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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Oconee County

Honorable R. Scott Sprouse, Circuit Court Judge

JOHN FITZGERALD OGLESBY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001798

APPENDIX

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

KELLY OPPENHEIMER
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Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

FORM 5

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE	)	
JOHN OGLESBY #194567 Full name and prison number (if any) of Applicant.	)	
v.	)	APPLICATION FOR
State of South Carolina	)	POST-CONVICTION RELIEF

2014-CP-37-399

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210

2. Name and location of Court which imposed sentence Oconee County Court of General Sessions, 205 W. Main Street, Walhalla, SC 29691

3. Name(s) of co-defendant(s) (if any) _____

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

   (a) 92-GS-37-889 - Murder

   (b) 92-GS-37-838 - CSC Minor, 2nd

   (c) _____

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

(a) May 4, 1994

(b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty x

(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. Court of Appeals

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. September 6, 1994

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. _____

ii. _____

iii. _____

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

(a) _____

(b) _____

(c) _____

4.

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

(a) Newly Discovered Evidence

(b) _____

(c) _____

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

(a) On February 19, 2014 Applicant received a letter from Probation and Parole indicating that he was not eligible for parole because he was a subsequent violent offender. The Applicant had been informed and believed that he was eligible for parole since his incarcertation in 1993.

(b) _____

(c) _____

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? Y

(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. PCR Application dated November 17, 1994 Appealed PCR Decision - denied December 10, 1998

ii. PCR Application dated November 24, 2003 - Conditional Order of Dismissal February 6, 2006

iii. _____

iv. _____

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

i. Oconee County Court of Common Pleas, 205 W. Main St., Walhalla, SC 29691

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. Dismissed

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. December 17, 1996

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:

i. _____

ii. _____

iii. _____

(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) Newly Discovered Evidence

(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? _____

(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. R. Daniel Day, Esq. P.O. Box 1587, Seneca, SC 29679

ii. Charles Hughes, Esq., P.O. Box 2003 Seneca, SC 29679

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Trial and Sentencing

ii. PCR

iii. _____

19. State clearly the relief you seek in filing this application:

_____

20. Are you now under sentence from any other court that you have not challenged?

no

STATE OF SOUTH CAROLINA)
)
County of Richland)

VERIFICATION

2014-CP-31-399

I, John Oglesby, 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.

Mr. John F Ogl

SWORN to and subscribed before me this 9th day of July, 2014.

Susan H. Frye (L.S.)
Notary Public

My Commission Expires: Commission Expires Oct. 5, 2018

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2014 JUL 17 P 12:33

Revised 3/2003

8

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

2014-CP-37-399

I, John Oglesby, 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.

Mr. John F Ogle
Applicant

SWORN or affirmed to and subscribed before me this
9th day of July, 2014.

Susan N. Ivey
Notary Public

My Commission Expires: ...sion Expires ...ch 5, 2018

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2014 JUL 17 P 12:33

Revised 3/2003

STATE OF SOUTH CAROLINA COUNTY OF OCONEE John Oglesby, S.C.D.C. No. 194567, Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS OF THE TENTH JUDICIAL CIRCUIT 2014-CP-37-399 **RETURN AND MOTION TO DISMISS**

In response to the post-conviction relief (PCR) application filed by John Oglesby (Applicant) on July 17, 2014, the Respondent would show this Court:

I.

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Oconee County. Applicant was indicted at the November 1992 term of the Oconee County Grand Jury for Murder (92-GS-37-889). Applicant proceeded with a jury trial from May 2, 1994 to May 4, 1994, at the Oconee County Courthouse in front of the Honorable Don S. Rushing. He was represented by R. Daniel Day, Esquire. Applicant was found guilty of murder and sentenced to life imprisonment.

Applicant timely filed a Notice of Appeal on May 19, 1994, but the appeal was never perfected. On August 18, 1994, the South Carolina Supreme Court dismissed Applicant's Appeal. On September 6, 1994, the Supreme Court issued a Remittitur.

1994-CP-37-00434

On November 17, 1994, Applicant filed an application seeking post-conviction relief alleging:

1. "Ineffective assistance of counsel. My case was poorly investigated and the evidence was circumstantial. Counsel failed to object."
2. "Denial of right to appeal. Counsel failed to perfect the appeal after timely filing of the notice. He failed to file the case and exceptions and the appeal was dismissed."

In response, the State filed a return on March 14, 1995. On October 25, 1996, Applicant filed an Amended Application pursuing the following grounds for relief:

1. Counsel was ineffective for failing to request the trial court to charge lesser charges of voluntary manslaughter and accessory after the fact to Murder.
2. Counsel was ineffective for failing to request an alibi charge.
3. Counsel was ineffective for failing to preserve his objection to Michael Wright being declared a hostile witness.
4. Counsel was ineffective for failing to object to the testimony of Kali Lee on the grounds of hearsay.
5. Counsel was ineffective for failing to object when the solicitor stated during his closing that the Applicant had taken Russell Wright to see the victim's body two times.
6. Counsel was ineffective for failing to renew his directed verdict motion.
7. Counsel was ineffective for failing to call exculpatory witnesses.
8. Applicant did not knowingly and voluntarily waive his right to direct appeal.

An evidentiary hearing into the matter was convened on October 29, 1996, at the Anderson County Courthouse. Petitioner was present at the hearing and was represented by Charles Hughes, Esquire. Petitioner and his trial counsel testified at the hearing. On December 17, 1996, the Honorable Alexander S. Macaulay issued an order denying the application for PCR but finding that Applicant did not knowingly and voluntarily waive his right to direct appeal and was entitled to review under White v. State, 263 SC 100, 208 S.E.2d 35 (1974) and Davis v. State, 288 SC 290, 342 S.E.2d 60 (1986).

On December 29, 1996, Applicant served a Notice of Appeal from Judge Macaulay's Order. On September 15, 1997, a Petition for Writ of Certiorari was submitted raising five Questions Presented:

1. Did the post-conviction relief judge err in granting petitioner's request for a belated direct appeal in this case?
2. Was trial counsel ineffective in failing to request manslaughter jury charges in the case?
3. Was trial counsel ineffective in failing to request a jury charge on accessory after the fact to a felony in the case?
4. Was trial counsel ineffective in failing to call favorable witnesses in the case?
5. Was trial counsel ineffective in failing to request a jury charge on the defense of alibi in the case?

On the same date, Applicant also submitted a Brief of Appellant Pursuant to White v. State, in which he raised the following ground for relief:

1. The lower court erred in declaring state's witness Michael Wright a hostile witness in the case.

On December 12, 1997, Respondent submitted its Return to Applicant's Petition for Writ of Certiorari and to the Brief of Appellant Pursuant to White v. State.

In June 18, 1998 order, the South Carolina Supreme Court granted certiorari on Question 1, proceeded with a review of the direct appeal issue, and affirmed Applicant's conviction pursuant to Rule 220(b)(1) SCACR. The South Carolina Supreme Court also granted certiorari on Question 4 and ordered the parties to serve and file briefs. On July 20, 1998, Applicant filed his Brief alleging "trial counsel was ineffective in failing to call favorable witnesses in the case."

The South Carolina Supreme Court, in an unpublished order filed on December 10, 1998, dismissed the appeal finding that certiorari was improvidently granted. During the collateral appellate proceedings before the South Carolina Supreme Court, Applicant was represented by Wanda H. Carter.

2:99-3857-10AJ

On November 11, 1999, Applicant filed a petition to the United States District Court seeking federal habeas relief under 28 U.S.C. § 2254. Applicant raised the following issues:

1. Conviction was obtained through improper use of codefendant's testimony after being declared a hostile witness
2. Conviction was obtained because my attorney did not request an alibi charge
3. Conviction was obtained because my favorable witness was not called.
4. Conviction obtained because my attorney did not request any lesser included charges. My co-defendant was convicted of Manslaughter. Because my attorney did not request a lesser-included charge, the jury convicted me of Murder.
5. Conviction was obtained by denial of effective assistance of counsel because my attorney did not renew his directed verdict motion at the close of the case. Malice, as an element in this case, was very weak. My attorney did not argue this in a directed verdict motion at the close of the trial. I think the state failed to prove malice and I think my attorney should have asked the judge to dismiss the case.

On January 13, 2000, Respondent filed its Motion for Summary Judgment. On January 27, 2000, Applicant through his counsel Richard Warder, Esquire, filed an opposition to the motion. The Honorable Robert Carr, United States Magistrate Judge, issued a Report and Recommendation on February 23, 2000, recommending that Respondent's motion for summary judgment be granted and Applicant's petition be summarily dismissed without an evidentiary hearing. No objections were filed in response to the Report and Recommendation. On May 16, 2000, the Honorable Matthew J. Perry, Jr. issued an Order adopting the Report and Recommendation and granting Respondent's Motion for Summary Judgment.

2003-CP-37-1194

On November 24, 2003, Applicant filed an application seeking post-conviction relief alleging:

1. Trial Court Lacked Subject Matter Jurisdiction
    a. "The Applicant contends that the Trial Court lacked Subject Matter Jurisdiction to try and convict applicant, as to where the indictment returned by the Grand Jury was invalid, for the reason, the Courts has ruled that the Solicitor can not be the sole witness before the Grand Jury, in order for the Grand Jury to return a valid indictment. See State v. Anderson, 439, S.E.2d 835."
2. The Trial Court Lacked Jurisdiction To Impose Sentence
    a. "The Applicant contend that the combined effect of S.C. Code § Ann. 22-3-540 (1962), S.C. Code § Ann. 23-3-710 (1962), and that 1993 statute S.C. Code Ann. § 17-30-50 (Supp. 1993), was to deprive the Court of General Sessions of jurisdiction to try him. See State v. Funderburk, 259 S.C. 256, 191 S.E.2d 520 (1972)."

In response, Respondent filed its return on June 21, 2004, and amended its return on January 20, 2006. A Conditional Order of Dismissal was issued on February 6, 2006, and a Final Order was issued on November 6, 2006. However, due to the fact that the Final Order was issued prior to Applicant's receipt of the Conditional Order, the court filed an Order Granting Motion to Vacate Conditional and Final Orders of Dismissal on December 29, 2006. An evidentiary hearing was convened on February 26, 2007, at the Oconee County Courthouse before the Honorable Alexander S. Macaulay. Applicant was present at the hearing and was represented by Karen Ballenger, Esquire. On March 20, 2007, an Order of Dismissal was issued, denying the application and dismissing it with prejudice.

On April 4, 2007, Applicant, through his counsel, filed a Notice of Appeal to the South Carolina Court of Appeals. On April 27, 2007, the South Carolina Supreme Court issued an Order of Dismissal, dismissing the appeal because Applicant failed to provide a written explanation as to why the lower court determination was improper. The Remittitur was issued on May 15, 2007.

II.

In his *third* and current application for post-conviction relief, Applicant alleges that he is being held unlawfully for the following reasons:

1. Newly Discovered Evidence
   a. "On February 19, 2014 Applicant received a letter from Probation and Parole indicating that he was not eligible for parole because he was a subsequent violent offender. The Applicant had been informed and believed that he was eligible for parole since his incarceration in 1993."

For the purposes of this Return, the Respondent incorporates the Oconee County Clerk of Court records and Applicant's prior PCR records. Respondent reserves the right to amend this return upon receipt of any relevant materials.

III.

This 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." [Emphasis in original]. 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).

In this case, Applicant could have raised the new ground for relief (newly discovered evidence) in either of his prior post-conviction relief applications. 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.

