Gordon v. State

4951

Order of

Dismissal

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	2008-CP-46-4951
	)	
Antonio Gordon, #259798	)	
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Court by way of an application for post-conviction relief filed January 9, 2009 and amended on May 19, 2009. The Respondent made its return and motion to dismiss on July 27, 2009. An evidentiary hearing into the matter was convened on December 1, 2009 at the Moss Justice Center in York County. The Applicant was present at the hearing and was represented by Tricia A. Blanchette, Esquire. Assistant Attorney General Jennifer A. Kinzeler represented the Respondent.

At the hearing, counsel for both parties presented argument to the Court. The Court also had before it copies of the records of the York County Clerk of Court regarding the subject convictions; the Applicant's records from the South Carolina Department of Corrections; the transcript from the motion to suppress hearing and guilty plea; the briefs from the direct appeal; the South Carolina Court of Appeals opinion dismissing the Applicant's appeal; the remittitur from the direct appeal dated January 9, 2001; the application for post-conviction relief (PCR) filed June 20, 2001 (2000-CP-46-1414)[1]; the amendment to the application dated May 8, 2003;

1 The Respondent notes that the Applicant filed a second PCR application on August 21, 2001 (2001-CP-46-1866),

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the Respondent's return to the first PCR action; the consent order changing venue; the transcript of the hearing held respecting the first PCR action; the order filed August 20, 2003 dismissing the first PCR action with prejudice; the order filed December 15, 2003 denying the Applicant's motion for a rehearing and/or motion for reconsideration of the facts; the Johnson petition for writ of certiorari filed on appeal from the denial of the first PCR action; the South Carolina Supreme Court order denying the petition; the remittitur of the appeal from the denial of the first PCR action dated August 9, 2005; the second PCR application filed July 6, 2004 (2004-CP-46-1700); the Respondent's return and motion to dismiss the second PCR action; the conditional order of dismissal filed December 30, 2004 with respect to the second PCR action; the final order filed May 20, 2005 denying and dismissing the second PCR action; the records and documents related to the Applicant's federal petition for writ of habeas corpus (2:05-3327-MBS-RSC) filed on December 22, 2005; the Applicant's state petition for writ of habeas corpus (2006-CP-46-010) filed on January 3, 2006; the Respondent's return and motion to dismiss the state habeas corpus petition; the Applicant's "complaint on unlicensed psychology/psychologist" filed January 23, 2006; an amendment to the state habeas corpus action filed January 23, 2007; the order filed June 1, 2007 dismissing the state habeas corpus action; the Applicant's Rule 60(b) motion to amend and clarify; the Respondent's return to the Rule 60(b) motion; the order granting the Applicant's Rule 60(b) motion to clarify and amend; the current PCR application and amended PCR application (2008-CP-46-4951) including two written statements attached as exhibits to the current PCR application; the Respondent's return and motion to dismiss the current PCR application; the conditional order of dismissal filed August 24, 2009; and the Respondent's

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but that it was merged with 2001-CP-46-1414.

motion to restrict future filings filed on November 19, 2009.

PROCEDURAL HISTORY

The Applicant is currently incarcerated in the South Carolina Department of Corrections. He was indicted in October 1998 by the York County Grand Jury for Murder (1998-GS-46-2847), three counts of Possession of a Firearm During the Commission of a Violent Crime (1998-GS-46-2847-A; 1998-GS-46-1949-A; 1998-GS-46-1950-A), two counts of Attempted Armed Robbery (1998-GS-2849, 1998-GS-46-2850), Criminal Conspiracy (1998-GS-46-2851), and Possession of a Pistol by a Person Under Twenty-One (1998-GS-46-2852). Daniel D'Agostino, Esquire, represented the Applicant.

A hearing on the Applicant's motion to suppress was held on July 12, 14, and 16, 1999. On July 16, 1999, following the suppression hearing, the Applicant pled guilty as indicted. On July 19, 1999 the Honorable John C. Hayes, III sentenced the Applicant to confinement for thirty (30) years for Murder; five (5) years for Possession of a Firearm During the Commission of a Violent Crime; five (5) years for Criminal Conspiracy; five (5) years for Possession of a Piston by a Person Under Twenty-One, all to run concurrently; and ten (10) years for Attempted Armed Robbery, running consecutive to the thirty (30) year sentence for Murder. This was a negotiated guilty plea to a cumulative forty (40) years confinement.

