STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari From Cherokee County
The Honorable J. Derham Cole, Circuit Court Judge
Case No. 2019-CP-11-0457

Alonzo C. Jeter, III, ... PETITIONER,

v

State of South Carolina, ... RESPONDENT.

PETITIONER'S EXPLANATION
(Pursuant to RULE 243(c), SCACR)

This matter comes before this Court as Alonzo C. Jeter, III, (Petitioner), seeks to Appeal the denial of his Application for Post-Conviction Relief (APCR). The Honorable Judge J. Derham Cole, PCR Judge, signed an order on August 30, 2021, denying and dismissing the APCR determining it to be barred as successive and untimely under the statute of limitations. The order was filed in the Cherokee County clerk of court's office on September 9, 2021.

PROCEDURAL HISTORY

THE 2004 GUILTY PLEA

On October 12, 2004, Petitioner, represented by Don Thompson, Esquire, appeared before the Cherokee County Court of General Sessions on indictments 2004-GS-11-0925 (Possession of Crack Cocaine, 1st Offense) and 2004-GS-11-0926 (Possession of Crack Cocaine, 1st Offense). A lengthy conversation and ultimate agreement and understanding between the Judge, State, Petitioner's Plea Counsel, and Petitioner that the charges would merge and be reflected as such on records as a single first offense conviction for the purposes of any recidivism-based enhancements on any future charges might face.[1]

[1] Due to the length of time since sentencing and the filing of the first PCR action challenging the interpretation of the conviction/sentencing agreement; the transcript of the 2004 plea proceeding is not available and thus not included in the record.

Pursuant to this agreement and understanding, Petitioner waived presentment and pleaded guilty before the Honorable Roger L. Couch for the possession of crack cocaine 1st Offense. Judge Couch sentenced Petitioner to a 3 years concurrent sentence, suspended upon the service of time served and 3 years probation.

See Simmons v State, 2016 WL 1589136 (2016) ("The phrase on the sentence sheet "without negotiations or recommendation" means the state and the defendant have not agreed on sentencing, and either party is free to request a favorable sentence. Medlin v State, 276 S.C. 540, 280 SE2d 648 (1981) (A judge may participate in negotiations of guilty plea.)

As such and in accordance with the agreement and understanding of all parties, the conviction was reflected as (1) conviction on Petitioner's records. (See Petitioner's criminal history reports, SLED Reports, and records of the South Carolina Department of Corrections which have reflected consistently with this agreement and understanding of the merging).

THE 2015 GUILTY PLEA [2]

In the year of 2015, Petitioner was arrested and charged with two counts of distribution of methamphetamine – 3rd Offense (2015-GS-11-0461 and -0463), two counts of distribution within proximity of a park or school (2015-GS-11-0462 and -0464), and trafficking in methamphetamine, more than 10 grams but less than 28 grams, 3rd Offense (2015-GS-11-0465).

On July 16, 2015, Petitioner, represented by Christopher D. Kennedy, Esquire, appeared before the Cherokee County Court of General Sessions to enter a guilty plea for the charges. Specifically, Petitioner would enter a negotiated guilty plea for lesser-included offenses (lesser grade of offenses) of the charges. Thus Petitioner pleaded guilty to the charges as 2 counts of distribution of methamphetamine, 2nd Offense; two counts of distribution within proximity of a park or school, and trafficking in methamphetamine, more than 10 grams but less than 28 grams, 2nd Offense.

During the guilty plea proceeding, the State sought to allow the court's record clearly reflect the charges the State relied upon to enhance Petitioner's charges to 3rd offenses. Thus, in specifying Petitioner's prior convictions, the solicitor stated that Petitioner had a 2005 conviction for possession of either methamphetamine or crack cocaine and a 2013 conviction for possession of a controlled substance. [3]

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[2] Although Petitioner seeks to attack only the 2004 convictions in this current PCR action, the 2015 convictions, the 2016 PCR action, and the 2017 PCR case provide context for this current action.

[3] The "controlled substance" was marijuana. Marijuana offenses cannot be used to enhance other drug offenses.

Petitioner did not appeal the guilty plea nor sentence.

2016 PCR ACTION – INEFFECTIVENESS OF 2015 PLEA COUNSEL

(PCR Case No. 2016-CP-11-0293) - "The 2016 PCR"

On April 28, 2016, Petitioner filed an application for post-conviction relief; 2016-CP-11-0293 ("the 2016 PCR"). In this post-conviction application, Petitioner alleged he was being held unlawfully for the following reason, inter alia; "Charges were erroneously enhanced – Prior marijuana conviction should not have been used to enhance my charges." [4]

The State filed its Return on November 15, 2016. An evidentiary hearing was convened on March 20, 2017, at the Spartanburg County Courthouse before the Honorable Robin B. Stilwell. Petitioner was present at the hearing and was represented by Steven D. Epps, Esquire. Petitioner's 2015 plea counsel, Christopher D. Kennedy, Esquire, was also present at the hearing and neither he nor the State provided any defense as to the erroneous enhancing of Petitioner's convictions based on a marijuana offense. Notably, neither did that mention that they knew of *any* other charge(s) which would have been allowed to enhance Petitioner's charges.

At the conclusion of the evidentiary hearing, Judge Stilwell decided to take under advisement Petitioner's claims as to the erroneous enhancement of his charges based on the 2013 marijuana conviction.

Motion To Reopen the 2016 PCR Record

On May 1, 2017, several weeks after the pcr hearing, the State filed a motion to reopen the pcr record explaining that in light of further investigation into Petitioner's criminal record it had come to the attention that Petitioner had an additional prior drug offense conviction that the State nor Petitioner's 2015 plea counsel knew nothing about.

The State, by way of this motion, requested that Judge Stilwell would reopen the pcr record so as to enter in the record (2) two sentencing sheets from the Cherokee County Clerk of Court's office. These sentence sheets were for Possession of Crack Cocaine, 1st Offense (2004-GS-11-0925) and Possession of Crack Cocaine, 1st Offense (2004-GS-11-0926).

Petitioner, through PCR counsel, Epps, objected to the State's motion. Over Petitioner's objection, the PCR judge held a hearing on June 30, 2017, on the State's motion. At this hearing the PCR judge ultimately granted the State's motion and did allow the State to enter the sentence sheets into the 2016 pcr record.

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[4] Petitioner requested that his 2016 PCR attorney amend his pcr application by adding this ground by way of a letter dated February 27, 2027, and filed with the clerk of court on March 1, 2017.

The State argued that because there were two sentencing sheets and two indictment numbers where the crimes occurred on two separate occasions, they had to be treated as 2 charges/convictions. Petitioner maintained that that reasoning conflicts with the 2004 plea agreement and understanding between the parties, and thus it frustrates the 2004 plea agreement.

Judge Stilwell ultimately signed an order denying post-conviction relief on July 24, 2017, based on the fact that there were 2 sentencing sheets without the agreement and understanding with regard to their merging reflected upon them.

It was then that Petitioner obtained knowledge that the only way that the State prevailed in convincing the 2016 PCR Court was due to the failure of his 2004 plea counsel to ensure that the specific terms, agreement and understanding with regard to the 2004 plea was specifically written on the 2004 sentencing sheets.

2017 PCR ACTION –THE FIRST PCR BASED ON INEFFECTIVENESS OF 2004 COUNSEL

(PCR Case No. 2017-CP-11-0486) "The 2017 PCR"

Based on the State's conduct, the 2016 pcr judge's determination, and ultimately the State's successful frustration of Petitioner's 2004 plea agreement and understanding, and the discovery that the State's success was due to Petitioner's 2004 plea counsel's failure to ensure that the specific terms, agreement and understanding with regard to the 2004 plea was specifically written on the sentencing sheets; Petitioner then filed his first PCR application based on the ineffectiveness of his 2004 plea counsel on June 19, 2017. This PCR Case 2017-CP-11-0486 ("the 2017 PCR"), was in-fact Petitioner's *first application* ever filed based on the ineffective assistance of his 2004 plea counsel.

