originally set forth in S.C. Code of Laws § 16-15-140, which in 2012 was repealed and replaced by § 16-3-655(C), Criminal Sexual Conduct in the Third Degree.

At the time of Petitioner's guilty plea, § 23-3-540, which is South Carolina's version of "Jessie's Law", had been adopted for nearly a year a half. At the guilty plea hearing, Judge Johnson asked defense counsel if he had explained to Petition the requirements that he register in the sex offender registry and the other requirements of the statute. (App., p. 9, lines 19-23). Defense counsel confirmed he had. (App., pp. 9, lines 21-23).[1] The Court accepted the guilty plea and conducted a thorough colloquy with Petitioner to ensure his guilty plea was made voluntarily, knowingly, and intelligently. (PCR App., pp., 3, 4-6).The Court confirmed that Petitioner understood the charges brought, the potential sentence he could receive, and the rights he was waiving in pleading guilty. (App., pp 2, 4-6, 9). The record also indicates that Petitioner is an exceptionally intelligent individual. (App., p. 21). However, the transcription concluded before the sentence of the Court was orally handed down on the record. (App., p. 28). Petitioner's sentencing sheet does not indicate GPS monitoring. (App., p. 86).

[1] South Carolina Code of Laws § 23-3-540 is located in Title 23, Chapter 3, Article 7. This is the exact same location for the other portions of the South Carolina sex offender registry statutes § 23-3-40 through § 23-3-555.

Applicant's original PCR Application, filed October 9, 2009, asserts without additional details, a claim of "after discovered evidence" on the basis of "electronic monitoring". (App., p. 30). The State responded with a Motion to Dismiss and a Conditional Order of Dismissal that was signed by Judge McMahon, wherein the Application was found to be untimely and based on a collateral consequence. (App., 35-43). Applicant filed a Reply contesting the Conditional Order as well as Notice of Motion and Motion to Amend Application for Post Conviction Relief on February 16, 2012. (App., 57; 45). This Amended Application for Post Conviction Relief argued specifically that Petitioner's Application should be considered timely under § 17-27-45(C) and that counsel was ineffective or failing to have the indictment date range for the crime corrected. (App., p 48). This Amended Application also provided a number of allegedly supporting document, including a "Request to Staff Member" *which is specifically referenced by the Application* as providing the October 10, 2008[2] date in which Applicant would have first learned of his electronic monitoring issue. (App., pp. 54, 48).

Based upon Applicant's Reply to the Conditional Order, and upon further review of the matter, it was determined that genuine issues of material fact existed such that an evidentiary hearing was warranted. (App., pp. 182-183). As a result, the Conditional Order of Dismissal was not made final and the State's Motion to Dismiss was denied. Prior to the evidentiary hearing, a Second Amended Application for Post Conviction Relief was filed, but did not assert new grounds for relief.

---

[2] The Amended Application and Second Amended Application mistakenly state the date to be October 10, 2009. (App., p. 48). The document is clearly dated for the year 2008. (App., p. 54). Clarification is needed as this documents provides substantial insight into determining the Application's untimeliness under § 17-27-45(C).(See Argument I; Infra).

An evidentiary hearing, *the first hearing held upon the merits of the Application*, was held on April 20, 2016, before the Honorable Perry H. Gravely. (App., p. 149). The Court heard testimony from Investigator Pritchard demonstrating that the crime committed, was believed to occur in August 2005; but because the victim was not sure when the crime occurred, a broader date range was provided to ensure that the necessary dates were covered. (App., pp. 160-161). The Court also heard testimony from the Applicant that his sentencing sheet did not have GPS monitoring box checked, that the Court did not sentence him to GPS tracking, *and that he did not know of the issue until his receipt of an October 24, 2008 letter* informing him of his GPS detainer.[3] (App., pp. 161, line 24 through pp. 163, line 6; pp. 163, lines 7-14). In argument by Respondent, the Court heard discussion regarding the January 1, 2006 adoption date of § 23-3-540 and discussion of the collateral consequences. (App., pp. 169, lines 1-22; pp. 170, line 20 through pp. 171, line 15). The PCR Court ruled from the bench that he did not find Applicant had met his burden for relief. The PCR Court also acknowledge that to the extent Petitioner was arguing a ex post facto claim – PCR was not the proper forum for consideration of that claim. (PCR App., pp. 158, lines 11-21; 167, lines 4-16; 175, lines 9-12).

