Billy Wayne McIntosh, 87743 v State
Appeal From Lexington County
Court of Common Pleas
Hon. Walton J. McLeod, IV. presiding
Civil Action No. 2020-CP-32-01083

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SC Court of Appeals

Memorandum
Facts and Law in Support of Appeal

FACTS

Appellate has not had "a bite of the apple." Trial Counsel filed Direct Appeal on the imposition of Sentence but did Not appeal issues preserved At trial. Appellate filed PCR Applications in 1982 And 1992, and voluntarily withdrew them prior to the state filing a response. Appellate filed a third PCR Application in 1992, and it was dismissed As Successive Without a hearing. Appellate was Not Aware of the right to Appeal denial of PCR. The Law did Not require PCR counsel to inform PCR Applicants of the right to Appeal denial of PCR At that time - 1995.

This Appeal Asserts a Claim of innocence And Ineffective Assistance of Counsel. It Was filed after Appellate obtained the Pathologist's Report on the Victim's Autopsy through Discovery in McIntosh v State, Civil Action No. 2018-CP-32-02764 (Ct App No 2020-000741), a Motion for Declatory Judgement under SC 23-3-430, sec. C-15, And Thompson v State, 415 SC 560, seeking judgement on Whether the Kidnapping Conviction Requires Sexoffender Registration. Appellate could Not have obtained the pathologist's Report otherwise; having No Cause to obtain Leave of Court for Post-Trial Discovery. The Report Was Not introduced into evidence At trial Nor did the Pathologist testify to the dimensions of the bullet holes in the Victim's Skull

or the bullet removed from the Victim's brain. The Pathologist, Dr. Sandra Conradi, testified to the decomposed state of the body and said the cause of death was two gunshot wounds to the head. The prosecutor elicited the pathologist's opinion that a defect in the Victim's forehead was a gunshot wound. The State's case depends on the Victim being shot in the head three times with a .22 calibre pistol. Trial Counsel did not question the Pathologist.

The dimensions of the bullet holes in the Victim's head indicate that gunshot wound #1 and gunshot wound #2 were inflicted by weapons of different calibre, and that the hole in the Victim's forehead is most likely An exit wound. Gunshot wound #1 is .28 inches in diameter. Gunshot wound #2 is .35 inches in diameter. Gunshot wound #2 exceeds the spectrum of a .22 calibre bullet. It is in the domain of .32, .357, and .380 calibre bullets. (Investigators questioned Co-defendant (Krause) about the existance of the second weapon). The hole in the Victim's forehead is .3 by .25 inches and squared off. A round bullet does not make a square hole unless it comes into contact with something that deforms the shape of it prior to making the hole. If made by A bullet, this hole is most likely An exit point. The bullet from gunshot wound #2 was Not recovered, And it appears the bullet removed from the Victim's brain is incomplete (gunshot wound #1).

The description of the bullet removed from the Victim's brain Leads Appellate to conclude that investigator Bill Mattlock's testimony that SLED matched that ~~the~~ bullet to a .22 calibre pistol appellate sold a neighbor is untrue or unreliable. That bullet is .45 inches long, .15 inches wide, And badly marred. A .22 calibre bullet is .22 inches wide. Thus, this bullet is incomplete or mashed flat. If mashed flat, the lead would have expanded in the direction of least resistance. Surely the pathologist's measurement represents the widest point. It is highly unlikely that SLED determined the calibre of this bullet beyond a reasonable doubt (.22 or .25 calibre). Further, the prosecutor could have And should have put SLED's ballistics expert on the stand to testify to this fact, not investigator Mattlock.

Furthermore, the Respondent in McIntosh v State, No. 2018-cp-32-02764, Produced All the evidence in this case except the SLED ballistics report. Respondent in this instant case did not include it in its Motion to Dismiss; even though it could be obtained by A phone call to SLED or 11th Circuit Prosecutor's Office - if it existed. Trial Counsel did Not question investigator Mattlock's testimony SLED matched the bullet to the gun.

