

South Carolina Supreme Court

Post Office Box 11330

Columbia, South Carolina 29211

March 14, 2019

Re: Case No. 2016-CP-32-02815

Dear Clerk;

enclosed you will find two (2) originals Notice of Appeals, please stamp-clerk-file both motions, and return the extra by way of the pre-paid self-addressed-envelope.

Sincerely,  
Raymond L. Rogers

CC: Attorney General  
Lisa M. Lomer

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MAR 18 2019

S.C. SUPREME COURT

The State of South Carolina  
In The Supreme Court

Appeal From Lexington County  
Court of Common Pleas  
Honorable William P. Keesley, Judge  
Case No. 2016-CP-32-02815

Hayward L. Rogers,

Petitioner,

vs.

State of South Carolina,

Respondent,

Intent To  
Notice of Appeal

The Petitioner appeals The Honorable William P. Keesley February 28, 2019.  
Order denying post-conviction Relief. A copy of the order was received, 3/11/2019.  
Pursuant to Rule 243(C), written explanation is below:

Rule 243(C) Written Explanation

In his application for post-conviction Relief, the applicant alleged  
that he is being held unlawfully for the following reasons:

- (1) Ineffective assistance of Trial Counsel.
- (2) Ineffective assistance of appellate Counsel.
- (3) Denial of Right To appeal. See (Case No. 2004-CP-32-3932).

In a amended application for post-conviction Relief Filed Aug. 21,  
2008. The applicant more narrowly defined his allegations in support  
of his claims that he received ineffective assistance of counsel.  
In that application he alleged denial of the Right To appeal and the  
following issues, Denial of Right to appeal, see (P.C.R. Case No. 2004-CP-32-3932).

- (1) Trial Counsel was ineffective for failing to require that a certified  
interpreter be sworn to take the victim's testimony,

2.

(2) Trial Counsel was ineffective for failing to challenge the sufficiency of the search warrant used to draw the applicant's blood. Victim's affidavit contained a false statement in affidavit of search warrant.

(3) Trial Counsel was ineffective for failing to challenge the chain of custody on the applicant's blood. The person that drew his blood was not a nurse and not authorized to do so pursuant to 23-3-630(A).

(4) Trial Counsel was ineffective for failing to use readily available experts, funds for whom had already been obtained by previous defense counsel, in the applicant's defense at trial. Counsel used no experts to investigate, and he did not investigate.

At the evidentiary hearing convened in this case, the applicant raised additional allegations of ineffective assistance of counsel. This court accepts those allegations as amendments to his application for post-conviction relief made pursuant to the evidence adduced at the hearing. See *Simpson v. Moore*, 627 S.E.2d 701 (S.C. 2006); Rule 15, S.C.R.P. At the hearing, the applicant specifically alleged:

(5) Defense Counsel was ineffective for failing to move for a mistrial when Counsel realized that the victim was deaf. Prior to trial we was not told that the victim was deaf.

(6) Defense Counsel was ineffective for failing to interview the victim prior to the trial.

(7) Appellate Counsel was ineffective for failing to argue on appeal that the applicant was entitled to a new trial based on the fact that the applicant's speedy trial rights was violated.

3.

(8) Appellate Counsel was ineffective for failing to argue on appeal that Judge Westbrook should have recused himself from the trial of this case,

(9) Appellate Counsel was ineffective for failing to argue that the applicant's motion for a directed verdict was improperly denied by the trial court.

While on appeal from denial of applicant's post-conviction relief case no. 2004-CP-37-3932, appellate counsel was ineffective for failing to raise all issues that was raised and ruled on by the P.C.R. Court in its final order.

Even though all (9) nine issues was raised and ruled on by the P.C.R. Court, and preserved for appellate review by way of a petition for writ of certiorari before the Supreme Court, the applicant was denied the right to appeal when appellate counsel chose to raise only (1) one of the (9) nine issues that was preserved for appellate review. The error prejudiced the applicant and was a constructive denial of his right to appeal.

*Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1985); *United States v. Lironi*, 466 U.S. 648 (1984). Applicant is entitled to his "one bite at the apple" and this includes appeal from the denial of post-conviction relief. *Austin; Rice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (S.C. 1991).

The findings of the P.C.R. Court must be contained in the final order for appellate review. Appeal may be taken by either party from the final order to the Supreme Court.

S.C.A.C.R. Rule 201

4.

An issue not ruled on by the P.C.R. judge will not be considered preserved for review by the Supreme Court. *Padgett v. State*, 484 S.E.2d 101 (S.C. 101); *Pruitt v. State*, 423 S.E.2d 127 (S.C. 1992).

The P.C.R. Court in a successive application may find that the applicant is entitled to a belated appeal of his first application. *Adom v. State*, 523 S.E.2d 753 (S.C. 1999); *Austin*. Procedures for review are the same as for a belated direct appeal. See S.C.A.C.R. Rule 227(e). The Supreme Court has determined that the statute of limitations does not apply to seeking a belated appeal from a P.C.R. application. *Adom*.

The applicant was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and article 1, section 3, and article 1, section 14 of the State Const. Trial counsel's performance fell below an objective standard of reasonableness that did prejudice the applicant when counsel failed to object to the false statements in the affidavit of the search warrant and arrest warrants.

The applicant was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and article 1, section 3, and article 1, section 14 of the State Const. when counsel failed to object to the unlawful procedures used to obtain the applicant's blood for a DNA sample in violation of the applicant's Fourth Amendment right against an illegal search and seizure in violation of article 1, section 3, art. 1, section 4, art. 1, section 14, ~~and~~ of the State Const, and 17-13-140 and 23-3-630(A).

5,

in violation of Applicant's Sixth Amendment Right of The United States Constitution, and art. 1 § 3, art. 1 § 14, when Trial Counsel Failed To Conduct Proper pre-Trial investigation, and Failing To object to applicant being UNLAWFULLY SENTENCED TO LIFE WITHOUT PAROLE BY USE OF A PRIOR 1979 CONVICTION THAT WAS NOT CLASSIFIED AT THE TIME.

Section 17-27-45 (a) Requires application For Relief To be Filed Within one year OF The Filing OF The Final appeal de cision. However, 17-27-45 (B), 17-27-45 (B), 17-27-45 (C), 17-27-20, and 16-1-60 (B), essentially Creates a "discovery Rule" Contrary To This Statute. For The Reasons Raised in The previous section, Applicant contends he acted with Reasonable diligence in discovering This new evidence; Applicant Faced a UNLAWFUL enhanced penalty of Life Without Parole under The "Two-Strike" statute of 17-27-45 based on a prior conviction of assault and battery with intent To Kill From 1979. Applicant submits That in 1979, There was no Classification To This Charge (serious, most serious, etc). Because his 1979 Conviction was not Classified as violent at That Time he should had not been sentenced To Life Without parole. Because 16-1-60 (B) was not passed until 1986, any Crimes committed before That date will no longer be Classified as "Violent offenses". AS A RESULT, The provisions of 24-21-640 would no longer be applicable To applicant's Conviction for assault and battery with intent to Kill. Thus, The discovery in This matter show that he was only indicted for "assault with intent to Kill".

The provisions of This Act other Than 16-1-60 (B) apply prospectively, To Crimes and offenses committed after The effective date

6

apply Retroactively To all persons Convicted under The Laws of This State. See (Atty. Gen. 1986. Under The 1986 omnibus Criminal Justice Improvement Act.) The issue was Ruled on in The Final Order of The applicant's post-Conviction Case no. 2004-LP-32-3932, and preserved For This Court for appellate Review, But because of 'Procedural Irregularities' ~~lead~~ Led To The Failure To Review an issue of ineffective assistance of Counsel determined in The First application. had Counsel objected To This abuse of discretion, The applicant would not had been prejudice and would not had been sentenced To Life without parole by Use of a prior 1979 Conviction For A.B.W.I.K. That was not Classified as violent or most Serious at The Time. Thus, applicant's Conviction is in Violation of The State and Federal Const., 14 Amered, article 1 § 3, art. 1 § 14, art. V § 22; because applicant's 1999 indictment For A.B.W.I.K. is based on Fraud, and without presentment by The Grand Jury. Lack of Subject matter Jurisdiction Can be Raised at any time for belated objections To Null Void documents. Thus, all The documents are Null and Void in This case because all The documents are without due process of Law, without due protection of applicant's Civil Rights, and without due protection of The Great Seal. The PCR Court's decision is improper because applicant had a due process Right to

his full bite at the apple by having all of his issues ruled on in his first PCR reviewed by the Supreme Court, applicant did not waive his right to seek appellate review on denial of those issues. Therefore, pursuant to S.C. Code Ann. 17-27-100 (1985), and Austin v. State, 409 S.E.2d 395 (S.C. 1991); Knight v. State, 325 S.E.2d 535 (S.C. 1985).

Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop; with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice.

The Court (PCR) failed the applicant by failing to review his claim to challenge the search warrant used to draw his blood, and failing to challenge the chain of custody on applicant's blood, because after discovered evidence show that the victim made a false statement in the affidavit of the search warrant, and the person that drew his blood was not authorized to do so pursuant to S.C. Code Ann. 23-3-630(A), not only did the failure caused a miscarriage of justice, it also caused the arrest and conviction of one who is actually innocent.

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S.C. SUPREME COURT

8.

The PCR Court's decision is improper because an exception to the Rule against successive applications occurs where the applicant has been denied the opportunity to appeal dismissal of his first PCR application.

Austin v. State, 409 S.E.2d 395 (S.C. 1991). The Court in Aice distinguished this situation from the general rule on the basis that "Austin never received a full bite of the apple." Aice, 305 S.C. at 452, 409 S.E.2d at 395.