Petitioner alleged in his pcr application that:

1. "Breach of agreement between attorney, solicitor, and myself."
    a. "My offenses [were] to merge as only a 1st offense."

Respondent made its return and motion to dismiss on December 1, 2017, requesting the case be summarily dismissed for untimeliness, failure to state a claim, and as barred by the doctrine of laches. On December 7, 2017, the Honorable J. Derham Cole, circuit court judge, issue a conditional order of dismissal. On December 8, 2017, Petitioner filed a "Memorandum In Support of PCR Hearing". Petitioner also amended his pcr application on December 18, 2017, to state a claim of ineffectiveness of his 2004 pcr counsel. Petitioner filed a timely objection to the conditional order on December 27, 2017.

Without acknowledging the amendment to the pcr application, the Honorable R. Keith Kelly issued the final order of dismissal, summarily dismissing the case for untimeliness, **failure to state a claim**, and as barred by the doctrine of laches, stating that after reviewing Petitioner's *original* 2017 application and Petitioner's objection to the conditional order of dismissal, it was adopting its reasoning from the conditional order. **The PCR Court neither addressed nor acknowledged the ineffective-assistance of counsel claim Petitioner added to his application by amendment.** It also never addressed Petitioner's motion requests for a hearing nor nor appointment of counsel.

Although Petitioner did amend his application the 2017 PCR Court still dismissed Petitioner's pcr application determining that Petitioner had failed to state a claim of ineffective assistance of counsel. This was clearly an error as ineffective assistance of counsel is in-fact a cognizable ground for post-conviction relief. *See* Gentry v Yonce, 337 SC 1, 522 SE2d 137 (1999) ("A complaint should not be dismissed for failure to state a claim merely because the court doubts the [pcr applicant] will prevail in the action".)

2017 PCR APPEAL – PETITION FOR WRIT OF CERTIORARI

Petitioner, without the PCR court notifying nor providing him counsel pursuant to Odom v State, 337 SC 256, 523 SE2d 753 (1999), thus continuing pro se, then filed a notice of appeal on August 6, 2018, and a Rule 243(c), SCACR, explanation on August 16, 2018, in the South Carolina Supreme Court. See Aice v State, 305 SC 448, 452, 409 SE2d 392, 395 (1991). (Explaining full bite includes right to counsel when seeking to appeal.") The Supreme Court dismissed the matter by written order dated January 11, 2019, for failure to show an arguable basis for asserting the lower court's determination was improper. The remittitur was then issued on January 29, 2019.

Subsequently, on June 19, 2019, petitioner filed a pro se application for post conviction relief and a memorandum in support, with the Cherokee County clerk of court. 2019-CP-11-0457 ("the 2019 PCR"). [5]

2017 PCR APPEAL – § 2241 FEDERAL HABEAS PETITION

Moving out of an abundance of caution in an attempt to ensure not to be captured up in the whirlwind of time concerns of the one (1) year statute of limitations for the filing of habeas petitions, Petitioner continuing to proceed pro se, then on July 16, 2019, filed a pro se petition for writ of habeas corpus under 28 United States Code Section 2254. Petitioner filed a motion to stay along with his habeas petition, asking that the asking that the United States District Court not decide his federal habeas petition, but rather stay the petition until Petitioner obtains a ruling in his latest pcr case, (the pcr case at bar). Petitioner sought to

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[5] The procedural history of this 2019 PCR action is stated below at a later point of this explanation.

obtain a ruling on the ineffective assistance of counsel claim with regard to the ineffectiveness of his 2004 plea counsel.

The State submitted its return and a motion for summary judgment, requesting the habeas petition be dismissed because the court lacked jurisdiction, and further asserted because the case was untimely, and the claims lacked merit as further support for its request for dismissal.

The United States Magistrate Judge, Mary Gordon Baker, issued her report and recommendation whereby Judge Baker agreed that the court lacked jurisdiction. However, Judge Baker also recommended that should the United States District Court find that jurisdiction exists, that the Petitioner's motion to stay be granted.

The United States Magistrate Judge, in expressing her reasoning that the court lacked jurisdiction, pointed to the fact that Petitioner cited two South Carolina Supreme Court opinions as support for his contention that jurisdiction exists. In looking to those cases cited by Petitioner, Brown v State, 423 SC 56, 814 SE2d 146 (2018) and McElrath v State, 276 SC 282, 277 SE2d 890 (1981), those case were then caused to be distinguished by Petitioner's case.

With regard to Petitioner's motion to stay; the court, in expressing its reasoning that the motion to stay should be granted, and that the successiveness of Petitioner's latest pcr application was certainly debatable, emphasized that Petitioner had emphasized that he had filed his latest application for post conviction relief pursuant to Case v State, 277 SC 474, 289 Se2d 413 (1982), as Petitioner had suffered the same factors as in *Case*. ("Where defendant's ***first*** application for postconviction relief was filed without assistance of legal counsel and was dismissed without hearing on basis that it lacked specificity, defendant's second application for postconvicton relief warranted hearing despite its successiveness.") *id*. Petitioner's case certainly presents one of the rare exceptions of extraordinary circumstances which would allow him to proceed with a pcr action despite it successiveness. See Woods v State, Appellate Case No. 2019-001713 (2019) (SC Supreme Court).

The United States Magistrate Judge further emphasized that Petitioner amended his 2017 pcr application to add an ineffective assistance of counsel claim and the lower court did not acknowledge his amendment nor motions for hearing and appointment of counsel. Importantly, with regard to successiveness, the lower court, nor any other court, has not ruled on the issue of ineffective assistance of 2004 counsel.

In looking toward the "unusual handling of Jeter's ineffectiveness claim" and the fact that the Magistrate Judge "has not found any PCR cases [in this nation] with a history precisely like Jeter's", the Magistrate Judge emphasized that as Petitioner has even allowed the record in the case to contain his criminal history

reports which reflect that Petitioner only has one (1) conviction reflected on his criminal history reports does support Petitioner's application to be considered timely filed pursuant to the discovery rule under the Uniform Post Conviction Relief Act. (See Jeter v Tucker, C/A No. 2:19-cv-1945-MGL-MGB (D.S.C. 2020), 2020 WL 1102231)

In short, Petitioner's federal habeas petition was ultimately dismissed solely on the basis that the court lacked jurisdiction.

2019 PCR ACTION –THE SECOND PCR BASED ON INEFFECTIVENESS OF 2004 COUNSEL

(PCR Case No. 2019-CP-11-0457) "The 2019 PCR"

Petitioner filed an Application for Post-Conviction Relief and Memorandum In Support of Application for Post-Conviction Relief with the Cherokee County Clerk of Court's Office on June 19, 2019. PCR Case No. 2019-CP-11-0457 – (*"The 2019 PCR"*)

On July 1, 2020, Petitioner filed a Motion for Appointment of Counsel. Petitioner subsequently filed a Memorandum In Support of Motion for Appointment of Counsel on August 3, 2020; and a Supplemental Memorandum In Support of Application for Post-Conviction Relief and a Motion for a Hearing on November 20, 2020.

On December 2, 2020, Respondent made it return and a motion to dismiss requesting that the APCR be dismissed for untimeliness, successiveness, barred by the doctrine of *res judicata*, and failure to establish a *prima facie* case of newly discovered evidence. Respondent submitted also on December 2, 2020, a proposed Conditional Order of Dismissal.

The proposed Conditional Order of Dismissal was signed by the Honorable J. Mark Hayes, II, on December 7, 2020, and was filed in the Cherokee County Clerk of Court's office on December 14, 2020. The Conditional Order provisionally summarily dismissed the application, but afforded Petitioner twenty (20) days to provide sufficient reasons why the order summarily dismissing the application should not be finalized.

