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S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

October 11, 2022

The Honorable Daniel Dewitt Hall
Moss Justice Center
1675-1J York Highway
York, South Carolina 29745

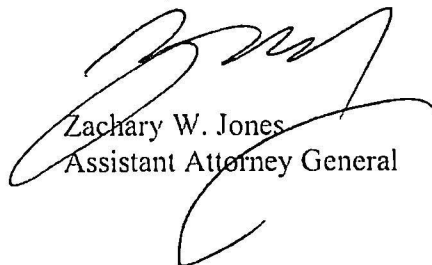
Re: Tony Moore, Jr., #188313 v. State of South Carolina
2021-CP-44-268

Dear Judge Hall:

Enclosed please find the proposed Final Order of Dismissal in the above-captioned case. For your convenience, I am enclosing a copy of the signed and served Conditional Order of Dismissal for your review. This order is being sent to your Honor because the Conditional Order of Dismissal was issued during your tenure as chief administrative judge for the Third Circuit.

If this Order meets your approval, please sign and forward to the Union County Clerk of Court to be filed and served.

Sincerely,



Zachary W. Jones
Assistant Attorney General

ZWJ/jmo
Enclosure(s)

cc: Tony Moore, Jr., #188313

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 found Applicant guilty as charged. Judge Pleicones sentenced Applicant to imprisonment for 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 Applicant's direct appeal so that Applicant 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 Applicant. At the conclusion of the hearing, Judge Pleicones denied the motion for a new trial, filing a written order on March 28, 1996. The Applicant subsequently continued with his appeal and the Supreme Court affirmed the Applicant'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, Applicant filed an amendment to his PCR application. A hearing was held before the Honorable Dean Hall, at which Applicant was present and was represented by B. Allen Bullard, Esquire. By order dated February 21, 2000, Judge Hall denied and dismissed Applicant's application.

A timely notice of appeal was filed on Applicant's behalf, and the South Carolina Office of Appellate Defense submitted a petition for a writ of certiorari. On December 15, 2000, Applicant filed a petition for a writ of habeas corpus, raising issues related to ineffective assistance of counsel. On March 27, 2001, 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 Applicant's petition and Respondent's cross-petition.

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

Applicant subsequently filed a petition for a 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 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 "inhancement" [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 Applicant, on July 6, 2021 Applicant 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 misconduct¹. On August 4, 2021, the South

¹ With Applicant's request for permission to file his sixth application for post-conviction relief, Applicant submitted an affidavit from Michael Porter wherein Mr. Porter alleges he discussed Applicant's case with Woodrow Smith, a juror during Applicant'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 Applicant was guilty and would vote to convict Applicant 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 Evidence²

- a. "On or about May 13, 2021, Applicant received an affidavit from a Michael 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."

The Court issued a conditional order of dismissal, finding that Applicant had failed to establish a *prima facie* case of newly discovered evidence. In response to the conditional order of dismissal, Applicant has since filed the following documents:³

1. A "Response in Opposition to Conditional Order of Dismissal," filed February 17, 2022, which argues
 - a. that Juror Smith was biased, engaged in premature deliberations, and was subjected to external influence, based on the affidavit of Michael Porter,

² Applicant attached two documents to his application for post-conviction relief. One is the affidavit from Michael Porter indicating Porter 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 is an anonymous letter supposedly sent to Applicant, claiming a member of the victim's family knew that Applicant was not guilty but was pressured by their family not to testify at Applicant's trial.

³ Applicant also filed a "Motion to Amend P.C.R. Application," accompanied by an "Amendment and Supplementation to PCR Pleadings," on August 18, 2022. By order dated September 14, 2022, the Supreme Court of South Carolina denied Applicant's request to file the amendment. Accordingly, this Court will not consider those documents.

- b. that an author's decision to remain anonymous is protected by the First Amendment to the constitution of the United States (apparently in reference to this Court's decision to discount the reliability of the anonymous letter attached to Applicant's PCR application), and
 - c. that the testimony of juror Debra Whitlock should be re-introduced in this action as additional evidence of juror misconduct;
2. An "Addition to Applicant's Response to Conditional Order of Dismissal," filed March 31, 2022, arguing that he is entitled to an evidentiary hearing based on *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013); and
3. An affidavit from Patricia Powers, who claims she was in a relationship with Juror Smith during Applicant's trial and that she remembers a conversation in which Juror Smith expressed his opinion that Applicant was guilty.

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 including Applicant's responses to the conditional order of dismissal.

III. DISCUSSION

This Court finds that none of Applicant's responses to the conditional order of dismissal sufficiently explain why that order should not become final; therefore, the Court grants the State's motion to summarily dismiss Applicant's PCR application. *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). Set forth below are the Court's 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).

