THE STATE OF SOUTH CAROLINA

In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY

Court of Common Pleas

William H. Seals Jr., Circuit Court Judge

Case No. 2018-CP-26-6065

State of South Carolina — Respondent

V.

Gregory Pendik #312332 — Petitioner

EXPLANATION OF IMPROPER DETERMINATION

Gregory Pendik #312332
Evans CI F4A275
610 Hwy 9 West
Bennettsville, SC. 29512
Petitioner, Pro Se

Comes now, Gregory Pendle # 312332, Appellant Pro se being duly sworn and depose, applicable facts and legal authority to show an arguable basis for asserting that the lower courts determination was improper.

STATEMENT OF THE CASE

Petitioner filed an application for Post-conviction relief under 17-27-45 (C) on October 29, 2018. Respondant filed a proposed return and motion to dismiss on January 08, 2019. Petitioner then filed his reply to return and motion to dismiss on January 16. 2019, On January 23, 2019 Judge Steven H. John signed an order Denying the States request for conditional Order of dismissal, Ruling that dismissal as inappropriate without a hearing on the motion to dismiss. [Under Rule 56(d) SCR civ P].

On June 14, 2019 a hearing was held in which appointed counsel requested to be relieved and new counsel was to be appointed. New counsel was appointed August 26, 2019 and met with petitioner November 15, 2019. Petitioner set out additional grounds he had just discovered to be supplemented into the current PCR. And sent counsel a supplemental application notorized February 18, 2020. On

April 28, 2020, July 15, 2020, July 28, 2020 petitioner after several attempts to communicate and contact counsel [Falk], petitioner filed letters of concern to all parties. Additionally, petitioner had requested several times to acquire further discovery/Information of warrants, indictments, and Grand Jury empaneling documents. Requests for this discovery/Information were sent from September 9, 2020 through to current without any discovery/information forthcoming or filed. Petitioner filed a pro se motion to relieve counsel [Falk] with good cause and filed a motion to compel discovery, Judge B. Culbertson denied as unfiled febuary 23, 2021, without a hearing. On febuary 18, 2021 petitioner again attempted to Alert the resident Judge of the issues of counsel and no being able to recieve request discovery/informatin papers.

On May 21, 2021 Counsel falk filed an amended Application for PCR without fully addressing all the issues petitioner had proposed to him in febuary of 2020 and without including citations of law that petitioner had included and requests added. On June 22, 2021 a hearing was held in which Judge William H. Seals Jr. presided. Following on August 23, 2021 counsel [Falk] filed a motion to be relieved as counsel and requested the court to rule on that motion before ruling on the motion to dismiss hearing. Upon request of Counsel, petitioner

filed a Pro se amended motion under Rule 59(b)(e) on September 22, 2021 and Counsel filed an inadequate Rule 59(e) on September 26, 2021.

The court filed its Order of dismissal on September 15, 2021 and filed an Order Denying Applicants Motion to Reconsider on October 15, 2021 without apparently considering petitioners Pro-se motion for new trial / Alter or amend Judgment. Petitioner received notice of Both the September 15, and October 15, 2021 orders on November 03, 2021 by his own request.

ARGUMENT OF IMPROPER DETERMINATION

The Judges determination was improper due to failure to recognize and address petitioners request for discovery and Grand jury empanelment documents. Respondent acknowledges that applicant requested further discovery [Order of dismissal Pg 7 Ln 17-18] and yet Judge Seals made no ruling and discovery was not "turned over". Summary dismissal must not be granted until opposing party has had a full and fair opportunity to complete discovery. Rule 56 SCRCP, BPS, Inc V. Worthy 362 SC. 319 (2005). The Court must give notice to the parties that prior to the hearing it was going to consider affidavits and motions at the motion

to dismiss hearing Baird V. Charleston County 333 SC 519 (1999) Petitioner attempted to have an "Affidavit of Facts" filed prior to the hearing but could not communicate with counsel [Falk] to do this.

Further the Order of dismissal assumes that an evidentiary hearing took place when in fact pursuant to Rule 56(d) SCRCP "... the Court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, ... It may thereupon make an order..." Judge Seals, asked No questions and reviewed No pleadings or evidence. And the State's point of controversy was to recite their original motion to dismiss which petitioner had refuted by his Reply to motion and which Judge John had denied by order on January 23, 2019.