On December 28, 2020, Petitioner filed a timely objection to the conditional order of dismissal. On this same date Petitioner also filed a document titled, "Applicant's Reply to Respondent's Return and a Return to Respondent's Motion to Dismiss".

On March 29, 2021, Petitioner filed a Supplemental Amendment to his Application for Post-Conviction Relief. On this same date Petitioner filed a Supplemental Response to Respondent's Return & to Respondent's Motion to Dismiss and the Conditional Order of Dismissal.

Respondent proposed a Final Order of Dismissal on April 5, 2021. Petitioner subsequently filed an Objection To Proposed Final Order of Dismissal on April 16, 2021; and filed a Motion for Independent Adjudication and Hearing on Motions, on August 16, 2021.

On August 30, 2021, correspondence written from Petitioner to the Cherokee County Clerk of Court asking that she place all motions that Petitioner has filed in the PCR case on the court's motions calendar was filed.[6] Petitioner filed a Motion For Written Order of the Chief Judge for Administrative Purposes on September 7, 2021. The signed Final Order was filed with the Cherokee County Clerk of Court's office on September 9, 2021.

Petitioner subsequently filed a RULE 59(e), SCRCP, Motion to Alter or Amend Judgment and Memorandum In Support and for a Hearing on the Motion on September 24, 2021, and a Supplemental RULE 59(e), SCRCP, Motion to Alter or Amend on Judgment on October 1, 2021.[7]

Respondent filed a Return to Petitioner's Motion To Alter or Amend Judgment on October 13, 2021. Petitioner filed a Reply to Respondent's Return on October 29, 2021.

Petitioner filed a Motion for Appointment of Counsel on January 3, 2022; and on this same date filed a Motion for Leave and Assistance In Initiating Disposition, Interrogatories, and Subpoena (Discovery), and a Notice and Motion for Discovery.

On January 31, 2022, Petitioner filed a (1) Request to Robert M. Dudek of the South Carolina Commission on Indigent Defense for Appointment of Counsel, (2) Motion for Appointment of Designated Counsel And Written Order of Judge, and (3) an Additional Supplemental RULE 59(e), SCRCP Motion/Additional Objections.[8]

On February 22, 2022, Petitioner filed a Designation of Priority Matters & Judicial Notice of Priority Matters; and a Notice of Subpoena on March 17, 2022.

On March 31, 2022, a hearing on Petitioner's RULE 59(e), SCRCP motions was convened before the Honorable J. Derham Cole at the Spartanburg County Courthouse. Petitioner wrote correspondence to the Cherokee County Clerk of Court, Brandy W. McBee on April 11, 2022, inquiring as to know who scheduled the hearing on the RULE 59(e), SCRCP motions, and informing the clerk that her office

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[6] Coincidently, the Final Order of Dismissal was signed by the Honorable J. Derham Cole on this same date.

[7] Petitioner filed a motion seeking to recuse Judge Cole on this same date.

[8] Petitioner filed a motion to strike the previously filed recusal motion on this same date.

failed to provide notice of the hearing to Petitioner.

Petitioner wrote correspondence to Cherokee County Clerk of Court, Brandy W. McBee on April 18, 2022, asking that the clerk would issue a subpoena for documents and things on the South Carolina Department of Corrections.

On April 27, 2022, the Honorable J. Derham Cole signed a FORM 4 Order denying Petitioner's RULE 59(e), SCRCP motion. This FORM 4 Order was then filed and entered by the Cherokee County Clerk of Court's office on April 29, 2022.

Subsequently, on May 13, 2022, Petitioner filed a Motion to Reopen the PCR Record and Leave to Complete Discovery, and a Motion to Reconsider/Objection To the April 27, 2022, RULE 59(e), SCRCP Ruling and Procedure. [9]

Petitioner has also filed a Motion for Judicial Notice of Partial Production Responsive To Subpoena and Expectancy for Additional; and South Carolina Department of Corrections' Partial Production Responsive To Subpoena.

This Appeal follows.

THE RULE 243(C), SCACR, MANDATE

As the application for post-conviction was determined by the lower court to be barred as successive and untimely, Petitioner is required by Rule 243(c), SCACR, to provide an explanation as to why the lower court's determination was improper.

Specifically, RULE 243(c), SCACR provides:

> "If the lower court has determined that the post-conviction relief action is barred as successive or being untimely under the statute of limitations, the petitioner must, at the time the notice of appeal is filed, provide an explanation as to why the determination was improper."

Petitioner therefore and hereby submits an explanation as required and provides below a sufficient explanation as to why the post-conviction relief (PCR) Court's determination is improper.

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[9] No rulings have been made on *any* motions or filings submitted after the filing of the FORM 4 Order; thus many of Petitioner's filings remain pending as of the date of composing this Explanation.

ABUSE OF DISCRETION STANDARD

This Court "[is] constrained by [its] standard of review." Putnam v State, 417 SC 252, 789 SE2d 594 (2016).("The standard of review in post-conviction relief (PCR) cases depends on the specific issue before the reviewing court...") Smalls v State, 422 SC 174, 810 SE2d 836 (2018).

("[This} Court applies an abuse of discretion standard on review of a post-conviction relief (PCR) court's resolution of procedural questions arising under the Post-Conviction Procedure Act or the Rules of Civil Procedure.") Mangal v State, 421 SC 85, 805 SE2d 568 (2017). ("An abuse of discretion occurs in an evidentiary ruling when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.") State v Gibbs, 431 SC 313, 847 SE2d 495 (2020)

Black v Lexington School Dist. No. 2, 327 SC 55, 488 SE2d 327 (1997) (Applying an abuse of discretion standard to trial court's rulings pursuant to Rule 56, SCRCP.)

("It is an equal abuse of discretion to refuse to exercise discretionary authority when it warranted as it is to exercise the discretion improperly.") State v Smith, 276 SC 494, 498, 280 SE2d 200, 202 (1981)

Smalls v State, 422 SC 174, 810 SE2d 836 (2018) ("The Supreme Court [reviews] questions of law de novo, with no deference to the pcr court.")

Earley v State, 418 SC 255, 792 SE2d 226 (2016) ("Where there is no support for the postconviction court's conclusion, reversal thereof is proper.")

Mangal v State, 421 SC 85, 99,100, 805 SE2d 568, 575, 576 (2017) ("[T]here are situations where the interests of justice require PCR courts to be flexible with procedural requirements before PC applicants suffer procedural default on substantial claims. Such flexibility is consistent with the purpose and spirit of our Rules of Civil Procedure. The considerations should guide PCR courts when struggling to balance procedural requirements against the importance of the issues at stake in PCR proceedings. We encourage trial courts in PCR cases to use the discretion we grant them on procedural matters to find reasonable ways – within the flexibility of our Rules – to reach the merits of substantial issues.") (footnote omitted).

THE EXPLANATION –THE LOWER COURT'S IMPROPER DETERMINATIONS

Prior to the State's act of frustrating Petitioner's 2004 plea agreement, there had previously been no reason for Petitioner to file an application for pcr based on 2004 plea counsel as all records that were ever presented to Petitioner at all times prior were always reflective of the plea agreement and understanding as they all

reflected Petitioner as having one (1) conviction on his record. These records were: City & County Criminal History Reports, State Law Enforcement Division (SLED) Criminal History Background Reports / "RAP" Sheets, and records of the South Carolina Department of Corrections, etc.

Statute of Limitations

Petitioner was sentenced on October 12, 2004, and did not file a direct appeal. The application for post-conviction relief was therefore due to be filed within one year of the plea, pursuant to the Uniform Post-Conviction Procedure Act.

Specifically, the act requires as follows:

> "An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later."

S.C. Code Ann. 17-27-45(A)

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v State, 321 SC 468, 469 SE2d 606 (1996).

However, the Uniform Post-Conviction Procedure Act provides that the "one year" time limit with regard to the statute of limits does not apply or actually it restarts if the pcr applicant files the application for post-conviction relief based on newly discovered evidence.

