

July 16, 2018

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
1231 Gervais Street
P.O. Box 11330
Columbia, SC 29211

RECEIVED
JUL 18 2018
S.C. SUPREME COURT

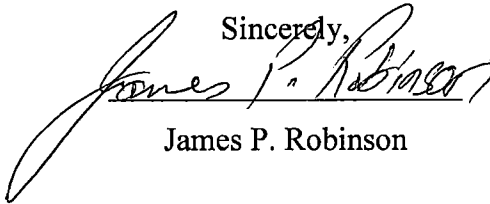
RE: Notice of Appeal, James P. Robinson #250720 v. South Carolina

Dear Mr. Shearouse:

I pray that appellate defense will probably handle the appeal in this matter. Enclosed for filing please find Notice of Appeal, Proof of Service on the attorney General, Appellate Defense, and the Order of Dismissal. By copy of this letter, I am serving Saluda County Clerk of Court.

Thank you for your assistance.

Sincerely,



James P. Robinson

Sherrie Butterbaugh
Office of the Attorney General
P.O. Box 1159
Columbia, SC 29211

Sheri Coleman
Saluda County Clerk of Court
100 E. Church St. Suite 6
Saluda, SC 29138

Appellant Defense
1130 Lady Street, Suite 401
Columbia, SC 29201
P.O. Box 1589
Columbia, SC 29211-1589

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SALUDA COUNTY
COURT OF COMMON PLEAS

HONORABLE J. DERHAM COLE
CIRCUIT COURT JUDGE

Case No. 2016-CP-41-0077

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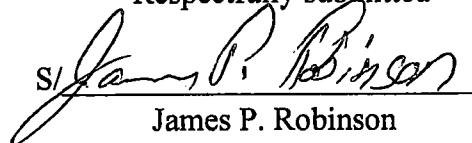
JUL 18 2018

S.C. SUPREME COURT

NOTICE OF APPEAL

Appellant James P. Robinson appeals the order of the Honorable J. Derham Cole dated July 2nd, 2018, dismissing Post Conviction Relief without a hearing. The appellant received notice of the dismissal from the Kirkland Correctional Institution mail room on July 12, 2018. This notice of appeal has been filed in a timely manner. See attachment of Notice of Appeal Explanation required in accordance with Rule 243(c) SCAR, Appellant is indigent and cannot afford attorney fees and cost, therefore appellant request for appointed counsel in appellant appeal.

Respectfully submitted


James P. Robinson

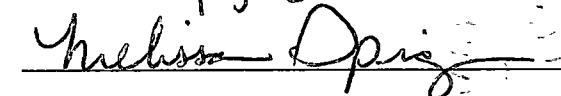
cc: Sherrie Butterbaugh
Office of the Attorney General
PO Box 1159
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Daniel E. Shearouse
Clerk of Court Supreme Court
PO Box 11330
Columbia, SC 29211

Division of Appellant Defense
1130 Lady Street, Suite 401
Columbia, SC 29201
P.O. Box 1589
Columbia SC, 29211

Sworn before me this 16 day

of July, 2018


Notary Public of South Carolina

My commission expires

Dec. 1, 2025

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SALUDA COUNTY
COURT OF COMMON PLEAS

J. Derham Cole, Judge
Case No. 2016-CP-41-0077

RECEIVED

JUL 18 2018

S.C. SUPREME COURT

James P. Robinson # 250720Appellant

V.

State of South CarolinaRespondent

PROOF OF SERVICE

I certify that the foregoing was served on the persons listed below by placing the same in the U.S. Mail postage prepaid this day July 17, 2018.

James P. Robinson #250720
Kirkland Corr. Inst.
4344 Broad River Rd.
Columbia, SC 29210

Sherrie Butterbaugh
Office of the Attorney General
P.O. Box 1159
Columbia, SC 29211

Sheri Coleman
Saluda County Clerk of Court
100 E. Church St. Suite 6
Saluda, SC 29138

Division of Appellant Defense
1130 Lady Street, Suite 401
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P.O. Box 1589
Columbia, SC 29211

Sworn before me this 16 day

of July, 2018

Melissa Opiz

Notary Public of South Carolina

My commission expires

Dec. 1, 2025

Division of Appellant Defense
1330 Lady Street, Suite 401
Columbia, S.C. 29201-3332
P.O. Box 11589
Columbia, S.C. 29211-1589