The Applicant filed a timely notice of appeal and an Anders brief was submitted on his behalf pursuant to Anders v. California, 386 U.S. 738 (1967). Of note to the present action, the Applicant filed a *pro se* brief in which he raised the issue of probable cause to arrest based on an "informant's" statement to law enforcement allegedly given without being advised of her rights.[2]

2 The "informant" to whom the Applicant is referring is Chyneca Dixon, his girlfriend at the time he committed and

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The Applicant also contended that both he and the informant were under age and should not have been questioned by law enforcement outside the presence of a parent or attorney. As a result, he argued, the informant's statement was inadmissible because it was obtained illegally and could not have established probable cause for his arrest. The South Carolina Court of Appeals dismissed the Applicant's appeal. State v. Gordon, 2000-UP-747 (S.C. Ct. App. Filed December 6, 2000). The remittitur was issued on January 9, 2001.

The Applicant subsequently filed a PCR application originally dated June 20, 2001 and amended on May 8, 2003 (2000-CP-46-1414). An evidentiary hearing was held on July 29, 2003. Tara D. Shurling, Esquire, represented the Applicant, who was present at the hearing. Jeanette C. Vanginhoven, of the South Carolina Attorney General's Office, represented the Respondent. Of note to the present action, the Applicant alleged his guilty plea was involuntary and that defense counsel was ineffective for failing to discuss with him evidence of a palm-print found on the victim's car door. The Applicant specifically contended that defense counsel failed to investigate or discuss with him "the fact that the palm print on the victim's car door was unidentified until the time of pre-trial," and that the South Carolina Law Enforcement Division (SLED) never tested the palm print. On August 20, 2003, the Honorable J. Ernest Kinard issued an Order denying and dismissing the application. The Applicant subsequently made a "Motion for Rehearing/Motion for Reconsideration of the Facts" on December 9, 2003. The Honorable J. Ernest Kinard dismissed the Applicant's motion by written Order filed December 15, 2003.

The Applicant filed a petition for writ of certiorari appealing the Order dismissing his

pled guilty to the crimes.

first PCR action.[3] On July 21, 2005, the South Carolina Supreme Court issued an Order denying the petition. The remittitur was issued on August 9, 2005.

On July 6, 2004, while his appeal from the denial of his first PCR action was still pending, the Applicant filed a second PCR application (2004-CP-46-1700). The Applicant raised issues previously raised in his first PCR action, including allegations that his guilty plea was involuntary and that defense counsel was ineffective. On December 30, 2004, the Honorable Lee S. Alford issued a conditional order of dismissal in which he expressed the intent to summarily dismiss the application because the Applicant failed to comply with the filing procedures of the Post-Conviction Procedure Act as set forth in S.C. Code Ann. §17-27-45(A) and §17-27-90, and because the application was an improper successive action, but granted the Applicant twenty (20) days to show why the order should not become final. The Applicant did not respond to the conditional order of dismissal. Thereafter, by Order dated May 20, 2005, the Honorable Lee S. Alford denied and dismissed the Applicant's second PCR action..

The Applicant then filed a federal petition for writ of habeas corpus on December 22, 2005 (2:05-3327-MBS-RSC) and an amendment to his federal habeas corpus action on April 14, 2006. On October 16, 2006, Federal Magistrate Judge Robert S. Carr entered his Report and Recommendation that habeas relief should be denied. On October 30, 2006, the Applicant filed an "Objection to Report and Recommendation of Magistrate Judge." Pertinent to this action, the Applicant raised the probable cause issue regarding his arrest. Specifically, the Applicant contended that his warrantless arrest was unlawful because law enforcement only found probable cause to arrest him based on statements given to them "by a minor whoes [*sic*] parents were not

3 Assistant Appellate Defender Robert M. Dudek filed a Johnson brief on behalf of the Applicant on July 19, 2004.

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present during questioning."[4] In essence, he asserted that law enforcement's reliance on Chyneca Dixon's statement to establish probable cause led to an unlawful arrest that violated his Fourth Amendment rights. He also claimed that defense counsel was ineffective for failing to advise him that by pleading guilty he waived his right to challenge the lawfulness of his arrest or the statements he made to law enforcement after he was arrested. On February 16, 2007, the Honorable Margaret B. Seymour entered an Order dismissing the Applicant's petition without prejudice to permit him to exhaust all State remedies.

