

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

JUN 20 2018

Honorable J. Cordell Maddox, Jr., Circuit Court Judge S.C. SUPREME COURT

Case No.: 2012-CP-32-3935

Rico Hickman, 297987,.....Petitioner,

vs.

State of South Carolina,.....Respondent.

EXPLANATION PURSUANT  
TO RULE 243, SCACR

Pursuant Rule 243 (c), SCACR, undersigned counsel provides the following explanation as to why Petitioner’s appeal should be allowed to proceed in front of this Court. As was argued at the brief Motion hearing and in detail in the attached Motion pursuant to Rule 59, SCRCR, Petitioner asserts that the lower court erred in summarily dismissing the allegation raised in his subsequent PCR Application when it is clear that the issue was not raised or ruled upon in his prior PCR proceeding and since issues of material fact and law are involved that need to be addressed in a full evidentiary hearing. Simply put, whether the lower court erred in summarily dismissing Petitioner’s claim is a matter that requires review by this Court.

As argued to the lower court in the Motion attached hereto and incorporated in this explanation hereby, Applicant would ask this Court to allow Petitioner to proceed

with an appeal in line with the recent reasoning set forth by this Court in Mangal v.

State, Op. No. 27726 (S.C. Sup. Ct. filed October 4, 2017).<sup>1</sup> As was argued at the

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<sup>1</sup> We have often considered the tension between the rights at stake in PCR proceedings and the application of traditional procedural requirements for the presentation and preservation of issues. See, e.g., Robertson v. State, 418 S.C. 505, 795 S.E.2d 29 (2016); Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999). The Supreme Court of the United States recently addressed this tension in Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). The issue in Martinez was "whether a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding." 566 U.S. at 5, 132 S. Ct. at 1313, 182 L. Ed. 2d at 280. After Martinez was convicted in the state court of Arizona of two counts of criminal sexual conduct with a minor, the state appointed new counsel for the direct appeal. 566 U.S. at 5-6, 132 S. Ct. at 1313-14, 182 L. Ed. 2d at 280.

While the direct appeal was pending, Martinez's newly-appointed counsel initiated a state PCR proceeding. 566 U.S. at 6, 132 S. Ct. at 1314, 182 L. Ed. 2d at 280. However, counsel made no claim of ineffective assistance of trial counsel, and later filed a statement asserting there were "no colorable claims at all." 566 U.S. at 6, 132 S. Ct. at 1314, 182 L. Ed. 2d at 280-81. The state court dismissed the PCR action. 566 U.S. at 6, 132 S. Ct. at 1314, 182 L. Ed. 2d at 281.

Later, Martinez filed a second PCR action in state court with new counsel, this time asserting trial counsel provided ineffective assistance. 566 U.S. at 6-7, 132 S.Ct. at 1314, 182 L. Ed. 2d at 281. The state court dismissed this PCR action, finding Martinez was procedurally barred from pursuing ineffective assistance claims that should have been asserted in his first PCR action. 566 U.S. at 7, 132 S. Ct. at 1314, 182 L. Ed. 2d at 281. Martinez subsequently filed a writ of habeas corpus in federal court, again raising the ineffective assistance of counsel claims. *Id.* The district court refused to address the claims on the ground they were barred by procedural default in state court, and "Martinez had not shown cause to excuse the procedural default." 566 U.S. at 7-8, 132 S. Ct. at 1315, 182 L. Ed. 2d at 281. After the Ninth Circuit affirmed, the Supreme Court granted certiorari. 566 U.S. at 8, 132 S. Ct. at 1315, 182 L. Ed. 2d at 282.

The Supreme Court held "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U.S. at 17, 132 S. Ct. at 1320, 182 L. Ed. 2d at 288. In doing so, the Court recognized the right to the effective assistance of trial counsel is a "bedrock principle in our justice system," and acknowledged applicants "confined to prison" and "unlearned in the law" often have difficulty complying with procedural rules in a PCR case. 566 U.S. at 12, 132 S. Ct. at 1317, 182 L. Ed. 2d at 284. The Court then stated,

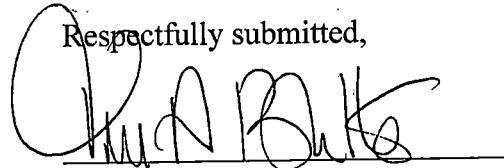
Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors (or the absence of an attorney) caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim. 566 U.S. at 14, 132 S. Ct. at 1318, 182 L. Ed. 2d at 285-86.

We first considered Martinez in Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013). We held Martinez "is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions." 404 S.C. at 365, 745 S.E.2d at 377. We considered Martinez again in Robertson. Reaffirming Kelly, we held "Martinez does not afford Petitioner a right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel." 418 S.C. at 516, 795 S.E.2d at 34. In Robertson, however, we permitted the PCR applicant to pursue successive application the PCR court found was procedurally barred. 418 S.C. at 516, 795 S.E.2d at 34.

The Supreme Court's decision in Martinez reminds us that the Sixth Amendment guarantee of effective assistance of counsel is a "bedrock principle in our justice system." Simmons and Martinez counsel us that

motion hearing, Applicant is simply seeking his “full bite of the apple” on this issue that would render the benefit of his plea completely void and needs to be fully and fairly addressed. See Poston v. State, 339 S.C. 37, 528 S.E.2d 422 (2000), Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582-83 (2002). Therefore, Petitioner would respectfully request the opportunity to proceed with an appeal of the lower court’s Order summarily dismissing his Application without a full evidentiary hearing.

Respectfully submitted,



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there are situations where the interests of justice require PCR courts to be flexible with procedural requirements before PCR applicants suffer procedural default on substantial claims. Such flexibility is consistent with the purpose and spirit of our Rules of Civil Procedure. These considerations should guide PCR courts when struggling to balance procedural requirements against the importance of the issues at stake in PCR proceedings. We encourage trial courts in PCR cases to use the discretion we grant them on procedural matters to find reasonable ways—within the flexibility of our Rules—to reach the merits of substantial issues.

As we stated in Odom and repeated in Robertson, "All applicants are entitled to a full and fair opportunity to present claims in one PCR application." Robertson, 418 S.C. at 513, 795 S.E.2d at 33; Odom, 337 S.C. at 261, 523 S.E.2d at 755.