Respondent also submits this Application for Post-Conviction Relief should also be dismissed for failing to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to –160 (Supp. 2003). 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). Applicant was convicted of murder on May 4, 1994. He filed a notice of appeal, failed to perfect the appeal, and a Remittitur was issued on September 6, 1994. Applicant was therefore required to file his application on or before **September 6, 1995.** This Application was filed on July 17, 2014, which was over eighteen (18) years after 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 dismiss the application for post-conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act.

V.

Finally, Applicant's claim of newly discovered evidence fails to make a prima facie showing that he is in actual possession of such evidence or how that evidence likely would have changed the outcome at trial. A newly discovered evidence claim can be timely raised within one year of actual discovery or within one year of when, by the exercise of due diligence, such evidence could have been ascertained. S.C. Code Ann. § 17-27-45(c) (2003).

Applicant claims his newly discovered evidence a letter notifying him that he is not eligible for parole because the offense at issue in this PCR, Applicant's 1994 murder conviction, made him a subsequent violent offender. Applicant made any showing as to why such alleged evidence was not readily discoverable at the time of his trial or his previous PCR action. Before the Court will hold an evidentiary hearing, Applicant must make a prima facie showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant failed to make a prima facie showing that he is entitled to relief based on the information set forth and, therefore, is not entitled to an evidentiary hearing in the matter.

VI.

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

VII.

WHEREFORE, Respondent moves to summarily dismiss the application because it is successive to the Applicant's prior PCR action, was filed after the statute of limitations had expired, and without merit.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SUZANNE H. WHITE
Senior Assistant Deputy Attorney General

JUSTIN J. HUNTER
Staff Attorney

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

By: 
Attorneys for the Respondent

Columbia, South Carolina
Feb. 2, 2015

STATE OF SOUTH CAROLINA COUNTY OF OCONEE JOHN OGLESBY, #194567, Applicant, vs STATE OF SOUTH CAROLINA, Respondent.	IN THE COURT OF COMMON PLEAS 2014-CP-37-399 AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return and Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

John Oglesby, #194567
Broad River Correctional Institution
4460 Broad River Road
Columbia, SC 29210

DATED this 2nd day of February, 2015.

Caroline Collins, Legal Assistant
For Respondent

State of South Carolina
County of Oconee

In the Court of Common Pleas

John Fitzgerald Oglesby,
Applicant,
-vs-
The State of South Carolina,
Respondent.

2014-CP-37-0399
June 6, 2016
Transcript of Record

B E F O R E:

The Honorable R. Scott Sprouse, Judge

A P P E A R A N C E S:

Johanna Valenzuela, Esquire
Attorney for The State

Tommy Arthur Thomas, Esquire
Attorney for Applicant

Diane L. Marcengill, RPR, CRR, CBC
Circuit Court Reporter

I N D E X

Witness	Direct	Cross	Redirect	Recross
None offered.				

E x h i b i t s

Marked	Description	I.D.	Admitted
	None offered.		

(WHEREUPON, court convened with all parties present and the following proceedings were had commencing at 10:38 a.m.)

MS. VALENZUELA: May it please the court, Your Honor. This is the case of John Oglesby vs. the State, case number 2014-CP-37-399.

Before going into the procedural history, Your Honor, this is actually a motions hearing and a motions hearing only, not an evidentiary hearing. There is some necessary procedural history in that, because this is excessive, outside the statute of limitations, the state has moved under a return motion to dismiss to have this case dismissed on the pleadings, and a conditional order of dismissal was submitted to a judge. The conditional order of dismissal has been signed in this case.

Mr. Thomas, who is representing the applicant, Tommy Thomas, who's present in the courtroom representing the applicant, filed a return to that conditional order of dismissal and asked for a hearing to be done -- an evidentiary hearing to be done in the case, even though it's outside of the statute of limitations.

Mr. Thomas will be able to outline his arguments, but in simple form, he's arguing that because his

client was not alerted to the fact that he would not get parole after 20 years until just recently, that he should be able to bring a PCR and so has asked for an evidentiary hearing. The state's position, and we can be heard on that after Mr. Thomas presents his motion, is that an evidentiary hearing should not be granted in this case and we should move on to a final order of dismissal.

MR. THOMAS: Your Honor, if it please the court, Your Honor, my name is Tommy Thomas. I'm here for John Oglesby. These cases are pretty -- are fairly straightforward. I've been practicing in kind of the field of probation and parole for quite some time, and I'm starting to see a number of these.

In essence, what happens is that you have got an individual who has a sentence or has a charge that's going to carry a life sentence; they are offered a plea. This situation is kind of reversed, but generally they are offered a plea, and they accept this plea, and they plead to a life sentence on a murder charge or something with the expectation of parole eligibility in 20 years, and for a short period of time, a 30-year parole eligibility.

What happens is that counsel doesn't advise them, and probably in many instances doesn't even know that

there is a statute out there for subsequent violent offenders, and the statute basically says if you have a prior violent crime, which then produces two violent crimes, you're ineligible for parole.

Now, this doesn't have a big impact on someone who may get a ten or 15 or five or whatever because they are going to get out. They're going to max out. Where it becomes extremely punitive, I think, is in a situation of life because what happens is that life sentence with parole eligibility, like in my client's case of 20 years, becomes a pure life sentence. Mr. Oglesby will not leave the Department of Corrections until he dies. And that's not what he had intended.

I don't think that's what the court intended at the time that he entered -- well, actually, he didn't enter into a plea. This one is reversed. He was offered a plea, Your Honor, of 30 years suspended upon -- correct me if I'm wrong -- five years, an active sentence, and five years probation. He turned it down because he felt like at the time and still believes that he wasn't guilty of the crime, and that if he took it to trial, that there was a significant possibility that he could win.

What happened is that he then was found guilty by

jury trial and sentenced to life. He had expectation of life with a 20-year parole eligibility, and he begins to serve his time. What happens with SCDC is that they do their classification and they do a printout, and it shows the inmate, what his eligibilities are. In this case, he was always shown a parole eligibility date.

Now, that's not completely corrections' fault because what happens is that corrections' computers generate a parole eligibility date, and then about anywhere from five to six, seven months prior to that date, that file is actually kicked to probation and parole. That agency then reviews the case to determine exactly when his parole eligibility date is and to start processing it for parole.

What happens and what is happening in a number of cases including with Mr. Oglesby is that upon review, they determine that Mr. Oglesby had a prior violent crime in 1993, and he had a murder conviction in 1994. So he now is a subsequent violent offender and ineligible for parole. He then gets a letter, which, Your Honor, should be in the file. If not, I have a copy of it here. I will be more than happy, Your Honor, to hand it up.

THE COURT: That would be quicker rather than me

trying to find it in the file.

MR. THOMAS: Yes, sir.

And what happens is that he is notified by a different agency, probation and parole, that he is ineligible for parole. So he goes 20 years with the expectation of parole and at the last minute determines and finds out that he is going to die in the Department of Corrections for a decision that he made in regards as to whether or not to accept the state's plea or whether or not to take this case to trial.

Your Honor, the only other -- we don't have anything in the transcript where he's advised by the court, which would simplify it and say, "Mr. Oglesby, you're eligible for parole," or, "Mr. Oglesby, you're not eligible for parole."

The only thing -- one of the things that we do have that seems to support his claim, which was a supplement to the return to conditional order of dismissal -- I will also hand this copy up -- which is he was on probation at the time, Your Honor, and, basically, what they did was just terminate his probation. And they said because he is serving a life sentence, subject will be incarcerated for a lengthy period of time and then be released to parole until date of death. And that's correct because if you're

serving a life sentence and you make parole, you serve that parole period until you die. You're always on parole.

Your Honor, if I may.

THE COURT: Yes.

(Document handed up to the court.)

MR. THOMAS: And it's the handwritten part on that document, Your Honor.

What I think is patently unfair, and the argument by the state in these cases is that counsel has no duty to advise a client about a collateral matter and with parole being a collateral matter. Their argument at this motion hearing is that this application is excessive, statute of limitations, that has to be filed within one year of date of conviction, and that it is not newly discovered.

Your Honor, I think everything can be discovered. Anything can be discovered. But, in this case, how was he going to discover it? He is -- he relies upon what SCDC is telling him, that he has a parole eligibility date. He serves his time. He believes that he has a parole eligibility date of 20 years, and it is only upon receipt of a letter from probation and parole that he learns, no, I don't, and his application for postconviction relief is filed within one year of the

date of discovering that he is ineligible for parole.

What we would ask, Your Honor, is that this matter be taken to an evidentiary hearing. I believe this is an extremely important issue because it really boils down to a matter of dying in prison or the possibility of having a parole eligibility date, and we -- and I believe that it is patently unfair for counsel not to advise someone who is trying to decide whether or not to take a murder trial to plea or to trial, that the consequences of a trial is life without parole.

THE COURT: Thank you.

All right. Ms. Valenzuela.

MS. VALENZUELA: Yes, Your Honor. May I approach?

THE COURT: Yes, ma'am.

MS. VALENZUELA: I'll get to what I just handed up in just a moment, but, Your Honor, just for the history, and I know you have the return and motion to dismiss in front of you, but the applicant before you filed his first application back in 1995.

He was then able to take an appeal under *White* and have his case reviewed at that point. And then in 1999 he filed a federal habeas. And then in 2003 he filed another PCR application and then filed a notice of appeal to the court of appeals in 2007. And then this is now his third PCR application, not counting the

federal habeas action that he took. In addition, it is out of time.

What I handed up to the court is the case of *Furtick*, F-u-r-t-i-c-k, *vs. DPPPS*, and it's 352 S.C. 594. Now, I turn your attention to the footnote on the very back, and it's highlighted for the court and for opposing counsel.

Footnote five makes a point of referencing cases that say, "The inmate raised his ex post facto challenge by bringing an action of PCR. After *Al-Shabazz*, this avenue is no longer available. The Court held that PCR is a proper avenue for relief only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence as authorized by," and it cites the statute. And then it goes on to say, "For this reason, it's especially important that respondent receive some form of administrative review of the DPPPS' permanent denial of parole eligibility."

So as an initial matter, the Supreme Court of South Carolina has already spoken and reinforced its ruling from *Al-Shabazz* that this is not the appropriate forum for this issue to be heard. I understand that counsel is trying to form it as that trial counsel misadvised his client and trying to get it that way,

but the court has been very clear that it's the administrative law court that needs to hear it.

As a second matter, the case before you is actually on point because it goes into an analysis of whether this is an ex post facto punishment. So understanding that Mr. Thomas feels that this is unjust and that this is something that needs to be looked at by the court, an issue that really needs to be raised, what you're holding in your hand indicates that the state supreme court has already looked at this situation, a person in similar circumstances found out that his prior violent crime was going to prevent him from getting parole eligibility.

But then turning to the specific facts here, it was a trial. So this was not a plea. This was not a situation of a person saying, "Okay, I'm going to plead and accept responsibility." This person elected to go to trial, and at trial he could have gotten the full range of sentencing. He knew that before he went into that trial.

Additionally, he turned down a plea offer that would have netted him only five years in prison. So he was very serious about taking his chances in court, and so it gets even more and more ludicrous to think that if only we had an evidentiary hearing and we were able

to recall what trial counsel told him at that time about the specific instance, then maybe we would have a different result.

So, although I understand Mr. Thomas' position and I understand that he wants to do what's best for his client, this isn't the right forum, and the facts of this particular case enhance the reason why it shouldn't be heard here so we would ask you to deny his motion so that we can proceed forward with the final order of dismissal.