Subsequently, the Applicant filed a state petition for writ of habeas corpus on January 3, 2006 (2006-CP-46-0010). He then filed an amendment to the state habeas corpus action on January 23, 2007 to which he attached Chyneca Dixon's two statements given to law enforcement on July 23, 1998. As it relates to this action, the Applicant alleged that law enforcement did not have probable cause to arrest him because the police relied on Chyneca Dixon's statement to law enforcement that she gave as a result of being threatened outside the presence of her parents. The Applicant asserted that the police should not have questioned Chyneca Dixon ("the minor") outside the presence of her attorney or parents, and that because she was the "probable cause provider," both of their statements to law enforcement, as well as the Applicant's arrest, were all unlawful. The Honorable John C. Hayes denied and dismissed the Applicant's state habeas corpus petition with prejudice by written order dated April 30, 2007 and filed on June 1, 2007.

The Applicant then filed a Rule 60(b) motion in which he alleged a conflict of interest with the Honorable John C. Hayes, III, who was original sentencing judge at the Applicant's

4 The Applicant raised this issue in his "Objection to Report and Recommendation of Magistrate Judge." The

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guilty plea. The Applicant also claimed that the order dismissing his state habeas corpus action did not advise him of right to appeal the order. On January 31, 2008 the Honorable Roger L. Couch granted the Applicant's Rule 60(b) motion to reconsider, amend, and clarify, and issued a written order finding that the Applicant was without prejudice to bring a petition for writ of habeas corpus in the original jurisdiction of the South Carolina Supreme Court.

On January 9, 2009, the Applicant filed his third PCR application currently pending before this Court. He amended the application on May 19, 2009. The Applicant attached to his current application two written statements given by Chyneca Dixon (hereinafter "Chyneca") and her mother, Geraldine Dixon (hereinafter "Ms. Dixon"), on January 20, 2008. The statements were given to an investigator who interviewed them on behalf of the Applicant. The Applicant alleges in his current application that he is being held in custody unlawfully for the following reasons:

1. Newly Discovered Evidence;
2. Ineffective Assistance of Trial Counsel;
3. Prosecutorial Misconduct;
4. Brady Violation;
5. Involuntary Guilty Plea;
6. Defense counsel failed to challenge applicant's statement's on the ground that there was no probable cause for the arrest and that "Applicant statement's was [*sic*] the fruit of the poisonous tree" with regard to the illegal arrest; and
7. Personal Jurisdiction.

"minor" to whom the Applicant refers is Chyenca Dixon.

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The Respondent made its return and motion to dismiss on July 27, 2009 asserting that the application must be summarily dismissed as an improper successive action and as having been filed after the expiration of the applicable statute of limitations. The Honorable John C. Hayes, III issued a conditional order of dismissal on August 24, 2009, in which Judge Hayes expressed the intent to summarily dismiss the application because the Applicant failed to comply with the filing procedures of the Post-Conviction Procedure Act as set forth in S.C. Code Ann. §17-27-45(A) and §17-27-90, and because the application was an improper successive action, but granted the Applicant twenty (20) days to show why the order should not become final. The Respondent also filed a motion to restrict future filings on November 19, 2009 pursuant to In re Theron Maxton, 325 S.C. 3, 478 S.E.2d 679 (1996). The Applicant did not file a response to the conditional order of dismissal. A hearing into the Respondent's motion for summary dismissal was convened on December 1, 2009. At the hearing, the State proceeded on a motion to dismiss all of the Applicant's claims as procedurally barred by the statute of limitations and successiveness.[5] The State also argued that the two written statements included with the application were not newly discovered evidence, and that any alleged newly discovered evidence was nonetheless barred by the statute of limitations. The State also made a verbal motion to restrict the Applicant from filing another PCR application in the future under In re Theron Maxton, 325 S.C. 3, 478 S.E.2d 679 (1996).

At the hearing, the Applicant, through counsel, acknowledged that he filed a lengthy

5 Section 17-27-45(A) imposes a one-year statute of limitations on any ground for post-conviction relief. Section 17-27-90 also requires all grounds for relief be raised in the original PCR application, and provides that any ground for relief finally adjudicated, or not so raised or waived, may not be alleged in a subsequent [or successive] application absent a court finding sufficient reason. Under Aice v. State, 305 S.C. 448, 409 S.E.2d 392, an Applicant cannot maintain a successive application alleging ineffective assistance of post—conviction relief counsel (1991).

