

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY

HONORABLE J. Mark Hayes, II, Chief Administrative Judge

Appellate Case No. 2021-000351
Lower Court Case No. 2020-CP-42-00681

Anthony B. Chapman,

Appellant,

v.

State of South Carolina,

Respondent.

APPELLANT'S WRITTEN EXPLANATION, RULE 243(c), SCACR

Dated 4-19-21.

Anthony B. Chapman, Appellant
Perry Correctional Inst.
430 Oaklawn Road, Q1A-108
Pelzer, South Carolina 29669

Other counsel of record:

Ms. Chelsey Faith Marto, Esquire
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S.C. SUPREME COURT

COMES, Anthony B. Chapman, Appellant above with a Written Explanation pursuant to the provision of Rule 243(c), SCACR and will show.

The Appellant asserts that pursuant to Statute Section 17-27-70 of the South Carolina Codes of Law(1976), PCR Court may grant a motion by either party for summary judgment of the application when it appears from the pleadings, deposition, and admission and agreements of facts, together with any affidavits submitted, that there is no genuine issue of material facts and the moving party is entitled to judgment as a matter of law.

The Appellant contends that by a preponderance of the evidence in the Record he will establish a prima facie case demonstrating not only that the Circuit Court's determination that the PCR Application is barred as being successive and untimely under statute of limitation is erroneous and improper but, also that there exists a genuine issue along with factual material evidence and fact supported by Federal and State Constitutions that entitle the Appellant to an evidentiary hearing and relief therefrom.

TIMELINESS

The Appellant was indicted by the Spartanburg County Grand Jury for manufacturing marijuana Indictment No. (2010-GS-42-0667) ; trafficking in methamphetamine or crack cocaine Indictment No. (2010-GS-42-0668); and possession with intent to distribute cocaine Indictment No. (2010-GS-42-0669), during the January 2010 term of General Sessions.

During October 5, 2010, the Honorable J. Derham Cole presided over a motion hearing regarding Appellant's Motion To Suppress. Ultimately, Judge Cole denied Appellant's motion. Thereafter, Appellant entered guilty pleas to the charged offenses. Judge

Cole sentenced the Appellant to Twenty years for trafficking crack cocaine, Twenty years for possession with intent to distribute cocaine, and Five years for manufacturing marijuana. On October 15, 2010, Appellant filed a timely Motion For Reconsideration, Rule 59(e), SCRCP. However, Judge Cole refused to acknowledge or entertain the motion for reconsideration.

Subsequently, on April 25, 2011, Appellant "attempted" to perfect a Direct Appeal. Unsuccessful, on September 20, 2011 the Appellant wrote his guilty plea counsel requesting he file the Direct Appeal on his behalf. Later, despite Judge Cole refusing to grant or deny Appellant's Motion For Reconsideration Rule 59 (e), on October 13, 2011, the South Carolina Court Of Appeals Dismissed Appellant's Direct Appeal as int timely. On October 28, 2011 the Remittitur was sent.

Afterwards, on December 8, 2011, Appellant filed a Post-Conviction Relief Application. Also, on June 4, 2012, Appellant through Mr. J. Faulkner Wilkes, Esquire filed a Motion For Discovery. On October 1, 2012, Honorable Couch issued an Order Granting Discovery. The matter proceeded to an evidentiary hearing on January 21, 2014, before Judge Roger L. Couch. At the PCR Hearing, the issue of whether the circumstances surrounding Appellant's filing of pro se documents titled " Motion For Reconsideration ", ten days after his guilty plea constituted an unresolved motion under Rule 29, SCRCrimP. The Court accepted a Memorandum requesting a new trial pursuant to Rule 29(a), SCRCrimP. from Appellant through, Mr. J. Faulkner Wilkes, Esq. on May 15, 2014.

On July 18, 2014, the Court issued an Order finding that the motion under Rule 29, SCRCrimP. was a proper motion, and held the PCR

proceeding in Abeyance until the motion was ruled upon.

Following, on October 31, 2014, Judge Cole presided over the Motion Hearing. So, on February 12, 2016, the Honorable Cole denied the Rule 29, SCRCrimP. Motion by written Order. Then, on May 20, 2016, Judge Couch denied Appellant PCR from his Convictions and sentences. Thereafter, on June 6, 2016, Appellant filed a timely Notice Of Appeal before the Supreme Court of South Carolina. On, April 6, 2017, Appellant through, Ms. Susan B. Hackett, Appellate Defender moved the Supreme Court for an Order to Reconstruct the incomplete PCR Transcript, (the only Issue Ms. Hackett presented in the Writ Of Certiorary despite Appellant's numerous requests that she raise all preserved PCR Issues for appellate review).

