

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

Opinion No. 2019-UP-386 (S.C. Ct. App. Filed December 18, 2019)

2015-CP-42-3806

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S.C. SUPREME COURT

JOHN WILLIE MACK, SR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000329

APPENDIX (COA CERT)

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

JOHN WILLIE MACK, SR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001570

BRIEF OF PETITIONER

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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.

STATEMENT

On April 2006, the Spartanburg County Grand Jury indicted Mack on the charges of burglary first degree and grand larceny. App. 364 – App. 367. February 22-23, 2011, Mack proceeded to trial before the Honorable J. Derham Cole and a jury. Mack was represented by Roger Poole, and the state was represented by Barry J. Barnette and Anthony C. Leibert. App. 1. The jury found Mack guilty as indicted. App. 157, ll. 1 – App. 159, ll. 11. The judge sentenced Mack to the mandatory life without parole on the burglary first degree and five years on the grand larceny. App. 168, ll. 14 – 25.

Petitioner Mack appealed his convictions and sentences which were affirmed by the Court of Appeals on April 17, 2013. State v. Mack, Op. No. 2013-UP-161(Ct. App. filed April 17, 2013).

On May 6, 2013, Petitioner Mack filed an application for post-conviction relief (PCR). The state filed a return on March 18, 2014. An evidentiary hearing was held on January 14, 23015 before the Honorable Deadra L. Jefferson. Mack was represented by Leah B. Moody, and the state was represented by Suzanne White. App. 193.

Judge Jefferson denied Mack's PCR application and dismissed it with prejudice. App. 281. Mack's PCR counsel filed a notice of appeal. The Supreme Court denied the appeal on February 1, 2018. Supp. App. 12.

On September 27, 2012 following his conviction at trial, Mack filed an application for forensic DNA testing. App. 294. On October 31, 2014, an evidentiary hearing was held in General Sessions Court before the Honorable J. Derham Cole. Petitioner Mack was again represented by Leah B. Moody, and the state was represented by Barry Joe Barnette and Anthony C. Leibert. App. 299.

Judge Cole issued an order on May 19, 2015 where he denied Mack's application for DNA testing. The judge found that "the items Mack wanted tested were previously subjected to DNA testing and further testing would not provide a more probative result." App. 317 – App. 320.

Mack filed a notice of appeal. On July 16, 2015, the Court of Appeals dismissed Mack's appeal as not timely served. Mack v. State, S.C. Sup. Ct. Order filed July 16, 2015. App. 330; App. 356.

On September 10, 2015, Petitioner Mack filed a second PCR application (2015-CP-42-3806) where he raised two issues: (1) DNA counsel, Leah B. Moody was ineffective for failure to appeal defendant's DNA application timely under the DNA Act Sec. 17-28-90(6); (2) DNA counsel was ineffective for failure to have the trial judge recuse himself from the DNA hearing when requested by the defendant. App. 321-App. 332; App. 356 – App. 357. The state filed a return and motion to dismiss on March 23, 2017. App. 333- App. 339.

An evidentiary hearing was held on June 29, 2017 before the Honorable Robin B. Stilwell. Mack was represented by Rodney Richey, and the state was represented by Valerie Giovanoli. App. 341. The PCR judge ruled on the record at the hearing and granted the state's motion to dismiss Petitioner Mack's PCR application. App. 350, ll. 11 – App. 351, ll. 25. On July 7, 2017, the PCR judge, the Honorable Robin B. Stilwell, filed an order denying Mack's PCR.

Mack's PCR counsel filed a timely notice of appeal. Counsel provided a separate accompanying explanation which provided that Petitioner Mack filed this PCR in order to obtain an appeal from his DNA testing hearing as his DNA counsel did not appeal the denial of his

request for DNA testing. Counsel wrote: "This was the only method he had to get the appeal."

application and dismissing it with prejudice. App. 354-App. 361

STANDARD OF REVIEW

Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). The Supreme Court would review questions of law de novo with no deference to the PCR Court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

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.

Relevant Facts

The main concern in this case is that Petitioner Mack has the right to a belated appeal from the denial of his DNA testing. His DNA counsel failed to file the appeal.

Two of the issues raised by Mack in his first PCR application were that his trial counsel failed to object to the DNA evidence when the state did not produce the tangible items nor pictures of the items swabbed. Mack also raised the issue of misconduct of the solicitor's office and law enforcement because the state did not turn over the blood evidence. App. 355.

