

Louis E. Fuller, #253694
MCCI F1-A-286
386 Redemption Way
McCormick, S.C. 29899

December 21, 2018

The Hon. Daniel E. Shearhouse
Clerk of Court
Supreme Court of S.C.
P.O. Box 11330
Columbia, SC 29211

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DEC 31 2018

S.C. SUPREME COURT

Dear Mr. Shearhouse:

Enclosed for filing, please find one copy of my Petition for Writ of Certiorari. I filed this same document last week but I inadvertently gave the mailroom clerk the handwritten copy to mail. This copy says the same thing but it's typed and more presentable. Sorry for the inconvenience.

Thank you for your time.

Respectfully submitted,

Louis Fuller

Petitioner, Pro Se

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Fairfield County
Brooks Goldsmith, Circuit Court Judge
2016 - CP - 20 - 0028

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DEC 31 2018

S.C. SUPREME COURT

LOUIS E. FULLER,

PETITIONER

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

LOUIS E. FULLER, #253694
Petitioner, Pro Se

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386 Redemption Way
McCormick, SC 29899

INDEX

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Index	2
Statement	3
Argument I	4
Argument II	11
Conclusion	12
Certificate of Service	13

STATEMENT

Petitioner was found guilty of murder after a jury trial held on October 19, 1998, before the Honorable Paul E. Short, Jr. in Fairfield County. A life sentence was imposed.

Petitioner filed an application for post-conviction relief on January 29, 2016. Respondent made its Return and Motion to Dismiss on February 7, 2018, requesting the application be summarily dismissed based upon (1) the presumption against successive applications, (2) the expiration of the statute of limitations and (3) Res Judicata.

A hearing over the State's Motion to Dismiss was held on July 17, 2018 before the Hon. Brooks Goldsmith. Petitioner was present and represented himself. Respondent was represented by Assistant Attorney General DeShawn H. Mitchell, Esquire.

The Court found that Petitioner failed to meet his burden in proving that he was entitled to a full hearing on the merits of his application for post-conviction relief. The Court found Petitioner's application untimely filed, successive to his previous application and barred by the doctrine of res judicata. Further, the Court found Petitioner did not make a requisite showing in regards to his allegation of newly discovered evidence. On August 25, 2018 Judge Goldsmith issued an order granting Respondent's Motion to Dismiss and dismissing with prejudiced Petitioner's application for post-conviction relief. Petitioner received notice of this order on November 14, 2018.

This petition follows.

ARGUMENT

The lower court's determination was improper in the summary dismissal of petitioner's third post-conviction relief (PCR) application, which alleged recently discovered juror misconduct, on the ground it was successive, untimely, and failed to prove a newly discovered evidence claim.

During voir dire at Petitioner's trial, the trial judge asked the potential jurors if they were related by blood or marriage, or had any connection with the Petitioner,...or to potential witnesses,...or if they were conscious of any interest, any bias or any prejudice for or against the petitioner, or if they had seen any media coverage of the crime. Three potential jurors responded affirmatively, however juror number 39, who ultimately served on the final jury panel, did not respond or disclose that she had a connection with the defendant and/or victim. The defense exercised only four of its ten peremptory strikes during the jury selection process. When juror 39's name was drawn, petitioner had six peremptory challenges remaining. At the conclusion of his trial, petitioner was convicted and sentenced to life.

Following the dismissal of his direct appeal and first PCR application, Petitioner learned from a high school classmate that juror 39 was actually a fellow classmate and that a prior relationship existed between juror 39 and petitioner. After confirming this discovery a few days later, Petitioner filed this PCR application alleging juror 39's concealment deprived him of information material to his intelligent use of peremptory challenges, which in turn, deprived him of his constitutional right to trial by an impartial jury. Petitioner averred that, if

he had been aware of this relationship, his use of peremptory challenges would have been different.

Petitioner further argued he could not have previously raised this issue because the juror's concealment of her relationship to Petitioner in and of itself, rendered the information unavailable to him until many years after trial when he discovered the information through a conversation with a classmate. As noted, this occurred after both his direct appeal and first PCR application were dismissed. Petitioner further contended his claim fell within the "discovery rule" exception to the one-year limitation period and was therefore timely.