The S.C. Supreme Court held that when a PCR applicant is denied due process of law in the PCR proceeding, then they are entitled to relief, "independent of any claim of ineffective assistance of counsel." Washington v. State, 478 S.E.2d 833 (S.C. 1996) (Toal, writing for the court), especially if applicant can prove he was denied due process of law in the first PCR proceeding due to omissions of counsel's errors may be sufficient reasons. See, ~~S.C.A.C.R.~~ S.C.A.C.R. Rule 243(e), and 243(f).

This not only violates applicant's Fourteenth Amendment right to due process, it also violates applicant's state const rights, Article 1, Section 2, art. 1, Sec. 3, art. 1, Sec. 4, art. 1, Sec. 8, art. 1, Sec. 9, and art. 1, Sec. 11. The order is improper because applicant was denied appellate review on claims ruled on in his first PCR.

March 14, 2019

Margaret L. Rogers

The South Carolina Supreme Court  
Appeal From Lexington County  
Court of Common Pleas

William P. Keesley, Circuit Court Judge  
Case No. 2016-CP-32-07815

Hayward L. Rogers,

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Petitioner,

VS.

MAR 13 2019

S.C. SUPREME COURT

State of South Carolina,

Respondent.

Proof of Service

I, The undersigned hereby does certify that on this herein date a copy of his notice of intent to appeal has been served upon opposing counsel by placing a copy of the same in the U.S. Mail postage prepaid.

March 14, 2019

Hayward L. Rogers

"From my First PCR"

This PCR Proposed order  
Contains 9 issues That was  
Ruled on by The PCR Court  
but denied appellate ~~Review~~  
Review

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S.C. SUPREME COURT



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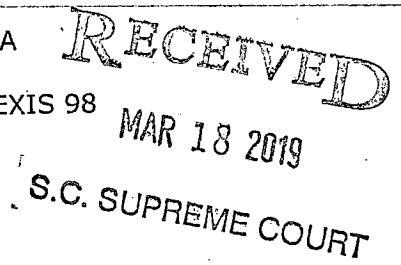
*321 S.C. 533, \*; 471 S.E.2d 134, \*\*;  
 1995 S.C. LEXIS 98, \*\*\**

Ex Parte: ~~Henry W. Martin, Jr., Appellant, v. The State, Respondent~~ In Re: Henry W. Martin, Jr. # 190394, Plaintiff, v. AT&T Telephone Co., Inc.; Southern Bell Telephone Co., Inc.; Zero Plus Dailing, Co., Inc.; Parker Evatt, Comm. SCDC; and Williams C. Wallace, LEECI, Defendants.

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF SOUTH CAROLINA  
 321 S.C. 533; 471 S.E.2d 134; 1995 S.C. LEXIS 98

May 5, 1995, Decided



**CASE SUMMARY**

**PROCEDURAL POSTURE:** Appellant inmate commenced the instant action seeking to have the court review the action taken by the clerk of court (South Carolina), in favor of respondent State, dismissing the inmate's motion to proceed without costs in the trial court.

**OVERVIEW:** The inmate, proceeding pro se, filed a motion to be allowed to proceed without costs in the trial court. The motion was returned to the inmate by the clerk of court on the basis of an order issued by the circuit's chief judge for administrative purposes that only allowed the filing of a complaint in forma pauperis in certain types of cases. On appeal, the court found that the inmate asked it to review the action taken by the clerk of court without first making a motion to have a circuit judge rule on his request to proceed without costs. Therefore, the court was without appellate jurisdiction. However, because of the increasing number of persons seeking to proceed in forma pauperis, the court provided guidance as to when it was appropriate to waive filing fees. When an indigent litigant filed a motion to proceed in forma pauperis pursuant to S.C.R. Civ. P. 3(c), and the complaint did not appear to fit within one of the statutory or constitutional exceptions to the requirement of a filing fee, the clerk of court had to submit the motion to a judge for a ruling as to whether the litigant could proceed in forma pauperis.

**OUTCOME:** The court dismissed the inmate's appeal and remanded the matter for a ruling by a circuit judge.

**CORE TERMS:** filing fees, indigent, forma pauperis, clerk, fundamental rights, statutory provision, constitutional violation, post-conviction, statutory exceptions

**LEXISNEXIS® HEADNOTES**

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Civil Procedure > Parties > Self-Representation > General Overview

**HN1** In the absence of a statutory provision allowing the general waiver of filing fees, motions to proceed in forma pauperis may only be granted where specifically authorized by statute or required by constitutional provisions. More Like This Headnote | *Shepardize*: Restrict By Headnote

Civil Procedure > Parties > Self-Representation > General Overview

Civil Rights Law > Prisoner Rights > Access to Courts

Healthcare Law > Treatment > End-of-Life Decisions > Abortion > Right to Privacy

**HN2** Where certain fundamental rights are involved, the Constitution requires that an indigent be allowed access to the courts. More Like This Headnote

**JUDGES:** **[\*\*\*1]** Ernest A. Finney, Jr., C.J., Jean H. Toal, A.J., James E. Moore, A.J., John H. Waller, Jr., A.J., E. C. Burnett, III, A.J.

**OPINION**

**[\*534] [\*\*134] ORDER**

Appellant, an inmate proceeding *pro se*, filed a motion to be allowed to proceed without costs in the circuit court. Appellant's motion, and the accompanying summons and complaint, were returned to him by the clerk of court on the basis of an order issued by the circuit's Chief Judge for Administrative Purposes. The order allowed the filing of a complaint in forma pauperis only in Employment Security Commission and Post-Conviction Relief Proceedings. Appellant has appealed the clerk's decision and asks to be allowed to proceed without costs on appeal. Appellant also asks the Court to issue a writ of mandamus ordering the lower court to comply with Rule 3(c), SCRPC, which provides for the filing of petitions to proceed in forma pauperis.

Appellant is asking this Court to review the action taken by the clerk of court without first making a motion to have a circuit judge rule on his request to proceed without costs. This Court sits to review rulings **[\*\*\*2]** of judges **[\*535]** and, without a judge first determining whether appellant should be allowed to proceed without costs, this appeal is premature. Accordingly, this appeal is dismissed and the matter remanded for the circuit court judge to rule on appellant's motion. *Key v. Currie*, 305 S.C. 115, 406 S.E.2d 356 (1991).

Because of the increasing number of persons seeking to proceed in forma pauperis, we take this opportunity to give guidance as to when it is appropriate to waive filing fees. **HN1** In the absence of a statutory provision **[\*\*135]** allowing the general waiver of filing fees, we conclude motions to proceed in forma pauperis may only be granted where specifically authorized by statute or required by constitutional provisions. See *Tahtinen v. Superior Court, Pinal County*, 130 Ariz. 513, 637 P.2d 723 (1981); *Steinkamp v. Jacque*, 36 Conn. Supp. 37, 410 A.2d 489 (1979); 1986 Op. S.C. Att'y Gen. No. 86-44 at 131.

Among the statutory provisions allowing or requiring waiver of filing fees are S. C. Code Ann. §§ 8-21-310(11) (Supp. 1994)(no fee must be paid to appeal from a conviction in magistrate's or municipal court); 17-27-60 (1985)(no fee required of indigent filing a post-conviction relief [\*\*\*3] action); 20-4-40(e) (1985)(clerks of court must assist persons seeking an order of protection from domestic abuse by giving them forms to proceed in forma pauperis); 20-7-1440 (Supp. 1994)(no court fee may be charged in delinquency and neglect actions); 41-39-30 (1986)(fee waived in a proceeding involving a claim for benefits from the Employment Security Commission); and, 44-41-34(B) (Supp. 1994)(a minor may file an action seeking consent for an abortion without paying any filing fee). Further, <sup>HN2</sup>where certain fundamental rights are involved, the Constitution requires that an indigent be allowed access to the courts. Compare *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971)(an indigent must be given access to courts in divorce action) and *Smith v. Bennett*, 365 U.S. 708, 81 S. Ct. 895, 6 L. Ed. 2d 39 (1961)(an indigent prisoner may not be required to pay a filing fee for petitioning for a writ of habeas corpus), with *Ortwein v. Schwab*, 410 U.S. 656, 93 S. Ct. 1172, 35 L. Ed. 2d 572 (1973)(no [\*536] constitutional violation in requiring payment of appellate filing fee by indigents seeking review of an adverse welfare decision) and *United States v. Kras*, [\*\*\*4] 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1971)(no constitutional violation in requiring payment of filing fee by indigent in bankruptcy action). <sup>1</sup>

#### FOOTNOTES

<sup>1</sup> The examples given are not exhaustive but are illustrations of when a motion to proceed in forma pauperis must be granted by a judge. Other statutory exceptions and other fundamental rights may require the waiver of filing fees for indigents.

In the future, when an indigent litigant files a motion to proceed in forma pauperis pursuant to Rule 3(c), and the complaint does not appear to fit within one of the statutory or constitutional exceptions to the requirement of a filing fee, the clerk of court must submit the motion to a judge for a ruling as to whether the complaint does fit within one of the statutory exceptions or whether the cause of action concerns a fundamental right that requires waiver of the filing fee.

IT IS SO ORDERED.

Ernest A. Finney, Jr., C.J.

Jean H. Toal ▾, A.J.

James E. Moore ▾, A.J.

John H. Waller, Jr. ▾, A.J.

