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STATE OF SOUTH CAROLINA
In the Court of Appeals

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas
Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2017-001570

John Willie Mack, Sr.,

Petitioner,

v.

State of South Carolina,

Respondent.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
S.C. Bar No. 101260
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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PETITIONER'S ISSUE PRESENTED

The PCR court erred in denying Petitioner Mack a belated appeal from the denial of his application for DNA testing and for failing to find his DNA attorney ineffective for not filing an appeal timely; instead, the PCR judge denied Petitioner's second PCR due to Petitioner's failure to state a cognizable claim under the Post-Conviction Procedure Act because Petitioner asked for a belated appeal; Petitioner's failure to comply with the statute of limitations; and as being successive which was prejudicial to Petitioner because this was his only avenue for the DNA appeal.

RESPONDENT'S ISSUE PRESENTED

Did the lower court properly dismiss Petitioner's application for post-conviction relief, where the "Access to Justice Post-Conviction DNA Testing Act" (S.C. Code Ann. §§ 17-28-10 to 120) explicitly states that the performance of counsel pursuant to this Act shall not form the basis for relief in any post-conviction relief proceeding, where applications under the act do not constitute a collateral attack on a conviction, and where the inapplicability of post-conviction relief does not necessarily foreclose procedural relief?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Petitioner was indicted at the April 2006 term of the Spartanburg County Grand Jury for grand larceny (2006-GS-42-01166), and burglary, first degree (2006-GS-42-01167). Roger Poole, Esq. represented Petitioner. Barry J. Barnette and Anthony C. Leibert, Esqs., of the Seventh Circuit Solicitor's Office, prosecuted the case. On February 22, 2011, Petitioner proceeded to trial before the Honorable J. Derham Cole and a jury. The jury found Petitioner guilty as indicted on February 23, 2011. Judge Cole sentenced Petitioner to imprisonment for concurrent terms of five years for grand larceny and, pursuant to S.C. Code Ann. 17-25-45, to life without parole for burglary, first degree.

Petitioner filed a timely notice of appeal and a direct appeal was perfected by LaNelle C. DuRant, Esq., who raised the following issues:

1. Did the trial court err in denying Mack's motion to quash the indictment for burglary in the first degree when the date was inaccurate and too broad as it designated over one year for the occurrence of the crime?
2. Did the trial court err in denying Mack's motion for a directed verdict when the state did not present sufficient evidence that Mack committed the burglary and grand larceny as there were no eyewitnesses and no one could testify as to or how the blood got into the victim's home?

The parties proceeded to oral arguments on April 9, 2013. Petitioner was represented by attorney DuRant, and the State was represented by Julie Kate Keeney, Esq., of the South Carolina Attorney General's Office. By unpublished opinion decided April 17, 2013, the South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Mack, Op. No. 2013-UP-161 (S.C. Ct. App. filed April 17, 2013). The Remittitur was issued on May 7, 2013.

During the pendency of the appeal, Petitioner filed an Application for Forensic DNA Testing on September 27, 2012. A hearing on the application was convened before the Honorable J. Derham Cole, on October 31, 2014. Petitioner was represented by attorney Moody

("DNA Counsel").[1] The State was represented by Solicitor Barnette and assistant solicitor Leibert. By written order dated May 18, 2015, and filed May 19, 2015, Judge Cole denied the application, finding "[t]he items [Petitioner] is seeking to be tested were previously subjected to DNA testing and further testing would not provide a more probative result." (Appx. 320). Petitioner appealed the denial, but the South Carolina Court of Appeals dismissed the appeal as untimely filed by order dated July 16, 2015. The Remittitur was issued on August 4, 2015.

Meanwhile, Petitioner filed his application for post-conviction relief on May 6, 2013 (2013-CP-42-02063). He alleged the following grounds for relief in his application, as set forth in the State's return:

1. Ineffective assistance of counsel, in that:
    a. Counsel failed to object to the amendment of the indictment,
    b. Counsel failed to object to the admission of DNA evidence when the State failed to produce tangible items or pictures of items swabbed,
    c. Counsel failed to object to Applicant's prior criminal history being presented to the jury,
    d. Counsel failed to thoroughly and properly examine a crucial prosecution witness to address her perjury, and
    e. Counsel failed to file a motion for a speedy trial.
2. Trial court error, in that:
    a. The trial judge improperly stated that only one aggravating circumstance had to be proven.
3. Misconduct of the Solicitor's office and law enforcement with regards to DNA evidence, in that:
    a. The State committed a Brady violation in failing to turn over blood evidence.