Following the oral ruling from the bench, Judge Gravely filed an Order of Dismissal on October 18, 2016. (App., pp. 119-127). The Order of Dismissal addressed two issues from Petitioner's Application:

a. Ineffective Assistance Counsel, concerning the alleged failure to correct the dates on the indictment;
b. Newly Discovered Evidence, concerning the enforcement of GPS electronic monitoring;

[3] The Amended Application and Second Amended Application both asserted that "October 10, 2008" was the date in which Petitioner gained knowledge of the issue. Discrepancy exists in Applicant's argument.

For "ineffective assistance of counsel," the Court recited the pertinent testimony from Investigator Pritchard put forth at the hearing, that the broader date range was used due to the victim's inability to precisely remember the date of the lewd act incident. (App., p. 122). However, Judge Gravely found that Applicant had failed to meet his burden of establishing plea counsel was ineffective and failed to show the implementation of GPS monitoring was directly related to plea counsel's representation of Applicant. (App., p. 122). The Court noted the statute's plain reading indicates the date of the guilty plea is controlling, and that the indictment dates are therefore irrelevant to the claims presented. (App., p. 125).

In addressing the argument concerning newly discovered evidence, the Court noted that the crux of Applicant's argument is that the original PCR Application filed October 9, 2008, is timely because Applicant did not discover his electronic monitoring requirement until receiving an October 24, 2008 letter from his classification officer. (App., pp. 124). The Court summarized the State's counter-argument that the law had been enacted for over a year before the plea and it should have been discovered with reasonable diligence.

The Court concluded first that the electronic monitoring law set forth in § 23-3-540(A) was enacted on January 1, 2006, over one year and three months before Applicant's guilty plea was entered. Judge Gravely agreed that the considerable length of time for which §23-3-540(A) had been enacted was sufficient notice of the issue such that it could not be availed as "newly discovered evidence". (App., p. 142). The Court's Order also expressed the legal consideration that "newly discovered evidence" is limited to circumstances effecting guilt, and that considerable evidence must exist to warrant the retracting of a solemn declaration of guilt. (App., p. 140). On this basis, Petitioner's claim was found untimely under § 17-27-45(C).

The PCR Court also concluded that PCR is not the proper forum for consideration of *ex post facto* violations of rights, and declined to rule in any manner. (App., p. 142). No finding was made as to whether or not this circumstance presented an *ex post facto* violation, the PCR court simply declined to address the presented argument on the basis it was not a cognizable claim for PCR. (App., pp. 125). Following the filing of the Order of Dismissal, Petitioner filed a Rule 59 Motion to Reconsider wherein he argued the Order of Dismissal was inadequate in the following ways:

a. The Order does not reflect the filing of the second amendment;
b. The Order of dismissal fails to set forth the allegations articulated in the original application, and it the two subsequent amended applications;
c. The Order fails to set forth the whole procedural history of the case;
d. The Order lacks reference to the Conditional Order of Dismissal, the Applicant's reply thereto, Second conditional order;
e. The Order failed to recognize that, through Investigator Pritchard's testimony, there was no evidence of any lewd act by Applicant after August 5, 2005;
f. The Order failed to recognize that counsel's failure to move for the dates alleged to be conformed with the evidence after the conclusion of the case, exposed Applicant to the new requirements found in §23-3-540(A).
g. The Order failed to reference a previous ruling by another circuit court judge, the Honorable J. Mark Hayes, II, concerning the timeliness of this application.

(App., pp. 130-131).

