

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

April 4, 2012

Appellate Defender Robert M. Pachak
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: McCoy, John Curtis v. The State

Dear Counsel:

Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter.

It will be necessary for you to furnish this office with an additional thirteen (13) **bound** copies of the appendix within thirty (30) days from the date of this letter.

Brief of Petitioner should be served and filed on or before May 4, 2012. The brief is not properly filed until we have proof of service.

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed. We must have proof of service. Any reply brief should be served and filed within ten (10) days after filing of respondent's brief.

Very truly yours,

CLERK

DES/jj

cc: Assistant Attorney General Suzanne H. White

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Derham Cole, Circuit Court Judge

RECEIVED

MAR 24 2011

S.C. Supreme Court

JOHN CURTIS MCCOY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX	1
ISSUE PRESENTED	2
STATEMENT	3
ARGUMENT.....	5
CONCLUSION	6

ISSUE PRESENTED

Whether petitioner's case should be remanded for a hearing on his after discovered evidence claim of juror misconduct?

STATEMENT

Petitioner was convicted of burglary in the first degree and assault and battery with the intent to kill after a jury trial held before the Honorable Roger L. Couch in Spartanburg County on June 14, 2005. Respective sentences of fifteen (15) years and five (5) years were imposed. The sentences were ordered to be served consecutively. Clay T. Allen, Esquire was trial counsel.

Petitioner appealed his convictions and the appeal was dismissed by the Court of Appeals on June 7, 2007, after a review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. McCoy, 2007-UP-294.

Petitioner filed his first application for post-conviction relief on August 29, 2007. An evidentiary hearing was held on May 28, 2008. Petitioner was present and was represented by counsel. On June 30, 2008, the Honorable Michael G. Nettles issued an order denying and dismissing the application for post-conviction relief. Petitioner appealed and this office filed a Johnson petition on petitioner's behalf. The petition was dismissed by the appellate court on October 21, 2009.

Petitioner filed his second application for post-conviction relief on November 13, 2009. Respondent filed a return and motion to dismiss on May 11, 2010, alledging that the second application was successive and that it was barred by the statute of limitations. Petitioner filed a response to respondent's return and motion to dismiss on May 21, 2010.

On July 19, 2010, the Honorable J. Derham Cole issued a conditional order of dismissal giving petitioner twenty (20) days to show why it should not become final. Petitioner wrote a response on July 27, 2010.

On November 5, 2010, Judge Cole issued a final order denying and dismissing petitioner's second application for post-conviction relief.

ARGUMENT

Petitioner's case should be remanded for a hearing on his after discovered evidence claim of juror misconduct.


Another defendant was tried on June 15-16, 2005, in Spartanburg County. During jury qualification juror number 84, Shannon Lewis, advised the court her cousin was married to Trey Gowdy, a solicitor in Spartanburg County. (App. p. 437, lines 1-7). Petitioner's trial was earlier on June 14. (App. p. 3). The same juror number 84, Shannon Lewis was seated at petitioner's trial. (App. p. 47, lines 13-25). During jury qualification at petitioner's trial the jury panel was asked if they were related by blood or marriage or a close personal friend with any person employed in the solicitor's office. (App. p. 22, lines 22-25). Juror number 84 did not respond.

Petitioner alleged in his PCR application that this denied him the right to a trial by a fair and impartial jury. (App. p. 408). This was after discovered evidence because he could not have known the juror's relationship with the solicitor since she failed to disclose it. Petitioner brought this out in his response to respondent's return and motion to dismiss. (App. p. 418 – p. 437). This issue was not addressed in the conditional order of dismissal. The issue was briefly discussed in the final order but petitioner never had a hearing on the issue or the appointment of counsel.

CONCLUSION

Petitioner's case should be remanded for a hearing and with the appointment of counsel.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of March, 2011.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Derham Cole, Circuit Court Judge

JOHN CURTIS MCCOY,

PETITIONER,

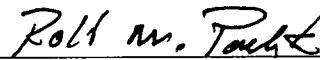
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

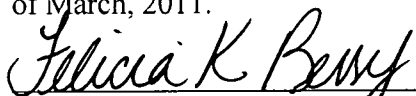
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire this 24th day of March, 2011.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day
of March, 2011.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: June 21, 2020.

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUL - 8 2011

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable J. Derham Cole, Circuit Court Judge

ORIGINAL

Case No. 2009-CP-42-6212

John Curtis McCoy, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTION PRESENTED.....	1
STATEMENT OF THE CASE.....	2
STANDARD OF REVIEW.....	3
ARGUMENT	
The PCR Court properly held that Petitioner's application was successive and his allegation of juror misconduct did not meet the requirements to allow for a new post-conviction relief hearing based on newly discovered evidence.....	3
CONCLUSION.....	9

QUESTION PRESENTED

Did the PCR Court properly hold that Petitioner's application was successive and his allegation of juror misconduct did not meet the requirements to allow for a new post-conviction relief hearing based on newly discovered evidence?

STATEMENT OF THE CASE

Petitioner was convicted of burglary in the first degree (2005-GS-42-0643) and assault and battery with the intent to kill (2005-GS-42-0642) after a jury trial held before Honorable Roger L. Couch in Spartanburg County on June 15, 2005. Judge Couch sentenced Petitioner to sentences of fifteen (15) years on each charge, ordered to be served consecutively. Clay T. Allen, Esquire was trial counsel.