Judge Jefferson found that trial counsel was not ineffective because counsel had no "good faith or legal basis" to object to the DNA testing. App. 271. Judge Jefferson also found that Mack's Brady rights were not violated as Mack failed to prove that the state suppressed any evidence. App. 279. The judge denied Mack's PCR application and dismissed it with prejudice. App. 281. The Supreme Court denied Mack's appeal on February 1, 2018. Supp. App. 12.

On September 27, 2012 following his conviction at trial, Mack filed an application for forensic DNA testing. App. 294. Mack claimed that there were two forensic analysis reports with different information. He wrote: "This dispute of DNA testing being done on the tangible

items (light switch, bookshelf, and entertainment center will constitute new evidence because pictures were said to be lost that were to show blood swab locations.) App. 296.

At the evidentiary hearing on October 31, 2014, before the Honorable J. Derham Cole, the state argued that Mack wanted the actual tangible items where the blood was found. App. 299; App. 302, ll. 1 – App. 304, ll. 10. DNA counsel explained that pictures were taken of the actual items where the blood was located. However, the pictures were lost before the case went to trial. The state produced only testimony about these items. Mack never got to see the pictures nor the actual items. Counsel told the court that Mack wanted the actual items because he wanted testing done of those items as related to the DNA. Counsel explained that Mack stated that he was innocent and it was not him. App. 304, ll. 12 – App. 306, ll. 20.

Judge Cole issued an order on May 19, 2015 where he denied Mack's request for DNA testing. The judge found that "the items Mack wanted tested were previously subjected to DNA testing and further testing would not provide a more probative result." App. 317 – App. 320.

Mack filed a notice of appeal. On July 16, 2015, the Court of Appeals dismissed Mack's appeal as not timely served. Mack v. State, S.C. Sup.Ct. Order filed July 16, 2015. App. 330; App. 356.

In his second PCR application filed September 10, 2015 (2015-CP-42-3806), Mack raised two issues: (1) DNA counsel, Leah B. Moody was ineffective for failure to appeal defendant's DNA application timely under the DNA Act Sec. 17-28-90(6); (2) DNA counsel was ineffective for failure to have the trial judge recuse himself from the DNA hearing when requested by the defendant. App. 321-App. 332; App. 356 – App. 357. The state filed a return and motion to dismiss on March 23, 2017. App. 333- App. 339.

At the evidentiary hearing on June 29, 2017 before the Honorable Robin B. Stilwell, the state told the court that they were there to address their motion to dismiss because ineffective assistance of PCR counsel was not a cognizable claim under the Post-Conviction Procedure Act. The state explained that the only exception was the granting of a belated appeal pursuant to Austin v. State, when a PCR applicant's PCR attorney failed to file an appeal. However, the state argued, Austin had not been extended to include counsel in DNA actions as DNA actions were governed by a different section of the code. The state argued that there was no precedent to extend Austin to DNA actions. The state cited the last sentence of section 17-28-60 which provided: "The performance of counsel pursuant to this part shall not form the basis for relief in any post-conviction relief proceeding." App. 341; App. 343, ll. 23 – App. 345, ll. 24.

Mack's PCR counsel argued in return that Mack had a right to appeal. Counsel cited Section 17-28-90 of the DNA Act which provided: "All rules and statutes application in criminal proceedings are available to the applicant." Counsel argued that that section gave Mack the right to have an appeal—even in a PCR case. Counsel told the court that Mack had an attorney for the DNA hearing, so he had "no mechanism of filing that appeal." App. 347, ll. 1 – 23.

PCR counsel said he did not believe that the intent of the Legislature in this statute was to preclude Mack from having an appeal. Counsel argued that in a PCR, if the PCR attorney failed to file an appeal, the defendant was entitled to a belated appeal. Counsel stated that the legislature meant the same for this DNA statute. Counsel asked for an evidentiary hearing to determine what happened with the DNA counsel regarding the appeal. App. 347, ll. 24 – App. 348, ll. 21.

The PCR judge ruled on the record at the hearing and granted the state's motion to dismiss Petitioner Mack's PCR application. App. 350, ll. 11 – App. 351, ll. 25. The judge

explained that the law was “contrary to Mack’s position.” The judge stated that a PCR application was not the venue for challenging PCR counsel’s performance. The judge also stated that further DNA testing would not be very productive as the items had already undergone DNA testing. He said that Mack just disagreed with the results. But the judge said: “I don’t think that the PCR application questioning deficient conduct of the PCR counsel is appropriate.” App. 350, ll. 11 – App. 351, ll. 24.