E. C. Burnett, III, [\*\*\*5] A.J.

Columbia, South Carolina

May 5, 1995


Source: **Legal > / ... / > SC State Cases, Combined** 






Terms: **name(martin) and date(geq (01/01/95) and leq (12/31/95))** (Suggest Terms for My Search)

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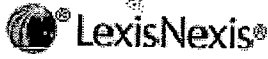
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STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

FILED

2018 APR 27 AM 8:39

IN THE COURT OF COMMON PLEAS  
ELEVENTH JUDICIAL CIRCUIT

LISA M. COMER  
CLERK OF COURT

Hayward L. Rogers, SCDC #278510, LEXINGTON SC

Case No.: 2016-CP-32-2815

Applicant,  
v.  
State of South Carolina,  
Respondent.

FINAL ORDER OF DISMISSAL  
RECEIVED  
MAR 18 2019  
S.C. SUPREME COURT

An application for post-conviction relief ("PCR") was filed August 11, 2016. Respondent made its Return and moved for summary dismissal, asserting the application is improperly successive, time barred, raises a claim that is not cognizable in a PCR action, and pleads other defenses barring the claims from review. The undersigned issued a Conditional Order of Dismissal on July 13, 2017, filed July 17, 2017, and allowed Applicant 20 days from the date of service in which to file a written response with the Clerk of Court.<sup>1</sup> Applicant thereafter sent the undersigned a letter dated July 26, 2017, to which the undersigned responded by memorandum dated July 31, 2017, filed August 2, 2017, and explained again that the Conditional Order allows time, specifically 20 days from the date of service, in which Applicant could file written objections. Applicant failed to file any written objections. Nonetheless, the court has considered what was submitted after the Conditional Order was entered.<sup>2</sup>

WPK  
#1

<sup>1</sup> Respondent has provided an Affidavit of Personal Service confirming Applicant was served with the conditional order on August 10, 2017. It is made a part of the instant Order. (Attachment 1).

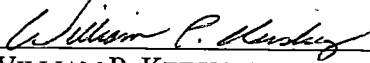
<sup>2</sup> The undersigned requested a proposed order from Respondent by memorandum dated October 11, 2017. With the submission of the proposed order via email that same day, Respondent also advised that Applicant apparently served a response on Respondent either on or about September 14th, but failed to file his response with the Clerk of Court. Respondent provided the

As discussed at length in the Conditional Order, the application is improperly successive, time barred, and fails to state a claim upon which relief could be granted. Other defenses pleaded by Respondent (specifically laches and res judicata) are well-taken given the record in this matter. In particular, the Court notes the long history of litigation which includes a direct appeal, three prior post-conviction relief actions, and several federal habeas actions. (See Conditional Order, pp. 2-7). At the time that this PCR action was filed, the Applicant had submitted motions in criminal court to seek relief, and an attorney was appointed to represent him for those motions. Applicant has had ample opportunities to submit his claims. The court finds that the Conditional Order should be made final and that this action should be dismissed.

**IT IS THEREFORE ORDERED** that the Court's Conditional Order of Dismissal is made final and the application for post-conviction relief is hereby denied and dismissed with prejudice.

If the Applicant desires to appeal this order, he must file and serve a Notice of Appeal within thirty (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

**AND IT IS SO ORDERED** this 26<sup>th</sup> day of April, 2018.

  
WILLIAM P. KEESLEY  
Circuit Court Judge  
Eleventh Judicial Circuit

Court with a copy of the document received. However, it is clear that Applicant failed to follow the instructions of the Court as set out in the Conditional Order and as reiterated in the July 31, 2017 memorandum. At any rate, this Court has reviewed documents submitted in response to the after the Conditional Order was signed and filed with the Clerk and finds Applicant fails to show sufficient cause to prevent the order from becoming final. This Court makes the document reviewed a part of the instant Order for purposes of this finding in the alternative, though such document has not been properly filed by Applicant and is not properly before the Court. (Attachment 2).

notes that while many of the attempts did not see fruition, Petitioner pressed twenty-three different claims in the application filed on July 6, 2012. See C/A 2:12-1858-TMC-BHH. That action was considered by the Magistrate in a Report and Recommendation, and subsequently considered by the District Court before relief was denied. See *Rogers v. Cartledge*, No. CIV.A. 2:12-1858-TMC, 2013 WL 2338617, at \*1 (D.S.C. May 29, 2013).

First PCR Application: 2004-CP-32-3932

On October 27, 2004, while Applicant's fourth Federal Habeas action was pending, Applicant filed his first state application for post-conviction relief. (2004- CP-32-3932). He alleged the following grounds for relief in his application:

- WPAC #3
1. Ineffective Assistance of Trial Counsel
  2. Ineffective Assistance of Appellate Counsel
  3. Direct Appeal Issues:
    - a. Conviction obtained by evidence procured through unconstitutional search and seizure
    - b. Conviction by unlawful arrest
    - c. Failure to Disclose Evidence Favorable to Defendant
    - d. Denial of Impartial Jury
    - e. Denial of Impartial Judge
    - f. Denial of Speedy Trial

Respondent made its return on July 18, 2005. An evidentiary hearing into the matter was held May 18, 2009, before the Honorable Roger M. Young. Applicant was present at the hearing, and was represented by Tara Dawn Shurling, Esquire. At the evidentiary hearing, Applicant amended the application, making the following additional allegations:

1. Ineffective Assistance of Counsel
  - a. Counsel never discussed with Applicant the fact that victim was deaf
  - b. Counsel failed to challenge search warrant ordering that Applicant's blood be drawn
    - i. Counsel should have moved for a suppression hearing

- because Applicant was not informed of right to attorney and actually requested an attorney
- ii. Counsel failed to object due to the fact that Applicant's Miranda rights were not discussed with him at the time he gave the blood
  - c. Counsel failed to object to the chain of custody regarding the sweater
  - d. Counsel failed to challenge evidence taken from purse
  - e. Counsel never reviewed discovery with Applicant
  - f. Counsel never discussed with Applicant whether or not Applicant should testify
  - g. Counsel failed to hire experts on Applicant's behalf, and did not discuss this option with Applicant
  - h. Counsel failed to file motion for speedy trial
  - i. Counsel failed to call alibi witnesses
2. Ineffective Assistance of Appellate Counsel:
- a. Appellate counsel failed to challenge the denial of directed verdict on appeal

*WSPC #4*

Applicant testified on his own behalf, and William Rast, Esquire, also testified. At the close of that evidentiary hearing, Applicant's counsel again amended the PCR application to include claims of:

1. Ineffective Assistance of Counsel:
  - a. Counsel failed to move for a mistrial
  - b. Counsel failed to interview the victim prior to trial
  - c. Counsel failed to put on record conversations with Solicitor about victim's ability to communicate
  - d. Counsel failed to preserve issues for appeal

By written Order dated August 18, 2009, filed August 20, 2009, Judge Young denied and dismissed the application.

Applicant filed a timely notice of appeal, and a petition for writ of certiorari was filed by Tara Dawn Shurling, Esquire, on or about February 25, 2011. Respondent filed its Return on July 13, 2011. On June 8, 2012, the Supreme Court denied Applicant's petition. Applicant filed a

petition for rehearing, which was denied by Order dated June 25, 2012. The Court issued the remittitur on August 23, 2012.

Second PCR Application: 2010-CP-32-3792

Applicant filed his second application for post-conviction relief on September 3, 2010 (2010-CP-32-3792). He alleged the following grounds for relief in his application:

1. Newly discovered evidence
2. Outrageous government conduct
3. Subject matter jurisdiction
4. Appointed trial attorney and PCR attorney misconduct
5. Denial of discovery
6. Denial of due process and equal protection under the law
  - a. Failure to pursue a defense of justification
7. Prosecutorial misconduct
  - a. Casting Applicant in an unfair light at trial.

*WPC*  
*#5*  
Respondent made its return and motion to dismiss on December 10, 2010. The Honorable R. Knox McMahon subsequently issued a Conditional Order of Dismissal, dated March 11, 2011, and filed March 16, 2011. Following a response by Applicant, Judge McMahon issued a Final Order dated December 29, 2011, and filed January 4, 2012, dismissing the application, with prejudice. Applicant filed a motion pursuant to Rule 59(e), SCRPC, which was denied September 18, 2012.

Applicant filed a timely notice of appeal. On November 14, 2012, the South Carolina Supreme Court dismissed the appeal on grounds that Applicant failed to show an arguable basis for asserting that the determination by the lower court was improper. *Rogers v. State*, S.C. Sup. Ct. Order dated Nov. 14, 2012. Applicant subsequently filed a motion seeking appointment of counsel. The Supreme Court denied that motion by Order dated November 28, 2012, and issued the remittitur on November 30, 2012.

Third PCR Application: 2012-CP-32-3237

Applicant filed his third application for post-conviction relief on August 8, 2012. (2012-CP-32-3237). He alleged the following grounds for relief in his application:

1. Denial of Due Process and Fundamental Fairness
2. The sentence exceeds the maximum authorized by law
3. The Court was without jurisdiction to impose sentence of ABWIK and CSC First Degree
4. The evidence of material facts not previously presented and heard that requires vacation of the conviction and sentence.

Applicant subsequently filed numerous *pro se* documents requesting sanctions for Respondent's failure to immediately reply to his successive and untimely PCR application. Respondent made its return and motion to dismiss on November 4, 2013, arguing the application was untimely, successive, barred by res judicata, and otherwise without merit. David K. Allen, Esquire, was appointed to represent Applicant by Order dated July 28, 2015.

