STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2013-002467

George D. Jackson, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

1. Whether the record supported the trial court's findings both that Petitioner's successive PCR claim was impermissibly delayed and that the after-discovered impeachment evidence of criminal charges against the State's key witness was immaterial where Petitioner presented uncontroverted evidence that his plea counsel specifically requested notice of any charges against the informant, where the State had the information in its possession but did not disclose it, and where Petitioner did not discover the charges until years after his plea?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the October 2003 term of General Sessions for two counts of trafficking cocaine (2003-GS-23-7212, -7216). (App.pp.149-50; pp.152-53). James H. Price, III, Esquire represented Petitioner.

On June 15, 2004, Petitioner pled guilty. The Honorable Edward W. Miller sentenced Petitioner to concurrent terms of 15 years on each count. (App.p.18).

A notice of appeal was filed at the South Carolina Court of Appeals. Petitioner indicated he wanted to withdraw his appeal. The Court of Appeals issued an order dismissing the appeal on August 16, 2005. The remittitur was sent August 26, 2005.

Petitioner filed an application for post-conviction relief (PCR) on November 7, 2005 (2005-CP-23-7170). A hearing was held at the Greenville County Courthouse on April 18, 2006. Petitioner was present and represented by Susannah C. Ross, Esquire. The Honorable James E. Lockemy denied the application by order filed May 19, 2006. Petitioner filed a notice of appeal at the South Carolina Supreme Court. Kathrine H. Hudgins, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Supreme Court denied the petition for writ of certiorari on March 6, 2008.

Petitioner filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina. On July 27, 2009, the Honorable Thomas E. Rogers, III, United States Magistrate Judge, issued a report and recommendation to grant the Respondent's motion for summary judgment. On August 19, 2009, the Honorable Cameron M. Currie, United States District Judge, issued an order granting the motion for summary judgment and dismissing the petition with prejudice.

Petitioner filed a second PCR application on July 6, 2012 (2012-CP-23-4393). (App.pp.20-27). A hearing was held at the Greenville County Courthouse on June 18, 2013. (App.pp.52-98). Petitioner was present and represented by Jeffrey Falkner Wilkes, Esquire. The Honorable D. Garrison Hill denied relief in an order filed August 21, 2013. (App.pp.132-39). By order filed October 16, 2013, Judge Hill denied Petitioner's subsequent motion to alter or amend judgment. (App.p.148).

STANDARD OF REVIEW

The proper standard for review of a PCR 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, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

The PCR judge did not err in finding Petitioner failed to meet his burden of proving he is entitled to post-conviction relief.

Petitioner argues the State violated Brady[1] by not providing him with evidence of criminal charges against the State's witness, acquired after the witness acted as a confidential informant, which could have been used as material impeachment evidence. Petitioner also argues his second PCR application was not impermissibly successive and the newly discovered evidence exception under Section 17-27-45(b) applied to his case, therefore making the timeliness of his application in compliance with the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-45(b) (2003). These arguments are without merit.

A.

On December 18, 2002, Petitioner delivered in excess of twenty-eight (28) grams of cocaine to a criminal informant in Greenville County. (App.p.16). Following this exchange, on March 27, 2003, Petitioner delivered in excess of one hundred (100) grams

[1] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).

of cocaine to a confidential informant with the Greenville County Sheriff's Office. (App.p.16). The Solicitor's office reduced the charge involving over one hundred grams of cocaine down one level, allowing Petitioner to plead to two counts of trafficking in excess of twenty-eight grams of cocaine. (App.p.8).

At the guilty plea hearing, Petitioner stated he wanted to plead guilty, and that no one had forced, coerced, threatened, or promised him anything in order to have him enter his plea. (App.pp.9-10). Petitioner stated he was guilty of the charges, satisfied with the representation of his attorney, and had no complaints to make against his attorney, the Solicitor's office, or law enforcement concerning this case. (App.pp.10-11). Petitioner stated he wanted to waive his right to a jury trial and plead guilty. (App.p.10). The assistant solicitor recited the facts to support each of the charges. (App.pp.16-17). Regarding the two counts of trafficking cocaine, the assistant solicitor stated:

> On 3/27/03, [Petitioner] did deliver more than 100 grams of cocaine to a confidential informant with the Greenville County Sheriff's Office. This transaction occurred at 1922 August Street in Greenville County. On December 18th of 2002, [Petitioner] distributed more than 28 grams of cocaine to a criminal informant at 1111 August Street in Greenville County. Regards to prior a [sic] record, in '93 a CDV. The recommendation from the State is 15 years concurrent.