Applicant suggests that Judge Hayes' Orders from January 2016 addressed and ruled upon the issue of whether the PCR Application was timely filed, and as such it was the law of the case before the evidentiary hearing on April 20, 2016, and error for Judge Gravely to rule on matter already decided by a different judge.[4] [5] Applicant also argued that given the

[4] Petitioner cites the January 15, 2016 Form 4 Order, and the Transcript of Hearing, with specific reference to "Tr. p. 8, 1.24 – p. 9, 1.14" as the citation for Judge Hayes having made a direct ruling as to the statute of limitations/timeliness of filing issue. Respondent has reviewed these materials extensively, and cannot find any conclusions or rulings on the merits of Applicant's claims; Judge Hayes' January 15, 2016 Order simply denied of the Motion to Dismiss on the

circumstances, Petitioner had no reason to investigate GPS monitoring requirements and should not be held to the date in which 23-3-540(A) was enacted. The Rule 59 Motion concluded with a request that the PCR Court reconsider its decision to deny Applicant relief. Judge Gravely denied the Rule 59 Motion.

BRIEF ARGUMENT

As §23-3-540(A) explicitly states the date of the guilty plea or conviction is the triggering date for enforcement of electronic monitoring requirements, there was ample evidence and legal basis within the record which supports the Court's conclusion that the broad indictment dates for the arresting incident did not constitute an error of counsel, nor did they have any influence on the electronic monitoring issue disputed by Petitioner. Moreover, there is no argument or facts on the record which indicate that Petitioner would have chosen to go to trial had he been aware of the electronic monitoring requirement prior to his plea. Lastly, testimony demonstrated there was a logical basis for why the broad range was provided. Petitioner did not satisfy the *Strickland* and *Hill* tests and relief was properly denied.

There is sufficient evidence to support the Court's conclusion that Petitioner, with the exercise of reasonable diligence, should have known about his mandatory electronic monitoring requirements such that a "newly discovered evidence" claim was not timely filed. The statute had been in effect for more than a year and 3 months before the April 5, 2007 guilty plea was entered. In additional support, the record shows Petitioner was actively inquiring about GPS

---

basis that a genuine issue of material fact exists *sufficient to warrant an evidentiary hearing.* Even the more thorough formal Order from Judge Hayes, filed February 3, 2016, does no more than conclude a material issue of fact exists to warrant further review. (App., pp 64-65).

[5] Infra, Section I, subsection "b": Judge Hayes Form 4 Order and January 15, 2016 Order

monitoring requirements as early as September 2, 2008, which was more than one year before he filed his first PCR Application.

Lastly, there is no basis in which to appeal issues relating to determination of collateral consequences and *ex post facto* violations, as Judge Gravely did not make legal or factual findings as to either issue, and no such determination was requested by Petitioner's Rule 59 Motion. Furthermore, as Petitioner's two claims were sufficiently addressed and properly dismissed on other grounds, it was not necessary to reach the question of collateral consequences in order for the PCR Court to properly adjudicate Petitioner's claims.

RELEVANT LAW

"On certiorari in a PCR action, the Court applies the 'any evidence' standard of review." *Terry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011) (quoting *Cherry v. State,* 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This "Court will affirm if any evidence of probative value in the record exists to support the findings of the PCR court." *Id. See also Holden v. State*, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) ("In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision."). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. *Butler v. State,* 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

"An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith,* 539 U.S. 510, 521, 123 S.Ct. 2527 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 673, 104 S.Ct. 2052 (1984)). A PCR "applicant has the burden of establishing his entitlement to

relief by a preponderance of the evidence." Rule 71.1 (e), SCRCP. See also *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). In application of this standard to Petitioner's claims, the Petitioner must have proven both deficient error and prejudice to the State courts, such that but for counsel's errors the Petitioner would not have plead guilty. See *Strickland v. Washington*, 466 U.S. 668 (1984); *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 370 (1985).