Petitioner appealed his convictions and the appeal was dismissed by the South Carolina Court of Appeals after a review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. McCoy, Op. No. 2007-UP-294 (filed June 7, 2007).

Petitioner filed his first application for post-conviction relief on August 29, 2007. An evidentiary hearing was held on May 28, 2008. Petitioner was present and was represented by counsel. On June 30, 2008, the Honorable Michael G. Nettles issued an order denying and dismissing the application for post-conviction relief. Petitioner appealed and a Johnson petition was filed on his behalf. The petition was dismissed by the appellate court on October 21, 2009.

Petitioner filed his second application for post-conviction relief on November 13, 2009. Respondent filed a Return and Motion to Dismiss on May 11, 2010, alleging that the second application was successive and that it was barred by the statute of limitations. On July 19, 2010, the Honorable J. Derham Cole issued a Conditional Order of Dismissal giving petitioner twenty (20) days to show why it should become final. Petitioner submitted a response on July 27, 2010. On November 5, 2010, Judge Cole issued a Final Order denying and dismissing petitioner's second application for post-conviction relief.

A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari was submitted. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

- I. The PCR Court properly held that Petitioner’s application was successive and his allegation of juror misconduct did not meet the requirements to allow for a new post-conviction relief hearing based on newly discovered evidence.**

Petitioner was indicted and proceeded to trial on charges of assault and battery with intent to kill and burglary – 1st degree, following his attack on his estranged wife and a male friend, after breaking into the estranged wife’s home. The male friend of his wife was shot by Petitioner nine times; however, following surgery, he survived. At trial, Petitioner was represented by Clay Allen, Esquire. Prior to trial, a jury panel was assembled and all took the oath and were sworn in. (App. p. 8-9). Judge Couch then began questioning the panel, asking if any member of the jury panel had ever been related by blood or marriage or ever had a close personal or social relationship with any of the attorneys involved in the case. (App. p. 22 lines 2-6). Several questions later, jurors were also asked if they were related by blood or marriage or were a close personal or social friend with any person employed in the seventh judicial circuit solicitor’s office, among other law enforcement agencies. (App. p. 22-3). At that time, several jurors disclosed relationships with various people in law enforcement or the judiciary; however, Ms. Shannon Lewis, #84, did not stand. After excusing some jurors the state and the defense selected

its jury, including Ms. Shannon Lewis, #84 (App. p. 47).

Petitioner now asserts, in a second post-conviction relief application, that the PCR Court erred in finding that the discovery that Ms. Lewis, #84, was related through marriage to a person employed within the solicitor's office did not meet the requirements to support Petitioner's claim of after discovered evidence. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983). Specifically, the Petitioner asserts that this was after discovered evidence because Petitioner could not have known the juror's relationship with the Solicitor since she failed to disclose it and that this failure to disclose denied him the right to a trial by a fair and impartial jury (App. p. 408).

In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Because Petitioner filed a previous application which was litigated on the merits and later dismissed on appeal, he must be able to prove that this new allegation meets the standards of after discovered evidence to move past a finding that this second application is successive. In general, successive applications for post-conviction relief are clearly disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) 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 point to 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."** [Emphasis in original]. Id., 305 S.C. at 450, 409 S.E.2d at 394. If the Petitioner could have raised these allegations in a previous application, then the Petitioner may not raise those grounds in successive applications. Id. The Petitioner bears the burden of showing that the allegations could not have been raised previously. Land, Id.

Petitioner was tried and found guilty in 2005. Following his appeal, Petitioner filed his first post-conviction relief application on August 29, 2007. (App. p. 373). The matter was dismissed and then the Petition for Writ of Certiorari was denied on October 21, 2009. (App. p. 405). Petitioner then filed this current successive application on November 13, 2009, one week following the issuance of the Remittitur in his prior case. (App. p. 406-7). Petitioner alleges that he discovered the alleged after discovered evidence in November 2009, which discussing his case with Timothy Wayne Dezern in prison. (App. p. 420). Respondent submits that this information was available in 2005, after Juror #84 disclosed the marital relationship between her cousin and Trey Gowdy during Mr. Dezern's jury voir dire, and more than four years prior to Petitioner's second application. Therefore, Respondent submits that the application was properly dismissed as successive.

Furthermore, where a Petitioner is making a motion for a new trial or for relief from judgment based on newly-discovered evidence must show that the evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983). Respondent submits that the court properly held that Petitioner did not meet the requirements of after discovered evidence.

In regards to the requirements enumerated in Hayden, Respondent submits that the knowledge that Juror #84 had a cousin who was married to the Seventh Judicial Circuit Solicitor at the time of Petitioner's trial, would not change the result if a new trial were granted. Also, this alleged after discovered evidence is not material to the issue of guilt or innocence.

