

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

) IN THE COURT OF COMMON PLEAS
) FOR THE THIRTEENTH JUDICIAL CIRCUIT

James F. Russell, SCDC #320488,

Applicant,

Case No.: 2023-CP-23-4075

v.

CONDIITONAL ORDER OF DISMISSAL
(Untimely & Successive)

State of South Carolina,

Respondent.

25 JUL 22 AM 10:19
CLERK OF COURT
GREENVILLE, SC

Applicant, James F. Russell, filed the above captioned application for post-conviction relief on August 9, 2023, challenging his 30-year sentence for criminal sexual conduct (CSC) with a minor, 1st degree. Respondent has moved for summary dismissal alleging the records attached to the return and motion show that the application is untimely and successive. Having reviewed the application, and the return and motion, this Court agrees and makes the following findings:

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections, Tyger River Correctional Institution, pursuant to orders of commitment from the Greenville County Clerk of Court. During its December 2005 term, the Greenville County Grand Jury indicted Applicant for CSC with a minor, 1st degree. (2005-GS-23-10278). (Return Attachment 1, PCR App. 351-352).

On March 5-7, 2007, Applicant’s case was called to trial with the Honorable T. Garrison Hill presiding. (Return Attachment 1, PCR App. 1). Applicant was represented by Richard Warder, Esq., and Assistant Solicitor Kris Hodge prosecuted the case. (Return Attachment 1, PCR App. 1). At the conclusion of trial, Applicant was found guilty as indicted. (Return Attachment 1, PCR App.

245-246). Judge Hill sentenced Applicant to imprisonment for 30 years. (Return Attachment 1, PCR App. 249, 353).

DIRECT APPEAL

Applicant timely filed a notice of appeal. On June 2, 2008, Appellate Defender Eleanor Duffy Cleary of the South Carolina Commission on Indigent Defense perfected the appeal, raising the following issues:

- I. Whether the trial judge should have excluded the prior consistent statement of the child accuser because it improperly bolstered his testimony.
- II. Whether the trial judge should have excluded the videotape because its probative value was substantially outweighed by its prejudicial impact.

(Return Attachment 1, PCR App. 254).

Respondent also filed its Final Brief on June 2, 2008. (Return Attachment 1, PCR App. 264-281). The Court of Appeals heard arguments on the issues on March 17, 2009. On May 18, 2009, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence in a published opinion. *State v. Russell*, 383 S.C. 447, 679 S.E.2d 542 (Ct. App. 2009). The Remittitur was issued on June 4, 2009. (Return Attachment 2). Applicant attempted to file a *pro se* Petition for Rehearing, dated June 8, 2009, which the Deputy Clerk for the Court of Appeals returned unfiled as Applicant was represented by Indigent Defense and the petition was not received within the time limits allowed by SCACR 221(a). (Return Attachments 3 & 4).

Applicant filed a *pro se* Petition for Writ of Certiorari with the South Carolina Supreme Court on July 8, 2009. (Return Attachment 1, PCR App. 285-293). On July 16, 2009, the Supreme Court issued an Order dismissing the petition due to the proper issuance of the remittitur, thereby ending appellate jurisdiction. (Return Attachment 1, PCR App. 294-295).

POST-CONVICTION RELIEF ACTION

On January 12, 2010, Applicant filed a *pro se* application for post-conviction relief (PCR) alleging therein that he was entitled to relief on the following grounds:

1. Ineffective Assistance of Trial Counsel
 - a. Failed to challenge the indictment as fatally defective.
 - b. Failed to timely notify the State of an alibi defense.
 - c. Failed to properly select the jury.
 - d. Failed to call Douglas Sellars as a witness.
 - e. Failed to depose the victim, the victim's mother, or the victim's grandmother.
 - f. Failed to submit as evidence a letter from the victim's mother.
 - g. Failed to subpoena the victim's mother.
 - h. Failed to challenge the testimony of the victim's grandmother.
 - i. Failed to challenge the victim's videotaped statement.
 - j. Failed to challenge § 17-23-175 as unconstitutional.
 - k. Failed to challenge § 17-23-175 as unfairly applied in this case.
 - l. Failed to adequately meet with the Applicant.
 - m. Failed to request the videotape be redacted.
 - n. Failed to request the videotape be shown at trial prior to the victim's testimony.
 - o. Failed to subpoena the victim's teachers or counselors.
 - p. Failed to move for reconsideration of the sentence.
 - q. Failed to "have the Court flesh out the details of his prior conviction for 3rd degree sexual conduct with a minor in West Virginia, to demonstrate the triviality of that charge."