*WSP*  
*#6*  
Applicant submitted an amended application dated October 16, 2015, and a second amended application October 23, 2015, respectively, raising the following additional grounds for relief:

1. Newly discovered evidence
  - a. Individual (Ms. Merkyle Blackmon) who drew Applicant's blood for D.N.A. sample was not, and has never been, licensed with the State Board of Nursing. The transcript shows that a witness for the State testified Ms. Blackmon was a nurse.

Respondent made its amendment to the return and motion to dismiss on December 3, 2015. A hearing on Respondent's motion was convened on January 14, 2016, before the Honorable J. Mark Hayes, II. Applicant was present at the hearing and was represented by Mr. Allen. By written Order dated April 18, 2016, filed April 29, 2016, Judge Hayes granted Respondent's motion, and denied and dismissed the application with prejudice.

On May 18, 2016, Applicant submitted a motion to alter/amend judgment pursuant to Rule 59(e), SCRPC. Respondent made its return on May 24, 2016. Judge Hayes denied that motion by written Order dated May 31, 2016, and filed June 13, 2016.

Applicant filed a timely notice of appeal. On July 25, 2016, the South Carolina Supreme Court dismissed the appeal on grounds that Applicant failed to show an arguable basis for asserting that the determination by the lower court was improper. *Rogers v. State*, S.C. Sup. Ct. Order dated July 25, 2016. Applicant subsequently filed a *pro se* motion for rehearing on August 10, 2016. By letter dated August 10, 2016, the Court informed Applicant it would take no action on the motion due to Mr. Allen's continued representation. The Court issued the remittitur on August 11, 2016.

## II. CURRENT APPLICATION

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

- W  
#7
1. "Evidence of material facts, not previously presented and heard, that requires vacation of the conviction and sentence in the interest of justice."
    - a. "Search warrant used to draw defendant's blood was insufficient for probable cause, because the search warrant affidavit was for the search of a dwelling, not for the search and body intrusion to draw blood, and there was no court order to compel the process."
    - b. "At trial, the State established no evidence that defendant's blood sample was drawn by a qualified individual as required under the statute. A witness for the state testified that the individual was a registered nurse and qualified to collect blood samples for D.N.A. Newly discovered evidence shows that the individual that drew the defendant's blood was not a registered nurse, and was not appropriately trained to do so."
    - c. "Indictment for assault and battery with intent to kill is without presentment by the Grand Jury and deprived the Court of subject matter jurisdiction."
    - d. "The State failed to supply proof beyond a reasonable doubt, and lacked sufficient evidence to convict and sentence the defendant to

first degree criminal sexual conduct, as the State failed to prove the elements of a 'sexual battery' and 'penetration,' failing to prove each and every element beyond a reasonable doubt."

2. "Ineffective assistance of trial counsel."
3. "Ineffective assistance of appellate counsel."

By amendment dated October 4, 2016, Applicant further alleges he is being held unlawfully for the following reasons:

4. "Outrageous Government Conduct,"
5. "Racial Discrimination,"
6. "Denial of Due Process and Equal Protection of the Law."
  - a. "For good cause, [Applicant] would prove by discovery and facts that the person whom issued his arrest warrants was never sworn under oath to act as a magistrate judge, and did not have constitutional authority to determined probable cause for arrest, see S.C. Code Ann. 22-1-20."
7. "Moreover, [Applicant] was wrongfully convicted and sentenced for 'assault and battery with intent to kill,' a charge in which the Lexington County Grand Jury did not indict him for, did not have subject matter jurisdiction, neither did applicant waived jurisdiction, in violation of [S.C. Const, art. I, §§ 3, 11; art. V., § 22] and his 14th Amend[ment] to the [United States Constitution.] Evans v. State, [363 S.C. 495,] 611 S.E.2d 510 (S.C. 2005)."

WPC  
#8

### III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the application, the Lexington County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the final orders of Applicant's previous PCR and federal habeas corpus actions, and considered the arguments set forth in the return and motion to dismiss. For all the following reasons, this Court finds the matter should be summarily dismissed.

## Successive

The Court finds the application should be summarily dismissed because it is successive to Applicant's previous PCR applications. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application either in state or federal court. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981). Section 17-27-90 of the South Carolina Code provides:

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.

*WPC*  
*#9*  
Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate 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 new ground raised in a subsequent application is limited to those grounds that "could not have been raised ... in the previous application." *Id.* If the applicant could have raised these allegations in a previous application, then he may not raise those grounds in successive applications. *Id.* Applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant's current allegations were, or could have been raised, in the proceedings based on Applicant's prior applications for post-conviction relief and even, where cognizable, in his federal litigation; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his

current allegations in his previous applications for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him, and the application shall be summarily dismissed.

#### Statute of Limitations

The Court also finds the application should be summarily dismissed for failure to timely file under the time limitations set out in the PCR statute:

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).

WPK  
#10

Applicant was convicted on September 21, 2001, and the Court of Appeals issued the remittitur on September 9, 2004. The current application was not filed until August 11, 2016 – well after the one-year statutory filing period expired. Therefore, this application shall be summarily dismissed as barred by the statute of limitations.

#### Laches

In addition to, and in complement to the statute of limitations bar, the Court finds that the application should also be dismissed as barred by the equitable doctrine of laches. Laches may bar litigation of claims not otherwise subject to the statute of limitations. *See Whitehead v. State*, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002); *Odom v. State*, 337 S.C. 256, 263, 523 S.E.2d 753, 756 (1999). “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.’” *Whitehead*, 352 S.C. at 219, 574 S.E.2d at 202 (quoting *Hallums v. Hallums*, 296 S.C. 195, 198–199, 371 S.E.2d 525, 527 (1988)).

Applicant seeks post-conviction relief nearly 15 years after his conviction. Absent some

explanation or justification for the delay in seeking post-conviction relief, laches prevents an Applicant from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to properly and fairly litigate and adjudicate those claims. *McElrath* at 283, 277 S.E.2d at 890. Applicant has offered no justification for the delay. The time alone supports the expectation that witness memories and physical evidence will have naturally faded and degraded. *See Bray v. State*, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005) (“Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party.”) (quoting *Whitehead, supra*). This Court finds laches also bars litigation of the claims.

#### Res Judicata

The Court also 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, 414 S.E.2d 786 (Ct. App. 1992). “[A] final judgment on the merits in a prior action” bars subsequent consideration of those issues in a new action. *Foran v. USAA Casualty Ins. Co.*, 311 S.C. 189, 190-191, 427 S.E.2d 918, 919 (Ct. App. 1993). Res judicata also bars any issues that could have been raised in the former action. *Id.*; *see also Foxworth v. State*, 275 S.C. 615, 617, 274 S.E.2d 415, 415–16 (1981) (“the claims raised and those that could have been raised in the prior federal habeas corpus proceeding were barred under the doctrine of res judicata.”).

Applicant had a full opportunity to litigate all his allegations in his prior actions. Each cognizable allegation has been previously raised and ruled upon by a state or federal court, if not both, in one form or another. The evidentiary validity of Applicant’s blood was raised, at minimum, in his first and third PCR actions, (see Return, p. 5 and 14), as well as his ninth federal habeas action, (see Return, p. 12). The jurisdiction of the trial court was raised in Applicant’s

second and third PCR actions, (see Return, pp. 11 and 14), as well as his ninth federal habeas action, (see Return p. 12). The finality of these previous Court rulings should be respected. Thus, the application shall be summarily dismissed as barred by the doctrine of res judicata.

#### Failure to State a Claim

The Court additionally finds Applicant's allegation of insufficient evidence of record to support his conviction fails to support a cognizable claim under any of the statutory grounds. Such a claim is not a cognizable ground for post-conviction. See S.C. Code Ann. § 17-27-20(A)(6) (“[T]his section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.”). Applicant has failed to state a claim upon which relief may be granted.

#### Subject-Matter Jurisdiction and Indictments

*WPC*  
*#12*  
The Court also finds Applicant's allegation that the trial court lacked subject matter jurisdiction because his indictments were insufficient should be summarily dismissed. “[S]ubject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts and the blending of these concepts serves only to confuse the issue.” *State v. Gentry*, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005). With respect to Applicant's claims concerning the sufficiency of the indictment, Applicant was required to raise such a challenge prior to the swearing of the jury. See S.C. Code Ann. §17-19-90 (2003). Regardless, “[a]n indictment is merely a notice document.” *State v. Baker*, 390 S.C. 56, 62, 700 S.E.2d 440, 442 (Ct. App. 2010) (citing *Gentry*, 363 S.C. at 102-103, 610 S.E.2d at 500). Whether or not the indictment could be made more definite and certain is irrelevant. *Id.*

Applicant's indictment allegation is not proper for PCR. Applicant's failure to raise this

challenge before the jury was sworn prevents him from raising this allegation in this action. Additionally, the indictments charged Applicant substantially in the language of the statute prohibiting the crime, and thus pass legal muster. As such, Applicant's allegation as it pertains to the indictments shall be dismissed.

Furthermore, Applicant has presented no facts whatsoever to support his claim that the trial court lacked subject matter jurisdiction. An Applicant may challenge the subject matter jurisdiction of the trial court and such a claim is one that may be raised at any time. *See Brown v. State*, 343 S.C. 342, 540 S.E.2d 846 (2001), *overruled in part by Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." *Gentry*, 363 S.C. at 101, 610 S.E.2d at 499. See also S.C. Const. Art. V, § 7. There must be some indication that his case is of a class over which the circuit court does not have the authority to preside. Applicant's conviction involved a criminal charge in the Court of General Sessions. Accordingly, the circuit court had subject matter jurisdiction. Applicant has failed to present any facts or evidence that the convictions he challenges in this application are in a class over which the circuit court does not have the authority to provide. Therefore, Applicant's allegation, as it pertains to subject-matter jurisdiction, shall also be dismissed.

