CHAPTER 27

Uniform Post‑Conviction Procedure Act

**SECTION 17‑27‑10.** Short title.

This chapter may be cited as the Uniform Post‑Conviction Procedure Act.

HISTORY: 1962 Code Section 17‑612; 1969 (56) 158.

CROSS REFERENCES

Applicability of South Carolina Rules of Civil Procedure to post‑conviction relief actions, see Rule 71.1, SCRCP.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Appeal and Error Section 11, Certiorari Jurisdiction of the Supreme Court.

S.C. Jur. Post‑Conviction Relief Section 2, Purpose.

S.C. Jur. Post‑Conviction Relief Section 3, Relationship to Federal and State Habeas Corpus.

S.C. Jur. Post‑Conviction Relief Section 18, Form and Sufficiency of Application.

S.C. Jur. Post‑Conviction Relief Section 24, Motion for Reconsideration.

S.C. Jur. South Carolina Rules of Civil Procedure Section 71.1.0, Rule 71.1. Post‑Conviction Relief Actions.

LAW REVIEW AND JOURNAL COMMENTARIES

Al‑Shabazz v. State: Excluding NonCollateral Claims from the Scope of Post‑Conviction Relief. 51 S.C. L. Rev. 839 (Summer 2000).

South Carolina post‑conviction relief: Practical considerations and procedures from a prisoner’s perspective. Demetrio L. Sears, 64 S.C. L. Rev. 1169 (Fall 2013).

NOTES OF DECISIONS

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1. In general

A post‑conviction action is a civil action generally subject to rules and statutes that apply in civil proceedings. Sutton v. State (S.C. 2004) 361 S.C. 644, 606 S.E.2d 779. Criminal Law 1409

In a post‑conviction proceeding, the focus usually is upon alleged errors made by trial or plea counsel; the applicant attempts to show that his or her attorney erred in a manner that a reasonably proficient attorney would not, and that the error prejudiced his case. Sutton v. State (S.C. 2004) 361 S.C. 644, 606 S.E.2d 779. Criminal Law 1519(1)

A postconviction relief applicant is entitled to relief based on ineffective assistance of trial counsel if he or she can establish that counsel’s performance was deficient and that this deficiency prejudiced his or her defense. Grier v. State (S.C. 1989) 299 S.C. 321, 384 S.E.2d 722. Criminal Law 1519(4)

The post‑conviction procedure act, rather than direct appeal, was a proper avenue for obtaining relief by a defendant who claimed that he was deprived of effective assistance of counsel due to the trial court’s failure in its duty to inquire as to existence of conflicts of interest between defendant and codefendants tried with him, especially since the defendant had not raised the issue in the lower court. State v. Felder (S.C. 1986) 290 S.C. 521, 351 S.E.2d 852. Criminal Law 1035(7)

The Supreme Court usually will not consider the issue of ineffective assistance of counsel at trial on an appeal from a conviction, particularly where the issue was not argued to the trial judge; a defendant must assert this claim under the Post‑Conviction Procedure Act. State v Carpenter (1982) 277 SC 309, 286 SE2d 384. An application for post‑conviction relief does not give a court jurisdiction to consider questions pertaining to prison living conditions. Tutt v. State (S.C. 1982) 277 S.C. 525, 290 S.E.2d 414.

Defendant who voluntarily absented himself from term of court during which his misdemeanor charge was to be tried waived his right to be present at his trial. Ellis v. State (S.C. 1976) 267 S.C. 257, 227 S.E.2d 304. Criminal Law 1937

Defendant who voluntarily absented himself from term of court during which his misdemeanor trial was to be held could not claim that his absence resulted in the ineffective assistance of counsel. Ellis v. State (S.C. 1976) 267 S.C. 257, 227 S.E.2d 304. Criminal Law 1937

Denial of effective assistance of counsel was not established where, even though court‑appointed counsel made no independent investigation of the case, counsel was aware of state’s evidence, including eyewitnesses, informed applicant of his jury trial rights, and made no promises as to the sentence, and where the court examined state’s witnesses before accepting nolo contendere plea. Kibler v. State (S.C. 1976) 267 S.C. 250, 227 S.E.2d 199.

Plea of nolo contendere was entered knowingly and intelligently where court thoroughly explained the meaning and consequences of such a plea; applicant could not claim that he believed nolo contendere to mean not guilty. Kibler v. State (S.C. 1976) 267 S.C. 250, 227 S.E.2d 199.

2. Constitutional issues

Habeas petitioners were barred from asserting that their sentences for narcotics offenses violated Apprendi because they were imposed in part based upon trial courts’ drug quantity determinations, without findings by jury, and sentences exceeded statutory maximums sentences imposed for narcotics offenses without specified drug quantities; Apprendi was decided long after petitioners were convicted, claims were raised for first time in habeas petitions, and Apprendi could not be applied retroactively on collateral review. San‑Miguel v. Dove (C.A.4 (S.C.) 2002) 291 F.3d 257, certiorari denied 123 S.Ct. 46, 537 U.S. 938, 154 L.Ed.2d 242. Courts 100(1); Habeas Corpus 275.1; Habeas Corpus 278

There is no constitutional infirmity in South Carolina Post‑Conviction Procedure Act merely because it contains no statutory provision for bail. Brown v. Leeke (D.C.S.C. 1978) 460 F.Supp. 947, dismissed 601 F.2d 579. Criminal Law 1404

Constitutional challenge to pertinent provisions of Uniform Post‑Conviction Procedure Act was not considered by the court where the issue was raised for first time in appellant’s brief and was not encompassed by any of his exceptions. Hunter v. State (S.C. 1978) 271 S.C. 48, 244 S.E.2d 530.

**SECTION 17‑27‑20.** Persons who may institute proceeding; exclusiveness of remedy.

(A) Any person who has been convicted of, or sentenced for, a crime and who claims:

(1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

(2) That the court was without jurisdiction to impose sentence;

(3) That the sentence exceeds the maximum authorized by law;

(4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

(6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

(B) This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction. Except as otherwise provided in this chapter, it comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them.

HISTORY: 1962 Code Section 17‑601; 1969 (56) 158.

CROSS REFERENCES

Applicability of South Carolina Rules of Civil Procedure to post‑conviction relief actions, see Rule 71.1, SCRCP.

Library References

Criminal Law 1406, 1426, 1573.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 2222 to 2224.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Appeal and Error Section 88, Petition for a Writ of Certiorari: Court of Appeals Decisions; Post‑Conviction Relief; and Habeas Corpus.

S.C. Jur. Children and Families Section 111, Appeal and Post‑Conviction Review.

S.C. Jur. Post‑Conviction Relief Section 2, Purpose.

S.C. Jur. Post‑Conviction Relief Section 5, Illegal Sentence.

S.C. Jur. Post‑Conviction Relief Section 18, Form and Sufficiency of Application.

S.C. Jur. Post‑Conviction Relief Section 26, Availability and Procedure.

LAW REVIEW AND JOURNAL COMMENTARIES

Al‑Shabazz v. State: Excluding NonCollateral Claims from the Scope of Post‑Conviction Relief. 51 S.C. L. Rev. 839 (Summer 2000).

Annual Survey of South Carolina Law: Criminal Law: Postconviction Relief. 28 S.C. L. Rev. 302.

Blume, An introduction to post‑conviction remedies, practice and procedure in South Carolina. 45 S.C. L. Rev. 235 (Winter 1994).

Coram Nobis and State v. Stinney: Why South Carolina should revitalize America’s legal “Hail Mary”. Kathleen M. Bure, 68 S.C. L. Rev. 917 (Spring 2017).

Attorney General’s Opinions

Discussion of whether following a post conviction relief hearing, an individual can receive a longer sentence than his original sentence. S.C. Op.Atty.Gen. (April 7, 2008) 2008 WL 1960286.

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1. In general

Cited in Campbell v State (1971) 256 SC 474, 182 SE2d 883. McLamore v State (1972) 257 SC 413, 186 SE2d 250; cert den 409 US 934, 34 L Ed 2d 189, 93 S Ct 240. Guinyard v State (1973) 260 SC 220, 195 SE2d 392. Chambers v State (1974) 262 SC 202, 203 SE2d 426. Wells v Leeke (1974) 262 SC 216, 203 SE2d 428. Fields v Martin (1974, DC SC) 372 F Supp 954.

Applied in Darby v State (1971) 257 SC 200, 184 SE2d 699. Ballard v State (1972) 258 SC 91, 187 SE2d 224. Ashley v State (1973) 260 SC 436, 196 SE2d 501. Peyton v Strickland (1974) 262 SC 210, 203 SE2d 388. Bethea v State (1974) 262 SC 255, 204 SE2d 12.

An inordinate and unjustified delay in the state corrective process may well result in the frustration of petitioner’s rights and be such a circumstance as to render that process ineffective. Allen v. Leeke (D.C.S.C. 1971) 328 F.Supp. 292.

All post‑conviction relief (PCR) applicants are entitled to a full and fair opportunity to present claims in one PCR application. Mangal v. State (S.C. 2017) 2017 WL 3045812. Criminal Law 1407

In a proceeding for postconviction relief, a defendant collaterally attacks his conviction and may raise any claims of constitutional violations relating to his conviction. Williams v. Ozmint (S.C. 2008) 380 S.C. 473, 671 S.E.2d 600, rehearing denied. Criminal Law 1407

Applicant must show both error and prejudice to win relief in a post‑conviction relief (PCR) proceeding. Roscoe v. State (S.C. 2001) 345 S.C. 16, 546 S.E.2d 417. Criminal Law 1450; Criminal Law 1454

Habeas corpus petition may be treated as a postconviction relief application. Gibson v. State (S.C. 1998) 329 S.C. 37, 495 S.E.2d 426. Criminal Law 1576

Where applicant for post conviction relief alleges in application that results of prior conviction still persist, even though sentence has been fully served, he is entitled to evidentiary hearing to determine whether or not he has been prejudiced. McDuffie v. State (S.C. 1981) 276 S.C. 229, 277 S.E.2d 595. Criminal Law 1655(1)

Court will not hear appeal for post‑conviction relief of party who, by his escape, has evaded process of court and refuses to submit himself to its jurisdiction. Berryhill v. State (S.C. 1981) 276 S.C. 183, 276 S.E.2d 926.

Stated in Taylor v. State (S.C. 1972) 258 S.C. 369, 188 S.E.2d 850.

2. Constitutional issues

There is no infirmity in the Post‑Conviction Procedure Act merely because it contains no statutory provision for bail. Brown v. Leeke (D.C.S.C. 1978) 460 F.Supp. 947, dismissed 601 F.2d 579. Criminal Law 1404

This section [Code 1962 Section 17‑601] affords post‑conviction relief of a scope sufficiently broad to comply with the mandates and holdings of the United States Supreme Court relating to Federal review of state convictions. Baskins v. Moore (D.C.S.C. 1973) 362 F.Supp. 187.

This section [Code 1962 Section 17‑601] affords post‑conviction relief of a scope sufficiently broad to comply with the mandates and holdings of the United States Supreme Court relating to Federal review of state convictions. There is no basis for a holding that this section [Code 1962 Section 17‑601] thus deprives a convict of constitutional rights. Harvey v. State of S. C. (D.C.S.C. 1970) 310 F.Supp. 83. Criminal Law 1404; Habeas Corpus 912

There is no constitutional obligation on the courts, State or Federal, to appoint counsel for prisoners who indicate, without more, that they wish to seek post‑conviction relief; nor is there anything in the Uniform Post‑Conviction Procedure Act or the rules adopted thereunder requiring appointment of counsel in such instances. Wood v. State (S.C. 1971) 257 S.C. 179, 184 S.E.2d 702. Criminal Law 1602

3. Conviction or sentence

Motion to reduce sentence that state prisoner filed in accordance with Rhode Island law, as postconviction motion that was not part of direct review process, and that required a reexamination of prisoner’s sentence to determine whether it was appropriate, qualified as one for “collateral review,” that served to toll one‑year statute of limitations on petition for federal habeas relief, such that prisoner’s federal habeas petition was timely; abrogating Alexander v. Secretary, Dept. of Corrections, 523 F.3d 1291; Hartmann v. Carroll, 492 F.3d 478; and Walkowiak v. Haines, 272 F.3d 234. 28 U.S.C.A. Wall v. Kholi, 2011, 131 S.Ct. 1278, 562 U.S. 545, 179 L.Ed.2d 252. Habeas Corpus 603.9

Credits‑related issues and other conditions of imprisonment are administrative matters and, thus, cannot be raised in a postconviction relief (PCR) proceeding; overruling Busby v. Moore, 330 S.C. 201, 498 S.E.2d 883, Harris v. State, 309 S.C. 466, 424 S.E.2d 509, Elmore v. State, 305 S.C. 456, 409 S.E.2d 397, and Simmons v. State, 316 S.C. 28, 446 S.E.2d 436. Al‑Shabazz v. State (S.C. 2000) 338 S.C. 354, 527 S.E.2d 742. Criminal Law 1557(3)

Even though inmate’s claim with respect to his sentence starting date should have been asserted under Administrative Procedures Act (APA), rather than Post‑Conviction Relief (PCR) Act, he would be entitled to seek writ of mandamus on remand, and would not be required to begin process anew, in light of fact that Supreme Court decided his appeal on same day it outlined correct APA approach. Cooper v. State (S.C. 2000) 338 S.C. 202, 525 S.E.2d 886, rehearing denied. Criminal Law 1192

For purposes of provision of Uniform Post‑Conviction Procedure Act as adopted in South Carolina allowing person who has been convicted of or sentenced for crime to file action for postconviction relief, “convict” means to prove person guilty of crime. Jackson v. State (S.C. 1997) 331 S.C. 486, 489 S.E.2d 915, rehearing denied. Criminal Law 1418

For purposes of provision of Uniform Post‑Conviction Procedure Act as adopted in South Carolina allowing person who has been convicted of or sentenced for crime to file action for postconviction relief, “sentence” is judgment formally pronounced by court or judge upon defendant after his conviction in criminal prosecution, imposing punishment to be inflicted. Jackson v. State (S.C. 1997) 331 S.C. 486, 489 S.E.2d 915, rehearing denied. Criminal Law 1418

For purposes of provision of Uniform Post‑Conviction Procedure Act as adopted in South Carolina allowing person who has been convicted of or sentenced for crime to file action for postconviction relief, “sentence” is not limited to term of imprisonment; instead, it may be either term in prison or fine or both. Jackson v. State (S.C. 1997) 331 S.C. 486, 489 S.E.2d 915, rehearing denied. Criminal Law 1418

Judgment rendered after hearing conducted pursuant to Habitual Offender Act (Code Section 56‑1‑1010) does not result in sentence from criminal conviction and cannot be contested under Post‑Conviction Procedure Act (Code Section 17‑27‑20). Lance v. State (S.C. 1983) 279 S.C. 144, 303 S.E.2d 100.

Provisions of Uniform Postconviction Procedure Act may be invoked only by someone who is claiming right to have sentence vacated, set aside or corrected; claim alleging cruel and unusual punishment in being assigned to maximum security center, placed in solitary confinement, and denied medical treatment does not pertain to sentence and therefore, cannot be considered under Act. Tutt v. State (S.C. 1982) 277 S.C. 525, 290 S.E.2d 414.

