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S.C. SUPREME COURT

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

from:

Frank Green # 116977
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669

was received in the Perry mailroom on or about October 18, 2018. The correspondence was sent to SCDC Headquarters in Columbia in a secure mailbag to be distributed.

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N.C. Merchant – Postal Director
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669

November 1, 2018

Date

In The State of South Carolina } S.C. Supreme Court
County of Aiken } 2016-CF-02-02833
2018-001699

Frank Green Jr. #116977 }
Petitioner, } 243(c) Explanation
vs }
State of South Carolina }
Respondent }
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NOV 16 2018

The petitioner Frank Green Jr. #116977 in the above captioned case will show this Honorable Court why the circuit court's determination was improper. This explanation will show that the petitioner's PCR should not be barred as being successive and/or untimely under the statute of limitations.

This matter comes by way of after discovered evidence which is material evidence which has never been presented before the court. This evidence submitted in his brief is so genuine material facts that will prove that the petitioner recently discovered this evidence.

Pursuant to S.C. Code of Laws 17-27-20(a)(4), there exist evidence of material facts not previously presented and heard that requires vacation of

his conviction and sentence in the interest of justice. The petitioner filed his PCR application under this chapter within the one year after date of the actual discovery of the facts by the petitioner or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

However, the court suggested and respectfully dismissed the instant PCR application as successive. Petitioner would submit the basis of instant application is premised on counsel's erroneous advice to enter a plea of guilty. Petitioner would submit he has never had his "one full bite of the apple" due to ineffective assistance of PCR counsel in that regard. While ineffective assistance of PCR counsel is not a ground to file a second PCR application, the lower court correctly pointed out that this issue could have been raised in the prior adjudication. However, state statutory PCR counsel failed to ensure all available grounds for relief were included in the original application, thus ensuring that [all] available grounds for relief be raised in the initial application,

thus resulting in an inadequate corrective process and any default should be imputed to the state.

Petitioner assert that the PCR application that he filed should not have been dismissed as successive, but rather an evidentiary hearing should have been convened to determine whether or not petitioner has a statutory created liberty interest in South Carolina PCR Actions.

Rule 71.1(d), SCRCP, Appointment of Counsel. The recent application should not be dismissed as successive. It is the state who bears the burden of a procedural default on any claims that should have been raised in the original application and presented to the PCR court and this honorable court for consideration. Rule 71.1(d) SCRCP states:

(d) Appointment of counsel for hearing. If after the state has filed its Return, the application presents questions of law and fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent. Counsel shall be given reasonable

time to confer with the applicant. Counsel shall ensure that all grounds for relief are included in the application and shall amend the application if necessary.

The word shall is considered mandatory, see South Carolina Police Officers Retirement Sys. v. Spartanburg, 301 S.C. 188, 391 S.E. 2d 239 (1990) (shall is considered mandatory under the principles of statutory interpretations); S.C. Dept of Hwy + Public Trans. v. Dickinson, 358 S.C. 189, 191, 341 S.E. 2d 135 (ordinarily the use of the word shall in a statute means that the action referred to is mandatory).

The duty is on the petitioner to show a duty of care was owed to him, Rayfield v. SCDC, 297 S.C. 95, 105-106, 374 S.E. 2d 910, 916 (Ct. App. 1988) cert. denied 298 S.C. 207, 379 S.E. 2d 133 (1989). An affirmative legal duty may be created by a statute, contract relationship, status, property interest, or some other special circumstance. Authurs v. Aiken County, 338 S.C. 253, 525 S.E. 2d 542, 547 (S.C. App 1979)

An affirmative legal duty here is created by the S.C. Const. Art. 1 § 3, S.C. Code Ann. § 17-27-60 (2003) and Rule 21.1(d)

The S.C. provisions here create a liberty interest in the 6th Amendment right to Effective

assistance of counsel, via the 14th Amendment. Petitioners had a legitimate claim of entitlement to counsel as created and determined by reference to South Carolina state law. Their laws make it clear that the appointment of counsel in the first initial review collateral proceeding (PCR) is not discretionary.

