

Chambers Esq. On October 8, 2003, the State called the case to trial with the Honorable J. Mark Hayes presiding. At the conclusion of the trial Applicant and King were found guilty as indicted. On October 11, 2003, Judge Hayes sentenced Applicant to life imprisonment.

Direct Appeal

A notice of appeal was filed on Applicant's behalf. Appellate counsel Susannah Ross Esq. perfected the appeal. Applicant raised the following issues:

- 1) The lower court erred in allowing law enforcement to testify where they searched for Appellant before he turned himself in.
- 2) The lower court erred in denying Appellant's Motion for Severance.
- 3) The lower court lacked subject matter jurisdiction to try Appellant's case.

The Court of Appeals affirmed the Applicant's conviction and sentence on November 28, 2005. *State v. Walker*, 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005). The Remittitur was issued on December 14, 2005.

First PCR Application

Applicant filed an application for Post-Conviction Relief (PCR) on May 22, 2006. (2006-CP-23-3331). Applicant raised the following claims in his application:

- 1) Ineffective Assistance of Trial Counsel
 - a. Failure of counsel to preserve objections
 - b. Failure of counsel to raise appropriate legal issues
 - c. Failure of counsel to appropriately cross-examine witnesses and raise appropriate defenses

The State filed a Return on August 15, 2006, requesting an evidentiary hearing. An evidentiary hearing was convened on March 1, 2007, at the Greenville County Courthouse with the Honorable Michael G. Nettles presiding. Applicant was represented by Kurt Tavenier Esq., and Karen Rattigan of the Attorney General's Office represented the State. After considering the

records and testimony at the hearing, Judge Nettles denied relief on the merits and dismissed the PCR application by Order filed March 19, 2007.

A timely notice of appeal was filed on Applicant's behalf and the appeal was transferred to the Office of Appellate Defense. On December 31, 2007, Appellate Defender Eleanor Duffy Cleary submitted a Motion to Remand and Reconstruct the PCR Record. The State submitted a Return to the motion on January 7, 2008. A reply was submitted on behalf of Applicant on January 9, 2008. The Court denied the Petitioner's Motion to Remand and Reconstruct the PCR Records on January 23, 2008. On February 22, 2008, appellate counsel filed a *Johnson* Petition for Writ of Certiorari, along with a Motion for Substitution of Counsel. The Court granted appellate counsel's motion, relieving her of representation. A Substitution of Petition for Writ of Certiorari was filed by Tricia A. Blanchette Esq., on June 13, 2008. The Supreme Court of South Carolina denied Applicant's Petition on July 9, 2009. Applicant filed a Petition for Rehearing and the Court denied the Petition on August 6, 2009.

Federal Habeas Corpus

Applicant filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina (1:09-2672-HMH-SVH) on October 9, 2009. Respondent submitted a Motion for Summary Judgement on February 26, 2010. On March 3, 2010, Applicant filed a response in opposition to Respondent's Motion for Summary Judgement. The Honorable Shiva V. Hodges, United States Magistrate Judge, issued a report and recommendation to grant the Motion for Summary Judgement dated August 2, 2010. Applicant filed an objection to the Report and Recommendation on August 31, 2010. On September 14, 2010, the Honorable Henry M. Herlong Jr., Senior United States District Judge, issued an order granting the Motion for Summary Judgement and dismissing the Petition with prejudice.

The applicant filed a notice of appeal at the United States Court of Appeals for the Fourth Circuit on December 21, 2010. In a Judgment filed January 4, 2011, the Court of Appeals denied a certificate of appealability and dismissed the appeal. Applicant filed a Petition for Rehearing *en banc* on January 24, 2011. The United States Court of Appeals for the Fourth Circuit denied Applicant's Petition for Rehearing as untimely on January 24, 2011. Applicant petitioned the Court for a three-day extension due to difficulty, and the Court denied Applicant's motion for reconsideration on March 15, 2011.

Rule 60 and Rule 29 motions

Applicant filed the first of several motions to vacate or set aside judgment and order a new trial on the basis of newly discovered evidence. Applicant filed the first of these motions, a Rule 60(b) Motion, on March 23, 2011. Applicant argued for an award of a new trial on the basis that the State attempted to use a false confession, false witness testimony, and that exculpatory evidence was destroyed by Investigator Silvaggio.

Second PCR Application

Applicant filed a second PCR application on May 31, 2012 (2012-CP-23-3623).