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application in this case, and that he was only proceeding at the hearing with the newly discovered evidence claim and with an issue regarding the palm print found on the victim's car. Specifically, the Applicant asserted that he discovered new evidence that law enforcement coerced and threatened Chyneca into giving her initial statements, outside the presence of her mother, and that those statements implicated him in the crimes. He contended that because Chyneca's statements were threatened and coerced, they could not have established probable cause to arrest him. Therefore, the Applicant asserts, his arrest was unlawful, and any incriminating statements he gave to law enforcement subsequent to his arrest were the "fruit of the poisonous tree."

The Applicant also raised an issue in his current application regarding the palm print obtained from the victim's car. He claimed that he has attempted to obtain certain documents from SLED regarding the palm print that allegedly show he was "not necessarily" the shooter, but that he has been unable to obtain those documents partly as a result of ineffective assistance of PCR counsel during his first PCR action. The Applicant also maintained that defense counsel was ineffective because he never had the palm print tested by his own expert. The Applicant also claimed that he attempted to raise this issue during his first PCR hearing, but he was "coerced into waiving this issue" at his first PCR hearing by PCR counsel.

At the hearing, the Applicant proffered the testimony of two witnesses, Chyneca Dixon and Geraldine Dixon, in support of his newly discovered evidence claim. The State offered the testimony of Mr. W. William ("Willy") Thompson, the Chief Deputy Solicitor for York County, and Daniel D'Agostino, Esquire, as rebuttal witnesses to the proffered testimony.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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This Court has had the opportunity to review the record in its entirety and has heard the argument of counsel presented at the hearing. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. section 17-27-80 (2003).

First, the Applicant proffered the testimony of Chyneca Dixon. She testified that she is twenty-six years old now and currently lives in Lancaster County. She stated that she was involved in the Applicant's criminal case, and that she gave two statements to law enforcement in July 1998 regarding his case. She stated she was fourteen years old at the time she gave her initial statements. Chyneca testified that a police officer came to her house on the night of the murder, and asked her to come with him to the police station. She testified she agreed to go with him. When PCR counsel asked whether she felt free to leave at that time, Chyneca answered "no." When PCR counsel asked whether she had been escorted by police officers, she answered affirmatively.

Chyneca testified that her interview with law enforcement occurred at the police station in an office with a window, and that she was there for "a long time." She testified that an officer asked her questions and typed her answers as she gave them. She stated that officers kept "going back and forth" until one "finally said 'well, I'm getting kind of tired of this. You know more than you say." Chyneca stated that an officer told her she could not go home until she told them exactly what she knew. She testified that she told them she did not know much, but that Antonio Gordon was her boyfriend and that the car involved in the crime belonged to her. Chyneca testified that at that point, she was just saying anything she could to go home. When counsel asked her whether she was allowed to leave after she gave her statements, Chyneca responded affirmatively.

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PCR counsel then asked Chyneca whether she had any further involvement with law enforcement. Chyneca testified that she was trying to get visitation for her and her baby, but that she was told she and her baby could not have any contact [with the Applicant].[6] She testified that she believed it was because of her age, that she "called and called" but that calling "didn't go no where," so after a while she felt like everything was "done" and "just gave up." Chyneca further testified that after she "gave up," she "was real popular and it was all over the place, everybody knew," so she left. She said she did not want to stay in York County any more, and that she only came back one time to try to get child support.

Chyneca testified that she did not have any further contact from law enforcement, the Solicitor's Office, or the Applicant's defense counsel about the case. She also testified that she was not aware that she would have been called as a witness for the State to testify against the Applicant if the case had gone to trial, and that she did not even know the case went to trial. Chyneca explained that the reason she had not come forward before now was because she left after it all happened. She testified here family stayed in York County, but that she stayed in Lancaster County and Charleston County. She then stated that the only time she came back here (York County) is when her grandfather passed away, but that she otherwise tried to avoid York County as must as possible. She stated that she has not seen the Applicant in almost nine years.

When counsel asked whether Chyneca would have testified for the Applicant at his Jackson vs. Denno hearing about her statements, she answered affirmatively. Chyneca also testified that she was never contacted by Ms. Shurling regarding the Applicant's first PCR action, and that she never received any subpoenas or any other document asking her to come to court. She testified that she got

6 PCR Counsel clarified that the Applicant is the father of Chyneca's baby, and was a few months old at the time of

back in touch with the Applicant recently because the Applicant talked with her mother. She testified that she was at her mother's house one day when the Applicant called, and that she started talking to him on the phone. Chyneca testified that after speaking with the Applicant, she agreed to give a statement to an investigator who came to her house on January 20, 2008.