The Discovery Rule

Petitioner filed his application for post-conviction relief under the discovery rule which exists within the Act. This rule specifically states as follows:

> "If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence."

S. C. Code Ann. 17-27-45(C)

Applicability of the Discovery Rule

On May 1, 2017, The State filed its motion on May 1, 2017, seeking to reopen the record in the 2016 PCR case. Within this motion, the State did mention and have attached two (2) sentencing sheets and did specify its intent to use these sentencing sheets in seeking to support its position reason to deny Petitioner's PCR. Based on this, on June 19, 2017, Petitioner filed an application for post-conviction relief based on ineffective of assistance of 2004 plea counsel; 2017-CP-11-0486 ("the 2017 PCR").

The Discovery Rule specifically mandates that the application for post-conviction relief, "must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence." Petitioner filed his application well within this one (1) year mandate.

There are several irrefutable facts existing which would prove that the discovery rule applies to Petitioner's case:

(1) There was only one single conviction on Petitioner's criminal history reports. (See the Record in this case); (2) The State, when citing Petitioner's prior criminal history at his 2015 guilty plea proceeding, realized that there was only one prior conviction on Petitioner's criminal record for "crack or meth". (See 2015 plea transcript). (3) The State, within its motion, emphasized, "it came to Respondent's attention that [Petitioner] had additional prior convictions that were not known about". (See Motion to Reopen Record). (4) When questioning Petitioner's 2015 plea counsel at Petitioner's 2016 PCR hearing, the 2015 plea counsel could offer no reason for not challenging the erroneous enhancement of Petitioner's 2015 plea charges, and did not mention that Petitioner had any more than one prior conviction, in 2015 plea counsel's defense regarding counsel's ineffectiveness; and (5) As of even the present time that Petitioner drafts this Explanation, Notice of Appeal and Petition, there remains only one prior conviction reflected on Petitioner's records.

Petitioner would also point to Creighton v State, No. 2012-213667, (S.C. Ct. App. 2016), 2016 WL 3511866; as Creighton both supports and demonstrates similar circumstances to Petitioner's.

Creighton's PCR application , although filed four years after she pled guilty, was timely filed pursuant to the discovery rule, S.C. Code Ann. 17-27-45(C). Creighton did not learn plea counsel's advice was erroneous until four years when the adverse consequences of her plea counsel's advice came to light. Creighton argued it was a "reasonable exercise of due diligence" to rely on plea counsel's advice until she was informed the advice was erroneous. The South Carolina Court of Appeals agreed.

Petitioner emphasizes that the circumstances in this case is identical to those in Creighton. It was a "reasonable exercise of due diligence" to rely on Petitioner's 2004 plea counsel's advice and the terms of the plea agreement until Petitioner discovered in 2017 that the advice was erroneous. The South Carolina Court of Appeals found that, "Creighton exercised reasonable diligence in relying on plea counsel's advice – even though the advice was erroneous – because Creighton was not required to second-guess plea counsel's advice absent facts that would put her on notice that the advice was erroneous." id.

The Creighton Court emphasized that it "found no South Carolina cases discussing or defining "reasonable diligence" as it relates to section 17-27-45((c)." id. Creighton and the case sub judice does in-fact present the exact circumstance where reasonable diligence is reasonably applied as a defendant is not required to second-guess plea counsel's advice absent facts that would put the defendant on notice that the advice was erroneous. See also True v Monteith, 327 SC 116, 489 SE2d 615 (1997) ("[T]he client should be able to rely on the attorney's advice and should be able to follow this advice without fear the attorney is not acting in the client's best interest.")

Petitioner would also point to the case of McElrath v State 276 SC 282, 277 SE2d 890 (1981). McElrath was found guilty in 1959, of escape, robbery and larceny, and was barred by laches from seeking post-conviction relief on the ground that he was indigent and not represented by counsel, where there was an absence of some explanation or just occasion for delay in seeking relief. The McElrath case has been distinguished by Petitioner's case Jeter v Tucker, C/A No. 2:19-cv-1945-MGL-MGB (D.S.C. 2020), 2020 WL 1102231.

There was not any way that Petitioner would have known before the time of discovery that the State would in the future claim that it doesn't understand that there was an agreement to consolidate or merge the charges and one (1) single offense for any future enhancement purposes. There was no sign or reason that the Petitioner would need to exercise any *reasonable diligence* as no issue existed in this regard because all of Petitioner's records reflected the plea understanding and agreement.

The records/exhibits/appendix in this case clearly contains all proof that the Petitioner's records reflected one (1) conviction. Petitioner rightfully filed the application under the discovery rule within the Uniform Post-Conviction Procedure Act (the Act). S. C. Code Ann 17-2-10 to -106.

SUCCESSIVENESS

Odom v State, 337 SC 256, 523 SE2d 753 (1999) ("A successive postconviction relief application is one that raises grounds not raised in prior application, raises grounds previously heard and determined, or raises grounds waived in prior proceedings.")

Odom v State, 337 SC 256, 523 SE2d 753 (1999) ("Successive postconviction relief applications are permitted in rare procedural circumstances.")

Petitioner, pro se, filed his ***first*** application for post-conviction relief, *2017 PCR, (PCR Case No. 2017-CP-11-0486),* in which he sought to raise the claim of the ineffective assistance of his 2004 plea counsel, on June 19, 2017.

Respondent made its return and motion to dismiss on December 1, 2017, requesting the case be summarily dismissed for untimeliness, failure to state a claim, and as barred by the doctrine of *laches*. On December 7, 2017, the Honorable J. Derham Cole, circuit court judge, issued the conditional order of dismissal.

Petitioner filed an objection and also an amendment to his pcr application stating a cognizable claim of ineffective assistance of 2004 pcr counsel. **Without acknowledging the amendment to the pcr application,** Petitioner's application was summarily dismissed for **failure to state a claim**, among other things.

Petitioner had also motioned for an appointment of counsel and a hearing. However, the PCR Court also never addressed Petitioner's motion requests for a hearing nor appointment of counsel.

Although South Carolina's state courts strongly disfavor successive applications a prisoner may nevertheless file one in certain rare circumstances." See e.g., Robertson v State, 418 SC 505, 795 SE2d 29, 33 (2016).

The Supreme Court of South Carolina has entertained successive PCR applications, although these cases involve very rare procedural circumstances. See, e.g., Case v State, 277 SC 474, 289 SE2d 413, 413-14 (1982) (court permitted a successive application where the applicant's first PCR application was filed without the benefit of counsel and was dismissed without a hearing); Carter v State, 293 SC 528, 362 SE2d 20, 20-21 (1987) (court permitted a successive application where the applicant raised the issue of ineffective assistance of trial counsel in his successive application and trial counsel represented the applicant during his first PCR application); Washington v State, 324 SC 232, 478 SE2d 833, 834-35 (1996) (permitted a successive application where the applicant, due to "so many procedural irregularities," did not have direct review of a claim he brought in his first and second PCR applications).

The "unique' combination of facts which exists in Petitioner's case does warrant allowing a successive application. Petitioner has made it clear that he does also pursue his current pcr action in accordance with Case v State, 277 SC 474, 289 SE2d 413, 413-14 (1982) (court permitted a successive application where the applicant's first PCR application was filed without the benefit of counsel and was dismissed without a hearing). That happened to Petitioner in his 2017 pcr action.

Williams v Ozmint, 380 SC 473, 671 SE2d 600 (2008) ("Although successive postconviction relief applications are disfavored, they are not prohibited.")