In his order issued on July 7, 2017 denying Mack’s PCR application, Judge Stilwell, found that Mack’s PCR application had to be dismissed because he failed to state a cognizable claim under the Post-Conviction Procedure Act at S.C. Code Section 17-27-10 to 160. The order also provided that “an allegation of ineffective assistance of counsel appointed pursuant to the ‘Access to Justice Post-Conviction DNA testing Act’ did not form a collateral attack on the validity of the conviction or sentence, and may not form the basis for relief in any post-conviction relief action.” S.C. Code Section 17-28-60. App. 354-App.361; App. 357 – App. 358.

The judge also ruled that Mack’s application had to be dismissed for failing to comply with the Statute of Limitations as it was filed more than one year beyond the expiration of the statutory filing claim. The judge wrote that Mack was convicted in 2011; and he filed this PCR application September 10, 2015. App. 358 – App. 359.

The PCR judge then ruled that this application was successive to the first PCR application in that it could be interpreted as attacking the underlying convictions. App. 359. The order provided that Mack could have raised the new grounds for relief in his prior post-conviction relief application. App. 360.

Mack’s PCR counsel filed a timely notice of appeal. Counsel provided a separate accompanying explanation which provided that Petitioner Mack filed this PCR in order to obtain

an appeal from his DNA testing hearing as his DNA counsel did not appeal the denial of his request for DNA testing. Counsel wrote: "This was the only method he had to get the appeal."

See Notice of Appeal Explanation. App. 363.

Discussion

In 2008, the South Carolina General Assembly passed the Access to Justice Post-Conviction DNA Testing Act to permit incarcerated individuals, who had been convicted of certain offenses, access to DNA testing. On January 1, 2009, the Act became effective. S.C. Code Ann. § 17-28-10, et seq.

The Access to Justice Post-Conviction DNA Testing Act provides in 17-28-30(A):
A person who pled not guilty to at least one of the following offenses, was subsequently convicted of or adjudicated delinquent for the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for forensic DNA testing of his DNA and any physical evidence or a biological material related to his conviction or adjudication
S.C. Code Section 17-28-30(A).

Therefore, to apply for forensic DNA testing under this subsection, a person must satisfy four requirements: (1) the person must have pled not guilty to an enumerated offense; (2) the person must have been convicted of the offense; (3) the person must be incarcerated for the offense; and (4) the person must assert his innocence of the offense.

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). Under the plain meaning rule, the court should not alter the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998) (citations omitted). Where the statute's language is plain and unambiguous, conveying a clear and definite meaning, the rules of statutory interpretation are not needed and the court should not impose another meaning. Id. (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)).

S.C. Code Section of the Uniform Post-Conviction Procedure Act provides instances when a person may institute the PCR proceeding. Section (B) provides:

“This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of **direct review** [emphasis added] of the sentence or conviction.

The state in their argument against a belated appeal for Mack cited the last sentence of Section 17-28-60 which provides: “The performance of counsel pursuant to this article shall not form the basis for relief in any post-conviction relief proceeding.”

PCR counsel then cited Section 17-28-90 (A) which provides: “All rules and statutes applicable in criminal proceedings are available to the applicant and the solicitor or attorney general as applicable.”

Section 17-28-90 (G) provides:

The applicant and the solicitor or attorney general, as applicable, shall have the right to appeal a final order denying or granting 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.

In Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), the Supreme Court held that the defendant alleged in his second PCR application that he expressed the desire for a review of the denial of his first PCR application but that his counsel failed to timely seek review. He then claimed ineffective assistance of counsel thus requiring a remand for an evidentiary hearing on the issue of whether he had requested a review and was denied the opportunity to seek appellate review. The Court remanded Austin’s case for an evidentiary hearing.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper

measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra*.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

DNA counsel was ineffective for not timely filing an appeal for Petitioner Mack following the denial of his DNA application. Mack was entitled to an appeal. The PCR judge erred in ruling that PCR was not appropriate for ineffective assistance of PCR counsel. DNA counsel was not a PCR counsel as the state made very clear during their argument that the DNA Act was in a separate code from the PCR Procedure Act. Therefore, DNA counsel would be separate from a PCR counsel.

Although the state argued that Austin was not extended to DNA appeals, Petitioner Mack had no other avenue for an appeal from the DNA hearing. His PCR counsel made this clear in the notice of appeal explanation.

