

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Orangeburg County

DeAndrea G. Benjamin, Circuit Court Judge

RECEIVED

JUN - 7 2013

S.C. Supreme Court

LEVON MINTZ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212935

S U P P L E M E N T A L A P P E N D I X

WANDA H. CARTER
Deputy Chief Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

MEGAN HARRIGAN
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Lavon Mintz, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Orangeburg County
James C. Williams, Trial Judge
Perry M. Buckner, Post-Conviction Relief Judge

Memorandum Opinion No. 2010-MO-026
Submitted October 20, 2010 – Filed October 25, 2010

DISMISSED

~~Appellate Defender Katherine H. Hudgins, South Carolina
Commission on Indigent Defense, Division of Appellate Defense, of
Columbia, for Petitioner.~~

Attorney General Henry Dargan McMaster, Chief Deputy Attorney
General John W. McIntosh, Assistant Deputy Attorney General
Salley W. Elliott, and Assistant Attorney General Mary S. Williams,
all of Columbia, for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari from the denial of his application for post-conviction relief (PCR).

The petition is denied as to petitioner's Question 2. However, because there is sufficient evidence to support the PCR judge's finding that petitioner did not knowingly and intelligently waive his right to a direct appeal, we grant the petition for a writ of certiorari on petitioner's Question 1, dispense with further briefing, and proceed with a review of the direct appeal issue pursuant to *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986).

Petitioner's appeal is dismissed, after review pursuant to *Anders v. California*, 386 U.S. 738 (1967). Counsel's motion to be relieved is granted.

DISMISSED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) April 20, 2005 (50) fifty years

(b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty Jury trial

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Supreme Court

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Dismissed

ii. _____

iii. _____

(c) the date of each such result:

i. October 25, 2010

ii. _____

iii. _____

(d) if known, state any other pertinent information related to (a) and (b)

results:

N/A

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective Assistance of Appellant Counsel

(b) 14th Amendment violation of Due-Process of law

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10): (see Memorandum of law attached)

(a) Appellant counsel failed to raise on belated direct appeal that the

(b) judge erred in allowing the prosecutor to make an indirect comment

(c) on defendant's right to remain silent and put the state to its burden of proof.

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? _____

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____

(d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Post conviction Relief

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. Orangeburg County / Court of Common Pleas

ii. _____

iii. _____

iv. _____

v. _____

vi. _____

(c) the disposition thereof:

i. denied in part / Granted a belated direct appeal Under White's State

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. Sept. 3rd, 2008

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

ii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) _____
- (b) _____
- (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
Yes

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. Glen Walters, Esquire
P.O. Box 1091, Orangeburg SC. 29115
 - ii. Robert Hood Esquire Strom Law Firm
2110 N. Beltline Blvd Columbia S.C. 29204
 - iii. Kathrine Hudgins Appellant defender
P.O. Box 11589 Columbia S.C. 29211
- (b) the proceedings at which you were represented by an attorney:
 - i. Trial/sentencing
 - ii. Post Conviction
 - iii. Appeal from post conviction / belated direct appeal

ARGUMENT

Appellant counsel was ineffective for failing to raise on belated direct appeal that the judge erred in allowing the prosecutor to make an indirect comment on defendant's right to remain silent and put the state to its burden of proof.

2007 NOV 24 P 12:37
FREDERICK S. CLARK
CLERK OF COURT
COURT HOUSE
5, SC

During the course of the states closing argument he made the following comments in reference to Cotina Brooks testimony; Remember on cross-examination Mr. Walters hammered her about discovery, and not getting this and not getting a statement. Then you find out on redirect her statement is on tape. Then guess who had that all along? The defense has it. they did not want you to know that. It's on tape. (trial trns. pg. 289 ln 6-12)

A timely objection was made (tr. trns. pg. 289 ln 12-13). The objection was made on the ground that it was a violation of defendant's sixth amendment right and (5) fifth amendment right to remain silent (tr. trns. pg 319 ln 22-25 & 320 ln 1-8). Defense counsel stated that any inference, any fact that's put before this court is in dispute and we don't have to come forward and refute anything (tr. trns. pg. 320 ln 6-8).

the trial judge overruled the objection. The judge erred and appellant counsel was ineffective for failing to raise this issue.