(App.p.16). Petitioner agreed with the State's recitation of these facts. (App.p.17).

Petitioner's father asked the Court to show mercy. (App.p.17). Plea counsel then spoke in mitigation. (App.pp.17-18). Plea counsel stated when he received his discovery package two weeks after he was hired, he learned the State had a confidential informant and "there were several recorded telephone conversations between the two of them." (App.p.17). Plea counsel acknowledged both the informant and Petitioner gave

statements, and that "from the get go it's not been a question of guilt or innocence, just been a question of begging and pleading." (App.p.17). Plea counsel stated he had advised Petitioner that "he stands little or no chance at a trial." (App.pp.17-18). Plea counsel advised the Court that the Solicitor had offered this fifteen-year recommendation and was not willing to offer anything lower. (App.p.18). The plea judge accepted the recommendation and levied a fifteen-year sentence. (App.p.18).

B.

At the PCR hearing, the State argued this PCR application was untimely because it was filed more than one year after Petitioner's direct appeal was dismissed. (App.p.56). The State also argued the application was successive because Petitioner already had "his one bite at the apple" and failed to raise these issues at his initial PCR hearing in 2006. (App.p.56). Lastly, the State argued Petitioner had not substantiated his claim that he filed the application within one year after discovering the alleged after-discovered evidence of the informant's criminal charges. (App.p.56).

Petitioner testified that when he retained plea counsel, he was not aware the State's informant had been arrested for trafficking cocaine, and that this information was not disclosed to him prior to making his decision to plead guilty. (App.p.59). When asked if he would have chosen to go to trial rather than plead guilty if he had known this information, Petitioner stated "[p]robably, yes." (App.p.59). Petitioner stated he discovered this information when he "seen the motion [for discovery]." (App.p.59). Petitioner testified his counsel brought the second PCR action "once we found out." (App.p.60). Petitioner admitted, however, that he knew the informant's identity when he

pled guilty in 2004 and – therefore – also at his first PCR hearing. (App.pp.61-62). Petitioner also admitted he gave a confession in this case. (App.p.62).

Plea counsel testified he made a general Brady motion and a motion requesting information on "impeachment witnesses" from the State on March 5, 2004. (App.pp.64-65). Plea counsel testified the "identify of the informant does not appear to be an issue," but that he did not recall "information about the informant being arrested, or having been arrested." (App.p.65). After consulting exhibits, plea counsel testified the incident dates related to the informant's subsequent arrests were June 1, 2003 and October 14, 2003 and that these charges appeared to be pending at the time of the guilty plea. (App.pp.74-75). Plea counsel testified that while having this information would have been beneficial in negotiating with the assistant solicitor, he could not "say how beneficial they would have been as far as a trial is concerned." (App.p.67). Plea counsel testified he and Petitioner spoke about all of his options, including the advantages and disadvantages of a trial. (App.p.69). Plea counsel testified he and Petitioner discussed the impact that both Petitioner's confession and the audiotaped transaction of the cocaine purchase had on the defense. (App.p.68). Plea counsel testified knowing information about the informant's subsequent arrest would have helped in negotiations with the assistant solicitor "as far as a potential plea is concerned," but that "[he] would have still had a tough road to hoe in light of the confession that [Petitioner] gave." (App.p.71).

Assistant solicitor Kathryn McCall of the Thirteenth Circuit Solicitor's Office testified the assistant solicitor who handled Petitioner's case no longer worked in the Solicitor's Office. (App.p.80). After reviewing the State's file, McCall testified plea

counsel was not provided with the impeachment material on the informant, but instead was provided with the Solicitor's office "standard response with the Code Five and all those things that go with that." (App.p.82). McCall testified the Solicitor's office does not turn over confidential informant information unless the case goes to trial. (App.p.82).