In order to prove deficient performance, the convicted defendant must "show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Harrington v. Richter*, 562 U.S. 86, 104, 131 S.Ct. 770, 787 (2011) (quoting *Strickland*, 466 U.S. at 687). Further, "[t]he standard for judging counsel's representation is a most deferential one." *Harrington*, 131 S.Ct. at 788. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...." *Strickland*, 466 U.S. at 689. *Holden,* 393 S.C. at 572, 713 S.E.2d at 615 ("There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.") (quoting *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). "[F]air assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Butler v. State*, 286 S.C. 441, 445, 334 S.E.2d 813, 815 (1985) (quoting *Strickland*, [466 U.S. at 690]). Moreover, the Sixth Amendment does not require "perfect advocacy" but "reasonable competence" given the circumstances at the time of trial. *Maryland v. Kulbicki*, __ U.S. __, __, 136 S. Ct. 2, 5 (2015) (quoting *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S.Ct. 1 (2003). "The benchmark for judging any claim of ineffectiveness must be

whether counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on has having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984)

Further, "[i]n order for counsel's inadequate performance to constitute a Sixth Amendment violation, petitioner must show that counsel's failures prejudiced his defense." *Wiggins v. Smith*, 539 U.S. at 534, 123 S.Ct. 2527 (citing *Strickland,* 466 U.S., at 692, 104 S.Ct. 2052). "The likelihood of a different result must be substantial, not just conceivable." *Harrington*, 131 S.Ct. at 792 (citing *Strickland*, 466 U.S. at 693). The Supreme Court has cautioned: "An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." *Strickland*, 466 U.S. at 694-695. "[W]hile in some instances 'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,' *Murray v. Carrier,* 477 U.S. 478, 496 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Harrington v. Richter*, 562 U.S. at 111.

Furthermore, Pursuant to S.C. Code Ann. § 17-27-45, a PCR application "must be filed within one year after the entry of a judgment of conviction, or if there is an appeal, within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later." S.C. Code Ann. § 17-27-45(A) (1976). However, "[i]f the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the

date when the facts could have been ascertained by the exercise of reasonable diligence." *Id.* at § 17-27-45(C).

ARGUMENT

I. Evidence that § 23-3-540(A) was enacted more than a year before Petitioner's guilty plea, in addition to Petitioner's own inquiries about GPS monitoring dated September 2, 2008, is more than enough to support the "any evidence" standard for the Court's ruling that the "newly discovered evidence" action was not timely filed under § 17-27-45(C).

a. Evidence supporting Court's conclusion the Application was untimely.

The record provides ample evidence supporting the PCR Court's conclusion that Petitioner failed to timely file his action for newly-discovered evidence. The Petition for Writ of Certiorari should be denied.

Petitioner's first issue presented asks whether the action was properly dismissed as untimely pursuant to §17-27-45(C). Petitioner's claims are particularly intertwined in this matter, as they all address whether GPS monitoring can be enforced in this case. Petitioner's claims are dependent upon Section 17-27-45(C), as Petitioners original PCR Application was filed more than two (2) years after the conclusion of Petitioner's right to direct appeal. (App., p. 30).

Section 17-27-45(C) provides the procedures *for filing a PCR Application* on the basis of newly discovered evidence. S.C. Code Ann. § 17-27-45(C) (1976). Section17-27-45(C) permits the filing of a PCR Application on the basis of "newly discovered evidence," but the Application "must be filed within one year of the date of actual discovery of the facts by applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence." *Id.* As the statute is a mechanism for allowing a PCR Application to operate under a different

calculation of the statute of limitations, a ruling that Petitioner's newly discovered evidence was untimely asserted, renders the action *as a whole* untimely.[6]

Petitioner's claims regarding the enforcement of mandatory electronic monitoring requirements under §23-3-540(A) were deemed untimely by the PCR Court under §17-27-45(C). (App., p. 125). The facts applicable to this case are straightforward. Mandatory electronic monitoring under § 23-3-540(A) was made effective on January 1, 2006. S.C. Laws Act 141, H.B. 3328 (2005). Petitioner pled guilty on April 5, 2007; he was therefore on notice of the statute's application to his case for a year and three months before he actually chose to plead guilty. Furthermore, defense counsel confirmed for Judge Johnson that he and Petitioner had already reviewed and considered the sex offender registry requirements in anticipation of Petitioner's plea. (App., p. 9, lines 19-23). In correlation to the plea court's inquiry, it is also important to note that the electronic monitoring requirements are set forth in the exact same statutory Title, Chapter, and Article of the S.C. Code of Laws as the other portions of the South Carolina sex offender registry laws. S.C. Code of Laws §§ 23-3-400 to 23-3-555 (1976).