The PCR judge erred in ruling that Mack failed to cite a cognizable claim under the PCR Procedures Act. Although Mack's claim is under the DNA Act he still met a claim pursuant to the PCR Act. Section 17-27-20 (A) (4) provides that where exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice. Mack continued to proclaim his innocence and that the DNA testing done previously was

incorrect. Mack was sentenced to life in prison. He deserves to pursue every chance that the state made a mistake.

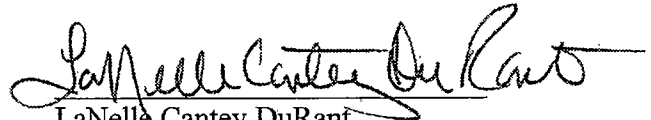
The PCR judge erred in ruling that Mack's PCR application was not in compliance with the statute of limitations without considering the fact that Mack first filed his DNA application in 2012 following his conviction at trial. The point of the second PCR was the DNA ruling without allowing him an appeal.

The PCR judge erred in ruling that this second PCR was successive. Mack had not made this claim of being denied an appeal from his DNA hearing previously.

Mack should be allowed a belated appeal from the denial of his DNA hearing. The DNA hearing was held in General Sessions with the Solicitor prosecuting the case unlike a PCR hearing.

CONCLUSION

Based on the above, Petitioner Mack's case should be remanded for an appeal of the denial of his application for DNA testing.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of April, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

JOHN WILLIE MACK, SR.

PETITIONER

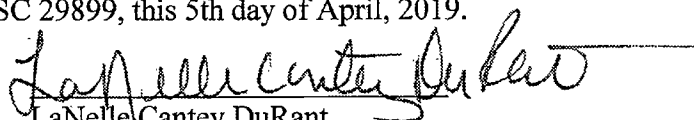
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STATE OF SOUTH CAROLINA,

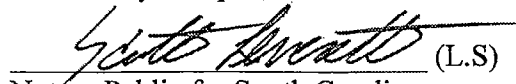
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner 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 Brief of Petitioner has been served on John Willie Mack, Sr., #257219, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 5th day of April, 2019.


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 5th day of April, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.

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

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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.....	8
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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

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. United 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. Girratano, 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.

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

CONCLUSION

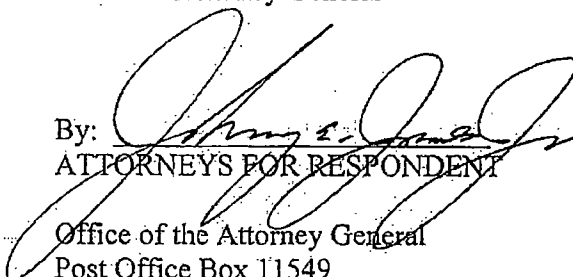
For the foregoing reasons, this Court should affirm the ruling of the lower court, or
dismiss certiorari.

Respectfully submitted,

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Attorney General

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5 August, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas
The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2017-001570

JOHN WILLIE MACK, SR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

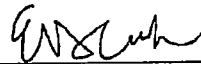
Respondent.

CERTIFICATE OF SERVICE

I, Johnny E. James Jr., certify that I have today served the within **Brief of Respondent** upon Appellant by depositing a copy of the same through courier, addressed to:

Jessica M. Saxon, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia South Carolina 29201

I further certify that all parties required by Rule to be served have been served. This 5th day of August, 2019.



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Spartanburg County

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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ATTORNEY FOR 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 pursuing 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."

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)

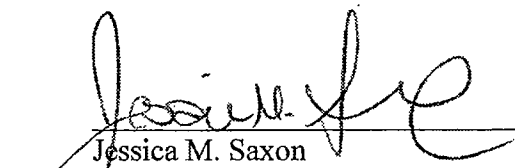
Likewise, Petitioner has no way of procuring the funding necessary to retest the DNA from his case. Common sense dictates that an individual, serving life in prison, has no means to obtain further testing of DNA materials other than those which are laid out in the DNA Act. The indigency of individuals 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.



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 15th day of August, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

 Appeal from Spartanburg County

 Honorable Robin B. Stilwell, Circuit Court Judge

JOHN WILLIE MACK, SR.