The PCR judge took the matter under advisement. (App.p.98). In his subsequent order denying post-conviction relief, the PCR judge found the PCR application must be dismissed based on the expiration of the statute of limitations and the presumption against successive PCR applications. The PCR judge also found Petitioner failed to meet his burden of proving either after-discovered evidence or a Brady violation. (App.pp.132-39).

C.

The PCR judge did not err in finding Petitioner's PCR application was filed outside the expiration of the statute of limitations and that Petitioner failed to meet his burden of proving newly-discovered evidence in order to circumvent this issue.

For an applicant to be granted post-conviction relief, they must comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §§ 17-27-10, et. seq. (2003). South Carolina 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 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 (emphasis added).

An exception to the statute of limitations is applicable when an applicant discovers "evidence of material facts not previously presented and heard that requires

vacation of the conviction or sentence." S.C. Code Ann. § 17-27-45(c) (2003). Under circumstances of newly-discovered evidence, the PCR applicant must file "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." Id.

This Court has held that, for an applicant to be granted post-conviction relief based on newly-discovered evidence, he must show the alleged 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, 611-12, 299 S.E.2d 854, 855 (1983) (citation omitted) (emphasis added).

The PCR judge did not err in finding that Petitioner failed to comply with the filing requirements of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §§ 17-20-10, et. seq. (2003). Petitioner pled guilty to the challenged offenses on June 15, 2004. (App.p.9). After Petitioner requested to withdraw his appeal, the South Carolina Court of Appeals dismissed his appeal on August 16, 2006. Petitioner did not file his second PCR application until July 6, 2012, which was more than five years after the statutory filing period expired. (App.pp.28-33). The defense of statute of limitations is properly raised through a motion for summary judgment. See McDonnell v. Consolidated Sch. Dist. of Aiken, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994). "A motion for summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Hedgepath v. American Tel.

& Tel. Co., 348 S.C. 340, 353, 559 S.E.2d 327, 334 (2001) (citation omitted).

The exception to the statutory filing period provided in S.C. Code Ann. § 17-27-45(c) is not applicable to the facts of this case. Petitioner asserts the evidence of the informant's criminal charges entitles him to a new trial because he exercised reasonable diligence in attempting to discover this information. Petitioner provided no corroborating evidence to confirm his testimony that he filed this second PCR application within one year of discovering the criminal charges against the State's informant. (App.p.60).

Petitioner failed to prove the informant's subsequent arrest constituted newly-discovered evidence that would allow him to circumvent the one-year statute of limitations for filing a PCR application. Petitioner cannot satisfy all five of the Hayden factors. The information about the confidential informant's arrests for drug offenses that occurred several months after the dates of Petitioner's offenses would not have changed the result of Petitioner's case. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (holding one must prove the alleged newly-discovered evidence "would probably change the result if a new trial is had"). The information about the confidential informant's subsequent arrests is not material to the issue of Petitioner's guilt or innocence where: the informant was arrested months after the dates in Petitioner's case, there was an audiotape of one of Petitioner's drug transactions, and Petitioner gave a confession. The information about the confidential informant's subsequent arrests would have merely been impeaching in nature. Evidence used for impeachment purposes is only considered material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id.

(citing United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985)). It is highly improbable that, in a case where Petitioner was recorded participating in a drug transaction and later gave a confession, having information that the informant was subsequently arrested would have changed Petitioner's mind about pleading guilty. Plea counsel even testified he could not say this information would have been beneficial at a trial and that this case would have been difficult even with knowledge of this information. (App.p.67; p.71). Petitioner failed to satisfy – as required – all five of the Hayden factors.

In dismissing Petitioner's PCR application, the PCR judge clearly did not find Petitioner's argument to circumvent the statute of limitations was compelling. This Court should give deference to the PCR judge's findings that Petitioner filed his second PCR application after the expiration of the statute of limitations and that he did not meet his burden of proving newly-discovered evidence. See, e.g., State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) ("The credibility of newly-discovered evidence is for the trial court to determine.").

D.

The PCR judge did not err in finding Petitioner's PCR application was improper because it was successive.

