

STATE OF SOUTH CAROLINA  
COUNTY OF UNION

) IN THE COURT OF COMMON PLEAS  
) FOR THE SIXTEENTH JUDICIAL CIRCUIT

Tony Moore Jr., #188313,

Applicant,

2022 FEB 11

) Case No.: 2021-CP-44-00268

v.

State of South Carolina,

Respondent.

) **CONDITIONAL ORDER OF DISMISSAL**

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Tony Moore Jr. (Applicant) on August 30, 2021, and received by the State on September 3, 2021. The State made its return and moved to summarily dismiss the action as it does not establish a *prima facie* case of newly discovered evidence<sup>1</sup>. For the reasons discussed below, this Court grants the State’s motion to summarily dismiss the PCR action.

**I. PROCEDURAL HISTORY**

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Union County Clerk of Court. On January 16, 1995 Applicant was indicted by the Union County Grand Jury for Murder (1995-GS-44-0035). Applicant was represented by Thomas H. White, IV, Esquire. Solicitor Thomas Pope, and Assistant Solicitor Michael McMullen

<sup>1</sup> The State’s return was originally due on December 2, 2021. See Rule 12(a), SCRCPP (“[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within 60 days after service of the application, if it arises out of a guilty plea, and 90 days if it arises out of a trial.”) However, having completed the return required in this matter, and in light of no demonstrable prejudice to Applicant as a consequence of the delay, this Court grants the State’s request accept its return as timely filed. See S.C. Code Ann. § 17-27-70(a) (establishing that the Court may fix the time in which the State must respond and that “respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application.”); *Guinyard v. State*, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the trial court may extend the time for filing and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court.).

of the Sixteenth Circuit Solicitor's Office prosecuted the case.

On March 23, 1995, Applicant proceeded to a jury trial before the Honorable Costa M. Pleicones. At the conclusion of Applicant's trial, the jury verdict found Applicant guilty as charged. Judge Pleicones sentenced Applicant to imprisonment for a period of his natural life.

A timely Notice of Appeal was filed, and an Appeal was perfected on Applicant's behalf by Joseph L. Savitz, III, Esquire. On November 17, 1995, the Supreme Court of South Carolina suspended the Petitioner's direct appeal so that the Petitioner could move for a new trial before the Circuit Court. On February 9, 1996, a hearing was held on the motion for a new trial before Judge Pleicones. Lesley M. Coggiola, Esquire, represented the Petitioner. At the conclusion of the hearing, Judge Pleicones denied the motion for a new trial, filing a written order on March 28, 1996. The Petitioner subsequently continued with his appeal and the Supreme Court affirmed the Petitioner's conviction and sentence. *State v. Moore*, 97-MO-107 (filed October 29, 1997). The Remittitur was sent on November 19, 1997.

#### **First Application for Post-Conviction Relief (1997-CP-44-0287) and Subsequent Appeal**

Applicant filed his first application for post-conviction relief on November 14, 1997. . The Respondent filed its Return on or about February 4, 1998. On June 2, 1999. On June 2, 1999, the Petitioner filed an amendment to his PCR application. A hearing was held before the Honorable Dean Hall, at which the Applicant was present and was represented by B. Allen Bullard, Esquire. By Order dated February 21, 2000, Judge Hall denied and dismissed the Applicant's application.

A timely Notice of Appeal was filed on the Applicant's behalf and the South Carolina Office of Appellate Defense submitted a Petition for Writ of Certiorari. On December 15, 2000, the Petitioner filed a Petition for Writ of Habeas Corpus, raising issues related to ineffective assistance of counsel. On March 27, 2001, the Respondent filed a cross-petition for writ of

certiorari, raising a separate issue relating to ineffective assistance of counsel. On August 23, 2001, the Supreme Court denied the Petitioner's petition and the Respondent's cross-petition.

**Petition for Writ of Habeas Corpus (6:02-2024-25AK) and Subsequent Appeal**

Applicant subsequently filed a Petition for Writ of Habeas Corpus in United States District Court in the District of South Carolina on June 18, 2002. Respondent filed a Return and Motion for Summary Judgment on November 4, 2002. Applicant filed a written opposition to the Respondent's motion on or about November 25, 2002. The United States Magistrate Judge issued a Report recommending that the State's Motion for Summary Judgment be granted. After reviewing the Report and Recommendation filed by Magistrate Judge Catoe, the Honorable Terry L. Wooten accepted the Report, overruled the Applicant's objections, and granted Respondent's motion for summary judgment by written Order filed August 25, 2003.

Applicant appealed to the U.S. Fourth Circuit Court of Appeals. He filed an Informal Brief on October 3, 2003, and a Preliminary Informal Brief Enhancement [sic] on October 10, 2003. The U.S. Court of Appeals denied the Certificate of Appealability on March 3, 2004 while also denying the Applicant's Motion for a Hearing *en banc*.