When counsel asked if there was anything else she wanted to tell the Court during her proffer, she stated that "since that time [she has] grown up and [she] realized that someone was hurt and that cannot be changed." She further stated that she feels like over time "anybody can change," and now when she talks to the Applicant sometimes, she "can see how he has changed." She stated that she regrets any of these events ever happened, that she and the Applicant were young and that as a result, she had to take responsibility of their son by herself. Chyneca stated that she knew someone was hurt, but at the same time she felt "like the judge's sentence should also be fixed for so called witnesses and people who wanted to come forth to help in this situation, but at the same time they get—[she couldn't] find the same word for it." Chyneca also told the Court that she was grateful for the opportunity to say that "some parts of York County justice system is [*sic*] broken," and that the night she was interviewed by law enforcement "lost [her] faith in the justice system."

On cross-examination, Chyenca testified that her correct date of birth is December 12, 1982, and agreed that she gave her first statement to police under the name Tawanda Burris with a December 10, 1976 date of birth. She agreed that she testified on direct examination that she was fourteen at the time she gave her statement.[7] Chyneca further agreed that in her first statement to the officer, she said she had been drinking that day and fell asleep around 6:30 p.m and that she told police officers "Terrance shot the boy," "Terrance said he was driving," and

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the murder.

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"Terrance says [*sic*] he shot the driver in the shoulder."[8] Chyneca also agreed that she did not identify the Applicant as the shooter or driver of the car in either of her statements to law enforcement.

Chyneca testified that after giving her statements to the police, she walked to her grandmother's house by herself. She testified that after giving her initial statements, she was "never spoken with any more about this case" until the Applicant's investigator came to get another statement from her in January 2008. Chyneca agreed that the substance of her January 20, 2008 statement to the Applicant's investigator is that at the time she gave her initial statements, she was at the police station for a long time, that she was threatened, and that the officers told her she could not leave until she gave them a statement. Chyneca also testified that she was never charged with a crime in association with the Applicant's case.

The Applicant then proffered the testimony of Geraldine Dixon, Chyneca's mother. Ms. Dixon testified that Chyneca was not at home the night the police came to take her down to the station to give her statement, and that no one called her to let her know Chyneca was at the police department. She testified that she did not know Chyneca was taken to the police department for questioning during the early morning of July 23, 1998 until later that morning when the Applicant's aunt called to tell her. Ms. Dixon also testified that she went to the police station, and that when she tried to talk to the police they "shunned [her] off." She stated they would not give her any information, and that she told them they had no right to question Chyneca without a parent or attorney present. Ms. Dixon further stated the police told her they "had just turned her loose, not to worry about it."

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7 Chenyca would have been fifteen years old at the time she gave her first statements to police.

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Ms. Dixon testified that she later picked Chyneca up at her "grand mamma's," and that the police never contacted her or told her anything else. She testified that she had concerns about her daughter being questioned without her being present. She stated that she was never contacted by any attorney for any of the Applicant's co-defendants, the Applicant's defense attorney, law enforcement, or the Solicitor's Office.

On cross-examination, Ms. Dixon confirmed that she did not know Chyneca was taken to the police department until the next morning. She also testified that she did not see any of the boys involved in what happened that night, and that she did not see anything regarding what happened that night. She agreed that all she knew about the case was that her daughter was questioned by law enforcement and that they never called her. Ms. Dixon then testified that the next time she saw Chyneca was at her "grand momma's" and that was when Chyneca told her what happened. She stated that up until that point, she had not spoken to Chyneca "or the law, or nobody else." Ms. Dixon also testified that the only person who contacted her about the case after that morning was the investigator that came to get her January 2008 statement.

Ms. Dixon then denied to this Court that she gave a sworn statement on January 20, 2008 in which she stated she got a call from the police department, and that she went down to the police department to pick her daughter up. She said that could not be true to her knowledge because the police never contacted her. This Court presented her with her January 2008 statement. Ms. Dixon agreed that it was her signature on the statement, and that it did say she went to pick her daughter up after someone from the police department called her. However, Ms. Dixon testified that she must have "got it wrong then" because she did not pick Chyneca up at

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8 The witness was referring to Terrance McCreary, one of the Applicant's co-defendants.

