

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Patrick Cleburne Fant III, Circuit Court Judge

Case No. 2023-CP-29-00015

David D. Stalk,

Petitioner,

vs.

The State of South Carolina,

Respondent.

NOTICE OF APPEAL

David D. Stalk appeals the final order of the Honorable Patrick Cleburne Fant III denying the Petitioner's application for post-conviction relief. This order was received by counsel March 22, 2024. Attached is a copy of the order.

Respectfully submitted,

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March 27, 2024.

PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections (SCDC) pursuant to the Lancaster County Clerk of Court orders of commitment. In May 2013, the Lancaster County Grand Jury indicted Applicant for Murder (2013–CP–29–758), Attempted Armed Robbery (2013–CP–29–759), and Possession of a Firearm During the Commission of a Violent Crime (2013–CP–29–760). Applicant was represented by Assistant Public Defender Marion H. (Mark) Grier, Jr., Esquire. Fourth Circuit Solicitor Douglas A. Barfield, Jr., Esquire, prosecuted the case.

After a withdrawn guilty plea, Applicant proceeded to a jury trial on January 13 – 17, 2014, before the Honorable R. Knox McMahon. On January 17, 2014, the jury found Applicant guilty on all charges as indicted. Judge McMahon sentenced Applicant to concurrent terms of forty-five years for murder, twenty years for attempted armed robbery, and five years for the weapons charge. Applicant timely appealed his convictions and sentences.

On appeal, Applicant was represented by Appellate Defender Raia Jane Hirsch. Assistant Attorney General Alphonso Simon, Jr. represented the State. On June 29, 2016, after briefing, the Court of Appeals affirmed without oral argument pursuant to Rule 215, SCACR. State v. Stalk, Op. No. 2016-UP-341 (S.C. Ct. App. filed June 29, 2016). The Remittitur was returned to the circuit court on July 15, 2016.

First PCR Action: 2018–CP–29–1006

Applicant subsequently *untimely* filed an application for PCR on August 28, 2018, in which he alleged the following grounds for relief:

1. False Statements
2. No Evidence
3. Officers threatening family

Applicant filed an amendment to his PCR application on May 26, 2020, alleging:

1. Counsel was ineffective during the jury charge by failing to object or file motions to the jury charge that inferred malice may arise when the deed is done with a deadly weapon.
2. Counsel was ineffective during jury deliberations to the answering two questions out of six that were asked to the Court, by the jury.
3. Counsel was ineffective for failing to file motions or object to the time of death of the deceased to wit 1/28/2013 or 1/26/2013 by indictment or 1/16/2013 all in violation of due process.

Applicant requested relief as follows:

I'm seeking to get a time cut or a new trial[.] [I] was sentenced to 45 years and I barely even have a record and also this is my first time ever being in prison[.] [I] just don't think it was fair[.] [A]ll I ask for is another chance[.]"

On October 3, 2020, the State moved to summarily dismiss the application pursuant to § 17-27-70 of the South Carolina Code (2014) on the basis that there was no genuine issue of material fact which would necessitate an evidentiary hearing. On October 9, 2020, the court issued a Conditional Order of Dismissal.² On January 22, 2021, the court issued the Final Order of Dismissal, informing Applicant of the dismissal and his right to appeal and detailing what Applicant needed to do to appeal the Final Order of Dismissal.

SUMMARY OF FACTS GIVING RISE TO CONVICTION

On January 26, 2013, Applicant shot the victim, Kevisis Anthony, in the head. The victim died two days later as a result of anoxic encephalopathy—brain death due to a laceration of the brain that was due to a gunshot wound to the head. (Trial Tr. pp. 250-51, 255, 265; R. pp. 148-49, 150, 158).

² For reasons unknown, on December 10, 2020, the Honorable Brian M. Gibbons signed and filed a second Conditional Order of Dismissal that was identical to the first Conditional Order of Dismissal.

Eric Huddleston, one of Ketta Evans'³ neighbors, testified that on January 26, two children came to his house and asked if their mother could use his phone. (Trial Tr. pp. 274-75; R. pp. 163-64). Huddleston testified that he went with the children and allowed their mother, who he later learned was Ms. Evans, to use his cell phone. (Trial Tr. pp. 275-76, 283-86; R. pp. 164-65, 172-75). He also testified that he received a return phone call around 8:15 p.m. (Trial Tr. pp. 280-81; R. pp. 169-170). He further identified the Evans' house as the one where he took his phone so the mother could use the phone. (Trial Tr. pp. 283, 286; R. pp. 172, 175).

