

IN THE SUPREME COURT OF SOUTH CAROLINA
APPEAL FROM GREENVILLE COUNTY

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Sep 20 2021

SC Court of Appeals

The Honorable **J. Mark Hayes, II**,
Presiding Circuit Judge, Thirteenth Judicial Circuit

Appellate Case No. 2020-001361

Oshaun J. Robinson, # 327798

Respondent,

v.

State of South Carolina, Petitioner,

Petitioner

PETITION FOR LEAVE TO FILE
AMENDED RETURN
TO PETITIONER'S
PETITION FOR WRIT OF CERTIORARI

TARA DAWN SHURLING
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ATTORNEY FOR RESPONDENT

NOW COMES the Respondent in the above captioned Post-Conviction Relief appeal, acting by and through his undersigned Counsel, requesting that this Honorable Court permit PCR Counsel for Respondent to submit and Amended Return in the this matter.

I.

PROCEDURAL HISTORY

PCR Counsel in this matter has suffered serious side effects from the two COVID 19 vaccinations she received on March 1, 2021 and March 29, 2021. Counsel will provide this Honorable Court with medical records if required. These side effects have prevented Counsel from working the schedule she is accustomed to working and have resulted in her being sick frequently in the past five and a half months. Counsel is pleased to report that she is finally feeling better and is finally returning to her usual work schedule.

This case involved an appeal by the State from an Order granting Respondent relief in a Post-Conviction action. This Application for Post-Conviction Relief (hereafter PCR) was filed on April 25, 2017 and docketed at 2017-CP-23-02653. Respondent served its Return and Motion to Dismiss on November 2, 2018. A Conditional Order of Dismissal was entered on that PCR action on November 9, 2018. Respondent filed a timely Response to said Conditional Order of Dismissal on December 12, 2018. By way of a Form 4 Order issued by the Court on December 27, 2018, Respondent was granted a hearing. Said Order did not specify whether the matter was to be set for an evidentiary hearing on the merits of Respondent's claims, or, whether the sole issue before the Court was to be whether Respondent should be allowed to proceed with a full PCR action at some point in the future. *See*, Form 4 Order dated December 27, 2018, entered by the Honorable Perry H. Gravely, Chief Administrative Judge. **App. pp. 610 – 611.** Following that order, a hearing was convened before the Honorable Alex Kinlaw, pressing circuit court judge, on this matter on April

15 and 17, 2019. **App. pp. 612 – 676.** Respondent was present at these proceedings and was represented by undersigned counsel, Tara Dawn Shurling, of the Richland County Bar. Petitioner was represented by Samuel L. Key, then Assistant Attorney General. Respondent testified on his own behalf at this hearing and additionally presented testimony from Plea Counsel, Andrew Burke Moorman. As previously noted, Attorney Moorman had also represented Respondent at his jury trial approximately seven (7) weeks prior to the guilty pleas at issue in this PCR action. In addition to that testimony, Judge Kinlaw had before him a copy of the records of the Greenville County Clerk of Court regarding the subsection convictions and sentences, a copy of Respondent's records from the South Carolina Department of Corrections and the pleadings in this matter and the orders previously filed in connection with this PCR action. Judge Kinlaw also had before him copies of the exhibits introduced by Respondent during the April, 2019, proceedings held on Respondent's Motion to Dismiss. The records of the Greenville County Clerk of Court indicate that the exhibits introduced during the April, 2019, proceedings were filed on April 17, 2019. By Order filed August 22, 2019, the Conditional Order of Dismissal in this matter was vacated. Respondent's Motion to Dismiss was denied. **App. pp. 815 – 823.**

An evidentiary hearing was convened before this Court on January 22, 2020. Respondent was present for this proceeding and was once again represented by undersigned counsel, Tara Dawn Shurling, Esquire. Likewise, Respondent was again represented by Samuel L. Key, Assistant Attorney General. At the outset of this proceeding, the parties requested that this Court incorporate by reference the testimony heard at the previous hearing before Judge Kinlaw. The parties further agreed that, with certain minor exceptions, that testimony would be accepted by this Court in lieu of testimony from Respondent and Plea Counsel, Andrew Morton. Exhibits introduced during that proceeding were filed on January 22, 2020 and included a transcript of the April, 2019, proceedings. On February 6, 2020, a Form 4 Order was entered directing both sides to file Proposed Orders in this matter. In said Order, the PCR Judge expressly found that the testimony of both Respondent

and Plea Counsel appeared believable and was consistent with the transcript of the testimony heard at the April, 2019 proceedings. **App. pp. 815 – 823.**

Respondent's current Application for PCR addressed his claims that he received ineffective assistance of counsel prior to and during his guilty pleas approximately seven weeks after his jury trial. He further asserted that he was advised by Defense Counsel to plead guilty to the charges addressed in this Application, but that he was given very limited advice concerning the terms of his pleas, and the potential consequences of his pleas in relation to the judgments and sentences entered at his jury trial. He sought a reversal of the judgments and sentences entered pursuant to his pleas of guilty, entered March 4, 2009, on Indictments No. 2008-GS-23-5385 (assault and battery with intent to kill); 2008-GS-23-5386 (armed robbery) and 2008-GS-23-5387,(possession of a weapon during the commission of a violent crime).