Conclusively, the State's case depends on the Victim being shot in the head three times with a .22 Calibre pistol Appellate sold a Neighbor. Trial Counsel expected to persuade Appellate to plead guilty And did Not consult a ballistics expert in preparation for trial And did not challenge ballistics evidence At trial. Trial Counsel failed to subject the State's case to the Adversarial Testing Appellate was entitled to, violating Appellate's right to Effective Assistance of Counsel And due process of law under U.S.C.A 6, 14. Appellate was convicted primarily on the testimony of Co-defendant Allen Eugene Kneece that Appellate walked the victim into the woods And Shot her three times with a .22 calibre pistol. Appellate testified he was out bar hopping with Kneece And passed out with Kneece driving My car; that I woke up the Next Morning in the Victim's car to find her in the trunk dead. I didn't Kill her!

LAW

Jamison v State, 410 SC 456 (2014) [[6-9] Nevertheless, the PCR Act provides that "anybody who has been convicted of, or Sentenced for, a crime and claims... that ~~new~~ evidence of material facts exists, Not previously presented and heard, that requires Vacation of the conviction or sentence in the interest of justice" ~~or~~ is entitled to seek post-Conviction Relief. SC 17-27-20(A)(4). See Simpson v State, 329 SC 43 (1998); [The Act comprehends And takes the place of all other common law, statutory, or other remedies heretofore Available for challenging a Conviction or

Sentence and shall be used exclusively in place of them.) Finklea v State, 273 SC 157 (1979) (our post-Conviction Act is designed to incorporate all rights available under federal habeas Corpus.)

McQuiggins v Perkins, 133 S.Ct. 1924 (2013) ([1] Habeas petitioner failed to demonstrate diligence required to equitably toll period for filing federal habeas Corpus petition, where he did not file petition until nearly six years after coming into possession of affidavits supporting his claim of innocence. 28 USCA §§2254. [2] plea of Actual innocence can overcome AEDPA 1 year statute of limitations for filing habeas petition; miscarriage of justice exception survived passage of AEDPA. 28 USCA §§2254. [3] Federal habeas court may invoke miscarriage of justice exception to justify consideration of claim defaulted in state court under state timeliness rules. 28 USCA §§2254. [4] Although petitioner Asserting Actual innocence claim need not prove diligence to overcome AEDPA statute of limitations, timeliness does bear on credibility of evidence proffered to show Actual innocence. 28 USCA §§2254. [5] To invoke miscarriage of justice exception to AEDPA 1 year statute, habeas petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the New evidence. 28 USCA §§2254.)

The Trial Record And PCR Records no longer exist, but the SLED case file/ prosecutor's case file does exist And contains All the evidence. The SLED ballistics report has not been produced yet, but it would have existed in 3 different case files. It is not likely All three copies were lost. In McIntosh v State, Civil Action No. 2018-CP-32-02764 (Court of Appeals No 2020-000741), the court created A record suitable for review in this case. Appellate seeks An evidentiary

hearing to add testimony from trial Counsel, Patterson McWhirter, As to his previous trial experience at the time of Appellate's trial, and did he consult a ballistics expert/forensic Scientist in preperation for trial or challenge ballistics evidence during trial; Further, expert testimony that it is more likely than not the victim was shot two times and each Wound was inflicted by a weapon of different caliber (you cannot be certain without the missing bullet); Also testimony that it is more likely than not, based on the Pathologist's description of the bullet, that SLED could not identify the caliber of the bullet removed from the victim's brain beyond a reasonable doubt. If the bullet or ballistics report exists, then a second opinion challenging it. Although this bullet is not determinitive of Appellate's guilt, As the gun belonged to Co-defendant Kneece and Appellate sold it on his behalf, if testimony that SLED matched the bullet to the gun was perjury, such would be evidence Appellate did not receive a fair trial.

There is precedent for using the prosecutor's case file (evidence available to the state at the time of trial) to Assess New evidence Against when A defendant seeks to withdraw A guilty plea with A claim of innocence. Jamison v State, 410 SC 456 (2014). The defense of Laches is a case by case Assessment. Although this is not an Austin, Odom, or Wilson Claim, Appellate makes mention of those cases in support of this Appeal. This is A claim of Innocense And Ineffective Assistance of Counsel based on the U.S. Supreme Court ruling in McQuiggins v Perkins, 133 S.Ct. 1924. If this Court rejects Argument this Appeal is Allowed under the Post-Convictions Act, then it should be Allowed under state habeas Corpus.

DATE: 8-5-21

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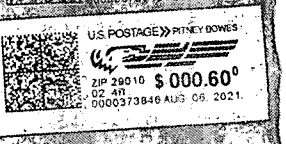

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