The PCR Court found that, as the plain reading of §23-3-540(A) specifies that the date of conviction or guilty plea is the controlling date for applicability of the statute, the Petitioner had not exercised reasonable diligence in discovering his electronic monitoring requirements and

---

[6] As a result of the intertwined nature of Petitioner's claims, the Order of Dismissal, at times, inartfully characterized "Newly Discovered Evidence" as a claim, instead of a procedural basis for the application as a whole. The PCR Court also chose to address the merits of Petitioner's ineffective assistance of counsel claim independently. The PCR court's characterization of the arguments creates some confusion, but ultimately § 17-27-45(C) allows a PCR statute of limitations to be calculated based on the date of the possible discovery of the issue, as opposed to the conclusion of direct appeal. The PCR Court's finding that Petitioner had failed to exercise reasonable diligence in timely filing his claim under § 17-27-45(C) constitutes a finding that *the action* is time-barred.

bringing a timely claim under §17-27-45(C). (App., p. 125). The PCR Court based this ruling on the fact that the statute was enacted more than a year before the guilty plea was entered. By itself, this basis was more than sufficient to support the Court's ruling under the "any evidence" standard. However, there are other facts in the record that further support the PCR Court's ruling.

In his first amended and second amended PCR Applications, Petitioner asserted that he first became aware of the issue on October 10, 2008. (App., pp. 48, 69). Petitioner specifically cites a document titled "Request To Staff Member" as his basis for this defense, and a copy of this document was attached to the Amended PCR Application. (App., pp. 48, 69; 54). However, at the PCR hearing, Petitioner changed his argument and testified instead that his receipt of an October 24, 2008 letter was the moment he was first informed of the potential issue. (App., pp. 103, line 2 through pp. 104, line 6). The variation in dates as to when he claimed to "first know" of the issue damaged the credibility of the argument.

And, far more definitively, the "Request to Staff Member" document referenced by Petitioner in his amended Applications shows that Petitioner inquired as to the GPS detainer being placed on him as early as September 2, 2008. (App., p. 54). This was more than thirteen (13) months before the original PCR Application was filed.

In calculating, the statute of limitations in the context of exercising reasonable diligence for discovery of the claim in question, the test is not to determine when a party knows he has a claim, but rather the Court must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some claim might exist. *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct.App.2001). The Request to Staff Member document, dated "9-2-08" by Petitioner reads in pertinent part: "(2) Also, I have a

detainer that is a hold for GPS. I checked my sentencing papers and the GPS monitoring box is not checked (& my charge isn't automatic GPS), why do I have this detainer." (App., p. 54). It is clear by this inquiry, that as early as September 2, 2008, Petitioner was aware that a GPS monitoring issue existed. However, he still delayed until October 9, 2009 to file a PCR Application and address the matter. The factual basis set forth in the Order of Dismissal is sufficient to support the ruling that Petitioner's claim was untimely for failing to exercise reasonable diligence, but the record shows that Petitioner's statute of limitations had passed on the basis of *actual knowledge* as well.

The existence of the September 2, 2008 inquiry by Petitioner also addresses the rebuttal arguments of Petitioner. In his Rule 59 Motion and his Petition for Writ of Certiorari, Petitioner argues he did not have any reason to investigate his circumstances concerning electronic monitoring, and therefore should not be held to expiration of the one (1) year statute of limitations based upon the enactment of the statute. The September 2, 2008 inquiry clearly demonstrates that he was on notice of his GPS requirements, but still waited over thirteen (13) months to file the claim.

There is substantial evidence within the record to support the court's conclusion Petitioner's newly discovered evidence action was not timely filed pursuant to §17-27-45(C). The Petition for Writ of Certiorari should therefore be denied.

b. Judge Hayes Form 4 Order and January 15, 2016 Order

Petitioner asserts Judge Hayes' Form 4 Order and/or January 15, 2016 Order constitute a ruling on the merits of Respondent's statute of limitations defense to Petitioner's claims, and thereby precluded Judge Gravely from the considering the timeliness of Petitioner's claims.