See South Carolina Jurisprudence, 15 S.C. Jur. Appeal and Error §88, stating:

> "The court explained in Aice that the absence of counsel at the first PCR hearing was one of the "unique" combination of facts in Case that justified a successive post-conviction relief petition. Thus it is unclear whether the absence of counsel at the first hearing, standing alone, will justify a successive petition. The court emphasized that the absence of counsel made it highly doubtful whether the petitioner "could have raised" the appropriate issues in the first hearing. This "doubt" appears justified given that the post-conviction relief trial judge in Case dismissed the first pro se PCR petition without a hearing because the petition lacked specificity. The pro se petitioner in Case did not appeal this summary dismissal of his first PCR petition. It is unclear, but the absence of counsel, lack of specificity, summary dismissal, and absence of appeal may be the "unique combination of facts" referred to in Case and Aice."

15 S.C. Jur. Appeal and Error §88

Aice v State, 305 SC 448, 409 SE2d 392 (1991) ("Among the "facts" in *Case* was that Case had no attorney in his first PCR application. Hence, it is highly doubtbul whether, in point of fact, Case "could have" raised the appropriate arguments."

Case v State, 277 SC 474, 289 SE2d 413 (1982) ("After [the Supreme Court's] reviewing the entire record and considering the unique combination of facts in the case, [it held that Case's] application warrants a hearing despite its successiveness."

If Petitioner's current application would be determined to be successive, it would however not be determined to be impermissibly successive. The lower court did err in determining Petitioner's application barred as successive. The present case is one of those rare exceptions allowing for successive applications.

Petitioner would also show that the State wisely did not attempt to pursue a claim of laches in Petitioner's current per attempt. See Whitehead v State, 352 SC 215, 574 SE2d 200 (2002) ("Laches is an equitable doctrine which arises upon the failure to assert a known right."). The Respondent did use extreme wisdom and caution in deciding not to argue laches in this case, as if it did pursue such a defense, this would have certainly opened the door and dovetailed to show the State's and PCR court's unreasonableness in its determinations. It did not want to risk bringing attention to Petitioner's substantial evidence which he has submitted

into the record of this case. See also, Brazell v State, 294 SE2d 343 (1982) (Time does not determine laches.); Lanier v Lanier, 612 SE2d 456 (2005)

Laches, used as a defense would be repugnant to the Discovery Rule under the PCR Act as the discovery rule would not serve any purpose and would rather be surplusage if laches would prevail as a defense to the discovery. As it would be unconscienciable to do so, the discovery rule rightfully does not include a specific time line for the discovery. Rather, in wisdom of the South Carolina Legislature, the timeliness of discovery is determined by (1) when the facts could have been ascertained by the exercise of reasonable diligence; and (2) within one year after the date of actual discovery of the facts by applicant. S.C. Code Ann. 17-27-45(c). Petitioner clearly meets both of these prongs . Also, Creighton v State, 2016 WL 3511866, clearly explains with regard to *reasonable diligence*, that Petitioner was reasonable in his actions.

PCR COURT'S FAILURE TO APPLY THE PROPER STANDARD

The Scintilla Standard

Council v Catoe, 359 SC 120, 597 SE2d 782 (2004) ("[An] [a]ction for post-conviction relief (PCR) is a civil action."). Also, "[the] burden of proof [in post conviction relief actions] is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v State, 351 SC 385, 570 SE2d 172 (2002) (citing Rule71.1(e), SCRCP).

This burden of proof applies when a hearing is held with regard to the "merits" of an applicant's claim. However, when a party makes a motion requesting that the case be summarily dismissed a change arises with regard to the burden as this burden of proof (preponderance of evidence standard) is set aside. The burden is then shifted to the party whom is seeking that the case be summarily dismissed. This moving party has the burden to show that there is no genuine issue of material fact. Celotex Corp. v Catrett, 477 US 317, 106 Sct 2548 (1986) ("The party seeking summary judgment bears the burden of initially coming forward and demonstrating an absence of a genuine issue of material fact.")

Spriggs v Diamond Auto Glass, 242 F3d 179, 183 (4th Cir. 2001) ("A fact is deemed "material" if it "might affect the outcome of the suit under the governing law."); Anderson v Liberty Lobby, Inc., 477 U.S. 242, 257 (1986) ("An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant.")

To defeat the moving party's assertion, the non-moving party must provide a scintilla of evidence. This is referred to the *'scintilla of evidence'* standard. The question as to whether or not summary judgment should be granted is determined by whether the Petitioner submitted a scintilla of evidence. Lemmons v Macedonia Water Works, Inc., 431 SC 186, 847 SE2d 471 (2020) ("[A] scintilla of evidence is any material evidence which, taken as true, would tend to establish the issue in the mind of a reasonable juror.")

Turner v Milliman, 392 SC 116, 122, 708 SE2d 766, 769 (2011) ("When the burden of proof is by a preponderance of the evidence, a non-moving party need only present a scintilla of evidence to withstand a motion for summary judgment."). The evidence that the non-moving party must present is very little. Bethea v Floyd, 177 SC 521, 181 SE 721, 724 (1935) (defining 'scintilla' as "the smallest trace" of evidence.)

Knibbs v Mamphard, 30 F.4th 200 (4th Cir. 2022) ("On a defendant's motion for summary judgment, the court cannot credit defendant's evidence, weigh the evidence, or resolve factual disputes in defendant's favor.") Knibbs v Mamphard, 30 F.4th 200 (4th Cir. 2022) ("On a motion for summary judgment, the court avoids simply accepting the movant's self-serving statements, and considers all contradictory evidence.")

Royster Co. v Eastern Distribution, Inc., 301 SC 18, 389 SE2d 863 (1990) ("Because a court must examine both the facts and the law when determining whether to grant summary judgment... such an examination constitutes a trial.")

Page 5 of the Final Order of Dismissal provides enlightenment that the 2019 PCR court applied the wrong standard as the order states, "the application shall be summarily dismissed" and then states, "Before this Court will hold an evidentiary hearing, Applicant must make a prima facie showing that he is entitled to relief." (Order of Dismissal quoting *Welch v MacDougall*, 246 SC 258, 143 SE2d 455 (1965) as support of its determination.)

Also on Page 5 of the Final Order of Dismissal, the order clearly, "reasserts its finding in the conditional order of dismissal", which that order neither addressed the scintilla standard but rather also applied the wrong standard.

Hancock v Mid-South Mgmt.Co., 381 SC 326, 330, 673 SE2d 801, 803 (2009) ("Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts.")

Brockbank v Best Capital Corp., 341 SC 372, 378, 534 SE2d 688, 692 (2000) ("Additionally, because summary judgment is a drastic remedy, it should be

cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. Madison v Babcock Center, Inc., 371 SC 123, 134, 638 SE2d 650, 655 (2006)

The Respondent and PCR Court seeks to bypass this scintilla of evidence standard, simply by asserting that the facts and evidence isn't "genuine" or "material". (See FORM 4 order dismissing the Rule 59(e), SCRCP motion to alter/amend judgment.) However, S.C. Prop. & Cas.Guar.Ass'n v Yensen, 345 SC 512, 518, 548 SE2d 880, 883 (2001) ("At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact.")

The 2019 PCR court's Final Order Dismissal as well as other orders are vaguely written as was drafted and proposed by the Office of the Attorney General. The vague orders were then ultimately accepted and signed, without any editing but rather verbatim, by the common pleas judge. The orders strategically failed to admit that Petitioner did amend his 2017 pcr application, that no other charges were on any of Petitioner's criminal history reports, and that Petitioner had submitted scintilla and more than scintilla of evidence in the record to substantiate his claims. Robinson v State, 422 SC 78, 810 SE2d 32 (2018) (The Supreme Court of South Carolina "finds troubling an order of the PCR court which contains findings which are flatly contradicted by the record."). Rather, the orders drafted by the State which were then ultimately blindly signed by the PCR Courts; would speak as broadly and ambiguously as it could in its attempt to confuse the record.

Rule 59(e), SCRCP, Motion to Alter/Amend Judgment: Petitioner filed a motion pursuant to Rule 59(e), SCRCP, to "alter or amend and for reconsideration" of the judgment entered by the Court on September 24, 2021. On October 1, 2021, Petitioner filed a "Supplemental Motion To Alter or Amend Judgment".