Successive applications for post-conviction relief are disfavored. See Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). South Carolina Code Ann. § 17-27-90 (2003) states the following:

> 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 raise in the original, supplemental or amended application.

This statute forbids successive PCR applications absent a showing of "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, 450, 409 S.E.2d 392, 394 (1991). The only new grounds a petitioner may raise are those that "could not have been raised . . . in the previous application." Id. (emphasis in original). A petitioner bears the burden of showing that the new grounds he is raising could not have been raised in previous post-conviction relief applications. Id.

The PCR judge did not err in finding Petitioner's PCR application should be dismissed because it was successive to his previous application. Successive PCR applications are disfavored "because they allow an applicant to receive more than one bite at the apple." Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) (citation omitted). Petitioner failed to prove he could not have raised the current allegation in his initial PCR application. Petitioner knew the identity of the informant at the time he entered into his guilty plea – and thus also knew this information when he filed his initial PCR application. (App.p.65). In advance of the PCR hearing on his first application, Petitioner easily could have researched the informant through public records, a FOIA request, or a discovery motion. Petitioner could have raised this issue at his first PCR hearing but did not do so.

This Court is required to affirm the PCR court's rulings if there is any evidence of

probative value in the record which supports them. Cherry v. State, 300 S.C. at 119, 386 S.E.2d at 626. Great deference is given to the findings of the PCR judge. Jones v. State, 382 S.C. 589, 595, 677 S.E.2d 20, 23 (2009) (citation omitted). There is probative evidence to support the PCR judge's ruling that Petitioner's second PCR application was successive.

E.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving there was a reversible Brady violation in this case.

This Court has set forth the elements required in order to prevail upon a purported Brady violation:

> A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment.

Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999) (emphasis added) (citations omitted). This Court has further found that, with regard to cases that end in guilty pleas, "[a] Brady violation is material when there is a reasonable probability that, but for the government's failure to disclose Brady evidence, the defendant would have refused to plead guilty and gone to trial." Id. at 525, 514 S.E.2d at 325; see also Riddle v. Ozmint, 369 S.C. 39, 44-45, 631 S.E.2d 70, 73 (2006) ("Evidence is material under Brady if there is a reasonable probability that the result of the proceeding would have been different had the information been disclosed.") (citation omitted).

The PCR judge did not err in finding that the knowledge of the informant's

charges was immaterial for purposes of a Brady violation. Petitioner cannot satisfy all four Gibson elements. Petitioner did not demonstrate the information about the confidential informant's arrests would have been favorable to his case. The informant was arrested several months after the incidents in Petitioner's case occurred. As noted supra, plea counsel testified he could not say this information would have been beneficial at a trial and that this case would have been difficult even with knowledge of this information. (App.p.67; p.71). Petitioner also did not demonstrate the information about the confidential informant's subsequent arrests was known and suppressed by the State. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814. There was no testimony or evidence that the solicitor's file contained information or documentation about the confidential informant's subsequent charges. Petitioner further did not demonstrate the information about the confidential informant's subsequent arrests was material to his guilt or punishment. As Petitioner was recorded conducting one drug transaction and later gave a confession to police, there is no reasonable probability he would have refused to plead guilty and gone to trial if he had known the confidential informant – whose identity he knew – had been arrested several months after the incidents in his case. See Gibson v. State, 334 S.C. at 524, 514 S.E.2d at 324.

Petitioner failed to prove all of the Gibson elements. Accordingly, there is probative evidence to support the PCR judge's ruling that Petitioner failed to demonstrate there was a Brady violation in his case.

F.

As Petitioner failed to meet his burden of proving he was entitled to post-

conviction relief, the PCR judge did not err in denying his PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

October 7, 2014

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2013-002467

George D. Jackson, ... Petitioner,

v.

State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Benjamin John Tripp, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 7th day of October, 2014.

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ATTORNEY GENERAL

October 7, 2014

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

Re: George Jackson v. State of South Carolina
Appellate Case No: 2013-002467
Lower Court Case No: 2012-CP-23-4393

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General
SC Bar #68331

KCR/jacc
Enclosures

cc: Benjamin J. Tripp, Esquire
Trisha Allen, Victim Services Counselor