In State v. Johnson, 293 S.C., 360 S.E.2d 317 (1987) "the courts concluded that it is improper for the state to refer to a defendant's exercise of a constitutional right." "Right to plead not guilty and put the state to its burden of proof," (right to remain silent). Although indirect the comment is constitutionally impermissible. State v. Hawkins 359 S.E.2d 10. For example when a defendant invokes the fifth amendment, the prosecutor cannot proffer the accused as evidence of guilt Griffin v. California 380 U.S. 609, 85 S.Ct 1229, 14 L.Ed2d 106 (1965). Likewise, this court has held that comments upon an accused decision not to testify and plead not guilty are egregious error State v. Cockerham, 365 S.E.2d 23.

In this case the witness Cotina Brooks by her own admission on re-examination testified that she "wrote" a statement and gave it to Det. Rivers a statement other than the one on tape (tr. trns pg 185 ln 1-25 p. 186 ln 1-25, p. 187 ln 1-25, p. 188 ln 1-25). Det. Rivers testified that he did not receive a written statement (tr. trns pg. 226 ln 21 - p. 227 ln 1-2). The tape statement was never the statement in dispute. This is clearly a credibility issue for the jury to decide.

Applicant contends that the solicitors closing argument was an indirect reference to applicants silence at trial and right to put the state to its burden of proof. Any inference or that's put before the court is in dispute and the defense does not have to come forward to rebut or refute anything. The defense has it, they did not want you to know that, shifts the burden of proof from the state to the defense and it infers that by the defense remaining silent he was intentionally misleading the jury and had something to hide. By the judge overruling the objection with instructions not to consider those comments during their deliberation, the jury was allowed to deliberate on an issue in dispute and weigh the fact that the defense did not refute it and was misleading the jury in its cross-examination. And given the fact that this was an eye-witness and credibility case these comment were prejudicial because it refers to the credibility of Estina Brooks, who testified that she seen the defendant pull a gun and Det. Rivers who testified that he took her statement. There is a reasonable probability that the outcome of applicants direct appeal would have been different because had appellants counsel raised this issue applicant would have gotten relief on his belated direct appeal.

Conclusion

Based on the above argument, the Applicant's sentence and conviction should be reversed and remanded for a new trial.

Respectfully Submitted

This 23 day of Nov 2010

Levon Mintz
Levon Mintz # 303362
Applicant

Certificate of Service

I, Levon Mintz, do hereby swear under the penalty of perjury that I have mailed the original copy of this Post conviction Application and Memorandum of Law in support to the Clerk of Court for Orangeburg County, Winnifa B. Clark P.O. Box 0000, Orangeburg, S.C. 29116-9000 This 23 ~~day of~~ Nov 2010.

2010 NOV 24 P 12:37
ED FOR RECORD
WINNIFA B. CLARK
CLERK OF COURT
ORANGEBURG, SC

Levon Mintz
Levon Mintz # 303362
Lieber Corr Inst.
P.O. Box 205
Ridgeville, S.C. 29472

Sworn To And Subscribed Before Me
This 23rd Day of November 2010

Leudiana Bryant
Notary Public

May 26, 2020
My Commission Expires

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Levon Mintz #303362, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Levon G. Mintz
Applicant

SWORN or affirmed to and subscribed before me this
23rd day of November, 2010.