It was appointed PCR counsel's professional obligation to ensure that all available grounds for relief were raised in at the first-initial-review collateral proceeding (PCR). Anything short of that is scrutinized under § 17-27-90, and thus should be imputed to the state. PCR counsel shall ensure that all available grounds will be raised in the first PCR application. Counsel is appointed just for this reason and thus has a duty to represent the client, without the constitutional duty of effective assistance in this regard, the PCR procedure itself is ineffective and runs afoul of the United States Supreme Court's 14th Amendment directive that the states employ an adequate PCR remedy to present federal constitutional claims. See *Case v. Nebraska*, 381 U.S. 336 (1965). The U.S. Supreme Court incorporates into the 14th Amendment any quarantee which is fundamental in the context of the [judicial] process maintained by the American States. *Duncan v. Louisiana*, 391 U.S. 145 (1961) emphasis supplied.

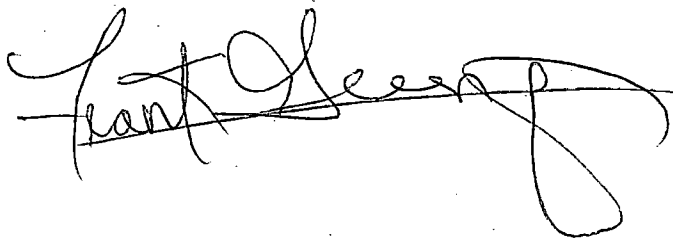
The failure of petitioner's first PCR counsel to ensure that [all] grounds for relief are included in the first PCR application is plainly ineffective assistance of counsel, *Washington v. State*, 324 S.C. 232, 428 S.E.2d 833, 835 (S.C. 1996). Petitioner submits he was denied his "first bite of the apple" due to ineffective assistance in the first - initial - review (PCR) proceeding.

In *Case*, the general basis for finding a constitutional right to "full and fair" state PCR procedures are the concerning opinions of the justice, Clark (381 U.S. at 337-47 and Brennan Id at 340-47). In *Case* the U.S. Supreme Court granted certiorari precisely in order to decide whether the constitution requires state's to provide a PCR remedy that offers an adequate corrective process for hearing of Federal constitutional guarantees and if so, what constitution on adequate process.

South Carolina rules of PCR procedures Rule 71.1(d) may be construed as inadequate where, as here has both counsel's (trial and PCR counsel) failed to protect petitioner's right and subsequently failed to address the claim collaterally. This performance or lack thereof, was so inadequate that it violated petitioner's 6th Amendment rights to a fair proceeding, and the effective assistance of counsel, which would amount to "cause" sufficient to overcome procedural default.

Conclusion

Wherefore, based on the foregoing, petitioner respectfully move this Honorable Court to accept his sufficient reason as to why the lower court determination was in error. Petitioner request that the PCR application that he filed (2016-CP-02-02833) in the Aiken County Common Pleas Court be allowed to proceed on the merits of the underlying claims that has not been presented to any other court.

A handwritten signature in cursive script, appearing to read "Grant Deery". The signature is written in black ink and is positioned below the main body of text.

State of South Carolina
County of Aiken

S.C. Supreme Court
2016-CP-02-02533
2018-001699

Frank Green #116977
Petitioner,

vs.

State of South Carolina
Respondent

Certificate of Service

The petitioner Frank Green #116977 certifies that he has served the Respondent's with a copy of his 243(c) Explanation and Appellant's Brief, by placing a copy in the Perry Correctional mailroom hands for mailing, postage prepaid, addressed as follows:

Alan Wilson
Attorney General
P.O. Box 11549
Columbia, S.C. 29211

I, Frank Green #116977 certify and verify under the penalty of perjury that the foregoing is true and correct.

signed in the presence of
Nancy C Merchant, notary
on 18th day of October, 2018
2018 app. 1-23-2023

Frank Green ✓

(2)