A potential juror's relationship to an attorney in the case is not an automatic disqualification. "There is no rule of the common law, nor is there a statute disqualifying a juror on account of his relationship to an attorney in the case, either by affinity or consanguinity, within any degree." State v. Nicholson, 221 S.C. 399, 406, 70 S.E.2d 632, 635 (1952). As Petitioner points out in the transcript of Timothy Wayne Dezern, whose trial followed Petitioner's in Spartanburg, Juror #84 stated that her cousin was married to Trey Gowdy, the Seventh Judicial Circuit Solicitor at the time. (App. p. 437). Furthermore, she stated that this relationship would not affect her ability to be fair and impartial. (App. p. 437). Although it appears that Petitioner still had strikes remaining, it would be speculative to believe that she would have been struck as a juror because of her cousin's marriage or that her presence on the jury was enough to sway the jury in favor of finding Petitioner guilty in light of the overwhelming evidence offered against him.

The State presented testimony from Petitioner's estranged wife, who was the victim of the burglary and identified the Petitioner in the courtroom. (App. p. 80-98). The State also introduced the identification of Petitioner by the victim of the shooting through a photo line-up. (App. p. 155). The victim of the assault also testified and identified Petitioner as the one who shot him at least nine times. (App. p. 193-214). Therefore, Respondent submits that as a result of overwhelming evidence against Petitioner, the outcome of the trial would not change if the information regarding Juror #84 was known at the time of trial.

Furthermore, when allegations arise concerning a juror's failure to reveal information in response to voir dire questions, courts look to whether the concealment was intentional and consider the nature of the information concealed. State v. Woods, 345 S.C. 583, 587-88, 550 S.E. 2d 282, 284 (2001). A two-pronged test is used in evaluating allegations of juror misconduct for nondisclosure to voir dire questions before awarding a Petitioner a new trial. First, the Petitioner must prove that the juror intentionally concealed the information. Second, the concealed information would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. Id. However, a determination that a juror did not intentionally conceal the information ends the court's inquiry. State v. Sparkman, 358 S.C. 491, 497, 596 S.E. 2d 375, 377-78h (2004). Here, the Petitioner has failed to meet the first prong and therefore should not be awarded a new trial.

In determining whether a juror's failure to respond to a voir dire question amounts to intentional concealment is a fact intensive determination that must be made on a case-by-case basis. Intentional concealment occurs when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Sparkman, 358 S.C. at 496, 596 S.E. 2d at 377. However, concealment is considered unintentional where the voir dire question posed is ambiguous or incomprehensible to the average juror or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances. Id. Here, the jury panel was asked a series of questions regarding their relations with any persons employed within the seventh judicial circuit solicitors' office as well as any attorneys involved in the case. (App. p. 425, lines 22-25; p. 426, lines 1-25; and p. 427, lines 1-5). However they were only given an opportunity to respond to these questions after a

period of time removed from the initial questions. (App. p. 427, line 6). Due to the significant removal of time between the initial question and the jurors' opportunity to respond it is reasonable to believe that layman juror could easily make an innocent mistake under such circumstances. Additionally, the non-disclosure at Petitioner's trial was not an act of deliberate concealment in response to a specific voir dire question about relationship by blood or marriage, but, rather, the product of a poorly constructed question. See State v. Guillebeaux, 362 S.C. at 275, 607 S.E.2d at 102 (stating juror did not intentionally conceal that she knew a witness when she was asked on voir dire whether she enjoyed a social relationship with any witness and the juror was merely acquainted with a witness).

Although it may be inferred that a juror is not impartial if she fails to disclose a relationship without justification, such an inference may not be drawn where there is information to the contrary or the failure to disclose is innocent. State v. Gullebeaux, 362 S.C. 272, 275 (2004). Here, the Petitioner discovered the disclosure of Juror #84's relationship with Solicitor Trey Gowdy because of Juror #84's disclosure of her cousin's marriage during the voir dire in someone's trial. (App. p. 437 line 7). However Juror #84 unequivocally states for the record that it would not interfere with her ability to give both the state and defendant a fair and impartial trial. (App. p. 437 lines 8-11). Therefore, the only inference that may be drawn from Juror #84's initial failure to disclose her cousin's marital relationship with an employee of the solicitor's office is one of innocence.

Respondent submits that Petitioner has failed to meet his burden of proof as to this argument.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

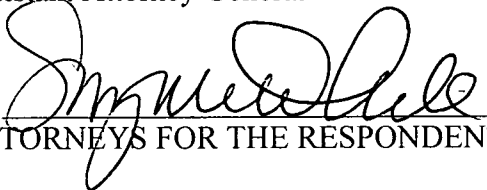
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Attorney General

By: 
ATTORNEYS FOR THE RESPONDENT

July 8, 2011.

Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

Case No. 2009-CP-42-6212

JOHN McCOY,

Petitioner,

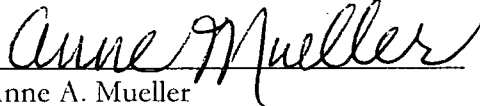
v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, Robert M. Pachak, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211, on this the 8th day of July, 2011.


Anne A. Mueller
Legal Assistant for Respondent

SWORN to before me this
8th day of July, 2011.

_____(L.S.)
Notary Public for South Carolina.
My Commission Expires: _____



ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737
PCR FACSIMILE: 803.734.4113

July 8, 2011

Via Hand Delivery

Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

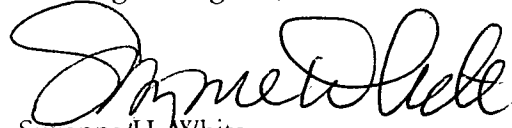
RECEIVED
JUL - 8 2011
S.C. Supreme Court

**RE: John Curtis McCoy v. State of South Carolina
2009-CP-42-6212**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this return today.