Judieann Bryant
Notary Public

My Commission Expires: May 26, 2020

2010 NOV 24 P 12:37
RECORD
CLERK OF COURT

19. State clearly the relief you seek in filing this application:
Vacate sentence and convict/or reverse and remand for New Trial
20. Are you now under sentence from any other court that you have not challenged?
No

STATE OF SOUTH CAROLINA)
 County of Dorchester)

FILED FOR RECORD
 WINNIE D. CLARK
 CLERK OF COURT
 2010 NOV 24 P 12:30
 VERIFICATION

I, Levon Mintz # 303362 being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Levon S. Mintz

Subscribed and sworn to before me this 23rd day of November, 2010.
Ludiean Buyant
 My Commission Expires: May 26, 2020

STATE OF SOUTH CAROLINA
COUNTY OF Orangeburg
Levon Mintz #303362
Plaintiff(s)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION COVERSHEET
2010 - CP - 38 - 01698

vs.
State of South Carolina
Defendant(s)

(Please Print)
Submitted By: Levon Mintz #303362
Address: Pichee Cove East
P.O. Box 205 Bridgeville S.C. 29472

SC Bar #: _____
Telephone #: _____
Fax #: _____
Other: _____
E-mail: _____

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint
- NON-JURY TRIAL demanded in complaint
- This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|--|--|---|
| <ul style="list-style-type: none"> <input type="checkbox"/> Contracts <input type="checkbox"/> Constructions (100) <input type="checkbox"/> Debt Collection (110) <input type="checkbox"/> Employment (120) <input type="checkbox"/> General (130) <input type="checkbox"/> Breach of Contract (140) <input type="checkbox"/> Other (199) | <ul style="list-style-type: none"> Torts - Professional Malpractice <input type="checkbox"/> Dental Malpractice (200) <input type="checkbox"/> Legal Malpractice (210) <input type="checkbox"/> Medical Malpractice (220) <input type="checkbox"/> Notices File Med Mal (230) <input type="checkbox"/> Other (299) | <ul style="list-style-type: none"> Torts - Personal Injury <input type="checkbox"/> Assault/Slander/Libel (300) <input type="checkbox"/> Conversion (310) <input type="checkbox"/> Motor Vehicle Accident (320) <input type="checkbox"/> Premises Liability (330) <input type="checkbox"/> Products Liability (340) <input type="checkbox"/> Personal Injury (350) <input type="checkbox"/> Wrongful Death (360) <input type="checkbox"/> Other (399) | <ul style="list-style-type: none"> Real Property <input type="checkbox"/> Claim & Delivery (400) <input type="checkbox"/> Condemnation (410) <input type="checkbox"/> Foreclosure (420) <input type="checkbox"/> Mechanic's Lien (430) <input type="checkbox"/> Partition (440) <input type="checkbox"/> Possession (450) <input type="checkbox"/> Building Code Violation (460) <input type="checkbox"/> Other (499) |
| <ul style="list-style-type: none"> Inmate Petitions <input checked="" type="checkbox"/> PCR (500) <input type="checkbox"/> Sexual Predator (510) <input type="checkbox"/> Mandamus (520) <input type="checkbox"/> Habeas Corpus (530) <input type="checkbox"/> Other (599) | <ul style="list-style-type: none"> Judgments/Settlements <input type="checkbox"/> Death Settlement (700) <input type="checkbox"/> Foreign Judgment (710) <input type="checkbox"/> Magistrate's Judgment (720) <input type="checkbox"/> Minor Settlement (730) <input type="checkbox"/> Transcript Judgment (740) <input type="checkbox"/> Lis Pendens (750) <input type="checkbox"/> Other (799) | <ul style="list-style-type: none"> Administrative Law/Relief <input type="checkbox"/> Reinstate Driver's License (800) <input type="checkbox"/> Judicial Review (810) <input type="checkbox"/> Relief (820) <input type="checkbox"/> Permanent Injunction (830) <input type="checkbox"/> Forfeiture (840) <input type="checkbox"/> Other (899) | <ul style="list-style-type: none"> Appeals <input type="checkbox"/> Arbitration (900) <input type="checkbox"/> Magistrate-Civil (910) <input type="checkbox"/> Magistrate-Criminal (920) <input type="checkbox"/> Municipal (930) <input type="checkbox"/> Probate Court (940) <input type="checkbox"/> SCDOT (950) <input type="checkbox"/> Worker's Comp (960) <input type="checkbox"/> Zoning Board (970) <input type="checkbox"/> Administrative Law Judge (980) <input type="checkbox"/> Public Service Commission (990) <input type="checkbox"/> Employment Security Comm (991) <input type="checkbox"/> Other (999) |
| <ul style="list-style-type: none"> Special/Complex/Other <input type="checkbox"/> Environmental (600) <input type="checkbox"/> Automobiles Acc. (610) <input type="checkbox"/> Medical (620) <input type="checkbox"/> Other (699) <input type="checkbox"/> Pharmaceuticals (630) <input type="checkbox"/> Unfair Trade Practices (640) <input type="checkbox"/> Out-of State Depositions (650) | | | |