RECEIVED

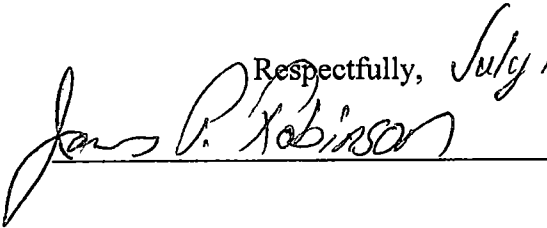
JUL 18 2018

S.C. SUPREME COURT

Dear Appellant Defense,

RE: Notice of appeal, James P. Robinson #250720 v. State of South Carolina

Hopefully your division will handle my appeal. I'm sending a copy of final order signed by Honorable J. Derham Cole and copies of Notice of Appeal that I sent to Saluda County Clerk of Court and the original Notice of Appeal to the Honorable Daniel E. Shearhouse Clerk, in the Supreme Court of South Carolina. I'm unable to afford attorney fees and cost. Hopefully this division will except appeal on my behalf. I'm thanking you in advance for your assistance.

Respectfully, *July 16, 2018*


Sherrie Butterbaugh
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Sheri Coleman
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STATE OF SOUTH CAROLINA)
COUNTY OF SALUDA)

IN THE COURT OF COMMON PLEAS)
IN THE ELEVENTH JUDICIAL CIRCUIT)

James P. Robinson, #250720,)

Case No. 2016-CP-41-00077)

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

CLERK OF COURT
SALUDA CO. S.C.

2018 JUL -9 AM 8:47

This matter comes before the Court by way of a post-conviction relief (PCR) application filed March 31, 2016. A hearing on the State's motion to dismiss the action was convened on February 22, 2018, at the Lexington County Courthouse. Applicant was present at the hearing to oppose the motion, and for the appointment of counsel in the event the State's motion was not granted. Respondent was represented by Sherrie Butterbaugh of the South Carolina Attorney General's Office.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections. During its January 1997 term, a Saluda County grand jury indicted applicant for murder, possession of a weapon during the commission of a violent crime, and two counts of pointing a firearm. (1997-GS-41-00039, -00323, -00325, -00326). Thomas Broadwater, Jr., represented applicant during his jury trial. On June 16, 1998, the jury found applicant guilty as indicted, and the Honorable Edward B. Cottingham sentenced applicant to concurrent terms of thirty years for murder and five years for each of the weapons charges. Applicant did not file a direct appeal.

1998-CP-41-00161

Applicant filed his first application for post-conviction relief on November-17, 1998, and

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alleged the following grounds for relief:

1. Ineffective assistance of counsel;
2. Trial counsel never filed an appeal and never informed defendant of his right to appeal;
3. The court lacked jurisdiction to sentence the defendant for murder as the evidence failed to establish the essential element of intent;
4. Newly discovered evidence requires the vacation of defendant's conviction.

The State made its return and an evidentiary hearing was convened on November 14, 2000, before the Honorable Rodney S. Peeples. Applicant was present and represented by Wayne Floyd. By written order dated February 20, 2001, Judge Peeples denied and dismissed the application.

Applicant filed a timely notice of appeal, and a petition for writ of certiorari was filed by Aileen P. Clare on applicant's behalf. PCR appellate counsel concurrently filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967) and *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). By order dated May 30, 2002, the Supreme Court of South Carolina denied the petition. Applicant filed a petition for rehearing which the Supreme Court denied by order dated July 10, 2002. The remittitur was issued on July 10, 2002.

2002-CP-40-5848

Applicant filed a petition for writ of habeas corpus in state circuit court on December 3, 2002, and alleged the following grounds for relief:

1. Denial of effective assistance of counsel;
2. Denial of right of appeal.

The State made its return and motion to dismiss on June 18, 2004. By written order dated March 4, 2005, the Honorable G. Thomas Cooper denied and dismissed the petition.

Applicant filed a *pro se* notice of appeal with the South Carolina Court of Appeals.

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Applicant then filed a motion to stay the appeal to file a new PCR application. The court denied applicant's request by order dated April 26, 2005. On June 24, 2005, the Court of Appeals dismissed the appeal "[d]ue to the failure of [applicant] to provide information regarding the transcript and/or serve and file [applicant's] Initial Brief and Designation of Matter[.]" The remittitur was issued on July 27, 2005.