With highest regards,


Suzanne H. White
Assistant Attorney General

SHW/aam
Enclosures

cc: Robert M. Pachak, Esquire (w/enclosure)



ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737
PCR FACSIMILE: 803.734.4113

June 8, 2011

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED

JUN - 8 2011

S.C. Supreme Court

(2)


**RE: John McCoy v. State of South Carolina
2009-CP-42-6212**

Dear Mr. Shearouse:

The Return to the Petition for Writ of Certiorari in the above appeal is due to be served and filed on today's date. However, this is to respectfully request a 30-day extension in which to serve and file this return.

This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a heavy workload and made for good cause.

Yours very truly,


Suzanne H. White
Assistant Attorney General

SHW/aam

cc: Robert M. Pachak, Esquire



ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737
PCR FACSIMILE: 803.734.4113

May 9, 2011

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED

MAY - 9 2011

S.C. Supreme Court


RE: **John Curtis McCoy v. State of South Carolina**
2009-CP-42-6212

Dear Mr. Shearouse:

The Return to the Petition for Writ of Certiorari in the above appeal is due to be served and filed on today's date. However, this is to respectfully request a 30-day extension in which to serve and file this return.

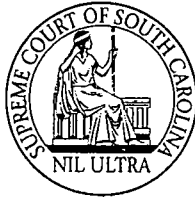
This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a heavy workload.

Yours very truly,


Suzanne H. White
Assistant Attorney General

SHW/aam

cc: Robert M. Pachak, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 14, 2011

Robert M. Pachak, Esquire
Appellate Defense
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: McCoy, John Curtis v. The State

Dear Counsel:

This responds to your letter dated March 1, 2011. This Court construed your client's pro se petition for a writ of certiorari as his explanation under Rule 243(c), SCACR, and that explanation has been deemed sufficient to allow this matter to go forward. Therefore, this matter will not be dismissed for the reason given in your letter.

Very truly yours,



CLERK

cc: Assistant Attorney General Suzanne H. White



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

March 1, 2011

RECEIVED

MAR 01 2011

S.C. Supreme Court

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: McCoy, John v. The State
Request to Dismiss

Dear Mr. Shearouse:

Please accept this letter in lieu of a formal motion to have this post-conviction relief appeal dismissed. On December 8, 2010, this Court wrote Mr. McCoy that it had received a notice of appeal in his case. You noted that the order of the circuit court determined that this action was barred as being successive and as being untimely under the statute of limitations. Pursuant to Rule 243(c), SCACR you required Mr. McCoy to provide a written explanation as to why the circuit court determination was improper. Mr. McCoy has failed to make any showing. Therefore, the undersigned counsel would request a dismissal of this matter.

Sincerely,

Robert M. Pachak
Appellate Defender

RMP/fkb

cc: Attorney General's office

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG

J. Derham Cole, CIRCUIT COURT JUDGE

RECEIVED
DEC 20 2010
S.C. SUPREME COURT

JOHN CURITS MCCOY, #309696,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PRO SE PETITION FOR WRIT OF CERTIORARI

John Curtis McCoy, #309696
McCormick Corr. Inst. F3B-216
386 Redemption Way
McCormick, S.C. 29899
Pro se Petitioner

Other Attorney of Record:
Suzanne H. White, Esquire
P.O. Box 11549
Columbia, S.C. 29211

INDEX

INDEX.....2
EXHIBIT A.....3
EXHIBIT B.....4
EXHIBIT C.....5
ISSUE PRESENTED.....6
STATEMENT.....7
ARGUMENT.....8
CONCLUSION.....13
PROOF OF SERVICE.....14

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF GENERAL SESSIONS
3
4 The State,)
5 -vs-) TRANSCRIPT OF RECORD
6 Timothy Wayne Dezern,) 2003-GS-42-3446
7 Defendant,) June 15 & 16, 2005
8) Spartanburg, South Carolina
9

10 B E F O R E:

11 HONORABLE ALEXANDER S. MACAULAY, JUDGE; and a jur
12
13

14 A P P E A R A N C E S:

15 ROBERT PATRICK COLER, ESQUIRE
16 Attorney for the State
17 ANDREW J. JOHNSTON, ESQUIRE
18 Attorney for the Defendant
19
20
21

22 Linda D. Moffitt
23 Circuit Court Reporter
24
25

Jury qualification

1 JUROR NUMBER 84: Did you say in relation to?

2 THE COURT: Yes, ma'am.

3 I'm going to have to ask you for your name again
4 because that's how we identify ourselves on the record.

5 JUROR NUMBER 84: I was Number 84.

6 THE COURT: Yes, ma'am.

7 JUROR NUMBER 84: My cousin is married to Trey Gowdy.

8 THE COURT: All right. Would that in any way
9 interfere with your ability to give both the state and the
10 defendant a fair and impartial trial?

11 JUROR NUMBER 84: No.

12 THE COURT: Very good. Thank you, ma'am.

13 Yes, sir.

14 JUROR NUMBER 41: Juror 41. My stepbrother is Roger
15 Couch.

16 THE COURT: All right. Would that in any way
17 interfere with your ability to give both the state and the
18 defendant a fair and impartial trial?