4. Trial errors

Under post‑conviction relief statute, petitioners would receive full consideration of all asserted trial errors should they establish that they were not informed by counsel of their right to appeal, since South Carolina Supreme Court would recognize inapplicability of general policy of not considering questions under post‑conviction relief which could have been raised on appeal. Patterson v. Leeke (C.A.4 (S.C.) 1977) 556 F.2d 1168, certiorari denied 98 S.Ct. 414, 434 U.S. 929, 54 L.Ed.2d 289. Criminal Law 1440(2)

Issue of whether state improperly elicited testimony from police officer commenting on defendant’s lack of remorse was not preserved for appellate review, where trial counsel objected to the testimony on competency and Miranda grounds, not on ground that it was an attempt to show lack of remorse. Legge v. State (S.C. 2002) 349 S.C. 222, 562 S.E.2d 618, rehearing denied. Criminal Law 1043(3)

Where neither the question raised, not the exceptions on which it is based, suggests anything more than a trial error reviewable only by direct appeal, no violation of constitutional right or other ground for relief under this chapter has been put forward. Johnson v. State (S.C. 1973) 261 S.C. 350, 200 S.E.2d 81.

5. Conviction or sentence in violation of constitution

This chapter encompasses an action by a petitioner seeking an initial declaration that procedures employed by the parole board are unconstitutional and seeking by way of such a declaration a second proceeding by which he might ultimately secure his release. Baskins v. Moore (D.C.S.C. 1973) 362 F.Supp. 187. Criminal Law 1557(4)

A post conviction relief (PCR) hearing is the appropriate forum for addressing the issue of whether a defendant knowingly and intelligently waived his statutory right to make a personal closing statement during the guilt phase of his capital trial. Franklin v. Catoe (S.C. 2001) 346 S.C. 563, 552 S.E.2d 718, rehearing denied, certiorari denied, certiorari denied 122 S.Ct. 2332, 535 U.S. 1114, 153 L.Ed.2d 162. Criminal Law 1655(8)

Issue of whether jury charge that law implied malice from use of deadly weapon could have been raised in defendant’s prior petition for postconviction relief, and issue was procedurally barred in habeas corpus proceeding; even if state Supreme Court had not recognized unconstitutionality of such a charge at time postconviction petition was filed, the United States Supreme Court had so recognized. Keeler v. Mauney (S.C.App. 1998) 330 S.C. 568, 500 S.E.2d 123, rehearing denied. Habeas Corpus 285.1

Petitioner may allege constitutional violations in postconviction relief proceedings unless issue could have been raised by direct appeal. Gibson v. State (S.C. 1998) 329 S.C. 37, 495 S.E.2d 426. Criminal Law 1429(2); Criminal Law 1451

6. Unlawfully held in custody

Provision of Post‑Conviction Procedure Act that allows a petition for claims involving an unlawful return to prison applies whether the unlawful restraint is called a revocation, a rescission, or a termination. Kerr v. State (S.C. 2001) 345 S.C. 183, 547 S.E.2d 494. Criminal Law 1557(4)

7. Collateral attack

Postconviction relief (PCR) is a proper avenue of relief only when the applicant mounts a collateral attack challenging validity of his conviction or sentence; the only exceptions are claims, specifically listed in PCR Act, that an applicant’s sentence has expired, or that an applicant’s probation, parole, or conditional release has been unlawfully revoked. Williams v. State (S.C.App. 2008) 378 S.C. 511, 662 S.E.2d 615. Criminal Law 1450; Criminal Law 1556

Petitioner’s ex post facto claim arising out of change from annual to biannual review for parole was not cognizable under the postconviction relief (PCR) statute, as ex post facto claim was not a collateral attack on the validity of petitioner’s conviction or sentence. Jernigan v. State (S.C. 2000) 340 S.C. 256, 531 S.E.2d 507. Criminal Law 1557(4)

Although inmate’s claims involving his custody status and loss of good‑time credits incurred as result of major disciplinary proceeding were non‑collateral or administrative matters that could not be raised in postconviction relief (PCR) application, he was entitled to seek judicial review in circuit court under Administrative Procedures Act (APA) after Department of Corrections reached its final decision. Al‑Shabazz v. State (S.C. 2000) 338 S.C. 354, 527 S.E.2d 742. Prisons 296

7.5. Newly discovered evidence

Newly discovered evidence, namely testimony from eyewitness to shooting of innocent bystander that related to self‑defense theory, which defendant discovered after pleading guilty to voluntary manslaughter, did not constitute evidence of material facts not previously presented and heard that, in the interest of justice, required defendant’s conviction be vacated on petition for post‑conviction relief (PCR); although there was evidence that testimony could not have been discovered prior to plea, defendant had admitted to shooting victim, specifically waived right to present any defense, and testified that he did so freely and voluntarily, evidence was presented that defendant’s decision to plead guilty was based on a number of factors, and testimony only went to theory of transferred self‑defense, which had not been recognized in South Carolina. Jamison v. State (S.C. 2014) 410 S.C. 456, 765 S.E.2d 123, rehearing denied, certiorari denied 135 S.Ct. 2387, 192 L.Ed.2d 173. Criminal Law 1536

8. Effective assistance of counsel—In general

Defendant’s claim of ineffective assistance of his parole revocation attorney did not constitute a cognizable claim under the Uniform Post Conviction Relief Act; since defendant’s attorney was permitted to appear, and defendant did not contend that his Due Process rights were violated, defendant failed to allege that his parole revocation hearing was “unlawful.” Duckson v. State (S.C. 2003) 355 S.C. 596, 586 S.E.2d 576. Criminal Law 1519(16)

In order to prove trial counsel was ineffective, the applicant for post‑conviction relief (PCR) must show counsel’s performance was deficient and the deficient performance prejudiced the defense. Humphries v. State (S.C. 2002) 351 S.C. 362, 570 S.E.2d 160, rehearing denied. Criminal Law 1519(4)

For petitioner to be granted post‑conviction relief as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective assistance. Legge v. State (S.C. 2002) 349 S.C. 222, 562 S.E.2d 618, rehearing denied. Criminal Law 1519(4)

Appellate counsel was not ineffective for failing to raise an issue that was not preserved for appellate review. Legge v. State (S.C. 2002) 349 S.C. 222, 562 S.E.2d 618, rehearing denied. Criminal Law 1968

To prove counsel was ineffective, the defendant must show counsel’s performance was deficient and the deficient performance caused prejudice to the defendant’s case. Patrick v. State (S.C. 2002) 349 S.C. 203, 562 S.E.2d 609, rehearing denied. Criminal Law 1881

To establish a claim of ineffective assistance of counsel, a postconviction relief (PCR) applicant must prove that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) the deficient performance prejudiced the applicant’s case. Thompson v. State (S.C. 2000) 340 S.C. 112, 531 S.E.2d 294. Criminal Law 1519(4)

A postconviction relief applicant is entitled to relief based on ineffective assistance of trial counsel if he or she can establish that counsel’s performance was deficient and that this deficiency prejudiced his or her defense. Grier v. State (S.C. 1989) 299 S.C. 321, 384 S.E.2d 722. Criminal Law 1519(4)

Ineffectiveness of counsel at the trial level is an issue which may be asserted only in proceedings under the Post‑Conviction Procedure Act, and the issue is inappropriate for review on direct appeal from a sentence imposing the death penalty. State v. Kornahrens (S.C. 1986) 290 S.C. 281, 350 S.E.2d 180, certiorari denied 107 S.Ct. 1592, 480 U.S. 940, 94 L.Ed.2d 781, denial of habeas corpus affirmed 66 F.3d 1350, certiorari denied 116 S.Ct. 1575, 517 U.S. 1171, 134 L.Ed.2d 673, rehearing denied 116 S.Ct. 2541, 518 U.S. 1013, 135 L.Ed.2d 1063. Criminal Law 1134.47(3); Criminal Law 1440(2)

Lower court properly held that it had no jurisdiction to vacate judgment and sentence after adjournment of term of court at which sentence was imposed; rather, where motion to vacate was based upon allegation that trial counsel did not advise defendant of right to appeal, or necessary steps to protect right, appellant has remedy to application for post‑conviction relief. State v. Walker (S.C. 1976) 269 S.C. 349, 237 S.E.2d 583.

A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the court and make the proceedings a farce and mockery of justice, and mere allegations of incompetency or ineffectiveness of counsel will not ordinarily suffice as grounds for a new trial under this chapter. Coardes v. State (S.C. 1974) 262 S.C. 493, 206 S.E.2d 264. Criminal Law 1519(2)

The trial judge had jurisdiction under this chapter to determine whether the appellant’s counsel’s representation of him at his trial met constitutional standards of adequacy. Rogers v. State (S.C. 1973) 261 S.C. 288, 199 S.E.2d 761.

9. —— Investigation, effective assistance of counsel

Defendant, who had been convicted of distributing cocaine within one‑half mile of school, was not entitled to postconviction relief based on alleged ineffective assistance of counsel due to counsel’s failure to measure distance between school and location of drug transaction; evidence presented by defendant allegedly showing that school was over one‑half mile from school based on odometer measurements was insufficient to show that straight‑line distance between school and transaction exceeded one‑half mile. Brown v. State (S.C. 1998) 333 S.C. 238, 510 S.E.2d 212. Criminal Law 1519(6); Criminal Law 1618(10)

10. —— Prejudice, effective assistance of counsel

In evaluating whether a post‑conviction relief applicant has suffered prejudice as a result of a jury charge, the jury charge must be viewed in its entirety and not in isolation. Gibbs v. State (S.C. 2013) 403 S.C. 484, 744 S.E.2d 170, habeas corpus dismissed 2015 WL 7188341. Criminal Law 822(1); Criminal Law 1552

To show prejudice, as element of ineffective assistance of counsel, the defendant must show that, but for counsel’s errors, there is a “reasonable probability” the result of the trial would have been different, which is a probability sufficient to undermine confidence in the outcome of the trial. Patrick v. State (S.C. 2002) 349 S.C. 203, 562 S.E.2d 609, rehearing denied. Criminal Law 1883

Capital murder defendant moving for post conviction relief (PCR) on ground that trial counsel were ineffective for failing to advise him of his statutory right to make personal closing statement during guilt phase was required to show that he was prejudiced by lack of such waiver; overruling State v. Reed, 293 S.C. 515, 362 S.E.2d 13, State v. Orr, 304 S.C. 185, 403 S.E.2d 623, State v. Charping, 313 S.C. 147, 437 S.E.2d 88, and State v. Cooper, 312 S.C. 90, 439 S.E.2d 276. Franklin v. Catoe (S.C. 2001) 346 S.C. 563, 552 S.E.2d 718. Criminal Law 1519(3)

Defendant seeking post‑conviction relief on grounds of ineffective assistance of counsel failed to prove that he was prejudiced by counsel’s failure to preserve for review issue of whether trial judge should have questioned jurors about whether they saw defendant in chains when he was brought into courtroom, absent showing that any of seated jurors saw defendant in chains. Foye v. State (S.C. 1999) 335 S.C. 586, 518 S.E.2d 265, certiorari denied 120 S.Ct. 1685, 529 U.S. 1072, 146 L.Ed.2d 492. Criminal Law 1618(10)

Defendant, who was sentenced as a second offender to thirty years in prison and a $50,000 fine for his conviction for trafficking in and transportation of cocaine, was prejudiced by his attorney’s failure to challenge trial judge’s decision to treat previous marijuana bond forfeiture as a first offense when sentencing defendant, where maximum sentence for first offender was ten years and $25,000 fine, and thus he was entitled to remand for resentencing as a first offender. Scott v. State (S.C. 1999) 334 S.C. 248, 513 S.E.2d 100. Criminal Law 1181.5(8); Criminal Law 1957

Defendant moving for post‑conviction relief (PCR) following conviction for cocaine trafficking failed to show that he was prejudiced by counsel’s allegedly deficient performance in failing to obtain receipts and witnesses’ statements from prosecution until shortly before trial; contents of those documents were never revealed at PCR hearing. Palacio v. State (S.C. 1999) 333 S.C. 506, 511 S.E.2d 62, rehearing denied. Criminal Law 1618(10)

A post‑conviction relief petitioner, who had been convicted of murder and assault and battery of a high and aggravated nature, was entitled to a new trial where his defense counsel failed to object to a jury charge which required the petitioner to establish the defense of self‑defense by a preponderance of the evidence. The defense counsel’s failure to interpose a timely objection to the erroneous charge by the trial judge constituted ineffective assistance of counsel, and the petitioner was prejudiced by the improper burden‑shifting charge. Dandy v. State (S.C. 1990) 301 S.C. 303, 391 S.E.2d 581.

11. —— Guilty plea, effective assistance of counsel

Defendant clearly established by a preponderance of evidence in post‑conviction relief (PCR) proceeding that he was incompetent at time he entered guilty pleas to armed robbery, carjacking, and accessory after the fact to murder; psychiatrist testified that defendant’s auto accident, which occurred year before charged offenses were committed, caused defendant to suffer from anoxia, which caused cerebral damage resulting from the lack of oxygen, and psychiatrist testified that defendant was incompetent and could not participate in his own defense. Matthews v. State (S.C. 2004) 358 S.C. 456, 596 S.E.2d 49, rehearing denied. Criminal Law 1618(3)

Defendant failed to demonstrate that plea to armed robbery was affected by trial court’s misstatement that maximum potential sentence was 25 years, after which defendant was sentenced to 30 years, where record was devoid of evidence that, if defendant had known maximum penalty for armed robbery was 30, rather than 25 years, he would not have pled guilty and would have insisted upon going to trial, where in exchange for plea, charges of grand larceny, possession of weapon during commission of violent crime, and criminal conspiracy were nol prossed, solicitor elected to indict defendant for only one count of armed robbery and kidnapping, notwithstanding multiple victims, and defendant was advised by plea judge that he was facing 70 years to life. Roscoe v. State (S.C. 2001) 345 S.C. 16, 546 S.E.2d 417. Criminal Law 273.1(4)

Defendant who pleads guilty on advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel’s representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases and that there is a reasonable probability that, but for counsel’s errors, defendant would not have pled guilty and would have insisted on going to trial, and “reasonable probability” is a probability sufficient to undermine confidence in the outcome of the trial. Thompson v. State (S.C. 2000) 340 S.C. 112, 531 S.E.2d 294. Criminal Law 1920

Defendant was entitled to postconviction relief (PCR) based on ineffective assistance of counsel during his guilty plea; defendant’s attorney’s failure to object when solicitor recommended maximum sentence in violation of negotiated plea agreement fell below professional norms, and fact that defendant was unsure whether to plead guilty, coupled with fact that he was under impression that solicitor would not make sentencing request, demonstrated that he would not have pled guilty but for attorney’s ineffective assistance. Thompson v. State (S.C. 2000) 340 S.C. 112, 531 S.E.2d 294. Criminal Law 1519(8)

A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel’s errors, the defendant would not have pled guilty. Johnson v. Catoe (S.C. 1999) 336 S.C. 354, 520 S.E.2d 617. Criminal Law 1519(8)

