

STATE OF SOUTH CAROLINA)
 COUNTY OF GEORGETOWN)
)
 Shannon D. McGee, SCDC No. 142120)
)
 Applicant,)
)
 v.)
)
 State of South Carolina)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2021-CP-22-00426

**CONDITIONAL ORDER
 OF DISMISSAL**

FILED
 GEORGETOWN COUNTY, S.C.
 2023 NOV 27 AM 11:26
 ALMA Y. WHITE
 CLERK OF COURT

This matter comes before the Court by way of Applicant Shannon D. McGee's May 26, 2021 application for post-conviction relief. Respondent made its return and moved to dismiss the application, citing the statute of limitations, the prohibition on successive applications, and the doctrine of *res judicata*. On September 21, 2023, the Hon. Jennifer B. McCoy, heard the Respondent's motion to dismiss in the Georgetown County Court of Common Pleas. The Respondent was represented by Assistant Attorney General Jason Bridges and the Applicant was represented by Mr. Steven Fowler, Esquire. The Applicant testified at this hearing on his own behalf. This Court has reviewed the record, pleadings, arguments, and testimony set forth by the parties and finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently incarcerated in the South Carolina Department of Corrections. Applicant was indicted for criminal sexual conduct with a minor in the second degree, lewd act upon a minor child, and assault with the intent to commit criminal sexual conduct with a minor-second degree by the Georgetown County Grand Jury at its June 2006 term. (06-GS-22-580; -581; -582). Applicant was represented by Attorney Stuart Axelrod and Assistant Solicitor Robert Bryan, Jr., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On September 18, 2006

Jbm/1

Applicant proceeded to a jury trial before the Honorable Roger L. Couch. The jury convicted applicant of all charges, as indicted. As the verdict was being read, Applicant jumped up, flipped the counsel table, attacked the Assistant Solicitor, and had to be removed from the courtroom. (Tr. 209, 23 – Tr. 210, 9). Judge Couch then sentenced Applicant to life imprisonment for the criminal sexual conduct with a minor in the second degree, fifteen years' imprisonment for the lewd act upon a minor, and twenty years' imprisonment for assault with intent to commit criminal sexual conduct with a minor. Applicant made a post-trial motion for a new trial, arguing that counsel had committed a *Brady* violation.¹ Judge Couch found that a *Brady* violation had been committed, but that Applicant nevertheless received a fair trial.

Applicant appealed and the appeal was perfected by Attorney Kathrine H. Hudgins. Applicant presented the following issue:

1. Did the judge err in refusing to grant a new trial based on the assistant solicitor's failure to disclose a letter from a witness demonstrating a willingness to make a deal in exchange for testimony?

The South Carolina Court of Appeals affirmed the convictions on November 19, 2009. *State v. McGee*, Op. No. 2009-UP-539. Applicant's petition for rehearing was denied on January 20, 2010. Applicant appealed to the South Carolina Supreme Court, and certiorari was denied on January 20, 2011. The matter was remitted to the circuit court on February 7, 2011.

First PCR Application: 2011-CP-22-0195

Applicant filed his first application for post-conviction relief on February 14, 2011. Applicant filed an amended application on March 7, 2011. In his application he alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel

¹ *Brady v. Maryland*, 373 U.S. 83 (1963)

- a. Failure to object to improper bolstering in the solicitor's closing argument (see transcript pages 152-62)
 - b. Failure to object to the solicitor's improper closing argument which violated the Golden Rule (see pages 47-49; p. 150-162)
 - c. Failure to conduct any pretrial investigation (see pages 14-21)
 - d. Failure to object to trial court's jury instruction that impermissibly commented on the facts (see p. 178, lines 21-23; p. 181, lines 21-24; p. 183, lines 16-17)
 - e. Failure to object to the solicitor's improper closing argument that impermissibly commented on facts not in evidence with regard to expert witness Dr. Carol Ann Rahter (see pages 125 and 155).
2. Prosecutorial misconduct, in violation of the due process clause of the 14th Amendment;
 3. Violation of the 5th, 6th, and 14th Amendments of the U.S. Constitution, and violation of the due process clause of the S.C. Constitution; and
 4. Ineffective assistance of counsel of appellate defender – failure to raise the following issues on direct appeal:
 - a. Motion for continuance (see p. 14-21);
 - b. Motion for directed verdict (see p. 136); and
 - c. Motion for mistrial (see p. 211-12).