19 JUROR NUMBER 41: No, it would not.

20 THE COURT: Very good. Thank you, sir.

21 Does any member of the jury panel regularly receive
22 copies of the Seventh Circuit Solicitor's newsletter? If
23 so, please stand.

24 (No response.)

25 THE COURT: Any member of the jury panel regularly

Exhibit B

Page 4

THE STATE)

Against

John Curtis McCoy

Defendant

In The Spky Co.
General Session Court

Charged with Burglary

Assault & Battery w/intent to kill

1. David Bastarache 07

2. Ronald Campbell 25

3. Julie Memmet 177

4. Pamela Grubbs 160

5. Nancy Krick 80 Scraperson

6. Albert Smalley 125

7. Candie Burgess 23

8. Sharon Covington 34

9. Adam Kirby 79

10. Alex Westall 140

11. Shannon Lewis (84)

12. Nancy Jay 184

All. Erica Dodd 39

ISSUE PRESENTED

Did the lower Court err by denying Petitioner's motion for either a new trial, relief from judgement, or an evidentiary hearing based on the newly discovered evidence of juror misconduct.

STATEMENT

Petitioner was indicted by the Spartanburg County Grand Jury for one count of Assault and Battery with Intent to Kill (ABWIK) (2005-GS-42-0642) and one count of Burglary 1st (2005-GS-42-0643). Petitioner was tried before the Honorable Roger L. Couch and jury between June 14th-15th, 2005. Petitioner was convicted and sentenced to five (5) years for ABWIK and fifteen (15) years for Burglary 1st, with the sentences to run consecutive. Petitioner appealed his sentence and conviction. The South Carolina Court of Appeals dismissed the appeal on June 7, 2007, State v. McCoy, 2007-UP-294.

Petitioner then filed an application for post-conviction relief (PCR) on August 29, 2007. A PCR evidentiary hearing was held on May 28, 2008, before the Honorable Michael G. Nettles. He was represented by Rodney M. Richey, Esquire. The Order of Dismissal was signed June 30, 2008.

Petitioner then filed an appeal which was dismissed by written Order on October 21, 2009. Petitioner filed a second application for PCR on November 13, 2009 based on newly discovered evidence pursuant to S.C. Code Ann. § 17-27-45 (c). The State responded with a conditional Order of Dismissal signed on July 19, 2010. Petitioner received the final Order November 16, 2010.

This Pro se Petition for Writ of Certiorari now timely follows.

ARGUMENT

Lower Court erred by denying the Petitioner's motion for either a new trial, relief from judgement, or an evidentiary hearing based on newly discovered evidence of juror misconduct.

Petitioner discovered while conducting legal research on his case with a fellow inmate in November of 2009, that another inmate had a similar issue and he offered to assist Petitioner with getting a copy of the inmates voir dire transcript. Upon review, it was discovered that the inmate went to Court during the same time as Petitioner during June 2005. See, Exhibit A.

It was also discovered that inmate Dezern and Petitioner's jury was selected from the same jury pool. Further research uncovered that juror eighty-four (84) served on both trials, see Exhibits B and C, Juror eighty-four (84) revealed information of a relationship with Head Solicitor Trey Gowdy during the second voir dire (Exhibit B, LN. 5-7), but when asked during Petitioner's voir dire (Tr.p. 20, LN. 22-25, p. 21, LN. 1-5) several jurors responded affirmatively to the voir dire question but juror eighty-four (84) did not (Tr.pp. 21-25). Juror eighty-four (84) was subsequently seated as a juror. When juror eighty-four (84) was drawn Petitioner had peremptory challenges remaining. Because juror failed to respond to question on voir dire which clearly applied to her, and she revealed the information when asked during a separate voir dire. Juror intentionally concealed information which deprived Petitioner of information material to his intelligent use of peremptory

challenges. Petitioner has demonstrated a "sufficient reason" why ground raised could not have been raised in a previous application.

LEGAL ANALYSIS

The filing procedures of the Uniform Post-Conviction Procedures Act, S.C. Code Ann. § 17-27-45 (c) provides that:

If the Petitioner 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 fact by Petitioner or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

All the criminal defendant's have the right to a trial by an important jury U.S. Const. Amends. VI and XIV; S.C. Const. Art. 1, § 14. To protect both parties right to an important jury, the trial judge must ask potential jurors whether they are aware of any bias or prejudice against a party. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998). "Though the judge, parties have a right to question jurors on their voir dire examination not only for the purpose of showing grounds for a challenge for cause, but also, within reasonable limits, to elicit such facts as will enable them intelligently, to exercise their right of peremptory challenge." Gulledge, 277 S.C. at 370, 287 S.E.2d at 490.

When a juror conceals information inquired into during voir dire, a new trial is required only when the Court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges.

Intentional concealment occurs when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable.

Doyle v. Kennedy Heating & Service, Inc., 33 S.W.3d 199, 201 (MO. Ct.App. 2000) ("If a juror intentionally withholds material information requested on voir dire, bias and prejudice are inferred from such concealment. Only when a juror's intentional nondisclosure does not involve a material issue, or where the nondisclosure is unintentional, should the trial Court inquire into prejudice.") (Emphasis in original).