Respondent made its return on March 18, 2014, and an evidentiary hearing into the matter was convened on January 14, 2015, before the Honorable Deadra L. Jefferson. Petitioner was present

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[1] Ms. Moody was appointed to represent Petitioner pursuant to S.C. Code Ann. § 17-28-60. (requiring counsel from the on-going PCR action to also represent an applicant for DNA Act application).

at the hearing and represented by Leah B. Moody, Esq. Suzanne H. White, Esq., of the South Carolina Attorney General's Office, represented Respondent. By written order dated April 6, 2015, and filed April 10, 2015, Judge Jefferson denied and dismissed the application.

Applicant filed a timely notice of appeal and a petition for writ of certiorari was perfected by Wanda H. Carter, Esq. filing a brief pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), which raised the following issue (some capitalization added):

> Trial counsel erred in advising Petitioner not to testify during his trial on a first degree burglary for fear that his prior burglary convictions would have been used to impeach him because his prior burglary convictions were submitted to the jury during the State's case by stipulation to prove the element of "having committed two or more convictions of burglary," which meant there was no risk of prejudice via an attack on his credibility had he testified at trial, particularly in light of the trial judge's limited instruction given to the jury regarding how to process the priors in question.

By Order filed August 11, 2016, the Supreme Court of South Carolina denied the motion to be relieved as counsel and directed the parties to address the following question:

> In light of Old Chief v. Untied States, 519 U.S. 172 (1997), and State v. James, 355 S.C. 25, 583 S.E.2d 745 (2003), is there evidence in the record to support the PCR judge's ruling that trial counsel was not ineffective for failing to object to the State's publication of three of petitioner's prior burglary convictions to satisfy the elements of first-degree burglary?

Attorney Carter thereafter filed petition for writ of certiorari on Applicant's behalf, which framed the issue as follows (some capitalization added):

> Trial counsel erred in failing to object to the State's publication of Petitioner's three prior burglary convictions in order to prosecute him on a first degree burglary charge under 16-11-311(A)(2) because the statute required proof of only two prior burglary convictions and as a result, the prejudicial value of admitting three priors outweighed the probative value and ultimately deprived Petitioner of the right to a fair trial, particularly where the State's case against Petitioner was comprised of only a single piece of evidence.

Respondent filed its Return on January 12, 2017. On February 1, 2018, the Supreme Court of South Carolina denied the petition by unpublished order. Mack v. State, S.C. Sup. Ct. Order filed Feb. 1, 2018. The Remittitur was issued on February 20, 2018.

During the pendency of the appeal from the first PCR application, Petitioner filed a second application on September 10, 2015 (2015-CP-42-03806), which he raised the following allegations:

1. "DNA counsel, Leah B. Moody, was ineffective for failure to appeal defendant's DNA application timely under DNA Act Sec. 17-28-90(G) Decided May 18, 2015;" and
2. "DNA counsel, Leah B. Moody, was ineffective for failure to have the trial judge recuse or remove himself from the DNA hearing when requested by defendant."

Respondent, by and through the undersigned, made its Return and Motion to Dismiss on March 23, 2017. A hearing on the motion was convened before the Honorable Robin B. Stilwell on June 29, 2017. Petitioner was represented by Rodney W. Richey, Esq., and Valerie G. Giovanoli, Esq., of the South Carolina Attorney General's Office, represented the State. By written order dated July 2, 2017, and filed July 7, 2017, Judge Stilwell granted Respondent's motion to dismiss the application for failing to raise a cognizable claim, as successive, and as beyond the statute of limitations.

This appeal follows.

STATEMENT OF THE FACTS

Sometime between September 1, 2005, and September 6, 2005, Petitioner broke into LaRhonda Moss' home and stole her television, computer, CD charger, and jewelry. (Appx. 48-51).