Respondent made its return and requested an evidentiary hearing on March 18, 2011. A hearing was convened at the Georgetown County Courthouse on December 19, 2013 before the Honorable Steven H. John. Applicant was present at the hearing and was represented by Attorney William L. Runyon, Jr., and Assistant Attorney General Joshua L. Thomas, of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf. Trial Counsel Axelrod and Michael Jerome Jones also testified. Judge John denied relief and signed a written order of dismissal on January 22, 2014.

Applicant appealed, and the appeal was perfected by Attorney Carmen V. Ganjehsani, who filed a *Johnson* petition on his behalf.² Applicant filed two *pro se* petitions and presented the following issues:

² *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988).

JBM/3

1. Did the State's calling of petitioner's case for trial violate the South Carolina Constitution and this Court's decision in *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012), hindering trial counsel's ability to prepare for trial?
2. Was appellate counsel ineffective for failing to raise additional issues on appeal, namely the trial judge's denial of petitioner's motion for a continuance?
3. Did the solicitor commit prosecutorial misconduct by misrepresenting his relationship with witness Aaron Kinloch?
4. Was trial counsel ineffective in failing to interview witness Michael Jones prior to trial?
5. Was trial counsel ineffective in failing to object to the solicitor's use of a "Golden Rule" argument in [opening and] closing argument?
6. Was trial counsel ineffective in failing to object to the trial judge's instruction that testimony of a victim in a criminal sexual conduct case need not be corroborated?
7. Was trial counsel ineffective in failing to object to the solicitor's use of improper vouching and bolstering during his closing arguments?
8. Was trial counsel ineffective in failing to object when the solicitor misstated evidence presented by the State's expert witness?

Respondent filed its return to the petition for writ of certiorari on April 11, 2016. The Supreme Court of South Carolina denied certiorari on September 21, 2016. The remittitur was sent on October 26, 2016.

Federal Habeas Corpus Action: C/A No. 1:16-3866-PMD-SVH

Applicant filed a petition for writ of habeas corpus with the United States District Court for the District of South Carolina on December 14, 2016. In his petition, he alleged he was being held in custody unlawfully for the following reasons:

1. 6th/14th Amendment – The State's calling of petitioner's case for trial violated the South Carolina Constitution.

2. 6th/14th Amendment – The Solicitor committed prosecutorial misconduct by misrepresenting his relationship with witness Aaron Kinloch.
3. 6th/14th Amendment – Trial counsel was ineffective in failing to object to the Solicitor’s use of “Golden Rule” argument in [opening and] closing argument.
4. 6th/14th Amendment – Appellate counsel was ineffective for failing to raise additional issues on appeal, namely the trial judge’s denial of petitioner’s motion for a continuance.
5. Was trial counsel ineffective in failing to interview witness Michael Jones prior to trial?
6. Was trial counsel ineffective in failing to object to the solicitor’s use of improper vouching and bolstering during his closing and opening arguments?
7. Was trial counsel ineffective in failing to object when the solicitor misstated evidence presented by the State’s expert witness?
8. Was trial counsel ineffective in failing to object to the judge’s instruction that testimony of a victim in a criminal sexual conduct case need not be corroborated?

Respondent made its return and moved for summary judgment on March 6, 2017. United States Magistrate Judge Shiva V. Hodges issued a report and recommendation on October 3, 2017, recommending that the motion be granted. Senior United States District Judge Patrick Michael Duffy adopted the report and recommendation, granted the motion for summary judgment, and dismissed the petition with prejudice on February 9, 2018. Applicant appealed and the appeal was dismissed by the Fourth Circuit Court of Appeals via unpublished per curiam opinion on July 31, 2018. Applicant petitioned for rehearing, which was denied on September 10, 2018.

Applicant filed a petition for writ of certiorari with the United States Supreme Court on November 16, 2018. The Supreme Court denied certiorari on June 28, 2019. *Mcgee v. McFadden*, 588 U.S. ____ (2019) (J. Sotomayor, dissenting).

II. FACTUAL HISTORY

Applicant was convicted of sexually abusing his minor stepdaughter. Evidence presented at trial showed that he would routinely molest the victim while her mother was at work. (Tr. 55, 24 – Tr. 59, 21). The abuse progressed from inappropriate clothed touching and gradually became more intrusive until one morning when Applicant called the victim to his bedroom and forced her to manually stimulate him. (Tr. 59, 22 – Tr. 61, 7). Sometime later Applicant began molesting and digitally penetrating the victim while she was sleeping. (Tr. 61, 11 – Tr. 62, 4). The victim was able to resist his attempts to force sexual intercourse. (Tr. 62, 19 – Tr. 65, 4). Applicant told the victim “whatever happens; don’t tell anyone about [the abuse].” (Tr. 66, 14-18).