MR. THOMAS: Your Honor, may I address that?

THE COURT: Yes, sir.

MR. THOMAS: I'll take the first one first.

All of the filings that we allude to -- and, again, he's filed postconviction; he's done a habeas; he's done this; he's done that. All of that, I think, is very common to see in someone who is serving a life sentence, but the distinction is that I don't think we should penalize him for filing those actions when at the time he didn't know that he was ineligible for parole. It was only after he received the letter from probation and parole that he filed this postconviction relief action. So I think that action is timely.

Second is that it should be filed in the administrative law court. Well, I've been down that

road before. What happens is that under *Al-Shabazz*, the administrative law court is entitled to review mistakes in sentence calculations from the Department of Corrections. What happens is that you file it; you get that letter from probation and parole; you've got a year. You file, you do the grievance situation step one, step two through corrections. You go to the administrative law court, and what they're going to tell you is that this is not a sentence miscalculation. This sentence is calculated correctly; therefore, there is nothing that we can do for you to assist you under *Al-Shabazz*. Well, if you're lucky, you get that decision within the one year. If you're unlucky, you get that decision after the one year has expired, and then you are untimely for filing the postconviction relief for PCR. So it is a dangerous step to do that, and I really believe that the administrative law court does not have the authority to come back and change that sentence because it's correct.

THE COURT: How do you answer her argument that he went to trial instead of pleading guilty?

MR. THOMAS: Well, I think -- and, again, I think there is a distinction between a ten-year sentence and a life sentence. If you -- first off, we can't -- we don't penalize someone for going to trial. And even if

they're charged with murder, then they have to make a determination, you know, "I didn't commit this crime. I'm willing to go and take my chances at trial and because I believe that I'm innocent." And I believe that's what happened here.

But I think that if you're going to enter into a plea or enter even into a decision to try a case, you've got to be informed. You've got to know. And it is the attorney's obligation to tell you what you're looking at.

The way I advise my clients on trials and pleas is that nobody knows. We don't have a crystal ball so we can't tell them, yes, you're going to be convicted, or, no, you're not. But what are my chances of being convicted? And if I'm convicted, what's going to happen to me?

Well, in this case, what he didn't know was that the consequences of taking this case to trial was pure life, life without parole and a sentence until you die. He didn't know that. And I think that it's extremely important -- I think you have to have that information to be able to make a decision as to whether or not you're going to accept the state's offer for a plea or whether or not you're going to run the risk at trial. Even though you contend that you're not guilty of that

crime, there's always a possibility that they can convict you of it, even if you are not guilty of it. And I think that has to go into calculating what risk that you're willing to take. So I truly believe that in these cases of life without parole, that they have to be advised.

Now, I'll be honest with the court, and the attorney general knows this, is that if you look at *Furtick* and some of the other cases, they start talking about collateral, that advising parole is a collateral issue. Your attorney had no obligation to advise you of parole consequences. But what I would ask this court to do is allow this case to go to an evidentiary hearing, allow us to present the evidence; let the court decide whether or not this is -- this issue is of such importance that it is and it rises to the point of ineffective assistance of counsel.

If the court disagrees and believes that it is still a collateral issue, then let us appeal it. Let us take the case to the supreme court because I think that this issue is now affecting -- I have two or three of these. And it's now affecting these gentlemen, and it's going to affect Mr. Oglesby until he dies. And I believe that the court, in all fairness, would have to say that it is an issue that should have been advised.

THE COURT: All right. Thank you, Mr. Thomas.

MR. THOMAS: Yes, sir.

THE COURT: All right. I'm going to take this under advisement. I want to read the case law and the materials submitted. I'll let counsel know.

MR. THOMAS: Thank you so much, Your Honor.

MS. VALENZUELA: Your Honor, may I point out one brief thing? I know opposing counsel may want to rebut to that, but I just point out that *Furtick* came out in 2003, so under the newly discovered evidence standard including a reasonable search, I would argue that Mr. Oglesby has been represented by counsel at multiple points reviewing PCRs and habeas, and this case came out well over a year ago -- 13 years ago, in fact. So I would just point that out for the consideration of the statute of limitations purposes.

MR. THOMAS: My only return to that would be there was no reasonable search. SCDC was showing he had parole eligibility; he believed that he had parole eligibility. Problem didn't occur, didn't pop up and exist until such time as he received a letter from probation and parole.

THE COURT: Thank you.

(WHEREUPON, proceedings concluded at 10:57 a.m.)

END OF REQUESTED TRANSCRIPT OF RECORD

Certificate of Reporter

I, Diane L. Marcengill, Official Court Reporter for the Tenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of a portion of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Oconee County, South Carolina, on the 6th day of June 2016.

This transcript may contain quoted material. Such material is reproduced as read by the speaker.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

March 6, 2018

Diane L. Marcengill, RPR, CRR, CBC
Circuit Court Reporter

Certificate of Reporter

I, Diane L. Marcengill, Official Court Reporter for the Tenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of a portion of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Oconee County, South Carolina, on the 6th day of June 2016.

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March 6, 2018

Diane L. Marcengill, RPR, CRR, CBC
Circuit Court Reporter

State of South Carolina
County of Oconee

In the Court of Common Pleas

John Fitzgerald Oglesby,
Applicant,
-vs-
State of South Carolina,
Respondent.

2014-CP-37-0399
March 1, 2017
Transcript of Record

B E F O R E:

The Honorable R. Scott Sprouse, Judge

A P P E A R A N C E S:

Tommy Thomas, Esquire
Attorney for Applicant

Lindsey McCallister, Esquire
S.C. Attorney General's Office
Attorney for Respondent

Diane L. Marcengill, RPR, CRR
Circuit Court Reporter

I N D E X

E x h i b i t s

(WHEREUPON, court convened with all parties present and the following proceedings were had commencing at 9:57 a.m.)

MS. McCALLISTER: This is John Oglesby versus the State of South Carolina, 2014-CP-37-399. We're here today on an application for postconviction relief that Mr. Oglesby filed on July 14, 2014. This is his third application for postconviction relief.

This case has a long history, Your Honor. I'm going to try to go through it and get this right. He is currently in custody of the South Carolina Department of Corrections. He was indicted at the October 1992 term for murder. He was represented on those charges by Daniel Day.

He eventually proceeded to trial in front of the Honorable Don Rushing and was convicted of murder on May 4, 1994. He filed an appeal, which was ultimately dismissed and then filed an initial PCR application, which also was appealed up to the South Carolina Supreme Court, being rejected in December of 1998.

He then filed a federal habeas corpus action in 1999, which was denied in May of 2000. He filed a second PCR on November 24, 2003. That second PCR was also ultimately appealed and rejected by the South Carolina Supreme Court on May 15, 2007.

This is his third application. It was filed on July 14, 2014. The state made its return, making a motion to dismiss, and a conditional order was signed. Respondent then sent in a reply to that conditional order.

There was a hearing held on whether he should be entitled to an evidentiary hearing, and I believe Your Honor signed that order granting him this evidentiary hearing in June of 2016, that hearing.

And we are here today on the only issue of ineffective assistance of counsel and some questions surrounding his parole eligibility. He is present in the courtroom represented by Mr. Tommy Thomas.

THE COURT: Thank you.

Mr. Thomas.

MR. THOMAS: That's correct, Your Honor. And the way it got here was basically after discovered evidence, he was given a letter by probation and parole saying that he was ineligible for parole because he was a subsequent violent offender.

There is a statute -- and I have copies of all this for the court. There is a statute that says if you have a second violent offense, second or more, then you are ineligible for parole.

What happened is that he spent basically 20 years

in the Department of Corrections waiting for a parole hearing. Once it was reviewed by probation and parole, it was determined that he was a subsequent violent offender, and he was notified. He timely filed a postconviction relief action based upon that notice from probation and parole. That's kind of why we're here.

And it is the issue of whether or not counsel had an obligation to advise the defendant that he would be a subsequent violent offender; therefore, his exposure at trial was a pure life sentence, life without parole.

And also -- we'll get to that -- in the transcript, he was offered a fairly -- or actually a very good plea, which he turned down, and we would present that he was prejudiced by not being provided with that information.

THE COURT: All right. Call your first witness.

MR. THOMAS: Your Honor, if it please the court, we call Mr. Oglesby to the stand.

JOHN OGLESBY,

BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

MR. THOMAS: Your Honor, please the court.

THE COURT: Yes, sir.

DIRECT EXAMINATION

BY MR. THOMAS:

Q Mr. Oglesby, would you please state your name for the record.
A John Oglesby.
Q And, John, where are you being housed?
A Broad River Correctional Institution.
Q And how long have you been in the Department of Corrections?
A Almost 25 years.
Q All right, sir. And you're serving a life sentence?
A Yes, sir.
Q On a murder charge?
A Yes, sir.
Q All right, sir. And you went to trial on that charge?
A Yes, I did.
Q Do you remember what year that was?
A 1994.
Q 1994?
A Uh-huh.
Q Okay. John, were you offered a plea?
A Yes, sir.
Q And let me show you this.
MR. THOMAS: Your Honor, may I approach?
THE COURT: Yes, sir.

MR. THOMAS: Your Honor, just for the court's information, I'm referencing pages 480, -81, and -82 of the trial transcript.

Q John, I'm going to let you look at those, if you want to read those to yourself. I just have some questions about it.

A I'm finished.

Q John, you were offered a plea bargain?

A Yes, sir.

Q And that plea bargain was a reduction of the manslaughter charge -- I mean of the murder charge to manslaughter?

A Yes.

Q And what was the offer in regards to the time that you would receive?

A 30 years suspended upon six years and five probation.

Q And that would be a recommendation from the state?

A I think it was. Yes, it was.

Q And also you were going to be allowed to plea under an Alford plea, *North Carolina vs. Alford*?

A Right. Yes.

Q And you understand that that plea would have allowed you to plea to this without having to admit guilt?

A Yes.
Q Okay. And did you turn that plea down?
A Yes, sir, I did.
Q Okay. At the time that you turned that plea down, did you know that if you were convicted at trial, that you were going to receive a life-without-parole sentence?
A No, sir, I didn't.
Q Okay. What was your understanding about parole eligibility or what was going to happen to you if you were convicted?
A That after the 20 years of service to the Department of Corrections, I would be eligible for parole.
Q All right, sir. And when you went into the Department of Corrections, you have a caseworker that you speak to?
A Yes, sir.
Q And that caseworker provides information to you about your incarceration?
A Yes.
Q And did that caseworker advise you about what your parole eligibility was going to be?
MS. McCALLISTER: Your Honor, I would object. That's hearsay, whatever someone else advised him.

MR. THOMAS: I'll rephrase.

THE COURT: Rephrase the question.

BY MR. THOMAS:

Q After meeting with your caseworker, what was your understanding, Mr. Oglesby, about your parole eligibility?

A Each year we have a classification hearing, and when you go to your hearing, you get to ask questions pertaining to your charge and parole or probation eligibility.

Q Right.

A And each year, when I went up, my parole date was February 25, 2013.

Q Okay. And so that was, in fact, what your expectation was in regards to your parole?

A Yes, sir.

Q And did -- now, you have had -- in your record, you've got a prior conviction; is that correct?

A True. Yes, sir.

Q And that prior conviction is classified as a violent crime?

A Yes.

Q Now, did -- and when you were convicted of this murder charge, you were on probation for that prior crime?