The State filed a motion to dismiss Petitioner's PCR application, arguing it was successive and barred by the statute of limitations. Regarding successiveness, the State claimed Petitioner failed to present sufficient reason why he could not have raised the current allegations in his previous PCR applications. Further, the State contended the application was untimely because it was not filed within the one year limitation period applicable to PCR actions. The State also contended Petitioner's claim that he discovered evidence that he was not tried by a fair and impartial jury lacked merit because Petitioner failed to provide any corroborating information or demonstrate how his allegation satisfied the test for newly discovered evidence.

The PCR judge granted the State's motion for summary dismissal finding Petitioner's claim was untimely because it was not filed within one year limitation period. The PCR judge also

found Petitioner's claim was successive because it could have been raised in his first PCR application and failed to prove a claim based on newly discovered evidence. Specifically, the PCR JUDGE FOUND THAT BECAUSE Petitioner failed to offer any independent evidence that ju^Hor 39 was related to the victim, Petitioner failed to establish a sufficient reason why the current allegations could not have been raised in his previous PCR application.

Petitioner argues his latest PCR application should not have been summarily dismissed and asks this Court to reverse and remand this matter for a hearing. Petitioner argues that summary dismissal was error because genuine issues of material fact exist as to whether Petitioner's claim is successive or barred by the statute of limitations.

A PCR application ordinarily must be filed within one year after a conviction or, if a direct appeal is taken, one year after the remittitur is sent to the trial court. S.C. Code Ann §§ 17-27-45(A)(2003). However, section 17-27-45(c) provides that if a PCR applicant discovers "material facts not previously presented and heard that require vacation of his conviction or sentence," he may file a PCR application "within one year after the date of actual discovery...or after the date when the facts could have been ascertained by the exercise of reasonable diligence."

A PCR applicant must allege all available grounds for relief in his original application. Any ground not raised in the original application may not be the basis for subsequent application unless the court finds a ground for relief asserted which, for

sufficient reason, was not raised in the original application.
S.C. Code Ann. §17-27-90.

The PCR court may grant a motion by either party for summary disposition of the PCR application when...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). When considering the State's motion for summary dismissal, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are 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 §17-27-80). Where an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing. Cf. Delaney v. State, 269 S.C. 555, 556, 238 S.E.2d 679, (1977).

As to the timeliness issue, the discovery rule in section 17-27-45(c) allows one year after the discovery of "material facts not previously presented and heard that require vacation of the conviction or sentence" to file a PCR application. Petitioner argued he did not discover the juror's misconduct until December 2015, and he promptly filed his latest PCR application after making that discovery. Because Petitioner's claim that he is entitled to the benefit of the discovery rule is not conclusively

refuted by the record, the PCR judge erred by summarily dismissing Petitioner's claim.

Petitioner also argues that a genuine issue of fact exists as to whether petitioner's claim is successive under section 17-27-90, which permits an applicant to file a subsequent PCR application only if the applicant demonstrates a sufficient reason why the claims asserted therein were not asserted therein were not asserted previously. Petitioner avers he has demonstrated sufficient reason why his claim was not included in his first PCR application was dismissed. However, the State contends the juror's misconduct could have been discovered earlier through the exercise of due diligence and, therefore, Petitioner has failed to state a "sufficient reason." Based on this factual dispute, a hearing is necessary to resolve this critical issue.

Although Petitioner's PCR claim may ultimately prove to be untimely, successive, or perhaps unsuccessful on the merits, the PCR judge erred in granting the State's motion for summary dismissal because genuine issues of material fact exist as to whether Petitioner's PCR claim is successive or untimely. See Leamon, 363 S.C. at 434, 611 S.E.2d at 495 (citing S.C. Code Ann. §17-27-70(b)-(c))(noting summary dismissal of a PCR application without a hearing is appropriate only when it is apparent on the face of the application that (1) there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief).

