STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to SpartanburgCounty

Honorable Robin B. Stilwell, Circuit Court Judge

JOHN WILLIE MACK, SR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001570

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

The state urges this Court to leave Petitioner without any appellate remedy where the PCR court erred by finding Petitioner did not state a cognizable claim under the Post-Conviction Procedure Act when DNA counsel failed to file an appeal from the denial of Petitioner's application under the Access to Justice Post-Conviction DNA Testing Act (herein after referred to as the DNA Act).

A.

Despite the assertion of the state, Petitioner is not explicitly foreclosed from filing a PCR application under the DNA Act on the limited issue of his entitlement to a belated appeal due to his appointed counsel's ineffectiveness in failing to file an appeal. This is due, as seen below, in part to the contradictory language contained within the DNA Act and in part due to the confusing procedural nature of this case.

Petitioner was convicted on February 23, 2011 after a jury trial before the Honorable J. Derham Cole. He was sentenced to concurrent terms of imprisonment for a mandatory term of life without parole on the burglary first degree conviction and five years on the grand larceny conviction. App. 1; App. 168 ll. 14-25.

Petitioner appealed his conviction which was affirmed by this court on April 17, 2013. State v. Mack, Op. No. 2013-UP-161 (Ct. App. filed April 17, 2013). While Petitioner's direct appeal was pending, he filed a *pro se* application under the DNA Act on September 27, 2012. App. 294-298. On October 31, 2014, just over eighteen months from the conclusion of Petitioner's direct appeal, and while his initial PCR application was pending, a hearing was

convened before Judge Cole on the DNA Act application in which Petitioner was represented by appointed counsel Leah Moody.[1] App. 229-316.

Judge Cole issued an order denying Petitioner's request to retest the DNA from his case on May 18, 2015.[2] App. 317-320. Appointed DNA counsel failed to file a timely appeal of the denial for retesting and Petitioner's *pro se* attempt to appeal later was dismissed by this Court as untimely on July 16, 2015. App. 330.

Petitioner filed a second PCR application on September 10, 2015, alleging that DNA counsel was ineffective for failing to file an appeal of Judge Cole's order denying retesting. App. 321-332. The state moved to dismiss on March 23, 2017 and a hearing was held before the Honorable Robin B. Stilwell on June 29, 2017. App. 333-340; App. 341-353. Judge Stilwell dismissed Petitioner's application for failing to raise a cognizable claim, as beyond the statute of limitations, and as successive. App. 354-362.

Respondent argued that Petitioner was statutorily barred from raising a claim of ineffective assistance of DNA counsel in a PCR application based on the last sentence of S.C. Code § 17-28-60 which states, "The performance of counsel pursuant to this article shall not form the basis for relief in any post-conviction relief proceeding." However, when the DNA Act is reviewed in full it is apparent that Petitioner is not foreclosed from pursing this avenue of relief. S.C. Code § 17-28-110(B) states "Nothing in this article prohibits a person from filing an application for post-conviction relief pursuant to Chapter 27, Title 17."

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[1] Leah Moody was appointed to represent Petitioner as DNA Counsel due to the fact that she was already acting as appointed counsel in Petitioner's initial PCR.

[2] Petitioner's initial PCR application on ineffective assistance of trial counsel was heard before the Honorable Deadra L. Jefferson on January 14, 2015. At that hearing Petitioner requested a continuance, pending the outcome of the DNA Act application hearing that had been held on October 31, 2014, two and a half months prior to the PCR hearing, arguing he needed to resolve that matter first before continuing with his PCR. This request was denied, and Petitioner's PCR application was dismissed with prejudice on April 10, 2015. App. 193-281.

The language in these two sections creates an inherent conflict within the statute. While each section, taken on its own, is clear and unambiguous, statutes are not intended to be read in a piecemeal fashion, taking only those parts which best serve a particular position. Citizens for Quality Rural Living, Inc. v. Greenville County Planning Commission, 426 S.C. 97, 825 S.E.2d 721 (2019) (The intention of the legislature when enacting a statute must be gleaned from the entire section and not simply clauses taken out of context). Courts, when interpreting a statute, should not concentrate on isolated phrases within the statute; a statute must be read as a whole and sections that are part of the same general statutory law must be construed together and each one given effect. Id. In interpreting the statute to resolve the conflict, it is apparent that PCR claims are not barred in their entirety but that the language relied on by Respondent, that performance by counsel appointed pursuant to the DNA Act "shall not form the basis" for a PCR, means it shall not be the *sole basis for an initial application* for PCR. The language expressed later in the act makes it clear that a PCR application could include ineffective assistance of DNA counsel on the limited issue of whether counsel was ineffective for failing to file an appeal.