On June 16, 2017 the Supreme Court of South Carolina denied the Request for Reconstruction. So, on May 7, 2018, the Supreme Court of South Carolina issued the Remittitur. Plus, on April 19, 2019, the Supreme Court of South Carolina denied the Petition For Writ of Certiorary.

Therefore, on February 14, 2019, Appellant filed his Writ of Habeas Corpus Petition under United States Code Section 2254. On April 5, 2019, the Respondent filed its Return and Motion For Summary Judgment. Well, on May 24, 2019, the Appellant moved to Amend the Petition For Writ of Habeas Corpus. Likewise, on May 24, 2019, the District Court filed a text Order directing the Respondent to file a Response to the Amendment on or " before June 7, 2019 ".

On June 11, 2019, the Honorable Kevin F. McDonald, United States Magistrate Judge, issued a Text Order granting Appellant's Motion To Amend. On the same day, the Respondent file its untimely Response Appellant's Motion To Amend. The Clerk of Court was

directed to docket the Respondent's Response To Motion Amend as a Supplement to the Motion For Summary Judgment and Return. And directed the Appellant to file a Response to the Respondent's Supplement to the Motion For Summary Judgment by June 26, 2019.

Promptly, on June 26, 2019, Appellant filed its Response and Memorandum Of Law to the Respondent's Supplement To Motion For Summary Judgment. On November 13, 2019, Magistrate Judge Kevin F. McDonald filed a Report And Recommendation. The Appellant filed its timely Objection to the Report And Recommendation.

However, on December 11, 2019, Honorable Mark Gergel, United States District Court Judge Adopted the Report And Recommendation as the Order of the Court. And, Granted Respondent's Motion For Summary Judgment.

Further, on February 17, 2020, Appellant filed its Second PCR Application. So, on October 8, 2020, the Respondent filed its Proposed Conditional Order Of Dismissal along with cover letter addressed to Judge Hayes stating: " Return And Motion To Dismiss has also been sent to your chambers for consideration ". The Appellant never received a copy of the Return And Motion To Dismiss.

Nevertheless, on November 10, 2020, Appellant filed its timely Response to the Respondent's Proposed Conditional Order Of Dismissal. And, on March 12, 2021, the Honorable J. Mark Hayes, II, signed the Conditional Order of Dismissal, and denied and dismissed the PCR Application.

As clearly demstrated above, Appellant's due diligence to pursue justice in the instant case avoided any gap, lapse of statute of limitation or, procedural timeframe. In fact, the only other mentioning of Appellant filing any appeal, petition,

application, etc. as untimely was by the South Carolina Court of Appeals in its Order dated October 12, 2011, dismissing a Direct Appeal. See Exhibit#1

However, The Court Of Appeals ruling was erroneous for two significant reason:

1.) The Honorable J. Derham Cole did not finalize Appellant's conviction and sentence until February 12, 2016, by Order denying Appellant's timely Rule 29(a), SCRCrimP. Motion To Reconsider his conviction and sentence; See Exhibit#2;

2.) Trial counsel, Michael Brown, Esquire nor the Appellant filed a proper Notice Of Appeal before the South Carolina Court Of Appeals. See Exhibit# 3 and 4

SUCCESSIVENESS/ARGUMENT

In the instant case, there are material evidence and facts that are supported by legal authorities which substantiate that the Circuit Court's determination was erroneous and improper. Particularly, under Statute Section 17-25-45(a), South Carolina Code Of Law (1976), an applicant for relief pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or...the "filing of the final decision upon an appeal, whichever is later".