The standard test governing newly discovered evidence is

properly applied when relief is sought based on evidence discovered post-trial that is material to the accused's guilt or innocence. See, e.g. State v. South, 310 S.C. 504, 507, 427 S.E.2d 666, 668 (1998)(noting that to obtain a new trial based on newly discovered evidence, the evidence must be material to the issue of guilt or innocence). However, juror misconduct discovered post-trial is not properly considered "newly discovered evidence;" rather, it is a separate basis for a new trial. See, e.g. State v. Sheppard, 582 A.2d 116, 118 (Vt. 1990)(noting evidence of juror misconduct is not properly considered newly discovered evidence because it has no bearing on the issue of innocence or guilt and does not concern the substance of the State's case or an accused's defense).

Because juror misconduct is a separate basis for a new trial, it is governed by a separate standard. Provided a claim is timely raised, a new trial is warranted on the basis of juror misconduct if it is shown that (1) the juror intentionally concealed information, and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. See. State v. Woods, 345 S.C. 583, 587-89, 550 S.E.2d 282, 284 (2001)(finding that a juror's intentional failure to disclose a relationship gives rise to an inference of bias and rejecting the State's argument that a new trial should be warranted only where an individual shows he was prejudiced by the juror's failure to disclose information); State v. Kelly, 331 SC 132, 145-46, 502 SE2d 99, 106-07 (1998) (recognizing that trial judges and attorneys cannot fulfill their duty to screen out biased jurors without accurate information and finding that the first inquiry in the

juror disqualification analysis is whether the juror intentionally concealed information during voir dire). Further, evaluating the merits of a juror misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing. See *State v. Sparkman*, 358 S.C. 491, 496, 596 SE 2d 375, 377 (2004) ("whether a juror's failure to respond [during voir dire] is intentional is a fact intensive determination that must be made on a case-by-case basis").

Juror concealment claims are set forth in Woods, and such case-by-case determinations are most appropriately made after a hearing, which allows the factual circumstances to be more fully developed.

II. The PCR judge who presided over this motion hearing could not have overridden the State's request that counsel not be appointed.

On October 6, 2008, C.J. Toal directed that instead of the PCR judge, the attorney general's office, the respondent, will now decide whether or not a PCR applicant is entitled to counsel. Under the new procedure, the attorney general's office files a return to the inmate's application in which "the attorney general's office shall clearly state in the caption heading whether it requests that counsel be appointed for the applicant." If the Attorney General requests that counsel not be appointed and asserts that the application is barred as being successive or as being untimely under statute of limitations, only the chief judge for administrative purposes in that circuit may override the request by written order.

Therefore, the PCR judge who presided over this motion hearing could not have overridden the State's request that counsel not be appointed. This matter should have been heard by the chief judge for administrative purposes, the only judge vested with the authority to rule in applicant's favor, pertaining to appointment of counsel.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Louis E. Fuller

Louis E. Fuller, #253694

Petitioner, Pro Se

M.C.C.I. F1-A-286

386 Redemption Way

McCormick, S.C. 29899

December 15, 2018

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CERTIFICATE OF SERVICE

DEC 31 2018

Petitioner, Louis E. Fuller, #253694, swears under penalty of **S.C. SUPREME COURT** perjury that he has served the Respondent in this matter with a copy of the Petition for Writ of Certiorari, by placing said copy in the care of the McCormick Correctional Institution Mailroom staff, postage-prepaid, and addressed to the Respondent's Attorney of Record, Assistant Attorney General DeShawn Mitchell, this 15th day of December, 2018

8/ Louis E. Fuller

Louis E. Fuller, #253694
Petitioner, Pro Se

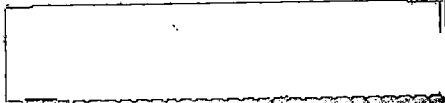
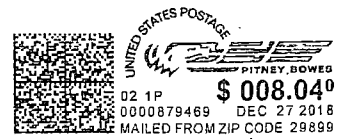
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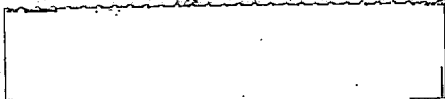
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