Applicant raised the following allegations in his application:

- 1) Newly Discovered Evidence
 - a. Letter of confession/not written by me
 - b. State's use of contaminated evidence
- 2) Actual Innocence
- 3) Fourth Amendment Violation

Respondent filed its Return and Motion to Dismiss on September 11, 2012, requesting the application be summarily dismissed based upon the expiration of the statute of limitations and the prohibition against successive PCR applications. The Honorable G. Edward Welmaker issued a Conditional Order of Dismissal filed September 24, 2012, provisionally denying and

dismissing the application. Applicant responded to the Conditional Order of Dismissal on November 13, 2012. On December 14, 2012, the Court issued a Final Order of Dismissal denying and dismissing Applicant's application with prejudice. Applicant filed a notice of appeal on February 7, 2013. The South Carolina Supreme Court denied the petition for writ of certiorari on June 7, 2013.

Motion for DNA Testing

On September 25, 2017, Applicant filed an Application for Forensic DNA Testing. In his application, Applicant requested "alleged letter of confession, red metal broom, three hairs from victim, and brown stick," to be tested. The State filed its Response and Motion to Dismiss the Application for Forensic DNA Testing for failure to timely file on October 31, 2017. Applicant filed a Reply to the State's Motion to Dismiss on November 30, 2017, and filed a Motion to Dismiss requesting his conviction be set aside or a new trial granted on February 19, 2017. The Court denied Applicant's Motion to dismiss on March 25, 2019. On April 29, 2019, Applicant filed an "anticipatory" Notice of Intent to Appeal in the event his Application for Forensic DNA Testing is denied, noting that he had not received the Order denying the Motion to Dismiss. On July 16, 2019, the Court instructed Applicant to include the Order dismissing his motion within ten days or his appeal would be dismissed. Applicant failed to do so, and the Court dismissed Applicant's appeal on August 15, 2019. The Remittitur was issued on September 11, 2019.

Third PCR Application and Current Action

In his third and current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully on the following grounds:

- 1) Newly Discovered Evidence
 - a. "A handwritten letter attributed to have been authored or written by Applicant was examined by renown forensic Expert

Dr. Robert Bennert Ph.D. R. Ph. And compared to known handwriting samples of Applicant. Dr. Bennet concluded this letter was unlikely to have been written by Applicant. Dr. Bennet's expert opinion is exculpatory because the State used this letter to prove the charges against Applicant."

- b. "The mother of the victim has recanted her incriminating statement that the State used to secure a conviction against Applicant for the charges on trial. This evidence compounds the exculpatory value of Dr. Bennet's expert opinion evidence and vice versa."

Applicant amended his claims, through counsel, on December 5, 2022, to include the following claims:

- 1) Newly discovered evidence
 - a. "After Applicant's conviction, a "confession letter" offered against him at trial has been forged. Applicant believes that the person that forged the letter will come forward and admit the forgery and the motive. Applicant has further obtained the opinion of a forensic handwriting examiner who has reviewed the document and is informed and believes the forensic expert will appear and opine that the confession letter was a forgery and not written by Applicant as the State alleged at trial."
- 2) Actual innocence
- 3) Fourth, Sixth, Eighth, and Fourteenth Amendment Violations in addition
 - a. Conviction based on evidence that was false, forged and fabricated where Applicant is innocent and would have not been convicted but for the introduction of a forged "confession letter."

Applicant seeks relief in the form of: "Grant an evidentiary hearing on the merits of the after discovered/actual innocence claim and grant a reversal of the conviction and/or new trial in the underlying criminal action." (Amended PCR App. at 7).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In addition to carefully considering the record and the arguments presented by counsel, this Court has also had the opportunity to consider the testimony presented at the hearing for Respondent's Motion to Dismiss and has weighed the testimony accordingly. Set forth below are

the relevant findings of fact and conclusions of law pursuant to S.C. Code Ann. §17-27-90 and S.C. Code Ann. §17-27-45.

Claims based on Newly Discovered Evidence

If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter 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).

Traditionally, in South Carolina, “[t]o obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.” *McCoy v. State*, 401 S.C. 363, 368 n. 1, 737 S.E.2d 623, 625 n. 1 (2013) (quoting *Clark v. State*, 315 S.C. 385, 387–88, 434 S.E.2d 266, 267 (1993)). However, “the [PCR] court may grant a motion by either party for summary disposition of the [PCR] application when... there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Id.*, at 369 (quoting S.C. Code Ann. § 17-27-70(c)). “When considering the State's motion for summary dismissal, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant.” *Id.*, at 369. “Where an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing.” *Id.*

RSS

Applicant testified on his own behalf at the motion hearing in regard to claims that an alleged confession letter (hereinafter referred to as "forged letter") he had written was forged by an individual named Clemeticia "Mesha" Thomason, Applicant's former girlfriend. Applicant includes Ms. Thomason's confession letter, (hereinafter referred to as "confession letter") with his application. Applicant claims that the confession of the forgery by Ms. Thomason is exonerating evidence. Applicant claims that the forged letter prejudiced him at trial, and that his conviction should be reversed, or a new trial should be granted. Applicant likewise references a March 25, 2010 handwriting expert analysis letter, and a September 29, 2019 affidavit from Ms. Thomason indicating she had created the forged letter as newly discovered evidence relating to the same matter.