PETITIONER

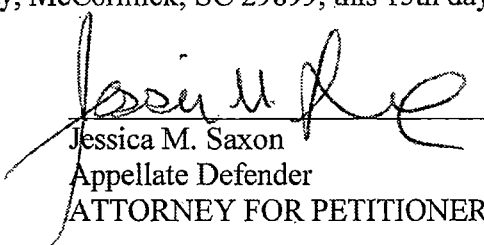
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

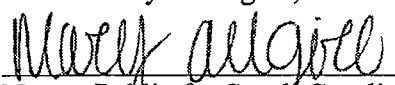
 CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Reply Brief of Petitioner 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 Reply Brief of Petitioner have been served on John Willie (2) Mack, #257219, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 15th day of August, 2019.



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 15th day of August, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

John Willie Mack, Sr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-001570

Appeal From Spartanburg County.
Robin B. Stilwell, Trial Judge
J. Derham Cole, DNA Court Judge
Robin B. Stilwell, PCR Court Judge

Unpublished Opinion No. 2019-UP-386
Submitted October 1, 2019 – Filed December 18, 2019

AFFIRMED

Appellate Defender Jessica M. Saxon, of Columbia, for
Petitioner.

Attorney General Alan McCrory Wilson, Senior
Assistant Deputy Attorney General Megan Harrigan
Jameson, and Assistant Attorney General Johnny Ellis
James, Jr., all of Columbia, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: S.C. Code Ann. § 17-28-60 (2014) ("The performance of counsel pursuant to this article shall not form the basis for relief in any post-conviction relief proceeding."); *State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) ("[A] court must abide by the plain meaning of the words of a statute.").

AFFIRMED.¹

LOCKEMY, C.J., and KONDUROS and HILL, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

JOHN WILLIE MACK, SR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001570

Appeal from Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

Unpublished Opinion No. 2019-UP-386

PETITION FOR REHEARING

Petitioner requests rehearing pursuant to Rule 221(a), SCACR, because this Court overlooked or misapprehended certain points in reaching its decision. Respectfully, this Court overlooked the fact that the DNA Act does allow for applications for post-conviction relief. Further, in denying Petitioner's request for a belated appeal of the denial of his DNA application this Court is precluding Petitioner from getting the full and complete adjudication of his petition on the merits that he is entitled to under the jurisprudence of this state.

This Court found 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 Ann.

§ 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, respectfully, this Court failed to consider the DNA Act as a whole. When the DNA Act is read in full it is apparent that Petitioner is not foreclosed from pursuing this avenue of relief. S.C. Code Ann. § 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*” (emphasis added).

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.

Furthermore, if a court cannot reconcile the conflict within the statute then the “last legislative expression” rule applies. 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) (under the principle that the last expression of the legislative will is the law, where conflicting provisions are found in the same statute, or in different statutes, the last in point of time or order of arrangement prevails); See also 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) (emphasis added).

In interpreting the statute to resolve the conflict, it is apparent that PCR claims are not barred in their entirety. The language relied on by this Court, 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 DNA Act makes it clear that a PCR application could include ineffective assistance of DNA counsel on any issue.

Admittedly, in Petitioner’s second PCR application the only basis asserted was failure of DNA counsel to file an appeal of the denial of his DNA application. However, Petitioner did everything within his power to ensure that he would not need to file a second PCR application. Petitioner initially filed the application under the DNA Act on September 27, 2012, *while his direct appeal was still pending and eight months prior to the filing of his original PCR application*. The hearing on the DNA Act application was held on October 31, 2014. Two and a half months later the PCR hearing was convened. At that point in time, the DNA court had not issued a decision on Petitioner’s DNA Act application.

At the PCR hearing, Petitioner correctly *requested a continuance pending the outcome of the DNA Act application hearing* that had been held on October 31, 2014. This request was denied, and Petitioner was forced to proceed on his PCR application without a ruling from the DNA Court. The PCR application was dismissed with prejudice on April 10, 2015. One month

after the PCR court issued an order of dismissal, the DNA court finally issued an order denying Petitioner's application for retesting.

When DNA counsel failed to file an appeal of the DNA court's decision, Petitioner's only option was to file a second PCR application seeking the relief that he was entitled to under the statute – a belated appeal because DNA counsel failed to file one. Procedurally, Petitioner did everything correctly. He should have been able to have the DNA Act application resolved, prior to the PCR hearing, because it was filed first in time. Petitioner recognized the need to continue the PCR hearing so that he could consolidate any claims against DNA Counsel into his then pending PCR application. However, the PCR court erred in failing to continue the evidentiary hearing.