A Yes.
Q So you have a revocation of that?
A Right.
Q All right. And were you served a citation or a warrant for that?
A Yes, sir.
Q Okay.
MR. THOMAS: Your Honor, if I can beg the court's indulgence just for a second.
Your Honor, may I approach?
THE COURT: Yes, sir.
BY MR. THOMAS:
Q Mr. Oglesby, I'm going to show you this document and see if you can identify that.
A This is the revocation of my parole that I received.
Q Okay. And did it give a reason as to why there was probable cause for the revocation?
A Yes, it did.
Q And what was that reason?
A May I read it?
Q Yes, sir.
A Okay. It says, "Receiving a life sentence on 5/4/94 in Oconee general sessions court for the offense of murder, therefore, there is probable cause that

Mr. Oglesby will be incarcerated for a lengthy period of time and then released to parole until day of death."

Q All right. Do you want to hand that back to me.

MR. THOMAS: Your Honor. If I may, I'd like to move this as Applicant's 1. And I have a copy for the attorney general, Your Honor.

MS. McCALLISTER: I have no objection.

THE COURT: All right. Applicant's Number 1 would be admitted without objection.

(WHEREUPON, Applicant's Exhibit Number 1 was admitted into evidence.)

MR. THOMAS: Thank you, Your Honor.

BY MR. THOMAS:

Q What was your understanding as you went into the DOC and while you were in the Department of Corrections regarding your parole eligibility?

A That after I did 20 years' service in the Department of Corrections, I would be going up for parole in accordance with that letter from the Department of Probation and Parole Services, that I would make parole and be on parole until the day of my death.

Q And did you, in fact, receive some notification otherwise about your parole?

A No, sir, not until 21 years later.
Q All right, sir.
MR. THOMAS: Your Honor, may I approach?
THE COURT: Yes, sir.
BY MR. THOMAS:
Q John, I want to show you this letter and ask you if you recognize that.
A Yes, sir, I do.
Q All right, sir. And what is that?
A That's the letter I received from the Department of Probation, Parole and Pardon Services in 2014.
Q And this was -- what did they tell you?
A They -- the letter states that because I am a subsequent violent offender, that I will not and I shall not be granted parole.
Q All right, sir. And did you know that you were a subsequent violent offender?
A No, sir, I did not.
Q And in that letter, it says that you had -- that the murder charge made your second violent crime?
A Yes.
Q And it made -- what it makes reference to, a prior violent crime?
A Yes, it does.
Q Okay. And is that the same crime that we were

just talking about?
A Yes.
Q And that's the one that you received the probation revocation on?
A Yes.
Q Okay.
MR. THOMAS: Your Honor, if it please the court, I would like to introduce it as Applicant's 2, please.
THE COURT: Any objection?
MS. McCALLISTER: No, Your Honor.
THE COURT: Applicant's Number 2 would be admitted without objection.
(WHEREUPON, Applicant's Exhibit Number 2 was admitted into evidence.)
MR. THOMAS: And, Your Honor, if it please the court, just administratively, I have a copy of that statute in regards to subsequent violent offender. I would like to hand up a copy of that, if I could, to the court.
BY MR. THOMAS:
Q Now, John, you were represented by who?
A Daniel Day.
Q All right, sir. And was he retained or he was appointed to represent you?
A He was retained.

Q He was retained, okay. And what all did you do in preparation of your case?
A Well, me, much of nothing. He handled everything.
Q Okay. All right. And you relied upon him, his advice?
A Yeah. Solely.
Q Solely. You're not an attorney?
A No, I'm not.
Q And in regards to this crime, did you discuss at all about parole eligibility?
A No, we didn't. No, sir.
Q You did not?
A No, sir.
Q So he didn't tell you anything about parole?
A The only mention of parole was after the jury found me guilty, and he and the solicitor conferred with the judge, and he come back to the table and told me that I was serving a 20-year life sentence with eligibility of parole.
Q Okay. And this was not on the record. This was off the record after the trial?
A Yes, sir.
Q Okay. Now, you made a decision to take this case to trial?
A Yes, sir, I did.

Q And in making that decision to take this case to trial, did you know that if you were going to be convicted, that you would be a pure life sentence?
A No, sir, I didn't.
Q Under your circumstances now, will you ever leave the Department of Corrections?
A No, sir, I will not.
Q You won't leave until you die?
A Until I die.
Q All right, sir. And you did not understand that at the time you made the decision to take this case to trial?
A I was never informed of that.
Q Okay.
MR. THOMAS: Your Honor, if I might beg the court's indulgence just for a second.
THE COURT: Yes, sir.
BY MR. THOMAS:
Q John, you were offered a very generous plea offer?
A Yes, sir.
Q In which you would be out now?
A Yes, sir.
Q And you would have served six years active time?
A Yes, sir.
Q Had you known of your exposure in going to trial

that you would be a pure life sentence, would you have accepted that plea offer?

A Yes, sir. Under these circumstances, I would have accepted the plea offer because who wants to spend the rest of their life in prison?

Q Would you have taken the chance, rolled the dice to see whether the jury was going to find you guilty or not guilty, or would you have accepted the plea?

A I would have accepted the plea.

Q Okay. And the reason that you didn't accept the plea was you didn't know?

A I didn't know. Nobody informed me that if I was found guilty, that I would be serving an actual life sentence. Nobody told me anything about that.

Q Okay. And everything that you received or information that you obtained, until you got that letter from probation and parole, was that you were eligible for parole?

A Yes, sir.

MR. THOMAS: Your Honor, I have no further questions.

THE COURT: All right.

Ms. McCallister.

MS. McCALLISTER: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. McCALLISTER:

Q Mr. Oglesby, what is the violent -- what is the second violent crime? The murder conviction that we're here on today is one. What's the other one?

A CSC with a minor second degree.

Q CSC with a minor second degree. And when were you convicted of that crime?

A 1992.

Q 1992?

A No, it was 1993. I remember that.

Q Okay. When -- did the incident happen in 1992?

A The -- yes.

Q And I can show you this again, but this affidavit regarding your -- the revocation of probation for that crime, when did you receive that, do you know? Do you need to look at it again?

A I think it was the same day that I received -- was found guilty of murder.

Q Okay. So it was subsequent to being found guilty to the murder?

A No. It was -- it was after I was found guilty of murder and went back to the county jail. They called me up front, and they had me to sign for that paper.

Q Okay. And then the next letter you received was this February 19, 2014, letter?

A Yeah, over 20 years later.
Q Okay. So those are the only two -- those are the only two letters you have ever received saying anything about your parole eligibility?
A Besides going for classification rehearings, and in the computer itself, it shows your parole date. It shows your max-out date, how much time you got, your charges and everything else. And each time I went up for my classification hearing, I always asked about my parole eligibility, and I was always told that February 25, 2013, I will be going up for parole.
Q Okay. And if I understand your testimony correctly, no one told you that you would be facing an actual life sentence?
A No one told me nothing.
Q So -- and you didn't -- and you were told after your trial and after your conviction, you, allegedly by Mr. Day, that you would get 20 years?
A Mr. Day informed me, after conferring with the solicitor and speaking with the judge, that I will receive a 20-year life sentence with the eligibility of parole.
Q But that conversation occurred after your trial?
A Yeah. We were still in the courtroom.
Q Okay. But the jury's verdict had been announced,

and the judge had sentenced you?
A Yes.
Q Okay.
MS. McCALLISTER: I have nothing further, Your Honor.
THE COURT: Any redirect?
MR. THOMAS: No, Your Honor.
THE COURT: All right. Thank you, Mr. Oglesby. You can step down.
THE WITNESS: All right. Thank you, Your Honor.
THE COURT: Mr. Thomas, call your next witness.
MR. THOMAS: Your Honor, if it please the court -- beg the court's indulgence just for a second.
Your Honor, we'd like to call one further witness, would be Mary Oglesby, please.
Ms. Oglesby.

MARY ELIZABETH OGLESBY,

BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:
MR. THOMAS: Your Honor, please the court.
THE COURT: Yes, sir.

DIRECT EXAMINATION

BY MR. THOMAS:
Q Ms. Oglesby, would you please state your full name for the record.
A Mary Elizabeth Oglesby.

Q Now, Ms. Oglesby, you're related to John?
A Yes.
Q How are you related to him?
A I am his sister.
Q You understand that you're here to tell the truth today?
A Yes.
Q Not here to reward anyone or to try to help him out; you're here to tell the truth?
A Yes.
Q And that's what you intend to do?
A Yes.
Q All right. Now, Ms. Oglesby, were you present in the courtroom when this case was tried?
A Yes.
Q And were you present after the trial concluded?
A Yes.
Q And did you witness any kind of communication, I guess, in the courtroom regarding the parole eligibility?
A Yes.
Q And was that -- that was after the trial?
A Yes, it was.
Q What was your understanding of what happened after the trial?

A After the trial --

MS. McCALLISTER: Your Honor, I would object to the relevance of this. I don't see how what happened after the trial is relevant to what he's arguing here today.

MR. THOMAS: Your Honor, we are just going to put on the record that she was here, and she also witnessed the colloquy.

THE COURT: Lay some foundation for what she heard, not what she understood. I will allow the question.

MR. THOMAS: I just wanted to stay away from a hearsay-type --

THE COURT: Well, she needs personal knowledge of what she's testifying to.

MR. THOMAS: Thank you, Your Honor.

Q Ms. Oglesby, so you were in the courtroom?

A Yes.

Q And did you witness, after the end of the trial, a conversation between his defense counsel, the solicitor, and the judge?

A Yes.

Q Okay. And do you know what that conversation was about?

A What they said or what Daniel said?

Q Well, what did they say? What were they talking about?
A They were talking about his sentencing.
Q And in regards to his sentencing, were they talking about when he would be eligible for parole?
A Yes.
Q And do you remember what they said, what that conversation resulted in about the parole eligibility?
A Daniel Day --

MS. McCALLISTER: Your Honor, objection. If she's going to testify as to what Mr. Day said or what Mr. Oglesby said, I think that's okay, but anyone else is hearsay.

THE COURT: I would sustain the objection as to other parties.

BY MR. THOMAS:
Q Okay. And do you know what Mr. Day said in regards to parole eligibility?
A Yes.
Q And what did he say?
A Daniel Day spoke to the family.
Q Yes, ma'am.
A My mother was living at the time.
Q Yes, ma'am.
A And he told us that he would do 20 years and come

up for parole. And he also stated to my mother that, "I know that's your baby boy."

Q Yes, ma'am. So it was also your understanding that Mr. Oglesby had a 20-year parole eligibility?

A Yes.

Q All right. Thank you.

MR. THOMAS: Your Honor, I have no further questions.

THE COURT: Any cross-examination?

CROSS-EXAMINATION

BY MS. McCALLISTER:

Q Just to be clear, all of these conversations occurred after the trial had finished; is that correct?

A Yes.

Q Okay.

MS. McCALLISTER: Thank you, Your Honor. I have nothing further.

THE COURT: All right. Thank you, Ms. Oglesby. You may step down.

MR. THOMAS: Your Honor, if it please the court, that's the applicant's case.

THE COURT: Okay. All right.

Ms. McCallister.

MS. McCALLISTER: Your Honor, we would call Danny Day to the stand.

R. DANIEL DAY,

BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

MS. McCALLISTER: May it please the court, Your Honor.

THE COURT: Yes, sir -- yes, ma'am.

DIRECT EXAMINATION

BY MS. McCALLISTER:

Q Mr. Day, how long have you been practicing law?

A A little over 38 years.

Q And at the time of this trial in 1994, how long had you been practicing then? Would that be 16 or 17 years?

A 14, 15 years.