(Petition for Writ of Certiorari, pp. 13-14). This argument constitutes a complete misunderstanding of Judge Hayes' Orders.

Our Supreme Court has addressed this basic understanding of rulings for summary dismissal. *McCoy v. State*, 401 S.C. 363, 370, 737 S.E.2d 623, 627 (2013). "Although Petitioner's PCR claim may ultimately prove to be untimely, successive, or perhaps unsuccessful on the merits," the presence of a genuine issue of material fact will preclude summary dismissal so that an evidentiary hearing can be conducted and the disputed facts to these arguments considered. *Id.*

As the Statement of Case and Statement of Facts point out, Petitioner's PCR Application was initially poised to be dismissed by Judge McMahon's Conditional Order of Dismissal. (supra). In pertinent part, the Conditional Order of Dismissal held the Application was filed after the one year statute of limitations had expired. Petitioner's claims were (and still are) time-barred *as a matter of law* under § 17-27-45(A). (App., p. 42). Petitioner had yet to assert § 17-27-45(C) as a basis for arguing a one year statute of limitations beginning from the date of possible discovery of the issues in question. Petitioner served his Reply to the Conditional Order of Dismissal, as instructed, and notified the court that he was seeking to Amend the Application and argue that his claims were timely under § 17-27-45(C). (App., p. 57-58). Judge Hayes took into consideration the "newly discovered evidence" basis for the PCR Application and held a genuine issue of material fact exists such that an evidentiary hearing was warranted. The sole purpose and effect of Judge Hayes' Form 4 and January 15, 2016, Order was to award Petitioner a PCR evidentiary hearing and to deny the State's Motion to Dismiss the action as a matter of law.

The Form 4 Order states in pertinent part:

> This action came to trial or hearing before the court. The issues have been tried or heard and decision rendered. This matter came before the court for a determination if further review of this Post Conviction matter should be conducted. After hearing from counsel for the State and the applicant, this court feels a sufficient showing has been made to warrant further review. Counsel for applicant is requested to prepare a brief order for the court to sign directed that further review of this PCR be conducted.

(App., pp. 147-148). The subsequent formal Order, dated January 15, 2016, states in pertinent part, under "FINDINGS OF FACT AND CONCLUSIONS OF LAW":

> South Carolina Code § 17-27-70 sets out the procedure the Court should apply upon receipt of a Post-Conviction Relief Application. As stated above, the State filed a motion for a dismissal of the application. Judge McMahon issued a Conditional Order of Dismissal and gave Applicant twenty (20) days to show why his Order should not become final. Applicant provided a Reply to the Conditional Order of Dismissal within the specified time.
> After reviewing the Applicant's Reply and after hearing from counsel for the State and the applicant, this court feels a sufficient showing that a material issue of fact has been made to warrant a further review. Therefore I direct that an evidentiary hearing be scheduled to allow for further review of this Post-Conviction Relief Application.

(App., pp. 64-65). The alleged "concession" by counsel for the State at the evidentiary hearing consists of the following:

> that there is a Motion to Dismiss but it appears – has that not already been addressed, because in the file in January of 2016 Judge Hayes says that a, (reading) "...sufficient showing of material issue of Genuine fact has been made to warrant a Further review. I direct that an evidentiary Hearing be scheduled to allow for further Review of this PCR Application."
> Does that not resolve the Motion to Dismiss that was filed prior to this Order?

Ms. Hastings: Yes Your Honor.

(App., p. 98, lines 1-12). This exchange merely informed Judge Gravely that he could proceed directly into a merits hearing, as opposed to hearing arguments for dismissal as a matter of law before the presentation of witness testimony.

