

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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S.C. SUPREME COURT

Appeal from Greenville County  
Alex Kinlaw Sr. Circuit Court Judge

Case No. 2019-CP-23-0812

Charles R. Richey

Applicant,

vs.

State of South Carolina

Respondant.

Notice of Appeal

Charles R. Richey, hereby appeal the order of the  
Honorable Alex Kinlaw Sr. filed on September 9, 2020. Written  
notice of entry was received on October 12, 2020.

Date: 11-2-2020

1 Charles R. Richey  
Charles R. Richey #301029  
990 Wisacky Hwy  
Bishopville, SC, 29010

Date 11-2-2020

Hon. Chief Justice Beatty  
South Carolina Supreme Court  
P.O. Box 11330  
Columbia, S.C. 29211

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S.C. SUPREME COURT

Re: Richey v. State, Notice of  
Appeal and Explanation  
pursuant to Rule 243 SCACR.

Dear Chief Justice,

The Petitioner hereby move to appeal the summarily dismissal of his application for Post Conviction Relief and submit the following explanation as to why the lower court decision is improper. Rule 243 SCACR.

Following the exhaustion of his state and federal appeal pursuant to a 2004 jury conviction in Greenville County, he petition this court in its original jurisdiction wherein he raised the below listed trial counsel ineffective assistance claim on June 6, 2018. His petition was denied on August 29, 2018, pursuant to Gibson v. State, 495 S.E.2d 426 (1998). This decision, it just so happen, alerted him to the fact that his

Claim below had not been raised or properly raised at his first PCR hearing. Therefore, he filed this current application on January 31, 2019, alleging that he was deprived of a full and fair hearing based on the ineffective assistance of his PCR counsel, and the abuse of discretion by the PCR judge. The State responded on August 25, 2020. The lower court dismissed his application based on a purpose conditional order of dismissal on ~~October 12, 2020~~ October 12, 2020. This appeal follow.

In this current application for PCR, he raise the following claim below.

(1) Whether trial counsel rendered ineffective assistance based on a conflict of interest.

As contended in the current application, his PCR counsel fail to properly raise this claim in that the claim was raised in the application but not pursued during hearing. That this failure, couple with her other action in requesting, without his consent, a procedure change that

later served as an impediment to correcting her mistake and the fact that she misled him on whether the claim was raised as is recorded in the PCR transcript. PCR tr. pg. 373, L. 4-16. Also, PCR knew or should have known that based on the court order the claim was not preserved for appellate review and therefore should have acted to correct the problem. This claim was substantial yet she showed a lack of responsibility in protecting his right as her duty required. Pruitt v. State, 423 S.E.2d 127 (1992); Strickland v. Washington, 104 S.Ct. 2052 (1984). He further contended that such deficiency amount to the type of performance the court in Aice v. State, 409 S.E.2d 392, 94 (1991), held could be challenged in a successive application being that the issue involves fundamental fairness and procedure due process. Washington v. State, 478 S.E.2d 833, where such irregular procedure adversely affected the applicant's right to a fair hearing. Jamison v. State, 765 S.E.2d 123, 128 (2014), where the court reasons that that fairness dictates a new trial where counsel's advice was relied on. To deny the justice he seeks would be to deny him the fundamental fairness essential to the concept of justice. State v. Beatty, 813 S.E.2d 502 (2018)

It is important to note that the lower court has misconstrued the Petitioner's claims as presented in the application. As a result, it has failed to properly take into account the facts presented in support of his application whereas, claims one and two as ~~the~~ referred to in the order, interpret these claims as grounds for relief when, in fact, they are facts he has established toward the exception to the bar against successive PCR application. S.C. Code, 17-27-90, Robertson v. State, 795 S.E.2d 29 (2016)