Submitting Party Signature: Luzel S. Mintz

Date: 2/9/2011

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et seq.

STATE OF SOUTH CAROLINA
In The Court Of Common Pleas

Case No: 2010-CP-38-01698

Levon Mintz,

Applicant

v.

State of South Carolina
Marr Wilson, ATTORNEY GENERAL

Amendment to Post Conviction
Relief Application Pursuant to
Rule 15(a) S.C.R. and §17-27-90
of the S.C. Code of laws

This 9 day of Feb. 2011

Respectfully Submitted,

Levon S. Mintz
Levon Mintz #303362
Lieber Law Inst.
P.O. Box 205
Ridgeway S.C. 29472

FILED TO A.M. 11

State Of South Carolina
County Of Orangeburg

Levon Mintz # 303362

Applicant

v.

State of South Carolina

Defendant

In The Court of Common
Pleas, Case No: 2010-CP-38-0169

Notice of Amendment to
Post Conviction Application

FILED FEB 10 A 10 11

You will please take notice that now comes
Levon Mintz # 303362, and moves this Honorable Court
to amend his P.C.R. application pursuant to § 17-27-90.
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 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.

Applicant relies on this statute as a basis for this amendment to his application and is prepared to show this court that this ground for relief was amended and raised in his first Post Conviction Relief application however was not raised adequately throughout his P.C.R. Proceedings. Applicant contends that this is not newly discovered evidence or a different ground for relief but the same issue, however it was raised inadequately and the only recourse legislative gave for a ground that was raised inadequately in the original supplemental or amended application is through §17-27-90 of the Post Conviction Relief act and is a basis for a subsequent application. Applicant further contends as follows:

1. Counsel was ineffective for agreeing to and participating in an unconstitutional stipulation that allowed the trial judge to read the contents of the pathologist report to the jury, depriving the applicant of his 14th amendment right to due process and a fair trial and his 6th amendment right to confrontation and effective assistance of counsel.
2. Counsel was ineffective for failing to object to the obvious hearsay statement by Det. Rivers concerning the flight evidence. Depriving applicant of his 14th amendment

right to a fair trial, Due process and 6th amendment
right to confrontation and effective assistance of counsel.

Based on the foregoing, the applicant request a
hearing on each claim asserted in his P.C.R. application
and this amendment.

Respectfully Submitted,

Levon S. Mintz
Levon Mintz #303362
Lieber Com. Inst
P.O. Box 205
Ridgeville S.C. 29472

This 9 day of Feb. 2011

Certificate of Service

I certify that I, the undersigned, do cause to be mailed, the foregoing amendment to the P.C.R. application to: Winnie B. Clark, Clerk of Court for filing addressed at P.O. Box 9000 Orangeburg, S.C. 29116 and all counsel of threecord, the Attorney Generals office for the Defendant addressed at P.O. Box 11549 Columbia S.C. 29211 this 9th of Feb. 2011.

NOTARIZED AND SIGNED BEFORE ME
 THIS 9th DAY OF February
 2011
Luthecia Bryant
 NOTARY PUBLIC
 STATE OF SOUTH CAROLINA
 MY COMMISSION EXPIRES May 26, 2020

Levon Mintz
 # 303362
 Lieber Law Inst
 P.O. Box 205
 Ridgeville S.C. 29472

STATE OF SOUTH CAROLINA)
 COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS

Lavon Mintz, 303362,)

2010-CP-38-1698

Applicant,)

v.)