- r. Failed to “suggest to the trial judge that the charge against [him] had been instigated by the mother and grandmother, for personal reasons of vindictiveness.”
- s. Failed to challenge the police reports.

2. Ineffective Assistance of Appellate Counsel

- a. “[R]aised in oral argument the very issue she failed to argue in her brief.”
- b. Failed to inform of the right to petition the Court of Appeals for rehearing.
- c. Failed to inform of the right to file a petition for writ of certiorari at the Supreme Court.

(Attachment 1, PCR App. 296-310).

Respondent filed the Return requesting an evidentiary hearing. (Return Attachment 1, PCR App. 311-315). An evidentiary hearing was held on November 9, 2011, at the Greenville County Courthouse with the Honorable Edward W. Miller presiding. (Return Attachment 1, PCR App. 317). Applicant was present and represented by Caroline Horlbeck, Esq., and Assistant Attorney General Karen Ratigan represented Respondent. (Return Attachment 1, PCR App. 317, 320). At the conclusion of the hearing, Judge Miller denied the application. (Return Attachment 1, PCR App. 341). The Order of Dismissal was filed on December 22, 2021. (Return Attachment 1, PCR App. 343-349).

PCR APPEAL

Applicant, through counsel, filed a notice of appeal. Appellate Defender Dayne C. Phillips of the South Carolina Commission on Indigent Defense, filed a petition for a writ of certiorari on October 1, 2012, raising the following issue:

Did the PCR Court err in finding that trial counsel provided effective assistance of counsel where the trial court granted the state’s motion to exclude Petitioner from offering an alibi defense after trial

counsel violated the court rule requiring him to timely notify the State of an alibi witness?

(Return Attachment 5).

The Return to the Petition was filed on November 15, 2012. (Return Attachment 6). The matter was transferred to the Court of Appeals and on September 24, 2014, the Court issued an Order denying the petition. (Return Attachment 7). The Remittitur was issued October 10, 2014. (Return Attachment 8).

FEDERAL HABEAS CORPUS ACTION

Applicant filed a Petition for Writ of Habeas Corpus on May 27, 2015, raising the following grounds:

- I. Ineffective Assistance of Trial Counsel
- II. Ineffective Assistance of Appellate Counsel.
 - a. “Raised in oral argument the very issue she failed to raise in her brief.”
 - b. Failed to inform of the right to petition the court of appeal for rehearing.
 - c. Failed to inform of right to petition for writ of certiorari at the Supreme Court.

In Applicant’s “Amendment and Memorandum of Law in Support of § 2254 Petition,” he specified the following grounds:

Ground One: Ineffective Assistance of Counsel

1(A) The State Court contrarily and unreasonably applied Strickland to counsel’s ineffectiveness in failing to timely comply with the alibi defense notice rule under South Carolina Law.

1(B) The State Court contrarily and unreasonably applied Strickland to counsel’s ineffectiveness in failing to investigate and subpoena witness Douglas Sellers to trial and the pretrial hearings.

1(C) The State Court contrarily [and unreasonably] applied Strickland to counsel's ineffectiveness in failing to lay as foundation and submit as evidence letters from the victim's mother.

1(D) The State Court contrarily and unreasonably applied Strickland to counsel's ineffectiveness in failing to subpoena the victim's mother, Christina Nix, to trial and the pretrial hearings.

1(E) The State Court contrarily and unreasonably applied Strickland to counsel's ineffectiveness in failing to effectively challenge the testimony of victim's grandmother . . . on cognizant legal grounds.

1(F) The State Court contrarily and unreasonably applied Strickland to counsel's ineffectiveness in failing to effectively challenge the victim's videotape statement on cognizant legal grounds.

1(G) The State Court contrarily and unreasonably applied Strickland to counsel's ineffectiveness in failing to effectively challenge S.C. Code of Law[§] 17-23-175 as unconstitutional on cognizant legal grounds.

1(H) The State court contrarily and unreasonably applied Strickland to counsel's ineffectiveness in failing to effectively challenge the indictment as fatally defective.

1(I) The State Court contrarily and unreasonably applied Strickland to counsel's ineffectiveness in failing to properly select the jury.