Additionally, expanding PCR actions to this discrete situation does not run afoul of the last sentence of S.C. Code § 17-28-60. Petitioner is not seeking a wholesale review of counsel's performance. He is not asking for new a expert or a new DNA appointed counsel. He only seeks the right which the DNA Act clearly creates; the right to an appeal. *See*, S.C. Code § 17-28-90(G). A limited ruling in Petitioner's favor will not open the floodgates to collateral review of the merits of counsel's performance under the DNA Act.

Furthermore, if the conflict within the statute cannot be reconciled then the "last legislative expression" rule would apply. Under that rule, where it is impossible to harmonize

two sections of a statute, the subsequent section must prevail over the prior one, being the last in point of time or order of arrangement. *See*, Feldman v. South Carolina Tax Commission, 203 S.C. 49, 26 S.E.2d 22 (1943); Jolly v. Atlantic Greyhound Corp, 207 S.C. 1, 35 S.E.2d 42 (1945). Applied to the present case, Petitioner would not be barred from filing a PCR claim of ineffective assistance of counsel for failing to file an appeal under the DNA Act because the subsequent section specifically states that "nothing in this article prohibits a person from filing an application for post-conviction relief" pursuant to the PCR Act. *See*, S.C. Code § 17-28-110(B).

The Supreme Court in Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991) held that a second PCR application filed on the ground that the first complete PCR application was insufficient due to ineffective PCR counsel was not proper. The Court simultaneously handed down Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) which extended PCR actions to cover ineffective assistance of PCR counsel in the limited situation in which PCR counsel failed to file an appeal. In distinguishing these two cases the Court reasoned,

> "We have held that the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." Gamble v. State, 298 S.C. 179, 178, 379 S.E.2d 118, 119 (1989). This phrase aptly delineates the distinction between the Austin and Aice cases. Austin never received a full "bite" at the apple, as he was prevented from seeking any review of the denial of his PCR application. We therefore provided him with a remedy in order to effectuate the purposes of the Uniform Act and of the PCR rules. Conversely, Aice seeks to have more than one procedural "bite" at the apple. Aice has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purpose of the Act and rules."

Aice at 452.

Petitioner current situation is more akin to that of the complainant in Austin than in Aice. The Court, in handing down Austin, stated it "must craft a remedy to correct the unfairness which has occurred." Austin. at 454. As Respondent observed, no comparable path "winds

through the woods of the DNA act." BOR, 10. This is precisely why Petitioner finds himself in the present situation. It is axiomatic then that when every other route to relief is foreclosed, it is proper that the court be asked to craft a remedy.

In Austin it was noted that the right to seek appellate review of the denial of PCR is expressly authorized by state law. The same is true of rulings coming from applications filed under the DNA Act. S.C. Code § 17-28-90(G) expressly and explicitly authorizes the right of either the applicant or the state to appeal a final order under the Act through a writ of certiorari. Here, as in Austin, failure of counsel to seek review correctly constitutes a claim for ineffective assistance of counsel and under the exceptional circumstances such as these, the only way to correct the unfairness is to craft a remedy that allows Petitioner to move forward with his belated appeal of the denial of his request for DNA retesting.

B.

Respondent next asserts that Petitioner has not stated a cognizable claim under the PCR Act. Specifically, Respondent argues that an application for post-conviction DNA testing does not challenge the validity of Petitioner's conviction or sentence. However, Petitioner's conviction hinged on DNA evidence presented at trial. It logically follows then that a challenge to the DNA is a *direct* challenge to the validity of Petitioner's conviction and sentence as without the DNA no conviction or sentence would have been possible.