Applying this analysis to the instant case, it's clear the concealment was intentional questions on voir dire was reasonably comprehensible and should have elicited a positive response from juror eighty-four (84).

The question unambiguously sought a response from any juror having any type of relationship by blood or marriage. Despite her relationship with the prosecuting attorney's office, juror eighty-four (84) did not respond on defendant's voir dire.

Having found that juror eighty-four (84) intentionally concealed information on voir dire, it must be determined if the information concealed would have supported a challenge for cause or would have been a material factor in the use of peremptory challenges. See, Thompson v. O'Rourke, supra. A juror should be disqualified by the Court if it appears to the Court the juror is not indifferent in the case.

Because juror eighty-four (84) did not respond to any of the

questions asked during voir dire, any potential biases she might have had toward the defendant were not discovered until well after the trial and through happenstance.

CONCLUSION

Because juror eighty-four (84) failed to respond to questions on voir dire which clearly applied to her, and because her concealment deprived Petitioner of information material to his intelligent use of peremptory challenges, Writ of Certiorari should be granted in order to allow full briefing on this issue.

This 21st day of December, 2010.

Respectfully submitted,

ISI John McCoy

John Curtis McCoy #309696

Pro se Petitioner

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG

J. Derham Cole, CIRCUIT COURT JUDGE

JOHN CURITS MCCOY,

RECEIVED
DEC 29 2010
S.C. SUPREME COURT

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

I certify, under penalty of perjury, that I have served this PRO SE PETITION FOR WRIT OF CERTIRARI by depositing a copy of it in the McCormick Correctional Institution mailroom via the United States Mail, postage prepaid, on December 21st, 2010, addressed to; (1) The South Carolina Supreme Court, P.O. Box 11330, Columbia, S.C. 29211; (2) The South Carolina Attorney General, P.O. Box 11549, Columbia, S.C. 29211.

SWORN AND SUBSCRIBED to before me
this 21 day of December, 2010.

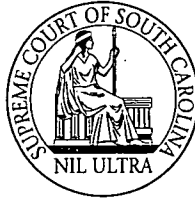
9 of Rankler
Notary Public for South Carolina
My Commission Expires: 12-16-2019

/s/ John McCoy
John Curtis McCoy #309696
McCormick Corr. Inst. F3B-216
386 Redemption Way
McCormick, S.C. 29899
Pro se Petitioner

AMS

1231 Gervais St

The Supreme Court of S.C.
Daniel E. Shearouse, Clerk
Post Office Box 11330
Columbia, South Carolina 29211



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

December 8, 2010

John Curtis McCoy #309696
McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29899


Re: McCoy, John Curtis v. The State

Dear Mr. McCoy:

This Office has received a notice of appeal in the above post-conviction relief action. Since the order of the circuit court determined that this action is barred as being successive and as being untimely under the statute of limitations, Rule 243(c), SCACR, requires you to provide a written explanation as to why this determination was improper. This explanation must contain sufficient facts, argument and citation to legal authority to show that there is an arguable basis for asserting that the determination by the lower court was improper. The failure to make a sufficient showing may result in the dismissal of this matter.

I ask that you provide the explanation required by Rule 243(c) within twenty (20) days of the date of this letter.

Very truly yours,



CLERK

DES/jj

cc: Appellate Defense
Assistant Attorney General Suzanne H. White

Supreme Court of South Carolina
Hon. Daniel E. Shearouse
P.O. Box 11330
Columbia SC 29211

Re: John McCoy v. State case # 2009-CP-42-
6212.

Mr. Shearouse:

Please find enclose one(s) true copy of Final Order.

This 2nd day of December 2010.

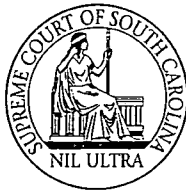
Respectfully submitted
s/ John McCoy
John McCoy, 309696

M.C.I F3-B-216
386 Redemption Way
McCormick SC 29899

RECEIVED

DEC 08 2010

S.C. SUPREME COURT



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

TO: John McCoy SCDC# 309696
DATE: 11-29-10

We are in receipt of your notice of appeal. It will be necessary for you to provide this office with the following required documents within **ten (10)** days of the date of this notice. Failure to provide the requested documents may result in dismissal of this matter.

_____ proof of service showing notice of appeal was served on opposing counsel,
(Attorney General's Office)

a copy of the final order of dismissal

_____ a copy of the conditional order of dismissal (if one was issued)

_____ a copy of the conditional order of dismissal dated _____.

*We already have the
conditional order of dismissal.*

Please return this sheet with the requested documents. Thank you!

RECEIVED
DEC 06 2010
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

John Curtis McCoy, #309696,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2009-CP-42-6212

FINAL ORDER

This matter comes before this Court by way of an application for post-conviction relief filed November 13, 2009. Respondent made its Return and Motion to Dismiss on or about May 11, 2010, requesting that the application be summarily dismissed.

Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal filed July 19, 2010, provisionally denying and dismissing this action, while giving Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final.