Sylvia Stover, who also lived near Ketta Evans, testified that on January 26, three children came and asked to use her cordless house phone. (Trial Tr. pp. 287-88; R. pp. 176-77). She noted that she did not get the phone back until it was returned by law enforcement later. (Trial Tr. p. 288; R. p. 177). Stover noted that she heard gunshots about five or ten minutes after she let the children take her phone. (Trial Tr. p. 290; R. p. 179).

Quinshun Evans, Ketta's oldest son, testified he recalled Applicant being at the house on January 26. (Trial Tr. p. 299; R. p. 186). Quinshun noted that his brothers and sisters were at the house, and other children were there. Id. One of those other children was Applicant's daughter. Id. Quinshun testified that Applicant was at the house, and he was having a discussion with Ketta. (Trial Tr. pp. 297, 300; R. pp. 184, 187). Quinshun recalled that Applicant went out the side door in the kitchen leading to the carport. (Trial Tr. pp. 301-02; R. pp. 188-89). A couple of minutes after Applicant left, Quinshun heard three gunshots. (Trial Tr. p. 303; R. p. 190). Quinshun indicated that the shots sounded like they were coming from under the carport. (Trial Tr. p. 303; R. p. 190). After the shots, Quinshun looked out the blinds and saw a man lying on the sidewalk in front of the yard. (Trial Tr. p. 304; R. p. 191). When Quinshun went outside the help the victim,

³ Ketta Evans and Applicant were dating at the time of the shooting. (See Tr. 529; Supp. R. p. 18).

Quinshun saw the victim's car under the carport. (Trial Tr. p. 305; R. p. 192). Quinshun testified that he and his mother helped the victim off the ground and brought him inside the house. (Trial Tr. pp. . 305-08; R. pp. 192-95). Quinshun also gathered all of the victim's belongings that had been scattered in the yard and placed them inside a knit cap. (Tria Tr. pp. 307-08; R. pp. 194-95). They also used a rag to help the victim clean up as he had a bleeding bump on his head. (Trial Tr. pp. 308-10; R. pp. 195, 196; Supp. R. p. 8). Ketta and Quinshun then took the victim to the hospital, driving the victim's car. (Trial Tr. pp. 310-11; R. pp. 196-97)

The victim was later flown to the Carolinas Medical Center in Charlotte, NC. (Trial Tr. pp. 199, 248, 250; R. pp. 112, 147, 148).

LAW ENFORCEMENT INVESTIGATION

A call from a cellphone number later associated with Applicant was received by 911 at approximately 9:41 p.m. on January 26. (Trial Tr. pp. 169, 406, 468, 553; R. pp. 92, 243, 300, 337). The caller indicated that someone had been shot on Pleasant Hill Street. (Trial Tr. p. 171; R. p. 93). Law enforcement was later dispatched to St. Paul Street in Lancaster. (Trial Tr. pp. 174-75; R. pp. 96-97). They were specifically dispatched to what was later determined to be Ketta Evans' house. (Trial Tr. pp. 175-76, 179; R. pp. 97-98, 101). At the house, they found five children. (Trial Tr. pp. 176-77; R. pp. 98-99).

Law enforcement found a can of Lime-A-Rita outside the house, a toboggan hat, a pack of Newport cigarettes, a red lighter, two silver Cigarillo packs, a metal watch, and a cellphone cover. a broken cell phone, vomit, and what appeared to be fresh blood in the driveway. (Trial Tr. pp. 186-87, 212-13, 225, 369-70; Supp. R. p. 4; R. pp. 104, 120-21, 133, 214-15). Six fired .380 caliber cartridge casings were found under the carport at Ketta Evans' house. (Trial Tr. pp. 217-22; R. pp. 125-30). Inside of Ketta Evans' house, law enforcement located a blue washcloth with

apparent blood on it. (Trial Tr. p. 228; Supp. R. p. 5). A cordless phone, later determined to belong to Sylvia Stover, was inside the house. (Trial Tr. p. 229, 287-91, 375; R. pp. 136, 176-80, 220).

A projectile jacket was recovered from the area near the windshield wiper of the victim's car. (Trial Tr. pp. 195, 202-03, 230; R. pp. 108, 115-16, 137). Also, there appeared to be other gunshot-related defects in the vehicle. (See Trial Tr. pp. 195, 201-02, 229-31, 232-34; see R. pp. 108, 114-15, 136-38, 139-41). A fired projectile was recovered from a rear speaker in the victim's car. (Trial Tr. pp. 233-34; R. pp. 140-41). During the autopsy, a fired projectile was also removed from the victim's head. (Trial Tr. p. 272; Supp. R. p. 7).