After considering the record, arguments presented by counsel, and the controlling case law, this Court finds that Applicant's application was impermissibly successive, untimely, and the evidence presented by Applicant is insufficient to constitute newly discovered evidence.

General Summary of Relevant Facts

On March 21, 2002, Earnetta King served dinner to her family. In the house were her boyfriend, Patrick Walker, and her children 13-year-old Rodrekus, 9-year-old Brittany, and 5-year-old Javario. Earnetta King tasted dinner and immediately suspected something was added to the food. She called Walker into the room and he immediately blamed Rodrekus. The boy denied tainting the food, but Walker hit him on the head. King sent the other children to their rooms. (Trial Tr. 282-284, 372-374). Then, over the course of hours, King and Walker participated in the brutal beating of Rodrekus.

At the very least, Rodrekus was hit with a belt, mop handle, and a metal broom stick. Brittany saw Walker laughing as he kicked and punched Rodrekus in the head and stomach.

Rodrekus had been stripped of his clothes. Walker pushed her as she tried to help her brother. (Trial Tr. 290-291, 380-381). Brittany told police she saw King hit Rodrekus with the mop stick on the left side of his body. (Trial Tr. 338, 442). The beating apparently continued into the early morning hours of March 22nd. Upon realizing that Rodrekus was no longer breathing, King called 911 and told EMS that Rodrekus had a seizure. (Trial Tr. 85-87).

Rodrekus was taken to the hospital with a weak pulse, but no other signs of life. (Trial T. 111). At approximately 2:15 am, he was declared dead. He had a massive hematoma that covered half of his head; abrasions, stabbed cuts and bruises on his ear, shoulder, arms, chest and buttocks. A bruise covered half of his back. (Trial Tr. 110-120). The left side of his scalp was detached from the underlying bone. Rodrekus (the victim) died as the result of multiple blunt force injuries. (Trial Tr. 459-473).

In 2002, prior to Applicant's trial, Ms. Thomason notified Investigator Silvaggio that she received a letter ("the forged letter") from Applicant in which he allegedly confessed to the victims' murder. However, on August 24, 2010, Ms. Thomason executed a letter (the "confession letter") stating that the alleged confession of Applicant could not have been sent by Applicant, and that she was forced to make a false statement after notifying Investigator Silvaggio. Ms. Thomason stated in her letter that she had warrants and Investigator Silvaggio offered to "help her out" with the warrants if she provided false testimony. Ms. Thomason was not present at Applicant's trial, nor did she testify. The forged letter was not offered into evidence to be considered by the jury, Investigator Silvaggio did not mention during the trial the forged letter Ms. Thomason gave him was from Applicant, nor did he discuss its substance. (Trial Tr. 222-223). However, the issue was taken up outside the presence of the jury such that all parties were aware of the forged letter's existence. (Trial Tr. 339-349; 484-488).

The Application is Successive

As to counsel's argument that Applicant was unable to pursue his prior PCR action effectively, such that prior PCR counsel was never assigned so as to raise the issue of equitable tolling, and that Applicant has not been given the opportunity to demonstrate prejudice, this Court finds such arguments to be without merit and find that the entire application is impermissibly successive.

S.C. Code Ann. § 17-27-90 provides:

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.

Pursuant to this statute, successive PCR applications are prohibited unless the applicant can establish that the grounds raised in the subsequent application could not have been raised in the previous application. *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). The Applicant bears the burden of showing that the allegations could not have been raised previously. *Id.* Applicant testified that he did not tell previous PCR counsel about the forged letter and concedes that he did not attempt to raise the issue. Likewise, Applicant's claims regarding expert testimony and recantation have not been supported by evidence or testimony as to demonstrate why these claims were not raised in Applicant's first PCR action.

Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications. In fact, Applicant raised many of the same claims in his previous application (2012-CP-23-3623), and alleges his claims were not decided on the merits because the Court summarily dismissed his application as barred as

untimely and successive. This Court concludes the same. Applicant has not presented any supporting testimony or evidence entitling him to a successive application for any of his allegations. Respondent's Motion to Dismiss should therefore be granted.