#### Newly-Discovered Evidence

Lastly, the Court finds that Applicant's assertion that each of his allegations constitutes newly-discovered evidence, such that he should be entitled to an evidentiary hearing, is without merit. The Uniform Post-Conviction Relief Act provides that a person may institute a Post-conviction relief 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). If the applicant contends there is evidence of material fact not previously

**ORIGINAL**

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON )

ELEVENTH JUDICIAL CIRCUIT

2017 JUL 17 PM 4:20

Hayward L. Rogers, SCDC #278510, )

Case No.: 2016-CP-32-2815

LOCAL COUNCIL  
CLERK OF COURT  
JUDICIAL DISTRICT

Applicant, )

v. )

CONDITIONAL ORDER OF DISMISSAL

State of South Carolina , )

Respondent. )

This matter comes before the Court by way of an application for post-conviction relief ("PCR") filed August 11, 2016. Respondent made its Return and moved for summary dismissal, asserting the application is improperly successive, time barred, raises a claim that is not cognizable in a PCR action, and pleads other defenses barring the claims from review. After a review of the pleadings, and attachments, this Court has determined that a conditional order of dismissal should be entered.<sup>1</sup> The Court finds it appears the application is improperly successive, time barred, fails to state a claim which would otherwise allow presentation either on the merits or in light of these procedural bars, and, additionally, the other defenses as pled by Respondent are well-taken. The Court will, however, give Applicant the opportunity to show cause why the Order should not become final. His attention is directed to the last page of the instant Order for specific directions in making its response. In making this determination, the Court has reviewed and accepted the following facts:

I. PROCEDURAL HISTORY

Original Conviction

<sup>1</sup> The Court advised both parties of its decision by Memorandum dated June 30, 2017.

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#1

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the February 1999 term of the Lexington County Grand Jury for the crimes of kidnapping (1999-GS-32-813), strong arm robbery (1999-GS-32-814), two counts of criminal sexual conduct in the first degree (1999-GS-32-815 and 818), and assault and battery with intent to kill (1999-GS-32-819). William Rast, Esquire, represented Applicant.

While the case was pending for trial, Applicant moved to dismiss all charges based on the length of pre-trial incarceration. The motion was denied and Applicant appealed. By written order dated June 8, 2001, the South Carolina Court of Appeals dismissed the appeal as premature.

Applicant proceeded to trial before the Honorable Marc H. Westbrook and a jury. The jury found Applicant guilty as indicted on September 21, 2001. Judge Westbrook sentenced Applicant to imprisonment for life without the possibility of parole for kidnapping, criminal sexual conduct, and assault and battery with intent to kill, and to a term of 15 years for strong arm robbery.

Applicant filed a timely notice of appeal, and a direct appeal was perfected by Wanda Hagler, Esquire. By opinion decided August 9, 2004, the South Carolina Court of Appeals affirmed Applicant's convictions. *State v. Rogers*, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004). The Court sent the remittitur out on September 9, 2004.

#### Federal Habeas Actions

Applicant filed his first *pro se* Petition for Habeas Corpus under 28 U.S.C. § 2254 on November 18, 2002. (C.A. No. 8:02-3820-MBS-BHH). On December 20, 2002, the District Court dismissed the petition without prejudice for failure to first exhaust state court remedies before turning to the federal courts for review. Petitioner would go on to file multiple federal actions attempting to challenge these same charges. (See Return, pp. 2-17). The undersigned

notes that while many of the attempts did not see fruition, Petitioner pressed twenty-three different claims in the application filed on July 6, 2012. See C/A 2:12-1858-TMC-BHH. That action was considered by the Magistrate in a Report and Recommendation, and subsequently considered by the District Court before relief was denied. See *Rogers v. Cartledge*, No. CIV.A. 2:12-1858-TMC, 2013 WL 2338617, at \*1 (D.S.C. May 29, 2013).

First PCR Application: 2004-CP-32-3932

On October 27, 2004, while Applicant's fourth Federal Habeas action was pending, Applicant filed his first state application for post-conviction relief. (2004- CP-32-3932). He alleged the following grounds for relief in his application:

1. Ineffective Assistance of Trial Counsel
2. Ineffective Assistance of Appellate Counsel
3. Direct Appeal Issues:
  - a. Conviction obtained by evidence procured through unconstitutional search and seizure
  - b. Conviction by unlawful arrest
  - c. Failure to Disclose Evidence Favorable to Defendant
  - d. Denial of Impartial Jury
  - e. Denial of Impartial Judge
  - f. Denial of Speedy Trial

Respondent made its return on July 18, 2005. An evidentiary hearing into the matter was held May 18, 2009, before the Honorable Roger M. Young. Applicant was present at the hearing, and was represented by Tara Dawn Shurling, Esquire. At the evidentiary hearing, Applicant amended the application, making the following additional allegations:

1. Ineffective Assistance of Counsel
  - a. Counsel never discussed with Applicant the fact that victim was deaf
  - b. Counsel failed to challenge search warrant ordering that Applicant's blood be drawn
    - i. Counsel should have moved for a suppression hearing

- because Applicant was not informed of right to attorney and actually requested an attorney
- ii. Counsel failed to object due to the fact that Applicant's Miranda rights were not discussed with him at the time he gave the blood
  - c. Counsel failed to object to the chain of custody regarding the sweater
  - d. Counsel failed to challenge evidence taken from purse
  - e. Counsel never reviewed discovery with Applicant
  - f. Counsel never discussed with Applicant whether or not Applicant should testify
  - g. Counsel failed to hire experts on Applicant's behalf, and did not discuss this option with Applicant
  - h. Counsel failed to file motion for speedy trial
  - i. Counsel failed to call alibi witnesses
2. Ineffective Assistance of Appellate Counsel:
- a. Appellate counsel failed to challenge the denial of directed verdict on appeal

*WPC*  
*#4*

Applicant testified on his own behalf, and William Rast, Esquire, also testified. At the close of that evidentiary hearing, Applicant's counsel again amended the PCR application to include claims of:

1. Ineffective Assistance of Counsel:
  - a. Counsel failed to move for a mistrial
  - b. Counsel failed to interview the victim prior to trial
  - c. Counsel failed to put on record conversations with Solicitor about victim's ability to communicate
  - d. Counsel failed to preserve issues for appeal

By written Order dated August 18, 2009, filed August 20, 2009, Judge Young denied and dismissed the application.

Applicant filed a timely notice of appeal, and a petition for writ of certiorari was filed by Tara Dawn Shurling, Esquire, on or about February 25, 2011. Respondent filed its Return on July 13, 2011. On June 8, 2012, the Supreme Court denied Applicant's petition. Applicant filed a

petition for rehearing, which was denied by Order dated June 25, 2012. The Court issued the remittitur on August 23, 2012.

Second PCR Application: 2010-CP-32-3792

~~Applicant filed his second application for post-conviction relief on September 3, 2010~~

(2010-CP-32-3792). He alleged the following grounds for relief in his application:

1. Newly discovered evidence
2. Outrageous government conduct
3. Subject matter jurisdiction
4. Appointed trial attorney and PCR attorney misconduct
5. Denial of discovery
6. Denial of due process and equal protection under the law
  - a. Failure to pursue a defense of justification
7. Prosecutorial misconduct
  - a. Casting Applicant in an unfair light at trial.

WPC  
#5  
Respondent made its return and motion to dismiss on December 10, 2010. The Honorable R. Knox McMahon subsequently issued a Conditional Order of Dismissal, dated March 11, 2011, and filed March 16, 2011. Following a response by Applicant, Judge McMahon issued a Final Order dated December 29, 2011, and filed January 4, 2012, dismissing the application, with prejudice. Applicant filed a motion pursuant to Rule 59(e), SCRPC, which was denied September 18, 2012.

Applicant filed a timely notice of appeal. On November 14, 2012, the South Carolina Supreme Court dismissed the appeal on grounds that Applicant failed to show an arguable basis for asserting that the determination by the lower court was improper. *Rogers v. State*, S.C. Sup. Ct. Order dated Nov. 14, 2012. Applicant subsequently filed a motion seeking appointment of counsel. The Supreme Court denied that motion by Order dated November 28, 2012, and issued the remittitur on November 30, 2012.

Third PCR Application: 2012-CP-32-3237

Applicant filed his third application for post-conviction relief on August 8, 2012. (2012-CP-32-3237). He alleged the following grounds for relief in his application:

1. Denial of Due Process and Fundamental Fairness
2. The sentence exceeds the maximum authorized by law
3. The Court was without jurisdiction to impose sentence of ABWIK and CSC First Degree
4. The evidence of material facts not previously presented and heard that requires vacation of the conviction and sentence.

Applicant subsequently filed numerous *pro se* documents requesting sanctions for Respondent's failure to immediately reply to his successive and untimely PCR application. Respondent made its return and motion to dismiss on November 4, 2013, arguing the application was untimely, successive, barred by res judicata, and otherwise without merit. David K. Allen, Esquire, was appointed to represent Applicant by Order dated July 28, 2015.

Applicant submitted an amended application dated October 16, 2015, and a second amended application October 23, 2015, respectively, raising the following additional grounds for relief:

1. Newly discovered evidence
  - a. Individual (Ms. Merkyle Blackmon) who drew Applicant's blood for D.N.A. sample was not, and has never been, licensed with the State Board of Nursing. The transcript shows that a witness for the State testified Ms. Blackmon was a nurse.