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the police station.

The State called Mr. Willy Thompson, Chief Deputy Solicitor for the York County Solicitor's Office, to testify as a rebuttal witness to the Applicant's proffered testimony. He testified that has worked at the York County Solicitor's Office since 1992, and that he and Assistant Solicitor John Anthony prosecuted the Applicant for his underlying criminal charges. He stated that he was present during Chyneca's testimony at the hearing in which she testified that no one from the Solicitor's Office ever contacted her regarding the Applicant's case.

Mr. Thompson was shown a document that he identified to be a copy of the subpoena that his investigator at the time, Chuck Neal, personally served upon Chyneca on July 8, 1999. Referring to the subpoena, he stated that Chyneca was served at 362 Workman Street in Rock Hill, South Carolina, and that the subpoena was issued to "Chyneca Dixon a/k/a Tawanda Burris." The subpoena was entered into evidence as Respondent's Exhibit 1.

Mr. Thompson testified that he personally met with Ms. Dixon on July 14, 1999, after she was subpoenaed, and that he took notes during their meeting. He testified that at the meeting, he and Chyneca talked about what her testimony would be in this particular case, because the State was going to call her as a witness to testify against the Applicant if the case went to trial.

Mr. Thompson was shown a copy of his notes that he took during his meeting with Chyneca on July 14, 1999. He identified them as a fair and accurate copy of his original notes and confirmed that the notes were written in his handwriting. He testified that the notes from his meeting with Chyneca indicate that she was interviewed in the Solicitor's Office conference room, that it is a large room with a table and chairs, and that he and his investigator were the only people present during the meeting.

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Mr. Thompson further testified that Chyneca told them about the night of the murder. He testified that Chyenca told him on the night of the murder, when the Applicant came back with the other boys, "everyone was hyped up," but that the Applicant did not say anything at first. He stated that Chyneca told him the Applicant had a look on his face that she could not explain, and that when she and the Applicant went in the back bedroom he told her "I killed someone" but "I don't know who."

Mr. Thompson testified that as he and Chyneca continued to talk, he asked her about any coercion when she gave her statements to law enforcement. He testified that she described her interview with law enforcement as "the officers laying a guilt trip on her" by talking about things "like the fact that someone was killed," and that she "wouldn't want this to happen to [her] family," but that she did not describe it to him as coercion. Mr. Thompson's notes from his July 14, 1999 meeting with Chyneca were then admitted into evidence as Respondent's Exhibit 2. Mr. Thompson further testified that it was his understanding if the case went to trial, Chyneca would testify.

Mr. D'Agostino, the Applicant's defense counsel, testified that he has been practicing law since 1992. He testified that he could not swear under oath that he or his investigator spoke with Chyneca Dixon, but that based on his recollection of the case and his reading of the transcript from the Jackson vs. Denno hearing, he felt confident that he or one of his investigators spoke to Chyneca. Defense counsel identified a document presented by PCR counsel that indicated his investigator billed him for serving Chyneca with a subpoena on July 14, 1999. He testified that his investigator billed him for three hours of work and for the twenty five (25) miles he traveled to serve her with the subpoena. The investigator's bill was admitted into the record as

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Applicant's Exhibit 1.

Defense counsel testified that he made several motions to suppress statements and evidence, and that the issues about the voluntariness of Chyneca Dixon's statements were thoroughly explored during the Jackson vs. Denno hearing, but that Judge Hayes ruled against him on all of them. He stated that if he had called Chyneca Dixon to testify at the Jackson vs. Denno hearing, her testimony would have had no impact on the outcome of hearing. Defense counsel further testified that he vigorously cross-examined Captain Charles Cabiness regarding the circumstances surrounding Chyneca's statements to law enforcement.

Defense counsel testified that all three of the Applicant's co-defendants pled guilty on the same day, and that they all agreed to testify against the Applicant at trial. He also testified that he could not have put the Applicant on the stand if the case proceeded to trial because the Applicant confessed to him that "he did it." He further stated that he hired a psychologist to interview the Applicant, and as a result of the psychologist's findings, a mental deficiency defense was never an option.