Importantly, Petitioner is not seeking a full-scale review of the performance of DNA Counsel. He is merely requesting that the Court consider the *very limited issue* of whether DNA counsel was ineffective for failing to file an appeal. Petitioner is well within his right to have the decision of the DNA court reviewed by the appellate courts. The DNA Act explicitly creates the right to an appeal by any party to the application. See S.C. Code Ann. § 17-28-90(G). Petitioner should not be foreclosed from pursuing this path due to actions and circumstances beyond his control.

A ruling in Petitioner's favor would not "open the floodgates" to PCR claims based solely on ineffective assistance of DNA counsel because Petitioner has presented an extremely narrow issue to the Court. Petitioner, like the complainant in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), is seeking the appellate review that he is entitled to under the law. 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.

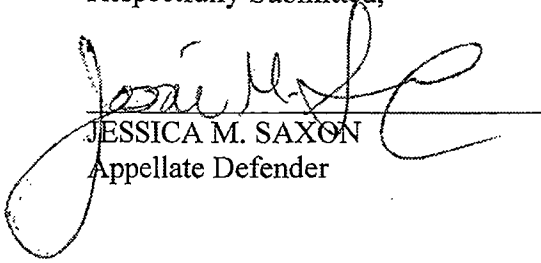
Notably, at the same time the Court issued its decision in Austin, the decision in Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991), was handed down. In Aice, the court addressed whether a second PCR application filed on the ground that the first complete PCR application was insufficient due to ineffective PCR counsel was proper. In holding that Aice was not entitled to a second PCR application and hearing the Court stated:

“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 (emphasis added).

Under this Court’s current decision, Petitioner is now foreclosed from getting his one full “bite” at the apple as he has been prevented from seeking appellate review of the denial of a DNA application when DNA counsel failed to file an appeal. Here, as in Austin, the failure of counsel to file an appeal constituted ineffective assistance of counsel. Petitioner respectfully request rehearing. Under these extraordinary circumstances the only way to correct this unfairness to Petitioner is to craft a remedy similar to that in Austin which allows Petitioner to move forward with the belated appeal of the denial of his request for DNA retesting.

Respectfully Submitted,



JESSICA M. SAXON
Appellate Defender

This 20th day of December, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

JOHN WILLIE MACK, SR.

PETITIONER

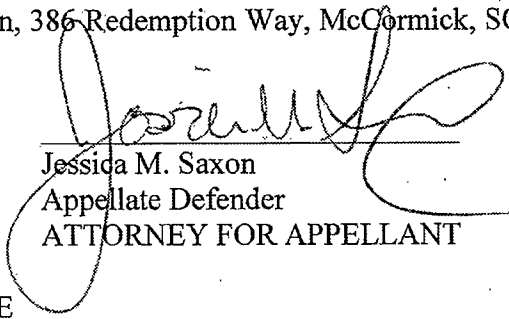
V.

STATE OF SOUTH CAROLINA,

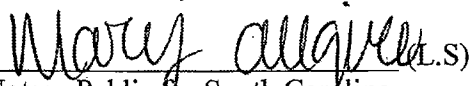
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and John Willie (2) Mack, #257219, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 20th day of December, 2019.


Jessica M. Saxon
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 20th day of December, 2019.


Notary Public for South Carolina
My Commission Expires: May 12, 2027.

The South Carolina Court of Appeals

John Willie Mack, Sr., Petitioner,

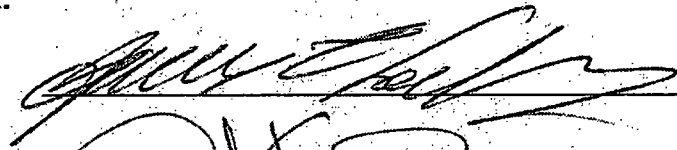
v.

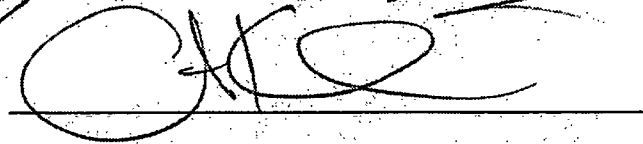
State of South Carolina, Respondent.

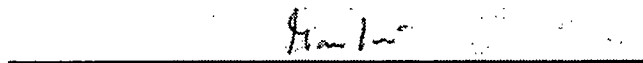
Appellate Case No. 2017-001570

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.

 J.

 J.

Columbia, South Carolina

cc:

Megan Harrigan Jameson, Esquire
Johnny Ellis James, Jr., Esquire
Alan McCrory Wilson, Esquire
Jessica M Saxon, Esquire
The Honorable Robin B. Stilwell

FILED

January 23, 2020