The State filed its response to the motions on October 18, 2021. Petitioner then filed a "Reply To Respondent's Return to Applicant's Motion To Alter or Amend Judgment" on October 29, 2021, and filed an "Additional Supplemental Rule 59(E), SCRCP, Motion/Additional Objections" on January 31, 2022. An "unfair surprise hearing" (hearing with notice thereof), was held on the Petitioner's Rule 59(e), SCRCP, motions on March 31, 2022.

The 2019 PCR Court also further in attempt to dodge the appointment of counsel at a hearing, held this "surprise" hearing on the Rule 59(e), SCRCP, motion and attempted to conflate this hearing as a hearing on the procedural questions. The PCR Court asked Petitioner only one (1) single question at this hearing and refused to answer any of Petitioner's questions or reveal to Petitioner any doubts it had with regard to Petitioner's application and claims. See Gary v State, 347 SC 627, 557 SE2d 662 (2001). ("In the interest of fairness, counsel should be appointed to an indigent postconvicction relief applicant when the state moves for dismissal on limitations grounds and the applicant raises an issue of material fact regarding the

applicability of the statute of limitations.") The Petitioner did raise "an issue of material fact regarding the applicability of the statute of limitations", as he did show his applicability to the discovery rule under the PCR Act. As the State moved for summary dismissal of Petitioner's pcr application, Petitioner should have been appointed counsel of representation for and for preparation of this hearing.

A FORM 4 order was signed and issued on April 27, 2022, by the Honorable J. Derham Cole, whereby Judge Cole made his ruling on the Rule 59(e), SCRCP, motions. The FORM 4 order states, "[Petitioner] contends in his motion that the Court: (1) failed to address the scintilla of evidence standard; (2) denied the [Petitioner] fundamental rights to due process; (3) violated Rules 71.1(f) and 77(d), SCRCP; (4) violated separation of powers doctrine, the equal protection clause, and procedural and substantive due process; (5) failed to make findings of fact and conclusions of law; (6) failed to appoint counsel for [Petitioner]; and (7) failed to grant the [Petitioner] an evidentiary hearing on the application.

Genuine Issues of Material Fact: The Honorable J. Derham Cole's FORM 4 order denying Petitioner's Rule 59(e), SCRCP motion, stated that it found no reason to alter or amend its previous ruling in the matter. However, the order also stated, "To the extent that any further clarification is needed this Court finds that based upon the record in this case, memoranda, and submissions, there is not "genuine" issue as to material fact and the application should be dismissed as a matter of law."

The PCR court's orders strategically declines to be specific as Petitioner has been in clarifying which case/case numbers he is referencing as he speaks concerning a case. The PCR court has remained vague and broad with its strokes of language using terms such as "in his prior action' to refer to when Petitioner did raise or could have raised a matter.

In the PCR Court's Conditional and Final Orders of dismissal and denial of Petitioner's Rule 59(e), SCRCP, motion; those rulings simply stated what some of Petitioner's claims were, but did not rule on the issues by way of sufficient facts, findings, and conclusions of law with regard to the issues,; which thereby would have given Petitioner and this Court a clear explanation of the reasons for its erroneous determinations. The orders also failed to address the existence of Petitioner's pleadings and exhibits which were substantially supportive of his claims. The evidence is certainly not lacking in this case, it is simply ignored with no reasonable basis as it is uncontroverted.

Within United States Magistrate Judge, Mary Gordon Baker's order in Petitioner's case Jeter v Tucker, C/A No. 2:19-cv-1945-MGL-MGB (D.S.C. 2020), 2020 WL 1102231; which relates to the same matters in the case at bar; Judge Baker speaks in regard to the State's omissions as she states, "The [State's] omission of these documents is bizarre." Further, on page 3 of 3 of her order, she

gestures, "[T]he [State's] omissions... are disconcerting, to say the least..." (See Petitioner's Exhibit M).

The PCR Courts seems to concentrate on the question of whether or not the conviction should be considered one (1) single offense or not. As the PCR Courts have considered that question, the courts have erroneously put the cart before the horse as they are first tasked to rather consider whether the circumstance surrounding the offense are newly discovered. The PCR court rather should have held a full, fair, and complete hearing with regard to the procedural questions. See e.g., McCoy v State, 401 SC 363, 737 Se2d 623 (2013) (PCR Court provided a hearing on the procedural questions; this would then determine whether or not a merits hearing would subsequently be convened.)

Madison v American Home Products Corp., 358 SC 449, 595 SE2d 493 (2004) ("As a general rule, important questions of novel impression should not be decided on a motion to dismiss.")

Hiers by Hiers v Mullens, 310 SC 63, 425 SE2d 57 (1992) ("matters of credibility should not be determined at the summary judgment stage".)

Graham v Welch, Roberts & Amburn, LLP, 404 SC 235, 239-40, 743 SE2d 860, 863 (2013) ("[W]hen conflicting evidence exists on the issue of when a [applicant] know or should have known that a cause of action existed, the issue becomes one for a jury to decide.")

The 2019 PCR court erred in failing to apply the scintilla standard to Petitioner's case. The PCR court attempts to dodge this standard, simply by not mentioning it nor considering any of Petitioner's facts and evidence. See Burr v Jackson, 19 F.4th 395 (4th Cir. 2021) (Emphasizing that a party nor this Court cannot dodge the proper standard of review by simply failing to argue it or address it.)

VIOLATION OF DUE PROCESS AND EQUAL PROTECTION OF LAWS

The PCR Court failed to provide Petitioner even a minimum measure of procedural protection. The PCR Court abused its discretion and did also violate Petitioner's rights to due process and equal protection as guaranteed by the United States and South Carolina Constitution. Davila v Davis, 137 S.ct 2058, 198 L.Ed.2d 603 (2017) "[The initial stages of pcr relief procedure and proceedings] is the main event at which a defendant's rights are to be determined, and not simply a tryout on the road to appellate review."

Dangerfield v State, 376 SC 176, 179, 656 SE2d 352, 353-54 (2008) ("The procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, the opportunity to be heard

in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review.") (internal quotations omitted) (emphasis added)

HEARING ON MOTIONS

Petitioner requested a hearing on his filed motions on several occasions. On one of these occasions Petitioner requested a hearing on the motions and other matters of the case such as discovery scheduling, etc. by way of a "Motion For Independent Adjudication And Hearing On Motions", which he filed on August 16, 2021.

In this filing Petitioner made his request for motions hearing pursuant to Rule 12(d), SCRCP and Rule 7(b)(1), SCRCP, and Rule 71.1(d), SCRCP, and Rule Rule 56(c), SCRCP, and Rule 56(d), SCRCP.

Rule 12(d), SCRCP, states that, "The defenses... ***shall be heard*** *and* ***determined*** before trial... unless the Court orders that the ***hearing*** *and* ***determination*** thereof be deferred until the trial."

Rule 7(b)(1), SCRCP, provides for a "*hearing of the motion*".

Rule 71.1(d), SCRCP, provides for a **hearing** as both questions of ***law*** *or* ***fact*** are presented.

Rule 56(c), SCRCP, provides there should be, "*time fixed for the hearing*".

Rule 56(d), SCRCP, provides that there will be action taken by, "the court *at the* ***hearing of the motion***".

Halsey v Simmons, 432 SC 54, 849 SE2d 578 (2020) ("The Due Process Clause requires all parties be given an opportunity to be heard in a meaningful way.") Wilson v State, 348 SC 215, 559 SE2d 581 (2002) ("It is well settled that a defendant has the procedural right to one fair bite at the apple.") Jones v Polk, 401 F3d 257 (2005) ("[A]n evidentiary hearing is an instrument to test the truth of facts already alleged..."). The PCR Court failed to assume the veracity of the pleading and exhibits that Petitioner submitted to the court. The PCR Court erred in failing to hold an evidentiary hearing as Petitioner did allege facts which, if true, would entitle him to relief. Rule 71.1(d), SCRCP, ("If... the application presents ***questions of law or fact*** which will require a hearing...) This case certainly presented genuine questions of law and of fact and thus did require procedural and merits hearings to be held, with regard to the issues in this case.

