



ALAN WILSON
ATTORNEY GENERAL

February 22, 2024

The Honorable Kristi F. Curtis
Chief Administrative Judge, Third Judicial Circuit
215 North Harvin Street
Sumter, South Carolina 29150

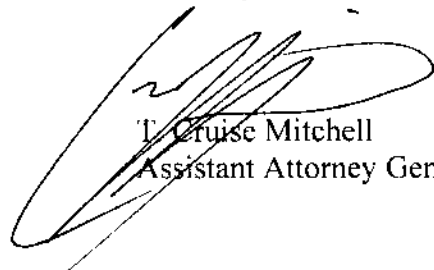
Re: Eugene Dwayne Green, #275500 v. State of South Carolina
2020-CP-14-00075

Dear Judge Curtis:

Enclosed please find the proposed Conditional Order of Dismissal in the above-captioned case. Respondent's return and motion to dismiss has also been sent to your chambers for your consideration. If this proposed order meets your approval, please sign and forward to the Clarendon County Clerk of Court for filing with the enclosed stamped envelope.

If you have any questions, please do not hesitate to contact me.

Sincerely,



T. Cruise Mitchell
Assistant Attorney General

TCM/bm
Enclosure(s)

cc: Eugene D. Green, #275500

2024 MAR 4 PM 4:12
Beulah Roberts, Clerk - Clarendon S.C.

STATE OF SOUTH CAROLINA)
 COUNTY OF CLAREDON)
)
 Eugene D. Green, #275500)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 IN THE THIRD JUDICIAL CIRCUIT

Case No.: 2020-CP-14-00075

CONDITIONAL ORDER OF DISMISSAL

This matter comes before the Court by way of a post-conviction relief (PCR) application filed February 13, 2020, Respondent made its return¹, requesting the application be summarily dismissed because its untimely, successive, and for failing to make a *prima facie* case of newly discovered evidence.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Clarendon County. Applicant was indicted at the January 2001 term of Clarendon County Grand Jury for Murder, Kidnapping, and Possession of a Weapon During a Violent Crime (2001-GS-14-0017). Applicant was represented on the

¹ Respondent's return was due to be filed within ninety days of receipt. See Rule 12(a), SCRCR ("[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within 60 days after service of the application, if it arises out of a guilty plea, and 90 days if it arises out of a trial.") Now, having completed the return required in this matter, and in light of no demonstrable prejudice to Applicant as a consequence of the delay, this Court accepts this return as timely filed. See S.C. Code Ann. § 17-27-70(a) (establishing that the Court may fix the time in which the State must respond and that "respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application."); Guinyard v. State, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the trial court may extend the time for filing and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court.).

charges by Harry Devoe, Esquire, and Jason Corbett, Esquire. Assistant Solicitor Ferrell Cothran prosecuted the case. A jury trial commenced on May 22, 2001, before the Honorable Kenneth Goode. The jury found Applicant was found guilty as indicted. On May 24, 2001, Judge Goode sentenced Applicant to thirty years' imprisonment for Kidnapping and thirty-seven-years' imprisonment for Murder. The sentences were to be served concurrently.

Applicant filed a Motion for Reconsideration of Sentence, which was denied on July 10, 2001. A notice of appeal was filed and an appeal perfected. On appeal, Applicant raised the following issues:

1. "Whether the court erred by refusing to give a 'mere presence' instruction where appellant told the police in his statements, and testified, that he was merely present when codefendant Nichols shot the decedent, where appellant also said he begged Nichols not to shoot the decedent, where appellant stated he did not know what Nichols was going to do, and where the solicitor admitted he did not know who shot the victim, since a 'mere presence at the scene' instruction was required by the evidence?"
2. "Whether the court erred by allowing appellant to be impeached with his prior armed robbery conviction since its probative value was outweighed by its prejudicial effect, and the court failed to articulate any reason why it concluded the probative value of this prior crime outweighed its prejudicial effect?"

The South Carolina Court of Appeals affirmed the conviction. State v. Green, Op. No. 2003-UP-462 (S.C. Ct. App. filed July 8, 2003). Applicant's petition for rehearing was denied on September 18, 2003. Applicant filed a petition for writ of certiorari in the South Carolina Supreme Court, raising the same issues presented to the South Carolina Court of Appeals. The petition was denied by written order dated October 21, 2004. The remittitur returned to the circuit court on October 26, 2004.