Q And how much of that experience at the time of the trial was in criminal law, would you say?

A Criminal law was a significant portion of my practice from the beginning, 1978, when I started practice.

Q And you were retained on this case; is that correct?

A I was.

Q And do you recall this case? You have had a chance to review your file, and are you familiar with the facts of your representation?

A I recall the case very well, but I do not have the

file. When I closed my office in 2008, I think it was 2012 or 2013, somewhere in there, I began disposing of files, and this one was one of the ones that was disposed. They're all gone now.

Q But you recall the representation?

A Yes, I do.

Q Okay. How many times, approximately, would you say you met with Mr. Oglesby before trial?

A Quite a few times. At that time, Suzanne Chapel was working with me in the office while she was in law school, and she also met with Mr. Oglesby and helped put the case together. But we met quite a few times and with his family.

Q And you have heard the testimony about the plea deal that was offered to Mr. Oglesby. Does that comport with your recollection of what he was offered?

A I knew we had an offer, but I had forgotten just really how good it was until I saw the transcript again, but, yes, I remember we negotiated long into that trial. We were still negotiating in the trial.

Q Okay. And do you recall discussing that offer with Mr. Oglesby?

A Oh, yes.

Q And what did you tell him about that offer?

A Each time he said no; he said he was innocent. He

said he did not do that crime. And he did not wish to enter any kind of guilty plea.

Q Even a guilty plea. Did you explain the Alford to him where he wouldn't have to admit guilt?

A Yes. He also said he still was not going to do that.

Q And did you explain to him the sentence he would be facing if he took this case to trial and lost?

A I told him he was facing life.

Q Is it your practice to discuss issues of parole eligibility with your clients?

A I have found that probably 99 percent of people I represent have a good idea of what parole eligibility means, meaning what kind of credits they would get while they are serving their time. But from the time I began practice, I never discussed that because what happens at SCDC determines whether or not you're going to get any kind of parole, what kind of credits you may get, and how long your sentence will actually last. I tell them the same thing the judges tell them, and that is, "You can expect to serve every day of whatever your sentence is. Anything beyond that is not up to me."

Q And to the best of your knowledge, is that the same advice that you gave Mr. Oglesby?

A Yeah. I cannot sit here and tell you that

specifically I said that, but that is my practice to do that so that they would understand what it is. And John, I remember -- I do remember discussing with him what we were facing, and he understood that. That's why we discussed each one of the offers.

Q Did you have any reason to believe that he didn't know what he was doing when he turned down that plea offer?

A No. John is an intelligent man.

Q Do you recall this conversation that allegedly happened after the trial?

A I do not. I know I spoke to the family. I remember John's mother very fondly. She's a wonderful lady, and I talked to her all the time. All during this she would come by my office numerous times and want to talk about John.

Q Okay. So you don't remember whether you would have told him afterwards anything about his eligibility?

A I do not ever remember discussing specifically the 20-year possible eligibility for parole under a life sentence because the laws were changing during that time, and they were getting the truth in sentencing, talking about life meant life, and a lot of discussions about doing away with credit and all that had to do in

the federal system, so I do not remember discussing that after the trial at all.

Q Okay. And did you say you remember discussing with him that life means life?

A Yes.

Q What was your practice in terms of keeping up with the changes in the laws?

A Well, I tried to keep up with any one of the changes, particularly ones that I was affected with. Anything that affected what I did, I tried to keep up with. At that time, like now, I received anything that came out of the legislature, received legislative reports each year, the advance sheets, et cetera. And at that time I was still receiving the law reviews, et cetera, to keep up with the reading, and I did at least two, usually three, criminal law seminars a year.

Q CLE seminars, continuing legal education?

A Yes.

MS. McCALLISTER: May I have just -- beg the court's indulgence, Your Honor.

THE COURT: Yes, ma'am.

MS. McCALLISTER: I have no more questions.

MR. THOMAS: Your Honor, if it please the court.

THE COURT: Yes, sir.

CROSS-EXAMINATION

BY MR. THOMAS:

Q Mr. Day, I think you testified there was a plea offer in this case?

A Yes.

Q All right. And it was a very generous plea offer?

A I think so, yes.

Q Yes, sir. And he would have been pleading to voluntary manslaughter?

A Yes.

Q And you said that you discussed that offer with him?

A Each time, yes.

Q All right. And he said that he was innocent of the crime?

A That's what he said always, yes.

Q But the solicitor was going to allow him to plea under Alford, do an Alford plea?

A Yes.

Q And I think you said that the judges now say in regards to sentencing that, you know, life means life, or if you receive 20 years, you will be expected to serve the 20 years, that they cannot really advise you about parole eligibility. There's nowhere in the transcript that the judge actually said that to Mr. Oglesby, is there?

A Not that I know of, no.
Q And as a matter of fact, is it that that type of information from the court has only recently begun; is it fair to say that?
A Most of them now say it. But Judge Ballenger would usually say that. Any sentence he gave, he usually wanted to make sure, don't think you're going to be getting out any sooner, but that's up to them.
Q Yes, sir. And you don't remember whether or not there was the colloquy afterwards between you and the judge and the solicitor in regards to parole eligibility?
A I do not remember that, no, sir.
Q Okay. And -- but, in fact, he was parole eligible?
A Well, the law was changing back and forth during that time --
MS. McCALLISTER: Your Honor, I'm not sure that he's qualified to say whether he's parole eligible or not. I think that's an issue for SCDC to decide, not for Mr. Day to decide.
THE COURT: I will sustain the objection.
MR. THOMAS: All right. Thank you, Your Honor.
Q And you said that -- I may have missed it. You either said 90 or 99 percent of the people that you

represent have a good idea of what's going to happen to them when they get to SCDC anyway?

A I find most of them were repeat offenders. John was not a repeat offender, not with me.

Q But a lot of times those folks that go in, they have some idea as to whether they're going to be violent or nonviolent or whether they're going to be 85 percent or 65 percent or if they're going to be eligible for parole?

A Yes. Anyone that's a repeat offender, I find I can get better information from them as to how it's going to work than I can get from SCDC.

Q Yes, sir. Do you remember that you didn't advise him or do you just don't remember if you did advise him?

A I don't believe I did, but I do not remember advising him of that at all. And for me to say I did not, I would also have to go the other way; I don't remember not advising him, but I don't think I would have because that's just not the way I would do it. Unless -- in some case you might want to do that --

Q Yes, sir.

A -- if they ask you about it, but I don't like to tell them that, and I don't believe I did in this one because he kept saying he was innocent, and he kept

turning down each offer.

MR. THOMAS: Your Honor, beg the court's indulgence.

Your Honor, I have no further questions.

THE COURT: Any redirect?

MS. McCALLISTER: Just very briefly.

REDIRECT EXAMINATION

BY MS. McCALLISTER:

Q You said you might talk about it if you were asked about it. Do you recall Mr. Oglesby asking you about it?

A No, I don't.

MS. McCALLISTER: Thank you, Your Honor.

THE COURT: Anything further from this witness?

MR. THOMAS: No, Your Honor.

THE COURT: Thank you, Mr. Day. You may step down.

MS. McCALLISTER: That's all from the state, Your Honor.

MR. THOMAS: Your Honor, if it please the court, I've got -- I did just a small pretrial brief, trying to kind of make this a little bit easier, I guess, for all of us. If it please the court, I'd be glad to hand that up and just address it very quickly.

THE COURT: Yes, sir.

I'll allow summation.

MR. THOMAS: Your Honor, may it please the court.

Your Honor, I spent quite a bit of time looking at this case, and I know this is not a good legal argument, you know, you get in a bind and just start saying it's not fair.

I think in this case it is just not fair. And then the way I approached the case was that if I look at it and say this is not fair because what he's got now is when he leaves the Department of Corrections, he will leave in a box, unfortunately. And I don't mean to say that to disparage him, but it's just that is what he's got. That's the consequences of what happened to him.

So I started thinking about, well, if I can't argue it's just not fair, what can I argue? And what we have is a situation where he, by statute, is a subsequent violent offender.

Counsel, we don't know. You know, he says he didn't advise. He may have advised. If he did advise, then the case becomes easy because we say because there is case law that says if you advise and you advise wrong, then that is grounds for ineffective assistance of counsel.

If we take it the other way and say, well, he

didn't advise and he didn't say anything, then this case gets a little more complicated.

What I did is look at it from three different ways, and one is that basically that he was just ineffective for not advising of the subsequent violent offender. He had a plea offer, which was just, in some instances, just amazing. I mean, it was a voluntary manslaughter; he would do six. I don't know if he would have done all of that. He would have been out on probation. He would have been way released before the 24 or 25 years that he served now.

And I looked at his prior crime, and he does have the CSC. It got a little muddy because you start thinking, well, was it a violent crime at the time from back in 1994?

What I was able to see is he pled, and this is all in the brief, under 16-655. And the statute that addresses that as to whether it's violent or not is 16-160, and it does list CSC conduct with a minor first, second, and third, and he pled to a third degree, so I think we would have to assume that probation and parole is correct, and if they're correct, then this murder charge is clearly violent, and he is a subsequent violent offender. That's why the administrative law court or even maybe appealing

probation and parole's decision is not going to go anywhere because they don't have any ability to change the sentence, and it is what it is.

What struck me was that there was a period of eight years. The subsequent violent offender statute went into effect in 1986. And so there was a period of eight years between '86 and this trial in which counsel either knew or should have known, since he was practicing in criminal law, that this statute was out there.

And the thing about the statute is that it's really not open for determination. I mean, it is what it is. And it is very clear. It says that if you are a subsequent -- if you have a second or subsequent violent offense, that you are, in essence, ineligible for parole. If you have got a ten-year sentence or five-year sentence or 20-year sentence, really doesn't matter as much. I mean, what happens is that you're either 65 percent or 85 percent and you max that sentence out. What distinguishes this case from those is that this is a life sentence. And once it went into a life sentence, it went into a pure life sentence.

Now, what led me back to the trying to figure out, do we have to give him notice? Is it required? If you look at the case law, the case law basically has

evolved to say collateral consequences. Parole is a collateral consequence. And if it's a collateral consequence, there's no obligation by defense counsel to advise. I personally disagree with that. I think a client should know what they are getting themselves into before they either accept or reject a plea, but the supreme court has basically said that. So if it's collateral, then you wouldn't have this obligation to advise.

The thing I think that's different in this case is that this notice is more like LWOP. And if you look at the LWOP statute, it says that based upon a second -- two strikes, three strikes, the prosecutor can either elect to proceed for life without parole. And the interesting thing about LWOP and if they're going to proceed or elect to go with life without parole, they have to give you notice.

If you look at that statute, in Subsection 8 of that statute -- and this is all in the pretrial brief -- requires that the state give you notice of LWOP at least ten days prior to trial. Why? I mean, that's what I wasn't able to determine. I would assume so the defendant can be fully informed and advised if they go to trial, what the consequences of that trial is.

Now, why is subsequent violent offender, which is a statutory requirement, different than LWOP? I don't think it is. I think it has the same effect in a life sentence case because what happens is that, in essence, it is an LWOP after the fact. I mean, he was clearly parole eligible but for the statute that says that if he's a subsequent violent offender, he's not parole eligible. So he, in essence, got a life sentence by going to trial.

We take -- a plea has to be knowingly, intelligently, freely and voluntarily entered into. Well, doesn't it have to be the opposite; doesn't it have to be knowingly, intelligently, and freely and voluntarily not entered into if you elect to go to trial? Aren't there some safeguards in going to trial that you'd have to understand what you're getting yourself into, what your chances of conviction are, and are you willing to take those chances and roll that dice.