After a long Labor Day weekend, Moss returned to her home and immediately realized someone broke into her house through her bedroom window. (Appx. 47; Appx. 56; Appx. 60; Appx. 76). Petitioner's blood was found in three places in Moss' house: (1) on the entertainment center where Moss' television was stolen; (2) on the light switch near the window in the bedroom where Petitioner broke into the house; and (3) on the bookshelf in the hallway. (Appx. 53; Appx. 61-62). Moss testified that the blood found in her house was not in her house prior to September 2005. (Appx. 115). Investigator John Burgess took swabs of the blood found in all three sites and sent it to SLED for DNA testing. (Appx. 61-64).

In 2006, Manuel John Ortuna, a forensic DNA analyst from SLED, examined DNA from the three blood swabs taken from Moss' house and determined that the DNA belonged to the same unknown individual. (Appx. 94-95). Investigator Burgess, through investigation, ultimately developed Petitioner as a suspect and, over Petitioner's protests, the State obtained a buccal swab from Petitioner on April 1, 2009, and sent it for testing. (Appx. 66; Supp. Appx. 3-10). On October 29, 2009, Ortuno compared the DNA from the blood swabs from Moss' house to the DNA from Petitioner's buccal swabs. (Appx. 96). Ortuno concluded that the DNA samples collected from Moss' house originated from Petitioner. (Appx. 107). Furthermore, Ortuno testified that the probability of randomly selecting an unrelated individual having the same DNA profile matching the DNA found in Moss' house was approximately one in 1.3 quadrillion individuals. (Appx. 106).

At trial, both Moss and Max Ballard, Moss' landlord, testified that they did not know Petitioner, and they did not give Petitioner consent to enter Moss' house. (Appx. 52; Appx. 113). In addition, Moss testified regarding the value of the property stolen from her house. (Appx. 48-51). She testified she paid approximately $200 for her television, $900 for her computer, and approximately $600 for her jewelry.

Roger Poole, Esq., Petitioner's trial counsel, addressed his treatment of the blood and DNA evidence during the first post-conviction relief action. Poole explained how Petitioner was initially matched to the blood at the house through a C.O.D.I.S. hit, which was subsequently confirmed by a buccal swab of Petitioner pursuant to a court order over Petitioner's objections. (Appx. 231, ll. 10-23). The swab confirmed the C.O.D.I.S. match. (Appx. 231-32). Poole shared the discovery with Petitioner and went over the issue of the blood evidence "several times." (Appx. 232, ll. 2-10; Appx. 236, ll. 12-15). Poole identified the DNA match as the single biggest issue at trial, and explained he did not pursue independent expert testing of the blood evidence out of concern the testing would only further confirm SLED's findings. (Appx. 236-37). Poole perceived no flaws or means of challenging SLED's findings. (Appx. 237-39).

At the hearing on the application for post-conviction DNA testing, Petitioner argued the actual swabs of blood from the scene should be re-tested because he was actually innocent. (Appx. 305-06). The State testified the evidence was already tested, as testified to at trial, and that "to go back and get the actual items [from which the swabs were taken] would be impossible from this standpoint. Obviously, it was years ago." (Appx. 306-07; Appx. 312, ll. 2-13). The State further noted that the method of testing DNA had not changed since the original testing. (Appx. 308, ll. 10-13).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

BECAUSE INEFFECTIVE ASSISTANCE OF DNA COUNSEL IS EXPLICITLY FORECLOSED AS A COGNIZABLE CLAIM PURSUANT TO S.C. CODE ANN. § 17-28-60, BECAUSE THE APPLICATION DOES NOT CONSTITUTE A COLLATERAL ATTACK ON A CONVICTION, AND BECAUSE PETITIONER MAY BE ABLE TO SEEK ADEQUATE RELIEF THROUGH OTHER MEANS, THE PCR COURT PROPERLY DISMISSED PETITIONER'S APPLICATION

Petitioner asserts that because DNA Counsel untimely filed a notice of appeal, he is entitled to post-conviction relief, much in the same vein as permitted in the PCR context in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). The PCR court properly dismissed Petitioner's application because claims of ineffective assistance of counsel appointed pursuant to the S.C. Code Ann. § 17-28-60 are specifically and explicitly foreclosed by the very same code section, and because the Uniform Post-Conviction Procedure Act only provides a cause of action for collateral attacks on convictions, not collateral attacks on actions arising under other statutes with result in something other than a conviction.

a. The legislature expressly and unambiguously prohibited post-conviction relief actions attacking the performance of DNA counsel, such that any PCR application to that effect must be summarily dismissed.

