STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Robert Lee Isom, #297314, Applicant,	)	Case No.: 2019-CP-10-4357
v.	)	**CONDITIONAL ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Gary Grant (Applicant) on August 20, 2019. Respondent made its Return, requesting the application be summarily dismissed.

I. Procedural History

Petitioner is currently incarcerated in the Lee Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court for Charleston County.2 [Doc. 1 at 1; Doc. 79 (notice of change of address to Lee Correctional Institution).] Petitioner was indicted by the Charleston County Grand Jury during the May 2003 Term of the Court of General Sessions for murder and possession of a firearm during the commission of a violent crime and during the October 2003 Term of the Court of General Sessions for criminal sexual conduct - first degree and assault and battery of a high and aggravated nature. [App. 943–50.] Represented by Jennifer Kneece Shealy and Daniel Prenner, on October 20, 2003, Petitioner proceeded to a jury trial before the Honorable Deadra L. Jefferson. [App. 3.] On October 23, 2003, Petitioner was found guilty as indicted. [App. 911–12.] Judge Jefferson sentenced Petitioner to five years for possession of a firearm during the commission of a violent crime; 30 years for criminal sexual conduct in the first degree; ten years

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for assault and battery of a high and aggravated nature; and life without the possibility of parole for murder. [App. 936–37.] The sentences were to run concurrently. [App. 937.]

Direct Appeal

Petitioner, represented by Joseph Savitz, III ("Savitz") of the South Carolina Office of Appellate Defense, appealed his convictions and sentences. [Doc. 17-1.] Savitz filed an *Anders*4 brief and a petition to be relieved as counsel. [*Id.*] In the brief, Savitz asserted the following issue:

> The judge erred by allowing the State to introduce evidence Petitioner was apprehended while driving a previously-stolen automobile, since this unrelated prior bad act served to place his character in issue in violation of South Carolina Evidence Rules 403 and 404.

Petitioner did not submit a pro se brief. [*See* Doc. 17-2 at 2.] On May 1, 2006, the South Carolina Court of Appeals dismissed Petitioner's appeal and granted Savitz's motion to be relieved. [Doc. 17-2] The South Carolina Court of Appeals issued remittitur on June 5, 2006. [Doc. 17-3].

PCR Proceedings

Petitioner filed an application for post-conviction relief ("PCR") on February 28, 2007. [App. 952–58.] On December 17, 2007, Petitioner, through counsel, filed an amended PCR application, alleging (1) the difference in the time and date of the murdered victim on Petitioner's warrant and on the death certificate created a subject matter jurisdiction claim; (2) an issue with the identification procedure of the witness at trial; (3) there was never a rape kit or DNA kit on Petitioner or the victim and no medical examiner took the stand; (4) there was no fingerprint match; and (5) a due process claim or a confrontation clause claim because the State used testimony without putting the witness on the stand. [App. 959 62.] The State filed a return

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and motion to dismiss on February 13, 2008, asserting all issues raised by Petitioner in his amended PCR application were direct appeal issues and not cognizable claims under the PCR Procedure Act, S.C. Code § 17-27-10 et seq. [App. 963–67.] The Honorable Roger M. Young, Sr. issued a Conditional Order of Dismissal on February 18, 2008 and a Final Order dismissing Petitioner's PCR application on April 15, 2008. [App. 968–73.]

On April 10, 2008, Petitioner filed a notice and motion to amend and supplement pleadings, in which he raised the issue of ineffective assistance of counsel for failing to point out that the witness described her attacker as a person seven inches shorter and 40 pounds lighter than Petitioner. [App. 975–86.] On April 16, 2008, Judge Young granted Petitioner's motion to amend and supplement pleadings.6 [App. 996.] Subsequently, Petitioner filed a petition for writ of certiorari to the Supreme Court of South Carolina. [*Id.*] On September 25, 2008, the State submitted a motion to dismiss without prejudice and remand for a full PCR hearing. [App. 994–97.] On October 22, 2008, the Supreme Court dismissed the appeal without prejudice and remanded the matter to the circuit court for a full PCR hearing on October 22, 2008. [App. 1000–01.] The Supreme Court also appointed Tricia A. Blanchette ("Blanchette") to represent Petitioner in the PCR action. [App. 1001.]