Defendant claiming ineffective assistance of counsel by recommending guilty plea on the basis of inaccurate information was not required to show why further action by trial counsel would have benefitted defendant or how there was a reasonable probability that the result would have been better; the focus should have concerned whether the defendant would have pled guilty had trial counsel accurately informed him of the situation. Turner v. State (S.C. 1999) 335 S.C. 382, 517 S.E.2d 442. Criminal Law 1920

Advising defendant to plead guilty and accept 15‑year sentence was ineffective assistance of counsel thus rendering guilty plea involuntary, where attorney mistakenly believed that the defendant would serve 14‑year sentence for revocation of probation; even though attorney would have recommended guilty plea had attorney correctly understood effect of plea, defendant would not have pleaded guilty if he had known that he was subjecting himself to an additional eight years in prison. Turner v. State (S.C. 1999) 335 S.C. 382, 517 S.E.2d 442. Criminal Law 1920

Fact that trial judge stated that he would make express finding as to voluntariness of Alford guilty pleas, but then failed to do so, did not warrant finding that those pleas were involuntary, as judge satisfied all necessary elements to establish pleas as voluntary; judge questioned defendant extensively about voluntariness of both non‑Alford and Alford pleas, discussed possible sentences under all charges and made no distinction between them until he established factual basis for each plea, and, following factual basis for both non‑Alford and Alford pleas, judge sentenced defendant for all three charges. Gaines v. State (S.C. 1999) 335 S.C. 376, 517 S.E.2d 439. Criminal Law 273.1(1); Criminal Law 273.1(4)

Applicant for post‑conviction relief (PCR) could challenge voluntary nature of his guilty plea by asserting that prosecution violated Brady v. Maryland by failing to disclose exculpatory material in its possession. Gibson v. State (S.C. 1999) 334 S.C. 515, 514 S.E.2d 320. Criminal Law 1481; Criminal Law 1550

Post‑conviction relief (PCR) applicant was entitled to have his guilty plea to voluntary manslaughter set aside due to prosecution’s violation of Brady v. Maryland, arising from prosecutor’s failure to disclose that he and police officers visited crime scene with witness who claimed to have seen shooting through window, that they confronted her with information that view from that window was obstructed, and that witness then changed her original statement by claiming that she must have seen shooting through door; evidence was favorable to applicant because it was additional proof of witness’ alleged lies, evidence was in possession of and known to prosecutor, prosecutor suppressed that evidence by failing to reveal it, and it was reasonably probable that, had prosecutor revealed such information, applicant would have chosen to stand trial instead of pleading guilty. Gibson v. State (S.C. 1999) 334 S.C. 515, 514 S.E.2d 320. Criminal Law 1481; Criminal Law 1550

A post‑conviction relief (PCR) petitioner, who had pleaded guilty to distributing crack cocaine and had been sentenced to 15 years’ imprisonment, was entitled to a new trial on the ground that his guilty plea was invalid because he had not knowingly and intelligently waived his right to counsel where the trial judge made no specific inquiry to determine whether the petitioner made his choice to proceed pro se “with eyes open,” the petitioner was 45 years old at the time of his plea and had a fifth grade education, he testified at the PCR hearing that after the judge presiding at his bond hearing told him he was entitled to an appointed attorney if he was unable to afford one, he took it upon himself to speak with an attorney at the public defender’s office but the attorney never contacted him after that, he stated that he saw the attorney in the courtroom earlier on the day of his plea hearing but the attorney did not have time to speak with him, when the trial judge asked him if he wanted an attorney, the petitioner testified that he “didn’t know what to do,” and the extent of the petitioner’s previous dealings with the court was that he pleaded guilty to one other charge in 1979 “because it was [for] something I had done”; the evidence did not demonstrate that the petitioner was sufficiently aware of the dangers of self‑representation to make an informed decision to proceed without counsel, and therefore the PCR judge erred in finding a knowing and intelligent waiver of counsel. Wroten v. State (S.C. 1990) 301 S.C. 293, 391 S.E.2d 575.

In determining the adequacy of a guilty plea in post‑conviction relief matters, the extent of inquiries made by the trial judge at the time of the plea is not conclusive. To determine whether a guilty plea was taken in accordance with constitutional standards, the courts will consider the entire record including facts presented at the post‑conviction relief hearing. The same analysis applies in determining the validity of an alleged violation of Faretta v California, 422 US 806, 95 S Ct 2525, 45 L Ed 2d 562 (1975), which requires that a defendant “be made aware of the dangers and disadvantages of self‑representation so that the record will establish he knows what he is doing and his choice is made with eyes open.” Wroten v. State (S.C. 1990) 301 S.C. 293, 391 S.E.2d 575.

Where the application of the appellant for post‑conviction relief was based entirely upon his claim that he did not have the effective assistance of counsel because of their incompetency, this allegation set forth a prima facie violation of the appellant’s constitutional rights, and raised a question of fact which could only be determined in the trial court by an evidentiary hearing. Rogers v. State (S.C. 1973) 261 S.C. 288, 199 S.E.2d 761. Criminal Law 1519(1)

Where the defendant voluntarily entered a plea of guilty to murder, she did not have the right, in post‑conviction proceedings, to attack the plea upon the ground that the facts were insufficient to establish the degree of the offense to which she pleaded. Ramey v. State (S.C. 1971) 257 S.C. 127, 184 S.E.2d 544. Criminal Law 1480

12. Credit for time served

Defendant was not entitled to credit for time served in federal custody, even though South Carolina had lodged a detainer against him while he was in federal custody, where defendant’s absence from custody in South Carolina was a result of his escape, and the federal judge stated that defendant’s federal sentence was “separate and distinct of all other sentences that have been imposed or that may be imposed by any other court.” Delahoussaye v. State (S.C. 2006) 369 S.C. 522, 633 S.E.2d 158, rehearing denied. Sentencing And Punishment 1175; Sentencing And Punishment 1180

Defendant’s claim for credit for time served in federal custody could be brought under the Post Conviction Relief Act, and was not required to be filed under the Administrative Procedures Act (APA); defendant’s case encompassed a claim that his state sentence had expired while he served time in federal custody. Delahoussaye v. State (S.C. 2006) 369 S.C. 522, 633 S.E.2d 158, rehearing denied. Criminal Law 1557(2)

13. Exclusivity

While subsection (b) purports to establish this chapter as the exclusive vehicle for these type actions, it is merely a procedural device. Baskins v. Moore (D.C.S.C. 1973) 362 F.Supp. 187.

Chapter does not abrogate the constitutionally bestowed original jurisdiction of the South Carolina Supreme Court to entertain such actions. Baskins v. Moore (D.C.S.C. 1973) 362 F.Supp. 187.

In favorem vitae review of death penalty cases has been abolished in light of creation of post conviction relief (PCR) system. Franklin v. Catoe (S.C. 2001) 346 S.C. 563, 552 S.E.2d 718, rehearing denied, certiorari denied, certiorari denied 122 S.Ct. 2332, 535 U.S. 1114, 153 L.Ed.2d 162. Sentencing And Punishment 1788(1)

Person is procedurally barred from petitioning circuit court for writ of habeas corpus where matter alleged is one which could have been raised in postconviction relief (PCR) application. Keeler v. Mauney (S.C.App. 1998) 330 S.C. 568, 500 S.E.2d 123, rehearing denied. Habeas Corpus 285.1

14. Fees

Convict whose numerous appeals, petitions, and motions had been unanimously rejected by Supreme Court, may be denied leave to proceed in forma pauperis on new petition or any further petitions for extraordinary writs. In re McDonald, 1989, 109 S.Ct. 993, 489 U.S. 180, 103 L.Ed.2d 158.

Inmate seeking postconviction relief was not required to pay filing fee or file certified copy of his trust account showing account balance to institute action for postconviction relief, regardless of inmate’s financial status. Thompson v. State (S.C. 1997) 325 S.C. 58, 479 S.E.2d 808. Costs 302

15. Relationship to habeas corpus relief

South Carolina Supreme Court, sitting in its original jurisdiction, will grant a writ of habeas corpus to correct only those infractions which in the setting constitute a denial of fundamental fairness shocking to the universal sense of justice. Wilson v. Moore, 1999, 178 F.3d 266, certiorari denied 120 S.Ct. 191, 528 U.S. 880, 145 L.Ed.2d 160. Habeas Corpus 447

Petitioner must first pursue remedy afforded by Post‑Conviction Relief Act, before applying to District Court for habeas corpus relief to assert claim that he lost right to appeal through no fault of his own, alleging that appeal was denied due to failure of court reporter to produce transcript of trial within 210‑day period allowed for appeal. Miller v. Harvey (C.A.4 (S.C.) 1977) 566 F.2d 879, certiorari denied 99 S.Ct. 124, 439 U.S. 838, 58 L.Ed.2d 135.

Post‑conviction procedure provides effective remedy to petitioners claiming denial of effective counsel in that counsel failed to advise them of right to appeal, and is one which should be exhausted before federal relief can be considered. Patterson v. Leeke (C.A.4 (S.C.) 1977) 556 F.2d 1168, certiorari denied 98 S.Ct. 414, 434 U.S. 929, 54 L.Ed.2d 289.

If petitioner’s claim is of the core of habeas corpus, petitioner must exhaust either by way of the statutory procedural device, i.e., this chapter, or, if this chapter be deemed inadequate or ineffective, by way of writ of habeas corpus filed with the South Carolina Supreme Court. Baskins v. Moore (D.C.S.C. 1973) 362 F.Supp. 187.

Excessive and inordinate delay by a state court in processing a state prisoner’s habeas petition has often been held to warrant dispensing with the requirement of exhaustion of state remedies before the exercise of Federal habeas jurisdiction, but the delay in those cases has been “inordinate,” “excessive” and generally “inexcusable.” Allen v. Leeke (D.C.S.C. 1971) 328 F.Supp. 292.

Only when evidence is produced that shows the state delay is a result of discrimination against the petitioner, a mounting to a denial of process, should Federal intervention proceed to a hearing upon the merits. Allen v. Leeke (D.C.S.C. 1971) 328 F.Supp. 292.

Delay in a state court in and of itself does not present sufficient grounds to merit Federal intervention. Allen v. Leeke (D.C.S.C. 1971) 328 F.Supp. 292.

Failure of the petitioner to exhaust state remedies under this chapter would justify dismissal of his petition for Federal habeas corpus relief. Frierson v. State of S. C., Florence County (D.C.S.C. 1970) 314 F.Supp. 444. Habeas Corpus 319.1

The fact that the South Carolina legislature enacted a post‑conviction statute did not suspend the right of habeas corpus by substituting the post‑conviction relief statutes (procedure) as the only remedy available to a state prisoner. Harvey v. State of S. C. (D.C.S.C. 1970) 310 F.Supp. 83. Habeas Corpus 912

If a habeas corpus petition does not satisfy the procedural requirements or allege sufficient facts to justify a habeas corpus hearing, the petition may be treated as a postconviction relief application. Lakes v. State (S.C.App. 1998) 333 S.C. 382, 510 S.E.2d 228, rehearing denied, certiorari denied. Criminal Law 1576

Matter which is cognizable under Uniform Post‑Conviction Procedure Act may not be raised by petition for writ of habeas corpus before circuit or other lower courts; abrogating Hunter v. State, 316 S.C. 105, 447 S.E.2d 203 (1994); Pennington v. State, 312 S.C. 436, 441 S.E.2d 315 (1994); Slack v. State, 311 S.C. 415, 429 S.E.2d 801 (1993). Simpson v. State (S.C. 1998) 329 S.C. 43, 495 S.E.2d 429. Habeas Corpus 285.1

Although matter cognizable under Uniform Post‑Conviction Procedure Act may not be raised by petition for writ of habeas corpus before circuit or other lower courts, Supreme Court retains ability, pursuant to State Constitution, to entertain writs of habeas corpus in its original jurisdiction and grant relief in those unusual instances where there has been violation which, in setting, constitutes denial of fundamental fairness shocking to universal sense of justice. Simpson v. State (S.C. 1998) 329 S.C. 43, 495 S.E.2d 429. Habeas Corpus 613

Uniform Post Conviction Procedure Act supersedes and encompasses habeas corpus procedure provided by statute; however, habeas corpus continues to be available as a constitutional remedy. Gibson v. State (S.C. 1998) 329 S.C. 37, 495 S.E.2d 426. Habeas Corpus 285.1

16. Waiver

Defendant did not voluntarily waive direct appeal from capital murder conviction, and he therefore would be allowed to bring, in post‑conviction relief (PCR) proceeding, belated appeal of direct appeal issues, where trial counsel misadvised defendant that if his conviction was overturned on direct appeal, death penalty could be imposed at retrial despite jury’s failure to recommend death penalty at original trial; while counsel had believed State would attempt to seek an overruling of United States Supreme Court’s Bullington decision which created an exception to “clean slate rule,” counsel’s speculation about what State would argue was not sufficient justification for his failure to correctly explain the law or to effectively convey to defendant that his advice was based on speculation about State’s strategy, rather than the law. Sheppard v. State (S.C. 2004) 357 S.C. 646, 594 S.E.2d 462. Criminal Law 1439

Certiorari granted to petitioner, who alleged that he had not knowingly and intelligently waived right to direct appeal and sought review of issues arising from his trial, where the post‑conviction relief judge indicated that a petitioner may not have waived that right, and the prosecution conceded that petitioner was entitled to review a direct appeal issues. Davis v. State (S.C. 1986) 288 S.C. 290, 342 S.E.2d 60.

Supreme Court adopted and published procedural guidelines to be followed in post‑conviction relief cases for the knowing and intelligent waiver of the right to direct appeal is at issue, where a petitioner for writ of certiorari and the prosecution joined in petitioning for such guidelines. Davis v. State (S.C. 1986) 288 S.C. 290, 342 S.E.2d 60.

Where defendant admits in open court after conviction that he is guilty, all non‑jurisdictional defects and defenses including claims of ineffective assistance of counsel are waived and are not available as grounds for post‑conviction relief. Whetsell v. State (S.C. 1981) 276 S.C. 295, 277 S.E.2d 891. Criminal Law 273.4(1)

Failure to object to imposition of sentence resulted in waiver of right to have sentence reviewed either on direct appeal or by post‑conviction proceedings. Cummings v. State (S.C. 1979) 274 S.C. 26, 260 S.E.2d 187. Criminal Law 1042.3(1); Criminal Law 1430

By entering guilty plea, defendant waived right to attack conviction on ground that facts were insufficient to establish that he committed offense. LoPiano v. State (S.C. 1978) 270 S.C. 563, 243 S.E.2d 448.

Upon application for post‑conviction relief, lower court properly held it was without authority to grant relief even though defendant was denied right to appeal, and properly refused to take testimony or rule upon issues raised in application, where failure to raise issues at trial constituted waiver of right to do so on direct appeal or post‑conviction relief. Miller v. State (S.C. 1977) 269 S.C. 113, 236 S.E.2d 422.