1(J) The State Court contrarily and unreasonably applied Strickland to appellate counsel's ineffectiveness in failing to brief the very issue she argued at oral argument before the S.C. Appellate Court.

1(K) The State Court contrarily and unreasonably applied Strickland to appellate counsel's ineffectiveness in failing to inform and consult the Defendant of his right to petition the S.C. Court of Appeals for rehearing.

1(L) The State Court contrarily and unreasonably applied Strickland to appellate counsel's ineffectiveness in failing to inform and consult the Defendant of his right to file a petition of writ of certiorari to the S.C. Supreme Court.

1(M) The State Court contrarily and unreasonably applied Strickland to trial counsel's ineffectiveness in failing to challenge § 17-23-175 as unfairly applied in this case.

1(N) The State Court contrarily and unreasonably applied Strickland to trial counsel's ineffectiveness in failing to meet with the Defendant.

1(O) The State Court contrarily and unreasonably applied Strickland to trial counsel's ineffectiveness in failing to request the videotape of child victim be redacted.

1(P) The State Court contrarily [a]nd unreasonably applied Strickland to trial counsel's ineffectiveness in failing to request videotape of child victim be shown prior to the trial testimony of child victim was presented to the jury.

1(Q) The State Court contrarily and unreasonably applied Strickland to trial counsel's ineffectiveness in failing to subpoena child victim's school teacher and counselor.

1(R) The State Court contrarily and unreasonably applied Strickland to trial counsel's ineffectiveness in failing to request a jury instruction on witnesses' bias and witnesses' vindictiveness as underlying motivation for child victim's mother's and grandmother's testimonies.

Ground Two: Trial Court should have excluded the videotape because its probative value was substantially outweigh[ed] by its prejudicial impact, and its introduction denied Petitioner's Due Process and right to a fair and impartial trial under the U.S. Constitution.

Ground Three: Trial Court should have excluded prior consistent statement of child accuser because it improperly bolstered the child accuser's testimony thereby depriving Petitioner of his Confrontation Clause rights, Due Process rights and right to a fair and impartial trial under the U.S. Constitution.

Ground Four: Petitioner's Due Process rights, Confrontation Clause right's and right to a fair impartial trial were violated when the interpreter in this case was not qualified nor certified nor adequate to accurately convey and express the communications of the Petitioner during the court proceeding nor accurately convey and express the communications of the testifying witness to Petitioner during the court proceedings.

(Return Attachment 12 at 5-7).

Respondent submitted the Return and Motion for Summary Judgment. (Return Attachment 10). Applicant filed a Response in Opposition to the Motion. (Return Attachment 11). On

December 16, 2015, United States Magistrate Judge Paige J. Gossett, issued the Report and Recommendation recommending that Respondent's motion be granted and Applicant's petition be denied. (Return Attachment 12). Applicant filed objections to the Report and Recommendation on January 12, 2016. (Return Attachment 13). On January 20, 2016, United States District Judge David C. Norton issued an Order affirming the Report and Recommendation. (Return Attachment 14). Applicant filed a Petition for Rehearing in the United States Court of Appeals for the Fourth Circuit on November 28, 2016, which was denied on December 20, 2016. (Return Attachments 15 & 16).

CURRENT ALLEGATIONS AND RELIEF SOUGHT

Applicant's second and current application for post-conviction relief filed on August 9, 2023, alleges that trial counsel was ineffective for failing to explain to him the "need for a double verdict, a seal [sic] verdict and a general verdict." Applicant alleges that his right to fair trial was violated because the alternate juror was in the deliberation room. He also alleges that appellate counsel was ineffective for not presenting the issue on appeal. (PCR App. 3, attached sheets 1-3). Applicant requests that he be granted a new trial. (PCR App. at 6).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to S.C. Code Ann. § 17-27-70(c), this Court may summarily dispose of an application if there is no genuine issue of material fact in the "pleadings, depositions and admissions and agreements of fact" and the movant is entitled to judgment as a matter of law. "Summary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief." *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005). This is such a case.

THE APPLICATION IS NOT TIMELY

The application is not timely filed in accordance with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon 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). 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).