On February 9, 2009, the PCR court held an evidentiary hearing into the matter. [App. 1002–32.] Petitioner was present at the hearing and was represented by Blanchette; Petitioner and his uncle, Larry Miller, testified. [*Id.*] At the evidentiary hearing, Petitioner alleged the following failures by trial counsel constituted ineffective assistance of counsel:

1. Failure to investigate into whether there was any DNA testing or a rape kit done;
2. Failure to address the discrepancy between time of death on the death certificate and on the affidavit of the warrant;
3. Failure to investigate and address a fingerprint issue;
4. Failure to address discrepancies between the bandit form, the composite sketch, and Petitioner's appearance when he was arrested;

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5. Failure to address the issue of media coverage;
6. Failure to object to the solicitor's statement during closing argument about what Keith Griffin would have testified to;
7. Failure to investigate further into Petitioner's uncle's testimony; and
8. Failure to address the victim's wife's claim that she saw Petitioner on the street three months before the murder when Petitioner was incarcerated at that time.

[Id.] The PCR court held the record open to obtain testimony from trial counsel. [App. 1031.] On July 21, 2009, a second hearing was held, in which Shealy and Petitioner testified. [App. 1033–59.] On August 14, 2009, the PCR court denied and dismissed Petitioner's PCR application. [App. 1060–67.]

Petitioner, represented by Robert M. Pachak ("Pachak"), Appellate Defender of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, appealed the dismissal of Petitioner's PCR application to the South Carolina Supreme Court. [Doc. 17-4.] Pachak filed a *Johnson*8 petition for writ of certiorari and a petition to be relieved as counsel. [*Id.*] In the brief, Pachak presented the following issue:

> Whether trial counsel was ineffective in her representation of petitioner?
> (a) Failed to prepare and investigate.
> (b) Failed to properly address discrepancies between the bandit form, the composite, and Petitioner's appearance.
> (c) Failed to object to solicitor's statement during closing argument about what Keith Griffin would have testified to.
> (d) Failed to request change of venue based on media coverage.

[App. 1062.] However, a review of the filings in the PCR application and the transcript of the evidentiary hearing reveals more specific allegations under what the PCR court broadly characterized as failure to prepare and investigate.

Petitioner filed a pro se petition for writ of certiorari which he asserted the following issues, quoted substantially verbatim:

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1. Did PCR court err in not finding trial counsel ineffective, and in not finding Petitioner's due process rights were violated when Petitioner was sentenced excessively?

2. Did the PCR court err in not finding Petitioner's constitutional due process rights were violated by insufficient evidence to sustain the convictions?

3. Did PCR court err in not finding Petitioner's constitutional due process rights were violated because of the admission of the testimony of Mariana Cordova by the trial court and additionally did the PCR court err in not finding trial counsel ineffective for not objecting upon the proper legal principles when challenging the admission and content of Marian Cordova's testimony.

4. Did PCR court err in not finding Petitioner's constitutional due process rights were violated because the charging murder indictment lacks time and death of the deceased; and additionally did the PCR court err in not finding trial counsel ineffective for not objecting to the indictment and moving for direct verdict on this legal and factual point.

5. Did PCR court err in not ruling the identification reliability and procedures violated Petitioner's constitutional due process rights and additionally did the PCR court err in not finding trial counsel ineffective for not articulating the proper legal principles to challenge the identification procedures and the resulting identification evidence.

On April 21, 2011, the South Carolina Supreme Court denied the petition and granted Pachak's request to withdraw. [Doc. 17-6.] After a petition for rehearing was denied [Doc. 17-7], remittitur was issued on May 25, 2011 [Doc. 17-8].

Petition for Writ of Habeas Corpus

Petitioner filed this petition for writ of habeas corpus on July 18, 2011 pursuant to 28 U.S.C. § 2254, raising the following grounds for relief, quoted substantially verbatim:

Ground One: Ineffective assistance of counsel

Supporting Facts:

1) Did PCR court err in not finding trial counsel ineffective, and in not finding Petitioner's due process rights were violated when Petitioner was sentenced excessively?

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2) Did the PCR court err in not finding that Petitioner's due process rights were violated by insufficient evidence to sustain the convictions?

3) Did the PCR court err in not finding Petitioner's constitutional due process rights were violated because of the admission of the testimony of Mariana Cordova by the trial court, and additionally did the PCR court err in not finding trial counsel ineffective for not objectioning upon the proper legal principles when challenging the admission and content of Mariana Cordova's testimony.

4) Did the PCR court err in not finding Petitioner's constitutional due process rights were violated because the charging murder indictment lacks time and death of the deceased; and additionally did the PCR court err in not finding trial counsel ineffective for not objecting to the indictment and moving for direct verdict on this legal and factual point.