Counsel testified that he could not put Chyneca on the stand, because her testimony would not have helped the Applicant. Counsel stated that because the Fourth and Fifth Amendment rights that were allegedly violated when she gave her statements to law enforcement were not the Applicant's rights to assert, her testimony would not have helped the defense. He also testified that the Applicant chose to plead guilty that day, after his three co-defendants pled guilty and agreed to testify against him, and after all of the statements made to law enforcement were ruled admissible. Defense counsel testified the Applicant chose to plead guilty, in light of the evidence against him, because he realized by doing so he had a chance of getting out of jail

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before he died. Finally, counsel testified that in his opinion, the Applicant would have been found guilty had he proceeded to trial, which made pleading guilty the best option for the Applicant, and that was his opinion regardless of any testimony Chyneca could have ever given, particularly because the Applicant said he did it.

First, this Court finds that the proffered testimony and evidence admitted during this PCR hearing have no real significance to the Applicant's case. This Court finds that Geraldine Dixon's testimony is not credible. She previously gave a sworn statement that directly contradicted her testimony given under oath at the PCR hearing. One of her statements that she gave under oath must necessarily be false. Regardless, this Court finds that Geraldine Dixon's testimony is irrelevant and immaterial to anything related to the Applicant's case.

Secondly, to the extent the Applicant relies upon an allegation of newly discovered evidence to show good cause for permitting him to pursue this successive application for post-conviction relief, this Court finds that the Applicant failed to make the requisite showing that the matter constitutes newly discovered evidence. There was no new evidence presented in this case that was not available to the Applicant through his prior applications where the allegations could have been fully explored.

Third, with regard to Chyenca Dixon's testimony, this Court heard her testimony about how she was treated by law enforcement when she gave her statements, and notes its concern about making sure the justice system is fair to everyone, including victims. Nevertheless, this Court also finds that Chyneca Dixon was available to the Applicant during the time he filed his prior PCR applications and state and federal habeas corpus actions. Chyneca Dixon testified at the hearing under oath that no one ever contacted her about testifying at trial, or about anything related to this

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case. This Court finds her testimony to be false, particularly in light of Solicitor Thompson's testimony. The Solicitor subpoenaed Chyneca Dixon for trial. Chyenca Dixon also came to the Solicitor's Office to give information to Solicitor Thompson, and she was prepared to testify at trial. The subpoena and Solicitor's Thompson's notes from the meeting with Chyneca Dixon were admitted as part of the record and testified to by the Solicitor. The Applicant was not misled as to the availability of Chyneca Dixon or as to the circumstances under which her statement was obtained.

Fourth, this Court finds that the Applicant's allegation regarding the palm print is not material or relevant. The Applicant has presented no evidence showing how this evidence is material to the Applicant's guilt or innocence, particularly in light of the Applicant's decision to plead guilty.

Finally, this Court finds that defense counsel's testimony is credible. According to Mr. D'Agostino, the Applicant pled guilty because all three of his co-defendants gave statements admitting their guilt, pled guilty, and agreed to testify against him. At the Jackson vs. Denno hearing, the court ruled the Applicant's statements would be admissible at trial. The Applicant had knowledge of all of this evidence against him at the time he pled guilty. Notably, Chyneca Dixon's statements, whether obtained through coercion, intimidation, or otherwise, were not self-incriminating and did not identify the Applicant as the shooter, although she later told Solicitor Thompson that the Applicant admitted to her that he shot someone. Therefore, any coercion or intimidation that may have accompanied Chyneca Dixon's statements to law enforcement was not a significant factor in the Applicant's decision to plead guilty.

Mr. D'Agostino testified that his investigator served a subpoena on Chyneca Dixon regarding

the trial, and thus he had no trouble finding her. Chyneca Dixon was certainly available and has been available, and the Applicant has failed to show any reason why he could not have called Chyneca Dixon as a witness at his prior PCR hearings.

Therefore, this Court finds that the current application for post-conviction relief must be summarily dismissed, first, because it is successive to the Applicant's prior applications for post-conviction relief and other action challenging the conviction and sentence. 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 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.

Successive applications are disfavored, especially when the grounds raised could have been raised in the initial application; Tilley v. State, 334 S.C. 24, 432 S.E.2d 689 (1999); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991), and the burden is on the 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. at 448, 409 S.E.2d at 392; Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). The prohibition against successive actions includes federal habeas corpus petitions or "any other proceeding taken to secure relief." Id.

An Applicant requesting a new trial based on after discovered evidence must establish that the evidence:

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> (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. State v. Mercer, 381 S.C. 149, 672 S.E.2d (2009); State v Spann, 334 S.C. 618, 513 S.E.2d 98 (1999); Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); State v. Kelly, 285 S.C. 373, 329 S.E.2d 442 (1985).