Respondent made its amendment to the return and motion to dismiss on December 3, 2015. A hearing on Respondent's motion was convened on January 14, 2016, before the Honorable J. Mark Hayes, II. Applicant was present at the hearing and was represented by Mr. Allen. By written Order dated April 18, 2016, filed April 29, 2016, Judge Hayes granted Respondent's motion, and denied and dismissed the application with prejudice.

On May 18, 2016, Applicant submitted a motion to alter/amend judgment pursuant to Rule 59(e), SCRCP. Respondent made its return on May 24, 2016. Judge Hayes denied that motion by written Order dated May 31, 2016, and filed June 13, 2016.

Applicant filed a timely notice of appeal. On July 25, 2016, the South Carolina Supreme Court dismissed the appeal on grounds that Applicant failed to show an arguable basis for asserting that the determination by the lower court was improper. *Rogers v. State*, S.C. Sup. Ct. Order dated July 25, 2016. Applicant subsequently filed a *pro se* motion for rehearing on August 10, 2016. By letter dated August 10, 2016, the Court informed Applicant it would take no action on the motion due to Mr. Allen's continued representation. The Court issued the remittitur on August 11, 2016.

## II. CURRENT APPLICATION

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

- WAL  
#7
1. "Evidence of material facts, not previously presented and heard, that requires vacation of the conviction and sentence in the interest of justice."
    - a. "Search warrant used to draw defendant's blood was insufficient for probable cause, because the search warrant affidavit was for the search of a dwelling, not for the search and body intrusion to draw blood, and there was no court order to compel the process."
    - b. "At trial, the State established no evidence that defendant's blood sample was drawn by a qualified individual as required under the statute. A witness for the state testified that the individual was a registered nurse and qualified to collect blood samples for D.N.A. Newly discovered evidence shows that the individual that drew the defendant's blood was not a registered nurse, and was not appropriately trained to do so."
    - c. "Indictment for assault and battery with intent to kill is without presentment by the Grand Jury and deprived the Court of subject matter jurisdiction."
    - d. "The State failed to supply proof beyond a reasonable doubt, and lacked sufficient evidence to convict and sentence the defendant to

first degree criminal sexual conduct, as the State failed to prove the elements of a 'sexual battery' and 'penetration,' failing to prove each and every element beyond a reasonable doubt."

2. "Ineffective assistance of trial counsel."
3. "Ineffective assistance of appellate counsel."

By amendment dated October 4, 2016, Applicant further alleges he is being held unlawfully

for the following reasons:

4. "Outrageous Government Conduct,"
5. "Racial Discrimination,"
6. "Denial of Due Process and Equal Protection of the Law."
  - a. "For good cause, [Applicant] would prove by discovery and facts that the person whom issued his arrest warrants was never sworn under oath to act as a magistrate judge, and did not have constitutional authority to determined probable cause for arrest, see S.C. Code Ann. 22-1-20."
7. "Moreover, [Applicant] was wrongfully convicted and sentenced for 'assault and battery with intent to kill,' a charge in which the Lexington County Grand Jury did not indict him for, did not have subject matter jurisdiction, neither did applicant waived jurisdiction, in violation of [S.C. Const, art. I, §§ 3, 11; art. V., § 22] and his 14th Amend[ment] to the [United States Constitution.] Evans v. State, [363 S.C. 495,] 611 S.E.2d 510 (S.C. 2005)."

WPA  
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### III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the application, the Lexington County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the final orders of Applicant's previous PCR and federal habeas corpus actions, and considered the arguments set forth in the return and motion to dismiss. For all the following reasons, this Court finds the matter should be summarily dismissed.

## Successive

The Court finds the application should be summarily dismissed because it is successive to Applicant's previous PCR applications. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application either in state or federal court. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981). Section 17-27-90 of the South Carolina Code provides:

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.

WPC  
#9

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate 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 new ground raised in a subsequent application is limited to those grounds that "could not have been raised ... in the previous application." *Id.* If the applicant could have raised these allegations in a previous application, then he may not raise those grounds in successive applications. *Id.* Applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant's current allegations were, or could have been raised, in the proceedings based on Applicant's prior applications for post-conviction relief and even, where cognizable, in his federal litigation; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his

current allegations in his previous applications for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him, and the application shall be summarily dismissed.

#### Statute of Limitations

The Court also finds the application should be summarily dismissed for failure to timely file under the time limitations set out in the PCR statute:

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).

WPK  
#10  
Applicant was convicted on September 21, 2001, and the Court of Appeals issued the remittitur on September 9, 2004. The current application was not filed until August 11, 2016 – well after the one-year statutory filing period expired. Therefore, this application shall be summarily dismissed as barred by the statute of limitations.

#### Laches

In addition to, and in complement to the statute of limitations bar, the Court finds that the application should also be dismissed as barred by the equitable doctrine of laches. Laches may bar litigation of claims not otherwise subject to the statute of limitations. *See Whitehead v. State*, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002); *Odom v. State*, 337 S.C. 256, 263, 523 S.E.2d 753, 756 (1999). “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.’” *Whitehead*, 352 S.C. at 219, 574 S.E.2d at 202 (quoting *Hallums v. Hallums*, 296 S.C. 195, 198–199, 371 S.E.2d 525, 527 (1988)).

Applicant seeks post-conviction relief nearly 15 years after his conviction. Absent some

explanation or justification for the delay in seeking post-conviction relief, laches prevents an Applicant from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to properly and fairly litigate and adjudicate those claims. *McElrath* at 283, 277 S.E.2d at 890. Applicant has offered no justification for the delay. The time alone supports the expectation that witness memories and physical evidence will have naturally faded and degraded. *See Bray v. State*, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005) (“Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party.”) (quoting *Whitehead, supra*). This Court finds laches also bars litigation of the claims.

#### Res Judicata

The Court also 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, 414 S.E.2d 786 (Ct. App. 1992). “[A] final judgment on the merits in a prior action” bars subsequent consideration of those issues in a new action. *Foran v. USAA Casualty Ins. Co.*, 311 S.C. 189, 190-191, 427 S.E.2d 918, 919 (Ct. App. 1993). Res judicata also bars any issues that could have been raised in the former action. *Id.*; *see also Foxworth v. State*, 275 S.C. 615, 617, 274 S.E.2d 415, 415–16 (1981) (“the claims raised and those that could have been raised in the prior federal habeas corpus proceeding were barred under the doctrine of res judicata.”).

Applicant had a full opportunity to litigate all his allegations in his prior actions. Each cognizable allegation has been previously raised and ruled upon by a state or federal court, if not both, in one form or another. The evidentiary validity of Applicant’s blood was raised, at minimum, in his first and third PCR actions, (see Return, p. 5 and 14), as well as his ninth federal habeas action, (see Return, p. 12). The jurisdiction of the trial court was raised in Applicant’s

second and third PCR actions, (see Return, pp. 11 and 14), as well as his ninth federal habeas action, (see Return p. 12). The finality of these previous Court rulings should be respected. Thus, the application shall be summarily dismissed as barred by the doctrine of res judicata.

#### Failure to State a Claim

The Court additionally finds Applicant's allegation of insufficient evidence of record to support his conviction fails to support a cognizable claim under any of the statutory grounds. Such a claim is not a cognizable ground for post-conviction. See S.C. Code Ann. § 17-27-20(A)(6) (“[T]his section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.”). Applicant has failed to state a claim upon which relief may be granted.

#### Subject-Matter Jurisdiction and Indictments

*WAC*  
*#12*  
The Court also finds Applicant's allegation that the trial court lacked subject matter jurisdiction because his indictments were insufficient should be summarily dismissed. “[S]ubject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts and the blending of these concepts serves only to confuse the issue.” *State v. Gentry*, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005). With respect to Applicant's claims concerning the sufficiency of the indictment, Applicant was required to raise such a challenge prior to the swearing of the jury. See S.C. Code Ann. §17-19-90 (2003). Regardless, “[a]n indictment is merely a notice document.” *State v. Baker*, 390 S.C. 56, 62, 700 S.E.2d 440, 442 (Ct. App. 2010) (citing *Gentry*, 363 S.C. at 102-103, 610 S.E.2d at 500). Whether or not the indictment could be made more definite and certain is irrelevant. *Id.*

Applicant's indictment allegation is not proper for PCR. Applicant's failure to raise this

challenge before the jury was sworn prevents him from raising this allegation in this action. Additionally, the indictments charged Applicant substantially in the language of the statute prohibiting the crime, and thus pass legal muster. As such, Applicant's allegation as it pertains to the indictments shall be dismissed.

Furthermore, Applicant has presented no facts whatsoever to support his claim that the trial court lacked subject matter jurisdiction. An Applicant may challenge the subject matter jurisdiction of the trial court and such a claim is one that may be raised at any time. *See Brown v. State*, 343 S.C. 342, 540 S.E.2d 846 (2001), *overruled in part by Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." *Gentry*, 363 S.C. at 101, 610 S.E.2d at 499. See also S.C. Const. Art. V, § 7. There must be some indication that his case is of a class over which the circuit court does not have the authority to preside. Applicant's conviction involved a criminal charge in the Court of General Sessions. Accordingly, the circuit court had subject matter jurisdiction. Applicant has failed to present any facts or evidence that the convictions he challenges in this application are in a class over which the circuit court does not have the authority to provide. Therefore, Applicant's allegation, as it pertains to subject-matter jurisdiction, shall also be dismissed.

#### Newly-Discovered Evidence

Lastly, the Court finds that Applicant's assertion that each of his allegations constitutes newly-discovered evidence, such that he should be entitled to an evidentiary hearing, is without merit. The Uniform Post-Conviction Relief Act provides that a person may institute a Post-conviction relief 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). If the applicant contends there is evidence of material fact not previously

presented, the post-conviction relief application must be filed 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). An applicant requesting a new trial based on purported after-discovered evidence must demonstrate the offered 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, 299 S.E.2d 854, 855 (1983) (citing *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979)).