First PCR Application (2005-CP-14-0118)

Applicant subsequently filed an application for post-conviction relief on March 4, 2005. Applicant raised the following issues in his first PCR action:

1. Ineffective assistance of counsel.
 - a. "...failure to object to the prosecutor's opening statement..."
 - b. "...failure to object to the presentation of photograph of victim to the jury."
 - c. "...counsel should have made an objection and requested curative instruction as soon as any evidence was presented during the opening statement."
 - d. "...failing to object to solicitor's cross-examination of Harold James about Applicant's 'outlaw' tattoo."
 - e. "...failing to object to law enforcement officer's testimony that he knew defendant from 'prior run-ins,' improperly attacking Applicant's character by painting him as a lawbreaker."
 - f. "...failed to subpoena Felicia Spann..."
 - g. "...failing to clearly establish the 'hearsay' rule exceptions wherein testimony could've been admitted under the excited utterance exception..."
 - h. "...failing to object to Solicitor's closing argument..."
 - i. "...failing to investigate defenses and talk with potential witnesses."
2. Lack of subject matter jurisdiction.
 - a. "Failure to properly allege or prove a conspiracy or accessory theory."
 - b. "Improper opening by State and introduction of evidence."
 - c. "Trial judge erred in admitting photographs."
3. "Prosecutorial misconduct - Improper comments and attacking character of Applicant."
4. "Mere presence instruction."

The State made its return on October 3, 2005. An evidentiary hearing convened on April 6, 2006, before the Honorable Howard P. King. Applicant was present and represented by Lisa Dennis, Esquire. Assistant Attorney General Paula S. Magargle, Esquire represented the State. Judge King dismissed the application with prejudice by order dated May 4, 2006, and filed May 8, 2006.

Following the denial of his PCR application, a Johnson² petition for writ of certiorari was filed on Applicant's behalf, and Applicant submitted a *pro se* response. The South Carolina Supreme Court denied the petition by Order dated January 10, 2008. The remittitur returned to the circuit court on January 28, 2008.

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

Federal Habeas Corpus Action (8:08-713-GRABHH)

Applicant then filed a petition for habeas corpus on February 25, 2008. In his petition,

Applicant raised the following allegations:

1. Counsel was ineffective for failing to object to a picture of the victim used by the solicitor to elicit sympathy from the jury during opening argument.
2. Counsel was ineffective for failing to object to the solicitor's cross examination of defense witness Harold James about Petitioner's "outlaw" tattoo because this testimony was used to impugn Petitioner's character;
3. Counsel was ineffective for allowing law enforcement officer to testify that he knew Petitioner from "prior run-ins" because testimony improperly placed Petitioner's character in evidence;
4. Counsel was ineffective for failing to object to solicitor's closing argument wherein he characterized Petitioner as one of two "criminals" and stated acts were those that a bunch of young "criminals" make;
5. Counsel was ineffective for failing to subpoena witness whose testimony he felt was "important" to the defense;
6. Counsel was ineffective for failing to object to solicitor's numerous references of prior bad acts by Petitioner;
7. Counsel was ineffective for allowing solicitor to cross-examine Harold James about prior bad acts because testimony was used to impugn Petitioner's character.
8. Counsel was ineffective for failing to suppress map created by the solicitor to illustrate the route Petitioner took officers on to get back to the crime scene because it was exposed that Petitioner never took officers and map was incorrect;
9. Counsel was ineffective for failing to object to portions of the solicitor's closing argument presented solely for the calculate purpose of arguing the sympathy and/or prejudice of the jury;
10. Counsel was ineffective for failing to object to portions of the solicitor's closing argument because such was for no other purpose than to attack Petitioner's character;
11. Trial court erred by allowing Petitioner to be impeached with his prior armed robbery conviction since its probative value was outweighed by its prejudicial effect, and the court failed to articulate any reason why it concluded the probative value of this prior crime outweighed its prejudicial effect;
12. Trial court erred by refusing to give a "mere presence" instruction where Petitioner told the police in his statements, and testified, that he was merely present when co-defendant Nichols shot the decedent, where Petitioner stated he did not know what Nichols was going to do, and where the solicitor admitted he did not know who shot the victim, since a "mere presence at the scene" instruction was required by the evidence.

Respondent filed a motion for summary judgment on November 3, 2008. On April 8, 2009, the Honorable Bruce H. Hendricks issued his report and recommendation that Respondent's motion for summary judgment be granted and the habeas petition be dismissed with prejudice. By order filed June 4, 2009, the Honorable G. Ross Anderson, Jr. adopted the magistrate's report and recommendation in its entirety and dismissed the petition with prejudice. Applicant did not make a timely appeal.