**Second Application for Post-Conviction Relief (2004-CP-44-0251)**

Applicant subsequently filed a document captioned "Petition for Writ of Habeas Corpus" with the Circuit Court on August 9, 2004. Respondent filed its Return and Motion to Dismiss on August 10, 2005. By Order dated August 16, 2005, the Honorable John C. Hayes, III, denied and dismissed the Applicant's application.

**Third Application for Post-Conviction Relief (2005-CP-44-0267)**

Applicant filed a *third* PCR application on November 2, 2005 (2005-CP-44-0267). Respondent filed its Return and Motion to Dismiss on March 22, 2006. A Conditional Order of

Dismissal was filed on March 29, 2006. Applicant filed a Response on or about April 3, 2006. The Honorable Lee S. Alford filed a Final Order on May 9, 2006, dismissing the application. Applicant did not appeal the dismissal of this application.

**Fourth Application for Post-Conviction Relief (2007-CP-44-0320) and Subsequent Appeal**

Applicant filed his *fourth* PCR application on October 5, 2007 (2007-CP-44-0320) and an amended application on or about December 19, 2007. Respondent filed its Return and Motion to Dismiss on April 25, 2008. In his application, the Applicant alleged ineffective assistance of counsel and subject matter jurisdiction. A hearing was held on August 12, 2008 before the Honorable James R. Barber, III. At that time, the Applicant also raised an after-discovered evidence issue regarding one of the jurors from Applicant's trial. On September 9, 2008, Judge Barber dismissed Applicant's allegations of ineffective assistance of counsel and subject matter jurisdiction and allowed the Applicant to come before the Circuit Court for a hearing on the after-discovered evidence issue. Respondent filed a Motion to Dismiss Future Filings on December 8, 2009. On December 18, 2008, a hearing was conducted before the Honorable J. Michelle Childs. Judge Childs dismissed Applicant's claim of after-discovered evidence and granted the State's Motion to Restrict Future Filings on September 15, 2009.

A notice of appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Supreme Court dismissed Applicant's petition for Writ of Certiorari on July 3, 2013. The Remittitur was issued on July 29, 2013.

**Fifth Application for Post-Conviction Relief (2014-CP-44-0502) and Subsequent Appeal**

On December 30, 2014, Applicant filed his *fifth* application for post-conviction relief, alleging the following:

1. “The circuit court lacked subject matter jurisdiction for failure to insure compliance with S.C. Code §17-19-40. Because this mandatory statute was not followed, Applicant’s conviction is invalid and should be vacated by the Court.”

On March 30, 2015, Respondent made its return and requested Applicant’s application be summarily dismissed as successive and untimely. This Court issued a Conditional Order of Dismissal signed on April 2, 2015, and filed April 21, 2015. Applicant filed a Response in Opposition to Conditional Order of Dismissal on May 13, 2015, in which Applicant reiterated his position that the application should not be barred as successive or barred by the statute of limitations. This Court filed a Final Order of Dismissal on June 9, 2015, denying Applicant’s application, and dismissing it with prejudice.

Applicant filed a timely notice of appeal, and an appeal was perfected on Applicant’s behalf. On August 25, 2016, the South Carolina Supreme Court filed a written order dismissing Applicant’s notice of appeal, and prohibiting Applicant from filing any further collateral actions in the circuit court, including PCR actions and habeas corpus actions, without first obtaining permission to do so from the South Carolina Supreme Court.

## II. CURRENT APPLICATION

In response to the South Carolina Supreme Court’s August 25, 2016 order limiting future filings by Petitioner, on July 6, 2021 Petitioner filed a document entitled “Petition to File a Successive P.C.R.” requesting to submit a sixth successive application for post-conviction relief on the basis of newly discovered evidence of juror misconduct<sup>2</sup>. On August 4, 2021, the South

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<sup>2</sup> With Petitioner’s request for permission to file his sixth application for post-conviction relief, Petitioner submitted an affidavit from Michael Porter wherein Mr. Porter alleges he discussed Petitioner’s case with Woodrow Smith, a juror during Petitioner’s 1995 trial. In his affidavit, Mr. Porter alleges Mr. Smith stated he knew the victim’s biological mother Perleen Neal, and Mr. Smith believed Petitioner was guilty and would vote to convict Petitioner at the conclusion of his trial.