Now, if the state in this case had not offered a guilty plea, then I think on my part I would have a problem because I would have a prejudice problem, and that's *Strickland* which says has to be doesn't meet the standard of normal practice and, two, that it has to be prejudice. I think there's clearly prejudice in this

case because he was offered a plea. And not only was he offered a plea, he was offered a good plea that was substantially different than what he received.

So what I'm thinking, his first part of this is we don't have to worry about whether there was collateral consequence and whether or not he had a duty to inform. I think he did. If you look at this case in analogy to the LWOP statute, that clearly says that you have to give notice.

Now, the cases that I was able to find in regards to -- if we move on to the second thing about, well, is it a collateral consequence? And the collateral consequences basically come down to whether or not it was going to be a direct result of the sentencing and whether or not it was not open for some sort of speculation.

And there are a couple of cases. One says that direct consequences have a definite, immediate, and largely automatic effect on the range of the defendant's punishment. And if you look at this case, it did. And the collateral consequences is collateral and it is uncertain, are beyond the direct control of the court. I don't think this case, this situation, was uncertain, and I think it was not outside of beyond the direct control of the court. It was going to

happen. And the difference, I think, again, is that it's statutory. The fact that there is a statute that says that he is going to serve life without parole is different than just saying, which all of us know, well, I don't know what's going to happen.

I practice in this area sometimes. I probably have a lot of knowledge about what's going to happen to my client. I actually, even on some pleas, I will call probation and parole or I will call SCDC and say, "What's going to happen to this person?" But it's always sometimes indecisive in there, and I think that's what the court has looked at in the past about collateral consequences, is that nobody knows. We don't know what's going to happen when they get to corrections.

As far as a direct consequence, I think it was. It was going to happen. It's just a matter of time. Unfortunately, the way this works is that SCDC just takes a sentence; they look at it; he's a 20-year life, and it stays in their system until this file is eventually either kicked over by computer or sent to probation and parole to do their pre-parole evaluation of it.

What happens to these gentlemen who have served life sentences is that they wait 20 years, and then

they're notified by a letter from probation and parole that says you're ineligible. You now have a pure life sentence. And that's what strikes me as unfair, and that's when I say that's just not right. But, you know, that's not the best legal argument.

And the third thing is, if it is a collateral consequence, does he still have an obligation to inform? That area is moving a little bit, and I cite a case, federal case, of *Padilla vs. Kentucky*, which is a 2010 case. And the supreme court has backed off of the collateral consequence situation a little.

And what they say is that the fact that someone is going to be deported is not collateral; and that if you're going to be deported, you have an obligation of counsel to tell you that if you enter into this plea, then you're going to set yourself up for deportation by ICE, and that is a consequence, even though it's been considered as a collateral consequence.

What I find interesting is some of their rationale in *Padilla*, and it says that because of -- and after 911, there were changes. Before it may have been not as certain. Maybe more discretionary.

MS. McCALLISTER: Your Honor, I understand he's making his arguments, but cases that came out in 2010 and after 9/11, I'm not sure how they're relevant to a

trial that happened in --

THE COURT: I'll give you an opportunity to respond.

MS. McCALLISTER: Thank you.

MR. THOMAS: This is why it's relevant, Your Honor. The court says that now, because of a tightening of the statutes in regards to deportation, is that it is now virtually a reality, that this is virtually going to happen. And I think what the court did is loosen that collateral consequence exception or rule to include the deportation.

And I think it fits this case. I mean, the argument on that prong is, is that even if it is collateral, he had an obligation to inform, and it flows back into the first argument that if it's collateral, the reason the court said he had the duty to inform is that it's virtually going to happen. And in this case it is by statute, and it was going to happen. He was going to be a subsequent violent offender, and that's why I think, Your Honor, that there was an obligation to inform, and I think that Mr. Oglesby testified that had he known that that was the consequences of this trial, he would have taken the plea. And I thank you for your time, Your Honor.

THE COURT: Thank you, Mr. Thomas.

Ms. McCallister.

MS. McCALLISTER: Thank you, Your Honor.

Your Honor, Mr. Oglesby himself testified that he and Mr. Day did not discuss parole eligibility. And his contention here today is that had he known about that parole eligibility, he would have not proceeded to trial. However, there's case law out there, *Frazier vs. The State of South Carolina*, that says that when counsel, trial counsel in that case, testified that it was her general practice not to advise clients as to parole eligibility, and in that case the court said that because there was no advice given, then he could not have based his decision on any bad advice by counsel. And I think that case is basically exactly what we've got here today.

If Mr. Day didn't give him any advice one way or another, then he was not using that advice to make his decision in terms of taking that plea bargain or going to trial. Mr. Day has testified that he maintained he's innocent; he did not want an Alford plea, even knowing that that meant he did have not to admit guilt. He was going to go to trial. And I think, you know, hindsight is 20/20. I'm sure he wishes that he had taken that plea deal, and, you know, if SCDC incorrectly informed him at some point that he was

parole eligible and then is now saying he's not, I understand how that can be a very hard pill to swallow, but that does not have to do at all with what Mr. Day did in his representation of Mr. Oglesby and has nothing to do with the advice that Mr. Day may have given him.

Your Honor, I had not seen this brief. There is a lot in here, and there was a lot in his summation. I would just respectfully ask that Your Honor give me a chance to read this and submit a response to this in writing.

THE COURT: All right.

MS. McCALLISTER: Thank you.

THE COURT: That's what I'll do. I'll keep the record open ten days and allow you to submit a reply brief, then I'll take the matter under advisement once the material is submitted.

MR. THOMAS: If it please the court, and I apologize to the attorney general. I do have a copy of *Padilla*. I'll be glad to give that to the court.

THE COURT: Anything you would like for me to review.

That would be the order of the court.

(WHEREUPON, proceedings concluded at 10:50 a.m.)

END OF REQUESTED TRANSCRIPT OF RECORD

Certificate of Reporter

I, Diane L. Marcengill, Official Court Reporter for the Tenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of a portion of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Oconee County, South Carolina, on the 1st day of March 2017.

This transcript may contain quoted material. Such material is reproduced as read by the speaker.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

December 6, 2017

Diane L. Marcengill, RPR, CRR
Circuit Court Reporter

Certificate of Reporter

I, Diane L. Marcengill, Official Court Reporter for the Tenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of a portion of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Oconee County, South Carolina, on the 1st day of March 2017.

This transcript may contain quoted material. Such material is reproduced as read by the speaker.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

December 6, 2017

Diane L. Marcengill, RPR, CRR
Circuit Court Reporter

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STATE OF SOUTH CAROLINA

County of Oconee

AFFIDAVIT

Personally appeared before me, Lucy Murr, who first being duly sworn, deposes says that John Oglesby, did within this County and State on the 5 day of May, 19 94, violate certain conditions of release in the following particulars:

DESCRIPTION OF VIOLATION

Receiving a Life sentence on 5-4-94 in Oconee General Session Count for the offense of Murder. Therefore there is probable cause that Mr. Oglesby will be ~~incarcerated for a lengthy period of time and then released to Parole until day~~ of death.

The Affiant states that there is probable cause to believe the defendant named committed the violations set forth and that such probable cause is based on the following facts:

Receiving a Life sentence on 5-4-94 in Oconee General Sessions Court for the offense of Murder. Therefore there is probable cause that Mr. Oglesby will be incarcerated ~~for a lengthy period of time and then released to Parole until Day of Death.~~ Therefore we ask the court to terminate the probation portion of this sentence.

Sworn to and subscribed
before me this 5 day of
May, 19 94.

Lucy Murr
Affiant

Darlys N. Chastain
Signature of Notary Public

My Commission Expires: 2-12-96

EXHIBIT
Applicant's
1

State of South Carolina

Department of Probation, Parole and Pardon Services

NIKKI R. HALEY
Governor

KELA E. THOMAS
Director

2221 DEVINE STREET, SUITE 600
POST OFFICE BOX 50666
COLUMBIA, SOUTH CAROLINA 29250
Telephone: (803) 734-9220
Facsimile: (803) 734-9324

February 19, 2014

John Oglesby, #194567
Broad River Correctional Institution
4344 Broad River Road
Columbia, South Carolina 29210

RE: NON ELIGIBILITY FOR PAROLE

Dear Mr. Oglesby:

It is my duty to inform you that South Carolina law prohibits the Board of Probation, Parole, and Pardon Services from granting you parole on the sentence(s) identified below. Section 24-21-640 states: "[t]he board must not grant parole nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for prior conviction, for violent crimes as defined in Section 16-1-60." Our records indicate that you have been convicted of the following violent crimes:

Violent Crime	Indictment Number	Parolable	Sentence
Murder	92-GS-37-889	No	05/04/1994
CSC, Minor, 2nd	92-GS-37-838		03/22/1993

Please note that this letter is the Department's "final decision" on this matter. You have the right to appeal this final decision by seeking review by an Administrative Law Judge. Furtick v. South Carolina Department of Probation, Parole and Pardon Services, 3525.c. 594, 576 S.E.2d 146 (2003). In order to file such an appeal, you must follow the instructions on the back of the enclosed "Notice of Appeal" form approved by the Administrative Law Court (ALC). You will also be required to comply with ALC Rules of Procedure for special appeals. Failure to follow the ALC instructions or Rules of Procedure will result in forfeiture of your right to challenge the Department's final decision.

Sincerely,

Tommy Evans, Jr.
Assistant General Counsel

EXHIBIT
Applicant's
2
PENGAD 800-631-6989

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE	
John Oglesby #194567,	CASE NO.: 2014-CP-37-399
Applicant,	ORDER
v.	
State of South Carolina,	
Respondent.	

PRESIDING JUDGE:	R. SCOTT SPROUSE
HEARING DATE:	JUNE 6, 2016
APPLICANT'S ATTORNEY:	TOMMY A. THOMAS
ATTORNEY GENERAL:	JOHANNA C. VALENZUELA
COURT REPORTER:	DIANE MARCENGILL

Procedural History and Facts

This matter is before the Court pursuant to the Applicant's request for the Court to vacate a Conditional Order of Dismissal issued by the Honorable Cordell Maddox on March 12, 2015, in which the application was summarily dismissed. The Applicant filed a return to said Order on April 10, 2015, and a supplement to the return on April 22, 2015, resulting in this hearing. The Applicant argues that he is entitled to an evidentiary hearing on the allegations made in the PCR application. The State opposes the relief sought by the Applicant.

This case has a long and tortured history. The Applicant, who currently is in the custody of the South Carolina Department of Corrections, was convicted of murder on May 4, 1994, in General Sessions Court in Oconee County, South Carolina. He was sentenced to life imprisonment by the Honorable Don Rushing. The Applicant was represented by R. Daniel Day,

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Esquire during the trial. The Applicant filed an appeal which was ultimately dismissed. He then filed an initial PCR application which worked its way up to the South Carolina Supreme Court, being rejected in December of 1998. The Applicant then filed a federal habeas corpus action in 1999, which was denied by order of the Honorable Matthew J. Perry, Jr. on May 16, 2000. The Applicant filed a second PCR case in the South Carolina Court of Common Pleas on November 24, 2003. This second PCR ultimately was rejected by the South Carolina Supreme Court on May 15, 2007.

This third PCR application was filed by the Applicant on July 14, 2014. The State filed a Return, seeking a dismissal of the action on the grounds that this new application was successive to previous applications and outside of the Statute of Limitations.