Seeking appointment of counsel, Petitioner filed a "Motion For Written Order Of The Chief Judge For Administrative Purposes" on October 7, 2021.

Seeking obtain a ruling on all of the motions he'd filed, Petitioner filed a document titled, "Designation of Priority Matters and Judicial Notice of Priority Matter" on February 22, 2022; On August 16, 2021, he filed a "Motion For Independent Adjudication and Hearing on Motions"; On April 16, 2021, Petitioner filed a request to the Cherokee County Clerk of Court asking that all motions which Petitioner has filed be placed on the motions calendar.

Petitioner received correspondence dated January 11, 2022, from the York County Clerk of Court's Office stating, "Motions received in a post-conviction relief case from a pro-se person are sent to the Office of the Attorney General and according to the type of motion ***may*** *be forwarded to the Judge for his review.*" (emphasis added); and "Motions are *scheduled by the Office of the Attorney General* on PCR terms of court." (emphasis added). (See Petitioner's exhibits Exhibit – AAA(a)). The Office of Attorney General should not be allowed to serve as a blockade preventing a pcr applicant from getting his motions ruled on by the judge.

City of Rock Hill v Thompson, 349 SC 197, 563 SE2d 101 (2002) ("[This] Court could direct [the] judge to rule on a pending motion because the act of ruling is ministerial in nature.")

Petitioner has not received a fair bite at the apple because Petitioner was essentially prevented through no fault of his own from fairly presenting his claims and/or having his claims adjudicated in his initial pcr application. See Case v State, 277 SC 474, 289 SE2d 413 (1982); Carter v State, 293 SC 528, 362 SE2d 20 (1987); Washington v State, 324 SC 232, 478 SE2d 833 (1996).

See State v Tessnear, 257 SC 290, 185 SE2d 611 (1971) (South Carolina Supreme Court explaining, "A determination of whether the motions... should have been granted requires a review of the material facts upon which the lower court acted.)

Also, the PCR Court seems to conflate the concepts of a hearing on the procedural questions and a hearing on the merits of the case. These are two separate concepts. See McCoy v State, 401 SC 363, 737 SE2d 623 (2013); Gamble v State, 298 SC 176, 379 SE2d 118 (1989); Coats v State, 352 SC 500, 575 SE2d 557 (2003); Pelzer v State, 378 SC 516, 662 SE2d 618 (2008); Sharper v State, 279 SC 264; 305 SE2d 247 (1983); all of these cases with regard to a hearing on the procedural questions.

Also see, Roger v State, 261 SC 288, 199 SE2d 761 (1973); Chambers v State, 262 SC 202, 203 SE2d 426 (1974); Coardes v State, 262 SC 493, 206 SE2d 264 (1974); Delaney v State, 269 SC 555, 238 SE2d 679 (1977); all of these cases with regard to a hearing on the procedural questions.

See also, arguedo, Washington v State, 478 SE2d 833 (1996).

INABILITY TO COMPLETE DISCOVERY

Petitioner filed a "Motion For Leave And Assistance In Initiating Disposition, Interrogatories, And Subpoena Production of Documents (Discovery)", on January 3, 2022. He also filed motions on February 22, 2022 and seeking to bring to the court's attention his difficulties and hardships with regard to his attempts to seek to provide the court substantial proofs as a person who is (1) indigent (2) a prisoner confined within the South Carolina Department of Corrections, (3) pro se, and (4) difficulties such as Covid and lack of law library access and other restrictions within the South Carolina Department of Corrections.

The institutional law library had been inaccessible from February of 2019 to October of 2020. Then, *see* Howard v Stephen, C/A No. 1:21-3356-RMG-SVH (D.S.C. 2021) , 2021 WL 6841642 ("According to news reports, the first inmate from the South Carolina Department of Corrections tested positive for Covid on April 19, 2020. https://www.wistv.com/2020/04/20/first-scdc-inmate-tests-positive-covid-") These circumstances did cause many barriers; albeit the record clearly reveals that Petitioner has remained diligent in his pursuits with regard to his case(s).

Rule 56(e), SCRCP, requires a party opposing summary judgment to come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial.

Rule 56(f), SCRCP, applies when it appears "from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition."

Baughman v American Tel. and Tel. Co., 306 SC 101, 410 SE2d 537 (1991) ("Summary judgment may not be granted until opposing parties have had full and fair opportunity to complete discovery.")

On March 17, 2022, Petitioner filed a Notice of Subpoena. On April 1, 2022, Petitioner filed another Notice of Subpoena. On April 11, 2022, Petitioner filed a document titled, "South Carolina Department of Corrections' Production Of Documents And Things Responsive To Applicant's April 1, 2022 Subpoena"; and did attach the production.

On March 31, 2022, Petitioner appeared before the Honorable J. Derham Cole in an unfair surprise hearing on his Rule 59(e), SCRCP, motion. Petitioner did inform Judge Cole at that time that he was experiencing difficulties obtaining discovery to substantiate his claims.

Petitioner has been diligent in his attempt to obtain affidavits, records, and other proofs for entering into the record for exhibit evidence in his case. Petitioner had expressed to the 2019 PCR Court on several occasions within his filings that he was experiencing troubles as a pro se, indigent, incarcerated prisoner, in his attempts to obtain this material.

On May 13, 2022, Petitioner filed a motion indicating that it was a Priority Matter, and titled, "Motion To Reopen The PCR Record And Leave To Complete Discovery", whereby he sought leave of the Court to pursue discovery and ensure it be entered in the record and considered as the Court adjudicated the case.

On this same date Petitioner filed another Rule 59(e), SCRCP, motion titled, "Applicant's Motion To Reconsider / Objection To April 27, 2022 Rule 59(E), Ruling and Procedure". In this motion Petitioner emphasized that at the Rule 59(e), SCRCP, hearing which was held on March 31, 2022, Petitioner was: (1) Unable to digest and comprehend the composition of the PCR record which was provided at that hearing; (2) Petitioner experienced unfairness as the Judge Cole did not seek to clear and misconceptions with regard to the case, but rather the judge and State sat quiet leaving Petitioner at a loss of what questions the Court needed clarity on; (3) Due to unfair surprise, resulting from lack of notice of the scheduled hearing, Petitioner was not prepared; (4) the Court failed to provide leave and assistance in compelling any discovery or acknowledge Petitioner's difficulties regarding the same; and (5) the Court still continues to fail to acknowledge and make independent rulings on Petitioner's motions which were filed in the case.

Petitioner has only recently had small success. Petitioner obtained an affidavit from Valerie Whitaker of the South Carolina Department of Corrections' Inmate Classifications Division on April 19, 2022. This affidavit was filed with the Cherokee County Court on April 25, 2022, as Exhbit - I I I. However, there is still more discovery / exhibit evidence that Petitioner has trouble obtaining for the record in this case.

See Joseph Cambell Williams, II, v State, 2022 WL 110793 (slip copy) (The Supreme Court of South Carolina, "recognize[s] the regrettable practice" [of] successfully exclude[ing] evidence and then arguing that there is a lack of evidence.). *See* State v Carleson, 363 SC 586, 611 SE2d 283 (2005) ("The burden is on the [pcr applicant] to provide a sufficient record for review.")

VERBATIM ADOPTION OF THE STATE'S PROPOSED ORDERS

Each proposed order that was filed in this case was adopted verbatim without the judge reviewing the record to ensure the accuracy of the State's proposed orders and unbiased recitation of any of the facts. The judge should have been aware that this practice has been criticized and should have independently reviewed the proposal and weighed the proposal against any contradictory facts which Petitioner pointed

out by way of Petitioner's objections to the orders. The judge failed to do this and consequently transformed himself into no more than an advocate for the State.