Law enforcement was able to determine that the six .380 shell casings cartridge cases recovered from underneath the carport were fired by the same gun. (Trial Tr. pp. 350, 353; R. pp. 201, 204). It was also determined that the bullet jacket recovered near the victim's vehicle's windshield wiper was consistent with having been loaded into a .380 caliber cartridge. (Trial Tr. p. 356; R. p. 205). The projectile recovered from the speaker of the victim's car was too damaged to determine its caliber. (Trial Tr. pp. 233-34, 356-57; R. pp. 140-41, 205-06). The projectile recovered from the victim's head was consistent with bullets fired in some .380 cartridges. (Trial Tr. pp. 359-60; R. pp. 208-09). The SLED firearms analyst also determined that the general rifling characteristics of the projectile reflected that it was fired by a Hi-Point firearm. (Trial Tr. p. 360; R. p. 209).

APPLICANT'S STATEMENTS TO LAW ENFORCEMENT

Applicant was arrested on February 5, 2013, for charges relating to a home invasion that occurred on January 22, 2013. (Trial Tr. p. 371; R. p. 216). Investigator Hall, the lead investigator in the case, testified that Applicant was interviewed on February 5. (Trial Tr. p. 388; R. p. 233).

Hall testified that he recalled there may have been some discussion with Applicant about a bond for the charge relating to the home invasion. (Trial Tr. p. 386; R. p. 231). Hall noted that no promises were made to get Applicant to talk, and no threats of physical violence or legal problems were used. (Trial Tr. p. 386; R. p. 231). He also indicated that no coercion was used against Applicant. (Trial Tr. p. 386; R. p. 231). Hall testified Applicant denied having any involvement in the murder during the February 5 interview. (Trial Tr. pp. 400, 401-07; Supp. R. pp. 16; R. pp. 238-44).

Hall further testified that he was informed Applicant wanted to talk with officers again on February 6. (Trial Tr. p. 390; R. p. 235). Hall noted that during this interview, Lynn Tucker, Applicant's employer, and friend, was present at Applicant's request. (Trial Tr. pp. 397-98, 409; R. pp. 236-37; 246). During the interview on February 6, Applicant admitted that he was the one who shot the victim. (Trial Tr. pp. 411-16; State's Exhibit 69; R. pp. 248-53). Applicant indicated that his intention was to rob the victim. (Trial Tr. p. 411; State's Exhibit 69; R. p. 248). Applicant stated that he was standing behind Evans' house when the victim came to the carport. (Trial Tr. p. 411; see State's Exhibit 69; R. p. 248). He also testified that he did not know the victim and thought the victim was Evans' friend. (Trial Tr. p. 411; see State's Exhibit 69; R. p. 248). Ms. Evans had used a neighbor's phone to call the victim to have him stop by her house. (Trial Tr. p. 411; see State's Exhibit 67, 69; R. p. 248). Applicant asserted that he had only intended to rob the victim because he and Evans needed money, and Evans advised him that the victim had money because he was involved in selling marijuana. (Trial Tr. p. 412; see State's Exhibit 67, 69; R. p. 249).

Hall stated that Applicant admitted that he parked under the carport when the victim arrived. (Trial Tr. p. 413; see State's Exhibit 69; R. p. 250). Once the victim made it to the house's side door, Applicant came around from the back of the house wearing a black hoodie, mask, and

pants. Id. Applicant had a gun in his hand, and he looked at the victim and said, "You know what time it is." (Trial Tr. p. 413; see State's Exhibit 69; R. p. 250). He told the victim not to run, but the victim took off running anyway. Id. Applicant stated he shot at the victim once and then at him three more times. Id. The victim fell to the ground. Id. Applicant stated that he was trying to shoot the victim in the leg to get him to the ground so that he could rob him. Id. Applicant did not admit to robbing the victim; he did not complete the robbery because he did not leave with any of the victim's property. Id. Applicant stated that after he fired the shots, he got scared and ran behind the house. (Trial Tr. p. 413; see State's Exhibit 69; R. p. 250).

Hall further relayed that in the statement, Applicant stated he jumped over a creek, used his cell phone to call 911, informed the dispatcher that there was a shooting on Pleasant Hill Street, and requested the dispatcher send an ambulance. (Trial Tr. p. 414; see State's Exhibit 69; R. p. 251). Applicant stated that he threw the phone down after the call and took off running again. Id. When he later realized he had the gun in his hand, he threw the gun into the woods. Id.