This new application surrounds the Applicant's parole eligibility. The Applicant alleges that he turned down a favorable plea offer based on his belief (and his attorney's belief) that he would be parole eligible should he be convicted. He alleges that his attorney's failure to advise him of his ineligibility for parole materially affected his decision-making process and constituted prejudicial ineffective assistance of counsel. The Applicant alleges that he decided to go to trial because he was informed and believed that he was parole eligible. He alleges that Day "conferred with Solicitor White as to the sentence imposed. Daniel Day was informed that after twenty years, applicant would be parole eligible... (Applicant's Affidavit, Page 2, Paragraph 3.)" The Applicant further alleges that he was offered a plea deal but ultimately rejected it, although he would have taken it "if he knew he was facing a natural life sentence... (Applicant's Affidavit, Page 2, Paragraph 4)." He alleges that he was never informed that he was not parole eligible. He alleges that he was even given November 25, 2013 as the date of his initial parole hearing.

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The Applicant presented two documents for the Court's review. The first is a February 19, 2014 letter he received from the Department of Probation, Parole and Pardon Services, wherein he was informed that he was not eligible for parole. The second is a form from the same agency which had been served on the Applicant the day after his conviction in 1994 while he was in the Oconee County Detention Center. This form is entitled "Probation Citation" and puts the Applicant on notice that he would "be incarcerated for a lengthy period of time and then be released to Parole Until Day of Death."

The State argues that the Conditional Order of Dismissal should stand. The first argument is that this Application is successive. This is the first time the Applicant has raised the issue of parole eligibility. The State argues that South Carolina law still bars this application as being successive----that the current allegations could have been raised in prior proceedings. The State further argues that the Statute of Limitations bars this application.

The Applicant counters by alleging that he did not discover the fact that he was ineligible for parole until the aforementioned February 19, 2014 letter from the Department of Probation, Parole and Pardon Services.

Applicable Law

South Carolina Code Section 17-27-45 (A) requires a PCR application to be filed within one year after the entry of judgment. However, South Carolina Code Section 17-27-45 (C) states that:

> 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

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the 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.

South Carolina law regarding PCR issues was established in *Al-Shabazz v. State*, 338 S.C.354, 527 S.E.2d 742 (2000) wherein the Court held that PCR is a proper avenue of relief only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence. Issues such as good time credits and inmate discipline accordingly must be heard by the Administrative Law Court. The State submitted the case of *Furtick v. South Carolina Department of Probation, Parole and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2003) in support of its argument that the present application is wrongfully filed as a PCR. However, the facts in *Furtick* surround the validity of the Defendant's classification by the SCDPPS, not ineffective assistance of counsel.

Counsel's advice regarding parole eligibility is a proper issue to be heard in a PCR hearing. *Hinson v. State*, 297 S.C. 456, 377 S.E. 2d 338 (1989); *Frasier v. State*, 351 S.C. 385, 570 S.E.2d 172 (2002); *Griffin v. Martin*, 278 S.C. 620, 300 S.E.2d 482 (1983).

In deciding whether or not to summarily dismiss the PCR application, the Court must treat the allegations contained on its face as true and view those facts in the light most favorable to the applicant. *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (citing S.C. Code Ann. § 17-278-80).

In *Coates v. State*, 352 S.C. 500, 575 S.E.2d 557 (2003), the South Carolina Supreme Court dealt with a case remarkably similar to our present case. In *Coates*, the Applicant alleged that he pleaded guilty after being erroneously advised by counsel that he was parole eligible. He filed a PCR application after being advised by the Department of Corrections that he was not

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parole eligible after conducting an initial parole hearing. The Court held that the PCR application was not barred by the Statute of Limitations when the Applicant did not know that he was not parole eligible and that the Applicant was entitled to an evidentiary hearing on his application.

In *Tilley v. State*, 334 S.C. 24, 511 S.E2d 689 (1999) the Court held that the applicant's fourth PCR application was not successive due to the applicant not knowing of his parole ineligibility. As in our present case, the applicant alleged that he had been erroneously advised by counsel that he was parole eligible and that he had received information from the State indicating that he was eligible for parole. The Court held that the applicant had no way of knowing that a life without parole sentence could be imposed and that he was entitled to an evidentiary hearing on his PCR allegations.

Conclusions

I conclude that this Court has jurisdiction over the parties and the subject matter. I further conclude, in considering the allegations in a light most favorable to the Applicant (assuming that they are true) in accordance with the law outlined above, that the application is not barred as being successive or by the Statute of Limitations. Accordingly, the Conditional Order of Dismissal is vacated and the Applicant shall be granted an evidentiary hearing on his allegations.

AND IT IS SO ORDERED!

R. Scott Sprouse, Judge
Tenth Judicial Circuit

June 8, 2016
Walhalla, South Carolina

FILED OCONEE COUNTY, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2016 JUN -8 P 4:07

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE) OF THE TENTH JUDICIAL CIRCUIT

John Oglesby, #194567,) Case No.: 2014-CP-37-0399

Applicant,)

v.) **ORDER OF CONTINUANCE**

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of Applicant's request for the Court to vacate a Conditional Order of Dismissal issued by the Honorable Cordell Maddox on March 12, 2015, and Judge Sprouse's June 8, 2016 order, vacating the Conditional Order of Dismissal and ordering this case to be scheduled for an evidentiary hearing. This matter was originally scheduled to be heard on October 24, 2016, at the Oconee County Courthouse.

The day of the hearing, Applicant's attorney indicated he had unexpected car trouble and would not be able to make it to the hearing. Respondent interpreted this as a request to continue and indicated no opposition to that request to continue due to the circumstances. As such, this Court finds this matter should be continued until the next appropriate term of court for post-conviction relief matters in the Tenth Judicial Circuit.

IT IS THEREFORE ORDERED:

That this post-conviction relief matter shall be continued and re-scheduled for the next appropriate term of post-conviction relief hearings.

AND IT IS SO ORDERED

This 28 day of Dec, 2016.

LETITIA H. VERDIN
Presiding Judge
Tenth Judicial Circuit

Greenville, South Carolina.

FILED OCONEE COUNTY, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2017 JAN 20 A 8:46

STATE OF SOUTH CAROLINA COUNTY OF OCONEE	IN THE COURT OF COMMON PLEAS OF THE TENTH JUDICIAL CIRCUIT
John Oglesby, #194567, Applicant, v. State of South Carolina, Respondent.	Case No.: 2014-CP-37-0399 **ORDER OF DISMISSAL**

Presiding Judge:	R. Scott Sprouse
Applicant's Attorney:	Tommy Thomas, Esquire
Respondent's Attorney:	Lindsey A. McCallister, Esquire
Trial Counsel:	R. Daniel Day, Jr., Esquire
Date of Hearing:	March 1, 2017
Court Reporter:	Diane L. Marcengill

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed July 17, 2014. The Respondent made its Return, seeking dismissal on the grounds that this application was successive to previous PCR applications and outside the statute of limitations. A Conditional Order of Dismissal (COD) was issued by the Honorable Cordell Maddox, Jr., on March 12, 2015, and Applicant subsequently filed a motion to vacate that order. A hearing on that issue was convened on June 6, 2016, and the COD was vacated. An evidentiary hearing into the matter was convened on March 1, 2017, at the Oconee County Courthouse. Tommy Thomas, Esquire, represented Applicant. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Mary Oglesby, Applicant's sister, also testified on his behalf. Daniel Day, Esquire, also testified. Applicant, through counsel,

submitted Applicant's "Pre-Trial Brief" on March 1, 2017. Respondent submitted a response on March 24, 2017.

PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Oconee County. Applicant was indicted at the November 1992 term of the Oconee County Grand Jury for Murder (92-GS-37-889). Applicant proceeded with a jury trial from May 2, 1994 to May 4, 1994, at the Oconee County Courthouse in front of the Honorable Don S. Rushing. He was represented by R. Daniel Day, Esquire. Applicant was found guilty of murder and sentenced to life imprisonment.

Applicant timely filed a Notice of Appeal on May 19, 1994, but the appeal was never perfected. On August 18, 1994, the South Carolina Supreme Court dismissed Applicant's Appeal. On September 6, 1994, the Supreme Court issued a Remittitur.

1994-CP-37-00434

On November 17, 1994, Applicant filed an application seeking post-conviction relief alleging:

1. "Ineffective assistance of counsel. My case was poorly investigated and the evidence was circumstantial. Counsel failed to object."
2. "Denial of right to appeal. Counsel failed to perfect the appeal after timely filing of the notice. He failed to file the case and exceptions and the appeal was dismissed."

In response, the State filed a return on March 14, 1995. On October 25, 1996, Applicant filed an Amended Application pursuing the following grounds for relief:

1. Counsel was ineffective for failing to request the trial court to charge lesser charges of voluntary manslaughter and accessory after the fact to Murder.
2. Counsel was ineffective for failing to request an alibi charge.

3. Counsel was ineffective for failing to preserve his objection to Michael Wright being declared a hostile witness.
4. Counsel was ineffective for failing to object to the testimony of Kali Lee on the grounds of hearsay.
5. Counsel was ineffective for failing to object when the solicitor stated during his closing that the Applicant had taken Russell Wright to see the victim's body two times.
6. Counsel was ineffective for failing to renew his directed verdict motion.
7. Counsel was ineffective for failing to call exculpatory witnesses.
8. Applicant did not knowingly and voluntarily waive his right to direct appeal.

An evidentiary hearing into the matter was convened on October 29, 1996, at the Anderson County Courthouse. Petitioner was present at the hearing and was represented by Charles Hughes, Esquire. Petitioner and his trial counsel testified at the hearing. On December 17, 1996, the Honorable Alexander S. Macaulay issued an order denying the application for PCR but finding that Applicant did not knowingly and voluntarily waive his right to direct appeal and was entitled to review under White v. State, 263 SC 100, 208 S.E.2d 35 (1974) and Davis v. State, 288 SC 290, 342 S.E.2d 60 (1986).

On December 29, 1996, Applicant served a Notice of Appeal from Judge Macaulay's Order. On September 15, 1997, a Petition for Writ of Certiorari was submitted raising five Questions Presented:

1. Did the post-conviction relief judge err in granting petitioner's request for a belated direct appeal in this case?
2. Was trial counsel ineffective in failing to request manslaughter jury charges in the case?
3. Was trial counsel ineffective in failing to request a jury charge on accessory after the fact to a felony in the case?
4. Was trial counsel ineffective in failing to call favorable witnesses in the case?
5. Was trial counsel ineffective in failing to request a jury charge on the defense of alibi in the case?

On the same date, Applicant also submitted a Brief of Appellant Pursuant to White v. State, in which he raised the following ground for relief:

1. The lower court erred in declaring state's witness Michael Wright a hostile witness in the case.

On December 12, 1997, Respondent submitted its Return to Applicant's Petition for Writ of Certiorari and to the Brief of Appellant Pursuant to White v. State.

In June 18, 1998 order, the South Carolina Supreme Court granted certiorari on Question 1, proceeded with a review of the direct appeal issue, and affirmed Applicant's conviction pursuant to Rule 220(b)(1) SCACR. The South Carolina Supreme Court also granted certiorari on Question 4 and ordered the parties to serve and file briefs. On July 20, 1998, Applicant filed his Brief alleging "trial counsel was ineffective in failing to call favorable witnesses in the case."

The South Carolina Supreme Court, in an unpublished order filed on December 10, 1998, dismissed the appeal finding that certiorari was improvidently granted. During the collateral appellate proceedings before the South Carolina Supreme Court, Applicant was represented by Wanda H. Carter.