This Court finds that the Applicant has already presented this newly discovered evidence claim that Chyneca Dixon's statement to law enforcement was given without her mother present as a result of coercion and threats by law enforcement. The Applicant has also already raised the allegation that the palm print lifted from the victim's car does not identify him as the shooter. The Applicant continues to repeatedly pursue these claims which long ago ceased to constitute newly discovered evidence within the definition of the term and which have been decided adversely to him in previous actions. No item of evidence has been discovered since those earlier proceedings that could not have been discovered at the time of the Applicant's first PCR action. Under the rules governing state post-conviction relief actions, the Applicant is foreclosed from relitigating this claim that has been decided previously. Tilley, v. State, 334 S.C. 24, 432 S.E.2d 689 (1999); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1992).

Therefore, this Court finds the Applicant has not provided sufficient reason why he should be able to litigate the newly discovered evidence claim or any of the other allegations presented in this third application for post-conviction relief. The application for post-conviction relief must be dismissed because it is improperly successive to the prior applications or actions and is barred by S.C. Code Ann. §17-27-90.

This Court finds that this application for post-conviction relief must also be summarily

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dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10, et. seq.

S.C. Code Ann. §17-27-45(A) (2003) 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.

Also, S.C. Code 17-27-45 (C) (2003) provides:

> 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.

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 he challenges in this Application in July 1999. The Supreme Court's decision was filed, after the Applicant's unsuccessful appeal. The remittitur was issued on January 9, 2001. The Applicant was therefore required to file his application before January 9, 2002. This Application was filed on January 9, 2009 and amended on May 19, 2009, which is more than seven years after the expiration of the statutory filing period.

Moreover and to the extent the Applicant contends that newly discovered evidence should permit him to pursue this untimely post-conviction relief action, this Court finds that S.C. Code Ann. §17-27-45(C) requires that all newly discovered evidence claims be raised within one year after the actual date of discovery of the facts giving rise to the claim by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. This Court finds that,

based upon the record before it, the Applicant was aware of and has pursued the basis for this claim beginning in July 1999. This Court finds, alternatively, that upon the exercise of due diligence, the Applicant could have ascertained the facts well in excess of one year prior to filing this current application. He has not presented an item of new evidence and has not established that he could not have ascertained the matter in a timely manner. This Court finds that newly discovered evidence has not been timely asserted in this current application for post-conviction relief, and that the allegation provides no basis to permit the applicant to pursue the current action.

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) 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 successiveness, and for failure to file within the time mandated by the Post Conviction Procedure Act. This Court also finds that there is no newly discovered in this case.

This Court further finds that the Applicant has had ample opportunity to present his case. The Applicant has already litigated or had the opportunity to litigate all the claims he presents in this application. The Applicant continues to raise the same groundless claims by repeated collateral attacks on his conviction. The public interest in finality of judgments requires that litigation must eventually come to an end. As a result and pursuant to this Order, the Applicant is prohibited from filing another post-conviction relief application alleging any ground raised in this application, any grounds raised in previous applications, or any allegations that could have been raised previously.

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CONCLUSION

Based on the foregoing, this Court finds and concludes that the application for post-conviction relief must be summarily dismissed because it was filed beyond the applicable statute of limitations, and because it is an improper successive action. Furthermore, the Applicant's allegations and testimony in support of are not newly discovered evidence. Accordingly, the application is dismissed with prejudice.

This Court advises the parties that in order to secure the appropriate appellate review, notice of appeal must be served and filed within thirty (30) days after receipt by counsel of notice of entry of this order. See Rules 203 and 243 of the South Carolina Appellate Court Rules. This Court notes that post-conviction relief counsel must advise an applicant of the right to seek appellate review of a post-conviction relief order. State v. Bray, 366 S.C. 137, 620 S.E.2d 743 (2005). Also, pursuant to Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on an applicant's behalf.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief must be dismissed with prejudice;

2. The Applicant is prohibited from filing any future application for post-conviction relief that raises the same grounds raised in this action, any grounds raised in a prior action, or any allegations the Applicant could have raised; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 4th day of January, 2010 ~~2009~~.

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LEE S. ALFORD
Presiding Circuit Judge
Sixteenth Judicial Circuit

York, South Carolina

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