Carolina Supreme Court granted Applicant permission to file an application for post-conviction relief based on after-discovered evidence of juror misconduct. Applicant filed his *sixth* PCR action on August 30, 2021. In his application, Applicant asserts he is being held in custody unlawfully, alleging:

1. Newly Discovered Evidence<sup>3</sup>
  - a. “On or about May 13, 2021, Applicant received an affidavit from a Micheal Porter. Mr. Porter outlines a very disturbing detailed conversation he had with his cousin Woodrow Smith, during Applicant’s trial in March of 1995, out of the presence of the other jurors. Juror Smith had personal knowledge of the victim’s biological mother that, even though Ms. Perleen Neal was not a witness, nor attended the trial, should have been disclosed to weed out any potential bias... Mr. Porter outlines a premature deliberation between himself and his cousin, juror Woodrow Smith, which helped the prosecution’s case...”

As requested relief, Applicant is seeking “conviction and sentence vacate/reversed, set aside, new trial, or any other relief the court may grant.”

Before the Court and incorporated herein are the Union County Clerk’s records, Applicant’s SCDC records, Applicant’s appellate records including the transcript from Applicant’s trial, the final orders of Applicant’s previous PCR actions, and the records of this PCR action.

### III. DISCUSSION

The State moved for summary dismissal pursuant to section 17-27-70 of the South Carolina Code (2014) on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing. Because there is no question of law or fact to necessitate a hearing, the State

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<sup>3</sup> Applicant attached two documents to his application for post-conviction relief. One being an affidavit from Michael Porter indicating he spoke with his cousin Woodrow Smith, who was a juror during Applicant’s trial, about Mr. Smith’s premature decision to find Applicant guilty. The second being an anonymous letter supposedly sent to Applicant, where a supposed member of the victim’s family knew that Applicant was not guilty but was pressured by their family to not testify at Applicant’s trial.

requested the Court not appoint counsel in this matter, and instead issue a Conditional Order of Dismissal indicating the Court's intent to dismiss the application and its reasons for so doing. *See* S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief); *Re: Appointment of Counsel in Post-Conviction Relief Cases Before the Circuit Court*, S.C. Sup. Ct. Order filed October 6, 2008; Rule 71.1(d), SCRCPP (providing for appointment of counsel only where there is a question of law or fact which necessitates a hearing). This Court has reviewed the pleading and the record in this case and finds there is no genuine issue of material fact. Therefore, summary dismissal is appropriate. Set forth below are the Courts findings as to each issue:

*Newly Discovered Evidence*

Applicant's assertion he is being held in custody unlawfully as a result of newly-discovered evidence, such that he should be entitled to PCR is without merit. The Uniform Post-Conviction Procedure Act states a person may institute a PCR action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). "If the applicant contends there is evidence of a material fact not previously presented, the PCR application must be filed *within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.*" S.C. Code Ann. § 17-27-45(C) (emphasis added). The standard test governing newly discovered evidence is properly applied when relief is sought based on evidence discovered post-trial that is material to the accused's guilt or innocence. *McCoy v. State*, 401 S.C. 363, 371, 737 S.E.2d 623, 627 (2013).

However, juror misconduct discovered post-trial is not properly considered “newly discovered evidence”; rather, it is a separate basis for a new trial. *Id.*

Because juror misconduct is a separate basis for a new trial, it is governed by a separate standard. Provided a claim is timely raised, a new trial is warranted on the basis of juror misconduct if it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges.

*Id.*

In support of his newly-discovered evidence claim, Petitioner has attached an affidavit from Michael Porter wherein Mr. Porter asserts he spoke with his cousin Woodrow Smith, who was a juror during Petitioner's trial, and Mr. Smith indicated he knew the victim's mother, and that Mr. Smith had prematurely decided that Petitioner was guilty of Murder. Petitioner asserts that this discussion between Mr. Porter and Mr. Smith did not automatically prejudice Petitioner, but that the contents of the conversation influenced Mr. Smith, and therefore prejudiced Petitioner by denying him his right to a fair trial by an impartial jury.

Petitioner has asserted that one juror had personal knowledge of the victim's biological mother, and this information was concealed during voir dire. Petitioner contends he was prejudiced because he was denied his right to a fair trial by an impartial jury.

Though the affidavit submitted by Petitioner asserts that one juror, Woodrow Smith, had personal knowledge of the victim's mother Perleen Neal<sup>4</sup>, Petitioner has failed to demonstrate that Mr. Smith intentionally concealed this information, or how this information would have supported

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<sup>4</sup> In the affidavit submitted by Petitioner, there is some confusion regarding who indicated they knew Perleen Neal, and her relationship to the victim in this case. However, despite this ambiguity, Petitioner has failed to demonstrate any evidence that Woodrow Smith intentionally concealed his knowledge of any anticipated witness when questioned by the court.