The argument that the statute of limitations was ruled upon and made the law of the case by Judge Hayes bears a complete absence of merit. The only way in which a statute of limitations defense can be concluded as law of the case *prior* to an evidentiary hearing and decision on the merits of the case is if Petitioner had filed and succeeded on a Motion for Partial Summary Judgment. Petitioner's argument that Judge Gravely was precluded from hearing argument and ruling on the timeliness of the PCR Application is completely unsupported by the record, unsupported by the Rules of Civil Procedure, and lacking any meritorious consideration. The Petition for Writ of Certiorari should be denied.

II. There is sufficient evidence within the record to support the PCR Court's ruling that Petitioner failed to meet his burden of showing ineffective assistance of counsel for failure to have the indictment date range narrowed.

There is abundant evidence in the record to conclude counsel was not deficient in failing to narrow the date range set forth in Petitioner's indictment. The PCR Court's ruling was therefore proper, and the Petition should be denied.

Issue two addresses the same underlying contention from Petitioner as was argued in Issue One (supra). Specifically, that § 23-3-540(A) should not be applied based upon the date of the guilty plea or conviction, despite the plain reading of the statute. (Petition for Writ of Certiorari, pp. 10-11). However, Issue Two suggests that the indictment date range is the culprit for Petitioner having been subjected to GPS monitoring requirements.

Petitioner argues that the allegedly unnecessarily broadening of the indictment date range placed Petitioner's crime into a time period after the enactment of the § 23-3-540(A), and consequently rendered Petitioner subject to the GPS monitoring requirements set forth by the statute. Petitioner asserts that this consequence was a result of trial counsel's failure to have the indictment date range narrowed. Additionally, Petitioner argues that the failure of the court to orally sentence Petitioner to GPS monitoring and/or the failure of the court to check the GPS monitoring box on the sentencing sheet, negates the applicability of the statute.

At the PCR hearing, Investigator Pritchard testified that a more precise range would have ended at August, 2005, but the extended date range was used because of the victim's uncertainty as to when the abuse occurred. (App., pp. 100, line 22 through pp. 102, line 2). The PCR Court accurately summarized this explanation in the Order of Dismissal. The PCR Court then held that the indictment date range had no impact on the mandatory application of the statute, and therefore there was no connection to be made to the performance of counsel. (App., pp. 122, 125, & 127). On that basis, the PCR Court found that Petitioner had failed to meet his burden under *Strickland*. This ruling was proper.

There has been no evidence or argument that Petitioner would have chosen to go to trial as opposed to pleading guilty, had he known of the electronic monitoring requirements. Such is required in order to prove prejudice in a guilty plea PCR matter. *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 370 (1985). Petitioner's failure to put forth any evidence to this standard is a failure to satisfy the requisite burden of proof, and denial of the Application was proper.

Furthermore, the plain reading of § 23-3-540(A) demonstrates the effective date for application of the statute is based upon the date of conviction or guilty plea – not upon the date

of the offense in question and not upon the dates reflected in the indictment. "The Cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citing *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993)). Under the plain meaning rule, it is not the province of the court to alter the meaning of a clear and unambiguous statute, or rewrite or inject matters into the statute that are not present in the language of the legislature. *Id.* (citing *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998)); *Id.* (citing *Timmons v. South Carolina Tricentennial Comm'n*, 254 S.C. 378, 175 S.E.2d 805 (1970)). The court need only apply the clear terms of the statute. *Id.*

S.C. Code of Laws § 23-3-540(A) states:

> Upon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere of a person for committing criminal sexual conduct with a minor in the first degree, pursuant to Section 16-3-655(A)(1), or criminal sexual conduct with a minor in the third degree, pursuant to Section 16-3-655(C), the court must order that the person, upon release from incarceration, confinement, commitment, institutionalization, or when placed under the supervision of the Department of Probation, Parole and Pardon Services shall be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

S.C. Code Ann. § 23-3-540 (1976). The PCR Court was correct in finding the date of the guilty plea triggers the application of electronic monitoring under § 23-3-540(A), the indictment has no impact on the statute, and the implementation of GPS monitoring requirements was not in any way related to counsel's actions. The PCR Court was likewise correct in finding Petitioner had failed to meet his burden under *Strickland and Hill.*

The Petition for Writ of Certiorari should be denied.