2005-CP-41-00048

Applicant filed his second application for post-conviction relief on April 4, 2005, and alleged the following grounds for relief in his application:

1. "Newly-Discovered Evidence Pursuant to §§ 17-27-45"
 - a. "Applicant alleges that on or about December 10, 2004, that he has learned and have knowledge of newly-discovered evidence in his case, which would result in reversal of his conviction."
 - b. "Applicant also contends that this ground(s) could not have been previously raised at his initial PCR hearing, as required by S.C. Annotated § 17-27-45 (The Uniform Post-Conviction Procedure Act)."

The State made its return and motion to dismiss on July 19, 2005, arguing applicant did not make a *prima facie* showing of newly discovered evidence and the application was successive and untimely. A hearing was convened on January 17, 2007, before the Honorable R. Knox McMahan. Applicant was present and represented by Barry Thompson. By written order dated March 1, 2007, Judge McMahan denied and dismissed the application.

Applicant appealed the dismissal and a petition for writ of certiorari was perfected by Kathrine Hudgins who filed a brief pursuant to *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988). The Supreme Court transferred jurisdiction of the case to the Court of Appeals on July 11, 2008. By order dated April 24, 2009, the Court of Appeals denied applicant's petition and granted counsel's request to withdraw. The remittitur was issued on May 14, 2009.

1:09-1757-HFF-SVH

Applicant subsequently filed a *pro se* petition for federal habeas corpus pursuant to 28 U.S.C. § 2254 on June 29, 2009. Applicant set forth numerous claims of ineffective assistance of counsel in his petition. Respondent filed its return and motion for summary judgment on December 23, 2009. The Honorable Shiva V. Hodges, United States Magistrate Judge, issued a report on July 22, 2010, recommending respondent's motion for summary judgment be granted. *Robinson v. McKie*, 1:09-1757-HFF-SVH, 2010 WL 3220083 (D.S.C. 2010). The Honorable Henry F. Floyd, United States District Judge, adopted the Report and Recommendation and denied applicant's petition on August 11, 2010. *Robinson v. McKie*, 1:09-1757-HFF-SVH, 2010 WL 3199997 (D.S.C. 2010). Applicant gave notice of his appeal to the Fourth Circuit Court of Appeals. The Fourth Circuit dismissed applicant's appeal on March 25, 2011. *Robinson v. McKie*, 419 F. App'x 429 (4th Cir. 2011).

2011-CP-41-00085

Applicant filed his third application for post-conviction relief on April 21, 2011, and alleged the following grounds for relief:

1. Counsel did not inform applicant of his right to appeal;
2. Lack of Subject Matter Jurisdiction;
 - a. Defective indictment – did the indictment apprise the applicant of the elements of the offense that is intended to be charged?
 - b. Did the trial court lack subject matter jurisdiction to try applicant for murder, because murder indictment was defective for failing to allege the elements required?

Respondent made its return and motion to dismiss on November 9, 2011, arguing the application was untimely, successive, and barred by the doctrine of *res judicata*. On July 9, 2014, the Honorable Thomas A. Russo issued a Conditional Order of Dismissal, and then a Final Order on

October 30, 2014, dismissing the matter with prejudice.

Current Application

In his current post-conviction relief application, applicant's *sixth* collateral action, he alleges he is being held unlawfully for the following reasons:

1. Ineffective assistance of counsel
 - a. "Trial counsel prejudice[d] applicant by failing to strike [or] object to a Juror that showed implied bias."
 - b. "Trial counsel never objected to juror after she revealed that her uncle, Dr. Keith Turner, the coroner, is a witness for the state."
 - c. "I, the applicant, discovered this After Discovered Evidence on June 8, 2015 after an examination of the trial transcripts."

Applicant argues the above constitutes newly discovered evidence, such that he should be entitled to the statute of limitations provided by S.C. Code Ann. § 17-27-45(C)¹ and an evidentiary hearing.

The State made its return and motion to dismiss on March 2, 2017, and argued applicant failed to make a *prima facie* showing he was entitled to relief as the facts presented were not newly discovered evidence, and the application was untimely, barred by the equitable doctrine of laches, successive, and barred by doctrine of *res judicata*. Applicant filed objections to the motion to dismiss and asserted, in part, he should not be held accountable for the failure of his previous attorneys to sufficiently raise issues, he was not aware of the evidence before his own

¹ The statute provides:

If the applicant contends that there is evidence of material facts on previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

S.C. Code Ann. § 17-27-45(C).

review of the transcript, and asked the Court to appoint him a new attorney and grant him an evidentiary hearing.