① With respect to the court ruling on the statute of limitation, the court held that the application is in violation of the one year limitation pursuant to S.C. Code 17-27-45(A). This finding is improper as the applicant ~~claim~~ claim in his application that he discovered his claim in question had not been raised based a decision by the Supreme Court where the claim was raised in a habeas petition, and that his application was filed within one year of that discovery. Thus his case falls under 17-27-45(C), which provide one year after discovery. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). Furthermore, the petitioner has predicated his claim on the misleading

advice of his PER counsel who, as explained above, misinformed him as to whether the claim was raised, that in light of this facts, the issue should be one of fundamental fairness insofar that he was denied the same under the circumstances. ~~■~~ In Jamison v. State, 765 S.E.2d 123, 128 (2014), the court held, under similar circumstances, that fairness dictates a new trial where counsel advice was relied on. As explained above, he was under the belief based on counsel advice that the claim had been properly raised. There was no reason to doubt her advice, especially when the PER court order confirmed the same in its general ruling. As the Petitioner now know, a general ruling or dismissal will not suffice. Manlar v. State, 644 S.E.2d 768 (2007) Further, under state law, an applicant relying on counsel advice constitute a reasonable exercise of due diligence, see also; True v. Moutreith, 489 S.E.2d 615, 616 (1997), which stand for the proposition that a client is protected by the discovery rule when relying on the advice of counsel. Coats v. State, 575 S.E.2d 557, 58-59 (2003). He further contends, as asserted above, the issue is one of fundamental fairness in that, at no fault of his own, he was deprived of a full and fair hearing he is entitle too as of right. Odum v. State, 523 S.E. 753 (1999).

In light of the above, a genuine issue of fact exist as to whether PCR counsel conduct qualify as sufficient reason to preclude summary dismissal of his application. McCoy v. State, 401 ~~S.E.2d~~ 362, 737 S.E.2d 623 (2013) Whether there exist evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence in the interest of justice. S.C. Code Ann Sect. 17-27-20 (a) (4) (2016). Mangal v. State, 805 S.E.2d 568 (2017).

(2) The lower court rule that the application is seccessive because it was raised or could have been raised in the first PCR. That the doctrine of res judicate prohibits subsequent actions by the same parties.

The Petitioner contends that a genuine fact exist as to whether PCR counsel failure to raise the above claim, couple with her decision to request a procedure change involving Rule 611 SCRP, and her misleading advice which, under Strickland v. Washington, fall short of the reasonable standard for counsel performance, constitute sufficient reason to over the bar to seccessive application. McCoy v. State, 737 S.E.2d 623 (2013).

In Aice v. State, 409 S.E. 2d 392 (1991), the court forbid a successive application unless there exist sufficient reason why the claim was not raised or properly raised in the first PCR. Aice further acknowledged that there may be unique circumstances where a PCR counsel performance could be challenged in a successive application, at 394. The Petitioner contends PCR counsel performance in this case qualify for such a challenge as her conduct and action is not only deficient but egregious, and hinges on the violation of his right to fundamental fairness and due process. Her action in falsely advising him have precedent. see Jamison v. State, 745 S.E. 2d 123 (2014).

As to the doctrine of res judicata, one of the essential element requires the judgment must be final. If that true then this doctrine is for all intent and purposes, is misplace and constitute an improper application of the law.

③ Finally, the court ruled that the trial counsel conflict of interest was raised in the first PCR, that claim is relative and depend on whether a claim raised in the application as oppose to during the hearing is considered raised for

the purpose of the state claim. Statute hold otherwise. Pursuant S.C. code 17-27-90, a successive PCR application is one that raises grounds not raised in a prior application, raises grounds previously heard and determined, or raises grounds waived in prior proceeding.

Provided sufficient exist the exception clause of 17-27-90, allows for a successive PCR application. Also where fundamental fairness would dictate such in the interest of justice, and where the petitioner rights under due process is implicated. Therefore, he would argue that PCR counsel performance constitute a genuine issue of material fact that is not conclusively refuted by the record before court as the law require for summary dismissal of his application.

In conclusion the Petitioner ask this Honorable court to grant his petition and or reversed the lower court decision. He believe the lower court has fail to conduct an independent evaluation.

of his claims and has therefore erred  
in properly applying the law ~~and~~ <sup>in</sup> deter-  
mining the genuineness of the facts pres-  
ented as required for granting the state  
motion for summary dismissal.

Respectfully submitted,

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