Second PCR Action (2008-CP-14-0434)

Applicant filed a second PCR application on August 22, 2008 (. In this application, Applicant asserted:

1. "The Applicant was denied effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution."
 - a. "...failing to object to a picture of the victim used by the solicitor to elicit sympathy from the jury during opening argument."
 - b. "...failing to object to the solicitor's cross-examination of defense witness Harold James about Petitioner's 'outlaw' tattoo because this testimony was used to impugn Petitioner's character."
 - c. "...allowing law enforcement officer to testify that he knew Petitioner from 'prior run-ins' because testimony improperly placed Petitioner's character in evidence."
 - d. "...failing to object to solicitor's closing argument..."
 - e. "...failing to subpoena witness whose testimony was 'important' to the defense."
 - f. "...failing to object to solicitor's numerous references to prior bad acts by Petitioner."
 - g. "...allowing solicitor to cross-examine Harold James about prior bad acts..."
 - h. "...failing to suppress map."
 - i. "...failing to object to portions of the solicitor's closing argument presented to arouse the sympathy and/or prejudice of the jury."
 - j. "...failing to object to portions of the solicitor's closing argument because such was for no other purpose than to attack Petitioner's character."
2. "The post-conviction court order dismissing Applicant's first PCR application does not comply with S.C. Code Ann. § 17-27-80 (1985) and Rule 52(a), SCRCPP, because it does not contain specific findings of fact and conclusions of law with regard to each issue raised in Applicant's application and at the hearing thereon."
3. "PCR counsel was ineffective for failing to call omissions to the attention of the post-

conviction court and failing to do so precluded Applicant from appellate review on meritorious ineffective trial counsel claims."

The Honorable R. Ferrell Cothran, Jr. issued a Conditional Order of Dismissal, filed April 9, 2009, finding the application should be dismissed as successive and barred by the one-year statute of limitations. The Honorable George C. James, Jr. signed a Final Order of Dismissal on March 31, 2010, which was filed April 8, 2010. Applicant filed a motion pursuant to Rule 59(e), SCRCF, which was denied in an order dated April 26, 2010. Applicant did not appeal the court's decision.

Third PCR Application (2010-CP-14-0376)

Applicant filed his third PCR application on July 1, 2010. In this application, Applicant asserted the following claims:

1. "Does Petitioner have a created liberty interest in statutory state appointed PCR counsel?"
 - a. PCR counsel failed to ensure that all grounds were raised in first PCR application.
2. "The State's post-conviction procedure process is an inadequate remedy for the hearing of Federal Constitutional claims?"
3. "The sentence pronounced by the Court is unconstitutional in that it exceeded the statutory maximum and was contrary to legislative intent, in violation of the Sixth Amendment rights to trial by jury and effective assistance of counsel, the Eighth Amendment prohibition against excessive sentences and cruel and unusual punishment: and Fourteenth Amendment Due Process Clause?"

The State filed a return and motion to dismiss on April 21, 2011. The Honorable W. Jeffrey Young issued a Conditional Order of Dismissal dated April 25, 2011, and filed May 4, 2011, finding the application should be dismissed as successive and barred by the one-year statute of limitations. Judge Young signed a Final Order of Dismissal on November 10, 2011.

Applicant filed a timely Notice of Appeal. By Order dated March 13, 2012, the South Carolina Supreme Court dismissed the appeal for failing to state an arguable basis for appeal pursuant to Rule 243(c), SCACR. The remittitur issued on March 29, 2012.

**Motion under 28 U.S.C. § 2244 Requesting Permission to File a Second Federal Habeas
Corpus Petition (8:08-cv-00713-GRA)**

Next, Applicant filed a motion under 28 U.S.C. § 2244 requesting permission to file a second federal habeas petition on March 11, 2013. By Order filed April 1, 2013, the United States Court of Appeals for the Fourth Circuit denied Petitioner's motion to consider a second or successive application for relief under 28 U.S.C. § 2254.

Fourth PCR Application (2015-CP-14-341)

Applicant filed his fourth PCR application on July 13, 2015. In this application, Applicant asserted:

1. Applicant was denied his sixth and fourteenth amendment rights to effective assistance of appellate counsel, where post-conviction counsel failed to comply with a state procedure rule, thereby obstructing applicant from receiving adjudication on viable federal constitutional claims of ineffective assistance of trial counsel.
 - a. "Applicant asserts that his first PCR Counsel's decision not to file a Rule 59(e) barred him from having his PCR issues heard on appeal. Essentially, Applicant's claiming that his first PCR counsel ineffectiveness robbed him of his one fair bite at the apple."

The State filed a return and motion to dismiss on October 27, 2015. The Honorable George C. James Jr., issued a Conditional Order of Dismissal dated October 28, 2015, and filed November 5, 2015, finding the application should be dismissed as successive and barred by the one-year statute of limitations. Judge James, Jr. signed a Final Order of Dismissal on February 1, 2016.