In considering the State's motion for summary dismissal of an application for PCR, a Judge must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant. SC. Code § 17-27-90, Pelzer V. State 378 SC. 516 (2008); Leamon V. State 363 SC. 432 (2005); Lampley V. Hulon 432 SC 566 (2021), further summary dismissal is a drastic remedy to be invoked cautiously and must be denied if a non-moving party demonstrates a scintilla of evidence in support of his claims Abdelghery V. Mood 2020 WL 6302425 (SC. App 2020). In a motion for dismissal hearing the burden of proof is on the moving party to prove there

is "no genuine issue of material fact". Rule 56(c) SCRCP. Beneficial financial, Inc V. Windham 431 SS. 256 (2020). Dismissal is not appropriate when further inquiry into facts of the case is desirable to clarify the application of Law Kagan V. Simchon 429 SS. 516 (2020).

SUMMARY OF FACTS NEWLY DISCOVERED AND NOT ADJUDICATED

Petitioner alleges that the State used feloniously altered 2004 warrants [J740369; J740370] and Voided 2001 Indictments [2009GS2605014; 2009GS2605015] as well as an Ex post facto application of 17-27-45(f) [Statute amended in 2006; SB1267] to coerce a guilty Plea in 2010. During the serving of the arrest warrants Detective D. Pitsinger served a search warrant for the Collection of DNA, not only were the (2) two 2004 arrest warrants originally Sworn by D. Pitsinger but affiants name was changed without reissuing the warrants or having the judge initial this change, Voiding the warrants oath and affirmation, SC. const. I § 22. State V. Winbush 9 SS. 309 (1878), a warrant issued upon a statement of facts not sworn to is unconstitutional and Void. The search warrants violated this same statute but Detective Pitsinger made no attempt to cover this violation. Violating SC. code 22-5-180 No magistrate shall deputize the person swearing out a warrant

in any case to serve it. Woods V. U.S. 279 Fed. 206 (1922); State V. Prescott 125 SC 21 (1923). It is held that evidence procured under a void search warrant cannot be admitted, "to admit evidence procured from a defendant under a void search warrant would in effect compel him to become a witness against himself in violation of 5th Amendment." SC. Const. Art 1§15. Silverthorn 251 U.S. 385, 40 Sup. Ct, 182, "The State cannot afford to be the receiver of stolen Goods".

Further, SC. code 23-15-45, Service of arrest warrants on incarcerated inmates. A Sheriff is vested with State-wide Jurisdiction to serve upon an inmate incarcerated at a State correctional institution an arrest warrant issued by a magistrate of a county who has been granted, by written order to dispose of qualified cases.

The other (2) two warrants issued from SLED and were executed by D. Pitsinger of North Myrtle Beach Public safety on October 09, 2008 and Prosecutor Lively held these indictments till January 21, 2010 but the indictments were prepared in 2009 on 2009 January term Indictment papers. [Shown on face of Indictments]. These Violate Rule 3 SC. CrimP. by not requesting required extensions with Good cause shown, to delay presentment to the Grand jury [(5) five consecutive orders would have to been given to delay] No requests were

made and No orders given and delay must have been for a tactical advantage for the prosecution.

During the plea hearing the State, trial counsel, and the Judge all erroneously relied on the false warrants and void Indictments and non-applicable Ex post facto application of 17-25-45(f) as consideration for the Plea deal from the defendant. when the court was devoid of subject-matter Jurisdiction to hear and sentence defendant. And Petitioner could not have plead knowingly, intelligently with a full understanding of the Guilty Plea. Petitioner only after the Plea discovered that himself and trial counsel Bellamy did not have any of the Indictments that petitioner had plead to. This violates petitioners constitutional rights [USCA 5th Amend), State V Jones 342 SC. 248 (2000) criminal defendant is entitled to be tried only on indicted offenses. State V Baker 411 SC. 583 (2015) Violating due process, taken by surprise as to what charges defendant was to face and in addition defendant could not challenge the sufficiency of the indictments under SC. code 17-19-90. State V. Gentry 363 SC. 93 (2005) further upon request of the solicitor at the hearing the Judge molified the sentence start-date to begin in October 2008 instead of when the defendant was originally placed in custody in November 2005. The Judge sentenced petitioner to a concurrent sentence in 2010 with the one