An evidentiary hearing was held in this matter on January 22, 2020, before the Honorable J. Mark Hayes, II, presiding circuit judge. Following the submission of proposed Orders by both sides, Judge Hayes granted Respondent a new trial by Order filed May 20, 2019. **App. pp. 893 – 908.** The State filed a Motion to Alter or Amend said Order pursuant to Rule 59(e), SCRCPC, on June 3, 2020. **App. pp. 910 – 915.** Following the filing of a Reply (**App. pp. 917 – 922**), and a Supplemental Reply (**App. pp. 923 – 926**) to the Rule 59(e) motion by PCR Counsel, said motion was denied by Order filed on September 9, 2020. **App. pp. 926 – 930.** Therefore, PCR Counsel has prevailed on behalf of Respondent at three different stages of this PCR action decided in Respondent's favor by three different Circuit Court Judges: the Honorable Perry H. Gravely, Chief Administrative Judge, The Honorable Alex Kinlaw and The Honorable J. Mark Hayes, II.

Petitioner's Notice of Appeal was served and filed on November 14, 2020. The transcripts required for this appeal were ordered on that same date. The State's Petition for Writ of Certiorari was filed on March 5, 2021 following their receipt of three, thirty (30) day

extensions totaling ninety (90) days. Respondent filed its Return on August 10, 2021, after receipt of multiple extensions totaling one hundred twenty (120) days. The following day, August 11, 2021, Counsel notified the Supreme Court that the Return did not contain page citations to the Appendix filed in this matter due to the fact that when she was completing her final edit of that Return she was unable to open the Appendix provided to her digitally by Petitioner. The following day, Counsel for Petitioner provided Counsel another digital copy of this Appendix which Counsel was still not able to open. Counsel this had this lengthy Appendix, 944 pages, printed out and bound. On August 31, 2021, the Supreme Court issued an Order noting Counsel's failure to follow through with a request to file an Amended Return, striking the Return filed in this matter and giving Counsel *two* (2) days to correct her error. Counsel was once again sick that week and did not see the email containing this Order at the time it was sent. Counsel checked her email daily while she was out sick but somehow missed this Order. She saw this Order on Tuesday, September 7, 2021 when she returned to work following the Labor Day Holiday on Monday. It was Counsel's intent to file a Petition for Reconsideration of this Order, entered on August 31, 2021, that week within the fifteen (15) days provided by Rule 221 (a), SCACR. Unfortunately, Counsel discovered that this PCR Appeal had been transferred to the Court of Appeals that same date; September 7, 2021. On September 8, 2021, Counsel received this Court's Order directing the parties to file one additional copy of everything filed in this matter within ten (10) days. That due date fell on Saturday, September 18, 2021 and therefore my additional copy of the Return in this matter would have been due for filing on today's date.

Under these unusual circumstances, Counsel herein most respectfully asks that she be permitted to file an Amended Return in the matter. She would have filed this request with the Supreme Court had they not transferred this appeal to the Court of Appeals on September 7, 2021. She has attached to this Petition a copy of the proposed Amended Return to the State's

Petition for Writ of Certiorari. With the exception of a few obvious typographical errors which I have corrected and disclosed to opposing counsel, as well as the omission of Roman numerals on section headers, the only changes that have been made to the Return are the addition of relevant page citations to the Return as it was originally filed. Inasmuch as Counsel did not have the opportunity to file a Petition for Reconsideration with the Supreme Court, she most respectfully prays that the Court will accept this Amended Return for filing. The day after Counsel's filing of the Return without citations to the Appendix, opposing counsel indicated that the Petitioner would not object to my request to file an Amended Return in this matter. Counsel has discussed the situation with this Return with Petitioner's counsel and she has graciously agreed not to take a position on this current request.

Respectfully submitted,

Tara D. Shurling

TARA DAWN SHURLING
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ATTORNEY FOR RESPONDENT

This 20th day of September, 2021

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APPEAL FROM GREENVILLE COUNTY

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Oshaun J. Robinson, #327798

Respondent,

v.

State of South Carolina, Petitioner,

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CERTIFICATE OF SERVICE
FOR
PROPOSED AMENDED RETURN
AND
PETITION FOR LEAVE TO FILE AMENDED RETURN

The undersigned Counsel for Respondent hereby certifies that a copy of her Proposed Amended Return, and a copy of her Petition for Leave to file an Amended Return in the above captioned appeal, have been digitally served on opposing counsel, Lillian Loch Meadows, Assistant Attorney General, on September 20, 2021. Attorney Meadows was copied on the transmittal email to the Court along with the attached Return. The documents were digitally served upon opposing counsel at the email address listed below.

Tara D. Shurling

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ATTORNEY FOR RESPONDENT

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