

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APR 26 2019

S.C. SUPREME COURT

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Certiorari to Horry County

Honorable Brooks P. Goldsmith, Circuit Court Judge

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HECTOR J. CASES VAZQUEZ,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001912

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PETITION FOR WRIT OF CERTIORARI  
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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether this Court should vacate an order denying post-conviction relief where the successor judge who signed the order was not the presiding judge at the hearing and where the successor judge relied upon credibility findings to support its legal conclusions?

## STATEMENT

During the May 2014 term, the Horry County Grand Jury indicted Petitioner for trafficking heroin over 28 grams. App. 101 – 102.

Petitioner pled guilty on February 23, 2015, in front of the Honorable Michael G. Nettles. App. 1. W. Thomas Floyd represented Petitioner. Id. David P. Caraker represented the state. Id. Petitioner pled guilty to the lesser included offense of trafficking heroin 4 to 14 grams. App. 3, ll. 3 – 12.

Petitioner and the state agreed to a negotiated sentence of fifteen to eighteen years' imprisonment. App. 3, ll. 14 – 16. Judge Nettles accepted Petitioner's guilty plea as freely, voluntarily, and intelligently made. App. 10, ll. 18 – 23. Petitioner was sentenced to fifteen years' imprisonment. App. 16, ll. 13 – 16.

Prior to the plea hearing, plea counsel never discussed going to trial with Petitioner. App. 52, l. 21 – 53, l. 2. Moreover, plea counsel never followed up on the leads Petitioner provided nor did he make an evidentiary challenge to the weight of the alleged heroin. App. 59, l. 16 – 60, l. 5; App. 71, ll. 9 – 73, l. 9. Due to that insufficient investigation, Petitioner made an uninformed and involuntary guilty plea. App. 53, l. 25 – 54, l. 5; App. 54, ll. 12 – 17. Petitioner would not have pled guilty if plea counsel had conducted an adequate investigation in his case. App. 60, ll. 9 – 12.

Petitioner filed an application for post-conviction relief (PCR) on October 29, 2015. App. 18 – 38. Petitioner alleged that plea counsel was ineffective because he induced Petitioner to plead guilty by failing to conduct an adequate investigation. Id. The state filed its Return on February 4, 2016. App. 39 – 42.

Petitioner's PCR hearing was held on November 15, 2016 before the Honorable John C. Hayes. App. 44. Steven Fowler represented Petitioner. Id. Jessica Kinard represented the state. Id.

In an order filed on September 29, 2018, Judge Brooks P. Goldsmith denied Petitioner's PCR allegation that plea counsel failed to properly investigate his case and found that plea counsel provided no deficiency. App. 91 – 100. Judge Goldsmith also found Petitioner did not testify credibly, even though he was not the judge at the PCR hearing. Id.

## ARGUMENT

This Court should vacate an order denying post-conviction relief where the successor judge who signed the order was not the presiding judge at the hearing and where the successor judge relied upon credibility findings to support its legal conclusions.

Judge John C. Hayes was the judge at Petitioner's PCR hearing. App. 44. However, Judge Brooks P. Goldsmith signed the order of dismissal denying Petitioner's PCR allegations. App. 91 – 100.

Although Judge Goldsmith was not present to observe any of Petitioner's PCR hearing, he made multiple credibility findings. Id. Judge Goldsmith signing an order containing credibility findings while not being the judge present at the PCR hearing was improper.

First his order contained the credibility finding of:

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys.

App. 93.

Later in the order, he made a credibility finding specific to Petitioner's case when he stated, "The Court finds little if anything credible in Applicant's testimony. The Court finds Counsel's testimony highly credible." App. 99.

The South Carolina Rules of Civil Procedure has set forth a rule governing the proper procedure in the event of the disability of a judge to perform his or her duties under Rule 63.

SCRCP 63. The rule states:

If at any time after a trial or hearing has been commenced, but before the final order or judgment has been issued, the judge is unable to proceed, a successor judge shall be assigned. The successor judge may proceed upon certifying familiarity with the

record and determining that the proceedings may be completed without prejudice to the parties. In a hearing or a trial without a jury, the successor judge shall, at the request of a party, recall any witness whose testimony is material and disputed and who is available to testify without undue burden. A successor judge may also provide for the recall of any witnesses.

SCRPC 63.

The seminal case in South Carolina interpreting Rule 63 SCRPC was Christy v. Christy, 353 S.C. 203, 580 S.E.2d 444 (2003). In Christy, the issue before this Court was, “whether a new trial is required when the trial judge who heard a nonjury matter died or [became] incapacitated before the filing of a signed order containing findings of fact and conclusions of law.” Id. at 205, 580 S.E.2d at 445-446.

In that case, ex-husband brought an action requesting termination or reduction of alimony because ex-wife had allegedly entered into a common law marriage. Id. at 204-205, 580 S.E.2d at 445-446. Ex-wife counterclaimed sought an increase in alimony. Id.