First, the "Access to Justice Post-Conviction DNA Testing Act" ("DNA Act") prohibits challenging the performance of DNA Counsel in a post-conviction relief application. Under the DNA Act, a person convicted for burglary in the first degree may apply for forensic DNA testing of his DNA and any physical evidence or biological material related to his conviction or adjudication. S.C. Code Ann. § 17-28-30(A)(15). If the applicant is successful following a hearing, the DNA Act compels the court to order testing of the applicant's DNA and the physical evidence or biological material. S.C. Code Ann. § 17-28-90(B). The DNA Act does not allow for an applicant's sentence or conviction to be vacated, but rather provides that any exculpatory results of any testing ordered may be used in subsequent proceedings, such as a motion or a new

trial under the South Carolina Rules of Criminal Procedure. S.C. Code Ann. § 17-28-100(B). If the applicant is not successful in obtaining testing, he or she "shall have the right to appeal a final order denying . . . DNA testing by a writ of certiorari to the Court of Appeals or the Supreme Court as provided by the South Carolina Appellate Court Rules." S.C. Code Ann. § 17-28-90(G).

The DNA Act provides that where an applicant requests counsel at the time he files his application, a court must appoint counsel after it determines the application is sufficient to proceed to a hearing, and that it must appoint the applicant's post-conviction relief counsel if any such proceeding is ongoing at the time of the DNA application. S.C. Code Ann. § 17-28-60. However, the DNA Act also specifically and explicitly provides that "[t]he performance of appointed DNA Act counsel shall *not form the basis in any post-conviction relief proceeding*." Id. (emphasis added).

The legislature's unambiguous mandate forecloses the relief Applicant seeks through PCR. "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citing In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998)). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Id. The language of S.C. Code Ann. § 17-28-60 could not be stated more clearly or plainly—no complaints regarding DNA Act counsel are cognizable in a post-conviction relief action.

The legislature's mandate is not unreasonable. After all, "[t]here is no constitutional right to an attorney in state post-conviction proceedings." Coleman v. Thompson, 501 U.S. 722 (1991) (citing Pennsylvania v. Finley, 481 U.S. 551 (1987); Murray v. Giarratano, 492 U.S. 1

(1989)); see also Wainwright v. Torna, 455 U.S. 586 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance).

The Supreme Court, in crafting relief in Austin v. State, acknowledged and circumvented the absence of the constitutional right to PCR counsel by observing the Court's extension of Anders procedures to post-conviction relief matters, and the right under the then-Rule 50(6) to obtain appointment of counsel for appellate review from an adverse PCR ruling. 305 S.C. at 454, 409 S.E.2d 396 (citing Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988)); see also Rule 243, SCACR (evidently replacing old Rule 227, SCACR), Appendix A, SCACR (Rule 227, SCACR, supplanted Sup.Ct. Rule 50); Rule 71.1(g), SCRCP (providing for continuing representation of appointed PCR counsel on appeal unless automatically relieved under Rule 602, SCACR, or permitted to withdraw). However, no comparable path winds through the woods of the DNA Act for when DNA counsel fails to file a notice of appeal—the Anders appellate procedure has thus far not been extended to appeals from DNA applications, and the legislature's explicit mandate forecloses attempting to funnel Applicant's issue through the PCR Act.

b. An application for post-conviction DNA testing does not challenge the validity of a conviction or sentence, such that the Uniform Post-Conviction Procedure Act is inapplicable even if the legislature did not expressly prohibit claims of ineffective assistance of DNA counsel.

Even if the DNA act did not explicitly close off post-conviction relief, PCR would still not be an appropriate mechanism for providing Petitioner the relief he seeks. In a PCR proceeding, a defendant collaterally attacks his *conviction* and may raise any claims of constitutional violations relating to his conviction. Williams v. Ozmint, 380 S.C. 473, 477, 671 S.E.2d 600, 601 (2008). The PCR act, and the rulings of the appellate courts, establish PCR an avenue for relief for four claims:

1. Ineffective assistance of trial and appellate counsel claims under Strickland v. Washington, 466 U.S. 688 (1984);
2. That an applicant's sentence has expired;
3. That an applicant's probation, parole, or conditional release has been unlawfully revoked;
4. That an applicant's prior post-conviction relief counsel failed to file a notice of appeal from an adverse post-conviction relief proceeding.