17. Federal courts

Post‑conviction procedure provides effective remedy to petitioners claiming denial of effective counsel in that counsel failed to advise them of right to appeal, and is one which should be exhausted before federal relief can be considered. Patterson v. Leeke (C.A.4 (S.C.) 1977) 556 F.2d 1168, certiorari denied 98 S.Ct. 414, 434 U.S. 929, 54 L.Ed.2d 289.

Alleged problems with post‑conviction procedure are not of sufficient magnitude to render exhaustion of remedy unnecessary prior to seeking federal relief, in view of recent efforts by state Chief Justice to reduce delay, and since lack of oral argument and other alleged differences do not prevent petitioners from getting relief they seek, that is, chance to have state Supreme Court review trial record and consider trial errors they raise. Patterson v. Leeke (C.A.4 (S.C.) 1977) 556 F.2d 1168, certiorari denied 98 S.Ct. 414, 434 U.S. 929, 54 L.Ed.2d 289.

Absent showing that accused has made some legitimate effort to set aside his state conviction which he claims was in violation of the United States Constitution, Federal District Court should not have the burden of entertaining a collateral attack without some exhaustion of state remedies. U. S. v. Bryant (D.C.S.C. 1978) 448 F.Supp. 139.

18. Justiciability

Applicant who alleged that he was suffering continuing effects from his conviction had standing to bring action for postconviction relief, despite fact that challenged conviction did not result in incarceration. Jackson v. State (S.C. 1997) 331 S.C. 486, 489 S.E.2d 915, rehearing denied. Criminal Law 1447

Post‑Conviction Procedure Act (Section 17‑27‑20) is designed to incorporate all rights available under federal habeas corpus; one who lost his driver’s license but who did not allege that he was under threat of detention or imprisonment did not have standing to assert claim for relief. Finklea v. State (S.C. 1979) 273 S.C. 157, 255 S.E.2d 447.

19. Limitation of actions

Claim for collateral relief from conviction and sentence which is 20 years old is barred by laches. McElrath v. State (S.C. 1981) 276 S.C. 282, 277 S.E.2d 890.

20. Burden of proof

Applicant bears the burden to prove allegations in a postconviction relief (PCR) application. Matthews v. State (S.C. 2002) 350 S.C. 272, 565 S.E.2d 766. Criminal Law 1613

In a post‑conviction relief (PCR) proceeding, the burden of proof is on the applicant to prove the allegations in his petition. Patrick v. State (S.C. 2002) 349 S.C. 203, 562 S.E.2d 609, rehearing denied. Criminal Law 1613

In a postconviction relief (PCR) proceeding, the burden is on the applicant to prove the allegations in his application, and if there is any probative evidence to support the finding of the PCR judge, those findings must be upheld; likewise, a PCR judge’s findings should not be upheld if there is no probative evidence to support them. Thompson v. State (S.C. 2000) 340 S.C. 112, 531 S.E.2d 294. Criminal Law 1158.36; Criminal Law 1613

Postconviction relief (PCR) applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial. Bannister v. State (S.C. 1998) 333 S.C. 298, 509 S.E.2d 807, rehearing denied. Criminal Law 1618(1)

Postconviction relief (PCR) applicant’s mere speculation as to what witness’s testimony would have been had she been called at trial cannot, by itself, satisfy applicant’s burden of showing prejudice resulting from counsel’s failure to call such witness at trial. Bannister v. State (S.C. 1998) 333 S.C. 298, 509 S.E.2d 807, rehearing denied. Criminal Law 1618(10)

Defendant’s contention that malice charge given to jury in his trial was unconstitutional because it raised impermissible presumption and shifted burden of proof to defense on element of malice was cognizable under the Uniform Post‑Conviction Procedure Act. Keeler v. Mauney (S.C.App. 1998) 330 S.C. 568, 500 S.E.2d 123, rehearing denied. Criminal Law 1552

**SECTION 17‑27‑30.** Jurisdiction of court.

The court in which, by the Constitution and statutes of this State, original jurisdiction in habeas corpus is vested, may entertain in accordance with its rules a proceeding under this chapter in the exercise of its original jurisdiction and in that event this chapter, to the extent applicable, governs the proceeding.

HISTORY: 1962 Code Section 17‑602; 1969 (56) 158.

CROSS REFERENCES

Applicability of South Carolina Rules of Civil Procedure to post‑conviction relief actions, see Rule 71.1, SCRCP.

Library References

Criminal Law 1587.

Westlaw Topic No. 110.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Post‑Conviction Relief Section 17, Jurisdiction and Venue.

LAW REVIEW AND JOURNAL COMMENTARIES

Al‑Shabazz v. State: Excluding NonCollateral Claims from the Scope of Post‑Conviction Relief. 51 S.C. L. Rev. 839 (Summer 2000).

NOTES OF DECISIONS

In general 1

1. In general

Lower court properly held that it had no jurisdiction to vacate judgment and sentence after adjournment of term of court at which sentence was imposed; rather, where motion to vacate was based upon allegation that trial counsel did not advise defendant of right to appeal, or necessary steps to protect right, appellant has remedy to application for post‑conviction relief. State v. Walker (S.C. 1976) 269 S.C. 349, 237 S.E.2d 583.

**SECTION 17‑27‑40.** Commencement of proceedings by filing of application.

A proceeding is commenced by filing an application verified by the applicant with the clerk of the court in which the conviction took place. Facts within the personal knowledge of the applicant and the authenticity of all documents and exhibits included in or attached to the application must be sworn to affirmatively as true and correct. The clerk shall docket the application upon its receipt and promptly bring it to the attention of the court and deliver a copy to the solicitor of the circuit in which the applicant was convicted and a copy to the Attorney General.

HISTORY: 1962 Code Section 17‑603; 1969 (56) 158.

CROSS REFERENCES

Applicability of South Carolina Rules of Civil Procedure to post‑conviction relief actions, see Rule 71.1, SCRCP.

Library References

Criminal Law 1574.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 2266, 2268 to 2269.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Attorney General Section 16, Civil, Administrative and Special Proceedings.

S.C. Jur. Post‑Conviction Relief Section 17, Jurisdiction and Venue.

S.C. Jur. Post‑Conviction Relief Section 18, Form and Sufficiency of Application.

S.C. Jur. Post‑Conviction Relief Section 19, Court Procedure on Receipt of Application.

LAW REVIEW AND JOURNAL COMMENTARIES

Blume, An introduction to post‑conviction remedies, practice and procedure in South Carolina. 45 S.C. L. Rev. 235 (Winter 1994).

**SECTION 17‑27‑45.** Filing procedures for post‑conviction relief applications.

(A) 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 upon an appeal, whichever is later.

(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

(C) 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.

HISTORY: 1995 Act No. 7, Part II, Section 40.

CROSS REFERENCES

Applicability of South Carolina Rules of Civil Procedure to post‑conviction relief actions, see Rule 71.1, SCRCP.

Library References

Criminal Law 1586.

Westlaw Topic No. 110.

C.J.S. Criminal Law Section 2267.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Post‑Conviction Relief Section 15, Statute of Limitations.

NOTES OF DECISIONS

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Construction and application 1.5

Court decisions 2

Discovery rule 3

Estoppel 4

Habeas corpus 4.5

Limitation of actions 1.7

Questions of fact 3.5

Review 5

Statute of limitations 1.7

Weight and sufficiency of evidence 4.7

1. In general

Because petitioner’s second state postconviction relief (PCR) petition, which raised issue of ineffective assistance of PCR counsel in timely‑filed initial PCR proceeding, did not effectively attack the PCR procedure used in petitioner’s case, South Carolina statute of limitations applied to second PCR petition; thus, second PCR was not “properly filed,” and did not toll time for filing federal habeas petition under Antiterrorism and Effective Death Penalty Act (AEDPA). Pettinato v. Eagleton, 2006, 466 F.Supp.2d 641, referred to 2007 WL 3239174, report and recommendation adopted 2007 WL 2783388, vacated 2007 WL 2903957, report and recommendation adopted 2007 WL 3992494, appeal dismissed 280 Fed.Appx. 325, 2008 WL 2337476. Criminal Law 1586; Habeas Corpus 603.9

A petition filed pursuant to Johnson v. State is the post‑conviction relief equivalent of a direct appeal filed pursuant to Anders v. California, under which an appellate court is required to review the entire record, including the complete trial transcript, for any preserved issues with potential merit. Code 1976, Section 17‑27‑10 et seq. Jamison v. State (S.C. 2014) 410 S.C. 456, 765 S.E.2d 123, rehearing denied, certiorari denied 135 S.Ct. 2387, 192 L.Ed.2d 173. Criminal Law 1668(9)

Claim in second petition for post‑conviction relief (PCR) filed by defendant, who had pled guilty to voluntary manslaughter, that there was newly discovered evidence, namely an eyewitness to the shooting who was willing to testify, was not procedurally barred, even though defendant had submitted eyewitness’s affidavit as an attachment to his petition under Johnson v. State appealing the denial of his first PCR petition, pursuant to which the Court of Appeals had reviewed entire record for any preserved issues with potential merit and found that there were none; discovery of eyewitness’s testimony was not properly before Court of Appeals, and thus was not part of the Johnson review, as it was not part of the lower court record. Jamison v. State (S.C. 2014) 410 S.C. 456, 765 S.E.2d 123, rehearing denied, certiorari denied 135 S.Ct. 2387, 192 L.Ed.2d 173. Criminal Law 1668(8)

One‑year limitations period governing application for postconviction relief begins to run from date remittitur is sent by appellate court on direct appeal, not from date of conviction. McCoy v. State (S.C. 2013) 401 S.C. 363, 737 S.E.2d 623. Criminal Law 1586

Where applicant for postconviction relief (PCR) demonstrates that failure to timely file for PCR was due to mental incompetency, statute of limitations should be tolled. Ferguson v. State (S.C. 2009) 382 S.C. 615, 677 S.E.2d 600. Criminal Law 1586

Ignorance of the statute of limitations for filing a petition for post‑conviction relief (PCR) is not an excuse for late filing, even when the petitioner claims he did not learn of the statute because he was incarcerated in another state. Leamon v. State (S.C. 2005) 363 S.C. 432, 611 S.E.2d 494. Criminal Law 1586

One‑year statute of limitations for post‑conviction relief (PCR) applications applied to applicant who was incarcerated in another jurisdiction during one‑year period. Leamon v. State (S.C. 2005) 363 S.C. 432, 611 S.E.2d 494. Criminal Law 1586

Neither trial nor appellate counsel had obligation to inform defendant of availability of post‑conviction remedies or one‑year limitations period for filing petition. Sutton v. State (S.C. 2004) 361 S.C. 644, 606 S.E.2d 779. Criminal Law 1967; Criminal Law 1971

One‑year period for filing an application for post‑conviction relief was not tolled prior to exhaustion of state remedies by petitioner’s pursuit of federal habeas corpus relief. Green v. State (S.C. 2003) 353 S.C. 29, 576 S.E.2d 182. Criminal Law 1586

One‑year limitations period in which to file a petition for post‑conviction relief did not apply where defendant was denied a direct appeal of his conviction due to ineffective assistance of counsel. Wilson v. State (S.C. 2002) 348 S.C. 215, 559 S.E.2d 581. Criminal Law 1586

A defendant was not prohibited by the statute of limitations from filing for post‑conviction relief where the defendant pled guilty to possession of cocaine with intent to distribute, trafficking in marijuana and trafficking in cocaine on September 29, 1993, and the filed an application for post‑conviction relief on July 10, 1995; since the applicable statute of limitation was not enacted until July 1, 1995, the defendant had 1 year from the date of its enactment to bring his application for post‑conviction relief. Peloquin v. State (S.C. 1996) 321 S.C. 468, 469 S.E.2d 606.

1.5. Construction and application

An application for postconviction relief is deemed “filed,” for purposes of the one‑year limitations period governing the application, when it is delivered to and received by the Clerk of Court, not when it is delivered to prison personnel for mailing. Mose v. State (S.C. 2017) 420 S.C. 500, 803 S.E.2d 718. Criminal Law 1586

1.7. Limitation of actions

Given the unique conditions of incarceration, the one‑year statute of limitations governing an application for postconviction relief should be tolled if the circumstances warrant. Mose v. State (S.C. 2017) 420 S.C. 500, 803 S.E.2d 718. Criminal Law 1586

If a postconviction applicant relies on the defense of equitable tolling in response to a motion to dismiss on limitations grounds, the applicant must substantiate that the correct and complete application was delivered to prison authorities prior to the expiration of the statute of limitations and that any delay in the Clerk of Court’s receipt of the application was due to processing, and if the postconviction judge determines that the applicant has presented a valid defense, then the statute of limitations shall be tolled until the application is delivered to and received by the Clerk of Court. Mose v. State (S.C. 2017) 420 S.C. 500, 803 S.E.2d 718. Criminal Law 1586

Tolling the one‑year statute of limitations governing an application for postconviction relief in circumstances in which an applicant demonstrates the failure to timely file the application was due to no fault of his own does not create an exception by which incarcerated litigants may avoid time restrictions; instead, it provides applicants with functionally equivalent time bars and seeks to ensure equal access to the courts for all. Mose v. State (S.C. 2017) 420 S.C. 500, 803 S.E.2d 718. Criminal Law 1586

Tolling the one‑year statute of limitations governing an application for postconviction relief when the applicant demonstrates that the untimely filing was due to no fault of his own not only recognizes the rule that a document is “filed” the moment it is sent to that court, but also promotes the interest of fairness in the pursuit of justice and no longer punishes applicants for delays beyond their control. Mose v. State (S.C. 2017) 420 S.C. 500, 803 S.E.2d 718. Criminal Law 1586

If an applicant for postconviction review raises the doctrine of equitable tolling as a defense to the one‑year statute of limitations, the judge should make the fact‑specific determination of whether equitable tolling is justified, and as a part of this determination, the judge should consider any reasonably verifiable evidence of the date the application was purportedly in the possession of prison authorities for purposes of mailing. Mose v. State (S.C. 2017) 420 S.C. 500, 803 S.E.2d 718. Criminal Law 1586

If the circumstances warrant, the one‑year statute of limitations governing an application for postconviction relief shall be tolled from receipt of the document by the prison until formally filed with the clerk’s office, provided that the applicant can verify by competent evidence the date prison authorities received the document for mailing. Mose v. State (S.C. 2017) 420 S.C. 500, 803 S.E.2d 718. Criminal Law 1586

2. Court decisions

One‑year limitations period governing postconviction claim that prior, uncounseled misdemeanor convictions could not be used to enhance subsequent federal charges began to run when United States Supreme Court issued decision in Alabama v. Shelton that defendants had constitutional right to counsel in prosecutions that could result in deprivation of liberty. Talley v. State (S.C. 2007) 371 S.C. 535, 640 S.E.2d 878, rehearing denied. Criminal Law 1586

Decisional law providing the right to a belated appeal, when an applicant for post‑conviction relief did not knowingly and intelligently waive his right to an appeal, did not apply to permit post‑conviction court’s consideration of whether appellate counsel was ineffective. Legge v. State (S.C. 2002) 349 S.C. 222, 562 S.E.2d 618, rehearing denied. Criminal Law 1440(1)