In documents captioned "Response Objecting to Respondent's Motion to Dismiss and Conditional Order of Dismissal," dated May 21, 2010, and "Response Objecting to Respondent's Conditional Order of Dismissal," dated July 27, 2010, Applicant argues that his application should not be summarily dismissed based on Statute of Limitations and the Doctrine of Successiveness. Applicant asserts that he has alleged newly discovered evidence exists, in the form of a seated juror being related to Trey Gowdy, Seventh Judicial Circuit Solicitor. Applicant alleges that he was only able to determine this fact after reviewing another inmate's transcript in November 2009 and filed his application on November 13, 2009, which is within the one-year requirement for after discovered

FILED
CLERK OF COURT
SEVENTH JUDICIAL CIRCUIT
SPARTANBURG, SOUTH CAROLINA
NOV 13 2009
10:44 AM

evidence.

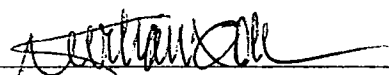
In response, Respondent submits that the Applicant has failed to establish that this information qualifies as after discovered evidence. Respondent submits that the Applicant has not demonstrated that the information could not have been discovered by due diligence or that the information would have affected the outcome of his trial had it been known at the time.

This Court has reviewed Applicant's responses to the State's Conditional Order of Dismissal in its entirety, in conjunction with the original pleadings, and finds that a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final. This Court further finds that Applicant's current Application is successive to Applicant's previously filed application, does not meet the requirements for a hearing as a result of after discovered evidence, and that Applicant's current application was filed outside the statute of limitations.

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for PCR is hereby denied and dismissed with prejudice.

This Court cautions 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. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

AND IT IS SO ORDERED this 5 day of November, 2010.



J. DeFham Cole
Chief Judge for Administrative Purposes
Seventh Judicial Circuit

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2010 NOV -5 PM 4:28
M. HORN BLANKENHORN

_____, South Carolina.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole Circuit Court Judge

Case No. 2009-CP-42-6212

The State

Respondent,

John McCoy

Appellant.

CERTIFICATE OF SERVICE

I John McCoy, #309696 appellant hereby certifies that a true copy of the Final Order in the above referenced case has been served upon the Hon. Daniel E. Shearouse Clerk of Court this 2nd day of December 2010.

Subscribed and sworn to before me
this 02 day of DEC 2010.

J. J. Namick (L.S.)

Notary Public for South Carolina

My Commission Expires: 12-16-2019

John McCoy
John McCoy, 309696
Appellate



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

TO: John McCay SCDC# 309696
DATE: 11-29-10

We are in receipt of your notice of appeal. It will be necessary for you to provide this office with the following required documents within **ten (10)** days of the date of this notice. Failure to provide the requested documents may result in dismissal of this matter.

proof of service showing notice of appeal was served on opposing counsel,
(Attorney General's Office)

a copy of the final order of dismissal

a copy of the conditional order of dismissal (if one was issued)

a copy of the conditional order of dismissal dated _____.

*We already have the
conditional order of dismissal.*

Please return this sheet with the requested documents. Thank you!

PCR

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2009-CP-42-6212

RECEIVED

NOV 24 2010

S.C. SUPREME COURT

The State,.....Respondent,

v.

John McCoy,.....Appellant.

NOTICE OF APPEAL

John McCoy appeals the order of the Honorable J. Derham Cole, dated November 5th 2010, which dismissed his Application for Post-Conviction Relief, Appellant received written notice of the entry of the order on the 16th day of November 2010.

11-23- 2010

/s/ John McCoy
John McCoy, 309696
McCormick C.I. F3B-216
386 Redemption Way
McCormick, S.C. 29899
Appellant

Other Counsel of record:
Office of the Attorney General
Suzanne H. White, Esquire
P.O. Box 11549
Columbia, S.C. 29211

PROOF OF MAILING

I, John McCoy SCDC # 309696, do hereby swear that I have deposited this NOTICE OF APPEAL into the U.S. Mail with postage prepaid attached to it on this 23 day of, November 2010.

Clerk of Court
P.O. Box 3485
Spartanburg, S.C. 29304

Office of the Attorney General
Suzanne H. White, Esquire
P.O. Box 11549
Columbia, S.C. 29211

Hon. Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, S.C. 29211

RECEIVED
NOV 24 2010
S.C. SUPREME COURT

Sworn to and subscribed to before me
this 23 day of NOV. 2010.

J C Franklin L.S.
Notary Public for South Carolina
My Commission Expires: 12-16-2019

15/ John McCoy
John McCoy, 309696
McCormick C.I. F38-216
386 Redemption Way
McCormick S.C. 29899
Appellant

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 John Curtis McCoy, #309696,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2009-CP-42-6212

**CONDITIONAL ORDER OF
 DISMISSAL**

This matter comes before this Court by way of an application for post-conviction relief filed November 13, 2009. Respondent made its return and motion to dismiss on May 11, 2010.

I. PROCEDURAL HISTORY

The records before this Court show that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. The Applicant was indicted at the January 2005 term of the Spartanburg County Grand Jury for one count of assault and battery with intent to kill (ABWIK) (2005-GS-42-0642) and one count of burglary - 1st degree (2005-GS-42-0643). He was represented by Clay T. Allen, Esquire. On June 14, 2005, the Applicant proceeded to trial and was found guilty as indicted. He was sentenced by the Honorable Roger L. Couch to confinement for a period of five (5) years for ABWIK and fifteen (15) years for burglary - 1st degree, with the sentences to run consecutively.