**RETURN AND MOTION TO
 DISMISS**

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 24, 2010. In its Return, Respondent requested that the application be summarily dismissed.

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Orangeburg County. The Applicant was indicted at the May 2003 term of the Orangeburg County Grand Jury for Murder (2003-GS-38-0887). He was represented by Glenn Walters, Esquire. On April 19, 2005, the Applicant proceeded to a jury trial before the Honorable James C. Williams Jr. On April 20, 2005, the jury found Applicant guilty, and Applicant was sentenced to fifty (50) years imprisonment. The Applicant did not appeal his conviction or sentence.

Applicant filed a PCR application on September 30, 2005 (2005-CP-38-01023). In his application, Applicant set forth the following grounds for relief:

1. Ineffective assistance of counsel.
 - a. "Failing to object to defective murder indictment."
 - b. "Failing to object to sentence that was handed down."

2. Trial counsel failed to file an appeal.
3. Denial of Due Process.

The State filed its Return on May 17, 2006. An evidentiary hearing was convened on August 6, 2008, at which Applicant was present and represented by counsel. In a written order dated September 3, 2008 and filed September 15, 2008, the Honorable Perry M. Buckner, III, denied and dismissed the application and granted a White v. State appeal. The Applicant filed a Motion to Alter or Amend Under Rule 59(e) on September 24, 2008. The State filed a Return to Motion for Reconsideration on October 3, 2008. In a written order dated October 6, 2008, Judge Buckner denied and dismissed the motion. A Notice of Appeal was filed. Following the submission of petitions, the writ of certiorari was dismissed. Mintz v. State, Op. No. 10-MO-026 (S.C. Sup. Ct. filed October 25, 2010). The Remittitur was sent on November 10, 2010.

II.

In his current application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Appellant Counsel.
 - a. "Failed to raise on belated direct appeal that the judge erred in allowing the prosecutor to make an indirect comment on defendants right to remain silent and put the state to its burden of proof."
2. "14th Amendment Violation of Due-Process of law."

In an Amendment, Applicant set forth the following additional ground:

1. Ineffective Assistance of Counsel.
 - a. "Agreeing to and participating in an unconstitutional stipulation that allowed the trial judge to read the contents of the Pathologist report to the jury, depriving the applicant of his 14th amendment right to due process and a fair trial and his 6th amendment right to confrontation and effective assistance of counsel."
 - b. "Failing to object to the obvious hearsay statement by Det. Rivers concerning the flight evidence."

For the purpose of this Return, the Respondent incorporates the Clerk of Court records, the South Carolina Department of Corrections' records and the prior PCR records by reference. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

The Court should summarily dismiss the current Application because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id., 305 S.C. at 450, 409 S.E.2d at 394. If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, 274 S.C. 243, 262 S.E.2d 735 (1980).

The Applicant could have raised the new grounds for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications. Accordingly, Respondent moves for a summary dismissal of the application because it is successive.

IV.

The Respondent submits that this Application for Post-Conviction Relief should also be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. S.C. Code Ann. §17-27-45(a) 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.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense(s) he challenges in this Application on April 20, 2005. This Application was filed on November 24, 2010, four (4) years beyond the time the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, the Respondent requests that this Court summarily

dismiss the application for post conviction relief for failure to file within the time mandated by the Post Conviction Procedure Act.

V.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VI.

WHEREFORE, Respondent moves to summarily dismiss the application because it is successive to the Applicant's prior PCR action and was filed after the statute of limitations had expired.

Respectfully submitted,

ALAN WILSON
Attorney General

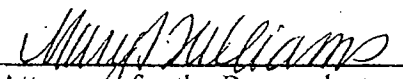
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Assistant Deputy Attorney General

MARY S. WILLIAMS
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for the Respondents

Columbia, South Carolina

May 17, 20 11