5) Did the PCR court err in not ruling the identification reliability and procedures violated Petitioner's constitutional due process rights, and additionally did the PCR court err in not finding trial counsel ineffective for not articulating the proper legal principles to challenge the identification procedures and the resulting identification evidence.

6) Did the PCR court err in not finding that Petitioner's Sixth Amendment's confrontation clause of the United States constitutional amendment were violated when Petitioner was not afforded the opportunity to cross-examine the out-of-court declarant, and additionally did the PCR court err in not finding that Petitioner's due process rights were violated when the prosecution presented an out-of-court conversation that he had with Keith Griffin a witness he intended to testify against the Petitioner?

Ground Two: Due process violations

Supporting Facts:

1) Did the PCR court err in not finding that Petitioner's due process rights were violated by insufficient evidence to sustain the convictions?

2) Did the PCR court err in not finding trial counsel ineffective, and in not finding Petitioner's due process rights were violated when Petitioner was sentenced excessively?

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3) Did the PCR court err in not finding Petitioner's constitutional due process rights were violated because of the admission of the testimony of Mariana Cordova by the trial court, and additionally did the PCR court err in not finding trial counsel ineffective for not objectioning upon the proper legal principles when challenging the admission and content of Mariana Cordova's testimony.

4) Did the PCR court err in not finding Petitioner's constitutional due process rights were violated because the charging murder indictment lacks time and death of the deceased; and additionally did the PCR court err in not finding trial counsel ineffective for not objecting to the indictment and moving for direct verdict on this legal and factual point

5) Did the PCR court err in not ruling the identification reliability and procedures violated Petitioner's constitutional due process rights, and additionally did the PCR court err in not finding trial counsel ineffective for not articulating the proper legal principles to challenge the identification procedures and the resulting identification evidence.

6) Did the PCR court err in not finding that Petitioner's Sixth Amendment's confrontation clause of the United States constitutional amendment were violated when Petitioner was not afforded the opportunity to cross-examine the out-of-court declarant, and additionally did the PCR court err in not finding that Petitioner's due process rights were violated when the prosecution presented an out-of-court conversation that he had with Keith Griffin, an witness he intended to call to testify against the Petitioner?

As previously stated, Chief Judge Wooten granted Respondent's motion for summary judgment and denied the Petition but later granted Petitioner's motion for reconsideration, reopened the case, and remanded it to the undersigned for a supplemental Report and Recommendation.

On March 1, 2016, the Honorable Jacquelyn D. Austin issued the Report and Recommendation that Petitioner had failed to establish cause under *Martinez* to excuse the

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procedural default of Petitioner's procedurally barred claims. Petitioner filed his Objection to the Report and Recommendation on June 6, 2016. Respondent filed his Response on July 27, 2016.

On July 11, 2016, the Honorable Terry L. Wooten, United States District Judge overruled all of Applicant's objections and accepted the Magistrate Judge's recommendation. The Court denied Petitioner's §2254 petition and declined to issue a certificate of appealability.

Current Application

Applicant filed his current post-conviction relief application on August 20, 2019 alleging the following allegations:

1. Trial Court Lack Subject Matter Jurisdiction

    a. Trial court lack subject matter jurisdiction, court was without power to impose convictions and sentences upon criminal offenses of murder, ABHAN, CSC 1st, and possession of firearm

Applicant requested the following relief: "Convictions and sentences vacated."

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Statute of Limitations

The Court finds that this application must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the act requires as follows:

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

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996).

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A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

Applicant was sentenced on October 23, 2003. Remittitur from the direct appeal was issued on June 5, 2006. The application was therefore due on June 5, 2006. This application was filed on August 20, 2019, well beyond the statutory filing period. Therefore, the application shall be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

Successive Applications

The Court further finds the application must be summarily dismissed because it is successive to Applicant's previous PCR application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

> 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.

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Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised ... in the previous application." Id. at 450. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. Applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant's current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous applications for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him, and the Court shall summarily dismiss the application as successive to Applicant's previous PCR application.

CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Charleston County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Benjamin Limbaugh, Esquire
PCR Division – 9th Circuit
P.O. Box 11549

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Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Charleston County Clerk of Court and opposing counsel within twenty (20) days, and that the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 24 **day of** August**, 2020.**

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JENNIFER B. MCCOY
Chief Administrative Judge
Ninth Judicial Circuit

Charleston, South Carolina

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.
By
DEPUTY CLERK

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