The issues were bifurcated, and the Honorable John T. Black was the presiding judge on November 4, 1996. Id. Before he signed the final order, Judge Black suffered a stroke. Id. Judge Segars-Andrews succeeded Judge Black as the presiding judge in the case. Id. Judge Segars-Andrews signed an order based in part on a draft order sent to Judge Black, finding there was no common law marriage. Id.

On appeal, the Court of Appeals held that Judge Segars-Andrews erred in denying respondent's request for a new trial following Judge Black's incapacity, vacated her order, and remanded the common law marriage issue for a new determination.<sup>1</sup> Id. This Court held that

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<sup>1</sup> The Court of Appeals determined that there were no other cases in South Carolina on this issue, so an examination of outside jurisdictions was necessary. The Court of Appeals stated that federal courts had read into the rule that, “if the presiding judge in a civil case dies or becomes disabled before the rendering of a verdict or before the judge issues his findings of fact and

since no written order was filed with the clerk of court by Judge Black prior to his incapacity a new trial was required<sup>2</sup>. Id.

In Girard Trust Bank v. Easton, the North Carolina Court of Appeals interpreted North Carolina's Rule 63<sup>3</sup> Girard Tr. Bank v. Easton, 12 N.C. App. 153, 182 S.E.2d 645 (1971). The trial judge in Girard issued an oral ruling in favor of the plaintiff at the conclusion of the bench trial and directed the plaintiff's counsel to submit a proposed order. Id. at 154-155, 182 S.E.2d at 645-646. The judge later died without having signed the proposed order. Id. Plaintiff moved for the successor judge to sign the proposed judgment which had been tendered by the now deceased judge. Id. The successor judge concluded that he did not have the jurisdiction to do so and denied the motion. Id.

The North Carolina Court of Appeals agreed with the successor judge and held that, "Rule 63 does not contemplate that a substitute judge, *who did not hear the witnesses and participate in the trial, may nevertheless participate in the decision making process.* It

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conclusions of law, a successor judge must retry the case." Christy v. Christy, 346 S.C. 503, 509, 556 S.E.2d 701, 704 (Ct. App. 2001). (See Townsend v. Gray Line Bus Co., 767 F.2d 11, 17-18 (1st Cir. 1985); Arrow-Hart, Inc. v. Philip Carey Co., 552 F.2d 711, 713 (6th Cir. 1977); Emerson Elec. Co. v. Gen. Elec. Co., 846 F.2d 1324, 1325-26 (11th Cir. 1988). "The federal cases... are unanimous in their holding that a trial de novo is required where the trial judge dies [or becomes disabled] before signing findings and conclusions or a jury verdict [is] returned." Id. (Quoting Estate of Ed Cassity, 656 P.2d 1023, 1024 (Utah 1982)).

<sup>2</sup> Since the holding by this Court in Christy, Rule 63 SCRPC had been amended. In an unpublished opinion by this Court in Hammer v. Hammer, 2008 WL 9881724 (2008) the changes to Rule 63 were outlined and do not have any impact on the issue in this case.

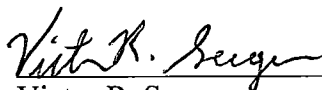
<sup>3</sup> Since Girard North Carolina's Rule 63 has been modified since Girard such that the holding in that case is no longer applicable in North Carolina. (See Springs v. City of Charlotte, 222 N.C. Ap. 132, 730 S.E.2d 803 (N.C. App. 2012)). However, our Rule 63 has not been altered in the same manner. Therefore, the holding in Girard is still equally instructive here as it was for the Court of Appeals in Christy v Christy, 346 S.C. 503, 509, 556 S.E.2d 701, 704 (Ct. App. 2001).

contemplates only that he may perform such acts as are necessary under our rules of procedure to effectuate a decision already made.” Id. at 155, 182 S.E.2d at 646. (emphasis added)

In the present case, Judge Goldsmith erred when he signed the order of dismissal in this case because he was not the presiding judge present at Petitioner’s PCR hearing. App. 44; App. 91 – 100. Moreover, the order contained credibility findings where the signing judge was in no position to observe the credibility of the witnesses. Therefore, the filing of such an order was improper and should be vacated.

**CONCLUSION**

By reason of the foregoing arguments, a writ of Certiorari should be issued to allow for full briefing on this issue.



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Victor R. Seeger  
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of April, 2019.

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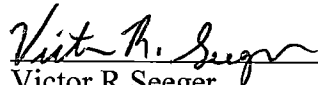
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STATE OF SOUTH CAROLINA,

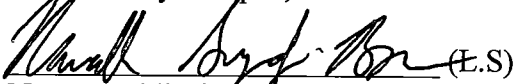
RESPONDENT

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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Hector J. Cases Vazquez, #363120, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 11th day of April, 2019.

  
\_\_\_\_\_  
Victor R Seeger  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 26th day of April, 2019.

 (E.S)  
Notary Public for South Carolina  
My Commission Expires: July 26, 2028