Hall testified that Applicant did take law enforcement to where he discarded the cell phone and the gun. (Trial Tr. pp. 415-16; R. pp. 251-53). They were unable to locate either item. (Trial Tr. p. 416; R. p. 253). During the defense's case, Hall also indicated that Applicant told him that he had used a Hi-Point .380 pistol. (Trial Tr. p. 611; R. p. 361).

APPLICANT'S DEFENSE

Applicant presented testimony from several witnesses to support his defense. James Johnson testified Applicant was at his house sometime shortly after 9 p.m. on the day of the shooting. (Trial Tr. p. 490; R. p. 307). Johnson indicated Applicant talked with Lynn Tucker and then later left. (Trial Tr. p. 490; R. p. 307). Johnson recalled seeing Applicant return ten to fifteen minutes later. Id. Johnson later noted Applicant stayed approximately ten to fifteen minutes the

first time, and approximately twenty to thirty minutes the second time. (Trial Tr. p. 495; R. p. 310). Crystal Johnson, James' wife, testified she saw Applicant at the house sometime after 10 or 11 p.m. (Trial Tr. p. 497; R. p. 312). She noted that Applicant was not at the house when she arrived home from a party. (Trial Tr. p. 496; R. p. 311). She also indicated that she thought Applicant came to the house twice after she got home. (Trial Tr. p. 499; R. p. 313).

Tawana Stalk, Applicant's sister, testified that she last saw Applicant on January 26 when he left her house to take his daughter to Ketta Evans' house. (Trial Tr. p. 523; R. p. 320). She noted it was around 6 p.m. (Trial Tr. p. 523; R. p. 320). Tawana testified that she heard from Applicant later that evening when he told her to get their children from Evans' house.⁴ (Trial Tr. p. 524; R. p. 321). Tawana stated that when she got home later that night, she found Applicant sleeping in the bed. (Trial Tr. p. 524; R. p. 321). She indicated that she did not get home until around 1 a.m. or 1:30 a.m. (See Trial Tr. pp. 532, 535; R. pp. 328, 331).

Lynn Tucker, Applicant's friend and employer, testified he saw Applicant at the Johnsons' house on January 26. (Trial Tr. p. 559; R. p. 338). Tucker thought Applicant had left the house after about thirty minutes, but he saw Applicant again later that evening. (Trial Tr. pp. 559, 561; R. pp. 338, 340). The second time he saw Applicant, he thought Applicant stayed around for about an hour. (Trial Tr. pp. 559, 562; R. pp. 338, 341). Tucker could not say that Applicant was at the house or had left the house because he did not know where Applicant was when he was not in the room with Tucker. (See Trial Tr. pp. 560-62; R. pp. 339-41).

Applicant also testified in his defense. He denied shooting the victim and denied knowing anything about shooting the victim. (Trial Tr. p. 628, R. p. 376). Applicant also denied making

⁴ Ketta Evans was watching Tawana's three children and Applicant's daughter that evening. (Trial Tr. p. 521; Supp. R. p. 17).

the 911 call. (Trial Tr. p. 622; R. p. 370). He also denied that he had the cell phone that was associated with the number that made the 911 call on January 26. (Trial Tr. pp. 619-21; Supp. R. pp. 19-20; R. p. 369). He claimed that the version of the story he gave police was what Ketta Evans told him her son did on the night of the shooting. (Trial Tr. p. 626; R. p. 374). Applicant asserted that he gave law enforcement a false confession. Id.

CURRENT ACTION

Applicant has now *untimely* filed his *second* application for post-conviction relief, alleging he is being held in custody unlawfully on the following grounds:

1. "Applicant requests appellate review of the denial of his first PCR case."
 - a. "Applicant did not knowingly and intelligently waive his right to the appeal of his PCR case."

Applicant seeks relief in the form of a new trial.

Before this Court are the Lancaster County Clerk of Court records regarding the subject's convictions; Applicant's records from the South Carolina Department of Corrections; Applicant's records from his first PCR action; Applicant's records from his direct appeal; and the records of the current PCR action.