The remittitur from Applicant's direct appeal was issued on June 4, 2009. A timely application was therefore due on or before June 5, 2010. This application was filed on August 9, 2023, well beyond the statutory deadline. Therefore, the action is summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

When a PCR applicant files beyond the statute of limitations - whether the application is the initial action or successive - and alleges that his claims are newly discovered, "the application must be filed...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). Applicant now raises issue with the alternate jurors' presence during deliberations. Upon discovery, the court removed the alternate, recharged the jury on Applicant's presumption of innocence, and sealed the jury verdict form to be made as a Court's Exhibit. (Return Attachment 1, PCR App. 237-243). The jury was then issued a new verdict form.

(Return Attachment 1, PCR App. 241). Applicant now alleges that counsel was ineffective for not explaining to him the “need for a double verdict, a seal [sic] verdict and a general verdict,” that his rights to a fair trial were violated as a result, and that appellate counsel failed to present the claim on appeal. Such alleged issues were identifiable at the time of trial and when the direct appeal was disposed. Applicant could have raised these claims in a timely manner in his first PCR action. Consequently, the provisions of (C) are not triggered. Applicant has failed to timely file and no exception applies.

THE APPLICATION IS IMPROPERLY SUCCESSIVE

Applicant’s current application is improperly successive to his previous post-conviction relief application. The PCR Act 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.

S.C. Code Ann. § 17-27-90.

Under this statute, successive applications are forbidden unless an applicant can indicate a “sufficient reason” why new grounds for relief were not raised or were not properly raised in previous applications. *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that “*could not* have been raised . . . in the previous application.” *Id.* at 450 (emphasis added). If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. *Id.* Courts disfavor successive applications and place the burden on applicants to

establish any new ground raised in a subsequent application could not have been raised in an earlier application, whether state or federal. *Land v. State*, 274 S.C. 243, 245, 262 S.E.2d 735, 737 (1980) (“applicant [has] the burden of proving that a new ground for relief could not have been raised in the previous application”); *Foxworth v. State*, 275 S.C. 615, 618 274 S.E.2d 415, 416 (1981) (“The language of Section 17-27-90 is not restricted to State proceedings but rather refers to ‘any other proceeding’”).

Applicant has been afforded his “one bite of the apple” in PCR, and the claims he now presents are claims that could have been raised in his first PCR action. Applicant has not provided sufficient reason for the delay in raising the claims. He only asserts that he did not discover “the two verdicts” until 2023, though he was present and aware of the circumstances at trial. Even so, Applicant’s “two verdicts” allegation has no merit, and the record supports as such. The finality of the previous court’s rulings should be respected, and the application is summarily dismissed as improperly successive.

THE APPLICATION FRUSTRATES THE CRITICAL NEED FOR FINALITY

“Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant’s imprisonment without review would amount to a gross miscarriage of justice.” *Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991); *Williams v. Ozmint*, 380 S.C. 473, 479, 671 S.E.2d 600, 603 (2008) (same). “[T]he principle of finality ... is essential to the operation of our criminal justice system” because “[w]ithout finality, the criminal law is deprived of much of its deterrent effect.” *Teague v. Lane*, 489 U.S. 288, 309 (1989). See also *Williams v. United States*, 401 U.S. 667, 691 (1971) (“If law, criminal or otherwise, is worth having and enforcing, it must at some

time provide a definitive answer to the question litigants present or else it never provides an answer at all.”) (Harlan, J., concurring in judgments in part and dissenting in part).

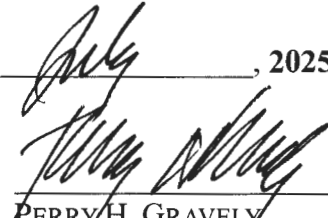
As Respondent’s return and motion demonstrates, it is appropriate to reject Applicant’s latest filing and prevent upsetting the finality attached to Applicant’s 2007 conviction, especially where Applicant has been afforded the collateral opportunities to challenge his conviction.

CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), and for all the reasons set out above, this Court intends to dismiss this application for post-conviction relief with prejudice unless Applicant provides specific factual or legal reasons that the application should not be dismissed for those reasons. Applicant is granted **twenty (20) days** from the date of service of this order upon him to provide REASONS that this order should not become final. Applicant shall file any reasons he may have with the Greenville County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Kaylee C. Kemp
Post Office Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 16th day of July, 2025.


PERRY H. GRAVELLY
Chief Administrative Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

Copy mailed to
Attorney general/applicant
on 7 / 22 / 2025