a challenge for cause or would have been a material factor in the use of a party's preemptory challenge. During the voir dire at Petitioner's trial, the jury pool was asked about their knowledge of and relationship with all involved parties, including Petitioner, Petitioner's lawyer Thomas White, IV., Solicitor Thomas Pope, and Assistant Solicitor Michael McMullen. Additionally, the jury pool was asked about their knowledge of and relationship with all anticipated witnesses, including members of the South Carolina Law Enforcement Division (SLED), members of the Union Police Department, the victim's mother Jerleen Smith, the victim's father Lonnie Smith Sr., and the victim's brother Lonnie Smith Jr. Finally, Judge Pleicones asked the jury pool if any juror had any reason to doubt their ability to be fair and impartial to both sides during Petitioner's trial. At no time during voir dire was the jury pool asked about their knowledge of Perleen Neal. Additionally, as Petitioner has stated, Mrs. Perleen Neal was not present at Petitioner's trial, nor was she called a witness during Petitioner's trial. Petitioner has failed to demonstrate that Woodrow Smith intentionally concealed information during voir dire, as Woodrow Smith and the jury panel were not asked questions regarding their knowledge of an individual named Perleen Neal. However, during the course of voir dire Woodrow Smith did affirmatively answer questions regarding his knowledge of a potential witness. During voir dire, Judge Pleicones questioned the jury panel about their knowledge or relationship to all anticipated witnesses, including Mr. Lonnie Smith Jr. and Mr. Lonnie Smith Sr., who are related to the victim. When Judge Pleicones asked the jury pool about these individuals Woodrow Smith informed the Court that he knew Mr. Lonnie Smith Sr. and that he was friends with Mr. Smith Sr. Woodrow Smith informed the Court that his knowledge of Mr. Smith Sr. and their friendship would not affect his ability to fairly and impartially pass judgment during Applicant's trial. Additionally, Petitioner did not respond when Judge Pleicones asked the jury pool if there was any reason to doubt their ability to be fair and impartial

to both sides during Petitioner's trial. Petitioner was aware of Woodrow Smith's friendship with one of the potential witnesses during his trial. Petitioner had the opportunity to challenge Woodrow Smith for cause, or to use a peremptory strike to remove Woodrow Smith from the jury. However despite this information, Petitioner and his counsel chose to not remove Woodrow Smith, and instead allowed him to sit on the jury during Petitioner's trial.

Further, Petitioner has relied on an affidavit from Michael Porter who is claiming to remember a conversation with his cousin Woodrow Smith *twenty six* years after Petitioner's trial to argue that Mr. Smith began deliberations prior to the conclusion of Petitioner's trial. However, Petitioner has failed to present any testimony directly from any of the jurors at Petitioner's trial which suggest some premature deliberations. This Court has previously held "The burden is on the party alleging premature deliberations to establish prejudice." *State v. Aldret*, 333 S.C. 307, 315, 509 S.E.2d 811, 815 (1999). Though Petitioner has provided an affidavit from an individual who claims to be related to a juror from Petitioner's trial, Petitioner has failed to establish that Woodrow Smith's conduct prejudiced Petitioner. In his affidavit, Mr. Porter, alleges he spoke with Mr. Smith during the course of Petitioner's trial, and Mr. Smith informed Mr. Porter that he believed Petitioner was guilty prior to the conclusion of Petitioner's trial and that Mr. Smith would vote to convict Petitioner. In this affidavit, Mr. Porter claims he decided to come forward with this information *twenty six* years after Petitioner's conviction because he is in bad health and does not want to hold onto this information any longer. Petitioner has relied on information presented by an individual who had no involvement in Petitioner's criminal conviction to insinuate that one of the jurors at his trial acted inappropriately and began deliberations prematurely. Petitioner has failed to present any testimony from the juror in question, or any other juror from Petitioner's trial, regarding the deliberations in Petitioner's case. Therefore, Respondent contends Petitioner has

failed to demonstrate through credible evidence that any premature deliberations occurred or that Woodrow Smith's conduct was such that it prejudiced Petitioner, or had any influence on the remaining jurors at Petitioner's trial.

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing he is entitled to relief. *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965); *Blandshaw v. State*, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make such showing he is entitled to relief based on the information set forth above; therefore, he is not entitled to an evidentiary hearing in the matter. Accordingly, this allegation shall be summarily dismissed.

#### IV. CONCLUSION

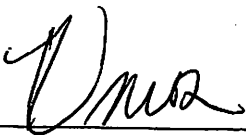
Pursuant to subsection 17-27-70(b), this Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this Order upon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

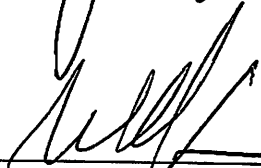
Office of the Attorney General  
Michael J. Neubauer, Esquire  
PCR Division – Sixteenth Circuit  
P.O. Box 11549  
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Union County Clerk of Court and opposing counsel within twenty (20) days from the date of the service

of this Order, 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 14 day of January, <sup>2022</sup>~~2021~~.

, South Carolina.

  
WILLIAM A. MCKINNON  
Chief Administrative Judge  
Sixteenth Judicial Circuit