SUMMARY OF THE EVIDENTIARY HEARING

At the evidentiary hearing, Respondent moved the Court to summarily dismiss the application as barred by the statute of limitations based on Applicant's untimely filing of his application. In response, Applicant moved to introduce several documents into evidence, arguing that the documents supported the argument that Applicant had cognitive impairments which made him unable to timely file his appeal. The documents included: a letter written by Applicant to the Lancaster County Clerk of Court explaining why his first PCR application was untimely filed on August 8, 2019; uncertified school records containing an alleged psychological evaluation of

Applicant conducted on April 11, 2002; and a printout of a Flesch-Kincaid⁵ reading assessment of a paragraph of the Final Order of Dismissal. Applicant argued the 2002 psychological report proved Applicant has an intellectual disability that impacts his reading and writing capabilities; thus, the reason Applicant did not timely file an appeal of his first PCR action.

Respondent objected to the introduction of Applicant's exhibits based on authentication, as the school records were not certified. The Court admitted Applicant's exhibits over Respondent's objection. Additionally, Respondent argued that the psychological report was conducted when Applicant was twelve (12) years old⁶, was too remote in time to Applicant's current action, and was not relevant to Applicant's current intellectual abilities. In response, the Court *sua sponte* asked Respondent for suggestions on how to remedy the non-existence of a current or more recent psychological evaluation. Respondent submitted that Applicant is not precluded from acquiring a psychological assessment to evaluate whether he has a present intellectual disability.⁷ Applicant argued a psychological evaluation was unnecessary. At the conclusion of the hearing, the Court asked each party to submit briefs on this issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged he is entitled to relief pursuant to Austin v. State⁸. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally considered the supplemental memoranda submitted by the parties.

Upon conducting and completing its analysis, this Court finds that Applicant has failed to

⁵ See <https://readable.com/readability/flesch-reading-ease-flesch-kincaid-grade-level/>

⁶ Applicant is now thirty-four (34) years old.

⁷ Notably, Applicant bears the burden to prove to the Court his claim(s), and not Respondent.

⁸ 305 S.C. 453, 409 S.E.2d 395 (1991).

establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. See Rule 71.1(e), SCRCP (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code:

REQUEST FOR BELATED APPEAL OF INITIAL PCR ACTION

In his application, Applicant alleged he is entitled to a belated appeal of his initial PCR action because he did not knowingly and voluntarily waive his right to appeal. In support of his contention, Applicant presented several documents to the Court at the evidentiary hearing. Included was an alleged psychological evaluation of Applicant from 2002, when Applicant was twelve years old.

Applicant argued the psychological evaluation conclusively established he had cognitive impairments that prohibited him from understanding the PCR court's instructions in the final paragraph of the Final Order of Dismissal. Specifically, Applicant averred the 2002 psychological report established Applicant had a 2nd-3rd grade reading level and an IQ of 76, and therefore, Applicant would not have been able to understand the instructions and timely file his application. Additionally, Applicant argued that he filed his initial PCR, sent a letter to the Lancaster Clerk of Court explaining his untimeliness, and then filed this PCR, showing he desired to appeal his first

PCR action and is entitled to relief under Austin. This Court finds this argument is without merit.

The Uniform Post-Conviction Procedure Act filing procedures requires applicants to file a PCR application, 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 upon an appeal, whichever is later.

S.C. Code Ann. § 17-27-45. 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). The statute of limitations does not apply to Austin⁹ claims.

Successive applications such as the one before this Court are disfavored. S.C. Code Ann. § 17-27-90. The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, (1991). The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State. 305 S.C. 453, 409 S.E.2d 395 (1991). Austin provides for a belated appellate review of an initial post-conviction relief action where prior post-conviction relief counsel fails to timely appeal the denial of the application. Id. at 454, 409 S.E.2d at 396; see S.C. Code Ann. § 17-27-100 (right to appeal final judgment by post-conviction relief court). But Austin "is limited to its particular factual situation." Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 394 (1991).¹⁰ Where an applicant's action is summarily dismissed and he is not represented by counsel, the Supreme Court has held PCR judges are required to inform *pro se* applicants of their right to

⁹ Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

¹⁰ Aice was issued in conjunction with Austin, limiting the reach of Austin and holding "that once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of prior PCR counsel." 305 S.C. at 454 n.1, 409 S.E.2d at 396 n.1.

appeal and the statute of limitations to appeal. Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999).

The record in Applicant's action reflects he was advised of his right to appeal and the time to appeal. Applicant untimely filed his first PCR action *pro se*. The action was ultimately dismissed, and the PCR court issued a Final Order of Dismissal. The Final Order of Dismissal advised Applicant of the thirty-day time requirement to file a notice of appeal, and directed Applicant's attention to Rule 243, SCACR, for the procedures following the filing and service of notice of appeal. This gave Applicant sufficient notice of his right to appeal as required by Odom.