2:99-3857-10AJ

On November 11, 1999, Applicant filed a petition to the United States District Court seeking federal habeas relief under 28 U.S.C. § 2254. Applicant raised the following issues:

1. Conviction was obtained through improper use of codefendant's testimony after being declared a hostile witness
2. Conviction was obtained because my attorney did not request an alibi charge
3. Conviction was obtained because my favorable witness was not called.
4. Conviction obtained because my attorney did not request any lesser included charges. My co-defendant was convicted of Manslaughter. Because my attorney did not request a lesser-included charge, the jury convicted me of Murder.

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5. Conviction was obtained by denial of effective assistance of counsel because my attorney did not renew his directed verdict motion at the close of the case. Malice, as an element in this case, was very weak. My attorney did not argue this in a directed verdict motion at the close of the trial. I think the state failed to prove malice and I think my attorney should have asked the judge to dismiss the case.

On January 13, 2000, Respondent filed its Motion for Summary Judgment. On January 27, 2000, Applicant through his counsel Richard Warder, Esquire, filed an opposition to the motion. The Honorable Robert Carr, United States Magistrate Judge, issued a Report and Recommendation on February 23, 2000, recommending that Respondent's motion for summary judgment be granted and Applicant's petition be summarily dismissed without an evidentiary hearing. No objections were filed in response to the Report and Recommendation. On May 16, 2000, the Honorable Matthew J. Perry, Jr. issued an Order adopting the Report and Recommendation and granting Respondent's Motion for Summary Judgment.

2003-CP-37-1194

On November 24, 2003, Applicant filed an application seeking post-conviction relief alleging:

1. Trial Court Lacked Subject Matter Jurisdiction
   a. "The Applicant contends that the Trial Court lacked Subject Matter Jurisdiction to try and convict applicant, as to where the indictment returned by the Grand Jury was invalid, for the reason, the Courts has ruled that the Solicitor cannot be the sole witness before the Grand Jury, in order for the Grand Jury to return a valid indictment. See State v. Anderson, 439 S.E.2d 835."
2. The Trial Court Lacked Jurisdiction To Impose Sentence
   a. "The Applicant contend that the combined effect of S.C. Code § Ann. 22-3-540 (1962), S.C. Code § Ann. 23-3-710 (1962), and that 1993 statute S.C. Code Ann. § 17-30-50 (Supp. 1993), was to deprive the Court of General Sessions of jurisdiction to try him. See State v. Funderburk, 259 S.C. 256, 191 S.E.2d 520 (1972)."

In response, Respondent filed its return on June 21, 2004, and amended its return on January 20, 2006. A Conditional Order of Dismissal was issued on February 6, 2006, and a Final Order was issued on November 6, 2006. However, due to the fact that the Final Order was issued prior to Applicant's receipt of the Conditional Order, the court filed an Order Granting Motion to Vacate Conditional and Final Orders of Dismissal on December 29, 2006. An evidentiary hearing was convened on February 26, 2007, at the Oconee County Courthouse before the Honorable Alexander S. Macaulay. Applicant was present at the hearing and was represented by Karen Ballenger, Esquire. On March 20, 2007, an Order of Dismissal was issued, denying the application and dismissing it with prejudice.

On April 4, 2007, Applicant, through his counsel, filed a Notice of Appeal to the South Carolina Court of Appeals. On April 27, 2007, the South Carolina Supreme Court issued an Order of Dismissal, dismissing the appeal because Applicant failed to provide a written explanation as to why the lower court's determination was improper. The Remittitur was issued on May 15, 2007.

ALLEGATIONS

In his current application, Applicant alleges that he is being held unlawfully for the following reasons:

1. Newly Discovered Evidence
   a. "On February 19, 2014 Applicant received a letter from Probation and Parole indicating that he was not eligible for parole because he was a subsequent violent offender. The Applicant had been informed and believed that he was eligible for parole since his incarceration in 1993."

At the hearing, Applicant framed this allegation as one of ineffective assistance of counsel, contending in the alternative that Counsel gave erroneous advice to Petitioner that he would be

parole eligible after service of twenty years or that Counsel should have informed Applicant that he would be ineligible for parole due to his status as a subsequent violent offender (SVO).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466

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U.S. 668, 688 (1984)). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

It is well settled that parole eligibility, or ineligibility is a collateral consequence of sentencing about which a defendant need not be specifically informed. See Brown v. State, 306 S.C. 381, 382, 412 S.E.2d 399, 401 (1991) ("Parole eligibility ... is a collateral consequence of sentencing about which a defendant need not be specifically advised before entering a guilty plea."). See also Jackson v. State, 349 S.C. 62, 64, 562 S.E.2d 475, 475-476 (2002) ("It is well settled that parole eligibility is a collateral consequence of sentencing, and that trial counsel need not advise a client of his parole eligibility, or ineligibility, in order to render effective assistance."). The classification of a crime as violent, and the attendant consequences of that classification, are also collateral issues, and defendants need not be informed about them. Smith v. State, 329 S.C. 280, 286, 494 S.E.2d 626, 629 (1997). In order to prevail on a claim of ineffective assistance of counsel regarding erroneous advice as to parole eligibility, an applicant must prove counsel's advice induced his decision to plead guilty or proceed to trial. See Griffin v. Martin, 278 S.C. 620, 621, 300 S.E.2d 482, 482 (1983) (upholding PCR Court's decision denying relief because the applicant "failed to prove his attorney's erroneous advice concerning parole eligibility induced his guilty plea...."); Frasier v. State, 351 S.C. 385, 388, 570 S.E.2d 172, 174 (2002) (upholding PCR Court's decision denying relief because Applicant "was not induced to plead guilty based on parole advice prior to the plea.").

Ineffective Assistance of Counsel

Applicant testified that he is currently incarcerated on a life sentence for murder, having served twenty-five years so far. He stated that he went to trial on that charge in 1994, and prior to trial he was offered a deal to plead guilty to the lesser-included charge of manslaughter and receive a sentence of thirty years suspended to six years of active time and five years of probation. Applicant stated that this would have been a recommendation from the state, and it would have been an Alford[1] plea, wherein he was not required to admit guilt. Applicant stated he rejected the plea offer because he did not know he was facing a natural life sentence if convicted at trial. Applicant testified that he thought he would be eligible for parole after the service of twenty years.

Applicant also testified that after being confined in SCDC, he was given a parole eligibility date of February 25, 2013. However, in February 2014, Applicant received a letter from DPPPS stating that he was not considered eligible for parole because he was classified as a subsequent violent offender. Applicant stated he has a prior conviction for CSC 2nd with a minor, for which he was on probation at the time he was convicted and sentenced on the murder charge. Applicant testified that the CSC was committed in 1992, and he was sentenced on that charge in 1993. He stated that he had a probation revocation for the CSC charge and was served with a citation that stated he would be incarcerated for a lengthy period of time and then released to parole "until day of death." He stated that he was given that citation on or about May 5, 1994, after the murder trial concluded. Applicant further stated that he received no other notice regarding his parole eligibility until he received the February 2014 letter from DPPPS.

[1] 400 U.S. 25 (1970).

Applicant testified that he retained Daniel Day as Counsel on the murder charge, and Applicant relied solely on Counsel's advice during the course of that proceeding. Applicant repeatedly testified that he and Counsel did not discuss his parole eligibility before proceeding to trial. Applicant stated that after the jury found him guilty and the judge pronounced his sentence, there was an off-the-record discussion between Counsel, the solicitor, and the judge, after which Counsel informed Applicant that he would serve twenty years and then be up for parole. Applicant testified that this conversation after the trial was the only conversation he and Counsel had regarding parole eligibility. Applicant testified that he would not have gone to trial if he had known he was facing a true life sentence and instead would have accepted the plea offer and would now be out of jail. Applicant stated the reason he did not accept the plea offer is because he was not aware that he was facing a natural life sentence otherwise.

Applicant's sister, Mary Oglesby, testified she was also present for the conversation that occurred between Applicant and Counsel after the conclusion of the trial. Ms. Oglesby testified that Counsel, the solicitor, and the judge had a conversation, after which Counsel informed the family that Applicant would serve twenty years and then be eligible for parole.

Counsel testified he has been practicing law for approximately thirty-eight years, and at the time of trial, he had been practicing fourteen or fifteen years, with a significant portion of that time in criminal law. Counsel testified he no longer has the file for this matter, but he remembered Applicant's case and his representation of Applicant. Counsel stated he met with Applicant multiple times before trial, as well as with Applicant's family. Counsel testified he worked with the solicitor to negotiate a plea offer, and they were still negotiating into trial. Counsel testified he discussed the plea offer with Applicant on several occasions, and Applicant

always rejected the offer, even when the Alford[2] plea was conveyed, because he maintained his innocence. Counsel testified he told Applicant he would be facing a life sentence at trial, and Applicant understood. Counsel stated that the laws were changing frequently at that time, with a move towards the idea that "life means life." Counsel stated he kept up with changes in the law by reading articles, advance sheets, and attending Continuing Legal Education seminars.

Counsel testified he did not remember any conversation regarding parole eligibility taking place after the trial. Counsel stated he did not remember advising Applicant about the issue at all, and he did not believe he would have done so. Counsel further testified it is his general practice not to discuss parole eligibility with clients because that is a matter within SCDC's control, and there is no way to know what will happen with earning time credits or disciplinary issues once a person is actually incarcerated. Counsel stated his clients, particularly ones who have previous involvement in the criminal justice system, often have an awareness of how parole works, and if clients ask, he will discuss it with them. Counsel testified Applicant never asked about his parole eligibility.

Regarding Applicant's claims of ineffective assistance of counsel, this Court finds Applicant has failed to meet his burden of proof. This Court finds Applicant's testimony regarding Counsel's ineffectiveness is not credible, while also finding Counsel's testimony is credible. This Court finds Counsel provided effective assistance in this case. Counsel is a trial practitioner who has extensive experience in the trial of criminal offenses. Counsel conferred with Applicant on multiple occasions, during which Counsel discussed the pending charges, Applicant's constitutional rights, the State's evidence, possible defenses, and answered all of

[2] 400 U.S. 25 (1970).

Applicant's questions. Additionally, Counsel conveyed all plea offers to Applicant, who rejected them in favor of maintaining his innocence.

This Court finds Applicant is not entitled to relief as parole eligibility or ineligibility is a collateral consequence of sentencing of which Applicant need not be specifically informed. This Court is not persuaded by Applicant's argument that his status as a subsequent violent offender is distinguishable from parole eligibility in general. The Court declines to find SVO status akin to life without parole and the attendant notice requirements when the State seeks such a sentence. This Court finds SVO status is a collateral consequence, and Counsel was not under a duty to advise Applicant specifically regarding this status. Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court finds Applicant was not induced to plead guilty based on advice given prior to the trial. Because Applicant has offered no evidence that Counsel discussed parole eligibility with him prior to trial, and Applicant's own testimony was that no conversation regarding parole eligibility took place until after the trial, Applicant could not have relied upon that advice in making his decision to reject the plea offers and proceed to trial. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing

proceedings. Counsel was not deficient, nor was Applicant prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice. This Court also finds, as to all other allegations, that Applicant failed to present evidence of such claims and thus, this Court deems them abandoned.

The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 27 day of July, 2017.

R. Scott Sprouse
Presiding Judge
Tenth Judicial Circuit

Walhalla, South Carolina.

FILED OCONEE COUNTY, SC
BEVERLY H. WHITFIELD
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