The Application is Untimely

Pursuant to S.C. Code Ann. § 17-27- 45(A) & (C), Applicant did not timely file an action to present Ms. Thomason's letter and argue that she forged Applicant's confession letter. As such, the action is barred by the statute of limitations and should be dismissed.

S.C. Code Ann. § 17-27-45 provides:

(A) 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.

...

(C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter 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. Based upon the record, the application of these statute of limitations provisions clearly demonstrates the untimeliness of Applicant's action.

First, Applicant was aware of the forged letter itself *prior to the conclusion of his trial*. He chose not to investigate or raise issue with it and the statute of limitations under § 17-27-45(A) has long expired. That alone is sufficient to render the entire claim untimely, but alternatively, Ms. Thomason's letter confessing to the forged confession is dated August 24, 2010, and his *second* PCR application was filed in 2012. Under subsection § 17-27-45(C), Applicant is required to bring forward this evidence in his PCR application within one year after the date of actual discovery of the facts or after the date when the facts could have been

ascertained by the exercise of reasonable diligence. Applicant's claim was indeed untimely prior to the filing of his second PCR application, let alone his third.

Similarly, Applicant raises the issue of supposed newly discovered evidence in the form of expert witness conclusions as to the forgery letter, and a supposed recantation of an initial prior statement to law enforcement by his co-defendant. Applicant has failed to demonstrate why either claim can be considered timely.

Applicant testified at the motion hearing that he became aware of the alleged forged confession letter on the second day of his trial on October 9, 2003. Assuming arguendo Applicant did not write the confession letter, Applicant was on notice of the forgery and did not diligently pursue additional evidence supporting his claim for post-conviction relief, including diligently pursuing an expert witness to examine the letter. The handwriting analysis was dated March 25, 2010, almost seven (7) years after Applicant's discovery of the forged confession letter. Trial counsel objected to the introduction of the forged letter through Ms. Thomason, and stated that the Applicant was deprived of obtaining a handwriting analysis from an expert due to the Prosecution's late notice of possession of such evidence. (Trial Tr. 486). Thus, Applicant had notice of the forged letter and had the opportunity to take action in regard to obtaining a handwriting analysis within the one-year statute of limitations as required by S.C. Code Ann. § 17-27-45(A).

Equitable Tolling

Applicant asserts that he should be entitled to argue equitable tolling in this third PCR application because he was not assigned counsel for his second PCR action, and therefore he was denied the opportunity to argue equitable tolling and avoid the dismissal of his action of procedural grounds. This argument is without merit for two reasons. First, there is no right to

counsel in successive PCR applications unless the applicant can demonstrate a proper basis for the action to proceed to hearing. To that end, the applicant is afforded an opportunity to file a Reply to the Conditional Order of Dismissal and argue why his action should not be dismissed on procedural grounds. S.C. Code of Laws § 17-27-70(b). This would include the opportunity to argue that he was diligent but otherwise unable to file a timely application. The second, is that not only do all applicants receive this opportunity, Applicant actually made an argument for equitable tolling in his second PCR application. The application was nevertheless denied. (See Amended Reply to Conditional Order of Dismissal and State's Return, p. 12-13 (2012-CP-23-3623)).

The Recantation Issue

Regarding the supposed recantation of his co-defendant raised in the initial application, this Court finds that Applicant has abandoned this claim. Applicant did not reassert this claim in the amended Application filed December 5, 2022. Applicant did not provide any testimony or documentation to the issue at the motion hearing. He cannot rely upon his pleadings to counter Respondent's motion to dismiss. Applicant has not even fully articulated whether this claim references a *post-trial* recantation, or simply the fact that two inconsistent statements by the co-defendant were presented at trial. In any case, Applicant has not demonstrated that his claim is timely as undiscoverable until within one-year of the filing of his third PCR application, pursuant to S.C. Code Ann. § 17-27-45(C).

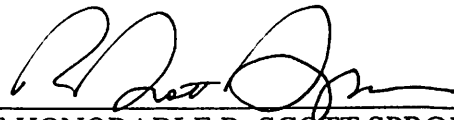
CONCLUSION

For the above stated reasons, this Court finds that the application is both impermissibly successive and time-barred. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

IT IS THEREFORE ORDERED:

1. Respondent's Motion to Dismiss is granted.
2. Applicant's application for post-conviction relief is denied and dismissed with prejudice; and
3. Applicant is remanded to the custody of Respondent for completion of his sentence.

AND IT IS SO ORDERED this 1 day of July, 2024.



THE HONORABLE R. SCOTT SPROUSE
Presiding Judge

Copy mailed to JM
Attorney general / Jeff Wilkes
on 7/3/2024.