sentenced in 2005, which created a (3) three year period of consecutive sentencing. Clark V. State 321 SC. 377 (1996) creating a plea bargin based on an unfulfillable aspect cannot stand. This modification is an error of law and an abuse of discretion. No sentencing court has the authority to deny credit for time served, Credit for time served is mandatory State V. Bogg 383 SC. 314 (2010). The State attempted to apply SC. code 24-13-40 (2) to justify this sentence calculation. In this case the "second offense" occured in 2004 and the first offense occured in 2005. This Violates Ex post facto sentencing calculations and interpretation of a "second offense". See State V. Gordon 363 SC. 143 (2003); Hodges V. Rainey 341 SC. 79 (2000). The courts interpretation of this sentence calculation under Al-shabazz V. State 338 SC. 354 (2000) and Cooper V. State 338. SC. 203 (2000) is clearly erroneous. Since the Sentencing Judge ordered this sentence modification and not SCDC, it cannot be presumed as an administrative issue and therefore can only be a collateral attack on the lawfulness of the imposed sentence. SC. code 17-27-20. And further should have been objected to by trial counsel. Yet another issue towards trial counsel Bellamy being ineffective. Blue V. Dept. of Army 914 F.2d 525 C4th cir 1990). Moore V. Bryant 348 F.3d 238 (2003).

Petitioner requested a direct appeal which was denied by the performance of Indigent defense counsel Robert. Pachtah. The principle of substantial equality that requires appointed counsel to make the same diligent and thorough evaluation of the case as a retained lawyer before concluding the appeal is frivolous [i.e. filing an Anders brief] McCoy V. Court of app. Wisconsin dist. 1, 486 US. 429 (1988) To waive a direct appeal a defendant must make a knowing and intelligent decision not to pursue the appeal. If an appellate counsel fails to be effective he is basically depriving an appellant of a direct appeal without a knowing Waiver, Austin V. State 305 SC. 453 (1991). This would toll the statute of limitations.

On Petitioners previous Post-conviction relief counsel Selna spent 18 pages of transcript at the hearing establishing the conflict between petitioner and counsel, Atley V. Ault 21 f. sup. 2d 949 (1998) when defendant raises substantial complaint before trial) regarding attorney, conflict of interest or divided loyalty. The Court must make an inquiry into factual basis for the complaint. On the record dissatisfaction, distrust, concern. (Prejudice is presumed and reversal is automatic) Crandell V. Bonnell 144 F3d 1213 (1998) Hobson's choice, defendant cannot be forced to choose between incompetent counsel and no counsel

at all, implicates fundamental fairness and a showing of prejudice is therefore not required. Counsel Selwa requested the Judges descression in being removed as counsel. State V. Jones 270 SC. 587 (1978); Richardson V. State 377 SC. 103 (2003) Applicant seeking PCR has a right to reject or discharge court-appointed counsel. Judge Russo in his discretion ordered a hybrid representation [PCR transcript pg 21 Ln 15-18, 25 pg 22 Ln 1] at the previous PCR, but abused his discretion by not placing on the record dangers of proceeding Pro se, State V. Cabrera-Pena 350 SC 512 (2002). And, applicant was entitled to a new hearing when the judge did not actively warn applicant of the dangers of appearing Pro se and failed to make a meaningful inquiry. Watts V. State 347 SC 399 (2001). Further, the judge failed to determine if applicant was competent to proceed Pro se. Farretta V. California 422 US. 806 (1975). Even if the court presumes to proceed under hybrid or Stand-by representation, it would still be considered a partial Pro se, State V. Sanders 269 SC. 215 (1977). The record must show applicant make an informed choice to proceed Pro se and permission must be granted by the Judge. This did not happen during the previous PCR and is a reversable error, due process violation, and abuse of discretion. The applicant must make a knowing and voluntary waiver of Counsel. Gardner V. State 351 SC 407 (2002).