In support of his newly-discovered evidence claim, Applicant presents an affidavit from Michael Porter wherein Mr. Porter asserts that he spoke with his cousin Woodrow Smith, who was a juror during Applicant’s trial, that Juror Smith indicated he knew the victim’s mother, and that Juror Smith had prematurely decided that Applicant was guilty of murder. In addition, Applicant presents an affidavit from Patricia Powers, in which she claims to remember a conversation with Juror Smith from the time of the trial wherein he expressed his belief that Applicant was guilty; Powers also asserts that she was seventeen at the time, and Juror Smith was approximately twenty-five years older than her. Applicant also presented an anonymous letter, purportedly from a member of the victim’s family, claiming that he or she was pressured not to testify and that other members of the victim’s family intimidated Applicant’s lawyer and improperly contacted two jurors during the trial.

Based on Michael Porter’s affidavit, Applicant argues Juror Smith had personal knowledge of the victim’s mother, and this information was concealed during voir dire. However, as the Court pointed out in its conditional order of dismissal, Juror Smith admitted knowing the victim’s *father* during voir dire, but Applicant did not ask for him to be struck from the jury. Accordingly, the Court found that Juror Smith had not intentionally concealed his relationship with the victim’s

family and that Applicant had failed to demonstrate that this additional information would have caused him to strike Juror Smith. In addition, the woman named as the victim's mother in the affidavit—Perleen Neal—was not present at Applicant's trial and was not called as a witness. Nothing in Applicant's responses to the conditional order addresses the Court's reasoning on this point.

Applicant also argues, based on the affidavit of Patricia Powers, that this Court "must not turn a blind eye to a grown man, who sat on a jury, passing judgment, when he was in a relationship with a minor." The impropriety of Juror Smith's alleged relationship with Patricia Powers is not a ground for post-conviction relief.

In addition, both affidavits refer to conversations that purportedly occurred at the time of Applicant's trial *in 1995*. Neither affidavit was made by a juror in Applicant's case; rather, both affidavits merely reflect what Juror Smith is alleged to have told the affiants. Applicant has failed to present any testimony from the juror in question, or from any of the jurors in Applicant's trial, regarding the deliberations in Applicant's case.

Finally, even if the Court were to credit the affiants' recollections of a conversation purportedly occurring many decades ago, Applicant still has the burden of proving prejudice from Juror Smith's allegedly premature deliberations. *See State v. Aldret*, 333 S.C. 307, 313–16, 509 S.E.2d 811, 813–15 (1999) (holding premature deliberations do not warrant automatic reversal, and the burden is on the defendant to demonstrate prejudice). Given the length and nature of trial, it is neither surprising nor inherently prejudicial for jurors to make some premature comments as trial progresses. *See id.* at 314, 509 S.E.2d at 814 (collecting cases). Moreover, the Supreme Court of South Carolina has drawn a distinction between cases where the *trial court* instructs jurors to begin their deliberations prematurely and cases where jurors prematurely discuss the case on their

own initiative, as in this case. *See id.* at 313 n.4, 509 S.E.2d at 814 n.4. Even if Juror Smith did privately say—to a third party who was not involved in the case—that Applicant was “guilty as hell,” Applicant must still show that Juror Smith’s premature discussion of his case affected the verdict. Since no other jurors were involved in the conversation, it is not apparent how Juror Smith’s expression of his own private opinion of the case—premature though it may have been—could have affected the verdict more than if he had kept his thoughts to himself.

Finally, Applicant attached to his application an anonymous letter purporting to be from a member of the victim’s family, which alleges that the victim’s family privately approached and tried to influence jurors during the trial and even tried to intimidate one of the lawyers by firing a bullet through his window. In his response to the conditional order of dismissal, Applicant claims the First Amendment to the United States Constitution protects the right of an author to remain anonymous. This argument misses the point, which is that an anonymous letter of unknown provenance lacks the necessary indicia of reliability to support an action for post-conviction relief. The fact that the author had a constitutional right to remain anonymous does not imbue the letter with any additional evidentiary weight.

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 a showing based on the information set forth above, even after the issuance of a conditional order of dismissal. Therefore, the Court finds Applicant has not shown a sufficient reason why that order should not become final.

IV. CONCLUSION

IT IS THEREFORE ORDERED that, for the reasons set forth above and in the Court's Conditional Order of Dismissal, this application for post-conviction relief is hereby **DENIED AND DISMISSED WITH PREJUDICE.**

This Court hereby advises Applicant he must file and serve a notice of appeal within thirty days of the service of this Order to secure appellate review. *See* Rule 203, SCACR. Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this ____ day of _____, 2022.

DANIEL D. HALL
Chief Administrative Judge
Sixteenth Judicial Circuit

_____, South Carolina.