A timely notice of appeal was filed on the Applicant's behalf and a brief pursuant to Anders v. California, 386 U.S. 738 (1967) was submitted by Aileen P. Clare, Esquire. The Court of Appeals dismissed the appeal on June 7, 2007 (State v. McCoy, 2007-UP-294). The Remittitur was issued on June 29, 2007.

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2010 JUL 19 PM 2:35
 M. HOPE BLACKLEY

The Applicant subsequently filed an application for post-conviction relief (PCR) on August 29, 2007. The State filed its Return on December 17, 2007. An evidentiary hearing was convened on May 28, 2008, at the Spartanburg County Courthouse, at which the Applicant was present and represented by Rodney M. Richey, Esquire. The Applicant raised the following issues in his first PCR:

- 1) Ineffective assistance of counsel, in that;
 - a) "Counsel did not object to false evidence that was being presented at trial,"
- 2) Abuse of Discretion, in that;
 - a) "The court did not instruct the jury that they may find the defendant guilty of a lesser included offense," and
- 3) Prosecutorial Misconduct, in that;
 - a) "Prosecutor knowingly and willingly presented false evidence to the jury."

The Honorable Michael G. Nettles denied and dismissed Applicant's application by written Order on June 30, 2008. The Applicant filed an appeal following the denial of his PCR application. The Office of Appellate Defense filed a Johnson Petition for Writ of Certiorari on Applicant's behalf. The South Carolina Court of Appeals dismissed Applicant's appeal by written Order on October 21, 2009. The Remittitur was sent on November 6, 2009.

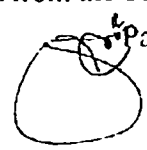
Applicant's Current PCR Application

In his current Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

- 1) Ineffective Assistance of Counsel, in that;
 - a) "My defense attorney did not conscientiously get her any information to protect my rights," and
- 2) After discovered evidence of Sixth and Fourteenth Amendment violation, in that;
 - a) "I was denied the right to a trial by an impartial and objective jury."

Before this Court are the records of the Spartanburg County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the transcript

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2010 JUL 19 PM 2:35
M. HOPE DLANKEY



of the Applicant's trial, the Applicant's prior application for post conviction relief and the order denying the Applicant's prior application, the Appellate Court records, Applicant's current PCR application and Respondent's Return and Motion to Dismiss.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Successiveness

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to his prior application for post-conviction relief. S.C. Code Ann. §17-27-90 provides that:

All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding 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.

Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application.

Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

This Court finds that the current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief and thus the current application is successive and barred under S.C. Code § 17-27-90. Although Applicant alleges that he has newly discovered evidence, he fails to offer any detail as to how this information would have affected his trial had it been known at that time, or how and when it was discovered. A party making a motion for a new trial or for relief from judgment based on newly-discovered evidence must show that the evidence: (1)

FILED
CLERK OF COURT
SOUTH CAROLINA
JUL 19 PM 3:35
HONORABLE JUDGE
E. BLANCHARD

will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching. Lanier v. Lanier, 364 S.C. 211, 612 S.E.2d 456 (S.C. App. 2005). Applicant has failed to meet his burden of proof as to newly discovered evidence. Therefore, Applicant has failed to establish 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. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 420 S.E.2d 834 (1992).

Statute of Limitations

This Court finds, further, that this Application for Post-Conviction Relief 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 (2003). S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgement 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.

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 Applicant was convicted of the offense(s) he challenges in this Application on June 15, 2005. The Applicant was therefore required to file his application before June 15, 2006. This Application was filed on November 13, 2009, which was well after the expiration of the statutory filing period.

A motion for summary judgement may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638

(1994). In addition, S.C. Code Ann. §17-27-70(c) (2003) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgement as a matter of law." Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute and for being successive.

Summary

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The 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. The Applicant shall file any reasons he may have with the Spartanburg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Suzanne H. White, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 19 day of July, 2010.



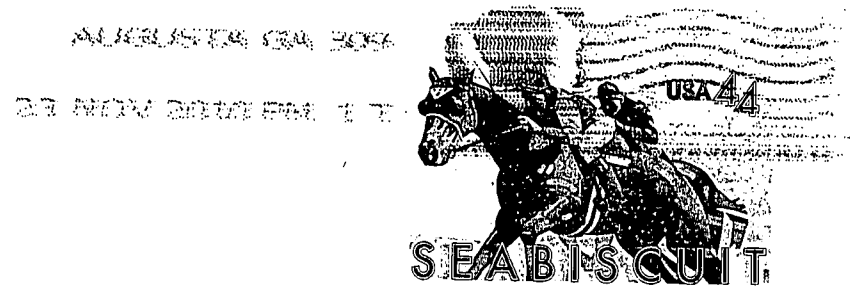
J. Derham Cole
J. Derham Cole
Chief Judge for Administrative Purposes
Seventh Judicial Circuit

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2010 JUL 19 PM 2:35
M. HOPE BLACKLEY

_____, South Carolina

A CERTIFIED COPY
M. Hope Blackley
CLERK OF COURT
SPARTANBURG COUNTY
BY: Mary Winstead, D.C.
DATED 7-21-10

John McCoy, 309696
McCormick C.I. F3B-216
386 Redemption Way
McCormick, SC. 29899



Hon. Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. BOX 11330
Columbia, S.C. 29211
29211#1330