See Aiken County v BSP Div. of Envirotech Corp., 866 F2d 661, 667 (4th Cir. 1989) (labeling the "near-verbatim adoption" of proposed findings of fact and conclusions of law "less than ideal"). See also Burr v Jackson, 19 F.4th 395 (4th Cir. 2021) ("[The Court does] continue to "strongly criticize" the practice of verbatim (or close-to-verbatim) adoption of proposed opinions.")

The State in its proposed orders purposely and strategically omitted pertinent facts and filings from those orders. *See* Robinson v State, 422 SC 78, 810 SE2d 32 (2018) (The Supreme Court of South Carolina "finds troubling an order of the PCR court which contains findings which are flatly contradicted by the record.")

JUDICIAL NOTICE / CAUTION AS TO RES JUDICATA

Petitioner seeks to not be in violation of the doctrine of res judicata. However, Petitioner seeks to preserve issues should the South Carolina Supreme Court decline to hear Petitioner's claims in its original jurisdiction. The issues of the inequitable and unconstitutional acts of (1) Allowance of the Attorney General's Office to schedule all pcr matters to include whether or not motions will be acknowledged or heard; (2) Allowance of the Attorney General's Office to ultimately decide if indigent Petitioner / indigent PCR Applicants will be appointed counsel or not; etc. Petitioner has raised these issues by way of a Mandamus seeking that the South Carolina Supreme Court would hear the matter in the court's original jurisdiction. Alonzo C. Jeter, III, v Honorable J. Derham Cole, et al; Appellate Case No. 2022-000120.

State v Sanders, 118 SC 498, 110 SE 808 (1920) ("[T]he Attorney General is the highest executive law officer of the state. He is charged with the duty of seeing to the proper administration of the laws of the state, and his duties are quasi judicial. It [is] assumed by the Legislature that he would act fairly and impartially in the discharge of his duties, and the he would not lend his official sanction to an unwarranted action by which the right or title to an office might be brought in question.")

Love v State, 428 SC 231, 834 SE2d 196 (2019) ("[The Court in Mangal recognizes the distinctive nature of PCR litigation. '...' [and] [t]he helter-skelter docketing of PCR matters...")

Allee v Medrano, 416 US 802, 94 Sct 2191 (1974) ("[The] court is presumed to be capable of fulfilling its 'solemn responsibility...' to guard, enforce, and protect every right granted or secured by the constitution of the United States'...' (citing Robb v Connolly, 111 US 624, 637, 4 Sct 544, 551 (1884);

Allee v Medrano, 416 US 802, 94 Sct 2191 (1974) ("[The] court cannot effectively fulfill its responsibility when the prosecutorial authorities take deliberate action, in bad faith, unfairly to deprive a person of a reasonable and adequate opportunity to make application in the [court] for vindication of his constitutional rights.")

Ex parte Townes, 975 SC 56, 81 SE 278 (1914) ("A court is presumed to do its duty.")

Walton v Arizona, 497 US 639, 110 Sct 3047 (1990) (overruled on other grounds) ("[A judge] is presumed to know the law as stated in the controlling opinions of the State Supreme Court.")

Marino v Ragen, 332 US 561, 68 Sct 240 (1947) ("[The judge] court is presumed to know what is in the record...")

Goodwyn's Adm'rs v Taylor, 2 Brev. 171, 4 S.C.L. 171 (1807) ("Every judgment of court is presumed to be fair until the contrary appears.")

Marino v Ragen, 332 US 561, 68 Sct 240 (1947) ("Perhaps none of the allegations considered separately would establish a deprivation of due process, yet with the whole picture before the court a violation of constitutional rights would be apparent.")

Petitioner would like to be afforded to opportunity to preserve the issues which he has raised in his mandamus simply by citing to case law. As he has to be mindful of both res judicata and preservation here, Petitioner only mentions mandamus here and does not seek to attempt to argue those issues within this filing but rather out of abundance of caution seek that they be preserved, should the Supreme Court not hear this novel and public interest matter in its original jurisdiction. Petitioner would await instruction from the Court in this regard and would brief here if need be.

CONCLUSION

The PCR Court clearly abused its discretion in this case and also violated Petitioner's rights to due process and equal protection of the law.

This Court should reverse the lower court's decisions regarding this case, remand for a hearing on Petitioner's motions which remain pending in the lower court, appoint counsel of representation, and ultimately grant post-conviction relief in this case by enjoining the State from frustrating the 2004 plea understanding and agreement.

Petitioner has moved forward with filing his Notice of Appeal because he has no faith that the lower court will rule on his motions, as the lower court has consistently ignored the Petitioner's filings on several past occasions. Love v State, 428 SC 231, 834 SE2d 196 (2019) ("[The Court in Mangal recognizes the distinctive nature of PCR litigation. '...' [and] [t]he helter-skelter docketing of PCR matters...")

Petitioner would also inform this court that Petitioner has also filed another Rule 59(e), SCRCP, motion / objection to the lower court's handling and ruling with regard to his Rule 59(e), motion and hearing on the motion. Otten v Otten, 287 SC 166, 337 SE2d 207 (1985) (Because of appellant's uncertainty as to the effect the motions would have on the time for appeal, he served and filed a notice of appeal.)

Otten v Otten, 287 SC 166, 337 SE2d 207 (1985) ("[B]ecause [appellant] was uncertain what effect his motions to alter or amend order and to correct clerical mistakes in order would have upon time for appeal, [appellant's] motion to remand case for consideration of motions was granted and appeal was dismissed without prejudice."); Hudson v Hudson, 290 SC 215, 349 SE2d 341 (1986) ("Service and filing of notice of appeal before filing of timely posttrial motions by any party does not deprive lower court of jurisdiction to consider motion.")

Collins Music Co. v IGT, 353 SC 559, 564, 579 SE2d 524, 526 (2002) (explaining successive post-trial motions are permitted in civil cases if the successive motion seeks "relief on issues coming to light as a result of an order following an initial post-trial motion that alters or amends the judgment.")

Petitioner also has not been able to obtain the transcript of his Rule 59(e), SCRCP, motion hearing, due to his indecency. Also, Petitioner has not been able to compose an Appendix at the time he files his Notice of Appeal and this Explanation, and has requested the assistance of this Court in making the same available for the record.

Respectfully submitted,

Alonzo C. Jeter, III
PETITIONER / *pro se*

This 3rd day of June, 2022.

STANDARD OF REVIEW

In PCR actions, the burden of proof is on the applicant. Butler v State, 286 SC 441, 334 SE2d 813 (1985). "This Court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them." Sellner v State, 416 SC 606, 610, 787 Se2d 525, 527 (2016). "Questions of law are reviewed de novo, and we will reverse the PCR court's decision when it is controlled by an error of law." Id.

"Summary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief." Leamon v State, 363 Sc 432, 434, 611 SE2d 494, 495 (2005); S.C. Code Ann. §17--27-70(b),(c) (2014). When considering the State's motion for summary dismissal of an application, where no evidentiary hearing has been held, the PCR judgment assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant. Leamon, 363 SC at 434, 611 Se2d at 495. When reviewing the propriety of a dismissal, an appellate court must view the facts in the same fashion. Id.

Love v State, 428 SC 231, 834 SE2d 196 (2019) ("On review of a post conviction court's resolution of procedural questions arising under the Uniform Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure, the appellate court applies an "abuse of discretion" standard."); Mangal v State, 421 SC 85, 805 SE2d 568 (2017) ("Supreme Court applies an abuse of discretion standard on review of a post-conviction relief (PCR) court's resolution of procedural questions arising under the Post Convictions Procedure Act or the Rules of Civil Procedure.")

Dennison v State, 371 SC 221, 639 SE2d 35 (2006) ("Unlike review of a conviction, which is by direct appeal and is a constitutional right, review of a decision in a post conviction relief matter is discretionary by way of a writ of certiorari.")