The Appellant's Exhibit# No. 5 establishes that the United States District Court on December 11, 2019, granted the Respondent's Motion For Summary Judgment finding that as a result of Ms. Susan B. Hackett, Appellate Defender (over the Appellant's objections) failed and neglected raise or incorporate either of the grounds presented to, and ruled upon by the PCR Court

into the United States Section 2254 Petition, the Appellant was not entitled to a hearing or, Writ Relief. See Exhibit#5

Incidentally, the Record clearly proves that on February 17, 2021, (well within one year of " the filing of the final decision upon appeal " to the United States District Court, the Appellant submitted his PCR Application solely alleging that Ms. Susan B. Hackett, Appellate Defender rendered gross deficient appellant assistance of counsel by failing and neglecting to present and argue either of his PCR Issues before the Supreme Court of South Carolina. Consequently, the Appellant was denied and deprived Due Process and Equal Protection of Law within the meaning of the Sixth and Fourteenth Amendments of the United States Constitution. As well as Article One Section Three of the South Carolina Constitution guarantee to have his PCR Issues for relief fully exhausted by the State highest Court. See PCR Application Case No. 2020-CP-42-00681.

For the above reasons this Honorable Court can and should agree that the Appellant has provided sufficient reason/s why the new ground for relief the Appellant asserts were not and could not have been raised in the initial PCR Application. As such, a PCR Hearing is warranted to address the merits of Appellant's allegations. See Aice v. State, 303 S.C. 448, 450, 409 S.E.2d 392,394(1991)

Final, the Appellant respectfully requests that this High Court adopts the Supreme Court's ruling in McCoy, v. State, (Opinion No. 27214, Feb. 6,2013), where the Supreme Court Reversed and Remanded for hearing the dismissal of the Petitioner's PCR Application. The Supreme Court held that summary

dismissal of the Petitioner's second PCR Application was error because genuine issues of material facts existed as to whether his claim was successive or barred by the statute of limitations. " When considering the State's motion for summary dismissal, where no evidentiary hearing has been held, " the PCR Judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant. Leamon v. State, 363 S.C.434,611 S.E.2d 494,495(2005)(citing S.C. Code Ann. Section 17-27-80)

Additionally, where an applicant alleges facts that would establish an exception to either the statute of limitation or prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR Court, a question of fact is raised which can only be resolved by a hearing. Cf. Delaney v. State, 269 S.C. 555,556,238 S.E.2d 679. (1977).

The Circuit Court's determination is improper herein because no " facts " in the Record conclusively establishes:

1.) That Ms. Susan B. Hackett, Appellate Defender presented at least one (1) of the issues the Appellant raised and argued in his PCR Application before the Supreme Court of South Carolina on Writ Of Certiorary, and, thus, preserved the issue for Section 2254 appellate review;

2.) That Ms. Susan B. Hackett provided a tactical or strategic reasonable explanation how her failing and neglecting to raise and argue at least one (1) of Appellant's PCR Issues on Writ Of Certiorary before the Supreme Court of South Carolina

would have been in Appellant's best interest; or

3.) That there exists some other "just cause" available to the Appellant that could have excused the procedural default created by Ms. Susan B. Hackett's failure and neglecting to present to and argue the PCR Issues before the Supreme Court of South Carolina. Thence, permitting Appellant to advance the issues on Writ of Habeas Corpus under Section 2254.

The Seventh Circuit emphatically has made clear that the primary purpose of appointing counsel in an appropriate case is to "insure that the meritorious claim/s for relief are not defeated". See Irby v. Winans, 604 F.Supp. 484(1985); see also Stringer v. Rowe, 616 F.2d993,1001(7th Cir. 1980). Because the United States Constitution's Sixth Amendment guarantee to the Appellant the right to effective assistance of appellate counsel is so deeply engrained in the Appellate Court Procedures, the Courts have condemned a decision to omit a meritorious claim in favor of raising an obvious weaker claim (in the present case, a claim not raised in the PCR Proceedings). See Chase v. Macualey, (971 E3d 582 (6th Cir.2010)

Last, this Honorable Court can and should find that there exists a genuine material issue of fact requiring a hearing to show an objective factor external to his defense impeded his efforts to comply with the State's exhaustion procedural requirements, and denied and deprived Appellant of effective appellate review. See Anders v. California, 386 U.S.353 (1963). Hybrid representation prohibited. See State v. Devore, 784 S.E. 2d 690 (2016)

Wherefore, it is prayed that this Supreme Court of South Carolina Grant the Appeal. Vacate the convictions and sentences. Or, in the alternative, Reverse the Circuit Court's decision. And Remand the case back to the lower Court with instructions that the Appellant be granted an evidentiary hearing.

Dated 4-19-21.

Respectfully Submitted,
Anthony Chapman