Findings of Fact and Conclusions of Law

This Court had the opportunity to review the record in its entirety, including the records of the Saluda County Clerk of Court, applicant's records from the South Carolina Department of Corrections, the final orders from applicant's previous PCR and federal habeas corpus actions, and the records of the current application. The Court further had the opportunity to hear and weigh the arguments made at the hearing. Pursuant to S.C. Code Ann. § 17-27-70(b), the Court makes the following findings of fact and conclusions of law based upon all of the probative evidence presented:

Newly Discovered Evidence

First, the Court finds applicant cannot demonstrate he is entitled to a *third* evidentiary hearing based on newly-discovered evidence. The Uniform Post-Conviction Procedure Act provides a person may institute a PCR action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). An applicant requesting a new trial based on after-discovered evidence after a conviction must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983) (citing *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979)). Before a court will hold a merits hearing on a claim of after-

discovered evidence, an applicant must make a *prima facie* showing that he is entitled to relief. *Welch v. MacDougall*, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965).

This Court finds applicant has failed to show the alleged "new" evidence meets *any* of the requirements for after-discovered evidence. Most importantly, applicant has failed to make a *prima facie* showing the purported "new evidence" is material to the issue of guilt or innocence, or that it would change the result of trial. Applicant's allegation involves facts that were or, through the exercise of due diligence, could have been, discovered before trial. Applicant's "discovery" is derived entirely from late review of the *voir dire* preceding his trial as recorded in the transcript. In addition, the record demonstrates multiple jury qualification claims were raised in applicant's first PCR action which this Court finds specifically refutes applicant's assertion his previous attorneys somehow failed to raise this issue or that this in any way constitutes newly discovered evidence. Moreover, applicant has raised similar vague claims of newly discovered evidence in previous collateral actions. This Court finds applicant has failed to make a showing he is entitled to relief based on the information set forth in the records. Therefore, applicant is not entitled to an evidentiary hearing in the matter.

Statute of Limitations

This Court finds the application must be summarily dismissed for failure to comply with the filing requirements of the Uniform Post-Conviction Procedure Act. The statute provides:

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 on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

A motion for summary judgment is a proper mechanism to raise the defense of statute of



limitations. *McDonnell v. Consol. Sch. Dist. of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, South Carolina authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." S.C. Code Ann. §17-27-70(c).

Applicant was convicted on June 16, 1998, and the record reflects he did not appeal his convictions or sentences. The current application was not filed until March 31, 2016—almost seventeen years after the one-year statutory filing period expired. The Court finds this PCR action is untimely and is, therefore, barred by the statute of limitations and must be summarily dismissed.

Laches

The Court finds the application must also be dismissed based on the equitable doctrine of laches. To ensure finality, our courts require reasonable diligence in pursuing collateral relief. *McElrath v. State*, 276 S.C. 282, 283, 277 S.E.2d 890, 890 (1981). The requirement "guards the state's legitimate expectation that it will not be called upon" to defend the integrity of convictions that occurred many years ago, "where records and witnesses are no longer available." *Id.* at 283, 277 S.E.2d at 890-91. Laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Bray v. State*, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005) (citation omitted). "Whether a claim is barred by laches is to be determined in light of the facts of each case," taking into account whether the delay has prejudiced or disadvantaged the other party. *Id.* at 140, 620 S.E.2d at 745.

Applicant filed this post-conviction relief application almost two decades after his

conviction. At the hearing on the State's motion to dismiss, applicant did not offer this Court any justification for the delay in raising the current claim. Because of the long delay, witness memories and physical evidence will have naturally faded and degraded, affecting the availability of evidence to review the claim. Therefore, this Court finds the application shall also be dismissed as barred by the equitable doctrine of laches.

Successive

This Court finds the action must also be summarily dismissed because it is successive to applicant's previous PCR applications. All grounds for relief must be raised in an applicant's "original, supplemental, or amended application." S.C. Code Ann. § 17-27-90. Courts disfavor successive actions and place the burden on applicants to establish any new ground raised in a subsequent application could not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 617, 274 S.E.2d 415, 416 (1981). Successive PCR applications are forbidden unless an applicant indicates to the court 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, 450, 409 S.E.2d 392, 394 (1991). Any ground raised in a subsequent application is limited to only those grounds that "could not have been raised . . . in the previous application." *Id.* at 450, 409 S.E.2d at 394.