Aaron Kinloch testified that he was incarcerated with Applicant after his arrest. (Tr. 101, 16 – Tr. 102, 17). Applicant confessed to Kinloch that he had digitally penetrated the victim. (Tr. 109, 18 – Tr. 110, 17). Kinloch alerted the Solicitor in a written letter where he explained that he had daughters of his own and was repulsed by Applicant’s actions. (Tr. 111, 13 – Tr. 112, 16).

III. CURRENT APPLICATION

In his current application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Prosecutorial Misconduct
 - a. The State violated *Brady* and its progeny through its representative Assistant Solicitor Robert “Bo” Bryan of the Georgetown County Solicitor’s Office at the time of trial when he withheld impeachment evidence of jailhouse snitch Aaron Kinloch’s letter that would have destroyed the credibility of Aaron Kinloch and his testimony.

Before this Court are Applicant’s records from the Georgetown County Clerk of Court’s Office, his records from the South Carolina Department of Corrections, the current application for post-conviction relief, the records from prior proceedings, and his trial transcript.

A hearing was held in the Georgetown County Court of Common Pleas on September 21, 2023 on the Respondent's motion to dismiss. The Respondent was represented by Assistant Attorney General Jason Bridges and the Applicant was represented by Mr. Steven Fowler, Esquire. The Applicant testified that he was represented in his previous post-conviction relief application by Mr. Runyon. The Applicant testified that the only circumstance that had changed since his 2011 PCR application and his current application is, "his understanding of the law".

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. Pursuant to S.C. Code Ann. §§ 17-27-70 and -80, this Court informs the parties of its intent to dismiss the application based upon the following findings:

Statute of Limitations

The application should 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).

The remittitur to Applicant's direct appeal was sent on February 7, 2011. Therefore his application for post-conviction relief was due no later than February 8, 2012. The current

JBM/7

application was not filed until May 26, 2021—over nine years after the one-year statutory filing period had expired. Therefore, the application shall be summarily dismissed as barred by the statute of limitations.

Successiveness

The application shall 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.

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, 409 S.E.2d at 394. 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 application for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him, and the application shall be dismissed as successive to Applicant's previous PCR application.

Res Judicata

The application is similarly barred by the doctrine of *res judicata*. "*Res judicata* applies where there is identity of parties, identity of subject matter, and adjudication of the issue in the former suit." *Bell v. Bennett*, 307 S.C. 286, 292, 414 S.E.2d 786, 789-90 (Ct. App. 1992). "Under the doctrine of *res judicata*, a final judgment on the merits in a prior action will conclude the parties and their privies in a second action based on the same claim as to the issues actually litigated and as to issues that might have been litigated in the first action." *Foran v. USAA Casualty Ins. Co.*, 311 S.C. 189, 190-91, 427 S.E.2d 918, 919 (Ct. App. 1993); *see also Foxworth v. State*, 275 S.C. 615, 617, 274 S.E.2d 415, 415-16 (1981) (agreeing with circuit court that post-conviction relief claims that were or could have been raised in prior petition for habeas corpus in federal court were barred by *res judicata*).

Applicant had a full opportunity to litigate all his allegations in his prior actions. His allegation that the State committed prosecutorial misconduct by withholding impeachment evidence was raised in a post-trial motion, his prior PCR application, and his federal habeas petition, which he appealed all the way to the Supreme Court of the United States. Relief has been denied in each of these prior actions. The finality of the previous Court rulings should be respected, and the application shall be summarily dismissed as barred by the doctrine of *res judicata*.

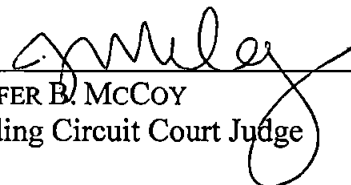
JBM/a

V. CONCLUSION

Pursuant to §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 Georgetown County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
PCR Division – 15th Circuit
Post Office Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to his order must be actually received by the Georgetown 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 the response if not so timely filed and served.



JENNIFER B. MCCOY
Presiding Circuit Court Judge

Georgetown, South Carolina

JBM/10