CURRENT ACTION BEFORE THIS COURT

In his current, *fifth* PCR application, Applicant alleges he is being held in custody unlawfully for the following reasons as:

1. "...Applicant has been provided a transcript of an interview conducted by Stillinger Investigations of Gibreel Nichols. Therein, Nichols accepts blame for the shooting at issue. Nichols admits that he committed the acts on his own and that Applicant has no prior knowledge that said act was going to occur. Nichols says that he lied at trial in placing blame on applicant and claims the Prosecution was aware of his deceit..."
2. "...The Prosecution allowed to go uncorrected false information which it relied upon for its deception and detriment. At issue, is the fabricated and coerced testimony of Gibreel Nichols, Applicant's alleged Co-defendant and also the key witness for the Prosecution. At trial, the Prosecution negotiated an agreement with Nichols wherein he would testify against the Applicant in exchange for thirty years. Nichols, according to new evidence, took the stand and lied..."

On July 6, 2022, Applicant filed a motion for summary judgment reiterating the above allegations.

Before this Court are the records of the Clarendon County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the records from Applicant's previous collateral actions, and appellate records.

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:

Summary Dismissal based on Statute of Limitations

This Court finds this application for Post-Conviction Relief shall 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. S.C. Code Ann. §17-27-45(a) requires as follows:

(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.

(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South

Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

(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.

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). In the present case, the Remittitur was returned to the circuit court on October 26, 2004. Applicant needed to file an application for post-conviction relief based on claims that he knew or should have known within one year of the issuance of the Remittitur from Applicant's direct appeal. This Application was filed on February 13, 2020, well after the expiration of the statutory filing period.

A motion for summary judgment 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) (1985) 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 judgment as a matter of law." Therefore, this Court summarily dismisses the application for post-conviction relief for failure to file within the time mandated by the Post Conviction Procedure Act.

Summary Dismissal Based on Successiveness

This Court finds the current application shall be summarily dismissed because it is

successive to his *four* previous post-conviction relief applications, and Applicant has failed to provide a sufficient reason for the filing of a successive 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). 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.” Id., 305 S.C. at 450, 409 S.E.2d at 394. If Applicant could have raised these allegations in a previous application, then Applicant may not raise those grounds in successive applications. Id. Applicant bears the burden of showing that the allegations could not have been raised previously. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

Here, Applicant has failed to provide a sufficient reason why these new grounds for relief were not raised in his previous application. Therefore, he has failed to meet the burden imposed upon him, and this Court summarily dismisses the application as successive to Applicant’s previous PCR application.

Newly Discovered Evidence

Applicant alleges he has been provided “new evidence” in the form of a “transcript” of an interview of his codefendant and an affidavit from a witness to events that took place in the days immediately following the murder. However, this Court finds Applicant has failed to make a prima facie showing of newly discovered evidence sufficient to entitle him to an evidentiary hearing on this issue, and therefore, this application shall be summarily dismissed.

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.” Id., 305 S.C. at 450, 409 S.E.2d at 394. If Applicant could have raised these allegations in a previous application, then Applicant may not raise those grounds in successive applications. Id. Applicant bears the burden of showing that the allegations could not have been raised previously. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

The Uniform Post-Conviction Procedure Act states a person may institute a subsequent PCR action if “there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.” S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of a material fact not previously presented, the PCR application must be filed within one year after the date of actual discovery of the facts by the applicant or *within one year of the date when the facts could have been ascertained by the exercise of reasonable diligence*. S.C. Code Ann. §17-27-45(C) (emphasis added). An applicant requesting a new trial based on after-discovered evidence following a conviction must show that

the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence 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, 299 S.E.2d 854, 855 (1983) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979)).

Before this Court will hold an evidentiary hearing, Applicant must make a prima facie showing he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965). Here, Applicant's current allegations involve a statement allegedly made by his co-defendant, in which the codefendant allegedly recants his trial testimony, along with an affidavit from the co-defendant's sister who was a witness to events in the days following the murder.