Al-Shabazz v. State, 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000) (setting forth the first three); Austin, 305 S.C. 453, 409 S.E.2d 395 (1991) (creating the fourth).

The Supreme Court of South Carolina has refused to extend PCR for judgments rendered pursuant to an unrelated statute. In Lance v. State, an applicant was denied PCR for his adjudication as a habitual traffic offender under S.C. Code Ann. § 56-1-1010 through -1130. 279 S.C. 144, 303 S.E.2d 100 (1983). The Supreme Court held a judgment from a hearing under the Habitual Offender Act does not result in a sentence from a criminal conviction and, therefore, cannot be contested under the PCR Act. Id at 145. Petitioner's case is similarly situated, as a judgment from a hearing under the DNA Act does not result in a sentence from a criminal conviction, but instead grants or denies DNA testing that may then be used in a motion for a new trial. Therefore, a post-conviction relief application is not an appropriate mechanism for review of the proceedings under the DNA act.

c. The unavailability of post-conviction relief to review an attorney's alleged error in handling an application under the DNA Act does not necessarily foreclose any possible review, or the relief Petitioner seeks.

The appellate courts no doubt sit with discomfort at the prospect that Petitioner could lose his statutory right to an appeal from an adverse ruling on his application for DNA testing due to actions or inactions outside of his immediate control. The inapplicability of the PCR Act to the issue raised by Petitioner does not foreclose the practical relief he seeks. First, "[t]his Court

retains its ability to consider habeas petitions in its original jurisdiction and grant relief in those unusual instances where 'there has been a violation which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice.'" Al-Shabazz, 338 S.C. at 365, 527 S.E.2d at 748. Second, the belated appeal requested fundamentally relates to funding for forensic testing—Petitioner could obtain the resources to have further testing conducted from sources other than the State.

d. Ultimately, Petitioner is entitled to no relief on the merits, because the evidence he seeks to have tested was already tested prior to trial.

In the end, the question of what to do about DNA Counsel's allegedly ineffective failure to file the notice of appeal from Judge Cole's denial of further DNA testing is academic—Petitioner has no right to testing under the statute. In order to obtain post-conviction DNA testing, an applicant must show the evidence to be tested:

> (1) is available;
> (2) has been subject to an adequate chain of custody;
> (3) is material, both in the evidence itself and in the DNA results;
> (4) if exculpatory, would constitute new evidence;
> (5) was not previously subjected to testing, unless the newly requested testing would provide a substantially more probative result; and
> (6) is not solely to delay the execution of a sentence or the administration of justice.

S.C. Code Ann. § 17-28-90. The evidence Petitioner wishes to re-swab (1) is not available, and (2) and was already tested *over Petitioner's objections*. There is no evidence in the record to show Petitioner demands some new, more accurate practice, or that the outcome of the testing would be reliably different. To the contrary, "the risks associated with evidence contamination increase every time someone attempts to extract new DNA from a sample." District Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 82 (2009) (Alito, J., concurring). The

State's interest in finality, so often sacrificed on the altar of the "pursuit of perfect justice[,]"[2] is deeply woven into the DNA Act, and here weighs heavily against the testing Petitioner demands.

Petitioner now seeks new law and new forms of relief through mechanisms which would require this Court to cut against unambiguous statutory language and jurisdictional procedures to obtain an appeal that is doomed to failure, either on the merits or through a filing in the vein of Anders and Johnson (notwithstanding no such mechanism at present formally exists). Petitioner, with nothing to lose, seeks a happy accident. Perhaps the day may come where the Court must craft a remedy to ensure no injustice is done, but Petitioner's case does not bring about that day, and post-conviction relief is not the proper vehicle.

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[2] Lafler v. Cooper, 566 U.S. 156, 175-76 (2012) (Scalia, J., dissenting)

CONCLUSION

For the foregoing reasons, this Court should affirm the ruling of the lower court, or dismiss certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
S.C. Bar No. 101260
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
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