3. Discovery rule

One‑year limitations period governing application for postconviction relief based on defendant’s claim that he was deprived of right to trial by impartial jury began to run when he discovered basis for claim, namely, that juror committed misconduct by failing to disclose that her cousin was married to solicitor. McCoy v. State (S.C. 2013) 401 S.C. 363, 737 S.E.2d 623. Criminal Law 1586

Post‑conviction relief (PCR) petitioner’s claim, that counsel was ineffective for improperly advising him that he would be parole eligible, fell within discovery rule providing when there was evidence of material facts not previously presented, PCR application was to be filed within one year after date of actual discovery of facts, and did not have to be filed within one year after conviction; petitioner was allegedly informed by counsel and Department of Corrections that he was parole eligible, and when Department later informed him he was not parole eligible, petitioner filed PCR application within one year. Coats v. State (S.C. 2003) 352 S.C. 500, 575 S.E.2d 557. Criminal Law 1586

3.5. Questions of fact

Where a defendant alleges, in a successive post‑conviction relief (PCR) application, facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications, and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing. Robertson v. State (S.C. 2016) 418 S.C. 505, 795 S.E.2d 29. Criminal Law 1655(9)

4. Estoppel

Where federal inmate’s application for postconviction relief (PCR) was dismissed without prejudice to his right to apply for PCR at such time as he was incarcerated in state facility, state would be estopped from asserting statute of limitations if inmate should attempt to file subsequent PCR application, as state consented to dismissal of PCR application after statute of limitations had run and agreed that inmate should be allowed to refile application. Carter v. State (S.C. 1999) 337 S.C. 17, 522 S.E.2d 342. Criminal Law 1668(6)

Where the state consents to the dismissal of a postconviction relief (PCR) application after the statute of limitations has run and agrees that the petitioner should be allowed to refile an application, the state is estopped from asserting the statute of limitations as a defense to a subsequent PCR application. Carter v. State (S.C. 1999) 337 S.C. 17, 522 S.E.2d 342. Criminal Law 1668(9)

4.5. Habeas corpus

Offender who challenged his civil commitment under the South Carolina Sexually Violent Predator (SVP) Act was barred from habeas corpus relief based on his Padilla‑related claim that his guilty plea was not knowingly, voluntarily, or intelligently entered because he was required to be advised that pleading guilty to certain sex crimes would subject him to the SVP Act and its potential implications, such as civil commitment, where offender failed to file an application for postconviction relief that raised any issues related to Padilla within one year of the Padilla decision by the United States Supreme Court. Hamm v. State (S.C. 2013) 403 S.C. 461, 744 S.E.2d 503. Habeas Corpus 285.1

4.7. Weight and sufficiency of evidence

Defendant demonstrated that his untimely filing of application for postconviction relief was due to circumstances beyond his control, and thus, he was entitled to equitable tolling of one‑year limitations period governing application; he relinquished control over application when he delivered it prison authorities for mailing, which was 17 days before limitations period expired, his application was notarized on same day, and he averred that associate warden confirmed that application was mailed before limitations period expired. Mose v. State (S.C. 2017) 420 S.C. 500, 803 S.E.2d 718. Criminal Law 1586

5. Review

In appeal in postconviction relief (PCR) proceeding involving issue of whether statute of limitations barred PCR application, remand to trial court was warranted for purpose of determining whether petitioner knowingly and voluntarily waived his right to counsel in prosecution for criminal domestic violence (CDV). Dearybury v. State (S.C. 2006) 367 S.C. 34, 625 S.E.2d 212. Criminal Law 1181.5(6)

**SECTION 17‑27‑50.** Form and contents of application.

The application shall identify the proceedings in which the applicant was convicted, give the date of the entry of the judgment and sentence complained of, specifically set forth the grounds upon which the application is based, and clearly state the relief desired. Facts within the personal knowledge of the applicant shall be set forth separately from other allegations of facts and shall be verified as provided in Section 17‑27‑40. Affidavits, records or other evidence supporting its allegations shall be attached to the application or the application shall recite why they are not attached. The application shall identify all previous proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or sentence. Argument, citations and discussion of authorities are unnecessary. The application shall be made on such form as prescribed by the Supreme Court.

HISTORY: 1962 Code Section 17‑604; 1969 (56) 158.

CROSS REFERENCES

Applicability of South Carolina Rules of Civil Procedure to post‑conviction relief actions, see Rule 71.1, SCRCP.

Library References

Criminal Law 1579.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 2266, 2268 to 2269.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Post‑Conviction Relief Section 18, Form and Sufficiency of Application.

LAW REVIEW AND JOURNAL COMMENTARIES

Blume, An introduction to post‑conviction remedies, practice and procedure in South Carolina. 45 S.C. L. Rev. 235 (Winter 1994).

NOTES OF DECISIONS

In general 1

1. In general

Evidence did not support excusing post‑conviction relief (PCR) applicant’s procedural default in failing to properly raise claim in PCR application that he received ineffective assistance of counsel (IAC) when trial counsel failed to object to direct examination testimony of state’s expert witness, who allegedly improperly bolstered victim’s credibility when she testified that she believed victim had been sexually abused; PCR court acted within its discretion in refusing to address claim, evidence regarding claim was not presented to PCR court at PCR hearing, and state made convincing argument that trial counsel intentionally elicited further testimony from expert on cross‑examination pursuant to a valid trial strategy. Mangal v. State (S.C. 2017) 421 S.C. 85, 805 S.E.2d 568. Criminal Law 1580(10)

Supreme Court adopted and published procedural guidelines to be followed in post‑conviction relief cases for the knowing and intelligent waiver of the right to direct appeal is at issue, where a petitioner for writ of certiorari and the prosecution joined in petitioning for such guidelines. Davis v. State (S.C. 1986) 288 S.C. 290, 342 S.E.2d 60.

**SECTION 17‑27‑60.** Court costs and expenses for indigents.

If the applicant is unable to pay court costs and expenses of representation, including stenographic, printing and legal services, these costs and expenses shall be made available to the applicant in the trial court, and on review, in amounts and to the extent funds are made available to indigent defendants by the General Assembly.

HISTORY: 1962 Code Section 17‑605; 1969 (56) 158.

CROSS REFERENCES

Applicability of South Carolina Rules of Civil Procedure to post‑conviction relief actions, see Rule 71.1, SCRCP.

Library References

Criminal Law 1669.

Westlaw Topic No. 110.

LAW REVIEW AND JOURNAL COMMENTARIES

Blume, An introduction to post‑conviction remedies, practice and procedure in South Carolina. 45 S.C. L. Rev. 235 (Winter 1994).

Cowden, Indigent defense services for post‑conviction relief in South Carolina: current problems and potential remedies. 42 S.C. L. Rev. 417 (Winter 1991).

NOTES OF DECISIONS

In general 1

Constitutional issues 2

1. In general

Convict whose numerous appeals, petitions, and motions had been unanimously rejected by Supreme Court, may be denied leave to proceed in forma pauperis on new petition or any further petitions for extraordinary writs. In re McDonald, 1989, 109 S.Ct. 993, 489 U.S. 180, 103 L.Ed.2d 158.

Postconviction relief application may be instituted without the payment of a filing fee, regardless of a person’s financial status. Lakes v. State (S.C.App. 1998) 333 S.C. 382, 510 S.E.2d 228, rehearing denied, certiorari denied. Costs 302

Litigant proceeding in forma pauperis is only entitled to filing fees, not court reporter’s costs or copying costs. Lakes v. State (S.C.App. 1998) 333 S.C. 382, 510 S.E.2d 228, rehearing denied, certiorari denied. Costs 128

An indigent post‑conviction relief (PCR) applicant was entitled to the appointment of counsel where the trial court addressed the merits of his PCR application during a habeas corpus hearing, and then dismissed the application at the conclusion of the hearing; the court’s error in refusing the applicant counsel was reversible error. Whitehead v. State (S.C. 1992) 310 S.C. 532, 426 S.E.2d 315. Criminal Law 1602

2. Constitutional issues

Neither Eighth Amendment nor Fourteenth Amendment due process clause requires states to appoint counsel for indigent death row inmates seeking state postconviction relief; considerations such as those listed by District Court in instant case should not be treated as factual findings since such treatment could permit different constitutional rules to apply in different states; and District Court would be able on remand to remedy any alleged denial to death row inmates of adequate and timely access to prison library. Murray v. Giarratano, 1989, 109 S.Ct. 2765, 492 U.S. 1, 106 L.Ed.2d 1.

State is not constitutionally required to furnish free transcript to indigent collaterally attacking conviction under Uniform Post Conviction Procedure Act when no showing of need was made and no issues of material fact were raised in application. Gunter v. State (S.C. 1976) 267 S.C. 486, 229 S.E.2d 723. Criminal Law 1669

**SECTION 17‑27‑70.** Court procedure on receipt of application.

(a) Within thirty days after the docketing of the application, or within any further time the court may fix, the State shall respond by answer or by motion which may be supported by affidavits. At any time prior to entry of judgment the court may, when appropriate, issue orders for amendment of the application or any pleading or motion, for pleading over, for filing further pleadings or motions, or for extending the time of the filing of any pleading. In considering the application, the court shall take account of substance, regardless of defects of form. If the application is not accompanied by the record of the proceedings challenged therein, the respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application.

(b) When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post‑conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or direct that the proceedings otherwise continue. Disposition on the pleadings and record is not proper if there exists a material issue of fact.

(c) The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

HISTORY: 1962 Code Section 17‑606; 1969 (56) 158.

CROSS REFERENCES

Applicability of South Carolina Rules of Civil Procedure to post‑conviction relief actions, see Rule 71.1, SCRCP.

Library References

Criminal Law 1582, 1591, 1651.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 2272 to 2275, 2282 to 2285.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Post‑Conviction Relief Section 18, Form and Sufficiency of Application.

S.C. Jur. Post‑Conviction Relief Section 19, Court Procedure on Receipt of Application.

S.C. Jur. Post‑Conviction Relief Section 22, Necessity.

S.C. Jur. Post‑Conviction Relief Section 25, Remedies Available.

LAW REVIEW AND JOURNAL COMMENTARIES

Al‑Shabazz v. State: Excluding NonCollateral Claims from the Scope of Post‑Conviction Relief. 51 S.C. L. Rev. 839 (Summer 2000).

Blume, An introduction to post‑conviction remedies, practice and procedure in South Carolina. 45 S.C. L. Rev. 235 (Winter 1994).

NOTES OF DECISIONS

In general 1

Dismissal 2

Review 3

1. In general

Applied in Wood v State, (1971) 257 SC 179, 184 SE2d 702. Chambers v State (1974) 262 SC 202, 203 SE2d 426. Ballew v State (1974) 262 SC 393, 204 SE2d 736. Coardes v State (1974) 262 SC 493, 206 SE2d 264. Creel v State (1974) 262 SC 558, 206 SE2d 825. Herring v State (1974) 262 SC 597, 206 SE2d 885.

Alleged problems with post‑conviction procedure are not of sufficient magnitude to render exhaustion of remedy unnecessary prior to seeking federal relief, in view of recent efforts by state Chief Justice to reduce delay, and since lack of oral argument and other alleged differences do not prevent petitioners from getting relief they seek, that is, chance to have state Supreme Court review trial record and consider trial errors they raise. Patterson v. Leeke (C.A.4 (S.C.) 1977) 556 F.2d 1168, certiorari denied 98 S.Ct. 414, 434 U.S. 929, 54 L.Ed.2d 289.

There are situations where the interests of justice require post‑conviction relief (PCR) courts to be flexible with procedural requirements before PCR applicants suffer procedural default on substantial claims. Mangal v. State (S.C. 2017) 2017 WL 3045812. Criminal Law 1436

Where a defendant alleges, in a successive post‑conviction relief (PCR) application, facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications, and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing. Robertson v. State (S.C. 2016) 418 S.C. 505, 795 S.E.2d 29. Criminal Law 1655(9)

Supreme Court adopted and published procedural guidelines to be followed in post‑conviction relief cases for the knowing and intelligent waiver of the right to direct appeal is at issue, where a petitioner for writ of certiorari and the prosecution joined in petitioning for such guidelines. Davis v. State (S.C. 1986) 288 S.C. 290, 342 S.E.2d 60.

Where record fails to show prejudice to appellant, seeking post‑conviction relief, from delay by respondent State’s failure to file answer to petition within extended time granted by lower court, court was not in error in failing to grant relief requested. Kneece v. State (S.C. 1977) 269 S.C. 177, 236 S.E.2d 746.

Compliance with the thirty‑day time limit prescribed by this section [Code 1962 Section 17‑606] is not mandatory, but discretionary with the trial court. Guinyard v. State (S.C. 1973) 260 S.C. 220, 195 S.E.2d 392.

2. Dismissal

Summary dismissal without a hearing of an application for postconviction relief 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. Mose v. State (S.C. 2017) 420 S.C. 500, 803 S.E.2d 718. Criminal Law 1652

When considering the State’s motion for summary dismissal of an application for postconviction relief, where no evidentiary hearing has been held, the postconviction judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant, and when reviewing the propriety of a dismiss, the appellate court must view the facts in the same fashion. Mose v. State (S.C. 2017) 420 S.C. 500, 803 S.E.2d 718. Criminal Law 1612(1); Criminal Law 1652

When considering the State’s motion for summary dismissal of a motion for post‑conviction relief (PCR), where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the defendant. Robertson v. State (S.C. 2016) 418 S.C. 505, 795 S.E.2d 29. Criminal Law 1652

When considering the state’s motion for summary dismissal of an application for post‑conviction relief (PCR), a judge must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant. Pelzer v. State (S.C.App. 2008) 378 S.C. 516, 662 S.E.2d 618. Criminal Law 1652

When considering the State’s motion for summary dismissal of an application for post‑conviction relief (PCR), where no evidentiary hearing has been held, the circuit court must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant. Leamon v. State (S.C. 2005) 363 S.C. 432, 611 S.E.2d 494. Criminal Law 1652

Defendant would not suffer unfair prejudice from dismissal of his post‑conviction petition without prejudice due to his mental incompetency to proceed, rather than continuation of case on docket until he became competent to proceed, where post‑conviction court informed defendant, without objection from state, that he could file application at later time, which thus would estop state from asserting limitations defense whenever post‑conviction petition was re‑filed. Norris v. State (S.C. 1999) 335 S.C. 30, 515 S.E.2d 523. Criminal Law 1586

An application for post‑conviction relief was properly dismissed where applicant’s only material allegation of fact, that he suffered a lack of effective assistance of counsel, was conclusively refuted by the record. Coardes v. State (S.C. 1974) 262 S.C. 493, 206 S.E.2d 264. Criminal Law 1652

3. Review

When reviewing the propriety of a summary dismissal of a motion for post‑conviction relief (PCR), appellate court must view the facts in the light most favorable to the defendant. Robertson v. State (S.C. 2016) 418 S.C. 505, 795 S.E.2d 29. Criminal Law 1144.17

An appellate court, an appeal from a dismissal of an application for post‑conviction relief (PCR), must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant. Pelzer v. State (S.C.App. 2008) 378 S.C. 516, 662 S.E.2d 618. Criminal Law 1144.17

**SECTION 17‑27‑80.** Hearing on application; final judgment.

The application shall be heard in, and before any judge of, a court of competent jurisdiction in the county in which the conviction took place. A record of the proceedings shall be made and preserved. All rules and statutes applicable in civil proceedings are available to the parties. The court may receive proof by affidavits, depositions, oral testimony or other evidence and may order the applicant brought before it for hearing. If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence or other matters that may be necessary and proper. The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. This order is a final judgment.