Respondent's reliance on Lance v State, 279 S.C. 144, 303 S.E.2d 100 (1983) is misplaced. In Lance, the court refused to extend PCR actions to *civil* determinations made under the Habitual Offender Act. The Court noted that "the determination by a circuit judge that a person is a habitual offender is not a criminal conviction, and the consequent loss of the privilege

to drive is not a sentence." Id at 145. Additionally, a full review of the Habitual Offender Act shows that at no point in the statute are post-conviction actions even contemplated.

The DNA Act sits in stark contrast to the Habitual Offender Act. Actions taken under the DNA Act are only ever initiated as the *direct result of a criminal conviction*. The application for retesting is filed in the General Sessions courts of this state, is in no way a civil procedure and deals with a challenge to the applicant's conviction and resulting sentence. Also, as stated above, the DNA Act creates an absolute right to appeal and contemplates PCR actions based on ineffective assistance of DNA counsel.

C.

The suggestion that there are other avenues to the relief Petitioner seeks is without merit. Petitioner seeks to assert his statutory right to appeal an adverse ruling; the most straightforward and procedurally proper path for that is through a PCR action. Respondent states Petitioner could file a habeas petition in the court's original jurisdiction, but such petitions are reserved for extraordinary circumstances that arise outside of the purview of the PCR Act. As the Court noted in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000),

> "Before the adoption of the PCR Act, inmates often pursued post-appeal claims by petitioning the court for a writ of habeas corpus or other remedial writ. The PCR Act now "comprehends and takes the place of all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction or sentence." S.C. Code Ann. § 17–27–20(b) (1985); Finklea v. State, 273 S.C. 157, 255 S.E.2d 447 (1979) (aim of PCR Act is to consolidate in one simple statute all the remedies presently available for challenging the validity of a sentence of imprisonment). *In keeping with that principle, we clearly have indicated that we wish to limit habeas petitions and funnel issues raised by inmates challenging their conviction or sentence into the PCR process.* We briefly traced the history of habeas corpus and the advent of the PCR Act in Simpson v. State, 329 S.C. 43, 495 S.E.2d 429 (1998). We held that a matter which is cognizable under the PCR Act must be raised in PCR application and may not be raised by a petition for a writ of habeas corpus before the circuit or other lower courts. This 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." (emphasis added)

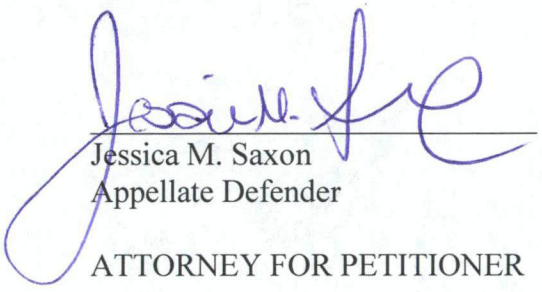
Likewise, Petitioner has no way of procuring the funding necessary to retest the DNA from his case. Common sense dictates that an individual, serving life in prison, has no means to obtain further testing of DNA materials other than those which are laid out in the DNA Act. The indigency of individuals serving lengthy prison sentences is, in part, why the bill was enacted. It ensures impoverished individuals who are incarcerated, and proclaim their innocence, have access to DNA testing in the pursuit of justice. Therefore, the proposition that Petitioner could obtain private DNA testing is untenable.

D.

Finally, Respondent turns to the merits of Petitioner's claim under the DNA Act. The question of whether Petitioner possesses a meritorious claim is not before the court at this time and has no bearing on the question of whether he is entitled to a belated appeal from Judge Cole's denial of further testing. Petitioner, in his PCR claim of ineffective assistance of DNA counsel, is collaterally attacking his conviction, as allowed by the PCR statute. To strip Petitioner of his right to an appeal, based on circumstances entirely outside of his control, would be fundamentally unfair. Petitioner seeks only that which he has a statutory right to, an appeal of the denial of the DNA application and respectfully request this court to craft a suitable remedy allowing him relief.

CONCLUSION

By reason of the foregoing additional arguments, in conjunction with those arguments made in Petitioner's initial filings, Petitioner respectfully request this court grant Petitioner a belated appeal under the DNA Act.



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This 15th day of August, 2019.