WAC #14  
Applicant has failed to allege facts sufficient to support his claim of newly-discovered evidence. Each of Applicant's allegations involves "facts" that were, or could have been, discovered before trial. Furthermore, each of Applicant's allegations have been raised at least once in his numerous prior actions in state and federal courts. 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 has failed to make such a prima facie showing that he is entitled to relief based on the information set forth and, therefore, he is not entitled to an evidentiary hearing in the matter. Accordingly, this matter shall be summarily dismissed with prejudice.

CLIENT COPY

STATE OF SOUTH CAROLINA )

COUNTY OF LEXINGTON )

HAYWARD LEON ROGERS, #278510, )

Applicant, )

v. )

STATE OF SOUTH CAROLINA, )

Respondent. )

IN THE COURT OF COMMON PLEAS  
ELEVENTH JUDICIAL CIRCUIT

CASE NO.: 04-CP-32-3932

ORDER

THIS MATTER comes before the Court by way of an Application for Post-Conviction Relief filed on October 27, 2004, and amended on August 21, 2008. The State made its Return on July 18, 2005. An evidentiary hearing was convened in this case on May 18, 2009. The Applicant was present and was represented by Tara Dawn Shurling of the Richland County Bar. The State was represented by A. West Lee, Assistant Attorney General.

I.  
PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Lexington County Clerk of Court's orders of commitment. The Lexington County Grand Jury indicted the Applicant at the February 1999 term of General Sessions for two counts of Criminal Sexual Conduct in the First Degree (99-GS-32-815; 818), Kidnapping (99-GS-32-813), Assault and Battery with Intent to Kill (99-GS-32-819), and Strong-Armed Robbery (99-GS-32-814). On September 17-21, 2001, the Applicant proceeded to trial by jury, and was represented by William Y. Rast, Jr., Esquire. He was found guilty as charged on all counts. The Honorable Marc H. Westbrook, presiding circuit judge, sentenced the Applicant to life imprisonment without the possibility of parole pursuant to S.C. Code Ann. §17-25-45.

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S.C. SUPREME COURT

A Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected by Wanda H. Haile,<sup>1</sup> Senior Assistant Appellate Defender, with the South Carolina Office of Appellate Defense.<sup>2</sup> By published opinion, the South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Rogers, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004). Though multiple issues were raised, appellate counsel did not petition for rehearing or seek certiorari to the Supreme Court.

## II. ALLEGATIONS RAISED

In his Application for Post-Conviction Relief, the Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel; and
2. Ineffective assistance of appellate counsel.

He alleged generally that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, were violated prior to, during, and after his trial.

In an Amended Application for Post-Conviction Relief filed August 21, 2008, the Applicant more narrowly defined his allegations in support of his claim that he received ineffective assistance of counsel. In that Application, he alleged:

1. Trial counsel was ineffective for failing to require that a certified interpreter be sworn to take the victim's testimony;
2. Trial counsel was ineffective for failing to challenge the sufficiency of the search warrant used to draw the Applicant's blood; ~~WARRANT IS SEARCH BY NO COURT ORDER FALSE STATEMENT~~
3. Trial counsel was ineffective for failing to challenge the chain of custody on the Applicant's blood; ~~FALSE~~

<sup>1</sup> Now Wanda H. Carter.

<sup>2</sup> Now the South Carolina Commission on Indigent Defense, Division of Appellate Defense.

4. Trial counsel was ineffective for failing to use readily available experts, funds for whom had already been obtained by previous defense counsel, in the Applicant's defense at trial.

At the evidentiary hearing convened in this case, the Applicant raised additional allegations of ineffective assistance of counsel. This Court accepts those allegations as amendments to his

Application for Post-Conviction Relief made pursuant to the evidence adduced at the hearing.

See Simpson v. Moore, 367 S.C. 587, 599, 627 S.E.2d 701, 208 (2006); Rule 15(b), SCRPC. At

the hearing, the Applicant specifically alleged:

5. Defense counsel was ineffective for failing to move for a mistrial when he realized that the victim was deaf;
6. Defense counsel was ineffective for failing to interview the victim prior to the trial.
7. Appellate counsel was ineffective for failing to argue on appeal that the Applicant was entitled to a new trial based on the fact that the Applicant's speedy trial rights were violated.
8. Appellate counsel was ineffective for failing to argue on appeal that Judge Westbrook should have recused himself from the trial of this case.
9. Appellate counsel was ineffective for failing to argue that the Applicant's motion for a directed verdict was improperly denied by the trial court.

### III.

#### EVIDENCE BEFORE THE COURT

At the Post-Conviction Relief hearing held in this case on May 18, 2009, the Applicant presented his own testimony, as well as testimony from trial counsel William Y. Rast, Jr., Esquire. In addition to this testimony, this Court has before it a transcript of the trial, a copy of the records of the Lexington County Clerk of Court regarding the subject convictions, a copy of the Applicant's records with the South Carolina Department of Corrections, and a copy of the appellate court documents in this case. What follows below are the findings of fact and rulings

of law made by this Court in accordance with the Uniform Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 *et seq.* (1985).

As a threshold matter, this Court would note that the Applicant was represented by an experienced trial attorney who is generally regarded for his competence. On the facts of this case, however, this Court finds that the combined effect of his errors and omissions was such that the Applicant was deprived of a fair trial. Specifically, this Court finds a reasonable probability that but for counsel's errors and omissions, the outcome of this trial would have been different. For that reason, this Court finds that trial counsel failed to provide the Applicant reasonable, professional assistance of counsel.

#### IV. RELEVANT FACTS

The South Carolina Court of Appeals' decision in this case contains an excellent summary of the facts, see State v. Rogers, supra. For the purposes of evaluating this action, this Court incorporates that factual summary by reference. In addition, this Court notes the following relevant facts.

The Applicant was charged with sexually assaulting the victim, Ethel Tillman, a fifty-seven year old woman, on September 28, 1998. The evidence presented by the State supported the following view of the facts. The victim was walking away from a video poker establishment when the Applicant came up to her. The Applicant forced her behind a nearby building and forced her to have vaginal and oral intercourse with him. She fought him off and he ran away with her purse.

After the incident, the victim was taken to a hospital and treated for her injuries. Notably, her treating physician did not find any physical evidence that she had been sexually assaulted. See Trial Tr. p. 804, line 22-p. 805, line 3. Three days after the incident, investigator

Wendy Frazier interviewed her. During this meeting, Investigator Frazier returned the purse and clothing worn by the victim the night of the incident. Investigator Frazier went to the victim's home six days after this interview to take possession of those items again.

~~The victim gave a composite sketch of the assailant a week after the assault.~~ Police officer Jason Amodio took the sketch to local businesses and ultimately showed it to a man named Harley Hancock (known as "Pop"). After speaking with Pop, Officer Amodio and other police officers waited for a man, who would turn out to be the Applicant, to arrive at Pop's house. Shortly thereafter, the Applicant arrived at Pop's home and was arrested.

The Applicant's fingerprints were then compared with latent fingerprints taken from items that were inside the victim's purse. SLED agent Ted Shealy testified that a latent print that matched the Applicant's fingerprint was found on a pay stub with the victim's name on it in the purse. Furthermore, a blood stain on the victim's sweater, which had been returned to her and then picked back up by Investigator Frazier, was tested by SLED.<sup>3</sup> SLED agent Gray Amick testified that this stain contained a mixture of the Applicant's and the victim's blood. See Trial Tr. p. 767, line 5- p. 768, line 21.

Of particular import at trial, and to this Court, was the victim's ability to testify. The victim became deaf at a very young age and never learned sign language. Instead, the victim communicated by a unique combination of hand gestures and speaking. At trial, the assistant solicitor was permitted to lead the victim throughout the course of her testimony. When defense counsel attempted to cross-examine her, the trial court appointed the victim's son to be her

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<sup>3</sup> This stain was initially found to be insufficient to test under the RFLP DNA testing procedures that SLED used at the time of the incident. However, while the case was pending, a new type of DNA testing—polymerase chain reaction testing ("PCR testing")—was adopted by SLED. It was under PCR testing that SLED was able to determine that the blood on the sweater was a mixture of the Applicant's blood and the victim's blood.

interpreter. Defense counsel's numerous failures with regard to this damaging testimony will be addressed below.

V.  
**STANDARD OF REVIEW**

This Application for Post-Conviction Relief generally raises numerous specific allegations of ineffective assistance of counsel. The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRPC. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that trial counsel 1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and 2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Applicant must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

On the one hand, where trial counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). On the other hand, counsel may not explain away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy

or tactics. In the case of Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the South

Carolina Supreme Court found that

Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

(Emphasis in original) (internal citations omitted).

## VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Defense Counsel's Failure to Take Adequate Measures Prior to, and During, the Victim's Testimony

The Applicant alleges that defense counsel was ineffective for failing to take numerous actions with regard to the victim's testimony, including: (1) failing to interview the victim prior to the trial; (2) failing to request that a qualified interpreter be appointed, prior to trial, to interpret the victim's testimony; and (3) failing to move for a mistrial once defense counsel discovered that the victim's impediment was far more severe than had been disclosed pretrial. The Applicant contends that he was prejudiced by defense counsel's failure to take any of these actions. Accordingly, the Applicant argues that he is entitled to a new trial. This Court agrees.