HISTORY: 1962 Code Section 17‑607; 1969 (56) 158.

CROSS REFERENCES

Applicability of South Carolina Rules of Civil Procedure to post‑conviction relief actions, see Rule 71.1, SCRCP.

Library References

Criminal Law 1588, 1656 to 1661.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 2265, 2279 to 2281.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Appeal and Error Section 73, Exceptions to the Second Requirement of Obtaining a Ruling Below.

S.C. Jur. Appeal and Error Section 82, Post‑Verdict and Post‑Trial Motions.

S.C. Jur. Post‑Conviction Relief Section 20, Discovery.

S.C. Jur. Post‑Conviction Relief Section 22, Necessity.

S.C. Jur. Post‑Conviction Relief Section 23, Conduct of Hearings.

S.C. Jur. Post‑Conviction Relief Section 24, Motion for Reconsideration.

LAW REVIEW AND JOURNAL COMMENTARIES

Al‑Shabazz v. State: Excluding NonCollateral Claims from the Scope of Post‑Conviction Relief. 51 S.C. L. Rev. 839 (Summer 2000).

Blume, An introduction to post‑conviction remedies, practice and procedure in South Carolina. 45 S.C. L. Rev. 235 (Winter 1994).

NOTES OF DECISIONS

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Review 8

1. In general

Inmate’s failure to pursue claims at state hearing on post‑conviction relief constituted abandonment of the claims, and the claims were thereafter procedurally barred as basis for writ of habeas corpus. Smith v. Padula, 2006, 444 F.Supp.2d 531. Habeas Corpus 365

Postconviction relief statute that conferred authority upon postconviction court to change sentence did not apply to postconviction judge’s grant of 90 additional days of credit time, where judge did not make finding of error in sentencing ordered by trial judge. Crooks v. State (S.C. 1997) 326 S.C. 171, 485 S.E.2d 374. Criminal Law 1556

S.C. Code Section 17‑27‑80 does not require that post‑conviction applications be heard in county in which applicant was convicted but only that application is heard before judge who has jurisdiction to pass upon matters rising within such county. Buchanan v. State (S.C. 1981) 276 S.C. 127, 276 S.E.2d 302.

The trial judge had jurisdiction under this chapter to determine whether the appellant’s counsel’s representation of him at his trial met constitutional standards of adequacy. Rogers v. State (S.C. 1973) 261 S.C. 288, 199 S.E.2d 761.

Where the application of the appellant for post‑conviction relief was based entirely upon his claim that he did not have the effective assistance of counsel because of their incompetency, this allegation set forth a prima facie violation of the appellant’s constitutional rights, and raised a question of fact which could only be determined in the lower court by an evidentiary hearing. Rogers v. State (S.C. 1973) 261 S.C. 288, 199 S.E.2d 761. Criminal Law 1519(1)

2. Dismissal

When considering the State’s motion for summary dismissal of an application for postconviction relief, where no evidentiary hearing has been held, the judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant. McCoy v. State (S.C. 2013) 401 S.C. 363, 737 S.E.2d 623. Criminal Law 1652

There was no evidence to support post‑conviction relief (PCR) court’s finding that defendant failed to present any evidence in support of his PCR claims, such that vacation of order dismissing defendant’s petition on basis of lack of evidence was required, as well as remand for a new PCR hearing. Marlar v. State (S.C.App. 2007) 373 S.C. 275, 644 S.E.2d 769, rehearing denied, certiorari granted, certiorari granted, opinion reversed 375 S.C. 407, 653 S.E.2d 266. Criminal Law 1158.36; Criminal Law 1177.7(2); Criminal Law 1181.5(3.1)

When reviewing the propriety of a summary dismissal of an application for post‑conviction relief (PCR), the Supreme Court must view the facts in the light most favorable to the applicant. Leamon v. State (S.C. 2005) 363 S.C. 432, 611 S.E.2d 494. Criminal Law 1144.17

Denial of post‑conviction relief application reversed where dismissal of application was made without evidentiary hearing upon question of whether appellant had been denied effective assistance of counsel because he was unaware of right to appeal, which could not have been conclusively refuted on basis of record before lower court. Delaney v. State (S.C. 1977) 269 S.C. 555, 238 S.E.2d 679.

3. Recusal

In all post‑conviction relief hearings,a judge shall, upon motion, recuse himself or herself if he or she was the judge who presided at the guilty plea, criminal trial, or probation revocation proceeding for which relief is being sought. Floyd v. State (S.C. 1991) 303 S.C. 298, 400 S.E.2d 145.

4. Prejudice

A defendant who alleges he was improperly tried jointly must show prejudice before the Supreme Court will reverse his conviction. (Per Waller, J., with one Justice concurring and one Justice concurring separately.) Hughes v. State (S.C. 2001) 346 S.C. 554, 552 S.E.2d 315. Criminal Law 1166(6)

5. Burden of proof

The burden is on the postconviction relief applicant to prove the allegations in his application. (Per Waller, J., with one Justice concurring and one Justice concurring separately.) Hughes v. State (S.C. 2001) 346 S.C. 554, 552 S.E.2d 315. Criminal Law 1613

The burden of proof is on the applicant in post‑conviction proceedings to prove the allegations in his application. Butler v. State (S.C. 1985) 286 S.C. 441, 334 S.E.2d 813, certiorari denied 106 S.Ct. 869, 474 U.S. 1094, 88 L.Ed.2d 908. Criminal Law 1613

6. Admissibility of evidence

Trial court’s decision to admit affidavits and depositions in lieu of live testimony is within the court’s discretion. Simpson v. Moore (S.C. 2006) 367 S.C. 587, 627 S.E.2d 701, rehearing denied. Criminal Law 1656

Postconviction relief court did not abuse its discretion by allowing defendant to introduce over forty depositions and some twenty‑two affidavits into evidence in lieu of live testimony; most of the relevant witnesses testified at the post‑conviction relief hearing and were cross‑examined by the State, and the court gave the State the opportunity to submit additional testimony and affidavits countering the evidence presented by defendant. Simpson v. Moore (S.C. 2006) 367 S.C. 587, 627 S.E.2d 701, rehearing denied. Criminal Law 1656

State’s failure to object to postconviction relief (PCR) applicant’s testimony concerning purported substance of witness’ testimony had she been called at trial did not excuse applicant from his obligation to either produce witness at PCR hearing or offer her testimony in some other manner consistent with rules of evidence; thus, applicant’s failure to satisfy that obligation precluded relief on claim that trial counsel was ineffective for failing to call witness in question. Bannister v. State (S.C. 1998) 333 S.C. 298, 509 S.E.2d 807, rehearing denied. Criminal Law 1618(10)

A post‑conviction relief judge did not abuse his discretion when he considered an affidavit from the guilty plea hearing judge since sworn affidavits are admissible at post‑conviction proceedings in the discretion of the trial judge. Beckett v. State (S.C. 1982) 278 S.C. 222, 294 S.E.2d 46. Criminal Law 1614

7. Findings of fact

A post‑conviction relief court’s general denial of all claims not specifically addressed in the court’s order does not constitute a sufficient ruling on any issues since it does not set forth specific findings of fact and conclusions of law. Simmons v. State (S.C. 2016) 416 S.C. 584, 788 S.E.2d 220. Criminal Law 1042.7(2)

In the absence of findings of fact, it was improper for the post conviction relief court (PCR) to deny a defendant’s motion for relief on his allegation of ineffective assistance of counsel where the defendant, who was convicted of 3 counts of assaulting a police officer and one count of resisting arrest, alleged that his trial counsel was ineffective in failing to object to the state’s numerous references to his criminal record and prior bad acts, and by failing to request a limiting instruction; Section 17‑27‑80 requires that the PCR court make specific findings of fact and conclusions of law. McCray v. State (S.C. 1991) 305 S.C. 329, 408 S.E.2d 241.

8. Review

Habeas petitioner was procedurally barred from raising ineffective assistance of counsel claims; although the Court of Appeals of South Carolina denied certiorari with respect to post‑conviction relief (PCR) application, petitioner did appeal the denial of that application and he could have raised all allegations concerning ineffective assistance of counsel in his PCR proceeding but did not do so. Primus v. Padula, 2008, 555 F.Supp.2d 596, appeal dismissed 298 Fed.Appx. 236, 2008 WL 4790104, certiorari denied 129 S.Ct. 1621, 556 U.S. 1133, 173 L.Ed.2d 1004. Habeas Corpus 365

In South Carolina, to preserve an issue for review, parties are required to make sure that the lower court’s final judgment reflects a ruling on the issue, and if the final judgment does not contain such a ruling, parties are usually required to file a motion to amend judgment, but in the specific context of postconviction relief, the South Carolina Supreme Court has consistently vacated and remanded postconviction review (PCR) judgments that do not contain findings on issues presented, notwithstanding a PCR petitioner’s failure to preserve an issue by filing a motion to amend. Pearson v. Harrison (C.A.4 (S.C.) 2001) 9 Fed.Appx. 85, 2001 WL 427933, Unreported. Criminal Law 1044.1(1); Criminal Law 1045; Criminal Law 1181.5(3.1)

Extraordinary action of remanding defendant’s application for post‑conviction relief was warranted, even though defendant failed to preserve for appeal issue of post‑conviction court’s failure to make specific findings of fact and conclusions of law by filing motion to alter or amend; strength of State’s DNA evidence against defendant was misrepresented to jury in murder trial, which could have violated defendant’s due process rights, and preemptive ruling on merits by Supreme Court would have been unfair to State. Simmons v. State (S.C. 2016) 416 S.C. 584, 788 S.E.2d 220. Constitutional Law 4632; Constitutional Law 4633

To preserve issues for appellate review, after an order is filed, counsel has an obligation to review the order and file a motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by the Uniform Post‑Conviction Procedure Act and the civil procedure rules. Simmons v. State (S.C. 2016) 416 S.C. 584, 788 S.E.2d 220. Criminal Law 1181.5(3.1)

Trial judge who presided over defendant’s bench trial on remand was not required to recuse himself, even though judge had presided at defendant’s earlier post‑conviction relief hearing; judge was not being asked to review his own conduct in prior post‑conviction relief proceeding, and guilt or innocence was not at issue in post‑conviction relief proceeding. State v. Watkins (S.C. 2013) 406 S.C. 360, 752 S.E.2d 261. Judges 47(2)

A post‑conviction relief (PCR) court’s findings will be upheld on appeal if there is any evidence of probative value sufficient to support them. Marlar v. State (S.C.App. 2007) 373 S.C. 275, 644 S.E.2d 769, rehearing denied, certiorari granted, certiorari granted, opinion reversed 375 S.C. 407, 653 S.E.2d 266. Criminal Law 1158.36

In reviewing a grant of post conviction relief (PCR), the Supreme Court is concerned only with whether there is any evidence of probative value to support the PCR judge’s decision. Franklin v. Catoe (S.C. 2001) 346 S.C. 563, 552 S.E.2d 718, rehearing denied, certiorari denied, certiorari denied 122 S.Ct. 2332, 535 U.S. 1114, 153 L.Ed.2d 162. Criminal Law 1158.36

An appellate court must affirm the postconviction relief court’s decision when its findings are supported by any evidence of probative value. (Per Waller, J., with one Justice concurring and one Justice concurring separately.) Hughes v. State (S.C. 2001) 346 S.C. 554, 552 S.E.2d 315. Criminal Law 1158.36

Both the plea record and the applicant’s postconviction relief testimony are considered on appellate review of a postconviction relief matter. Rollison v. State (S.C. 2001) 346 S.C. 506, 552 S.E.2d 290. Criminal Law 1134.6

The postconviction relief judge’s findings should be upheld on appeal if supported by any probative evidence in the record. Rollison v. State (S.C. 2001) 346 S.C. 506, 552 S.E.2d 290. Criminal Law 1158.36

An order denying a defendant’s request for post‑conviction relief would be remanded for rehearing where it failed to directly address the defendant’s claims that his trial counsel was ineffective; not only does such failure deprive the parties of rulings on the issues raised, but it makes review by the appellate court more difficult, and thus counsel preparing orders should be meticulous in doing so, and opposing counsel have the obligation to review the order and file a motion to alter or amend the judgment if the order fails to set forth the required findings and reasons. Pruitt v. State (S.C. 1992) 310 S.C. 254, 423 S.E.2d 127.

**SECTION 17‑27‑90.** Grounds for relief.

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

HISTORY: 1962 Code Section 17‑608; 1969 (56) 158.

CROSS REFERENCES

Applicability of South Carolina Rules of Civil Procedure to post‑conviction relief actions, see Rule 71.1, SCRCP.

Library References

Criminal Law 1427, 1435.

Westlaw Topic No. 110.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Post‑Conviction Relief Section 2, Purpose.

S.C. Jur. Post‑Conviction Relief Section 18, Form and Sufficiency of Application.

S.C. Jur. Post‑Conviction Relief Section 26, Availability and Procedure.

S.C. Jur. Post‑Conviction Relief Section 15.5, Successive Applications.

LAW REVIEW AND JOURNAL COMMENTARIES

1982 Survey: Post conviction relief; an exception to the rule against successive applications. 35 S.C. L. Rev. 114, Autumn 1983.

An introduction to post‑conviction remedies, practice and procedure in South Carolina. 45 S.C. L. Rev. 235 (Winter 1994).

United States Supreme Court Annotations

Due process, disclosure of exculpatory evidence, postconviction relief proceedings, state’s postconviction relief procedures, discovery available for good cause, access to evidence for new DNA testing, see District Attorney’s Office for Third Judicial Dist. v. Osborne, 2009, 129 S.Ct. 2308, 557 U.S. 52, 174 L.Ed.2d 38.

Habeas corpus, Antiterrorism and Effective Death Penalty Act, ineffective assistance of counsel, Strickland standard, prejudice, deficiency, reasonableness of counsel’s performance, see Harrington v. Richter, 2011, 131 S.Ct. 770, 562 U.S. 86, 178 L.Ed.2d 624, on remand 643 F.3d 1238.

Ineffective assistance of counsel, guilty pleas, Strickland standard, habeas corpus, see Premo v. Moore, 2011, 131 S.Ct. 733, 562 U.S. 115, 178 L.Ed.2d 649, on remand 632 F.3d 1287.