This Court finds the current application is successive and barred under S.C. Code Ann. § 17-27-90. A review of applicant's prior applications indicates the current allegation was or could have been raised in the prior proceedings for post-conviction relief. Applicant has failed to establish any sufficient reason why he could not have raised the current allegation in his previous actions. Indeed, as noted, applicant raised claims of ineffective assistance of counsel related to jury qualification in at least one previous PCR action, including an allegation in his first

#9

application that "counsel was ineffective for failing to object to several jurors who knew the Defendant, and most likely the victim and these potential witnesses, who ended up on the jury, did not reveal the acquaintanceship to the Court." This Court finds the record demonstrates the current claim of alleged "new evidence" could have been, and was, raised in an earlier application. Therefore, applicant has failed to meet the burden imposed upon him, and the Court finds the application is successive to applicant's previous PCR actions and must be summarily dismissed.

Res Judicata

The Court finds the application is similarly barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. *Bell v. Bennett*, 307 S.C. 286, 292, 414 S.E.2d 786, 789 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action, or issues that could have been raised in the former action. *Foran v. USAA Cas. Ins. Co.*, 311 S.C. 189, 190-91, 427 S.E.2d 918, 919 (Ct. App. 1993).

The applicant had a full opportunity to litigate all his allegations in his prior actions. Applicant's current allegation of ineffective assistance of counsel was thoroughly explored in his first application for post-conviction relief. The finality of the previous court rulings should be respected, and this Court finds the application must be dismissed as barred by the doctrine of *res judicata*.

Conclusion

Based on the foregoing and for good cause shown, the Court finds applicant failed to: (1) make a *prima facie* showing he is entitled to relief sufficient to warrant an evidentiary hearing based on newly discovered evidence; (2) timely file for post-conviction relief; (3) demonstrate

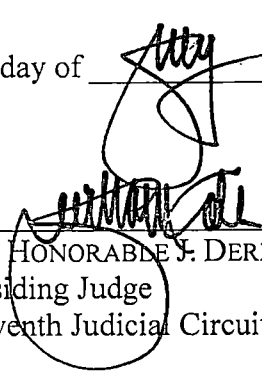
why the application should not be dismissed as barred by the equitable doctrine of laches; (4) meet his burden of showing the action is not successive to an application already filed, heard, and dismissed after a hearing; and, (5) demonstrate the application should not be barred by the doctrine of *res judicata*. Therefore, the Court grants respondent's motion to dismiss this application with prejudice.

This Court advises the applicant that he must file and serve a Notice of Appeal within 30 days of the service of this Order to secure appellate review. *See* Rule 203, SCACR. Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

IT IS THEREFORE ORDERED THAT:

1. Respondent's motion to dismiss the PCR application is granted;
2. The PCR application is denied and dismissed with prejudice; and
3. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

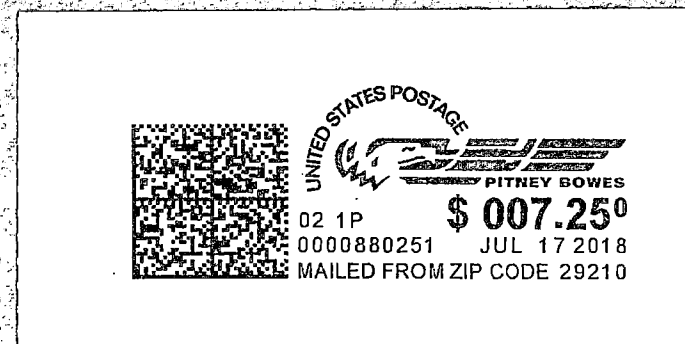
AND IT IS SO ORDERED this 2nd day of July, 2018.



THE HONORABLE J. DERHAM COLE
Presiding Judge
Eleventh Judicial Circuit

_____, South Carolina

James P. Robinson # 250720
Mr. Kland, Lorr, Inst. B2-22
1344 Broad River Rd,
Columbia, S.C. 29210



LEGAL
MAIL
ONLY

THE Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
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P.O. Box 11330