III. Petitioner's remaining arguments

Petitioner has also raised additional questions within the Petition for Writ of Certiorari that are not proper for consideration on PCR Appeal, and are unpreserved for review. Petitioner *argues* the PCR Court was in error for finding that electronic monitoring constituted a collateral consequence that did not rise to the level of an *ex post facto* violation, and for finding, simultaneously, that Petitioner's claim did not constitute *ex post facto* violation while also ruling PCR was not the proper forum for consideration of *ex post facto* claims. These issues, as argued by Petitioner, do not accurately reflect the record and are not preserved for consideration on appeal.

The PCR Court made no official findings of fact or conclusions of law as to collateral consequences and *ex post facto* violations, other than to acknowledge counsels' arguments concerning these two issues (App., p. 99, lines, 11-18; p. 123), and concluded that PCR is not the proper venue to decide the *ex post facto* violations. (App., p. 108, lines 4-16; p. 116, lines 2-18). As the Order of Dismissal demonstrates, these topics were completely absent from the PCR Court's reasoning; instead, the Judge Gravely denied the Application on the basis of being untimely under § 17-27-45(C), and for counsel's performance having no connection to the statutory construction and application of § 23-3-540(A), thereby failing to satisfy Petitioner's burden under *Strickland*.

Judge Gravely's refusal to rule on these issues was proper. This Court has already concluded that since an *ex post facto* claim is not a collateral attack on the validity of a conviction, "pursuant to *Al-Shabazz*, an *ex post facto* claim is not appropriate for PCR." *Jernigan v. State*, 340 S.C. 256, 259, 531 S.E.2d 507, 509 (2000) (citing *Al–Shabazz v. State*, 338 S.C.

354, 527 S.E.2d 742 (2000)); App., p. 125; App., p. 108, lines 4-16). In his ruling from the bench, Judge Gravely acknowledged this limitation, and ruled solely on the Petitioner's failure to meet his burden under *Strickland*, and expressly left the issue of *ex post facto* violations as a matter for another court. (App., p. 175, lines 2-18).

The matter of collateral consequences was also left unaddressed, as this issue was encapsulated in the *ex post facto* arguments of counsel. Even if a ruling on collateral consequences could have been extracted without also performing an *ex post facto* analysis, Petitioner's Application was sufficiently addressed and properly dismissed on other grounds; it was not necessary to reach the question of collateral consequences in order for the PCR Court to properly adjudicate Petitioner's claims. However, *in arguendo*, if the issue of collateral consequences were to be considered, this Supreme Court has already ruled that electronic monitoring is considered a collateral consequence; it is a public safety measure, not a punitive measure. *In re Justin B.*, 405 S.C. 391, 408, 747 S.E.2d 774, 782-83 (2013); *State v. Nation*, 408 S.C. 474, 481, 759 S.E.2d 428, 432 (2014). As such, it cannot be the basis of an *ex post facto* violation. *State v. Walls*, 348 S.C. 26, 30, 558 S.E.2d 524, 525 (2002); *Jernigan v. State*, 340 S.C. 256, 261, 531 S.E.2d 507, 509 (2000); *State v. Huiett*, 302 S.C. 169, 172, 394 S.E.2d 486, 487 (1990)

Lastly, Petitioner did not request these factual or legal findings be made by the PCR Court in his Rule 59 Motion. (App., pp. 128-133). As such, they have not been properly preserved for appellate review. *Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007).

The Petition for Writ of Certiorari should be denied.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

ANTHONY MABRY
Assistant Attorney General

W. JOSEPH MAYE
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By: _____
W. Joseph Maye
SC Bar No. 100851

February 5, 2018.
Columbia, South Carolina.

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, W. Joseph Maye, hereby certify that I have served the Return to Petition for Writ of Certiorari in the foregoing by depositing two (2) copies in the United States mail addressed to:

Tara Dawn Shurling, Esquire
3614 Landmark Drive, Suite A
Columbia, SC 29204

This 5th day of February, 2018.

W. JOSEPH MAYE
Assistant Attorney General