NOTES OF DECISIONS

Amendment of petition 2

Questions of fact 4

Res judicata 3

Review 5

Successive applications 1

1. Successive applications

Given circumstances indicating that state Supreme Court did not visit merits of petition for state writ of habeas corpus, its one‑sentence order denying petition did not fairly appear to be based on federal law, but rather was premised on adequate and independent state procedural grounds, precluding review by federal habeas court of evidence offered by petitioner for first time in her petitions for federal and state habeas relief; order made no mention of federal law, no basis existed for concluding that “denial” of state petition, rather than “dismissal,” indicated that state supreme court reached the merits, state habeas relief was inappropriate, in that petition was simply attempt to file second application for postconviction relief on grounds that could have been raised in initial application, and state sought dismissal of state petition solely on procedural basis. Wilson v. Moore, 1999, 178 F.3d 266, certiorari denied 120 S.Ct. 191, 528 U.S. 880, 145 L.Ed.2d 160. Habeas Corpus 422; Habeas Corpus 423

Under South Carolina law, any issue which could have been raised in an initial state post‑conviction relief action cannot be raised in a second PCR action. Primus v. Padula, 2008, 555 F.Supp.2d 596, appeal dismissed 298 Fed.Appx. 236, 2008 WL 4790104, certiorari denied 129 S.Ct. 1621, 556 U.S. 1133, 173 L.Ed.2d 1004. Criminal Law 1668(3)

Even if habeas petitioner did raise three claims to the state Supreme Court in his most recent petition for certiorari, he was still procedurally barred from litigating the claims in his federal habeas proceeding where the state Supreme Court rejected his entire petition on the grounds that it was barred as successive by procedural rules. Gibson v. Bazzle, 2005, 383 F.Supp.2d 870, appeal dismissed 155 Fed.Appx. 703, 2005 WL 3209206. Habeas Corpus 370

South Carolina statute barring successive postconviction relief (PCR) petitions was an adequate and independent state‑law ground for decision, and thus, South Carolina Supreme Court’s refusal to consider petitioner’s challenge to a malice instructionon the basis that he had failed to present it in his first PCR application barred the petitioner from raising that claim in his federal habeas proceeding. Gibson v. Bazzle, 2005, 383 F.Supp.2d 870, appeal dismissed 155 Fed.Appx. 703, 2005 WL 3209206. Habeas Corpus 370

Supreme Court of South Carolina, which responded to a writ of habeas corpus in its original jurisdiction by issuing a one‑sentence denial, did not consider new evidence presented by the petitioner which had not been presented in direct appellate and postconviction relief proceedings, and the new evidence could consequently not be considered by the federal court in federal habeas proceedings; the Supreme Court petition was essentially a second postconviction relief proceeding barred by South Carolina law even when there was new evidence, denial rather than dismissal of the claim did not establish that the Supreme Court considered the merits of the petitioner’s claim, and the quick response time of the Supreme Court argued against its having reviewed the voluminous materials and made a merits determination. Wilson v. Moore, 1998, 999 F.Supp. 783, affirmed 178 F.3d 266, certiorari denied 120 S.Ct. 191, 528 U.S. 880, 145 L.Ed.2d 160. Habeas Corpus 424

Allegation by defendant, who had been convicted of murder and sentenced to death, that his prior post‑conviction relief (PCR) counsel was not qualified, under the South Carolina Effective Death Penalty Act, for representation of a death‑sentenced inmate, was sufficient to permit a successive PCR application. Robertson v. State (S.C. 2016) 418 S.C. 505, 795 S.E.2d 29. Criminal Law 1668(3)

Merely alleging ineffective assistance of prior post‑conviction relief (PCR) counsel did not afford defendant the right to file a successive PCR application in state court. Robertson v. State (S.C. 2016) 418 S.C. 505, 795 S.E.2d 29. Criminal Law 1668(3)

All defendants are entitled to a full and fair opportunity to present claims in one post‑conviction relief (PCR) application; successive PCR applications and appeals are generally disfavored because they allow a defendant to receive more than one bite at the apple, as it were. Robertson v. State (S.C. 2016) 418 S.C. 505, 795 S.E.2d 29. Criminal Law 1407; Criminal Law 1668(1)

Normally, state law procedurally prohibits a continuance of post‑conviction proceedings and submission of successive petitions for post‑conviction relief. Council v. Catoe (S.C. 2004) 359 S.C. 120, 597 S.E.2d 782, rehearing denied. Criminal Law 1650; Criminal Law 1668(1)

Defendant was precluded from raising claim in successive petition for postconviction relief claim that malice instruction given in trial was defective, in light of subsequent case holding that instruction was unconstitutional, where claim could have been raised in initial petition. Gibson v. State (S.C. 2003) 355 S.C. 429, 586 S.E.2d 119, certiorari denied, certiorari denied 124 S.Ct. 1439, 540 U.S. 1191, 158 L.Ed.2d 102. Criminal Law 1668(3)

Defendant’s filing of four post‑conviction relief actions, one of which was successful, was not repetitive, numerous, or totally frivolous, and thus defendant was not subject to strict restrictions on future post‑conviction relief filings. Williams v. State (S.C. 2003) 354 S.C. 630, 583 S.E.2d 52. Criminal Law 1668(3)

Successive post‑conviction relief (PCR) applications are disfavored and the applicant has the burden to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Tilley v. State (S.C. 1999) 334 S.C. 24, 511 S.E.2d 689, rehearing denied. Criminal Law 1668(5)

Inmate’s fourth application for post‑conviction relief (PCR), in which he challenged his guilty plea as involuntary on ground that he did not know he would be ineligible for parole due to sequence of his sentences, was not “successive”; inmate learned of his ineligibility in letter from parole board, he filed his fourth application less than one month later, and he could not have raised his claim in any earlier application because he was then unaware of such claim. Tilley v. State (S.C. 1999) 334 S.C. 24, 511 S.E.2d 689, rehearing denied. Criminal Law 1668(6)

A second application for post conviction relief correctly stated a claim of ineffective assistance of counsel where the applicant alleged that he expressed a desire to seek review of the denial of his first application, but that his counsel failed to timely seek review; thus, the matter would be remanded for an evidentiary hearing on the sole issue of whether the applicant requested and was denied an opportunity to seek appellate review. Austin v. State (S.C. 1991) 305 S.C. 453, 409 S.E.2d 395. Criminal Law 1181.5(3.1)

A second application for post conviction relief, brought on the ground that the first application was insufficient due to ineffective assistance of counsel, was not permitted where the second application argued 3 additional grounds for relief, the defendant asserted that the new arguments were of great merit, and he argued that based thereon, his prior counsel had been ineffective in not raising them; since it had been possible to raise these arguments in the first application, the applicant could not raise them in a successive application, regardless of their merit. Aice v. State (S.C. 1991) 305 S.C. 448, 409 S.E.2d 392.

Section 17‑27‑90 and Supreme Court Rule 50(3), while barring subsequent petitions on grounds available to or waived by an applicant in a prior action or petition, contemplate an adjudication on the merits of the original action and will not be construed to operate as a trap for the unwary. Thus, the dismissal of a post‑conviction release application on the request of the defendant with the consent of the State which did not state that the application was to be dismissed with prejudice would not be construed to bar a subsequent petition for post‑conviction relief. Gamble v. State (S.C. 1989) 298 S.C. 176, 379 S.E.2d 118.

Based upon the particular circumstances of his case, a defendant was entitled to a hearing on his application for post‑conviction relief despite the dismissal of a previous application for the same relief. Case v. State (S.C. 1982) 277 S.C. 474, 289 S.E.2d 413.

Mere allegation of ineffective counsel on appeal and at first post‑conviction proceeding is insufficient to establish a new ground that could not have been raised in previous application. Land v. State (S.C. 1980) 274 S.C. 243, 262 S.E.2d 735.

Application for postconviction relief seeking to set aside sentence of 25 years for voluntary manslaughter where sentence was recorded as a 15 year sentence due to clerical error, was denied on ground that defendant did not meet burden placed upon him to show that this claim could not have been raised in his earlier application for postconviction relief. Hunter v. State (S.C. 1978) 271 S.C. 48, 244 S.E.2d 530.

2. Amendment of petition

A petitioner’s motion to amend his post‑conviction relief petition was untimely made after the Circuit Court had issued its order denying such relief on remand from the United States Supreme Court where the petitioner sought, after full hearings and a decision on the merits, to add new grounds and new claims for post‑conviction relief. Arnold v. State (S.C. 1992) 309 S.C. 157, 420 S.E.2d 834, rehearing granted, certiorari denied 113 S.Ct. 1302, 507 U.S. 927, 122 L.Ed.2d 691.

3. Res judicata

Claims that had been raised in a prior habeas corpus proceeding in federal court, or that could have been raised therein but were not, were barred under the doctrine of res judicata in a subsequent state proceeding for post‑conviction relief. Foxworth v. State (S.C. 1981) 275 S.C. 615, 274 S.E.2d 415.

4. Questions of fact

Where a defendant alleges, in a successive post‑conviction relief (PCR) application, facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications, and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing. Robertson v. State (S.C. 2016) 418 S.C. 505, 795 S.E.2d 29. Criminal Law 1655(9)

Genuine issue of material fact remained whether postconviction claim of juror misconduct in failing to disclose during voir dire that her cousin was married to solicitor could have been discovered prior to defendant’s filing of initial application for relief, thus precluding summary dismissal of second application as successive. McCoy v. State (S.C. 2013) 401 S.C. 363, 737 S.E.2d 623. Criminal Law 1655(9)

5. Review

Post‑conviction relief (PCR) court acted within its discretion in refusing to address PCR applicant’s claim that he received ineffective assistance of counsel (IAC) when trial counsel failed to object to the testimony of state’s expert medical doctor witness, who allegedly improperly bolstered victim’s credibility when she testified that she believed victim had been abused, in prosecution for first‑degree criminal sexual conduct (CSC) with a minor, second‑degree CSC, lewd act upon a minor, and incest; claim was not included in PCR application and no amendment was made to application, PCR counsel did not mention additional IAC claims until closing argument of PCR hearing, PCR counsel did not make claim with specificity, and no testimonial evidence was presented in support of claim. Mangal v. State (S.C. 2017) 2017 WL 3045812. Criminal Law 1580(10)

Evidence did not support excusing post‑conviction relief (PCR) applicant’s procedural default in failing to properly raise claim in PCR application that he received ineffective assistance of counsel (IAC) when trial counsel failed to object to direct examination testimony of state’s expert witness, who allegedly improperly bolstered victim’s credibility when she testified that she believed victim had been sexually abused; PCR court acted within its discretion in refusing to address claim, evidence regarding claim was not presented to PCR court at PCR hearing, and state made convincing argument that trial counsel intentionally elicited further testimony from expert on cross‑examination pursuant to a valid trial strategy. Mangal v. State (S.C. 2017) 2017 WL 3045812. Criminal Law 1580(10)

The post‑conviction relief court’s ruling on an ineffective assistance of counsel claim should be upheld if it is supported by any evidence of probative value in the record. Gibbs v. State (S.C. 2013) 403 S.C. 484, 744 S.E.2d 170, habeas corpus dismissed 2015 WL 7188341. Criminal Law 1158.36

In reviewing the findings of the post‑conviction relief court, the Supreme Court applies an “any evidence” standard of review. Gibbs v. State (S.C. 2013) 403 S.C. 484, 744 S.E.2d 170, habeas corpus dismissed 2015 WL 7188341. Criminal Law 1158.36

Court of Appeals would not review defendant’s unpreserved claim that since federal court dismissed possessory drug offenses with prejudice, prosecution of state charges evolving from the same facts was barred by statute providing that an acquittal under federal law was a bar to prosecution, as defendant did not raise issue in trial court and statute did not involve subject matter jurisdiction, and therefore claim could not be raised for the first time on appeal. State v. Rice (S.C.App. 2001) 348 S.C. 417, 559 S.E.2d 360, rehearing denied, certiorari denied. Criminal Law 1030(3)

State prisoner, by arguing, in his petition seeking certiorari review by state’s highest court as to his murder and arson convictions, that counsel was ineffective in failing to investigate co‑defendant’s admissions of guilt, did not fairly present to state’s highest court a claim that counsel was ineffective in failing to review physical evidence with prisoner before trial, and thus, the latter claim, which prisoner could not now raise in state court, was procedurally defaulted for federal habeas review, based on failure to exhaust state remedies. Phillips v. Lewis (C.A.4 (S.C.) 2017) 2017 WL 1200976. Habeas Corpus 382

**SECTION 17‑27‑100.** Appeals.

A final judgment entered under this chapter may be reviewed by a writ of certiorari as provided by the South Carolina Appellate Court Rules.

HISTORY: 1962 Code Section 17‑609; 1969 (56) 158; 1999 Act No. 55, Section 24.

CROSS REFERENCES

Applicability of South Carolina Rules of Civil Procedure to post‑conviction relief actions, see Rule 71.1, SCRCP.

Library References

Criminal Law 1011.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 2324, 2330 to 2331.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Post‑Conviction Relief Section 26, Availability and Procedure.

LAW REVIEW AND JOURNAL COMMENTARIES

An introduction to post‑conviction remedies, practice and procedure in South Carolina. 45 S.C. L. Rev. 235 (Winter 1994).

NOTES OF DECISIONS

In general 1

Standard of review 2

1. In general

Post‑conviction relief (PCR) court acted within its discretion in refusing to address PCR applicant’s claim that he received ineffective assistance of counsel (IAC) when trial counsel failed to object to the testimony of state’s expert medical doctor witness, who allegedly improperly bolstered victim’s credibility when she testified that she believed victim had been abused, in prosecution for first‑degree criminal sexual conduct (CSC) with a minor, second‑degree CSC, lewd act upon a minor, and incest; claim was not included in PCR application and no amendment was made to application, PCR counsel did not mention additional IAC claims until closing argument of PCR hearing, PCR counsel did not make claim with specificity, and no testimonial evidence was presented in support of claim. Mangal v. State (S.C. 2017) 421 S.C. 85, 805 S.E.2d 568. Criminal Law 1580(10)

Applicant for post‑conviction relief preserved for review issue of whether trial counsel was ineffective for failing to object to pediatrician’s testimony that she believed victim was abused as improper bolstering, in trial for criminal sexual conduct (CSC) with a minor, lewd act upon a minor, and incest; trial counsel was questioned and cross‑examined about issue during post‑conviction relief hearing, post‑conviction counsel specifically mentioned issue in his closing remarks, and when post‑conviction court’s order failed to address issue, post‑conviction counsel took appropriate action to preserve it by requesting a ruling in motion to amend judgment. Mangal v. State (S.C.App. 2015) 415 S.C. 310, 781 S.E.2d 732, rehearing denied, reversed 2017 WL 3045812. Criminal Law 1042.7(2)

Although a defendant may waive his right to collateral review, he is nevertheless still entitled to challenge whether the advice he received from his attorney in agreeing to that waiver was constitutionally defective. Sanders v. State (S.C. 2015) 412 S.C. 611, 773 S.E.2d 580. Criminal Law 1434; Criminal Law 1440(1)

An order in a postconviction matter which does not include specific findings of fact and conclusions of law relating to each issue presented, but instead dismisses some of the issues without prejudice to them being raised in a future postconviction proceeding, does not constitute a final order or judgment, and therefore is not reviewable by writ of certiorari. Garner v. State (S.C. 2006) 371 S.C. 1, 636 S.E.2d 860. Criminal Law 1011

Defendant was not entitled to appeal from order granting defendant’s own motion to withdraw post‑conviction relief action. Rush v. State (S.C. 2006) 368 S.C. 144, 628 S.E.2d 42. Criminal Law 1026

Under Section 17‑27‑100, appellate review under the Uniform Post‑Conviction Relief Act is discretionary with the state Supreme Court. Knight v. State (S.C. 1985) 284 S.C. 138, 325 S.E.2d 535.