At the PCR hearing defense counsel testified that prior to trial he had been informed by the assistant solicitor prosecuting the case that the victim's possible impediment to testifying was that she had trouble speaking. Importantly, defense counsel was not told that the victim had trouble *hearing*. Defense counsel testified that he had asked the assistant solicitor about having an interpreter for the victim's testimony at trial, but he was reassured on numerous occasions that the victim would be capable of testifying at trial. However, defense counsel did not take any action, prior to the start of trial, to ascertain for himself the extent of the victim's impediment. Furthermore, defense counsel did not move to have an interpreter appointed.

At trial, it became abundantly clear that the victim was having great difficulty testifying.

On direct examination, and over defense counsel's repeated objections, the assistant solicitor was permitted to lead the victim with virtually every question.<sup>4</sup> Furthermore, on cross-examination, defense counsel was having so much difficulty questioning the victim that her son was appointed to serve as her interpreter. Defense counsel testified that this resulted in a constructive denial of his ability to cross-examine the victim. However, at no point in time prior to or during direct examination did defense counsel ask that an interpreter be sworn to assist with the victim's testimony.<sup>5</sup> Furthermore, defense counsel never moved for a mistrial based on the State's misrepresentations concerning the degree of the victim's impairment, and their erroneous assurances that the victim was capable of testifying without the assistance of an interpreter.<sup>6</sup> This Court finds that defense counsel committed error in failing to take any of these actions.

<sup>4</sup> For example, the following testimony was permitted regarding the initial assault:

Q: ... He grabbed you by the back of the neck?  
A: (Witness nods.) (Indicating affirmative response.) And threw.  
Q: He pushed you down?  
A: (Witness nods.) (Indicating affirmative response.) In the wall.  
Q: In the wall. And it cut your head?  
A: (Answer unintelligible.)  
Q: The tree and the ground?  
A: (Answer unintelligible.)

...

Q: He pushed you into the ground?  
A: (Witness nods.) (Indicating affirmative response.)  
Q: Then you got back up?  
A: (Witness nods.) (Indicating affirmative response.)  
Q: And he pushed you into the wall?  
A: (Witness nods.) (Indicating affirmative response.)

Trial Tr. p. 162, line 22-p. 163, line 22.

<sup>5</sup> On appeal, appellate counsel argued that the trial court erred in not appointing an interpreter during direct examination. The Court of Appeals found that the issue was not preserved because defense counsel never made an objection. See *State v. Rogers*, *supra*, at 183, 603 S.E.2d at 913.

<sup>6</sup> While the problems would obviously not be readily apparent until the victim actually testified, this Court would note that the victim's sister, Ann Bryant, testified that the victim was deaf immediately prior to the victim's testimony. See Trial Tr. p. 113, line 20-p. 115, line 24.

An interpreter for a deaf witness must not be a family member of that witness, unless the trial court finds that the use of the family member as a qualified interpreter "is in the best interest of the individual and is in the best interests of justice." S.C. Code Ann. §15-27-15. Had defense counsel requested a qualified interpreter in advance, the parties would have had the opportunity to locate a qualified interpreter who was not related to the victim. Counsel's failure to adequately deal with this issue pretrial resulted in the Court's authorization of the use of the victim's son as an interpreter in the midst of this trial. The use of the son as an interpreter, and all the inherent risks of bias attendant that decision, could therefore have been avoided.

"A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009). "The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way." Id.

The record before this Court demonstrates that defense counsel took little to no affirmative action to ensure that his client's ability to effectively challenge the victim's testimony would be preserved. While defense counsel asked the assistant solicitor about having an interpreter appointed, he did not request permission to personally interview the victim or make a motion to appoint an interpreter as a precaution. Such a motion would have resulted in a pretrial hearing at which the Court, and defense counsel, could have explored the need for an interpreter by questioning the victim. Given her testimony at trial, this Court believes such a hearing would clearly have resulted in a pretrial ruling that a qualified interpreter was needed to insure that reliable testimony could be obtained. Furthermore, when it became abundantly evident during this trial that an interpreter would be needed to properly take the victim's

testimony, defense counsel did not ask that an interpreter be sworn. Finally, defense counsel did not move for a mistrial when he realized that the assistant solicitor's repeated assurances that the victim could testify were not accurate and had been misleading.<sup>7</sup> As noted *supra*, a mistrial is an extreme remedy. Where, however, defense counsel discovered in the midst of the Applicant's trial that the prosecution had misrepresented the victim's level of impairment, a mistrial was the only viable remedy. Defense counsel admitted that he did not take these actions and testified that he believed that the Applicant did not receive a fair trial because of the numerous problems with the victim's testimony. This Court finds that defense counsel's repeated failure to take any preventative or corrective action to ensure that his client's right to a fair trial was preserved was error.

The Applicant was prejudiced by defense counsel's numerous failures.<sup>8</sup> This Court does not agree with the State's contention that the evidence against the Applicant was overwhelming.<sup>9</sup> As noted above, the standard of proof in Post-Conviction Relief actions is whether or not there is a reasonable probability that the result at trial would have been *different*. Importantly, the Applicant does not have to show that there is a reasonable probability that he would have been *acquitted* of any criminal wrong doing had defense counsel taken the appropriate actions. Given the vague nature of the victim's communication with regard to this incident, the jury could easily have found the known facts supported a far less serious view of the Applicant's culpability.

<sup>7</sup> Defense counsel testified that he did not believe that he had been intentionally misled by the assistant solicitor. However, the fact remains that what he had been assured would occur by the assistant solicitor did not actually occur, and defense counsel should have taken immediate action to correct the problem. He did not do so.

<sup>8</sup> Initially, this Court is uncertain whether the factors present in this case warrant the standard harmless error inquiry because this is not a case where, for example, there is a particular piece of evidence which was admitted in violation of the Confrontation Clause. In this case, the Applicant asserts that the problems with the victim's testimony amounted to a constructive denial of the ability to cross-examine the victim, which resulted in an error "so fundamental and pervasive that [it] require[s] reversal without regard to the facts or circumstances of the particular case." Delaware v. Van Arsdall, 475 U.S. 673, 681 (1985). See also United States v. Cronin, 466 U.S. 648 (1984). For the sake of argument, this Court will assume that the Applicant must show that he was prejudiced by defense counsel's errors.

<sup>9</sup> This Court would also note that at no point did the Court of Appeals find that the evidence against the Applicant was overwhelming. See State v. Rogers, *supra*.

At trial, the State admitted evidence that the Applicant's blood was found on the victim's sweater. The State also admitted evidence that the Applicant's fingerprint was found on a document inside the victim's purse. Finally, the victim also sustained an injury to her forehead. However, while this evidence could be considered as establishing that the Applicant was present at the time of the assault, none of these facts *prove* that: (1) the victim was sexually assaulted; (2) the victim was kidnapped; or (3) the Applicant committed an ABWIK against the victim. This same evidence, without the uncorroborated claims of the victim, could be evidence of a simple assault and a purse snatching. Likewise, this evidence might be viewed as circumstantial evidence of a strong-armed robbery.<sup>10</sup> The only direct evidence that the Applicant committed the particular crimes he was tried for was the highly questionable testimony of the victim. By defense counsel's inaction, the Applicant was deprived of his opportunity to effectively cross-examine the victim regarding her testimony on these crucial issues. Had the Applicant been provided the opportunity to cross-examine the victim about her testimony, instead of permitting the assistant solicitor's leading questions to be, in effect, her *only* testimony on the record, there is a reasonable likelihood that the result at trial would have been different. Additionally, given the circumstances in this case, especially the assistant solicitor's pretrial assurances to defense counsel that the victim would be able to testify without an interpreter, this Court finds that a mistrial would have been warranted. Consequently, the Applicant is entitled to a new trial.

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<sup>10</sup> While the Applicant was not charged with either purse snatching or strong-armed robbery, defense counsel would have been free to argue that there were other less serious crimes the State had elected not to charge which equally fit the evidence.

**B. All Other Allegations**

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As to any and all other allegations presented at the evidentiary hearing convened in this case, this Court finds that there was insufficient evidence introduced to support granting the requested relief. Accordingly, those allegations are denied and dismissed.

**VII.  
CONCLUSION**

This Application for Post-Conviction Relief is hereby granted. The Applicant's convictions and sentences are vacated, and the Applicant's case is remanded to the Lexington County Court of General Sessions for a new trial.

**IT IS SO ORDERED.**

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**Roger M. Young**  
Presiding Circuit Judge  
Eleventh Judicial Circuit

This \_\_\_\_\_ day of \_\_\_\_\_, 2009.

\_\_\_\_\_, South Carolina.

The South Carolina Supreme Court  
Appeal From Lexington County  
Court of Common Pleas

William P. Keesley, Circuit Court Judge  
Case No. 2016-CP-32-02815

Hayward L. Rogers,

PETITIONER,

RECEIVED

VS.

MAR 18 2019

S.C. SUPREME COURT

State of South Carolina,

Respondent.

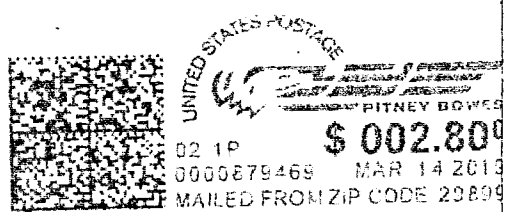
Proof of Service

I, The undersigned hereby does certify that on this herein date a copy of the notice of intent to appeal has been served upon opposing counsel by placing a copy of the same in the mail postage pre paid.

March 14, 2019

Hayward L. Rogers

ROGERS # 278510  
rectional Institution  
ion Way  
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