Furthermore, the State's contension that an applicant is not entitled to "effective" assistance of PCR counsel is

contemptible. When the court determines there is a need for an evidentiary hearing pursuant to Rule 71.1(d) SCRCP and 17-27-60 "the court shall promptly appoint counsel" and Rule 407 SCACR Preamble [4] "In all professional functions a lawyer shall be competent, prompt, and diligent." If legal counsel is appointed as a right then under professional rules he must be competent which is to the senses say effective. Matter of Chapman 419 SC. 172 (2017) civil case in which effective assistance is axiomatic. by right. Rule 71.1(d) continues to state counsel shall insure that all available grounds for relief are included in the application.

Under Arica V. State 305 SC 948 (1991) acknowledging "Unique circumstances" and when the system has simply failed a defendant and when to continue the defendant's imprisonment without review would amount to a gross miscarriage of Justice. When a PCR applicant can point to a "sufficient reason" why new grounds for relief he asserts were not raised or were not raised properly and all applicants are entitled to a full and fair opportunity to present claims in one PCR. Robertson V. State 418 SC. 505 (2016), and facts presented would establish exception to statute of limitations or the prohibition against successive PCR. Ineffectiveness of PCR counsel should be upheld if any evidence of "probative value" exists in the record. Gibbs V. State 403 SC. 484 (2013). In Washington V. State 324 SC. 232 (1996) The Supreme Court held, petitioner was entitled to a new trial, given the evidence supporting the PCR courts findings of the states misconduct.

The petitioner was not procedurally barred from recieving a new trial, even though the PCR application may have been successive, given the many procedural irregularities that occured during the course of petitioners judical process that deprived him of due process as in this instant case. Further, In Tilley V. State 334 Sc. 24 (1999) applicants 4th PCR was granted by recieved evidence that he was not parole eligible. In Petitioner's case, he discovered has was not eligible for his sentence to be enhanced to Life without Parole (LWOP) Prosecution served LWOP papers on defendant which were an Ex post facto violation and used to coerce a plea by means of fraud/misrepresentation. Petitioner further discovered the Sentence start-date was in error of law and also an Ex post facto violation, the warrants oaths were voided, and the indictments were delayed by prosecution illegally for tactical advantage US. V. Sapman 87 F3d 1220 (1996). Delay being intentional to give a tactical advantage over the defendant, court should have dismissed the indictment. State V. Brazell 32 Sc. 65 (1997), 14th Amend.

Under 17-27-45(c), defendants reasonable diligence discovered evidence of material facts not previously raised or known by the defendant and not knowingly waived by him. that requires reversal and vaction of the sentence. And had he known of this evidence he would have filed a timely motion to Quash and/or Proceeded to trial.

Petitioner discovered this evidence Post-Plea and could not have raised it prior and should justly be allowed to withdraw his plea. Jamison V. State 410 SC 456 (2014). Through the petitioners own initiative and research he discovered that the prosecution relied of a statute 17-25-45(f) that was amended in 2006 to enhance a 2004 crime with a sentence from 2005, this obviously triggers an Ex Post Facto application. SC. Law act 342 (SB1267) provides that this amendment is not to be applied retroactively and the prosecution had knowledge of this misrepresentation of law.

CONCLUSION

Petitioners prays this court allows certiorari to allow proper consideration of claims or overturn the Lower courts Order of dismissal and order a full evidentiary hearing on the merits of the case.

Petitioners claims are meritorious and the Statute of limitations should be tolled or should not been able to be waived by consent or the court. The issues presented are paramount to the interest of Justice. The lack of action or ineffective actions, intentional or accidental by all of the petitioners counsel throughout

his Judical process have prejudiced him to the degree that the judical system has voided his 1st Amendment right to, redress of grevances and were out of the petitioners control. Petitioner has established exceptions to the Statute of limitations and/or prohibition against successive PCR applications and not reviewing his claims is a gross misscarrage of Justice. And that petitioner now proceeds Pro Se due to abandonment of counsel.

VERIFICATION

I, Gregory Pencille, being duly sworn upon my oath, depose and say that I have subscribed to the forgoing Explenation; that I know the contents thereof; that the matters and allegations therein set are true and correct.

Gregory Pencille 312332

November 15, 2021

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Bennettsville, SC. 29512
Petitioner, Pro Se

Sworn to and subscribed before me
15th day of November, 2021

(Notary Public of South Carolina)
My Commission Expires 2/17/24