Applicant has presented an interview between his Co-Defendant Gibreel Nichols and Stillinger Investigations where Nichols allegedly recants his testimony from trial. (PCR Application p. 18-20). This statement constitutes inadmissible hearsay, and therefore should not be considered by the court. SCRE Rule 801(c) defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Hearsay is not admissible unless there is an applicable exception. See Rule 802 SCRE. The report offered by Applicant is a record of an interview between Applicant's co-defendant and investigators from Stillinger Investigations. This report is not a certified transcript, nor a sworn testimony, nor has Applicant's co-defendant signed the statement to confirm the validity of the statement being offered by Applicant. In the report, the statements by investigator A. Henderson are paraphrasing the co-defendant. There is no evidence that this is an accurate

description of what the co-defendant has said. Additionally, during the interview co-defendant was not represented by counsel, and specifically asked for help retaining counsel. These notes from the interview do not fall into any of the exceptions listed in SCRE 803, therefore they constitute inadmissible hearsay. These statements clearly constitute inadmissible hearsay, they are out of court statements made by someone other than the declarant, which are being offered to prove the truth of the matter asserted. The court should find these statements inadmissible, and therefore not allow them as newly discovered evidence.

Applicant has also introduced an affidavit from Christina Nichols, the co-defendant's sister wherein Ms. Nichols alleges Mr. Nichols admitted to her that he committed the murder instead of Applicant. (PCR Application p. 22-26). This statement does not meet the standard for newly discovered evidence for multiple reasons. First, this statement could likely have been obtained prior to trial through due diligence. Applicant was aware of the possible testimony from Ms. Nichols at trial. Applicant's counsel attempted to introduce Ms. Nichols statements through another witness, Felicia Green, during trial. (Tr. of Record p. 283 ln. 20- p. 284 ln. 7). Additionally, Applicant addressed his concerns with counsel failing to establish a hearsay exception during Applicant's first PCR application. It is clear that Applicant was aware of Ms. Nichol's statements at trial on July 10, 2001. Therefore, Applicant cannot present this testimony as newly discovered evidence, because Applicant has not filed this application within one year of the actual discovery of this evidence. Additionally, the statement constitutes hearsay and would likely not be admissible during trial. SCRE Rule 801(c) defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Hearsay is not admissible unless there is an applicable exception. See Rule 802 SCRE. Ms. Nichols was seemingly available to testify at trial however she was not brought in to testify.

Applicant is now attempting to introduce her out of court statement to prove the truth of the matter asserted in her statement. This statement will constitute hearsay, additionally, Ms. Nichol's statement will not satisfy any of the hearsay exceptions listed in SCRE 803. Therefore, the court should find that this statement is inadmissible hearsay, and not allow Applicant to introduce it as newly discovered evidence. Finally, this statement is seemingly being introduced to impeach the testimony of Mr. Nichols during trial and therefore should not meet the standard for newly discovered evidence.

This Court finds Applicant has failed to make a *prima facie* case for why he is entitled to relief on his claim and, as such, this Court dismisses this Application for failure to make a *prima facie* case of newly discovered evidence.

Prosecutorial Misconduct

Applicant asserts he is entitled to post-conviction relief based on prosecutorial misconduct. Specifically, Applicant asserts the prosecutor knowingly used false testimony during trial in order to secure a conviction. This Court finds Applicant's allegations of prosecutorial misconduct are without merit.

In prosecuting a criminal trial, the Due Process Clause obliges the government "not [to] knowingly use false evidence, including false testimony, to obtain a tainted conviction. United States v. Basham, 789 F.3d 358, 376 (4th Cir. 2015). On collateral attack, a movant alleging this sort of misconduct must demonstrate three elements: (1) that the testimony at issue was false; (2) that the prosecution knew or should have known of the falsity; and (3) that a reasonable probability exists that the false testimony may have affected the verdict. Id.

Applicant cannot demonstrate that the prosecution knowingly used false testimony. Applicant has not provided evidence the testimony at trial claiming Applicant was responsible for

shooting the victim. Additionally, Applicant has failed to provide any evidence that suggests the prosecution knew the testimony used during trial was false. Applicant has presented an affidavit from a witness who was available at trial but did not testify, additionally Applicant has presented the notes from an interview between an independent investigator and Applicant's co-defendant. In both statements allegations are made that Applicant was not responsible for the killing, however there is not sufficient evidence to show the prosecution has knowingly used false testimony at trial to secure a conviction. Finally, Applicant has failed to show the testimony provided at trial may have affected the verdict. Therefore, Applicant has failed to show the prosecution knowingly used false testimony to secure a conviction, and this Court finds Applicant's claim of prosecutorial misconduct is without merit and is dismissed.

[SIGNATURE PAGE FOLLOWS]

CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), the 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 with the Sumter County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
T. Cruise Mitchell, Esquire
PCR Division – 3rd Circuit
P.O. Box 11549
Columbia, South Carolina 29211

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

AND IT IS SO ORDERED this 29th day of February, 2024.

Kristi Curtis
THE HONORABLE KRISTI F. CURTIS
Chief Judge for Common Pleas
Third Judicial Circuit

Sumter, South Carolina