Applicant avers the records he provided to this Court show he has cognitive impairments that should exclude him from the strict time requirements provided by statute.

At the hearing, Applicant presented an alleged psychological report conducted by David G. Yarborough, III, on March 11, 2002, which Applicant primarily relies on to support his contention that he is cognitively impaired. The report contains Mr. Yarborough's opinions and conclusions about Applicant's cognitive abilities. Applicant presented the uncertified public school records.

The psychological report is also negligibly relevant to the present issue before this Court. The psychological evaluation was conducted in 2002 when Applicant was twelve (12) years old. Applicant is now thirty-four (34) years old, and no records before this Court indicate Applicant has had any other psychological evaluation since 2002. "Evidence meets the test of relevance if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears." Judy v. Judy, 384 S.C. 634, 641, 682 S.E.2d 836, 839 (Ct. App. 2009). Over *twenty-two years* have passed since Applicant was allegedly

psychologically evaluated. Though the report is minimally relevant, it has lost its probative value because it is too far removed from the issue, whether Applicant has a present cognitive impairment. State v. Glenn, 328 S.C. 300, 309, 492 S.E.2d 393, 397 (Ct. App. 1997); Cf. State v. Bright, 323 S.C. 221, 473 S.E.2d 851 (Ct. App. 1996) (finding evidence of two fires which occurred fifteen years prior were too remote to have any probative value in proving defendant's guilt where defendant was charged with criminal conspiracy, second-degree arson, and burning personal property to defraud an insurer).

After reviewing all documents Applicant provided at hearing the Court finds they do not conclusively support a finding Applicant is cognitively impaired in that Applicant cannot read, write, or comprehend. Applicant argued in his brief that the psychological report indisputably established Applicant has a permanent intellectual disability, making a current psychological evaluation unnecessary. However, looking at the psychological report on its face, nowhere does the report conclusively state Applicant had permanent and fixed cognitive deficits. Notably, the records Applicant submitted with his brief include his December 2002 grades and progress report, eight months after his evaluation, which showed Applicant received a 90% in language arts and noted he was making progress. This does not support a conclusive finding Applicant is presently cognitively impaired to such an extent he was not able to progress past a second/third grade reading level in the past twenty-two years.

Moreover, at trial, Applicant represented to the trial court he had successfully completed the tenth grade. (Trial Tr. pp. 130; 780 – 81). In his brief, Applicant asserts that the Flesh-Kincaid reading assessment established the final paragraph of the Final Order of Dismissal is written at a 10-12th grade reading level. Based on Applicant's representations to the trial court, Applicant would have been able to comprehend the PCR court's instructions

in the Final Order of Dismissal. Further, the records before this Court include legible, well-written letters signed by Applicant to the Lancaster Clerk of Court. Applicant presented this letter to the Court as one he wrote, which is contrary to his claim that he cannot read, write, or comprehend.

Applicant's assertion that the mere fact he filed his first PCR application and subsequent appeal evidence he wished to appeal his sentence and conviction is not sufficient to establish he is entitled to relief under Austin. As stated *supra*, Austin "is limited to its particular factual situation." Aice, 305 S.C. at 452, 409 S.E.2d at 394.

This Court finds Applicant has failed to meet his burden of establishing that he was entitled to relief pursuant to Austin. Even if this Court were to consider the substance of the records Applicant provided, the records offer pure conjecture as to Applicant's present cognitive abilities. Nothing Applicant has provided conclusively establishes he could not read and comprehend the PCR judge's instructions in the Final Order of Dismissal. Accordingly, this Court **DENIES** Applicant relief under Austin, and **DENIES** and **DISMISSES** the application as barred by the statute of limitations.

[CONCLUSION PAGE FOLLOWS]

CONCLUSION

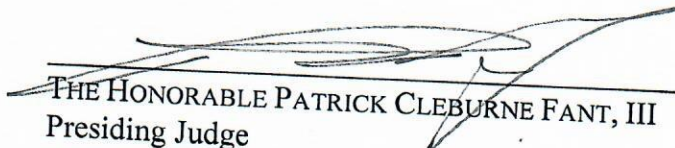
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED and DISMISSED WITH PREJUDICE.**

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking a review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 22nd day of March, 2024.


THE HONORABLE PATRICK CLEBURNE FANT, III
Presiding Judge
Circuit Court Judge

Lancaster, South Carolina