2. Standard of review

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‑Conviction Procedure Act or the Rules of Civil Procedure. Mangal v. State (S.C. 2017) 2017 WL 3045812. Criminal Law 1156.11

Findings of a post‑conviction relief (PCR) judge will be upheld by the Supreme Court when they are supported by any competent evidence in the record; however, the Supreme Court will not uphold the findings of the PCR court if no probative evidence supports those findings. Jackson v. State (S.C. 2003) 355 S.C. 568, 586 S.E.2d 562, rehearing denied. Criminal Law 1158.36

The Supreme Court will sustain the post‑conviction relief (PCR) judge’s findings regarding ineffective assistance of counsel if there is any probative evidence to support those findings. Humphries v. State (S.C. 2002) 351 S.C. 362, 570 S.E.2d 160, rehearing denied. Criminal Law 1158.36

Appellate court must affirm a postconviction relief (PCR) court’s decision when its findings are supported by any evidence of probative value. Pauling v. State (S.C. 2002) 350 S.C. 278, 565 S.E.2d 769. Criminal Law 1158.36

Appellate court will not uphold the findings of a postconviction relief (PCR) court if there is no probative evidence to support those findings. Pauling v. State (S.C. 2002) 350 S.C. 278, 565 S.E.2d 769. Criminal Law 1158.36

Appellate court must affirm the post‑conviction relief (PCR) court’s decision when its findings are supported by any evidence of probative value. Gilchrist v. State (S.C. 2002) 350 S.C. 221, 565 S.E.2d 281. Criminal Law 1158.36

Appellate court will not uphold the findings of a post‑conviction relief (PCR) court if no probative evidence supports those findings. Gilchrist v. State (S.C. 2002) 350 S.C. 221, 565 S.E.2d 281. Criminal Law 1158.36

The Supreme Court will sustain the post‑conviction relief (PCR) court’s factual findings and conclusions regarding ineffective assistance of counsel if there is any probative evidence in the record to support those findings. Patrick v. State (S.C. 2002) 349 S.C. 203, 562 S.E.2d 609, rehearing denied. Criminal Law 1158.36

In reviewing a postconviction relief grant, the Supreme Court is concerned only with whether there is “any evidence” to support the postconviction relief judge’s decision. If “any evidence” is found, the Supreme Court must affirm the ruling of the postconviction relief judge. Grier v. State (S.C. 1989) 299 S.C. 321, 384 S.E.2d 722. Criminal Law 1158.36

**SECTION 17‑27‑110.** Rules.

The Supreme Court may adopt such rules as it shall deem necessary to effectuate the purposes of this chapter.

HISTORY: 1962 Code Section 17‑611; 1969 (56) 158.

CROSS REFERENCES

Applicability of South Carolina Rules of Civil Procedure to post‑conviction relief actions, see Rule 71.1, SCRCP.

NOTES OF DECISIONS

In general 1

1. In general

Postconviction procedure rule providing for review of a judgment in a postconviction relief case through a writ of certiorari complies with discretionary review prescribed by the legislature in postconviction relief cases and therefore it does not violate section of the State Constitution governing appellate jurisdiction in law cases. Knight v. State (S.C. 1985) 284 S.C. 138, 325 S.E.2d 535. Criminal Law 1404

Cited in Chambers v. State (S.C. 1974) 262 S.C. 202, 203 S.E.2d 426.

**SECTION 17‑27‑120.** Construction.

This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it.

HISTORY: 1962 Code Section 17‑610; 1969 (56) 158.

CROSS REFERENCES

Applicability of South Carolina Rules of Civil Procedure to post‑conviction relief actions, see Rule 71.1, SCRCP.

Library References

Criminal Law 1402.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 2220 to 2221.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Appeal and Error Section 11, Certiorari Jurisdiction of the Supreme Court.

S.C. Jur. Post‑Conviction Relief Section 2, Purpose.

S.C. Jur. Post‑Conviction Relief Section 3, Relationship to Federal and State Habeas Corpus.

S.C. Jur. Post‑Conviction Relief Section 18, Form and Sufficiency of Application.

S.C. Jur. Post‑Conviction Relief Section 24, Motion for Reconsideration.

S.C. Jur. South Carolina Rules of Civil Procedure Section 71.1.0, Rule 71.1. Post‑Conviction Relief Actions.

**SECTION 17‑27‑130.** Waiver of attorney‑client privilege by allegation of ineffective prior counsel; access to files.

Where a defendant alleges ineffective assistance of prior trial counsel or appellate counsel as a ground for post‑conviction relief or collateral relief under any procedure, the applicant shall be deemed to have waived the attorney‑client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant, to the extent necessary for prior counsel to respond to the allegation. This waiver of the attorney‑client privilege shall be deemed automatic upon the filing of the allegation alleging ineffective assistance of prior counsel and the court need not enter an order waiving the privilege. Thereafter, counsel alleged to have been ineffective is free to discuss and disclose any aspect of the representation with representatives of the State for purposes of defending against the allegations of ineffectiveness, to the extent necessary for prior counsel to respond to the allegation.

In the case of a defendant who has been convicted of a capital offense and sentenced to death, the defendant’s prior trial counsel or appellate counsel shall make available to the capital defendant’s collateral counsel the complete files of the defendant’s trial or appellate counsel. The capital defendant’s collateral counsel may inspect and photocopy the files, but the defendant’s prior trial or appellate counsel shall maintain custody of their respective files, except as to the material which is admitted into evidence in any trial proceeding.

HISTORY: 1996 Act No. 448, Section 4.

Editor’s Note

1996 Act No. 448, Section 1, eff June 18, 1996, provides as follows:

“SECTION 1. This act [consisting of Sections 16‑3‑21, 17‑25‑380, 17‑27‑130, 17‑27‑150, and 17‑27‑160] is known and may be cited as the ‘South Carolina Effective Death Penalty Act of 1996’.”

CROSS REFERENCES

Applicability of South Carolina Rules of Civil Procedure to post‑conviction relief actions, see Rule 71.1, SCRCP.

Library References

Criminal Law 1590.

Privileged Communications and Confidentiality 170.

Westlaw Topic Nos. 110, 311H.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Post‑Conviction Relief Section 20, Discovery.

S.C. Jur. Witnesses Section 31, Waiver.

**SECTION 17‑27‑150.** Discovery in post‑conviction relief proceeding.

(A) A party in a noncapital post‑conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for the effective utilization of discovery procedures, counsel may be appointed by the judge for an applicant who qualifies for appointment pursuant to Section 17‑27‑60 or similar applicable provisions of law.

(B) A party in a capital post‑conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure.

HISTORY: 1996 Act No. 448, Section 5.

Editor’s Note

1996 Act No. 448, Section 1, eff June 18, 1996, provides as follows:

“SECTION 1. This act [consisting of Sections 16‑3‑21, 17‑25‑380, 17‑27‑130, 17‑27‑150, and 17‑27‑160] is known and may be cited as the ‘South Carolina Effective Death Penalty Act of 1996’.”

CROSS REFERENCES

Applicability of South Carolina Rules of Civil Procedure to post‑conviction relief actions, see Rule 71.1, SCRCP.

Library References

Criminal Law 1590.

Westlaw Topic No. 110.

**SECTION 17‑27‑160.** Capital case post‑conviction relief procedures.

(A) If a defendant has been sentenced to death in South Carolina, he must file his application for post‑conviction relief in the county in which he was indicted for the crime resulting in the sentence of death. Upon receipt of the application for post‑conviction relief, the clerk of court shall forward the application to the judge who has been assigned to hear the post‑conviction relief application. This judge shall maintain control over the expedited consideration of the application pursuant to this section. The judge assigned as the post‑conviction relief judge must not be the original sentencing judge. A copy of the application shall be immediately provided to the solicitor of the circuit in which the applicant was convicted and a copy provided to the Attorney General. The filing of the application does not automatically stay any sentence of death.

(B) Upon receipt of the application for post‑conviction relief, the counsel for the respondent shall file a return within thirty days after receipt of the application.

If the applicant is indigent and desires representation by counsel, two counsel shall be immediately appointed to represent the petitioner in this action. At least one of the attorneys appointed to represent the applicant must have previously represented a death‑sentenced inmate in state or federal post‑conviction relief proceedings or (1) must meet the minimum qualifications set forth in Section 16‑3‑26(B) and Section 16‑3‑26(F) and (2) have successfully completed, within the previous two years, not less than twelve hours of South Carolina Bar approved continuing legal education or professional training primarily involving advocacy in the field of capital appellate and/or post‑conviction defense. The Supreme Court may promulgate additional standards for qualifications of counsel in capital post‑conviction proceedings. The court may not appoint an attorney as counsel under this section if the attorney represented the applicant at trial or in a direct appeal unless the applicant and the attorney request appointment on the record or the court finds good cause to make the appointment. Counsel appointed in these cases shall be compensated from the funding provided in Section 16‑3‑26 in the same manner and rate as appointed trial counsel, provided that Section 16‑3‑26(I) shall not apply to counsel appointed in post‑conviction relief proceedings. Appointed counsel on appeal from state post‑conviction relief cases shall be funded and compensated from the funds established for representation of indigents on appeal by the Office of Appellate Defense pursuant to Chapter 4, Title 17. Nothing in this section shall preclude an out‑of‑state attorney from appearing pro hac vice.

If counsel is the same person appointed as counsel on appeal, the court shall appoint a second counsel to assist in the preparation of the application for post‑conviction relief. If the applicant elects to proceed pro se, any findings made by the court shall be done on the record and in open court concerning the waiver of the assistance of counsel.

(C) Not later than thirty days after the filing of the state’s return, the judge shall convene a status conference to schedule a hearing on the merits of the application for post‑conviction relief. The hearing must be scheduled within one hundred eighty days from the date of the status conference, unless good cause is shown to justify a continuance.

(D) Within thirty days from the receipt of the transcript, or if the judge requests post trial briefs, within thirty days from the receipt of the post trial briefs, the hearing judge in writing shall make specific findings of fact and state expressly the judge’s conclusions of law relating to each issue. This order is a final judgment subject to a motion for rehearing, a motion to alter or amend judgment, a motion for relief from judgment or order, or any other motion as allowed by the South Carolina Rules of Civil Procedure.

(E) In these expedited capital post‑conviction relief hearings, a court reporter shall be assigned to take testimony. The transcription of the testimony and record shall be given priority over all other matters concerning the preparation of the record and, upon completion, shall immediately be provided to the parties and the Clerk of the Supreme Court of South Carolina.

HISTORY: 1996 Act No. 448, Section 6.

Editor’s Note

1996 Act No. 448, Section 1, eff June 18, 1996, provides as follows:

“SECTION 1. This act [consisting of Sections 16‑3‑21, 17‑25‑380, 17‑27‑130, 17‑27‑150, and 17‑27‑160] is known and may be cited as the ‘South Carolina Effective Death Penalty Act of 1996’.”

Library References

Sentencing and Punishment 1790.

Westlaw Topic No. 350H.

NOTES OF DECISIONS

In general 1

Counsel 2

1. In general

One‑year limitations period applied to petition of state prisoner subject to death sentence, even though state had enacted mechanism designed to comply with conditions for invoking 180‑day filing period under expedited review provisions of Antiterrorism and Effective Death Penalty Act (AEDPA) for capital cases, given that lawyers appointed to represent prisoner in seeking state post‑conviction relief did not meet state’s standards of competency established in connection with such mechanism. Tucker v. Catoe (C.A.4 (S.C.) 2000) 221 F.3d 600, certiorari denied 121 S.Ct. 661, 531 U.S. 1054, 148 L.Ed.2d 563. Habeas Corpus 603.3

Capital defendant’s post‑conviction counsel did not have ample opportunity to investigate matters pertaining to defendant’s potential brain damage, and therefore post‑conviction court abused its discretion in denying defendant’s second motion for additional time; post‑conviction counsel promptly sought funding and additional time for neuropsychologist and neuroimaging, but counsel was subsequently delayed by defendant’s undiagnosed medical condition, and ruling left post‑conviction counsel unable to present evidence to support claim that trial counsel was ineffective for failing to investigate defendant’s brain damage. Winkler v. State (S.C. 2016) 418 S.C. 643, 795 S.E.2d 686, rehearing denied. Criminal Law 1011

Supreme Court would not establish procedures for cases where the defendant was sentenced to death prior to Atkins decision, holding the execution of a mentally retarded person is cruel and unusual punishment prohibited by the Eighth Amendment, as such procedures already existed in post‑conviction relief (PCR) proceedings. Franklin v. Maynard (S.C. 2003) 356 S.C. 276, 588 S.E.2d 604, rehearing denied. Sentencing And Punishment 1791

2. Counsel

Since state respondents did not follow their own procedures when appointing counsel for petitioner during state postconviction proceedings, respondents could not invoke Chapter 154 of Antiterrorism and Effective Death Penalty Act (AEDPA), which established requirements for state to “opt in” to the special habeas corpus procedures in capital cases, against petitioner in federal habeas action, even assuming that South Carolina statute did not satisfy “opt in” requirements. Tucker v. Moore, 1999, 56 F.Supp.2d 611, affirmed 221 F.3d 600, certiorari denied 121 S.Ct. 661, 531 U.S. 1054, 148 L.Ed.2d 563. Habeas Corpus 332.1

An independent constitutional violation did not occur when the State failed to follow statute establishing qualifications of counsel appointed to represent a petitioner in state postconviction proceedings, and, therefore, no cause existed in federal habeas proceeding to excuse procedurally defaulted claims. Tucker v. Moore, 1999, 56 F.Supp.2d 611, affirmed 221 F.3d 600, certiorari denied 121 S.Ct. 661, 531 U.S. 1054, 148 L.Ed.2d 563. Habeas Corpus 406

Non‑compliance with the qualification requirements of the South Carolina Effective Death Penalty Act for post‑conviction relief (PCR) counsel for a death‑sentenced defendant constitutes deficient performance per se, in an ineffective assistance claim. Robertson v. State (S.C. 2016) 418 S.C. 505, 795 S.E.2d 29. Criminal Law 1971

Genuine issue of fact as to whether death‑sentenced defendant’s prior post‑conviction relief (PCR) counsel met qualification requirements of South Carolina Effective Death Penalty Act for representation of defendant precluded summary dismissal of defendant’s successive PCR application, which alleged that prior PCR counsel did not meet such qualifications. Robertson v. State (S.C. 2016) 418 S.C. 505, 795 S.E.2d 29. Criminal Law 1668(3)

Allegation by defendant, who had been convicted of murder and sentenced to death, that his prior post‑conviction relief (PCR) counsel was not qualified, under the South Carolina Effective Death Penalty Act, for representation of a death‑sentenced inmate, was sufficient to permit a successive PCR application. Robertson v. State (S.C. 2016) 418 S.C. 505, 795 S.E.2d 29. Criminal Law 1668(3)